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## Citizenship and Taxation in France

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**This article discusses the Andorra-France Income Tax Treaty (2013), which includes a specific clause to tackle the effects of “tax exile”, potentially paving the way for citizen-based taxation in the future.**

### 1. Introduction: The Discussion on Unilateral Solutions Against Tax Base Erosion in France

Like many countries, France has experienced an increase in the volatility of its tax base in recent years. This increase has triggered a discussion on possible remedies, including unilateral solutions. As regards the tax liability of legal persons, the territoriality of the tax system has been questioned in light of the evolution of economic activity.<sup>1</sup> As regards the tax liability of natural persons, the discussion has included the question of the extension of tax liability in order to counter situations of “tax exile”.<sup>2</sup> Both these aspects would entail a redefinition of the concept of “tax nexus” in the new socioeconomic context in order to counter tax base erosion. The same process is true for other countries as well. With regard to natural persons, for example, there has been an interesting theoretical discussion in recent years in the United States, however, in the opposite direction of France.<sup>3</sup>

The 2012 presidential election was the turning point that made it possible to suggest specific solutions to tax base erosion from a French perspective. In that context, the electoral platforms of the two major candidates included a proposition aimed at tackling the consequences of “tax exile” through a change in tax nexus for natural persons.<sup>4</sup> On the one hand, the outgoing president was committed to establishing a tax that would be linked to citizenship applicable to the income of

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1. See, in particular, with regard to the digital economy, the report of N. Colin & P. Collin, *Mission d'expertise sur la fiscalité de l'économie numérique*, France, Ministry of Finance and the Economy, January 2013, available at <http://www.economie.gouv.fr/rapport-sur-la-fiscalite-du-secteur-numerique>.

2. See, for example, the implementation of a French exit tax in 2011, codified in article 167 bis of FR: General Tax Code (*Code Général des Impôts* – CGI), National Legislation IBFD.

3. M. Kirsch, *Taxing Citizens in a Global Economy*, 82 New York University Law Rev. 5, pp. 443-530 (2007); R. S. Avi-Yonah, *The Case against Taxing Citizens*, 58 Tax Notes, pp. 389-394 (2010); E. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 Iowa Law Rev. 4 pp. 1289-1350 (2011).

4. For a critical analysis of the various solutions suggested, see D. Gutmann, *La sous-imposition des particuliers et des entreprises: Un thème majeur de la campagne présidentielle*, JCP-G 15, pp. 710-714 (2012). For a study of possible solutions to the effects of tax exile, see D. Gutmann, *La lutte contre l'“exil fiscal”: du droit comparé à la politique fiscale*, Revue de droit fiscal 21, étude 306 (2012).

taxpayers going into “tax exile” from capital. It would consist of an obligation to pay to the French tax authorities an amount equal to the difference between the tax paid abroad and what would have been paid in France.<sup>5</sup> On the other hand, the proposal of the candidate that was finally elected advocated renegotiating most of France’s tax treaties with other EU Member States.<sup>6</sup> This primarily concerns the countries bordering France, which receive the majority of French “tax exiled” citizens, namely Luxembourg, Belgium and Switzerland. In the aftermath of the election, the political platform including this second proposition prevailed. Hence, the tax treaty negotiations that followed have included the idea of a specific clause in order to tackle the effects of “tax exile”.

## 2. The Context of the Andorra-France Income Tax Treaty (2013)

In the wake of international pressure aimed at Andorra, which has always been considered a “tax haven”,<sup>7</sup> Andorra signed some 20 exchange of information agreements, including an agreement with France<sup>8</sup> and other EU Member States. As a result, Andorra was deleted from the list of non-cooperative jurisdictions.<sup>9</sup> Furthermore, Andorra signed the OECD Multilateral Convention on Mutual Administrative Assistance (2008)<sup>10</sup> on 5 November 2013.

At the same time, the country took steps to establish a proper tax system.<sup>11</sup> Until 2010, Andorra’s public revenue was mainly derived from indirect taxes. The tax reform in respect of direct tax matters resulted in the establishment of a corporate tax, which has been in force since 2012, and an income tax for non-residents, in

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5. For a discussion on the “nationalization” of the tax liability of natural persons in France, see D. Gutmann & J.-Y. Mercier, *Comment réussir à taxer les exilés fiscaux français?*, Atlantico (13 Mar. 2012), available at <http://www.atlantico.fr/decryptage/impots-francais-expatries-solidarite-daniel-gutmann-jean-yves-mercier-308444.html>.

