

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

### The ratification by Spain

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#### (A) GENERAL CONSIDERATIONS

The preparatory work for the Third UN Conference on the Law of the Sea (hereinafter, UNCLOS) began in 1969. The first session was held in New York, in 1973, and the work was concluded in 1982, after 11 sessions, 14 years after the Conference's inception, making it the longest UN-sponsored codification conference to date. On 30 April 1982, the Conference adopted the UN Convention on the Law of the Sea (hereinafter, LOSC) by a majority of 130 votes in favour, 4 against (the United States, Israel, Turkey and Venezuela) and 17 abstentions (primarily European states, including Spain). The LOSC was signed by 117 delegations on 10 December 1982 at Montego Bay (Jamaica) and opened to signature until 9 December 1984. It entered into force on 16 November 1994, 12 months after the date on which the government of Guyana deposited the sixtieth ratification instrument.<sup>1</sup>

The LOSC was adopted by vote rather than consensus due to the fundamental disagreement between the maritime powers and the Group of 77 over Part XI of the Convention, concerning the institutions and regime for the exploitation of the resources of the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (hereinafter, the Area), as a result of which the United States, the United Kingdom and Germany declined to sign it. A new Agreement relating to the implementation of Part XI of the LOSC, adopted in New York in 1994 and in force since 28 July 1996 (hereinafter, Agreement relating to Part XI or the 1994 Agreement),<sup>2</sup> settled the discrepancies in this regard, making it easier for the maritime powers to join the LOSC and thus enabling both the Convention's universality and the operation of the system for the exploration and exploitation of the Area.

Enforcement of the LOSC was entrusted, amongst other bodies, to a new permanent and

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<sup>1</sup> Art. 308(1), UN Convention on the Law of the Sea, [1833 UNTS 3](#) (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter). Today, 165 states and the European Union are parties to the LOSC. The most important official documentation on the law of the sea can be easily consulted at [www.un.org/Depts/los/index.htm](http://www.un.org/Depts/los/index.htm) (Oceans & Law of the Sea – United Nations).

<sup>2</sup> A/RES/48/263, 28 July 1994; in force for Spain since 14 February 1997 (BOE No. 38, 13 February 1997). Today, 147 states and the European Union are parties to this Agreement. See Art. 6(1), in relation to Arts. 4 and 5, of the Agreement relating to Part XI, which established its entry into force 30 days after the date on which 40 states had ratified it, albeit subject to certain conditions that are not material here.

specialized court, the International Tribunal for the Law of the Sea (hereinafter, ITLOS),<sup>3</sup> which was officially inaugurated on 18 October 1996 in the German city of Hamburg, where it has its seat. The court has jurisdiction over all the disputes and applications submitted to it regarding the interpretation or application of the LOSC.<sup>4</sup>

Spain signed the LOSC on 4 December 1984, but it made certain interpretative declarations, endeavouring not to violate the general prohibition on making reservations and exceptions other than those expressly permitted laid down in Article 309 of the Convention. These declarations sought to safeguard, *inter alia*, its position against the regime for transit passage through straits used for international navigation established in Part III LOSC, as well as to prevent the discretionary use, to the detriment of third parties, of the powers attributed to coastal states in the Economic Exclusive Zone (hereinafter, EEZ).<sup>5</sup> Indeed, the new legal regime for straits used for international navigation (hereinafter, international straits) provided for under the LOSC seemed to be the main obstacle to its ratification by Spain.<sup>6</sup> However, the adoption of the aforementioned Agreement relating to Part XI apparently encouraged many states, including Spain, to ultimately ratify the LOSC. Spain, moreover, took advantage of the ratification to reduce the number of and simplify the interpretative declarations it had made upon signing.<sup>7</sup> Once both the LOSC and the 1994 Agreement came into force for Spain,<sup>8</sup> on 14 February 1997, Article 311(1) LOSC provided that the Convention would prevail, in relations between states parties, over the four Geneva Conventions on the Law of the Sea of 1958, thereby limiting the application of those Conventions to Spain's relations with states that are not parties to the LOSC but are to the Geneva Conventions.<sup>9</sup>

## (B) AN UNSTABLE AND CHANGING CODIFICATION PROCESS

Therefore, the codification process begun in 1969 produced not one, but two treaties, which, as we

<sup>3</sup> See its Statute in Annex VI LOSC, in relation to Arts. 287 *et seq.* of the Convention.

