Different Strokes:

The approaches of different legal systems to treaty interpretation in the context of the International Agreement on Taxation and the Protection of Financial Interests between the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland Regarding Gibraltar

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1 – Introduction

1.1 General background

This article is a rare thing. There is very little, though the amount is growing, cross-border Spanish, Gibraltarian cooperation in matters academic, especially those impacting contentious issues such as taxation. So little that a third-party, independent observer would be surprised. The two authors feel that this is unhelpful for two jurisdictions so close to each other geographically and which interact on so many human levels from cross border workers to romances and marriages. Both authors are, as well as academic writers, lawyers and tax advisers in daily practice, we see the daily effects of the treaty we will be discussing in this paper. We hope that the ease with which we have worked together shows others that this is a fertile area for study and establish a conversation that continues for years to come.

We would just like to make a note as to language. The language codes of the two jurisdictions with regard to each other can be very strict and what can appear innocuous to one can be a red flag loaded with political meaning to another (for example the words “fence” and “border”). We have taken a policy decision not to police each other’s language, when Mr Jackson writes he writes in language informed by his British Gibraltarian background using the forms he would in everyday discourse. The same is true of Dr Benitez Perez, save for his Spanish background. The aim of this article is to see the perspective of the other on the use of language; to police that language would be to defeat the object of the conversation. Both authors are approaching it with good intentions and with full respect, and we hope that is apparent to the reader.

Which brings us to the aim of this paper. The International Agreement on Taxation and the Protection of Financial Interests between the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland Regarding Gibraltar[3] signed on the 4th March 2019 and entering into force on the 4th March 2021 (hereafter, “The Tax Treaty”) is a unique document, mainly, for two reasons: From a political perspective, as for the first time in 300 years, Spain and the United Kingdom have reached an agreement concerning Gibraltar—demonstrating a genuine willingness on both sides to coexist in the

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[3] https://www.gov.uk/government/publications/ukspain-international-agreement-on-taxation-and-the-protection-of-financial-interests-regarding-gibraltar-ts-no782024 recovered 17th April 2025

highest possible degree of harmony, and; no less importantly, it is also unique from a strictly legal standpoint, as it constitutes a *rara avis* within the field of international taxation[4].

Anyone reading it will see that whilst it has some echoes of the OECD Model Convention on Income and Capital it is filled with novel language and phrases which are drafted afresh for the purposes of the Treaty. Moreover, it reflects a strong influence of Spanish domestic tax law and practice, which reveals the political context in which the agreement was reached. It is not a double taxation treaty, though some elements deal with double taxation though they are very limited[5], it is agreed by the authors that the Tax Treaty is much more of an anti-avoidance treaty in spirit and approach:

This novel use of language creates a problem, the reader of the Tax Treaty is shorn of his usual supporting documents, there is no jointly approved commentary[6], and the OECD Commentary on the Model Convention is only of limited value in reading the Tax Treaty. In addition to this it is the general approach of the Spanish tax authorities (the Agencia Tributaria) not to issue guidance or commentary beyond the administrative doctrine of the General Directorate of Taxes and the case law of the administrative or judicial courts[7], and that approach has continued with respect to the Tax Treaty.

The paper will seek to examine the practical outcomes of the wider problem of interpreting treaties highlighted by several authors. As said by Erik Bjorge when he stated, in relation to the differences between the French and British approaches:

> The view has become orthodox that in France the courts interpret treaties in a "minimalist" way whilst in the courts of the United Kingdom the trend is towards what could be called a "maximalist" approach. On the one hand, leading French commentators have argued that the French courts, in general, have a preference for a very literal interpretation of treaties, the courts having displayed "a certain preference for literal or minimalist interpretation". On the other hand, leading British commentators have argued that the courts in the United Kingdom have, in general, a preference for a very teleologic, or purposive, interpretation of treaties, resulting at times in "inadmissible deviation from the terms of the treaty", in a way that amounts more generally to "a remarkable disrespect for treaty law"[8]

As Vogel[9] argued, "it is therefore necessary to reconcile the various national methods of interpretation". Otherwise, one risks concluding an agreement whose terms are not commonly understood or interpreted by both parties, thereby rendering its practical application unfeasible. One of the most crucial aspects in reconciling different legal cultures is, fundamentally, the alignment of the meaning of legal concepts and the linguistic differences arising from this reality.

The paper will proceed as follows. In this first section we will introduce the paper and lay out our aims and objectives.. In the second section we will lay out the varying methods of treaty interpretation; those being to compare and contrast the methods of treaty interpretation prevalent in the Spanish legal system with its civil law base and that prevalent in the Gibraltar legal system with its common

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[4] Perhaps a distant precedent can be found in the Franco-Monégasque Convention of 1963.

[5] p151 *On the Principles of Gibraltar Taxation*, ed Levy I and Jackson G, Spiramus 2024

[6] Though there is a set of "Frequently asked questions" published by the Income Tax Office of Gibraltar https://www.gibraltar.gov.gi/uploads/Income%20Tax%20Office/docs/FAQs%20-%20International%20Tax%20Agreement%20-%20Spain.pdf. However, this interpretation is not binding on the Spanish tax administration.

[7] Which is virtually non-existent at the time of writing this paper.

[8] The Vienna rules on treaty interpretation before domestic courts L.Q.R. 2015, 131(Jan), at 78–107

[9] Klaus Vogel on Double Taxation Conventions. 2022, Volume I, 45.

law base[10]; and then in the third section we will apply those methods from a Gibraltarian and Spanish perspective to selected pieces of language within the Tax Treaty.

2. Approaches to Interpretation

2.1 The Gibraltarian Approach

Like so much about Gibraltarian law the Gibraltarian approach to treaty interpretation is entirely informed by the fact that Gibraltarian law is a common law system. The Gibraltarian common law has developed out of and been heavily influenced by English common law. In fact large swathes of English common law are directly applicable in Gibraltar as the base position. Section 2 of the English Law (Application) Act 1962 directly applies English case law in its entirety to Gibraltar when it states:

> 2.(1) The common law and the rules of equity from time to time in force in England shall be in force in Gibraltar, so far as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require, save to the extent to which the common law or any rule of equity may from time to time be modified or excluded by
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> (a) any Order of Her Majesty in Council which applies to Gibraltar; or
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> (b) any Act of the Parliament at Westminster which applies to Gibraltar, whether by express provision or by necessary implication; or
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> (c) any Act[11]

Thus, we can see that the whole body of English case law analysis of treaty interpretation is in place in Gibraltar and should be referred to when discussing and analysing the language of a treaty. It is irrelevant that Gibraltar has no other treaties (other than one double taxation treaty with the UK) nor is it relevant that the Tax Treaty is a unique document, the approach is laid out over decades of case law and judicial discussion.

The starting point for interpreting a treaty under the English/Gibraltarian system must be the rules in Part 3 of the Vienna Convention on the Law of Treaties (the Vienna Convention)[12]. The Vienna Convention was extended to Gibraltar on ratification by the United Kingdom on 25th June 1971 and entered into force in 1980[13].

Much ink has been spilt in analysing whether or not multilateral conventions such as those at the core of the OECD Base Erosion Profit Shifting project are treaties, and it is crucial to establish a document is a "treaty" for the purposes of the Vienna Convention in order for that convention to apply. From the UK/Gibraltar side we see no reason for the use of the phrase "Agreement" in the name of the Tax Treaty, it will suffice to say for the purposes of Spanish politics it may be more palatable than "Treaty". However, for the purposes of the Vienna Convention such niceties are irrelevant. Either a document

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[10] In this second part, the reader will observe numerous similarities between the Gibraltarian and Spanish perspectives, as both jurisdictions interpret international tax treaties in accordance with the rules of the 1969 Vienna Convention. However, the authors' intention is to highlight the particularities of each jurisdiction in applying the same interpretative rules to their respective domestic cases, which constitutes the most compelling aspect of this section of the paper.

