Tax Treaty Interpretation in Spain

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M. Lang (ed.), Tax Treaty Interpretation, 303–316.

I. Tax treaty law and domestic law

In accordance with Art. 96 (1) of the Spanish Constitution of 1978 (hereafter 'CE') and Art. 1 (5) of the Civil Code (hereafter 'CC'), international treaties in general – and tax treaties in particular – become part of domestic law once they have been published in the Boletín Oficial del Estado (Spanish Official Bulletin, hereafter 'BOE'). In this respect, although the Spanish Government is free to decide whether to negotiate a tax treaty with another country, the convention may not be signed without prior approval from the parliament. Thus, only tax treaties validly concluded, ratified by the contracting parties (after parliamentary approval, if required) and finally published in the BOE are part of Spanish law. Generally speaking, the date of publication of the agreement is when it enters into force in Spain.

Nevertheless, it should be pointed out that the application of Art. 94 (1) (d) CE to tax conventions, which provides that treaties creating financial obligations for the Spanish Treasury or affecting domestic legislation (such as tax treaties) must be approved by the parliament, is still largely discussed nowadays. From the author's point of view, however, the fact that tax treaties must be subject to the approval of the parliament is not a controversial question.

Concerning the status of tax treaties in relation to domestic law, the principle of the primacy of treaty law over national law applies to tax matters as to any other legal matters. In other words, tax treaties are overruled by the CE but in turn overrule the internal tax acts promulgated by the Spanish legislator.[1] This remark implies that, obviously, treaty provisions would be applied in case divergent regulations arose from domestic law and international agreements.

Needless to say, the possibility of a "treaty override" by the domestic legislation exists but in case that such a situation occurs an amendment of the internal act concerned will undoubtedly be necessary in order to clarify its meaning to the tax treaty obligation in force. As noted above, the contracting States are unable to give preference to their own domestic law (which would mean a treaty tax violation[2]) unless the tax treaty itself or a general rule of International law enables them to do that.

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1 Although not being expressly stated, this conclusion clearly emerges – a sensu contrario – from the wording of Art. 96 (1) CE, which states that international tax treaties can only be modified or derogated according to their provisions or to the general rules of international law.

2 Once an international agreement is incorporated into domestic law, the agreement still remains as an international treaty. The subsequent enactment of domestic legislation which is intended to override a treaty is therefore a breach of this international obligation. The overriding of a treaty provision by internal law could lead to a complaint under the mutual agreement procedure of the treaty or before an international arbitral body such as the International Court of Justice, or to the termination of the treaty by the other party.

Besides, it should be emphasized that the way the tax treaty is implemented into domestic law does not have any impact on the interpretation of tax treaties, taking into account that this issue is governed by customary International law, as embodied in the Vienna Convention on the Law of Treaties of 23 May 1969 (hereafter 'VCLT')[3] and by the specific interpretation provision that almost all the double taxation conventions include.

II. The relevance of Community law for the interpretation of tax treaty law

Community law has been part of Spanish law since 1 January 1986 and prevails over national law.[4] Its supremacy is based on its higher legal status. In broad lines, the treaties establishing the European Community make few references to direct taxation, apart from Art. 220 EC Treaty, but there are several principles and fundamental freedoms which may have an impact on tax treaties signed by Member States (free movement of workers, freedom of establishment, freedom to provide services and free movement of capital, the general non-discrimination clause and the most-favoured-nation treatment).

Potential conflicts are inherent in the parallel application of the two treaty systems.[5] As far as treaty interpretation is concerned, two areas of possible conflict arise: firstly, conflicts between double taxation conventions and overlapping Community legislation and, secondly, conflicts between tax treaties and the principles and fundamental freedoms of the Community previously mentioned. In this conflict between the two rules, Community law has priority. An interesting example as regards this issue is the Parent-Subsidiary Directive.[6]

In relation to Art. 24, this provision supplements non-discrimination rules and equal treatment precepts already existing under international or domestic law. For EU Member States the rule prohibiting discrimination in tax matters is settled by Art. 6 EC Treaty (Art. 12 of the Treaty of Amsterdam) and concretely defined in Articles 48 (Art. 39 Treaty of Amsterdam), 52 (Art. 43 Treaty of Amsterdam) and 59 (Art. 49 Treaty of Amsterdam) of the EC Treaty. The content of this rule has been clearly stated through the case law of the European Court of Justice. Art. 24 of the Model Treaty designed by the Organisa-

3 Articles 26 (*pacta sunt servanda*) and 27 (internal law and observance of treaties) of the VCLT provide clear rules on the performance of treaties.

