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Spain and the Law of the Sea: 20 years under LOSC

Spain at UNCLOS

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(A) PREPARATION OF UNCLOS

Spain is a country conditioned by the sea and, accordingly, is extremely interested in anything related to this space. She is a peninsula with a broad coastline which borders an open sea —the Atlantic Ocean— and a semi-enclosed sea —the Mediterranean—. She has islands, two archipelagos and straits, especially the Gibraltar Strait, an important route of international navigation. She occupies the tenth position in the world ranking of ship tonnage —the eleventh in tankers— and the third in shipbuilding, and is included among the most important countries in maritime trade. She is the fifth power in fishing and the second in mariculture, and 200.000 Spaniards work at sea. She is placed at the cross-road of three important maritime routes: that of Finisterre —by which the traffic between Europe and Africa and America flows—, that of the Canary Islands —which receives the traffic between Europe and Northern Africa and South America— and that of Gibraltar —of special importance for the traffic of the tankers coming from the Middle East—. Consequently, Spain has been qualified as a country "especially exposed to the risks of marine pollution", which constitutes a serious problem for its incidence in fisheries, mariculture and tourism[1]. The UN General Assembly convened the III UNCLOS to deal with

> "the establishment of a an equitable international regime [...] for the area and the resources of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, a precise definition of the area and a broad range of related issues, including those concerning the regime of the high seas, the continental shelf, the territorial sea —including the question of its breadth and of international straits— and the contiguous zone, fishing and conservation of the living resources —including the question of the preferential rights of coastal States—, the preservation of the environment —including, 'inter alia', the prevention of pollution— and scientific research."[2]

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[1] Intervention of José Antonio de Yturriaga at the 15th session of the Afro-Asian Legal Consultative Committee (Tokyo, 11 January 1974), in J.A. de Yturriaga, *La actual revisión del Derecho del Mar: Una perspectiva española. Textos y Documentos* (Instituto de Estudios Políticos, Madrid, 1975), vol, II (2), at 380.

[2] Paragraphs 2 and 3 of A/Res/2750 C (XXV), 17 December 1970, reprinted in M.H. Nordquist, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht, 1975), at 179.

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The Spanish Government was aware of the importance of UNCLOS and of its repercusions for Spain and prepared carefully her participation in the Conference. She was faced at the time with advantages and disadvantages.

(1) Advantages

The Spanish Government had a clear idea of where the interests of Spain lay and gave political support to its delegation in UNCLOS, appointed a multi sectorial delegation composed of competent diplomats and experts in the various fields of 6he sea, and established a platform at the rear-guard to study the subjects and give relevant instructions to the Spanish delegation.

(a) Clarity of ideas

In 1971-1972, the United States sounded various states —including Spain— on the possibility of convening an international conference on the Law of the Sea, to deal with the issues that it considered necessary to modify: the extension to twelve miles of the breadth of the territorial sea, a regime of free transit through international straits and the recognition of special fishing rights to coastal states, beyond their territorial sea. Most of the countries consulted considered that the Conference should deal with all the issues related to the Law of the Sea and the General Assembly upheld this opinion in its resolutions.

The Spanish Ministry of Foreign Affairs was aware that the "winds of history" had changed and that the traditional regulations of the Law of the Sea had to be modified, especially to allow the expansion of coastal Sates' jurisdiction. As Foreign Minister Gregorio López Bravo stated,

> "we are facing a moment of historical implications in the change of the norms that rule maritime spaces. The UNGA adopted in December 1970 the resolution 2750 C (XXV) which convened the Third UNCLOS in 1973. This Conference will adopt agreements on various issues of the Law of the Sea, which are not regulated or which are regulated by norms such as the 1958 Geneva Conventions, that need to be renewed in view of the new data afforded by scientific and technological developments."[3]

The Minister felt that the extension of coastal states' jurisdiction up to 200 miles was unavoidable and, unlike the states member of the European Economic Community and other countries like Japan, accepted this fact —although it was against their fishing interests— and fought for the recognition of the right of fishing states to continue to fish in these areas with the consent of the coastal states concerned.

(b) Political support of the Governmentt

The Government duly instructed the Spanish delegation and supported its performance in UNCLOS, especially in the delicate issue of straits, where it had to face the combined efforts of the United States, the Soviet Union and their respective allies to impose absolute freedom of navigation and overflight through and over them. As López Bravo remarked, freedom of navigation and overflight

[3] Gregorio López Bravo's lecture at the "Centro Superior de Estudios de la Defensa Nacional" (3 February 1971), reprinted in Yturriaga, *supra*, n. 1, at 398.

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through the Strait of Gibraltar was "an essential and priority objective both for the Unites States and for the Soviet Union", since they did not accept the regime of innocent passage. He observed that

> "the qualification of the passage as innocent or non innocent and the prohibition of overflight over the territorial sea constituted for the coastal State a safeguard, which had the value and the scope of a legal norm in the troubled times in which w eare living. It is, in any way, a minimum and unrenounceable safeguard, and constitutes the international legal basis for our defense in a point of the greatest strategic importance for Spain and for the protection of her territory in an area with such intense traffic and so close to our territory."[4]

Thanks to the political support from its Government, the Spanish delegation was able to stand the tremendous pressure exerted by the two superpowers and challenge them with solid legal arguments. It did not succeed in maintaining the innocent passage regime, but managed to partially dilute their demands for unrestricted passage.

(c) Creation of a competent team for the negotiations

López Bravo entrusted the International Legal Office of his Ministry with the task of preparing the Conference. It was necessary to start from scratch and begin by acceding to the 1958 Geneva Conventions on the Law of the Sea, in order to fill the gaps existing in the Spanish legislation on the subject. A preparatory Committee —composed by diplomats, professors, navy officers, oceanographers and experts in fisheries, maritime safety and industry— was set up and I was appointed its Secretary. This Group was institutionalized at a later stage by the creation of a the Inter-ministerial Committee on International Maritime Policy (ICIMP), which created a Subcommittee in charge of issuing the relevant instruction to the Spanish delegation and following the development of UNCLOS. An ad hoc Ambassador was appointed to lead the delegation, which also include an administrative secretary[5].