6. *Exil fiscal: Hollande veut renégocier les conventions en Europe*, Les Echos (14 Dec. 2012), available at [http://www.lesechos.fr/14/12/2012/lesechos.fr/0202450834132\\_exil-fiscal---hollande-veut-renegocier-les-conventions-en-europe.htm](http://www.lesechos.fr/14/12/2012/lesechos.fr/0202450834132_exil-fiscal---hollande-veut-renegocier-les-conventions-en-europe.htm).

7. Referring to a state or territory, the expression “tax haven” can characterize either a low tax burden level, or a low degree of cooperation in tax matters of the jurisdiction concerned. In the context of the present paper, the term refers to the degree of tax cooperation only.

8. *Accord entre le Gouvernement de la République Française et le Gouvernement de la Principauté d’Andorre Relatif à l’Échange de Renseignements en Matière Fiscale* (22 Sept. 2009), Treaties IBFD.

9. See the Declaration of 10 March 2009 pursuant to which Andorra formally committed to implementing the OECD standards on transparency and effective exchange of information, available at <http://www.oecd.org/ctp/harmful/42826270.pdf>.

10. *Convention between the Member States of the Council of Europe and the Member Countries of the OECD on Mutual Administrative Assistance in Tax Matters* (25 Jan. 1988) (as amended through 2010), Treaties IBFD.

11. For an overview of the recent tax reforms in Andorra see A. Pascual Teixidó, *From Tax Haven to a Competitive Tax System*, 54 Eur. Taxn. 10 (2014), Journals IBFD.

force since 2011. More recently, a comprehensive individual income tax system was enacted, which has been in force since 1 January 2015.<sup>12</sup>

The negotiation and conclusion of tax treaties by Andorra is part of this greater picture. France, whose President exercises joint co-suzerainty together with Andorran local authorities,<sup>13</sup> was the first country to negotiate and conclude a treaty with the country. Andorra subsequently concluded a treaty with Luxembourg and is in negotiations regarding a treaty with Spain. The Andorra-France Income Tax Treaty (2013)<sup>14</sup> raised discussions regarding a particular provision, which created certain difficulties in getting it approved in France.

### 3. Citizenship-Based Taxation in the Context of the Treaty

The interest of the French authorities in taxing French citizens who transfer their residence abroad is not limited to the Andorra-France context. Another microstate bordering France, which is comparable to Andorra with regard to international tax relations, is Monaco.<sup>15</sup> While Monaco is considered as a sovereign state for tax

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12. See J. Torres Segura & I. Gómez Alemany, *New Individual Income Tax Act*, 54 Eur. Taxn. 10 (2014), Journals IBFD.

13. Suzerainty may be defined as “a relationship between a dominant and a dependent State the incidents of which are, in part, defined by treaty or agreement and, in part, by a *lex specialis* peculiar to that relationship or class of relations” (J. Crawford, *The Creation of States in International Law*, 2<sup>nd</sup> ed. p. 321 (Oxford University Press 2007)). The joint suzerainty of Andorra was founded in 8 September 1278. Prior to 1993, the literature considered Andorra as a *sui generis* entity: although close to statehood, such a qualification was difficult given its particular relationship to France in international relations and the ambiguous status of the French co-prince (for the period prior to 1993 see B. Béliugier, *La condition juridique des vallées d’Andorre* pp. 197-250 (Pedone 1970)). The situation became more clear after 1993, when an Andorran Constitution was approved and a trilateral treaty between Andorra, France and Spain was concluded, pursuant to which the two latter states guaranteed Andorran security and territorial integrity, as well as the possibility to represent Andorra before international organizations. For an analysis see J. C. Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood*, coll. *Cambridge Studies in International and Comparative Law* pp. 316-373 (Cambridge University Press 1996). One question that would be interesting to study from an international tax relations point of view would be the negotiation of tax treaties and the meaning of consent and intention of treaty parties in such situations, given that, with regard to Andorra, the French President also has the power to negotiate treaties in the name of Andorra.

14. *Convention between the Government of the French Republic and the Government of the Principality of Andorra for the Avoidance of Double Taxation and for the Prevention of Fiscal Evasion and Fraud with Respect to Taxes on Income* (together with a protocol) (unofficial translation) (2 Apr. 2013), Treaties IBFD [hereinafter *And.-Fr. Income Tax Treaty*].