[11] S2 English Law (Application) Act 1962

[12] Brown, H. & Jackson, G.. (2022). Article: Interpretation of Multi-lateral Treaties: The Purposive Approach and Multiple Parties Through the Lens of the UK Courts. Intertax. 50. 766-781. 10.54648/TAXI2022083.

[13] Foreign Commonwealth and Development Office Treaties - Treaties with Gibraltar https://api.parliament.uk/uk-treaties/parties/56/treaties recovered 18th April 2025

meets the test of a "Treaty" or it does not, the name in the title is irrelevant. The test for "treaty" is contained at Article 2 of the Vienna Convention and it states:

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

In the case of the Tax Treaty it was entered into between the United Kingdom and the Kingdom of Spain, it is in written form, and is governed by international law. Thus, the Tax Treaty is a treaty for the purposes of the Vienna Convention "whatever its particular designation".

At Articles 31, 32 and 33 of the Vienna Convention the basic principles of treaty interpretation in the Gibraltarian system are laid out, we believe it is worth laying these out in full as they are so fundamental to the task at hand:

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Article 33 Interpretation of treaties authenticated in two or more languages

> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
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> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
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> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
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> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Therefore, when interpreting in the light of the Vienna Convention:

a. one must give words their ordinary meaning within the context of the treaty and its objectives and purpose. Under the Vienna Convention approach, the purpose and context of the treaty complement and assist the interpretation of its text without overriding the words themselves, which retain their full strength and significance[14].
b. that "context" includes any agreed text about the treaty, any practice between the two parties relevant to meaning, and any relevant international law provisions. What it does not mean is that one side can issue guidance without agreement of the other and that guidance be determinative of meaning.
c. A term can be given a special meaning if it can be established that the parties meant that meaning to apply.
d. One can refer to guidance or commentary (amongst other things referred to as "supplementary means of interpretation") only when the strict application of Article 31 leaves meaning ambiguous or obscure or results in a manifestly absurd or unreasonable outcome.
e. With regard to treaties concluded in two different languages (such as the Tax Treaty) both languages bear equal weight and the two texts are assumed to bear the same meaning[15]

Being, as Gibraltar is, an English common law system, one must not only have an eye on the Vienna Convention but also on the case law surrounding treaty interpretation. Lord Diplock famously stated:

> The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in *James Buchanan & Co. Ltd v. Babco Forwarding &*

[14] Jackson, G. The Interpretation of Multilateral Instruments and the Status of Commentary: The Definition of "Permanent Establishment" in the GLoBE Pillar Two Model Rules. Bull. Int. Tax. 2025, 79, https://doi.org/10.59403/5mh097.

[15] Given the practical outcome of the "treaties in different languages all bear the same meaning" rule must be that a person reads the treaty in his language and as a result may assume that the words in the other version of the treaty bear the same meaning it will be very interesting when we carry out our comparative analysis in the later sections of this paper.

> *Shipping (U.K.) Ltd* [1978] A.C. 141, 152, 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation.[16]

In doing so he was cautioning against a technical legalistic approach to treaty interpretation, treaties are negotiated by diplomats and turned into a text by lawyers. It must equally apply to other nations as it does to English parliamentary draftsmen and women. As a Gibraltarian interpreting a treaty under this ruling one should take treaties as having a broader meaning not a highly technical local meaning. The Tax Treaty can no more use language which has an apparent common sense meaning which is then transformed by a highly technical Gibraltar tax law interpretation than it can a Spanish tax law interpretation. The language means what it does in a non-technical sense.

One can give a live and real example of Diplock's axiom in action. The Maritime Labour Convention, 2006 is applicable to Gibraltar, and states at Title 4, Standard A4.5 Social Security para 3

> 3. Each Member shall take steps according to its national circumstances to provide the complementary social security protection referred to in paragraph 1 of this Standard to all seafarers **ordinarily resident** in its territory. This responsibility could be satisfied, for example, through appropriate bilateral or multilateral agreements or contribution-based systems. The resulting protection shall be no less favourable than that enjoyed by shoreworkers resident in their territory.[17] (emphasis added).

In Gibraltar law the phrase "ordinarily resident" has a defined meaning as per s74 of the Income Tax Act 2010 which states:

> "ordinarily resident" when applied to an individual means an individual who irrespective of whether such individual is domiciled in Gibraltar or otherwise who in any year of assessment–
>
> (a) is present in Gibraltar for a period of, or periods together amounting to, at least 183 days; or
>
> (b) is present in Gibraltar in any year of assessment which is one of three consecutive years in which the total of the days on which the individual is present in Gibraltar exceeds 300[18]

For those, in Gibraltar, who implement the social security provisions of the Maritime Labour Convention it would be tempting to apply the Income Tax Act 2010 definition when deciding who is or is not eligible for access to social security protection under the Maritime Labour Convention. That would be an error. The intention of the provisions relating to social security protection in the Maritime Labour Convention is to protect those who do not meet the requisite presence requirement to access social security protection in their home jurisdiction. It is not to impose a minimum day count (as the definition at s74 would) but instead to remove the requirement for a minimum number of days. "Ordinarily resident" for the Maritime Labour Convention must have its ordinary language meaning not its technical definition, to act otherwise would be to entirely negate its effect. This is not to say that a technical word used in a technical way cannot have a technical meaning but instead that regard should be had to the way in which technical words are used and that it should be clear in the Treaty itself that the technical meaning is intended rather than assumed that it is intended.

Thus, in conclusion as to the approach one must take to interpreting the Tax Treaty under Gibraltar law the following must be true:

i) The ordinary meaning of the words is the starting point, as understood in the context of the relevant treaty

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[16] *Fothergill v. Monarch Airlines Ltd* [1981] AC 251

[17] Maritime Labour Convention, 2006 Title 4 Regulation 4.4 Standard A4.5 para 3.

[18] s74 Income Tax Ac 2010

ii) Supplementary sources are permitted to help interpretation where (i) fails to produce a clear or non-absurd result

iii) Where a treaty is in different languages all versions have equal weight and all are assumed to have the same meaning.

iv) When reading a treaty one should not take an overly legalistic approach but should read the words without importing technical meaning.

What is most important here is that where there is a phrase which can be read to have a coherent and conscionable meaning in English one should not refer to the Spanish text of the Tax Treaty to "understand better" the meaning of the English text. One should not try and amend sensible English meaning so as to fit into a framework of Spanish legal concepts[19].

2.2 The Spanish Approach.

Validly concluded international treaties, once officially published in Spain[20], form part of the Spanish legal order (Article 96 of the Spanish Constitution). This leads us to consider that we must necessarily observe the provisions of all international treaties, together with domestic legislation, when interpreting Spanish law.

The Agreement between Spain and the United Kingdom in relation to Gibraltar is an international treaty, and as such forms part of the Spanish legal order with hierarchy superior to domestic legislative provisions, since '[i]ts provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law'. This is also deduced from article 7 of the General Tax Law, which establishes a higher hierarchy of international treaties with tax clauses with respect to the domestic law.

To address the interpretation of an international treaty such as the Agreement, we must turn to another treaty that is also part of the Spanish legal order[21] : the 1969 Vienna Convention on the Interpretation of Treaties. This treaty contains, in the words of CASADO[22] (2015) "a general rule of interpretation" while "allowing [...] recourse to complementary means of interpretation and containing specific rules for the frequent case of treaties authenticated in two or more languages".