<sup>4</sup> See the Agreement on the privileges and immunities of the International Tribunal for the Law of the Sea, adopted 23 March 1997 (2167 UNTS 271), entered into force 30 December 2001 in general and for Spain in accordance with the provisions of Art. 30 thereof (BOE No. 15, 17 January 2002; corrigenda in BOE No. 29, 2 February 2002). See also the Protocol on the privileges and immunities of the International Seabed Authority, adopted 27 March 1998 (2214 UNTS 133), entered into force 31 May 2003 in general and for Spain (BOE No. 138, 10 June 2003). Both treaties were submitted for parliamentary approval at the time. For the 1997 Agreement, see DSS-C, VII Leg., No. 59 (favourable opinion, without debate or observations, by the Foreign Affairs Committee of the Senate at its session of 7 November 2000); and BOCG-Senado.IV, VII Leg., No. 6(b) (approval by the full Senate at its session of 16 November 2000).

<sup>5</sup> See *infra* section (C).

<sup>6</sup> R. Riquelme Cortado, *España ante la Convención sobre el Derecho del Mar. Las declaraciones formuladas* (Universidad de Murcia, Murcia, 1990), at 85-90.

<sup>7</sup> *Multilateral Treaties Deposited with the Secretary-General*, *supra* n. 5, at 228-229.

<sup>8</sup> Instrument of Ratification of the United Nations Convention on the Law of the Sea, done in Montego Bay on December 10, 1982 (BOE No. 39, 14 February 1997, corrigenda in BOE No. 136, 7 June 1997). UN, *Multilateral Treaties Deposited with the Secretary-General. Status as at 31 December 2000*, vol. II (New York, 2001), at 228.

<sup>9</sup> Spain acceded to all four Conventions (the 1958 Convention on the Territorial Sea and the Contiguous Zone, CTS; the 1958 Convention on the High Seas, CHS; the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, CFCLR; and the 1958 Convention on the Continental Shelf, CCS) on 25 February 1971, and they entered into force for it on 27 March 1971: see BOE No. 307, 24 December 1971, for the first; No. 309, 27 December 1971, for the second and third; and No. 308, 25 December 1971, for the fourth).

will see below, were shortly joined by a third. It furthermore spanned more than three decades. Its aim of fully regulating maritime zones made it a formally complex process, primarily resulting in three conventional instruments, one of which is quite long and has a format more typical of a standard domestic code. This is not to say that it has solved all the problems posed by the contemporary regulation of maritime zones, as in the case of the vague, programmatic nature of the rules on conserving the marine environment.<sup>10</sup> It also left other matters open, pending subsequent agreements, such as that of the cooperation between states on the conservation and management of straddling and highly migratory species in the high seas contiguous to the EEZ;<sup>11</sup> hence, the third conventional instrument came into being. Indeed, a United Nations Conference, convened for that purpose, adopted by consensus on 4 August 1995, in New York, the UN Agreement for the implementation of the provisions of the LOSC relating to the conservation and management of straddling fish stocks and highly migratory fish stocks (hereinafter, the Fish Stocks Agreement or 1995 Agreement). Opened for signature on 4 December 1995, it entered into force on 11 December 2001 and today has 84 states parties, including Spain,<sup>12</sup> in addition to the European Union (hereinafter, EU).<sup>13</sup>

Thus, the entry into force of the LOSC in 1994 and the Agreement relating to Part XI in 1996 was supplemented by the entry into force in 2001 of the Fish Stocks Agreement, giving rise to a changing and unstable regulatory panorama from the adoption of the LOSC in 1982 until the turn of the 21<sup>st</sup> century. Consequently, if we go back to its inception, in 1969, the entire codification process in question, to which considerable efforts, resources and time have been devoted, has been delayed in achieving the usual objectives, i.e. encouraging the establishment and implementation of the codified norms and endowing practice in this area with the desirable legal certainty.

As a result of this conventional imbroglio, the states parties, including Spain, have had no choice but to look to the process of interaction between the rules of the LOSC and customary practice to determine the actual normative value of its provisions. In fact, the LOSC has been being used as a legal framework for domestic law on the matter, and its content is reflected in state practice. This is true to such an extent that institutions such as the EEZ have been part of general international law for many years now, since even before the LOSC came into force, although not necessarily in

<sup>10</sup> LOSC, Part XII, Arts. 192 et seq.