15. See E. Crepey, public reporter before the Supreme Administrative Court, who points out the similarity between Andorra-France relations and Andorra-Monaco relations in his conclusions in the *Giorgis* case: FR: Supreme Administrative Court (*Conseil d’État* - CE), Plenary Tax Assembly, 11 Apr. 2014, No. 362237 (*Les personnes de nationalité française qui sont nées à Monaco et qui y ont constamment résidé depuis leur naissance, sont-elles assujetties à l’impôt français?*, Bulletin des Conclusions Fiscales 73 (July 2014)).

purposes,<sup>16</sup> it is “under French tax jurisdiction”<sup>17</sup> in respect of certain taxes. Unlike most tax treaties, the main purpose of the France-Monaco Income Tax Treaty (1963)<sup>18</sup> is to *establish* tax jurisdiction over French citizens who are resident in Monaco.<sup>19</sup> According to article 7 of the treaty, natural persons of French citizenship who transferred their residence to Monaco after 13 October 1962 are deemed to have their domicile or residence in France and are, therefore, liable to pay French income tax.<sup>20</sup> Until recently, the provision was the object of extensive interpretation by the courts, with the result that even natural persons of French citizenship who were born in Monaco and who were resident in that state were characterized as being liable to tax in France.<sup>21</sup> Recent case law has, however, altered this situation<sup>22</sup> by taking into account the ordinary meaning of the terms of the provision, its context, its object and aim.<sup>23</sup> The Supreme Administrative Court has ruled that, under article 4 B of the General Tax Code,<sup>24</sup> a French citizen, born in Monaco and resident in that jurisdiction, can be characterized as a French tax resident only if he has an economic activity in France or if France is the centre of his economic interests.<sup>25</sup>

The question of tax liability of French citizens is of central importance in the Andorra-France Income Tax Treaty (2013).<sup>26</sup> In addition to the inclusion of various anti-abuse provisions, this is the first time that France has negotiated and included a specific provision pursuant to which it has reserved the power to tax French citizens who are resident in the other contracting state. Article 25(1)(d) of

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16. MC: Court of First Instance (*Tribunal de Première Instance, Monaco*), 31 Oct. 1991, *M. Vergnion*, *Revue de Droit fiscal* 26, comm. 1265 (1992), confirmed by MC: Court of Appeals (*Cour d'appel, Monaco*), 21 June 1994, *The Chase Manhattan Bank NA*, *Revue de Droit fiscal* 3, comm. 48 (1995).

17. P. Dibout, *La relativité du territoire fiscal de la France*, *Revue de Droit fiscal* 17/18, pp. 628-635, at p. 632 (1985); For professors J. Lamarque, O. Négrin & L. Ayrault, Monaco can be treated as part of the French tax territory (*Droit fiscal général*, coll. *Manuels*, 3<sup>rd</sup> ed., § 1105 (Litec 2014)).

18. *Convention on Taxation between France and the Principality of Monaco* (18 May 1963), *Treaties IBFD* [hereinafter *Fr.-Monaco Income Tax Treaty*].

19. Ch. Louit, *Les relations fiscales franco-monégasques: le droit du plus fort*, *Revue de Droit fiscal* 12, comm. 216 (2014); and Crepey, *supra* n. 15, at § 3.

20. Art. 7(1) *Fr.-Monaco Income Tax Treaty*.

21. See, for example, FR: CE, 2 Nov. 2011, Case No. 340438, *M. Marc R.*, note by F. Dieu, *Les Français nés à Monaco et y ayant toujours résidé sont des Français comme les autres*, *Revue de Droit fiscal* 51 comm. 637 (2011).

22. For an overview see E. Bodkam-Tognetti, *Fiscalité des résidents de Monaco: comme un ouragan jurisprudentiel*, *Revue de Jurisprudence Fiscale* 7, pp. 635-642 (2014).

23. Crepey, *supra* n. 15.

24. FR: General Tax Code (*Code Général des Impôts – CGI*), National Legislation IBFD.

25. FR: CE, 11 Apr. 2014, No. 362237, *Giorgis*, note by Ch. Louit, *Revue de Droit Fiscal* 21, comm. 342 (2014); see also Louit, *supra* n. 19.