In the field of taxation, the most frequent international treaties are the Double Taxation Conventions (DTC), although they are not the only ones. The Vienna Convention applies to these treaties in exactly the same way, although with certain particularities, as MARTÍN[23] (2024) reminds us.

The rules on the interpretation of treaties are set out in Articles 31 to 33 of the Vienna Convention.

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[19] This is of course an academic discussion of meaning. No competent adviser would refuse to have regard to the Spanish text and Spanish meaning of the language used when understanding the practical outcome of a tax investigation mounted in Spain by Spanish authorities applying these same rules of interpretation to the Spanish text with their level of understanding and competence.

[20] In the Spanish Gezette, the *Boletín Oficial del Estado (BOE).*

[21] For two reasons: firstly, this Treaty is considered *ius cogens* in public international law, and secondly, because Spain acceded to it on 2 May 1972, explicitly incorporating its provisions into domestic law.

[22] Chairman of International Public Law at the University of Cordoba (Spain). CASADO RAIGON, R (2015). *Derecho internacional*. Editorial Tecnos, 2nd Edition, pages 192-194, Madrid.

[23] Chairman of Financial and Tax Law at the University of Cadiz (Spain). MARTIN JIMENEZ, A et al (2024). *Manual on the negotiation, interpretation and application of double taxation treaties for the elimination of double taxation in the field of income and capital taxation*. Instituto de Estudios Fiscales / Inter-American Development Bank, pages 37-46, New York.

2.2.1 Rules of interpretation under public international law.

According to the general rule of interpretation contained in Article 31(1), " [a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Thus, three methods of interpretation can be drawn from this general rule: the literal, the systematic and the teleological.

Literal interpretation is the starting point, as it manifests the letter reflected by the contracting parties in the treaty, the expression of their will. Therefore, the will of the parties must be presumed to be that which reflects the literal wording of the agreed terms, unless proven otherwise.

This literal interpretation may sometimes be insufficient, and must therefore be accompanied by systematic interpretation, since the terms of the treaty cannot be isolated from its legal context, meaning the entire text of the treaty, including the preamble, annexes, protocols and subsequent agreements that refer to the treaty itself.

Finally, the interpretation must conclude with a search for the purpose of the norm, for its ultimate and real intention. But this should not be done outside the literal and contextual context, but through it

The Supreme Court of Spain has ruled on several occasions on the need to interpret tax treaties on the basis of their text and the intention of the contracting parties, for which it is useful to rely, in the field of DTCs, on supplementary texts such as commentaries (STS of 18 May 2005, rec. 754/2000; STS of 8 June 2012, rec. 4496/2009), especially taking into account the capacity of the States to make reservations to them in interpretative and/or application matters. However, these commentaries or ancillary texts cannot replace the will of the parties as they are not binding legal texts, but simply serve as a mechanism for better understanding and discernment.

The courts have also consolidated their position on the autonomous interpretation of the concepts included in the DTCs, so that they should not be identified from the prism of domestic law and without taking into account their own scope (STS of 12 June 2023, rec. 915/2022; SAN of 17 March 2025, rec. 1206/2020; SAN of 22 May 2025, rec. 222/2023).

So, following the above criteria, we can give a concrete example of how to interpret the Agreement. The expression contained in Article 2.2.a.i) of the Agreement cannot be understood only in a literal sense, as it would lead us to conclude that the meaning of "the majority of assets" refers to the amount of assets that a company may have, regardless of the value of each of those assets. If we take into account the context of the Agreement itself (which is that the authorities in Gibraltar and Spain wish to eliminate abuse of claims to Gibraltar residence by establishing strict rules which establish when a person or individual is resident in Spain) and the purpose of the Agreement (to attract taxable income to Spain when the economic substance is located in Spain), we must interpret the expression "majority of assets" in the sense of the economic value of those assets and not a simple count of the number of distinct assets. This contextual and definitive interpretation has been applied by the Spanish courts for a long time, as we can see in judgments such as the SAN of 21 January 2010, rec. 90/2008.

Along with the general criteria of interpretation, the Convention itself adds additional references to be taken into account in interpreting it, such as any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; any subsequent practice in the application of the treaty which reflects the agreement of the parties regarding the interpretation of the treaty; or any relevant rules of international law applicable in the relations between the parties.

The Government of Gibraltar has published on its website a series of answers to frequently asked questions from taxpayers, as well as a Note on the key elements of the negotiation of the treaty, and the Directorate General of Taxation has issued two binding consultations (i.e. V1310-22 and V1323-22) concerning the interpretation of the Agreement. This administrative acquis must also be taken

into account when interpreting the treaty. Although from the Spanish perspective, the rulings issued by administrative or judicial bodies will have greater interpretative weight than those issued by foreign governments. Nevertheless, at the end of the day, the judge/court will have its own criteria (*iura novit curia* principle), which may or may not coincide with the interpretation given by the administrative bodies.

Following the conclusion of the political agreement between the European Union and the United Kingdom (with Spain's endorsement) concerning Gibraltar, the definitive legal text is still awaited, and its content remains unknown. Should it make reference to, or have any bearing upon, the Agreement, it will also need to be considered in its interpretation

In addition to the above, as supplementary means of interpretation (Article 32), where there is ambiguity or obscurity in a term, or the above rules would lead to a manifestly absurd or unreasonable result, recourse may be had to supplementary means of interpretation, in particular to the preparatory work of the treaty and the circumstances of its conclusion, such as Article 3 of the Protocol to the *Brexit* agreement. On this point, it is essential to remember that the Agreement was drafted in the context of *Brexit*, with a predominance of the Spanish position in the negotiation that was subsequently reflected in the text of the Agreement itself.

Finally, we must bear in mind that the Agreement has been signed in Spanish and English. This duality of languages entails an added difficulty in its interpretation, since the terms and legal concepts do not always coincide as to their meaning and scope, although the Vienna Convention presumes that the terms of the treaty have the same meaning in each authentic text (33.3). Unless otherwise provided, both languages are authoritative, without one prevailing over the other (33.1).

In order to resolve any linguistic differences that may arise, since one language does not prevail over the other, the meaning that best reconciles the two texts must be adopted, taking into account the object and purpose of the treaty (33.4). That is precisely the purpose of this work.

2.2.2 EU law in the interpretation of the treaties[24]

Following Brexit, Gibraltar left the EU together with the United Kingdom. But Spain remains a Member State, which obliges us to observe the provisions of EU law insofar as it forms part of Spanish domestic law and takes precedence over domestic provisions.

Therefore, from the Spanish perspective, the provisions of the Agreement cannot infringe the general principle of non-discrimination (Article 18 TFEU) or the free movement of capital (Articles 63 et seq. TFEU), the only fundamental freedom that applies in the *ad intra* and *ad extra* relations of the EU Member States.

An interpretation that contradicts these principles is invalid and must be rejected. The interpretation of the Agreement may not lead to a result which entails discriminatory treatment or an unjustified and/or disproportionate restriction on the free movement of capital. If this is the case, and if it is impossible to interpret a particular provision in a way that respects these principles, that provision would be null and void and should not be applied. This could amount to a unilateral breach of the Agreement by Spain, so the administration should take particular care to observe EU principles when applying the rules of the Agreement.

On several occasions, the Spanish courts have applied the principle of the primacy of EU law and have resolved a situation in the light of EU law, even if this formally contradicts domestic law and/or the provisions of the DTC. Specifically in matters of free movement of capital, proof of this are the STS of

[24] This matter has been thoroughly analysed in BENÍTEZ PÉREZ, M (2023). *El Acuerdo internacional en materia de fiscalidad y protección de los intereses financieros entre el Reino de España y el Reino Unido de Gran Bretaña e Irlanda del Norte en relación con Gibraltar. Examen a la luz de la libre circulación de capitales*. Revista de Contabilidad y Tributación. CEF, (484), 53-86, Madrid.