<sup>11</sup> LOSC, Arts. 63-64 and 116-119. Straddling fish stocks are found within the EEZ of two or more coastal states or both within the EEZ and in an area beyond and adjacent to it (Art. 63). Highly migratory fish stocks can be fished both within and beyond the EEZ (Art. 64).

<sup>12</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001), [2167 UNTS 3](#). In force for Spain since 18 January 2004: see Instrument of Ratification of the Agreement on the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 concerning the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, done in New York on 4 August 1995 ([BOE No. 175](#), of 21 July 2004). In its ratification instrument, Spain made a total of nine interpretative declarations. On this question, see the contribution in this volume by Borrás Pentinat on “[Related agreements and Spain: Fish stocks and marine biological diversity](#)” for additional information on both the circumstances and the content of the Agreement and on Spain’s position on it.

<sup>13</sup> The European Union signed the 1995 Agreement on 27 June 1996 and Spain reluctantly followed suit some months later, on 3 December 1996. They ratified the Agreement on the same date, 19 December 2003, two years after its entry into force: see Council Decision 98/414 of 8 June 1998, OJ 1998 L 189/14.

accordance with the terms of the treaty, as domestic law tends to better reflect the rights granted to coastal states than their obligations towards other states.<sup>14</sup>

In short, the LOSC contains provisions that are merely declarative of customary law, such as virtually all those concerning the regime for internal waters, the territorial sea, the contiguous zone and the high seas,<sup>15</sup> which respect and follow significant portions of the law codified in 1958. Other provisions might be better described as crystallizing an earlier customary practice, as in the case of archipelagic states.<sup>16</sup> Finally, still other provisions encourage or may encourage the formation of customary law, provided they promote a practice consistent with their content concerning conduct beyond the scope of the convention. This has been the case of its rules on the delimitation of maritime zones, imbued with very weak normative content, which have been the subject of extensive attention and jurisprudential development.<sup>17</sup> All of this has greatly affected Spanish practice on the matter as a coastal state that moreover borders a major strait (Gibraltar), is a mixed state (continental with state archipelagos) and has a large fleet and fishing industry.

However, the current status of the law of the sea has changed considerably since the 1960s. Then, there was a lack of solutions for important issues such as the disagreement over the extension of the territorial sea, the newfound independence of a large number of developing countries, scientific and technological advances, and the logical and growing demands of socioeconomic development within the system. The need to address these issues immediately triggered the start of a broad process of review of the conventional law agreed in the four Geneva Conventions of 1958, only recently concluded. This was carried out through unilateral or multilateral state practice within the framework of various regional subsystems, especially the inter-American one. This process resulted in a genuine confrontation of conflicting interests and opposing practices, whose solution was not to be found in international jurisdiction, i.e. judicial enforcement of the law in force,<sup>18</sup> but rather required a return to the path of cooperation and agreement through the opening of a new codification process, as indeed occurred in 1969.

Strictly speaking, the turbulence surrounding the LOSC began with the sudden last-minute disagreement of the United States, immediately seconded by other maritime powers and by the then European Community.<sup>19</sup> The disagreement regarded the regime of the Area, even though they had

<sup>14</sup> R. Wolfrum, "The Emerging Customary Law of Marine Zones: State Practice and the Convention on the Law of the Sea", 18 NYIL (1987), 121-144, at 143-144.

<sup>15</sup> LOSC, Part II, Arts. 2-33, and Part VII, Arts. 86-115.

<sup>16</sup> LOSC, Part IV, Arts. 46-54.

<sup>17</sup> LOSC, Arts. 74 (EEZ) and 83 (CS). In this regard, see C. Jiménez Piernas, "La jurisprudencia sobre delimitación de los espacios marinos: una prueba de la unidad del ordenamiento internacional", in E.M. Vázquez Gómez, M.D. Adam Muñoz and N. Cornago Prieto (eds.), *El arreglo pacífico de controversias internacionales* (Tirant, Valencia, 2013), 241-273, at 243.

<sup>18</sup> Proof of this can be found in the judgments of the International Court of Justice of 25 July 1974 in the *Fisheries Jurisdiction* cases, in which the Court was dangerously divided almost in half, with each side representing conflicting state practices: ICJ Reports 1974, 23 et seq., 46 et seq.