26. *And.-Fr. Income Tax Treaty*.

the treaty, in particular, reads as follows: “France may tax natural persons of French citizenship who are resident in Andorra as if the present treaty did not exist”.<sup>27</sup>

Although France’s tax treaty policy has always deviated from the OECD Model (2010),<sup>28</sup> which stems from “the desire of the French tax authorities to prevent the tax treaties from prohibiting the application of French tax law in certain circumstances”,<sup>29</sup> the deviation at issue in respect of the treaty goes beyond the scope of previous French practice. More specifically, the explanatory memorandum to the draft law implementing the Andorra-France Income Tax Treaty (2013) in France (the Draft Act) states that the introduction of this provision “would allow France to implement an eventual future evolution of the scope of French taxation”.<sup>30</sup> Hence, at first glance, the aforementioned provision seems to be directly inspired by the US “saving clause”.<sup>31</sup> In this light, France

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27. *La France peut imposer les personnes physiques de nationalité française résidentes d’Andorre comme si la présente Convention n’existait pas.*

28. OECD Model Tax Convention on Income and on Capital (22 July 2010), Models IBFD.

29. B. Gibert, *The Evolution of the French Tax Treaty network*, 42 Eur. Taxn. 8, pp. 422-428 (2002), Journals IBFD.

30. FR: National Assembly (lower house), Draft Law Authorizing the Approval of the Convention between France and Andorra for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Income Tax, No. 2026, 11 June 2014, p. 11: “[...] *cet article permettrait de mettre en œuvre une éventuelle évolution future du champ de la fiscalité française*”, available at <http://www.assemblee-nationale.fr/14/pdf/projets/pl2026.pdf>.

31. See US Model Tax Convention on Income, art. 1(4) (15 Nov. 2006), Models IBFD; article 29(2) of the *Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital* (31 Aug. 1994), Treaties IBFD [hereinafter *Fr.-U.S. Income and Capital Tax Treaty*], provides that: “Notwithstanding any provision of the Convention except the provisions of paragraph 3, the United States may tax its residents, as determined under Article 4 (Resident), and its citizens as if the Convention had not come into effect [...]”. Pursuant to a 2009 Protocol, the “saving clause” has been made reciprocal. Article 9(2) now reads: “Notwithstanding any provision of the Convention except the provisions of paragraph 3, the United States may tax its residents, as determined under Article 4 (Resident) and its citizens as if the Convention had not come into effect, and France may tax entities which have their place of effective management and which are subject to tax in France as if paragraph 3 of Article 4 of the Convention had not come into effect [...]”. In fact, this revision is to be read together with article 4 of the treaty, with the result that the power of France to tax partnerships that are considered as semi-transparent/translucent entities (*société de personnes translucide*) in France has been preserved. Therefore, France is competent to exercise its tax jurisdiction in respect of these entities, which are liable to personal income tax under French law, regardless of how they are qualified in the United States. See National Assembly, *Report No. 2082 on the Draft Act authorizing the approval of the amendment of the Convention between France and the United States of America for the elimination of double taxation and the prevention of tax evasion with respect to income tax*, available at <http://www.assemblee-nationale.fr/13/rapports/r2082.asp>. A chart comparing the OECD Model (2010) and the *Fr.-U.S. Income and Capital Tax Treaty* is available at <http://www.senat.fr/rap/108-522/108-522.pdf>.

With regard to article 29(3) of the aforementioned treaty, some provisions take precedence over the “saving clause”. For case law application see US: US Tax Court, 6 Oct. 2010, Docket No. 6839-09S, *Lisa Hamilton Savary v. Commissioner of Internal Revenue*, Tax Treaty Case Law IBFD. In contrast,

“agrees to be bound by the substantive provisions of [the] treaty, except when it chooses not to be bound”.<sup>32</sup> Therefore, the provision introduces a lawful treaty override, given that the deviation from the treaty is explicitly set out in the treaty itself.<sup>33</sup>

It should be noted that the reasons for this contentious provision are contradictory. In fact, it was first argued that the provision was justified by the fact that, at the time of negotiation, Andorra did not have a proper individual income tax system.<sup>34</sup> Indeed, the comprehensive individual income tax was not effective until 1 January 2015.<sup>35</sup> One should note, however, that while this argument was invoked in the discussions before the French Parliament in order to justify the adoption of article 25(1)(d) of the treaty, this is not consistent with the provision in the explanatory memorandum to the Draft Act. In fact, according to this memorandum, it is clear that the absence of an income tax system in Andorra justified the insertion of article 25(1)(c)<sup>36</sup> but not of article 25(1)(d). But even if this were the case — if the absence of an individual income tax system in Andorra at the time of negotiation did justify the saving clause — tax treaties should be given a literal interpretation. The historical intention of the parties is not without interest,<sup>37</sup> but, firstly, it is considered to be embodied in the text of the treaty.<sup>38</sup> Therefore, the treaty contains a “saving clause” that evokes the US tax treaty practice. From a comparative perspective, it is worth studying how courts interpret such clauses.<sup>39</sup> In this respect,

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there is no provision introducing a limitation of the French “saving clause” in the *And.-Fr. Income Tax Treaty*.