(d) Multisectorial approach and coordination

The Ministry adopted a multisectorial approach for the renewal of the Law of the Sea, studying its various aspects —legal, political, strategical and economic— and focusing on the overall interests of Spain, without indulging in the interests of any particular sector. The interests of the various sectors were sometimes in contradiction and the Government had to balance these interests and give priority to the general interest of the State.

In addition, through the follow-up of UNCLOS by the ICIMP, the Government coordinated the actions of the Spanish delegations in various International Organizations and Conferences in order to adopt a unified and coherent position. Thus, Spain maintained her position in the International Maritime Consultative Organization —especially in the 1972 London Conference on Dumping and in the 1973 London Conference on Pollution by Ships— or in the in the 1972 Paris Conference on the

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4 Lopez Bravo's lecture, *supra*, n. 3, at 400.

5 J.A. de Yturriaga, "La Convención de las Naciones Unidas sobre el Derecho del Mar: Balance de 15 años de aplicación", in *España y la práctica del Derecho Internacional* (Colección Escuela Diplomática, Madrid, 2014), at 96.

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Legal Regime of "Oceanographic Data Acquisition Systems" sponsored by theIntergovernmental Oceanographic Organization.

(2) Disadvantages

The main disadvantages were the disparity of interests among the various sectors involved and the scarce involvement of some of them, and the negotiating weakness of Spain for political reasons.

(a) Disparity of interests

The interests of the various sectors involved in the Law of the Sea were not always coincidental and, at times, were in contradiction. The strategic interests did not necessarily coincide with those of the fishing sector, or the industrial interests with those of the environmental or tourist sectors. Special frictions arose between the military and the fishing departments on the issue of the expansion of coastal states' jurisdiction. The "Subsecretaría de la Marina Mercante" resented the position held by the Ministries of Foreign Affairs, of the Navy and of the Air Forces, and unduly accused them of sacrificing fishing interests to the defence of the regime of innocent passage through straits. It could not understand that they were two different issues and that the latter were not sacrificed for the former. Irrespective of the UNCLOS' decision on straits, the expansion of coastal states' jurisdiction up to 200 miles could not be stopped, and Spain did her best to preserve somehow her legitimate rights and interests as a long-distance fishing country. The fishing experts finally accepted this evidence and the cooperation within the Spanish delegation improved considerably.

There were two sectors of the Spanish Administration which were hardly involved in UNCLOS: the industrial sector —which, athough it participated in the delegation, was represented at a low level— and the economic and financial sectors, which did not participate at all. Therefore, the Spanish delegates at the First Committee dealing with seabed issues kept a low profile, lacking due instructions and sufficient knowledge about the interests of Spain in that area. It is true that Spain was not particularly interested in the exploration and exploitation of mineral resources beyond her national jurisdiction, because she lacked technological capacity to participate in such activities and was not an underdeveloped state which may get economic benefits out of them.

(b) Negotiating weakness

At the time of UNCLOS, Spain was, to some extent, an outcast of the international community due to the lack of acceptance of the Franco's regime and was somewhat isolated. She was neither a member of the Socialist Group, nor of the Group of 77 (G-77). She belonged to the "Western States and Others' Group", but was not integrated in western institutions, such as NATO or of the EEC. She was therefore isolated and whenever a post was to be attributed to the Group, it either went to a member of the Community or to the "Others" —Australia, Canada and New Zealand—. Spain joined the "Coastal States Group" —although she did not share some of its goals— and, in this way, managed to get support from some of the states of the Group in the issues which were not essential for them, such as straits or the rights of landlocked and geographically disadvantaged States.

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Apart from the ideological cleavage between East and West, and the equidistant role assumed by the G-77, the interests of the various states were not always coincidental enen within the same group. Thus, Spain clashed with Great Britain in the issue of straits and cooperated with her in that of delimitation or was allied with Morocco in the issue of straits, but fought with her on delimitation issues. Spain formed "interest groups" with other delegations concerned with straits or with delimitation. She prompted the formation of the "Straits Group" and led it discretely, and promoted the "Equidistance Group" —coordinated by Ambassador José Manuel Lacleta—, which played an essential role in reaching an agreement on delimitation. Although the Spanish delegation had poor cards, it plaid them very reasonably well.

(B) PERFORMANCE OF THE SPANISH DELEGATION

(1) General attitude of the Delegation

Spain was one of the states that least benefited from UNCLOS. However, had it not been for the performance of the Spanish delegation, the situation could have been much worse. It carefully studied the situation, duly elaborated the legal basis of its position and properly exposed its arguments. In 1970, the Spanish Government answered the questionnaire submitted by the UN Secretary General in order to collect the opinion of all the member states regarding the convening of UNCLOS[6] and, in 1972, it circulated a Memorandum on the *Spanish position on the Law of the Sea*[7] and, later on, three other memorandums about straits and delimitation. At the end of the meetings of the Sea-Bed Committee, the Head of the Spanish delegation, Ambassador Antonio Poch, edited a very comprehensive book on *The Present Review of the Law of the Sea: A Spanish Perspective*, written by various members and collaborators of the delegation.[8] This study was complemented with the publication of two additional books with documents, which included international treaties, national legislation, declarations and interventions of Spanish representatives in international fora concerning Law of the Sea issues.[9]

Once in the Sea-Bed Committee, Spain joined the Latino-American Group in co-sponsoring a proposal on a comprehensive "List of Subjects and Issues Relating to the Law of the Sea". Its presence among the co-sponsors contributed to soften its formulation. Thus, the issue of "Straits" appeared in the section covering "Zones within national jurisdiction" and was formulated as follows: "Navigation through straits used for international navigation: Innocent passage". Under the chapter dealing with these Zones, there was a reference to the "rights of coastal States with regard to the conservation, preservation and exclusive or preferential exploitation of the resources, economic and/or fisheries closing lines, resources, administration, protection of the marine environment and scientific

6 Reply of the Spanish Government to the UN Secretary General about the convening of a Conference on the Law of the Sea (10 June 1970), reprinted in Yturriaga, *supra* n. 1, at 357-358.