19 February 2018 (rec. 62/2017) and 19 November 2020 (rec. 6314/2018), both in matters of Inheritance and Gift Tax, or the recent STS of 5 April 2023, rec. 7260/2021 and 24 March 2025, rec. 3800/2023, in matters of withholding taxes on CIIs .[25]

3 - The legal nature of the rules established by the Tax Treaty: common interpretation

It is trite law that treaties bind jurisdictions that enter into them in a way which overrides domestic legislation where those treaties are relevant, such as with withholding tax rates applicable to residents of jurisdictions which enter into traditional double taxation treaties overriding the general "non-treaty" rate.

From a Gibraltar perspective however, it is a slightly more complex picture. Gibraltar does not enter into treaties in its own right being a jurisdiction which is an overseas territory rather than an internationally recognised state in its own right[26], in addition to that it is longstanding Spanish policy to interact only with the United Kingdom in matters related to Gibraltar (as the two contracting parties to the Treaty of Utrecht which are concerned with Gibraltar). Thus, the Tax Treaty was entered into, not by Spain and Gibraltar but instead by Spain and the United Kingdom.

This creates a rather novel constitutional position, at least where Gibraltar is concerned, whereby an international treaty concluded in the name of the United Kingdom needs to be transposed into law applicable in Gibraltar. The basic position is that the United Kingdom retains the power to legislate for Gibraltar directly but in general does not. The Crown has reserved powers to legislate for the "peace, order and good government" of Gibraltar through the office of the Governor, but this power has not been exercised directly since the introduction of the Gibraltar Constitution Order in 2006. The only truly politically acceptable method by which the Tax Treaty could be ratified as part of Gibraltar law was for the Tax Treaty to be passed into Gibraltar law through the devolved mechanisms centred on the Gibraltar Parliament. Any other mechanism would amount to an imposed settlement and would be unsustainable politically, even with the process of negotiating the Tax Treaty being conducted in great measure by the representatives of the Gibraltarian parliament and government.

Therefore, on 26th February 2021 the Tax Treaty was transposed into Gibraltar law and became effective on 4th March 2021. Its provisions then became a part of the domestic law of Gibraltar. Whilst it is convenient then to define the various tests as the "domestic law test" and the "treaty test" this is an convenient though artificial distinction, since 26th February 2021 the provisions of the Tax Treaty have been domestic law. In Spain, such particularities do not arise, as it is clearly established that an international treaty forms part of the domestic legal order, pursuant to the explicit provision set out in Article 96 of the Spanish Constitution. As a sovereign State, Spain retains the right to conclude its own international treaties, the content of which must merely comply with the general principles of international law and the requirements of EU law, as outlined in the preceding section.

[25] These judgments are of particular interest for the issue addressed in this paper if we consider that all of them examined the possible infringement of the free movement of capital in tax relations with non-EU third countries, such as the United Kingdom and Gibraltar after *Brexit*.

[26] For a detailed discussion of the constitutional position of British Overseas Territories including Gibraltar see Jackson, Grahame, Understanding the Constitutionality of the Actions of the UK When Formulating the Policy Agenda of International Organisations Such as the OECD and the Imposition of International Standards on British Overseas Territories and Crown Dependencies. (May 20, 2024). Available at SSRN: https://ssrn.com/abstract=4834164 or http://dx.doi.org/10.2139/ssrn.4834164

4- Interpreting Specific provisions of the treaty.

In this final section of the paper, we offer a series of observations on selected terms contained in certain provisions of the Treaty. The authors are fully aware that many other provisions could equally warrant analysis; however, the purpose of this section is not to provide an exhaustive catalogue of potential interpretative conflicts, but rather to illustrate how divergences between the two interpretative approaches may arise.

4.1 Article 2(1)(b)(i)- Individuals

There are two phrases of interest in Article 2(1)(b)(i)A. But first one must give some context to this provision. Article 2(1) performs a role which is well understood in the OECD Model Treaty. 2(1)(a) states that:

> Natural persons shall be tax resident in Spain or in Gibraltar in accordance with their domestic law, including rules regarding the issuance of tax certificates confirming residency and subject to the following rules only in cases of tax residency conflicts;

In other words, for natural persons only, the provisions of 2(1) act as a "tiebreaker" similar to the contents of Article 4(2) of the OECD Model Convention with Respect to Taxes on Capital and Income. Thus, when we consider Article 2(1)(b)(i)A we are considering a tiebreaker. If Article 2(1)(B)(i)(a) is triggered then it breaks the tie of dual residence. In this respect, there are no differences between the Spanish and English versions of the Treaty in terms of interpretation.

Firstly, let us lay out the relevant text.

> (b) Where by reason of the provisions in paragraph (1)(a) natural persons are resident of both Parties then their status shall be determined as follows:
> (i) Natural persons shall be tax resident only in Spain when any of the following circumstances exist:
> A. They spend over 183 ***overnight stays*** of the calendar year in Spain. In determining the count of ***overnight stays***, ***sporadic absences*** in neither Spain nor Gibraltar shall be added to the time where these individuals spend the majority of their overnight stays;
>
> Emphasis added to highlight the phrases being considered.

3.1.1 The concept of "Overnight Stays".

The phrase "overnight stays" is not defined in the Tax Treaty, and is therefore a matter of interpretation.

Given the method discussed above in para 1.2 we must first apply the ordinary meaning of the language in its relevant context.

The phrase also has no relevance to Gibraltar tax law other than in this context[27]. It does not appear in relevant UK statutes which may form a basis for an influential but not binding interpretation[28]. The UK's statutory residence test definition of "day" which is contained in paragraph 22 of Schedule 45 of the Finance Act 2013 does not contain the word "overnight" but instead uses the phrase "at the end of the day", meaning midnight. The lack of assistance from the English legal system leaves us looking

[27] The only similar usage of a time period is the use of "day" in the test for ordinary residence contained in s74 of the Income Tax Act 2010 which defines a day as " any part of a 24 hour period commencing at midnight shall be counted as a day of presence".

[28] Though s240 of the Income Tax (Earnings and Pensions) Act 2003 does contain a reference to "Overnight" related to overnight expenses it is unlikely that this will be relevant to the interpretation of a tax treaty. In any case s240 does not define "overnight".

to the English Dictionary to find the meaning of the word. The Cambridge English Dictionary states the definition of "overnight" as:

> "for or during the night"[29]

This is less than helpful as it permits part or all of the night to be "overnight".

The problem for a Gibraltarian interpretation of the word "overnight" using the ordinary meaning of the words is that the ordinary meaning of the word is imprecise and as result we are left with the question "at what point does a late stay become "overnight?". Is there some requirement for sleep? Does a late night trip to La Linea where the individual visits a night club, does not go to bed and returns in the early hours of the morning constitute "overnight"? Is presence in Spain at midnight required? Or can one arrive at 1am and party until 6am and still qualify as "overnight"? Does the word "stay" in "overnight stay" rule out the "partying" scenario and if so, does that lead to the effect that a person can stay up all night at a rave and his brother go to stay in a hotel on the same night but one has impacted his tax residence and one not?