<sup>19</sup> This was expressly stated by the European Community upon signing (*Multilateral Treaties Deposited with the Secretary-General*, *supra* n. 5, at 216): "The Community, however, considers that significant provisions of Part XI of the Convention are not conducive to the development of the activities to which that Part refers in view of the fact that several Member States of the Community have already expressed their position that this Part contains considerable deficiencies and



participated in the consensus that made it possible. The United States subsequently voted against the LOSC and did not sign it. The very significant legal and political concessions made by developing states in the negotiation and adoption of the Agreement relating to Part XI derived from the need to include the most developed states, i.e. those that possessed the necessary technology and resources to actually make the system work, coupled with the aim of encouraging universal participation in the LOSC.<sup>20</sup>

However, it is not merely a question of these concessions, but also of the licences the Agreement took with the law of treaties. Indeed, to name only the most important irregularities, the LOSC was amended before its entry into force and without following the procedure provided for to this end. The Agreement was negotiated by the Preparatory Commission for the International Seabed Authority, which was enlarged for this purpose to include Germany, the United States and the United Kingdom, which could not be members of it as they had not signed the LOSC. Moreover, despite being presented as interpretative, the Agreement in fact substantially modified Part XI and Annexes III and IV of the LOSC. In short, the 1994 Agreement was opened to the participation of the same subjects as the LOSC (Article 8); the consent to be bound by either was inseparable from the consent to be bound by the other (Article 4(2)); and the consent to be bound by the LOSC was assumed also to apply to the Agreement (Article 4(1)), to the extent that those states parties to the LOSC that signed the Agreement were bound by it without further ado, unless otherwise expressly stated within one year of the date of its adoption (Article 5). This explains the climate of instability generated around the LOSC and the problems posed by the Fish Stocks Agreement, undertaken with the same objective, i.e. the immediate review of the consensus reached at the UNCLOS on important aspects of the law of the sea, although in that case by more orthodox formal means than those employed with the 1994 Agreement.

In the context of this analysis of both the ratification by Spain of these treaties and subsequent Spanish practice, let us now consider the consequences for Spain of the climate of regulatory instability created around the LOSC.

### (C) SPAIN'S SIGNATURE, RATIFICATION AND INTERPRETATIVE DECLARATIONS

The present contribution will not examine Spanish practice prior to the country's ratification of the LOSC, as it has been sufficiently studied elsewhere.<sup>21</sup> Suffice it to say that this practice, especially at

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flaws which require rectification. The Community recognises the importance of the work which remains to be done and hopes that conditions for the implementation of a sea bed mining regime, which are generally acceptable and which are therefore likely to promote activities in the international sea bed area, can be agreed. The Community, within the limits of its competence, will play a full part in contributing to the task of finding satisfactory solutions."

<sup>20</sup> J.A. de Yturriaga Barberán, *Ámbitos de jurisdicción en la Convención de las Naciones Unidas sobre el Derecho del Mar. Una perspectiva española* (Ministerio de Asuntos Exteriores, Madrid, 1996), at 524-526. Of particular interest is the control regime imposed by the industrialized states on the operation of the International Seabed Authority, deemed excessive and discriminatory for the developing states.

<sup>21</sup> To cite but a few, and at the risk of unfairly neglecting a relevant contribution from prior to 1997, attention should be drawn to the monographs and articles on specific areas of Spanish practice by P. Andrés Sáenz de Santa María, J. Juste Ruiz, E. Orihuela Calatayud, J.A. Pastor Ridruejo, R. Riquelme Cortado, L.I. Sánchez Rodríguez and J.A. de Yturriaga

the legislative and jurisprudential levels, was largely consistent with the law of the sea then in force, albeit with certain technical legislative shortcomings that could lead to confusion and errors in Spanish case law, which made an admirable effort to adapt to the requirements of international law on this matter, coinciding with the establishment and consolidation of a democratic regime in Spain.<sup>22</sup> This was the state of affairs in the mid-1990s, just prior to Spain's ratification of the LOSC in 1997, which was a landmark in Spanish practice. This led to a renewed attention to the country's interests and position on the matter in the Spanish scholarly literature, especially with regard to fisheries, environmental conservation and the delimitation of maritime zones.<sup>23</sup>