7 Yturriaga, *supra n.* 1, at 376-380.

8 A. Poch (ed.), *La actual revisión del Derecho del Mar: Una perspectiva española* (Instituto de Estudios Políticos. Madrid, 1974).

9 See Yturriaga, *supra* n. 1.

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research."[10] The proposal offered the peculiarity of adopting a zonal approach by referring to "economic and/or fishing zones" and showing the global and comprehensive nature of the zone by including the issues of preservation of the marine environment and marine scientific research.[11]

This proposal was merged with another one co-sponsored by several Afro-Asian states[12] and the new text —which was sponsored by 56 delegations— served as the basis for the final adoption of the "List of Subjects and Issues". Paragraph 4, devoted to "Straits used for international navigation" included two sub-paragraphs on "Innocent passage" and "Other connected subjects, including the issue of transit rights". Concerning the Economic Zone, the List included two optional paragraphs: "Exclusive Economic Zone beyond the territorial sea" and "Preferential rights or any non exclusive jurisdiction of the coastal State over the resources beyond the territorial sea".[13]

Spain joined the Coastal States Group and the Spanish delegation participated actively in the informal meetings of the Group of Experts led by the Norwegian Minister Jens Evensen —known as the "Evensen Group"—, which played an essential role in the elaboration of compromise texts, many of which were eventually embodied into the LOSC. Spanish delegates participated in international meetings preparatory of UNCLOS and in conferences dealing with Law of the Sea issues, such as the Meeting of the Intergovernmental Group on Marine Pollution (Ottawa, 1971), the Conference on the Human Environment (Stockholm, 1972), the Conference on Dumping (London, 1972), the Conference for a Draft Convention on Oceanic Data Acquisition Systems (Paris, 1972), the Conference on Pollution by Ships (London, 1973), the Afro-Asian Legal Consultative Committee (Tokyo, 1974) or the Meeting of the G-77 on the Law of the Sea (Nairobi, 1974). The members of the Spanish delegation also followed an determined policy in approaching the delegation of the other participating states in order to explain its position. They even made contacts and exchanged opinions with states with which Spain had no diplomatic relations, namely the Popular Republic of China. The delegation also resorted to the "gastronomic diplomacy" and made efficient use of the *Don Quijote* restaurant in Geneva or the *Spanish House* in New York. A good *paella* was sometimes more convincing than a solid legal argument!

As a matter of policy, Spain normally tried to get a post in the Drafting Committees of the International Conferences in which she participated. At UNCLOS, the Spanish delegation was appointed member of the Drafting Committee in spite of its political isolation in the Conference. The Spanish Government did a detailed study of the Spanish text of the Draft Convention and shared the results of its work with other Spanish-speaking delegations. The Spanish delegation formed a "Spanish Linguistic Group", open to all the Spanish-speaking delegations, which examined the text and made the relevant comments in order that they may be taken into account by the Spanish-

[10] Paragraphs 4 and 2 (3) of the proposal by 14 Latino-American States and Spain. UN Doc. A/AC.138/56, 19 July 1971. General Assembly Official Records, 27th session (New York, 1972), Supplement No. 21, at 199.

[11] J.A. de Yturriaga, *The International Regime of Fisheries: From UNCLOS 1982 to the Presential Sea* (Martinus Nijhoff Publishers. The Hague/Boston/London, 1997), at 29.

[12] Proposal by thirty Afro-Asian States and Yugoslavia. UN Doc. A/AC.138/58, 20 July 1971, *supra* n. 10, at 202.

[13] Paragraphs 4, 6 and 7 of the "List of Subjects and Issues Relating to the Law of the Sea" (16 August 1972), para. 23 of the "Report on the Work of the Committee", UN Doc. A/AC/138/66. General Assembly Official Records, 27th session (New York, 1972), Supplement No. 21, at 5.

speaking members of the Committee, and I was appointed coordinator of the Group. This example was followed by other delegations and Linguistic Groups in Arabic, Chinese, English, French and Russian were set up and coordinators appointed. At times, the discrepancies which arose in the Committee were examined during the meetings of the coordinators before being decided upon by the plenary of the Committee

(2) Straits Used for International Navigation

The agreement reached before the beginning of UNCLOS between the United States and the Soviet Union about a regime of free passage through and over straits used for international navigation left Spain little margin for manoeuvring. She formed a "Strait Group "with Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines and Yemen, and the Group submitted a proposal on 'Navigation through the territorial sea, including straits used for international navigation' in 1973."[14] One year later, the Spanish delegation elaborated a revised version of the proposal which was submitted to the Conference by Oman for tactical reasons.[15] In 1972, Spain circulated a Memorandum on "International Straits"[16] and, in 1978, another on "Overflight over international straits used for international navigation".[17] In spite of the considerable pressure exercised by the big powers, the Group succeeded in opposing the establishment of a regime of freedom of navigation and overflight as in the high seas, and succeeded in softening their requirement by the adoption of a regulated new regime of "transit passage".

The LOSC established unimpeded freedom of maritime navigation, although "solely for the purpose of continuous and expeditious transit", and offered certain safeguards to coastal states. The regime of transit should not in other respects affect the legal status of the waters forming the strait or the rights of the coastal state of its sovereignty or jurisdiction over such waters and their air space, soil and subsoil.[18] Transit passage should be exercised only for the purpose of continuous and expeditious transit of the strait and any activity which was not an exercise of such right would remain subject to the applicable provisions of the Convention. Ships in transit had to comply with a series of obligations, including that of refraining from any activities other than those incidental to their normal mode of transit, unless rendered necessary by *force majeure* or by distress. Finally, ships in transit were obliged to comply with the laws and regulations adopted by the coastal state relating to transit passage, as well as with generally accepted rules, procedures and practices for safety at sea, and for the prevention, reduction and control of pollution from ships. They should also respect applicable sea-

[14] UN Doc. A/AC.138/SC.II/L.18 (27 March 1973). General Assembly Official Records 28th session (New York, 1973), vol. III, at 3-4.

[15] UN Doc. A/CONF.62/C.2/L.16, 17 July 1974. UNCLOS III (New York, 1974), vol. IV, at 194.