This is language then gives and unclear or absurd result and under the Vienna Convention permits the interpreter of the language to move to supplementary sources. As previously mentioned, Spain has not issued comprehensive guidance, and no commonly agreed document has been issued by the two relevant jurisdictions. However, Gibraltar has issued FAQs. Unfortunately, we are given no obvious assistance in the meaning of the phrase "Overnight stays" in the Gibraltar FAQs. The only glimmer of hope is this paragraph:

> Spanish tax law determines residence in Spain if presence in Spain exceeds 183 days in the tax year. Permanence of stay in Spain is established by considering the place returned to after being away (i.e. return from holiday, business travel or educational leave), demonstrating the characteristics of a regular or typical abode.[30]

If this is correct (and one must remember these FAQs are written by one side in this and are not acknowledged by the Spanish authorities as consistent with their understanding) and "overnight stays" is intended to determine this then it would lean toward an interpretation of "overnight stays" which requires sleep and permanence. Whilst this seems sensible it also feels rather more like a process of deduction than interpretation, a process outside the Vienna Convention method. The Gibraltarian lawyer interpreting the phrase "overnight stays" must then be left with the unsatisfactory position of interpretation being uncertain and hoping for judicial guidance. This is wholly unsatisfactory for taxpayers and could have easily been resolved with a definition.

In the Spanish version, the term *"overnight stays"* is translated as *"pernoctaciones"*, which carries a similar meaning. According to the Royal Spanish Academy, an *"overnight stay"* implies *"spending the night in a certain place"*. Consequently, a taxpayer may be present in a territory during nighttime hours without necessarily having had an *"overnight stay"* in the sense understood in Spanish. From the Spanish perspective, this rule cannot be interpreted as referring simply to physical presence in Spain at a specific time.

In any case, we concur with the Government of Gibraltar that the intention of this clause is evidently to attribute residence based on the physical presence of individuals who, although they may work in Gibraltar, maintain their habitual residence elsewhere and return to Spain to spend the night. For all

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[29] https://dictionary.cambridge.org/dictionary/english/overnight retrieved 21st May 2025

[30] Frequently Asked Questions (FAQs) International Tax Agreement: Gibraltar – Spain, Income Tax Office: HM Government of Gibraltar 2021

such cross-border workers, this provision enables them to disregard their presence in Gibraltar when calculating tax residence, and to account only for the days spent in Spain. This provision also ensures that Gibraltarians who cross the border daily merely to enjoy leisure time in Spain are not considered Spanish tax residents. Nevertheless, they may still face potential dual tax residency issues, since the *overnight stay* rule is applicable exclusively within the framework of the Agreement and does not extend to the domestic Spanish legal criteria for determining tax residency, particularly the 183-day rule.

From the Spanish standpoint, it is evident that the precise scope of this clause is uncertain, and its meaning will necessarily be developed through case-by-case interpretation. It may be characterised as a legally undefined concept, requiring contextual interpretation in light of all relevant facts and circumstances. In any event, if in Spanish *pernoctar* is defined as "to spend the night in a certain place", then the taxpayer's intent—whether to attend a party or to sleep—is irrelevant. The key element is the objective fact of the taxpayer's presence in Spain during the night, not at a specific moment, but during a continuous and sufficiently substantive period to be considered as such.

4.1.2 The concept of "Sporadic Absences"

The language of Article 2(1)A(i)(b) similarly contains reference to "sporadic absences". Again, this wording has no specific meaning in Gibraltar statute. Under the Vienna Convention method we must approach the ordinary language meaning of the words. The Cambridge dictionary defines "sporadic" as

> Happening sometimes; not regular or continuous[31]

This is a much clearer definition than that of "overnight". In the context of absences it is clear that what is meant here is holidays, business trips, anything other than being in Spain or Gibraltar (on the condition that one is tax resident in both Gibraltar and Spain). It is simply saying, all those small absences should be added to the larger of the two piles in terms of overnight stays.

From the Spanish perspective, the matter is far from straightforward. The concept of *"sporadic absence"* was introduced into the presence test for determining Spanish tax residence several decades ago, yet its interpretation has remained uncertain and problematic ever since.

As a starting point, it must be emphasised that the concept of *"sporadic absence"* in the agreement should be construed in accordance with Spanish law, as it constitutes a specifically Spanish legal notion. Consequently, the interpretation of the agreement should reflect the ordinary meaning of the term within its legal context, bearing in mind that the relevant tie-breaker rules are, to a large extent, shaped by Spanish legal principles. In practical terms, this means that a "neutral" interpretation of the term is unlikely to be accepted by the Spanish tax authorities. This exposes a major flaw in the Vienna Convention approach to treaty interpretation. The primary rule that language must be interpreted in accordance with the "context" of the relevant treaty, when such "context" is legal principles embedded in the legal system of one of the parties to the treaty, means that those legal principles are imported into the treaty, and therefore, only the legal profession of one of the parties can properly interpret the treaty. This is the exact opposite of what we believe the Vienna Convention is attempting to do, which is to provide an objective method freed of national assumptions as to how to interpret a treaty in a way which allows both sides to conclude similar meanings from the same words. In the case of the Tax Treaty, the method seems to achieve the exact opposite if professionals on both sides of the Gibraltar border are bound to consider Spanish tax law whenever they read a given word or meaning.

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[31] https://dictionary.cambridge.org/dictionary/english/sporadic retrie ved 21st May 2025

At present, there is no definitive official or doctrinal guidance on the minimum period of time a taxpayer must spend outside Spain for their absence to be considered *sporadic*. It is evident that the longer the period spent abroad, the more robust the taxpayer's position will be. However, Spanish case law does provide some boundaries: it is well established that an absence of more than 183 days will not be regarded as sporadic. The Spanish Supreme Court issued important rulings to this effect in 2017 and 2018.

What remains unclear, however, is whether an absence of, for example, 180 days could be deemed sporadic. There is no statutory definition and no conclusive jurisprudence to clarify this point. In our view, the classification will ultimately depend on the specific circumstances and context of the individual case. It is beyond doubt that a weekend trip abroad constitutes a *sporadic* absence. Conversely, a longer stay may or may not be deemed sporadic, depending on its duration, purpose, and frequency. The limit remains undefined.

4.2 The concept of "Spouses and Similar".

> B. In the event that, pursuant to the Spanish tax legislation, their spouse (from whom they are not **legally separated**) or the natural person **with whom a similar relationship has been established,** and/or any **dependent ascendants** or descendants, resides or reside habitually in Spain. (Emphasis added)

The above section uses some language unknown to the Gibraltar legal system, and some which is part of our system.

Legal Separation in the sense of the Gibraltarian system is a court ordered process by which a married couple may separate for legal purposes whilst remaining married. The court will generally give orders under s30 of the Matrimonial Causes Act 1962. s31 of that Act specify the effects of such an order including the removal of any obligation to cohabit[32]. In order to explain why "judicial separation" and "legal separation" are used interchangeably in English one must understand that the terminology in UK is that of "legal" separation rather than "judicial" therefore the plain English everyday version of the phrase is "legal separation"[33].

What Legal/judicial separation is <u>not</u> is the separation of a couple and their entering into a separation agreement to govern arrangements between them prior to any divorce or petition for legal separation. That is a private arrangement between the two, but not a legal separation.

From the Spanish perspective, the separation of a married couple may be either *legal* or *de facto*. The latter occurs when a married couple decide to cease cohabitation and live independent lives, without initiating formal legal proceedings. Although this situation is acknowledged in the Spanish Civil Code, it gives rise to very limited legal consequences and have effect mainly *inter partes* (i.e., effects enforceable only against the other partner).

By contrast, legal separation takes place when a married couple choose to formalise their separation through an official agreement or judicial process, thereby producing legal effects *erga omnes* (i.e., effects enforceable against all).