Spain had good reason to abstain, as it indeed did, in the vote to adopt the LOSC. In light of subsequent events, the package deal seriously harmed Spanish interests and did not truly close the negotiation within the UNCLOS. Spanish strategic priorities were threatened by various aspects of the new legal regime ultimately agreed, including: the right of transit passage through international straits, which had not previously been recognized in international law; the regime envisaged for the new EEZ, which augured a drastic reduction in the fishing grounds available to the country's fishing fleet, at the time one of the world's largest; the exclusion of state archipelagos from the regime established for archipelagic states; the weak regulation of the delimitation of maritime zones, which reflected the rise of the principle of equity and left all pending delimitations with neighbouring states wide open; and the legal regime of the Area, contrary to the interests of average industrialized states.<sup>24</sup> Over the course of the negotiations, the mechanism of consensus and the package deal arbitrated within the UNCLOS terminally sandwiched Spain's interests between those of the maritime powers, rich states and developing states.

Even so, at the last minute, Spain signed the LOSC. There are no objective reasons for that signature, other than the usual commonplaces, *inter alia*: as a gesture towards developing countries; to align itself with the member states of the then European Community, which Spain hoped to join; to align itself with the strategy of the North Atlantic Treaty Organization (NATO), of which it was already a member;<sup>25</sup> or as the lesser evil of the certainty of a universally agreed legal regime. The

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Barberán, the majority published in Spanish journals (REDI, the former RIE, *Anuario IHLADI*, *Anuario de Derecho Internacional* and *Cursos de Derecho Internacional de Vitoria-Gasteiz*). See the [Spanish bibliography](#) in this volume on the Law of the sea selected by Abegón, Maestro and Vázquez.

<sup>22</sup> See the summary of Spanish legislative practice and domestic case law up to that date, at least with regard to the legal regime for the territorial sea and the EEZ (right of innocent passage, right of hot pursuit, right to visit, jurisdiction of the coastal state over the protection and preservation of the marine environment in the EEZ, prohibition on the use of force by the coastal state to exercise its rights in the EEZ) in C. Jiménez Piernas, "Competencia territorial del Estado y problemas de aplicación de Derecho del Mar: práctica española", 12 *Anuario IHLADI* (1995), 233-278, at 257-278.

<sup>23</sup> Again to cite only a few, attention should be drawn to the line of work opened by the contributions of the teams of Professors R. Casado Raigón (at the University of Cordoba) and J.M. Sobrino Heredia (at the University of La Coruña), especially, but not exclusively, regarding the legal regime for fishing, as well as the contributions of the team of professors from the University of Alicante, led by the author of the present contribution, on the protection and delimitation of maritime areas. Mention should likewise be made of the continuity of the lines of research of the professors cited *supra* n. 21.

<sup>24</sup> Amongst others, see J.A. Pastor Ridruejo, "La Convención de 1982 sobre el Derecho del Mar y los intereses de España", *Cursos de Derecho Internacional de Vitoria-Gasteiz* (1983), 69-103, at 103; J.A. de Yturriaga Barberán, *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 317 *in fine*-321 and 413-414; and, again, Yturriaga Barberán, *supra* n. 20, at 184-186.

<sup>25</sup> The North Atlantic Treaty, signed in Washington on 4 April 1949, which entered into force on 24 August 1949 in

considerable challenges the Spanish delegation faced in its highly professional and rigorous defence of Spain's position are thus clear;<sup>26</sup> hence, the nine interpretative declarations submitted along with Spain's signature, which sought to mildly mitigate the damage caused by the conventional regulation. To this end, five of the declarations referred to international straits (the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup>), two to the EEZ (the 5<sup>th</sup> and 8<sup>th</sup>), and one (the 9<sup>th</sup>) to the Area, whilst an additional initial declaration recalled Spain's position on the status of the waters of the Rock of Gibraltar.<sup>27</sup> Nevertheless, signing the LOSC seriously crippled Spain's legal position as a persistent objector to the new regime proposed for international straits, archipelagic states and the Area, as, according to the governing principles of the law of treaties, including that of good faith, from the moment of its signature, it should "refrain from acts which would defeat the object and purpose" of the LOSC, pending its foreseeable future ratification.<sup>28</sup>

Nor are there decisive objective reasons, exclusively within the context of the law of the sea, to explain why Spain ultimately expressed its consent to be bound by the LOSC and the Agreement relating to Part XI. This is especially true given that the new regime for international straits established under the LOSC was not customary and, therefore, Spain's ratification was not trivial. This was unlike, for example, the case of the EEZ, whose main principles (if not the nature and exact content of the powers of the coastal state) were already customary law long before Spain's ratification. Furthermore, whilst the Agreement relating to Part XI reduced Spain's economic obligations, it did not improve its position in the institutional system of the Area, although this issue was not as important as the new regime for international straits.