[16] "Memorándum sobre la cuestión de los estrechos internacionales" (New York, 1972), reprinted in Yturroaga, *supra.* n 1, at 420-428.

[17] "Memorándum sobre la cuestión del sobrevuelo en los estrechos utilizados para la navegación internacional" (17 April 1978). See J.A. de Yturriaga, *Ámbitos de soberanía en la Convención de las Naciones Unidas sobre el Derecho del Mar: Una perspectiva española* (Ministerio de Asuntos Exteriores. Madrid, 1993), at 241-242.

[18] LOSC, Section 2 of Part III on "Transit Passage".

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lanes and traffic separation schemes established by the coastal states in accordance with the Convention.[19]

With respect to air navigation, the LOSC abrogated the conventional and customary rules of International Law by establishing the unrestricted freedom of overflight, Nevertheless, the Convention offered some limited safeguards to coastal States: Thus, the regime of transit should not, in other respect, affect the sovereignty or jurisdiction of this state over the air space above the strait. Transit passage must be exercised "solely for the purpose of continuous and expeditious transit on the straits" and "any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions on this Convention". Aircraft in transit had to comply with a series of duties, including those of proceeding without delay over the strait and of refraining "from any activity other than those incidental to their normal modes of continuous and expeditious transit, unless rendered necessary by *force majeur* or by distress"[20].

(3) Delimitation

UNCLOS was split on the issue of the delimitation of the exclusive economic zone (EEZ) and of the continental shelf between the delegations which gave priority to the criterion of equidistance and those which commended the "equitable principles". The Informal Single Negotiating Text (ISNT) stated that the delimitation should be effected by agreement in conformity with equitable principles and using, whenever appropriate, the median or equidistance line, and taking the relevant circumstances into account. If there was no agreement, no state might extend the limit of its EEZ or its continental shelf beyond the equidistance line[21]. The Chairman of the Second Committee, Ambassador Andrés Aguilar (Venezuela), changed this formula in the Revised Single Negotiating Text (RSNT) and established that, pending agreement, the states concerned should enter into provisional arrangements[22]. In 1977, Spain, together with other sixteen delegations which formed the "Equidistance Group", submitted a proposal in favour of equidistance, which was counteracted by the proposal of other eleven delegations from the "Equitable Group", which opposed the equidistance criterion and defended the application of "equitable principles" in the delimitation[23].

Spain circulated a *Memorandum on Delimitation*, which reflected the views of the "Equidistance Group". There were endless informal negotiations between the two groups —respectively coordinated by the Spanish Ambassador José Manuel Lacleta and by the Irish Ambassador Mahon Hayes— under the supervision of Judge Manner —Chairman of the Negotiating Group on Delimitation—, until a compromise was reached at the eleventh hour under the pressure of UNCLOS President, Ambassador Tommy Koh, on the following terms: The delimitation of the EEZ/continental shelf between states

[19] J.A. de Yturriaga, *Straits Used for International Navigation: A Spanish Perspective* (Martinus Nijhoff Publishers. Dordrecht/London/Boston, 1991), at 296.

[20] Arts. 34 (1), 38 and 39 (1) LOSC.

[21] Art. 70 of the ISNT/Part II, reprinted in R. Platzöder, *Third UN Conference on the Law of the Sea. Documents* (Dobs Ferry, 1983), vol. XI, at 171.

[22] Art. 62 (3) of the RSNT/Part II, reprinted in Platzïder, *supra* n. 21, vol. IV, at 176.

[23] Proposals by the "Equidistance Group" and by the "Equitable Group", reprinted in Plqatzöder, *supra* n. 21, at 467 and 468.

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with opposite or adjacent coasts "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution". Pending agreement, the states concerned "shall make every effort to enter into provisional arrangements of a practical nature [...], without prejudice of the final delimitation"[24].

(4) Exclusive Economic Zone

With pragmagtism, Spain accepted the zonal approach from the very beginning, but tried to obtain some recognition for fishing nations so that they may have access to the living resources in the EEZ of another state which were not fully exploited by such state. The LOSC established that when the coastal state did not have the capacity to harvest the entire allowable catch, it should give other states access to the surplus. At Spain's proposal, the Convention provided that, in giving access to its EEZ, the coastal state should take into account all relevant factors, including "the need to minimize economic dislocation in states whose nationals have habitually fished in the zone"[25].

Since most of the proposals submitted granted a preferential status to the so called "geographically disadvantaged states" —which included various European fishing nations—, the Spanish delegation tried to reduce the privileged status recognized to this new category of states and got the support of the Coastal States Group, which submitted a document on the issue[26]. The LOSC established that developed geographically disadvantaged states are entitled to fish only in the EEZ of developed coastal states of the same region, having regard to the extent to which the coastal state had taken into account the need to minimize "economic dislocation in states whose nationals have habitually fished in the zone". In addition, the Convention gives a rather restrictive definition of the term; that is, coastal states "whose geographical situation makes them dependent upon the exploitation of the living resources of the EEZ of other states in the subregion or region for adequate supplies of states which can claim no EEZ of their own"[27]. The Second Committee used the term "states with special goegraphic characteristics", whereas the Third Committee employed that of "geographically disadvantaged states". The Spanish delegation proposed to unify the terminology by using the first expression, but there was no agreement in the Drafting Committee and the Plenary opted for the second alternative[28].

Several states with broad continental shelves —the "Margineer States"— tried to consecrate the *special interests* of coastal states in those parts of the high seas adjacent to their EEZ. Thus, Argentina proposed that coastal and fishing states should be "obliged to agree", rather than "seek to agree", on the adoption of conservation measures with regard to straddling stocks. Argentina and Canada also asked for the introduction of provisions on disputes settlement in case of disagreement, in order that

[24] Arts. 74(3) and 83(3) LOSC. See J.A. de Yturriaga, *Ámbitos de jurisdicción en la Convención de las Naciones Unidas sobre el Derecho del Mar: Una perspectiva española* (Ministerio de Asuntos Exteriores. Madrid, 1993), at 224, 228-229 and 238-245.

[25] Art. 62(2) and (3) LOSC.