The interpretation of the term "separation" must be conducted in accordance with Spanish legal practice, which in this respect is similar to the approach followed in Gibraltar, as previously explained. Only couples who are not legally separated may qualify for the application of the relevant criteria. *De*

[32] Though one wonders how much of this obligation remains in the age of no-fault divorce

[33] Here you will find the UK government referring to "legal separation" https://www.gov.uk/legal-separation

facto separations do not meet this standard, as they are implicitly excluded from the scope of the rule.The meaning of "**With whom a similar relationship has been established"**

Once again, we must apply the ordinary language meaning of the words in the context of the Treaty there is no assistance in the Gibraltar legal vocabulary. Gibraltar law does however, throw up an anomaly, that is the existence of Civil Partnerships as a non-religious form of union for those who do not feel the need for "marriage" but want a legally recognised union. It is clear that this form of union would be included in the definition of "similar relationship". Unfortunately, despite what many people believe there is no such thing as a "common law marriage" so, in terms of those who cohabit but are neither married nor part of a civil partnership then we are left adrift as to what amounts to a "similar relationship".

Reading the plain language in the context of the treaty and its purposes leads us to understand that the object of the treaty is to identify those who's "real home" is Spain (at least in this provision). If one reads that and does not apply a legalistic interpretation (as we are encouraged to do by the Vienna Convention) then one should read the words "similar relationship" to cover the kind of "living together" which is so common in this era. Where a relationship is identical in all regards other than legal form to marriage then that is certainly in scope. How long is required for a couple to cohabit before they are caught or whether four days a week or 7 years is required before a relationship is "similar" enough is not clear but as with so much in life one suspects that one will "know it when you see it".

This provision is not entirely stark in its clarity, but it is clear enough to function.

4.2 Article 2(1)(c) and (d)- Transfer of residence from Spain to Gibraltar

Article 2(1) (c) provides for special rules which override the generality of Article 2(1) where the matter relates to individuals moving their residence from Spain to Gibraltar. It is worth noting the full text of 2(1)(c) and (d):

> (c) The following special rules for determining residency shall be applied in all cases without prejudice to the criteria set forth in the preceding paragraphs:
>
> > (i) Spanish nationals who move their residency to Gibraltar after the date on which this Agreement is signed shall in all cases only be considered tax residents of Spain;
> >
> > (ii) Non-Spanish nationals who provide proof of their new residency in Gibraltar shall not lose tax residency in Spain. This rule shall apply in the tax period in which the change of residency is made and during the four subsequent tax years. This paragraph shall not apply to non-Spanish nationals that spend less than one complete tax year in Spain or registered Gibraltarians that spend less than 4 years in Spain;
>
> (d) For the purposes of paragraph (1)(c)(ii) above, registered Gibraltarians means any natural person as defined by section 4 of the Gibraltarian Status Act, generally British citizens that have resided in Gibraltar for over ten years

The application of the Vienna Convention approach to treaty interpretation to 2(1)(c) throws up a number of oddities and difficult phrases.

Firstly, with regard to (c)(i). (c)(i) states clearly that all Spanish nationals that relocate their residence to Gibraltar shall be considered residents of Spain. This appears clear. Any Spaniard becoming resident in Gibraltar shall be deemed resident in Spain, the fact they move from Spain or a third country seems

to be irrelevant. However, this plain English interpretation is challenged by the Gibraltar Government FAQs which state

> It would go against the spirit and context of the Treaty if these rules are applied to Spanish nationals relocating to Gibraltar from elsewhere having already lost their Spanish tax residency.
>
> A risk of tax base erosion to Spain can only exist as a result of a change in residence from an individual that was previously resident in Spain. Tax is not charged in Spain on the basis of nationality[34]

For this author the FAQs go beyond the methodology of the Vienna Convention. The plain English interpretation of 2(1)(c)(i) is supported in the light of the context and purpose of the Treaty. The Treaty (from one perspective) is designed to neutralise the effect of Gibraltar's tax system for Spanish nationals, and thereby protect the Spanish tax base, and its context is that of a 300 year sovereignty dispute. The FAQs are obviously reaching for the phrase "context and purpose" but instead refer to "spirit", we cannot know what the spirit of the treaty is and it is unhelpful that they used such language.

The language of 2(1)(c) does not support the assertion that a Spanish national must move his/her residence directly from Spain to Gibraltar for 2(1)(c) to apply. If it were meant to do such a thing it could easily be amended with one or two words to mean that very clearly. For this author, the language has been left deliberately in this form to permit a Spanish court in later years to take an expansive reading and in that case the optimism of the FAQs will prove unfounded.

2(1)(c)(ii) is certainly more clearly designed only to catch those who relocate their residence from Spain to Gibraltar. The language is clear:

> Non-Spanish nationals who provide proof of their new residency in Gibraltar shall not lose tax residency in Spain.

It is clearly necessary for a non-Spanish national to have Spanish residency in the first place for them to lose that residency. The contrast between 2(c)(i) and (ii) in this regard is marked.

The effect of 2(c)(ii) is that a non-Spanish national (other than a Gibraltarian) will have a four year "tail" of Spanish tax residence if they move from Spain to Gibraltar. That is, they will remain tax resident in Spain for four years after the end of the tax period in which they move. The only exception to this rule is a registered Gibraltarian who is required to be resident in Spain for four full tax years before the tail is applicable.

From the Spanish perspective the interpretation is quite different. In the author's view, the rule is designed to regulate situations of change of tax residence from Spanish territory, not from a third jurisdiction. If we interpret this special provision in the light of the context provided by Article 2(1), which links the application of these rules to the conflict of tax residence, it must be understood that the transfer of residence must take place from Spain to Gibraltar. The opposite would be to interpret the rule in such a way that the Spanish State would have the power to attract tax residence to its territory potentially to any taxpayer in the world, irrespective of whether he has any nexus of union (presence, economic interests or family) with Spain beyond nationality; it would only be sufficient to hold a Spanish passport and move to Gibraltar.

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[34] *Supra* Note 30

Moreover, if we interpret this provision in conjunction with the rule for the transfer of non-national tax residents, we can only conclude what has already been said. Otherwise, we would reach the absurd conclusion that within the same rule, when referring to Spanish nationals the power of attraction of residence is potentially infinite, but when referring to non-nationals only transfers of residence from Spain should be considered. This interpretation must be rejected, as in the authors view the trailing tax rule for Spanish and non-Spanish citizens is the same in nature, only different in terms of intensity (residents forever vs 4 years of residence).

4.3 Article 2(2) Legal Persons and other legal structures and arrangements.

4.3.1 The General Nature of Article 2(2),

Article 2(2) is a very broadly written Article which extends its reach to all forms of entities and arrangements which may have a tax effect. That is its scope is very expansive. It is applicable to;

> Legal persons, entities and other legal structures or arrangements, established and managed in Gibraltar, or governed by its legislation.

This is an interesting approach. The language of the Treaty is not entirely clear in that it appears that there is no requirement for "residence" in both Gibraltar and Spain for the provisions of Art 2(2) to be applicable to any entity. Article 2(2) is not a "tiebreaker". It is instead an entirely new tax residence test, independent of the Income Tax Act 2010's original provisions (though it is now incorporated into the Income Tax Act 2010) and as such makes the Treaty unique. There are no other jurisdictions in the world with which Spain has a similar treaty, the effect of which is to reach out into another jurisdiction and to impose Spanish residence onto the home jurisdiction's entities, and the authors have not seen any similar provision in any other treaty of which they are aware, even in the French-Monegasque convention.

However, there is a counterpoint to this, that the second part of Art 2(2)(a) states:

> shall be considered to have residency **only** in Spain when any of the following circumstances exist: **[emphasis added]**.