32. R. Doernberg, *Overriding Tax Treaties: The U.S. Perspective*, 9 Emory Intl. Law Rev. (Spring), pp. 71-132, at pp. 72-73 (1995). Obviously, the original citation concerns the US “saving clause”.

33. For an analysis of the legitimization of treaty override from a public international law point of view, see J. Wouters & M. Vidal, *An International Law Perspective on Tax Treaties and Domestic Law in Tax Treaties and Domestic Law*, vol. 2, pp. 13-35, in particular pp. 25-29 (G. Maisto ed., IBFD 2006), Online Books IBFD.

34. See Pascual Teixido, *supra* n. 11.

35. See Torres Segura & Gomez Alemany, *supra* n. 12.

36. According to article 25(1)(c) of the *And.-Fr. Income Tax Treaty*, even if the taxing power over the categories of income enumerated in articles 12, 14, 17 and 20 is allocated to State A, the same income may also be subject to tax in State B in respect of that part of the income that is tax exempt or not subject to tax as a result of legislation in State A.

37. K. Vogel & R. Prokisch, *Interpretation of Double Taxation Conventions: General Report*, in *IEA Cahiers de droit fiscal international*, vol. 78a, pp. 55-85, at p. 73 (Kluwer 1993), Online Books IBFD.

38. *Vienna Convention on the Law of Treaties*, art. 31 (23 May 1969), Treaties IBFD; and F. Engelen, *Interpretation of Tax Treaties under International Law*, Doctoral Series, vol. 7, p. 83 et seq. (IBFD 2004).

39. See, for example, US: US Tax Court, 27 May 1980, Docket No. 8767-76, *Herbert A. Filler and Ingeborg J. Filler v. Commissioner of Internal Revenue*, Tax Treaty Case Law IBFD. The case deals with the application of the *Fr.-U.S. Income and Capital Tax Treaty*. The Court held that article 22(4)(a) of the treaty (the “saving clause”) neutralizes the effect of article 15 of the same treaty, given that “article 15 does not stand alone and its effect is completely eliminated by the saving clause [...] since petitioner is a United States citizen”. Therefore, the United States could tax a US citizen who was resident in France on his worldwide income. For an analysis of the US tax treaty policy

it should be noted that discrepancies in terms of the structure of the tax systems of the treaty partners have no impact on taxation on the basis of the saving clause and the treaty is not being violated in circumstances in which a treaty partner relies on the saving clause.<sup>40</sup> Finally, coming back to the wording of the memorandum, what is clear is that the provision was inserted in anticipation of an eventual evolution of the French tax system towards the implementation of citizenship-based taxation.<sup>41</sup>

#### 4. The Parliamentary Procedure regarding Approval of the Andorra-France Income Tax Treaty (2013)

The procedure regarding approval of the Andorra–France Income Tax Treaty (2013), in light of constitutional rules regarding the relationship between international law and domestic law in France, is worthy of study. Tax treaties fall within the scope of article 53 of the Constitution and qualify as “treaties having an impact on the State’s budget”.<sup>42</sup> Hence, this qualification requires that their approval be authorized by way of statute before the Parliament. While State practice has made this procedure a mere formality,<sup>43</sup> the existence of the approval is a *sine qua non* condition for the treaty to be binding.<sup>44</sup> It is also important to note that, while parliamentary authorization of approval of a treaty is a purely domestic act, the approval of the treaty itself is in the nature of an international act.<sup>45</sup> In fact, the procedure is carried out at two distinct levels and, therefore, it is impossible for Parliament to amend the treaty as part of the approval procedure<sup>46</sup> and, similarly,

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regarding the “saving clause”, see J. Sasseville, *A Tax Treaty Perspective: Special Issues*, in Maisto, *supra* n. 33, at pp. 37-61, in particular, pp. 48-55, as well as American Law Institute, *Federal Income Tax Project — International Aspects of United States Income Taxation II — Proposals of the American Law Institute on United States Income Tax Treaties*, pp. 229-231 (The American Law Institute 1992), cited by the author.