[26] Document of the Coastal States Group on Art. 56 to 60 of the RSNT/Part. II (13 June 1977), reprinted in Platzöder, *supra* n. 21, vol. IV, at 542.

[27] Art. 70 (2) LOSC.

[28] Yturriaga, *supra* n. 17 at 583.

the "appropriate tribunal" determined conservation measures compatible with those applied to the same stocks by the coastal state within its EEZ. Fifteen margineer states proposed that coastal and fishing States cooperated in the adoption of such measures in areas adjacent to their EEZ. These suggestions -strongly criticised by Spain and the EC- were not included in the draft Convention. Eight of these states submitted a proposal that recognized coastal states the rights to take conservation measures in the high seas concerning straddling and highly migratory fish stocks[29], but due to the opposition of the fishing States and after the request made by President Koh, the amendment was withdrawn[30]. Some margineer states raised again the issue at the 1992 Rio UN Conference on Environment and Development and finally an Agreement was adopted in 1995 on Implementation of the Provisions of the LOSC Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks[31].

(5) Islands and Archipelagos

Spain maintained that all the islands, except the rocks, had equal rights to maritime spaces. The LOSC accepted this principle and established that the territorial sea, the contiguous zone, the EEZ and the continental shelf of an island were "determined in accordance with the provisions of this Convention applicable to other land territory", with the exception of "rocks which cannot sustain human habitation or economic life of their own", which were not entitled to EEZ or continental shelves[32].

Spain supported the thesis that the archipelagic states had a particular status, according to which their geographical, historical and political features should be taken into account, and maintained that the especial regime granted to them should be applied *mutatis mutandi* to the archipelagos of states which were not independent. The ISNT stated that the provisions concerning archipelagic states did not prejudiced the legal condition of the oceanic archipelagos which formed an integral part of the territory of a continental state[33]. This vague formulation was interpreted as meaning that the provisions concerning archipelagic state were applicable by analogy to the archipelagos of states[34]. The Spanish delegation suggested a clearer formulation of the text, but the President of the Second Committee, Ambassador Aguilar, deleted that provision from the RSNT without any explanation and it was not included in the Convention[35].

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[29] Amendment co-sponsored by Australia, Canada, Cape Verde, Iceland, Philippines, Santo Tomé and Principe, Senegal and Sierra Leone. UN Doc. A/CONF.62/L.114 (12 April 1982), UNCLOS-III. (New York, 1984), vol. XVII, at 224.

[30] J.A. de Yturriaga, 'Perspectives on Hifh Seas Fisheries after UNCLOS', in J.M. de Faramiñán (Ed.), *Coopération, securité et dévelopement durable dans les mers et les océans: Une referenc spéciale à la Mediterranée* (Jaen University), 2013, at 233.

[31] Yturriaga, *supra* n. 11, at 201-220.

[32] Art. 121 LOSC.

[33] Art. 131 of the ISNT/Part II (7 May 1975), *supra* n. 21, at 179.

[34] J.M. Lacleta, J.A. Pastor & J.A. de Yturriaga, *III Conferencia de las Naciones Unidas sobre el Derecho del Mar* (Ministerio de Asuntos Exteriores. Madrid, 1978), at 37.

[35] Yturriaga, *supra* n. 17, at 358-359.

(6) Preservation of the Marine Environment and Marine Scientific Research

In the Third Committee, the Spanish delegation adopted a middle-of-the-road position in matters concerning marine pollution and oceanographic research. It was coherent with its acceptance of the expansion of coastal states' jurisdiction beyond their territorial sea and supported broader powers of these states in their EEZ in such issues, adopting a moderate zonal approach. At the Sea-bed Committee, she had submitted, with other seventeen delegations, a working document on the application by coastal states of measures to prevent pollution by ships[36]. At the Conference, Spain and other nine countries sponsored a proposal on *Zonal Approach for the Preservation of the Marine Environment*[37], which was the basis of the provision included in the Convention[38].

The Spanish delegation —together with Australia, Canada and New Zealand— also adopted an intermediate position on marine scientific research. They submitted various informal proposals aimed at establishing a regime of absolute consent in the territorial sea, freedom of research in the high sea and a limited consent regime in the EEZ and in the continental shelf. The LOSC established that marine scientific research within the EEZ or the continental shelf of a State should be conducted with the consent of that State, and introduced the formula of "implied consent", according to which the authorization to conduct scientific research should not be withheld when the researching States complied with certain requirements[39].

(C) SPAIN'S ATTITUDE TOWARDS THE LOSC

(1) Adoption of the LOSC

The main political problem that the Spanish Government had with the Draft Convention was the regime of transit passage through straits used for international navigation. The Heads of the Spanish and of the United States delegations, Ambassadors José Manuel Lacleta and James Malone, maintained bilateral negotiations to find formulae to make the straits provisions more palatable for Spain. In 1980, they reached a gentlemen's agreement to introduce some changes in the Draft: In Article 42 (1) (b) —which regulated "transit passage" through straits—, to replace "applicable" by "generally accepted" international regulations and delete "oily" before "wastes"; in Article 221(1) —concerning "maritime casualties"— to delete the words "beyond the territorial sea"; in article 233 —on "safeguards with respect to straits"—, to replace "the legal regime of straits" by "the regime of passage through straits"; and to add an article with the following text: "The provisions of this Convention regarding responsibility for damages are without prejudice to the application of other rules and principle of international law concerning responsibility for damages". Both the American

[36] UN Doc. A/AC.138/SC.III/L.56 (22 August 1973). Official Records of the UN General Assembly, 28th session (New York, 1973).

[37] Proposal by Canada, Fiji, Ghana Guyana, Iceland, India, Iran, New Zealand, Philippines and Spain. UN Doc. A/CONF.62/C.3/L.6 (31 July 1974). Official Records of the Third UNCLOS (New York, 1975), vol. III, at 284-285.

[38] Part XII LOSC.

[39] Arts. 246 (2) and 252 LOSC.