With regard to the revision of the interpretative declarations presented upon signature at the time of Spain's ratification, suffice it to say that those related to the regime for international straits continued to be the most important and the ones most subject to appreciable changes. Indeed, Spain withdrew two of the five declarations made upon signing with regard to the regime for these straits, to wit, the 4<sup>th</sup> and 7<sup>th</sup>, concerning the protection of the marine environment in international straits. It moreover reformulated the original 2<sup>nd</sup> declaration, eliminating the references to the regulation of air navigation in such straits and endowing it with such a broad meaning as to allow it to accommodate the content of the two withdrawn declarations.<sup>29</sup> In contrast, it left the other two declarations

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accordance with Art. 11 thereof, entered into force for Spain on 30 May 1982 (BOE No. 129, 31 May 1982).

<sup>26</sup> On this question, see the contribution in this volume by de Yturriaga Barberán on "[Spain at UNCLOS](#)".

<sup>27</sup> Spain has formally maintained its position on the Rock on significant occasions, for instance, upon ratifying two of the 1958 Geneva Conventions on the Law of the Sea, in particular, the CTS (see *supra*, n. 9). Twenty years later, upon signing the LOSC, it made a similar interpretative declaration on the Rock. It is a recurrent safeguarding formula that Spain repeated and expanded upon ratifying the LOSC on 20 December 1996, which provides as follows: "In ratifying the Convention, Spain wishes to make it known that this act cannot be construed as recognition of any rights or status regarding the maritime space of Gibraltar that are not included in article 10 of the Treaty of Utrecht of 13 July 1713 concluded between the Crowns of Spain and Great Britain. Furthermore, Spain does not consider that Resolution III of the Third United Nations Conference on the Law of the Sea is applicable to the colony of Gibraltar, which is subject to a process of decolonization in which only relevant resolutions adopted by the United Nations General Assembly are applicable." On this question, see the contribution in this volume by del Valle Gálvez on "[Maritime zones around Gibraltar](#)".

<sup>28</sup> See the Preamble and Art. 18(a) of the Vienna Convention of 23 May 1969 on the Law of Treaties, entered into force in general and for Spain 27 January 1980 (BOE No. 142, 13 June 1980).

<sup>29</sup> The new declaration 3(a) was worded as follows: "3. Spain understands that: a) The provisions laid down in Part III

(formerly, the 3<sup>rd</sup> and 6<sup>th</sup>, now 3(b) and 3(c)) unchanged. These declarations also referred to the regime for international straits and were quite opportune to head off interpretations by parties from the user states of such straits that were clearly contrary to the legitimate interests of their coastal states, so as to prevent abuse of the right of transit passage by aircraft and safeguard the coastal state's right to intervene in case of accidents.<sup>30</sup> However, there was a softening of the opposition maintained against the new regime during the UNCLOS and at the signing of the LOSC, which will be examined below. The rest of Spain's interpretative declarations are, undoubtedly, minor and some (the 4<sup>th</sup> in particular) are little more than an empty gesture. These are the declarations relating to Gibraltar (the 2<sup>nd</sup>), the regime for fishing in the EEZ (the 4<sup>th</sup>) and the regime for exploiting the Area (the 5<sup>th</sup>), which were kept almost word for word. These declarations, in that order, aim to maintain the status of Gibraltar, as established under the Treaty of Utrecht, unaltered, to establish that the rights of states that have habitually fished in the EEZ shall prevail over those of developed landlocked or geographically disadvantaged states, and to preclude consideration of the exercise of the coastal state's powers to determine the allowable catch, its own harvesting capacity and the allocation of surpluses to other states to be discretionary. They are further intended to enable Spain to participate in the joint ventures referred to in Article 9(2) of Annex III for the exploitation of the resources of the Area.