40. See US: US Tax Court, 1 Feb. 2012, Docket No. 18113-09S, *Andrea Ready v. Commissioner of Internal Revenue*, Tax Treaty Case Law IBFD.

41. Memorandum, *supra* n. 30.

42. Lamarque, Negrin & Ayrault, *supra* n. 17, No. 434 et seq.; B. Castagnède, *Précis de fiscalité internationale*, coll. Fiscalité, 4<sup>th</sup> ed., No. 244 et seq. (PUF 2013); and N. Message, *France*, in Maisto, *supra* n. 33, at pp. 209-232, at p. 214.

43. B. Gouthière, *Les impôts dans les affaires internationales*, 10<sup>th</sup> ed., No. 1510 (Francis Lefebvre 2014).

44. Lamarque, Negrin & Ayrault, *supra* n. 17, at No. 438.

45. As regards the consequences and stakes of this distinction under French law, see C. Santulli, *Introduction au droit international. Formation – Application – Exécution* pp. 71-72 (Pedone 2013).

46. However, there is no constitutional limitation on the power of Parliament to launch the authorization procedure or to submit an amendment to an authorization law (G. Carcassonne, *La Constitution*, 11<sup>th</sup> ed., p. 387 (Seul 2013); G. Drago, *Le Parlement et les traités internationaux. Considérations sur l'autorisation parlementaire de ratification des engagements internationaux*, in *Mélanges en l'honneur de Jean Gicquel* pp. 157-174, at p. 167 (Monchrestien/Lextenso 2008). However, the regulations regarding the two houses limit this possibility (see article 47 of the regulations of the Senate and article 128 of



the act of authorization does not oblige the executive branch to approve the treaty. Moreover, it should be noted that while the constitutional allocation of powers is straightforward in theory, in practice the process is much more complicated.<sup>47</sup>

While the Andorran General Council ratified the treaty, as expected, in October 2014, the situation from the French perspective was different. This was partly due to the French constitutional framework, which may result in a situation in which the two houses of Parliament do not reach consensus on the content of a draft statute, which needs to be voted on, on identical terms, by both chambers in order to be adopted as law. It is, however, unusual for ratification of an international treaty to create such a situation. When it was submitted to a vote before the National Assembly (lower house), the Draft Act authorizing the approval of the Andorra-France Income Tax Treaty (2013) was approved as expected during the course of the first reading.<sup>48</sup> However, the situation was different when the Draft Act reached the Senate (upper house), due to the fact that the September 2014 elections changed the balance of powers between the political forces.

In this context, it emerged that the introduction of the “saving clause” in article 25(1)(d) was part of a wider project to establish taxation based on citizenship.<sup>49</sup> This idea was expressed in the arguments set forth in the discussions before the Senate against approval of the treaty. For some members of the Senate, a positive vote would “create a precedent” and would be seen as an expression of consent in favour of the establishment of taxation on the basis of citizenship in the future, an evolution that could affect 2.5 million French citizens living abroad, 3,200 of which are resident in Andorra.

In response, the government claimed that there was no such project at that time and, moreover, it reminded them that any project aimed at enacting citizenship-based taxation would require a new statute that would have to be voted on by

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the regulations of the National Assembly, in light of the decision in FR: Constitutional Court, 9 Apr. 2003, 2003-470 DC, according to which although amendments to a draft law for the authorization to approve international treaties are not *a priori* excluded, the conditions for the exercise of this function are restrictive).

47. On that aspect see the doctoral thesis of V. Goesel-Le Bihan, *La répartition des compétences en matière de conclusion des accords internationaux sous la Ve République*, coll. Publication de la RGDIP, no. 46 (Pedone 1995).

48. See the report of the National Assembly (No. 2299) on *the authorization of approval of the convention between France and Andorra for the avoidance of double taxation and the prevention of tax evasion with respect to income tax*, 15 October 2014, prepared by F. Rochebloine, available at <http://www.assemblee-nationale.fr/14/pdf/rapports/r2299.pdf>.

49. M. Collet, *Convention fiscale signée avec la Principauté d'Andorre le 4 avril 2012: et la citoyenneté française devint imposable*, Option Finance (25 June 2012).