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and the Spanish delegations held consultations with the Conference, but the only amendment accepted was the introduction of the new clause about responsibility. The Drafting Committee examined the changes proposed to article 42 as a matter of "text concordance" and accepted them, but when they were examined by the Second Committee, Argentina objected the proposal for procedural reasons. The amendments to article 221 and 233 were not accepted by the Chairman of the Third Committee, Alexander Yankov and the only change included in the Draft was the addition of the clause on responsibility. After this fiasco, Lacleta informed Malone that Spain was relieved from her commitment witn the USA and recovered her freedom of action[40].

The Spanish delegation formally submitted the amendments agreed with the American delegation to articles 42, 221 and 233, and another one not agreed about the deletion in paragraph 3 (a) of article 39 —devoted to the duties of aircraft in transit passage— of the word "normally", in order to make no exception to the obligation of aircraft to comply with safety measures[41]. President Koh urged the delegations to withdraw their amendments, but Spain only withdrew her amendments to articles 221 and 233, and maintained those referring to articles 39 and 42. Put to the vote, the amendment to article 39 was rejected by 55 votes to 21, with 60 abstentions and the amendment to article 42 carried by 60 votes to 29, with 51 abstentions, although it could not be embodied into the Convention because it had not received the two thirds majority required. The Convention was approved by 130 votes to 4 —Israel, Turkey, United States and Venezuela—, and 17 abstentions, including that of Spain. Ambassador Lacleta explained that, since the amendments proposed by Spain had not been accepted., "it would have been surprising if his delegation had voted against the Draft", but "his Government, aware of the political and historical importance of the final moments of the Conference, had simply abstained, because it considered that its position on a question of great importance, which affected it very directly, had not been properly reflected in the text of Part III of the Draft Convention and, more particularly, in articles 38, 39, 41 and 42". His Government considered that these provisions "did not constitute a codification or expression of customary law".[42]

Prior to the signature of the Final Act of the Conference there was a general debate during which Ambassador Lacleta said that very few of the participating States felt fully satisfied with the LOSC. Many of its provisions were satisfactory, some of them —especially articles 39 and 42— were unsatisfactory and other were barely acceptable. The Convention contained provisions —as those concerning delimitation or access by third States to the resources of the EEZ of other States— which were the result of lengthy and difficult negotiations, in which the balanced texts agreed constituted a compromise. The Spanish Government supported these provisions which would protect the interests of Spain, "though they may not be the precise regulations that we desired". He said that his Government would undertake "a detailed study and an overall assessment, taking into account all the positive and negative factors", and assured that, in making this final analysis, his Government would bear in mind "the meaning of the Convention and its aspiration to be a universal code, which may be

[40] Yturriaga, *supra* n. 19, at 143.

[41] UN Doc. A/CONF.62/L.109 (13 April 1982).

[42] Statement by Ambassador José Manuel Lacleta (30 April 1982), reprinted in *UNCLOS III*. (New York, 1983), vol. XV, at 93.

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the basis for the peaceful and orderly use of the sea and its resources, regardless of the objections which may be raised to the text adopted on April 30th; it will also bear in mind its significance for the implementation of the principle of the common heritage of mankind which has been, beyond any doubt, accepted by my Government"[43]

(2) Signature of the LOSC

The Spanish Government examined the pros and the cons of the LOSC and, just a few days before the end of the deadline provided by the Convention, signed it because -in spite of its shortcomings- the Government considered that it was better to be a party rather than to keep outside its regulations, accepted by the majority of the international community. Spain accepted the Convention as a whole despite its reservation towards the regime of "transit passage". She was the ideal *persistent objector*, because —as accepted by the International Court of Justice— she had "sufficiently, consistently and openly" [44] opposed that regime before, during and after UNCLOS. She submitted formal and informal proposals, as well as amendments, in favour of innocent passage and against the regime of transit passage, elaborated and circulated a couple of well-founded legal memorandums on the subject, maintained its position until the end of the Conference and abstained when the Convention was adopted. Ambassador Lacleta, explained that his abstention was due to the fact that his Government considered that "its position on a question of great importance, which affected it very directly, had not been properly reflected in the text of Part III", and stated that "the text approved by the Conference did not constitute a codification or expression of customary law"[45]. In professor Pastor's opinion, in order that a regulation may be considered as custom, "a very broad and representative participation in a Convention is not sufficient; it requires for the states more particularly concerned to be among the participating states, and there is no doubt that states bordering straits enter within this category". Even if the new regime was accepted as general customary law, "such norm would not be binding on those states which opposed it during the period of its formation[46] Spain, however, spoilt her position as a *persistent objector* by signing the LOSC on 4 December 1984.

(3) Declaratory statements formulated by Spain

When Spain signed the Convention, she formulated interpretative declarations with respect to nine of its provisions. Most of them were voluntarist and ineffective, and were made mainly with a purpose of self-justification *vis-à-vis* the Spanish public opinion. These declarations were restated when Spain ratified the Convention on February 7th 1997.

The first statement reproduced the declaration made by Spain about Gibraltar in 1971 when she acceded to the 1958 Geneva Conventions on the Law of the Sea. It said that the signing of the LOSC

[43] Statement by Ambassador José Manuel Lacleta (8 December 1982), reprinted in *UNCLOS III* (New York, 1983), at 90-91. See Yturriaga, *supra* n. 19, at 149-150.

[44] See *Fisheries* case, in *Pleadings, Oral Arguments, Documents, International, ICJ Reports 1971*, vol. I, at 382.

[45] Yturriaga, *supra* n. 19, at 329

[46] J.A. Pastor, 'La Convención de 1982 sobre el Derecho del Mar: los intereses de España', in *Cursos de Derecho Internacional* (Vitoria-Gasteiz, 1983), at 81.

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could not be interpreted as "recognition of any rights or situations relating to the maritime spaces of Gibraltar which are not included in article X of the Treaty of Utrecht, of 13 July 1713, between the Spanish and British Crowns". It added that Resolution III of UNCLOS —about the extension of the rights of the Convention to the population of dependent territories— was not applicable "in the case of the colony of Gibraltar, which is undergoing a decolonization process in which only the relevant resolutions adopted by the United Nations General Assembly apply"[47].