Two new declarations (the 1<sup>st</sup> and 6<sup>th</sup>) were also added, which are self-explanatory. In the latter (the 6<sup>th</sup>), in accordance with Article 287 LOSC, which offers a choice of dispute settlement procedures, Spain initially chose the International Court of Justice as the means for the settlement of disputes concerning the interpretation or application of the LOSC. It subsequently presented another declaration, dated 19 July 2002 and deposited with the Secretary-General of the United Nations, in which it also accepted the jurisdiction of the ITLOS.<sup>31</sup> The former declaration (the 1<sup>st</sup>) merits a discussion of its own.

#### (D) THE POSITION OF THE EUROPEAN UNION

In its first interpretive declaration, Spain recalled that, as a member of the then European Community, "it has transferred competence over certain matters governed by the Convention to the European Community. A detailed declaration will be made in due course as to the nature and extent of the competence transferred to the European Community, in accordance with the provisions of Annex IX of the Convention". Annex IX of the LOSC, regulating participation by international organizations in the Convention, which was tailor-made to facilitate participation in the LOSC by the then

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of the Convention are compatible with the right of a coastal State to dictate and apply its own regulations in straits used for international navigation, provided that this does not impede the right of transit passage." However, in reality, Spain has a very limited capacity to intervene in the prevention of pollution in the Strait of Gibraltar.

<sup>30</sup> The new declarations are worded as follows: "(b) In article 39, paragraph 3 (a), the word 'normally' means 'unless by force majeure or by distress'. (c) The provisions of article 221 shall not deprive a State bordering a strait used for international navigation of its competence under international law regarding intervention in the event of the casualties referred to in that article."

<sup>31</sup> BOE No. 170, 17 July 2003. The declaration provides: "Pursuant to article 287, paragraph 1, the Government of Spain declares that it chooses the International Tribunal for the Law of the Sea and the International Court of Justice as means for the settlement of disputes concerning the interpretation or application of the Convention."



European Community, provides that, upon signing and agreeing to be bound by the LOSC, both an international organization and its member states shall make a declaration specifying the matters governed by it in respect of which competence has been transferred to the organization by those member states, which the European Community and those of its member states that are parties to the LOSC did.<sup>32</sup> Thus, the other contracting states or parties to the LOSC were informed that none of the member states of that organization that ratified the LOSC could be bound by certain provisions thereof due to the transfer of sovereign powers to it. Moreover, the scope of this lack of competence was explained in detail as soon as the EU acceded to the LOSC.<sup>33</sup>

Needless to say, the broad competences, both exclusive and shared with the member states, that the then European Community had in the areas of fisheries, trade and environmental policy,<sup>34</sup> as well as the exercise of those competences, whether exclusively or in coordination with the member states, made it essential for this organization to effectively participate in the LOSC and in the functioning of its bodies. In particular, the deposit of the instrument of formal confirmation gave the EU's participation in the International Seabed Authority a final nature. On the other hand, as reflected in the EU's declaration in consenting to be bound, due to their very functional nature, the scope and exercise of Community competences may undergo continuous modifications, prompting the organization to amend or supplement that declaration, in accordance with the provisions of Article 5.4 of Annex IX of the LOSC.

Consequently, the European Parliament (hereinafter, EP) took the assent procedure related to the request submitted by the Council, pursuant to Article 300(2) and (3) TEC, concerning the conclusion of the LOSC and the Agreement relating to Part XI, very seriously. The President of the EP referred the proposal to the Committee on Legal Affairs and Citizens' Rights, as the committee responsible, and to four other Committees, including the Committee on Fisheries, for their opinions. The Committee on Legal Affairs examined the proposal and unanimously recommended the draft favourable decision, submitting the opinions issued by the other Committees with its report, and the proposal was ultimately approved by the EP.<sup>35</sup> A review of the procedure, especially the explanatory statement and also the opinion issued by the Committee on Fisheries, reveals the interest of the

<sup>32</sup> See *Multilateral Treaties Deposited with the Secretary-General*, *supra* n. 5, at 208 and 216-218; the European Community signed the Convention on 7 December 1984 and formally confirmed its participation in it on 1 April 1998. The documentary sources from the process followed within the EU can be found in *Bulletin of the EU*, 3/1998, point 1.3.18, and in OJ 1998 L 179/1, which contains the Council Decision of 23 March 1998 on the conclusion by the European Community of the LOSC and of the Agreement relating to Part XI thereof. See also the Declaration concerning the competence of the European Community with regard to matters governed by the LOSC in BOE No. 136, 7 June 1997.