Parliament.<sup>50</sup> Nevertheless, the Draft Act regarding ratification of the treaty was rejected by the Senate on first reading.<sup>51</sup> Furthermore, no compromise could be reached by the joint committee that was convened, which was composed of MPs from both houses.<sup>52</sup> After a second reading of the draft before the National Assembly<sup>53</sup> and the Senate,<sup>54</sup> confirming the previous vote, the government asked the National Assembly to adopt the Draft Act upon final reading<sup>55</sup>. Indeed, under article 45 of the French Constitution, the lower house has the “final word” in the event of a failure to reach a compromise in such cases. Subsequently, the Law authorizing the approval of the convention was enacted.<sup>56</sup>

## 5. Concluding Remarks

With respect to the possible impact of the saving clause on the domestic legal order, the case law in France related to the effect of international treaties on domestic law should be noted. In fact, it has been ruled that if a treaty’s content “falls within the material scope of a domestic statute” the treaty provisions “alter” this statute under article 53 of the Constitution.<sup>57</sup> Therefore, the adoption of a treaty provision that falls within the material scope of a statute may alter the substance of the latter. It should also be noted that there is case law specific to tax matters: While a “methodological requirement”<sup>58</sup> was established by the Supreme Administrative Court in *Schneider Electric* (28 June 2002),<sup>59</sup> pursuant to which any

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50. Article 34 of the French Constitution establishes the competence of the Parliament to enact tax legislation (“Statutes shall determine the rules concerning: [...] the base, rates and methods of collection of all types of taxes [...], available in English at <http://www.assemblee-nationale.fr>).

51. See the report of the Senate (No. 185) on the *Draft Act in view of the authorisation of approval of the convention between France and Andorra for the avoidance of double taxation and the prevention of tax evasion with respect to income tax*, 11 December 2014, prepared by Ph. Dominati, available at <http://www.senat.fr/rap/114-185/114-1851.pdf>. See also the verbatim record of the Senate session with regard to the discussion on the Draft Act, available at <http://www.senat.fr/seances/s201412/s20141218/s20141218001.html>.

52. National Assembly/Senate, Joint Report No. 2496/No. 227, 15 January 2015, available at <http://www.assemblee-nationale.fr/14/pdf/rapports/r2496.pdf>.

53. National Assembly, Report No. 2500, 20 Jan. 2015, prepared by F. Rochebloine, available at <http://www.assemblee-nationale.fr/14/rapports/r2500.asp>.

54. Senate, Report No. 287, 11 Feb. 2015, prepared by Ph. Dominati, available at <http://www.senat.fr/rap/114-287/114-2871.pdf>.

55. National Assembly, Report No. 2617, 4 Mar. 2015, prepared by F. Rochebloine, available at <http://www.assemblee-nationale.fr/14/pdf/rapports/r2617.pdf>.

56. Law No. 2015-279 of 13 Mar. 2015 authorizing the approval of the convention between France and Andorra, Official Gazette p. 4833 (14 Mar. 2015). The terms of entry into force of the treaty are determined by article 28 of the treaty.

57. F: CE, 5 Mar. 2003, No. 242.860, *Aggoun*, Lebon, p. 77.

58. See D. Gutmann, *Droit fiscal des affaires*, 5<sup>th</sup> ed. coll. Domat droit privé No. 52 (LGDJ/Lextenso 2014).

59. FR: CE, 28 June 2002, Case 232 276, *Ministre de l'Economie, des Finances et de l'Industrie v. Societe Schneider Electric*, Tax Treaty Case Law IBFD, étude P. Dibout, *Revue de Droit fiscal* 36, comm. 367 (2002); conclusions of S. Austry, *Bulletin des Conclusions Fiscales*, No. 120 (October

judicial review of taxation is to give priority to domestic law before determining the effect of tax treaty provisions, no general principle of non-aggravation<sup>60</sup> has been established under domestic law according to the Court.<sup>61</sup> Thus, a tax treaty may increase the tax burden on taxpayers, especially where a domestic jurisdictional rule provides that French tax jurisdiction extends to situations in respect of which a treaty provision allocates the taxing power to France. Therefore, in light of the French legal framework, the first issue is whether or not article 25(1)(d) of the Andorra-France Income Tax Treaty (2013) falls within the *material scope* of article 4 A of the CGI<sup>62</sup>, establishing jurisdictional rules for natural persons, and, therefore, can alter its substance.