The majority of the paragraphs of the Declaration refers to the provisions concerning strait, as the assertion that "the regime established in Part III of the Convention is compatible with the right of a coastal State to issue and apply its own regulations in the air space of the straits used for international navigation, so long as it does not impede the transit passage of aircraft". With regard to article 39 (3), the Spanish Government took the word "normally" as meaning "except in cases of 'force majeure' or distress". The Government considered that article 42 (1) did not "prevent it from issuing, in accordance with international law, laws and regulations giving effect to generally accepted international regulations". It interpreted article 221 "as not depriving the coastal States of straits used for international navigation of its powers recognized by international law to intervene in the case of casualties referred to in this article", and considered that article 233 "must be interpreted, in any case, in conjunction with the provisions of article 34"[48].

Concerning fishing, the Spanish Government interpreted articles 69 and 70 of the Convention —dealing with the rights of land-locked and geographically disadvantaged states— as meaning that the access to fishing in the EEZ of third states by the fleets of these states was "dependent upon the prior granting of access by the coastal states in question to the nationals of other states who had habitually fished in the economic zone concerned". It declared that, without prejudice to the provisions of article 297 regarding the settlement of disputes, articles 56, 61 and 62 of the Convention precluded "considering as discretionary the powers of the coastal state to determine the allowable catch, its harvesting capacity and the allocation of surpluses to other states"[49]. These declarations cannot be more voluntarist, since it is evident that the coastal state have full latitude to fix the allowable catch and its fishing capacity, and distribute the surplus as it considers it convenient for its interests.

(D) CONCLUSIONS

(1) Straits used for international navigation

The Spanish delegation and its allied prevented the establishment of a regime of free transit similar to the one existing in the high seas and modulated the transit passage regime adopted"[50]. Navigation and overflight in straits used for international navigation are regulated by the Spanish Law on Maritime

[47] Paragraph 1 of Spain's Declaration of 4 December 1984, available at DOALOS website here.

[48] Paragraphs 2, 3, 4, 6 and 7 of Spain's Declaration.

[49] Paragraphs 5 and 8 of Spain's Declaration.

[50] J.A. de Yturriaga, 'Contribución de España a la elaboración del concepto de Zona Económica Exclusiva', in *Obra Homenaje al Profesor Luis Ignacio Sánchez Rodríguez* (Universidad Complutense. Madrid, 2013), at 308.

Navigation (*Ley de Navegacion Marítima*) of 2014[51] in a very unsatisfactory way. The Law does not mention the regime of "transit passage" through these straits, but establishes that "the navigation through the strait of Gibraltar will be regulated in accordance with the provisions of Part III of the 1982 UN Convention on the Law of the Sea"[52], and includes a final clause stating that nothing in the Law could be interpreted as "recognition of any rights or situations relating to the maritime spaces of Gibraltar which are not included in article 10 of the Treaty of Utrecht of 13 July 1713 between the Spanish and British Crowns"[53]. The Law states that navigation through the Spanish maritime spaces should follow the provisions of the LOSC, and contains an article regarding "overflight of foreign aircraft", which establishes that the "innocent passage of foreign aircraft over the air space above the maritime internal waters or the territorial sea may be authorised by a special permit"[54]. This is an improper formulation because the International Law of the Air does not contemplate the notion of innocent passage of aircraft and provides that the overflight of state aircraft over the territory of a state —including its internal waters and territorial sea— requires the prior authorization of that state. The LOSC has changed air regulations with the implicit establishment of a new regime of "transit passage" over straits used for international navigation by state aircraft. It may be interpreted that the reference to the Convention in article 19 of the Law also covers overflight, although the provision only mentions "maritime navigation".

(2) Delimitation

The "equidistant group" led by Spain prevented the victory of the criterion of "equitable principles" for the delimitation of the EEZ and the continental shelf, and succeeded in including in the Convention the criterion of "agreement on the basis of international law". The only concession granted to the "equitable group" was the assertion that the agreement should aim "to achieve an equitable solution"[55]. The LOSC did not solve the problem of delimitation since it forwarded its solution to the eventual agreement to be reached by the states concerned "on the basis of international law" and did not precise which was the solution offered by international law. As in the episode of the fight between Don Quixote and el Vizcaino, the Convention has left "las espadas en alto".

Reynaldo Galindo-Pohl —who was the author of the ISNT – Part II— stated that the delimitation of the EEZ and the continental shelf was complex and that many questions remained unanswered or were in a process of change. The legal unity between the economic zone and the infrajacent seabed within 200 miles loomed over such questions. The aftermath of these question and the methods of dealing with them "are still in process of elaboration, but the basis have been identified by, and defined in, the judgements of the International Court of Justice and the awards of the Arbitration

[51] Law 14/2014, 24 May 2014, on Maritime Navigation (BOE No. 180, of 25 July 2014), en English version available here.
[52] Art. 37 Law 14/2014.
[53] Final clause No. 7 Law 14/2014.
[54] Art. 47 Law 14/2014.
[55] Art. 74 (1) and 83 (1) LOSC.

Tribunals"[56]. The ICJ has passed various judgements in matters of delimitation, in which the criterion of "equidistance" has been eroded and that of "equitable principles" further developed[57].

Spain has concluded the 1974 Conventions of delimitation of the continental shelf with Italy in the Mediterranean Sea and with France in the Atlantic Ocean, and the 1976 Convention of delimitation of the continental shelf with Portugal in the Atlantic Ocean, although it has not been ratified yet. The delimitation of the EEZ of Spain with France, with Portugal between the Canary Islands and Madeira, and with Morocco is still pending. The delimitation between Spain and Gibraltar is another question, since the Spanish Government maintains that Gibraltar has no territorial waters and, accordingly, there is no need for delimitation[58].