4 See Art. 93 CE and Art. 191 Treaty of Rome of 1957.

5 See Hinnekens, Compatibility of bilateral tax treaties with European Community Law. The rules, *EC-Tax Review* No.4/1994, p 146.

6 This Directive (Council Directive 90/435 of 23 July 1990) provides, inter alia, for exemption from withholding tax on dividends paid from a subsidiary in one Member State to a parent owning 25 per cent or more of the share capital in another Member State; the question therefore arises whether this Directive overrides bilateral treaties. Baker, *Double taxation conventions and International Tax Law* (1994), p 59.

tion for Economic Co-operation and Development (hereafter 'OECD Model') prohibits a less favourable treatment whilst the non-discrimination rule of the EC Treaty constitutes a provision that protects against discrimination based on nationality.[7]

III. The relevance of Articles 31 and 32 of the Vienna Convention on the law of treaties

Tax treaties are international agreements, thus, Articles 31 to 33 VCLT are in principle applicable in order to determine their interpretation. This Convention, which entered into force on 27 January 1980, embodies a system of provisions which are directly binding in Spain due to the ratification of the VCLT by the Spanish parliament on 2 May 1972 (BOE 13 June 1980). In addition, it should be borne in mind that even though Spain did not ratify the VCLT, its rules would also be applied as they are part of customary International Law. The Spanish practice reflects, however, that whereas both the Constitutional Court and the Supreme Court have usually noted the relevance of the VCLT (whose regulations have been more often than not forgotten by the Courts[8]), the authors, on the contrary, do not know of any case in which the VCLT has been explicitly applied to the interpretation of tax treaties.

Consequently, we can conclude that despite their theoretical application to tax treaties, the general principles of interpretation of the VCLT are not of a great influence in Spain.[9] The Commentaries on the OECD Model, for example, do not have an appropriate characterization in the VCLT. Logically, since tax treaties are simply a specific kind of international agreements, the general provisions of the VCLT are not enough to rule accurately the status of such an important tool for the interpretation of double taxation conventions.

Moreover, some Spanish authors have also indicated the strict extent the VCLT gives to the term "context" – apart from the little attention paid to this expression by the Vienna Convention – as well as the restrictive conditions required in order to use the complementary materials related to the tax treaty by the

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7 Vogel, *Klaus Vogel on Double Taxation Conventions*[3] (1997) (hereafter 'Conventions') p 1282. It should be kept in mind, however, the extension operated in this ambit, in relation to taxes, by the Schumacker Case (ECJ 14 February 1995, Finanzamt Köln-Altsdatd contra Roland Schumacker, Case 279/93, Recueil at I-225).

8 National Courts have generally been applying the internal rule of interpretation (Art. (1) CC) instead of the provisions of the VCLT to clarify the meaning of tax treaty terms. Indeed, even some rulings of the Supreme Court – although not concerning tax treaties – for instance, of 20 and 21 January 1992, followed that philosophy that, fortunately, does not constitute the general rule at present. See, for example, the sentence of the Constitutional Court of 28 September 1995, in which this judicial authority insists on the application of the VCLT in the interpretation of international treaties.

9 Calderón Carrero/Piña Garrido, Interpretation of tax treaties, *ET* 1999, p 380.

interpreter.[10] As *Casero Barrón* argues, we consider that all materials which can be useful to the interpretation objective must be used in order to clarify as much as possible the meaning of a tax treaty term. Notwithstanding, the previous suggestion involves the problem of the weight that has to be given to each of the materials mentioned as any solution is provided by the VCLT to this question.

To make matters worse, statistics show that the competent authorities of the contracting States usually apply the international principles of interpretation codified in the VCLT with different intensity. Then, taking Articles 31 to 33 VCLT as the starting point, in comparison with several States that follow an objective or a subjective approach, others focus the importance on the text itself, whereby the final result is an unequal valoration of the elements taken into consideration. The last remark brings us back to the criteria used by the Spanish interpreter in relation to double taxation conventions. At first glance, they are not identical to the ones included in the VCLT but most of them are quite similar to the rules provided by Articles 31 to 33, as it will be commented below in more detail.