The issue is essentially whether or not article 25(1)(d) of the treaty is capable of extending the personal scope of French tax jurisdiction. It is arguable that any modification of jurisdictional rules in respect of the taxation of natural persons can only be the result of the enactment of a relevant statute. Therefore, even if the “saving clause” were considered to be an allocation rule, it would further be necessary to modify article 4 A of the CGI, which establishes the tax nexus for natural persons, similar to other articles of the CGI with the same effect.<sup>63</sup> In this hypothetical scenario, a treaty-based allocation rule related to citizenship, to have effect, would require an amendment to article 4 A of the CGI as follows: “Persons who have their tax residence [*domicile fiscal*] in France *and also those in respect of whom a double taxation convention attributes to France the power to tax* are subject to income tax on their worldwide income”.

The contentious treaty provision does not, however, qualify as a distributive rule, but it is also not a simple anti-abuse provision.<sup>64</sup> Therefore, it is in the nature of a

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2002). On the “principle of subsidiarity” of tax treaties in France *see* Lamarque, Negrin & Ayrault, *supra* n. 17, at Nos. 472-475; Gutmann, *supra* n. 58, Nos. 52-53; Castagnède, *supra* n. 42, No. 273-274.

60. French authors define the principle of non-aggravation as follows: “if tax treaties are meant to avoid double taxation and cannot provide a legal base for domestic taxation, consequently, they should never increase the tax burden of a taxpayer” (Ph. Martin, *Interaction between Tax Treaties and Domestic Law*, 65 Bull Intl. Taxn. 4/5, pp. 205-201, at p. 207 (2011), Journals IBFD).

61. FR: CE, 12 Mar. 2014, No. 362.5238, *Sté Céline*, Revue de Droit fiscal 22, conclusions by F. Aladjidi, note Ph. Durand (2014).

62. FR: Act No. 76-1234 of 29 December 1976, Modifying territoriality rules and conditions of taxation of French citizens living abroad and of other non-resident individuals, article 1.

63. Art. 4 bis, art. 165 bis and the last phrase of art. 209-I CGI. These provisions are a result of the codification of article 3-III of the Law of 28 December 1959 and extend French tax jurisdiction in circumstances in which a tax treaty allocates a taxing power to France.

64. In the context of Action 6 of the BEPS Project, it has been suggested that a “saving clause” should be introduced under article 1(3) of the OECD Model, similar in structure to the one in the US Model (2006), which, as such, would be limited to residents (OECD/G20, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances* p. 94 (2014), available at <http://www.oecd.org/tax/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-9789264219120-en.htm>.

“saving clause” and, as such, may only be used in order to counter situations in which taxable income falls outside French tax jurisdiction due to a reason that was not intended by the treaty partners. Therefore, it cannot serve as a legal basis for the taxation of French citizens who are resident in Andorra without implementing a relevant statute changing the jurisdictional rules in France.<sup>65</sup>

The only effect, at this point, of this “saving clause *à la française*” is that it creates the necessary context in the event of an eventual change in jurisdictional rules regarding the tax liability of natural persons in France. If this provision is, however, a prelude to an eventual future tax reform in France, instigating this process by way of tax treaty negotiation rather than domestic law is quite unusual. And finally, a reform extending tax jurisdiction over natural persons to citizens, outside anti-abuse cases, may raise compatibility issues not only with regard to the constitutional “ability to pay” principle, but also EU law and well-established ECJ case law regarding the fundamental freedoms of non-resident taxpayers.<sup>66</sup>

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65. See the last phrase of the subparagraph of the contentious provision: “If French tax legislation allows the application of the present provision, the competent tax authorities of treaty parties will regulate the application of the provision by a common agreement”. Therefore, a bilateral agreement between tax administrations may implement the provision *once* France has enacted this kind of legislation.

66. See, inter alia, J. Englisch, *The European Treaties’ Implications for Direct Taxes*, 33 Intertax 8/9, pp. 310-335, at p. 319 (2005); and E. Dinh & D. Fontaine-Bassetet, *La France va-t-elle taxer ses ressortissants partout dans le monde?*, Le Monde (5 Dec. 2014), available at [http://www.lemonde.fr/idees/article/2014/12/05/la-france-va-t-elle-taxer-ses-ressortissants-partout-dans-le-monde\\_4535408\\_3232.html](http://www.lemonde.fr/idees/article/2014/12/05/la-france-va-t-elle-taxer-ses-ressortissants-partout-dans-le-monde_4535408_3232.html).