(3) Exclusive Economic Zone

Spain accepted as a *fait accompli* the eventual acceptance by UNCLOS of a 200-mile EEZ and tried to minimize its aftermaths by getting some kind of recognition of the rights and interests of the states whose nationals had habitually fished in the areas which would fall under the jurisdiction of coastal states, and by reducing the preferential rights of land-locked and geographically disadvantaged states. In 1978, the Government of Spain established an Economic Zone in its Atlantic coasts and left open the possibility of its extension to the Mediterranean shore. Although the Law reserved the exercise of fishing in the area to Spaniards, it allowed the access to the living resources of the EEZ to "the nationals of those countries whose fishing vessels had fished in a habitual manner"[59]. The Spanish delegation succeeded in including in the LOSC a reference to "the need to minimize economic dislocation in states whose nationals have habitually fished in the zone",[60] in limiting the access of developed land-locked and geographically disadvantaged states to the EEZ of developed coastal states[61], in prohibiting these states to transfer their rights to third states, and in adopting a very restrictive definition of "geographically disadvantaged states"[62]. In 2013, the Spanish Government established an EEZ in the Mediterranean Sea[63].

(4) Islands and archipelagos

Contrary to the delegations which defended the "plurality of regimes" for the islands in accordance with a series of circumstances —geographical location, size or colonial status— and in conformity with phantasmagorical "equitable principles", Spain and her allies were successful in keeping the

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56 R. Galindo-Pohl, 'Desarrollo de la delimitación de espacios oceánicos', *Anuario Hispano-Luso-Americano de Derecho Internacional* (1993), at 227.

57 Yturriaga, *supra* n. 11, at 144.

58 P.A. Fernández, 'The Dry-Shore Doctrine' and A. Mangas, "Gibraltar: Adjacent Waters to the Territory Yielded by Spain", in P.A., Fernández (Ed.), *New Approaches to the Law of the Sea: In Honour of Ambassador José Antonio de Yturriaga* (Nova Science Publishers. New York, 2017), at 19-30 and 31-46, respectively.

59 Art. 3(1) of the Law 15/1978, 20 February 1978, on the Economic Zone (BOE No. 46, 23 February 1978).

60 Art. 62(3), 69(4) and 70(5) LOSC.

61 Art. 72 LOSC.

62 Art. 70(2) LOSC.

63 Royal Decree 236/2013, 5 April 2013, establishing the Spanish Exclusive Economic Zone in the North-West Mediterranean (BOE No. 92, 17 April 2013).

"unity of regime" for the islands, and the LOSC provided that any island —with the exception of rocks which could not sustain human habitation or economic life on their own— was entitled to have territorial sea, contiguous zone, EEZ and continental shelf. They rejected the arguments of some States which considered the islands as "special circumstances" for the purpose of delimitation between States[64] . The Spanish-Portuguese negotiations for the delimitation between the Canary Islands and Madeira failed because Portugal claimed an EEZ for the rock of Salvages. Spain has also had problems with the delimitation between the Canary Islands and Morocco, because the Moroccan Government has argued that islands did not have the same rights to maritime spaces as the continental mass.

The LOSC has consecrated the concept of archipelagic state, but —against any logic— refused to apply it to the archipelagos of states, despite the well-founded argument of Spain that they were integral parts of those states. During the adoption of the Spanish Law about the Economic Zone, the Parliament accepted an amendment proposed by a Canary Islands deputy, against the opinion of the Government. Accordingly, the Law prescribes that, in the case of archipelagos, the outer limit of the EEZ will be measured from the straight baselines joining the outer points of the islands and islets which conform the archipelago, in such way that the resulting perimeter followed the general configuration of the archipelago. In the case of its delimitation, the median or equidistant line will be calculated from the archipelagic perimeter[65]. The Spanish Government has not adopted regulations to develop these provisions despite the pressure exercised by the Government of the Canary Islands.

(5) Preservation of the Marine Environment and Marine Scientific Research

The Spanish delegation was coherent with its acceptance of the EEZ concept and tried to apply it, not only to the exploitation of resources, but also in the fields of preservation of the marine environment and of marine scientific research. It became a "friend of the chair" held by José Luis Vallarta (Mexico) —who presided over the Working Group on Marine Pollution— and backed him in his differences of views with the President of the Third Committee, Alexander Yankov. In the middle of the road between the delegations that backed the predominance of the flag State and those that defended a radical zonal approach, Spain joined the members of the white Commonwealth and some Latino-American and European countries to support a moderate zonal approach, position which was eventually embodied in the LOSC. Spain has not adopted an "*ad hoc*" law on the preservation of the marine environment and its regulation is dispersed in various norms, especially the 1988 Law of Coasts[66] and the 1992 Law concerning State Ports and the Merchant Marine[67].

With regard to marine scientific research, the Spanish delegation placed itself in between those which supported a radical zonal approach and those in favour of absolute freedom of research, and adopted a moderate zonal approach, which was eventually included in the LOSC. In 1981, even before the adoption of the Convention, the Spanish Government enacted a Decree about the applicable

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64 J.A. de Yturriaga, 'Orígenes, desarrollo y resultados de la Conferencia de las Naciones Unidas sobre el Derecho del Mar', *Cuadernos de la Escuela Diplomática* (Madrid, 2007), at 29.

65 Art. 1(1) and 2(2) of the Law 15/1978, *supra* n. 59.

66 Law 22/1988, 22 July 1988, on Coasts (BOE No. 181, 29 July 1988).

67 Law 27/1992, of 24 November, on State Ports and Merchant Marine (BOE No. 283, 25 November 1992).

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norms to the conduct of scientific research in the maritime areas under Spanish jurisdiction, which reproduced the provisions contained in the draft-Convention[68].

I honestly think that Spain can be proud of the role played by her delegation at UNCLOS. The Spanish Government carefully prepared the Conference and its instructions were duly implemented by its delegation, despite the serious disadvantages that it faced. Had not been for its active, intense and effective performance, the LOSC would have probably consecrated the unfettered freedom of navigation and overflight in straits used for international navigation, the delimitation of the EEZ and the continental shelves between States in accordance with "equitable principles", and the preferential right of access to the resources in the EEZ of coastal states by geographically disadvantaged states —a broad and vague concept embracing developed fishing states—, to the detriment of long distant fishing states whose nationals had habitually fished in the areas formerly considered as high seas and nowadays under the jurisdiction of coastal states.

[68] Royal Decree 799/1981, of 27 February, concerning the Rules Applicable to Marine Scientific Research Activities in Areas under Spanish Jurisdiction (BOE No. 110, 8 May 1981).

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