On the whole, this shows that the internal principles used in the interpretation of international agreements do not differ so much from the international rules included in the VCLT.[11] In any case, it is convenient to note that when referring to domestic principles of interpretation in this context, we do not comprise the criteria contained in Articles 1281 to 1289 CC (which govern the interpretation of private contracts), but only the ones settled in Art. 3 (1) CC[12] that, as it was previously indicated, have much in common with the VCLT rules.

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[10] Casero Barrón, La interpretación en Derecho español de los tratados internacionales para evitar la doble imposición. El papel del Consejo de Estado. Propuesta revitalizante o regeneracionista (I), *Carta Tributaria* 1988, p 5. In the opinion of this tax author, that situation shows the inappropiate character of the VCLT with regard to tax treaty interpretation.

[11] See, as examples of the application of Articles 31 to 33 VCLT to non-tax treaties, the case of the territorial conflict between the Jamahiriya Arabe Libia and Chad. CIJ, *Recueil* 1994, at 6. In this case the context (Art. 31 (2) VCLT) is represented by the Good Neighbourhood Convention between France and Libia of 1955. The International Court of Justice affirmed that the conclusions reached by the Court were reinforced by the treaty context and particularly by the aforesaid Convention, which had been signed at the same time as the treaty in question. Case of the frontier controversy terrestrial, insular and maritime. CIJ, *Recueil* 1992, at 584. Recourse to the complementary ways of interpretation (Art. 32 VCLT) plays an important role in this connection. And, in relation to tax treaties a good example regarding Art. 31 (2) (b) VCLT could be, for instance, that Spain produces a technical explanation for its tax treaty with Canada and this country publicly announces later its acceptance of the Spanish explanation of the Spain-Canada tax treaty. See in this respect Fernández de Casadevante Romaní, La interpretación de las normas internacionales (1996).

[12] The purport of Art. 3 (1) CC, as the legal basis of domestic interpretation, states that the law must be interpreted according to the proper meaning of the words, in relation to the context, the historical and legal antecedents, the social circumstances present at the moment of its application, and particularly taking into account the goal of the provisions.

IV. The relevance of the OECD Model and the OECD Commentary

Among the several model conventions for the avoidance of international double taxation existing so far, the OECD Model is the most extended as it is followed not only by Member States in their bilateral negotiations but also by non-Member States, as well as in the work of some worldwide or regional international organisations in this field. Indeed, both the United Nations Model[13] and the United States Model Treaty[14] use the OECD Model as a basic instrument of reference, which reflects its great importance. As recommended by the Council of the OECD,[15] when concluding or revising bilateral conventions, "member countries should conform to this Model Convention as interpreted by the Commentaries thereon and having regard to the reservations contained therein and their tax authorities should follow these Commentaries, as modified from time to time and subject to their observations thereon when applying and interpreting the provisions of their bilateral tax conventions that are based on the Model Convention".[16]

The existence of the OECD Model has facilitated bilateral negotiations and allowed desirable harmonization in this field. The majority of the double taxation conventions concluded by Spain follow the pattern and, in most cases, the main provisions of the OECD Model.

As a consequence of the OECD Model's impact, the Commentaries on its provisions have become a widely accepted guide to the interpretation and application of the articles of such bilateral treaties. Nevertheless, some important questions still remain unresolved. First, it is necessary to precise the real status of the Commentaries for the purpose of treaty interpretation. Then, the underlying question is: could we consider the Commentaries to be included in the term "context" used in Art. 31 (2) VCLT or in the so-called "preparatory work" within the meaning of Art. 32 VCLT? Whereas the Spanish tax authorities and courts do not refer to the nature, legal force and rank of the OECD Commentaries, a different thesis can be found in the Spanish literature on this subject.

In our opinion, although the first would surely be the best solution, it is, however, truly difficult to integrate the Commentaries into the strict definition of "context" given by Art. 31 (2) VCLT. Obviously, the OECD Commentaries

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[13] United Nations Model Double Taxation Convention between Developed and Developing Countries (*United Nations Publications* 1980, New York). It also reproduces a significant part of the Commentaries of the OECD Model Convention.

[14] United States Model Income Tax Treaty of 1981.

[15] See OECD Council Recommendation of 30 July 1963; Recommendation of 11 April 1977; Recommendation of 1 September 1992; Recommendation of 21 September 1995.