The use of the word "only" could potentially imply that the entity was dual resident prior to the application of Art 2(2). However, the authors believe that whilst this is slightly confusing the inclusion of entities which are not recognised as existing legal bodies (i.e. trusts) in the list of things which are deemed to be Spanish tax resident by Art2(2) it is impossible for those entities to be dual resident prior to the application of Art 2(2). Furthermore, a comparison between the wording of the residence test applicable to legal entities and that applied to individuals reveals a clear distinction, allowing us to conclude that we are not dealing with a mere 'tie-break' set of rules, but rather with an autonomous system for determining tax residence in Spain

As a follow on from this position and as a consequence of the broad drafting of Art 2(2) it may well have the consequence of meaning that "arrangements" not recognised by Spanish law (such as a trust) may well find themselves as treated as resident entities for Spanish tax law. The Gibraltar FAQs seem unsure as to how trusts will be dealt with:

> Spain applies a purposive approach to unincorporated entities.
>
> Their civil law system does not recognise the protection afforded by such legal structures or arrangements that are available under a common law legal system. If a structure contains such legal arrangements, then the impact of these rules will likely

> need to be considered on the highest corporate or individual layer available, where Spain considers the 'true' purpose, effect, control and ownership to be.
>
> The tax residence of any natural persons at this highest layer would need to be established in accordance with the provisions of the Treaty.[35]

This may well be eminently sensible, but it deviates from the text of the Treaty substantially which specifically states that:

> "legal structures or arrangements…shall be considered to have residency only in Spain"

This language is substantially similar to the language in the Category D1 hallmark of DAC6[36] which speaks of "legal entities, arrangements or structures" which is normally read to include trusts[37] as "arrangements", similarly Hallmark D2 refers to "persons, legal arrangements, and structures".

To the ears of a Gibraltarian lawyer this is clear, the arrangement or entity has the tax residence, those above it are of no relevance. Section 13(2) of the Income Tax Act 2010 attributes residence to trusts themselves, and thus the idea that a trust has a residence status to itself is entirely consistent with Gibraltar taxation law. Nonetheless, there is extensive administrative doctrine in Spain that expressly recognises the non-existence of trusts and analogue arrangements under Spanish law. Accordingly, from a Spanish legal perspective, a trust cannot possess tax residence, as it is not recognised as a legal entity. The legal effects attributed to a trust under a foreign legal system must, therefore, be ascribed to the underlying individuals or to legally recognised entities. Consequently, any tax implications that would potentially arise from the trust being considered tax resident in Spain must, depending on the circumstances, be attributed to its settlors and/or beneficiaries.

One is left wondering what is meant to be caught by the word "arrangements" if those things which are legal relationships which do not have a legal personality are to be disregarded. A partnership famously has no tax residence and is looked through, so if partnerships and trusts are not affected by this language, what is? Foundations are covered by "legal persons" as are Limited Liability Partnerships and (some) Limited Partnerships, others would be classed as simple partnerships. The distinction in the language between "legal persons" and "entities" and "arrangements" means all other forms of organisation in the Gibraltarian legal system are in one or other of the categories "legal persons" and "entities".

Under an alternative interpretation, if one reads the test as applicable to trusts, then the trust in question could well possess "treaty residence" in Spain whilst at the same time the Spanish legal system ignores that existence, and the "treaty residence" is a meaningless outcome.This continued uniqueness in the absence of any case law to help clarify should be remembered whenever interpreting the Tax treaty.

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[35] *Supra* Note 30

[36] Annex IV Part 2 D of Council Directive (EU) 2018/822 of 25 May 2018, published in OJ L 139, 5.6.2018, p. 1–13

[37] Brown H & Jackson G, *A Practitioners Guide to International Tax Information Exchange Regimes* Spiramus 2021, Chapter 9

4.3.2 Article 2 (2)(iii) the concept of "effective management"

Article 2(2) has as its form a list of tests which will cause an entity to be tax resident in Spain, as noted above, this is not a tiebreaker test. It is a stand alone. Article 2(2)(iii) is one of the four potential triggers that make up that tests and states:

> (iii) The majority of the natural persons in charge of effective management are tax resident in Spain;

Thus, under this leg of the Article 2(2)(a)(iii), in order to be treated as Spanish tax resident a Gibraltar legal person, arrangement or structure must:

i) Be established in Gibraltar; and
ii) Be managed in Gibraltar, or
iii) Be governed by its legislation; and
iv) There must be a majority of the natural persons in charge of the effective management tax resident in Spain.

An entity must be both established and managed or governed by law in Gibraltar for the test to be applicable.

Finally, we move to the requirement of a majority of the natural persons in charge of the effective management of the entity must be tax resident in Spain, interpreted under the Spanish domestic law and provisions of the Treaty.

When taking a Gibraltarian approach to this sentence one can admit that several words are uncontentious. For example, "majority" and "natural persons" have commonly accepted meanings. However, what does "in charge of" or "effective management" mean?

"In Charge of". This language is unhelpful from the perspective of clarity for an English speaker. If the intention of the authors of the Tax Treaty was to indicate those who exercise the effective management of the entity in question then exactly that language would have been effective, that is "the majority of those who exercise the effective management". The authors are clearly trying to go beyond a simple head count of directors, but they seem to have gone further than that. "In charge of" seems to imply (in its plain English meaning) a hierarchy of those who exercise effective management. One could imagine a board where there is a central core of two directors who are the managing director and the chief financial officer who take a dominant role. Are they "in charge of effective management" whilst the others merely "exercise" the effective management? The authors suspect that the answer to this query will be unknown until the point is litigated. Practically, such litigation is most likely to occur in a Spanish court, though it is not impossible for a Gibraltarian court to litigate the point. If this is the case then there is a case to be made that "in charge of" modifies the position of simply counting all those who "exercise" effective management to a narrower core of individuals.

From a Spanish legal perspective, this expression may be understood to refer to individuals who are genuinely engaged in the effective management of the company, rather than merely acting as nominal or figurehead directors. The term 'in charge of' is not interpreted in a formalistic sense, but rather from a substantive, functional standpoint. In other words, an individual who is formally appointed as a director but does not in practice exercise the powers associated with that position should not, in principle, fall within the scope of the concept. This interpretation aligns with the overall wording of the Treaty, and in particular Article 2, which clearly prioritises substance over form.

"**Effective Management**" Effective management is a concept which grows out of the concept "place of effective management" which featured in the OECD Model Convention prior to the 2017 revision of the Model Convention as the tiebreaker provision in Paragraph 3 of Article 4 applicable to persons other than individuals . In the post 2017 Model it still features as a factor to which the contracting states should "have regard" when applying the mutual agreement procedure on a case by case basis. "Place of effective management" and "effective management" are clearly technical terms in this context and one should interpret them within the context of the treaty. There is extensive literature on the meaning of "place of effective management" though one should note that it does not feature in Gibraltar law *per se*. The management based test of residence which is contained in s74 of the Income Tax Act is the traditional English style test of "management and control"[38].

Given that the phrase "effective management" is a technical term one can be influenced by technical texts as to its meaning. The 2008 and 2014 OECD Commentary states that the place of effective management is:

> the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made. All relevant facts and circumstances must be examined to determine the place of effective management. An entity may have more than one place of management, but it can only have one place of effective management at any one time'[39]

the UK's His Majesty's Revenue and Customs helpfully elaborate on the interaction between "effective management" and "management and control";

> The meaning of place of effective management and its distinction, if any, from the place of central management and control has yet to be considered by the UK courts. [40]

Though they do acknowledge that the place of effective management and the location of management and control may well be in different places in a small number of cases.

Thus, we are left with a consideration that "effective management" is the making of the "key management and commercial decisions that are necessary for the conduct of the entity's business as a whole". This does seem marginally wider than the description of management and control in *De Beers Consolidated Mines v Howe* [1906] AC 455 and so the Gibraltar practitioner must be careful not to simply import his or her's standard approach when considering this text of the Treaty.

Whilst the differences in the language may be small the Gibraltar interpretation of the phrase "effective management" may well include those who carry out executive roles, but which are not director level individuals.