[16] OECD Model Tax Convention on Income and on Capital, Introduction, at 7; 29 April 2000 (condensed version), OECD Committee on Fiscal Affairs, Paris.

do not constitute an agreement or an instrument made by the contracting States, in connection with the conclusion of each double taxation convention, as it is required by the aforesaid article. On the contrary, the general character of the Commentary as a widely accepted guide in the interpretation of tax treaties does not allow that identification. Consequently, only in the case we have in mind, the content of Articles 31 (2) and (3) is not a *numerus clausus*, it could be possible to include the OECD Commentaries in the treaty "context" defined by the VCLT. An additional reason to reject this approach focuses on the first sentence of Art. 31 (1) VCLT, which would imply the binding effect of the Commentaries for the purpose of treaty interpretation whether they became part of the "context". The absence of such a binding character – which was expressly declared by the Committee in the Model's introduction – makes this solution impossible.[17]

On the other hand, if we consider the OECD Commentaries as a supplementary means of interpretation, as a second group of Spanish scholars does[18] – after having pointed out the non-restricting wording of Art. 32 VCLT –, their interpretative value will be only complementary and consequently limited. Therefore, although this provision is, undòubtedly, the unique article which we believe could provide some room for the Commentaries, it seems to us that this secondary value of the Commentaries does not correspond to the intention of the Committee on Fiscal Affairs. Other scholars hold that the Commentaries could be understood within the meaning of Art. 31 (3) (c) VCLT, as the relevant rules of International law applicable in the relations between the parties.[19]

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[17] Nevertheless, we agree with those commentators (Tovillas Morán, for example) who consider the OECD Commentaries as a part of the "context" under Art. 3 (2) OECD MC, because of the wider sense that this general rule attributes to the term "context" in comparison to the VCLT. In our view, this thesis becomes stronger after the definition of "context" provided by the Committee on Fiscal Affairs in Paragraph 12 of the OECD Commentaries to Art. 3 (2). Opposing this position is Baena Aguilar, Editorial, *Revista de Derecho Financiero y Hacienda Pública* No. 242, 1996, pp 895 and 897.

[18] See Borrás, Los convenios internacionales para evitar la doble imposición desde el punto de vista de la teoría general de los tratados internacionales, in: Instituto de Estudios Fiscales (ed), *Estudios de doble imposición internacional* (1979), p 36; Baena Aguilar, *Revista de derecho Financiero y Hacienda Pública*, p 895; Tovillas Morán, La interpretación de los Convenios de doble imposición y la cláusula general de interpretación del Modelo de Convenio de la OCDE, *Revista Latinoamericana de Derecho Tributario* 1996, p 113.

[19] In this respect, there is also a group of authors who understand both the new Model Convention and Commentaries on it as a "subsequent practice", within the meaning of Art. 31 (3) (b) VCLT, of the States that take part in it. See, among others, de Juan Peñalosa, Modelo 92, *Impuestos* No.15-16, 1993, p 31. On the contrary, we agree with Lang in that the OECD Model and Commentary „can equally not be seen as "subsequent practice" as Art. 31 (3) (b) of the Vienna Convention specifies. (...) there has to be a differentation between treaty interpretation as set out in Art. 31 (3) (b) of the Vienna Convention and treaty amendments". Lang, Later Commentaries of the OECD Committee on Fiscal Affairs, not to affect the interpretation of previously concluded tax treaties, *Intertax* 1997, p 8.

We do not agree with that opinion to the extent that, strictly speaking, the Commentaries, not being binding, can not be considered real rules of International law.

After carefully studying the various solutions noted above, we think the OECD Commentaries constitute a major source of interpretation[20] that should be included in the "context" of each tax treaty. On this basis, our suggestion would be to slightly modify the VCLT by adding this specific tool of tax treaty interpretation not contained in it because of the general character of the VCLT. The relevance of this interpretative instrument does not allow to identify it with the "preparatory work" – which corresponds to a minor level – and with its complementary effects.[21]

Another interesting question regarding the OECD Commentaries was the possibility to apply them in the interpretation of earlier tax treaties. The OECD Committee made clear this controversy between the authors by recommending that all tax treaties, including those entered into before the revisions of the Commentaries, be interpreted in the light of the updated Commentaries. Thus, the ambulatory or dynamic theory is adopted against the static one. In Spain, both the Tribunal económico-administrativo central[22] (hereafter 'TEAC') and the Dirección General de Tributos (hereafter 'DGT') have been using the OECD Model and the Commentaries as general criteria in the interpretation of tax treaties. Only when the wording of the treaty provision is very clear no reference is made to the OECD Commentary. Eventually, it is possible to affirm that the Spanish tax rulings and court decisions often refer to the OECD Commentaries and reports,[23] which sometimes intend to solve the doubts arising in the interpretation of tax treaties or reinforce the meaning reached by using other methods,[24] or provide the characterization of income and transactions or determine whether a permanent establishment exists. Moreover, in Spain the OECD Commentary and reports have been used for the interpretation of

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20 The OECD Commentary provides not only aids to treaty interpretation, but also includes suggestions, guidelines and analysis concerning a wide variety of double taxation issues and problems. Furthermore, the Commentaries are much easier to change than the Model Treaty itself because disenting countries can and do register reservations to the Commentaries on particular articles of the Model Treaty.

21 The OECD does not intend for the Commentary to have a such limited role. In addition, the characterization of the Commentaries as a "preparatory work" in the light of Art. 32 VCLT does not make any sense because of many reasons which have been already indicated by Vogel and other international tax authors. Vogel, *Conventions*, at 44.

22 See, for example: RRTEAC of 30 April 1996, 6 November 1996 and 9 April 1997.

23 DGT used the OECD "Thin Capitalisation" report in order to interpret tax treaty provisions in RRDGT of 17 October 1994. Furthermore, there have been cases where a domestic law has not been applied as the tax authorities interpret on the basis of the OECD Model and Commentaries. For instance, in RDGT of 23 December 1983 the DGT determined the taxable base of a permanent establishment in accordance with the Commentaries to Art. 7 (2) OECD Model, without applying the Spanish Royal Decree.

24 RRTEAC of 29 August 1993 and 30 April 1996.

domestic tax legislation as well (such as transfer pricing rules) which have nothing to do with tax treaties.[25]

Finally, it should be borne in mind that the OECD Commentary is not binding – as the OECD Committee itself declared in the Model's Introduction – in the interpretation of tax treaties.[26] Notwithstanding, as the network of tax conventions increases, the relevance of the Commentary as a generally accepted guide becomes greater.

V. The relevance of Art. 3 (2) OECD Model

Obviously, it is rather important that tax treaties are interpreted the same way in both countries (the principle of common interpretation) because otherwise income may be taxed twice or not at all. For that reason, tax agreements based on the OECD Model Treaty, such as the treaties concluded by Spain, contain – in addition to the provisions of the VCLT – an internal rule of interpretation. Art. 3 (2) of the OECD Model provides that undefined terms used in the treaty have the meaning they have under the domestic law of the country applying the treaty, unless the context requires otherwise. Therefore, the application of the aforesaid article involves a three-stage process: firstly, it should be determined whether or not the treaty itself provides a definition of the term; if a definition is not provided, the domestic meaning of the term must be adopted, unless the treaty context requires a different meaning .

As the OECD Committee on Fiscal Affairs stated,[27] the context is determined in particular by the intention of the contracting States when signing the convention as well as the meaning given to the term in question in the legislation of the other contracting State (an implicit reference to the principle of reciprocity on which the Convention is based). Basically, not only Spanish tax treaties follow the rule established by Art. 3 (2) OECD Model but also Spanish tax authorities and courts[28] observe the requirements of this Article.[29]

In case reference is made to the Spanish domestic legislation – only possible in the absence of a treaty –, the meaning of the term undefined „may be ascertained

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[25] Calderón Carrero/Piña Garrido, *ET* 1999, p 385; see, for instance RRTEAC of 23 March 1988 and 18 July 1990.

[26] As Vogel noted, its binding nature would not yet be justified either under International law or under the constitutional law of most member countries. Vogel, Tax Treaty news, *Bulletin for International Fiscal Documentation* 2000, p 98.

[27] Paragraph 12 of the OECD Commentaries to Art. 3 (2).

[28] See RDGT of 13 January 1995; RTEAC 29 August 1993; SAN 12 December 1995.