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[38] See p144 *On the Principles of Gibraltar Taxation* ed Levy, I and Jackson GR Spiramus press 2024 for detail of the expansion fothe simple managed and controlled test in s74 of the Income tax Act 2010.

[39] *Commentary on the Model Tax Convention on Income and On Capital*, Commentary to Article 4 paragraph 3. (OECD, 2007)

[40] https://www.gov.uk/hmrc-internal-manuals/international-manual/intm120070#IDAQVIQH retrieved 3rd June 2025.

In Spanish, *gestion* (management) refers to the act of managing[41], while *gestionar*[42] (to manage) denotes taking responsibility for the administration, organisation, and functioning of a company, business activity, or organisation. In other words, the individual who manages effectively is the one involved in the day-to-day operations of the company—making routine decisions, coordinating work teams, liaising with suppliers and clients, initiating and promoting projects, and ensuring the continuity of business activities.

Such effective managerial activity may be carried out by a partner, director, company secretary, or even a skilled employee. In short, the condition of being an effective manager is not necessarily tied to the formal holding of a position of authority within the entity.

4.4 Article 2(2)(e) – Relocation of tax residence of Spanish entities.

In a mirror of Article 2(1)(c) which deals with the relocation of individuals to Gibraltar Article 2(2)(e) deals with the relocation of entities, legal persons, and other legal structures or arrangements to Gibraltar.

From a practical perspective in many cases this article seems to be redundant. It is unclear how a trust (for example), a form which is not recognised in Spain, can relocate its residence from Spain to Gibraltar. The only scenario which can be envisaged is a redomicilaition of a company to Gibraltar, it is, of course not always the case that a redomiciled company relocates its tax residence (incorporation and residence are not universally tied together).

Other than this one comment to Gibraltarian eyes this article is very clear. Any entity which relocates to Gibraltar for tax residency will remain tax resident in Spain. This is equally true from a Spanish legal perspective; however, an important nuance warrants particular attention.

Spain is a Member State of the European Union and, as such, EU law is fully applicable and takes precedence over domestic legislation. Accordingly, when interpreting the provisions of the Treaty, it is necessary to do so with due regard to EU law in order to avoid any interpretation that may contradict it.

EU law enshrines the free movement of capital (Articles 63 et seq. TFEU), both within the EU and in relations with third countries. As a result, any legal provision—regardless of its nature—that restricts the capacity of individuals or legal entities to transfer or relocate capital to another jurisdiction may be deemed contrary to EU law.

In this context, the continued attribution of tax residence to a company in Spain despite its relocation to Gibraltar could constitute a breach of EU law, insofar as it represents a de facto restriction on the free movement of capital.

Consequently, from a Spanish legal perspective, such a provision must be interpreted restrictively in order to ensure its compatibility with EU law. An interpretation informed by the principle of free movement of capital should allow for a more flexible application of this trailing tax rule, construing it as giving rise to a rebuttable presumption (*iuris tantum*), rather than an irrebuttable one (*iuris et de iure*), as is suggested by the literal wording

[41] Acceptance 1 of the Dictionare of Spanish language.
[42] Acceptance 2 of the Dictionare of Spanish language

5 – Conclusions

The interpretation of the International Agreement on taxation and the protection of financial interests between Spain and the United Kingdom regarding Gibraltar highlights both notable differences and points of convergence between the Spanish and Gibraltarian legal systems.

From the Gibraltarian perspective, rooted in the common law tradition and influenced by English legal principles, treaty interpretation begins with the application of the 1969 Vienna Convention on the Law of Treaties, prioritising the ordinary meaning of terms in their context and in light of the treaty's object and purpose. This approach favours a literal and functional reading, avoids overly technical or localised interpretations, and resorts to supplementary means only where the plain meaning proves ambiguous or absurd. Equal weight is given to the treaty's different language versions, presuming identical meaning. Although Spanish legal concepts are not typically used to reinterpret the English version, Spanish legal context is considered in practical application when necessary. This is a consequence of the Vienna Convention Article 31(1) exhortation that one should understand the context of a treaty and apply that when interpreting words. The authors believe this to be a weakness in the Vienna Convention approach when interpreting this particular treaty; in nearly all other circumstances the understanding of context is vitally important but when the context of a treaty is the taxation system of one of the parties then the treaty itself ceases to be a shared document.

The Spanish legal system, shaped by the civil law tradition, also adheres to the Vienna Convention, but complements the literal approach with systematic and teleological reasoning. Spanish courts emphasise the importance of interpreting treaties not only according to their wording, but also in line with their context, purpose and the intent of the parties. Jurisprudence discourages equating treaty terms with domestic legal definitions, reaffirming their autonomous meaning. Under Spanish law, international treaties take precedence over national legislation, and their interpretation must align with fundamental principles of European Union law, such as the free movement of capital and non-discrimination.

Despite methodological differences, both systems apply the Vienna Convention and recognise the relevance of good faith, context, and the treaty's object and purpose. Gibraltar tends to prioritise literal meaning, while Spain adopts a broader, purpose-driven analysis that incorporates international and EU legal standards more actively.

This divergence becomes evident in specific examples outlined in Article 3 of the Agreement:

- On "overnight stays", a Gibraltar interpretation focuses on the ordinary English usage and acknowledges its ambiguity. Spain interprets "pernoctaciones" as the objective act of spending the night in a place, assessing its meaning on a case-by-case basis.
- For "sporadic absences", a Gibraltar interpretation understands the term as non-regular, non-continuous absences, while Spain treats it as a distinct legal concept, interpreted in light of duration and context, with guidance from Supreme Court case law.
- Regarding relationships "similar" to marriage, a Gibraltar interpretation includes civil partnerships and similar cohabitation arrangements, though without precise criteria. Spain, by contrast, requires formal legal recognition and explicitly excludes *de facto* separations.
- In the case of trusts and unrecognised entities, Gibraltar attributes tax residence to the entity itself under s31(1) of its Income Tax Act 2010 and therefore it is possible to read the the language of Article 2(2) as ascribing Spanish tax residence to those vehicles. Spain, which does

not recognise trusts as legal persons, assigns tax obligations to the beneficiaries or participants.

- In the interpretation of the trailing tax rules applicable to individuals, the application of both interpretative methods leads to opposing conclusions: from the perspective of one Gibraltarian reading (though this position is not held by the Gibraltar Income Tax Office), any Spanish national relocating to Gibraltar shall be regarded as a Spanish tax resident; however, from the Spanish standpoint, only those individuals who transfer their residence from Spain to Gibraltar shall retain their Spanish tax residence status indefinitely.

These interpretative differences reflect the inherent complexity of applying a unified international text within two distinct legal systems, each shaped by its own traditions and institutional frameworks. This can result in uncertainty and calls for future clarification.

The authors would seek to go further than to identify this particular treaty as a case where the interpretation of the treaty language, when carried out in accordance with the Vienna Convention, leads to divergent understandings amongst the legal professions in the different jurisdictions which are parties to the relevant document. We would hypothesise that any document when interpreted from the standpoint of one legal and technical system will always (or will always at least have the potential to) diverge from an interpretation from a different standpoint. The Vienna Convention is an imperfect attempt to resolve that but it, we believe, will most likely fail in all circumstances[43]. This hypothesis can only be tested by repeated parallel analyses across borders, and we appeal to our colleagues in the profession to engage in this process, if only to increase greater understanding and cooperation.

In summary, although both jurisdictions operate under a shared international legal framework, the practical interpretation and application of the Agreement are shaped by the specific features of each legal tradition and the political and institutional context in which the treaty functions. Ongoing cooperation and dialogue between Spain and Gibraltar are essential to ensure legal certainty and the effective implementation of the Agreement.

[43] This effect is particularly pronounced in the case of the Tax Treaty as it crosses the boundaries of civil and common law.