[29] An exception to this general rule is the Spanish tendency to apply a "static interpretation" of the term in question – particularly when a contracting State has changed the domestic meaning of a term and this amendment alters the taxing powers agreed by both contracting States – rather than the "dynamic interpretation" recommended by the OECD. See RTEAC of 11 June 1997.

by reference to the meaning it has for the purpose of any relevant provision of the domestic law"[30] of Spain whether or not a tax law. However, as the OECD Committee adds, „where a term is defined differently for the purposes of different laws of a contracting State, the meaning given to that term for purposes of the laws imposing the taxes to which the Convention applies shall prevail over all others, including those given for the purposes of other tax laws".

Finally, as far as the Spanish treaty practice is concerned, reference made by Art. 3 (2) OECD Model to domestic legislation does not extend to "concepts" but only to "terms" used in this kind of conventions.

VI. The relevance of other references to domestic law contained in bilateral tax treaties

In terms of its wording, paragraph 1 of Art. 4 OECD Model makes an explicit reference to the domestic legislation of the contracting State in order to determine whether a person fulfils the conditions required in order to be a resident of that State. The purport of this provision is to avoid the possibility of an individual or legal person to be considered a resident in the two contracting States. From our point of view, this objective has been reached particularly by the Commentaries to this Article, which preclude the problem of a conflict of residence in the scope of double tax treaties.[31]

Moreover, we can easily find some explicit references to domestic law contained in the following provisions of the OECD Model: Art. 6 (2) expressly refers to the internal law of the contracting State in which the property is situated in order to determine the meaning of the term "immovable property" for treaty interpretation purposes. Notwithstanding, on the one hand the provision specifies certain things that must be always included in this expression and, on the other hand, some others that shall not be regarded as "immovable property". In line with it, another reference of this kind is located in Art. 10 (3) which, after having defined the term "dividends" for its right understanding in the treaty context, also includes „income from other corporate rights" which have the same taxation treatment as income from shares by the domestic legislation of the State of which the company that makes the distribution is a resident.

A few steps further back in time, the wording of Art. 11 (3) in the 1963 OECD Draft Convention[32] provided another good example of reference to the internal

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30 Paragraph 13.1 of the OECD Commentaries to Art. 3 (2).

31 See García Prats, Triangular cases and residence as a basis for alleviating international double taxation. Rethinking the subjective scope of double tax treaties, *Intertax* 1994, p 482.

32 In the 1963 OECD Draft Convention, Art. 11 (3) read as follows: "3. The term "interest" as used in this Article means income from government securities, bonds or debentures, whether or not secured by mortgage and whether or not carrying a right to participate

law, by stating that this expression encompasses, apart from the incomes expressly referred, other kinds of income that the State in which the income arises assimilates to income from money lent in its taxation law.

To sum up, we can conclude that whereas in the first and the third cases reference is made to the internal legislation of the State of source, in the second situation, however, the criteria adopted point to the State in which the company distributing the dividends has its residence. This implies, in our opinion, that the establishment of a general rule on this issue does not make sense at all. It seems to be more convenient to refer to the domestic law of the State of source or the State of residence, depending on each particular situation and kind of income.[33]

Further, we consider that no reference is made in Art. 23 OECD Model to any domestic legislation in terms of treaty interpretation. The qualification mentioned by this provision is not made by the State of source but by the treaty rules agreed upon by both contracting States. Therefore, whether according to these settlements – that are binding for the two parties – the State of source is entitled to tax income or properties of a resident of the other contracting State, this one must provide in its internal tax law some methods to avoid an international double taxation situation. The unique aim of the reference to domestic law of the State of reference made by Art. 23 is to oblige this State to prevent its residents from double taxation that will probably derive from situations in which, as both parties agreed, the right to tax corresponds to the State of source although the person liable to be taxed is not a resident of this State. In this respect, the discussion on this issue maintained in international literature has been definitively solved by Paragraphs 32.3 and 32.5 of the Commentaries to Art. 23 OECD MC.[34]

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in profits, and debt-claims of every kind as well as all other income assimilated to income from money lent by the taxation law of the State in which the income arises".

33 In our view, another allusion to domestic law is included in Art. 12 (4), when referring to the internal taxation treatment of both contracting States in the specific case concerning royalties set out in this provision.

34 From the point of view of Avery Jones, „the question of categorisation of income applies only to the source State and that State's determination of the question of how the income is to be taxed is conclusive against the residence State, (...). (...), the source State's categorisation (...) would bind the residence State to exempting it or giving full credit (...)". Avery Jones et al, The interpretation of tax treaties with particular reference to article 3 (2) of the OECD Model", *British Tax Review* 1984, pp 50 et seq. Against Avery Jones' opinion – UK national reporter in the IFA Congress 1993 –, nevertheless, „the General Reporters (Vogel and Prokisch) think that the residence State, when exempting income from taxation or granting a credit, may and will verify that the source State reaches a different conclusion, it will deny the tax exemption or allowance". Vogel/Prokisch, General report (47th Congress of the International Fiscal Association, Florence, 1993), in: *Cahiers de Droit Fiscal International volume LXXVIIIa*, p 79.
Paragraph 32.3 of the Commentaries to Art. 23 OECD MC states that „where, due to differences in the domestic law between the State of source and the State of residence, the former applies, with respect to a particular item of income or capital, provisions of

In any event and going back to the question of a "static" versus a "dynamic" meaning, we agree with the authors in considering the ambulatory interpretation the best solution even though it is important not to lose sight of the significant problem that the aforesaid approach involves, as it permits a country to amend its tax treaties unilaterally depending on the nature of the amendment.[35]

VII. The relevance of mutual agreements

Although the mutual agreement procedure clause is generally included in the tax treaties signed by Spain, this mechanism has rarely been used for the purpose of determining the meaning of a tax treaty term. In our opinion, a significant element is the absence of any provision requiring the competent authorities to reach an agreement or providing an alternative dispute resolution procedure in case the one established in Art. 25 (3) OECD Model fails to achieve that objective.

As the OECD Committee put it, the result of this procedure resolving general difficulties of interpretation or application of the convention is "binding on administrations as long as the competent authorities do not agree to modify or rescind the mutual agreement".[36] This means that both contracting States will be bound by the solution agreed through this procedure. In fact, there does not exist an appeal in Spain against results of the mutual agreement procedure.

As far as the status of these agreements in the VCLT is concerned, we do not see any obstacle – despite the silence of the Spanish tax commentators – to consider them "subsequent agreements" in accordance with Art. 31 (3) (a) of the VCLT.

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the Convention that are different from those that the State of residence would have applied to the same item of income or capital, **the income is still being taxed in accordance to the provisions of the Convention, as interpretaed and applied by the State of source. In such a case, therefore, the two articles require that relief from double taxation be granted by the State of residence notwithstanding the conflict of qualification resulting from these differences in domestic law**". Moreover, Paragraph 32.5 of the Commentaries provides that „Art. 23 A and Art. 23 B, however, do not require that the State of residence eliminate double taxation in all cases where the State of source has imposed its tax by applying to an item of income a provision of the Convention that is different from that which the State of residence considers to be applicable. (...) Such conflicts resulting from different interpretation of facts or different interpretation of the provisions of the Convention must be distinguished from the conflicts of qualification described in the above paragraph where the divergence is based not on different interpretations of the provisions of the Convention but on different provisions of domestic law".

35 For instance, whether a contracting State modifies its domestic law in a way that substantially alters the agreement between the two contracting States, and that was not contemplated by both of them, that amendment is equivalent to a treaty override.

36 Paragraph 36 of the OECD Commentaries to Art. 25.

VIII. The relevance of the other contracting State's tax authority practice

At first sight, Spanish tax treaty interpretation does not usually take into consideration the other State's tax authority practice on this topic. The unilateral practice followed by the other contracting State is not binding either, because only a uniform understanding of the treaty term concerned could be binding on both of the contracting States on the basis of Art. 31 (3) (b) of the VCLT.

Nevertheless, in relation with the so-called "subsequent practice", it is very important to note – in contrast to other subjects (for example, Law of the Sea) –, that on the content of tax treaties concluded by Spain the relevance of that general practice followed by the parties after having signed the convention is practically non-existent. For that reason, it would be really difficult that this "subsequent agreement" could modify any tax treaty provision.

IX. The relevance of foreign court decisions

Not only Spanish tax courts but also Spanish tax authors carefully study foreign court decisions regarding treaty interpretation. Although these decisions are not binding on tax authorities in Spain, they become very useful guidance of how other countries understand the same provision and provide examples both to the scholars and courts in order to harmonize as much as possible the tax treaty interpretation criteria.