<sup>33</sup> Upon depositing the instrument of formal confirmation (this is the formula used in Art. 306 LOSC and Art. 3 of Annex IX thereof), the European Community clarified the matters for which it had exclusive competence (e.g. the Common Fisheries Policy and, in particular, the conservation and management of fisheries resources both in Community waters and on the high seas) and those for which it shared competence with its member states (e.g. in matters of maritime transport, navigation safety and marine pollution), listing in an Appendix the relevant Community acts on these matters.

<sup>34</sup> Arts. 37, 133 and 175 of the Treaty establishing the European Community (TEC) then in force. These competences have increased (Arts. 43, 153 and 192 of the current TEU).

<sup>35</sup> See OJ 1997 C 325/14. The rest of the documentation cited in this paragraph can be found in European Parliament, Committee on Legal Affairs and Citizens' Rights, Recommendation on the proposal for a Council Decision concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement relating to Part XI thereof, Rapporteur Jean-Pierre Cot (Ref. PE DOC A4-0283/97).

MEPs in these matters, their capacity for information and advice, their concern to ensure that the powers of the EP were respected, and, of course, their interest in protecting Community interests by taking advantage of the occasion to recommend the submission of an interpretative declaration recalling the Community position opposing the creeping jurisdiction of certain coastal states. To this end, it recalled the 1995 fishing dispute with Canada involving the seizure by Canadian patrol boats of a Community trawler (the Spanish vessel *Estai*) when it was fishing in the high seas, and, indeed, the Community's declaration takes a firm position on the matter:<sup>36</sup>

"The Community also wishes to declare, in accordance with Article 310 of the Convention, its objection to any declaration or position excluding or amending the legal scope of the provisions of the [said Convention], and in particular those relating to fishing activities. The Community does not consider the Convention to recognize the rights or jurisdiction of coastal States regarding the exploitation, conservation and management of fishery resources other than sedentary species outside their exclusive economic zone."

Furthermore, as a supplement to this declaration and on the occasion of the signature by the European Community, on 27 June 1996,<sup>37</sup> of the Fish Stocks Agreement, it also included in the well-known declaration on its exclusive and shared competences in matters regulated by the Agreement a set of very precise interpretative declarations aimed at preserving the following principles: the prohibition of the threat or use of force, the freedom of the high seas, the jurisdiction of the flag state, and the primacy of the jurisdiction of the flag state over any other jurisdiction to ensure compliance and enforcement of conservation and management measures for these fish stocks.<sup>38</sup>

However, Canada's declaration seems to be a clear response to the European Community's concerns,<sup>39</sup> insofar as it recalls that Article 42 of the 1995 Agreement prohibits reservations and exceptions and that Article 43 likewise prohibits declarations or statements that purport to exclude or modify the legal effect of the provisions of the 1995 Agreement in terms of their application to the state or entity making them. It further states that Canada reserves the right to decide at any time when a declaration does purport to exclude or modify the legal effect of the 1995 Agreement for the purposes of not being bound by it. This underscores the degree of regulatory uncertainty that prevailed on the matter upon the entry into force, in 2001, of the Fish Stocks Agreement, the parties to which are mostly developing countries, together with Australia, Canada, Norway, the Russian Federation and the United States, in addition to the European Union and Spain.<sup>40</sup>

Of course, the presence of the United States amongst the states parties to the 1995 Agreement is striking. It is indicative of the hegemonic power's behavioural patterns that its government had no problem unabashedly leading the rebellion of the richest states against the LOSC, in defence of the market economy and freedom of enterprise, even as it participated in the 1995 Agreement, legally

<sup>36</sup> *Multilateral Treaties Deposited with the Secretary-General*, *supra* n. 5, at 217.

<sup>37</sup> In other words, one and a half years after the signature by the Community (on 7 December 1984) of the LOSC and almost two years before the formal confirmation of that signature (1 April 1998). In any case, on dates very close to those of the dispute with Canada over the seizure of the *Estai*.

<sup>38</sup> *Multilateral Treaties Deposited with the Secretary-General*, *supra* n. 5, at 244 and 246 (Declarations 2, 3, 5, 6 and 7). Cf. Part VI (Compliance and Enforcement), Arts. 19-23, of the Fish Stocks Agreement.

<sup>39</sup> See again *Multilateral Treaties Deposited with the Secretary-General*, *supra* n. 5, at 245.

<sup>40</sup> *Ibid.*, at 244.

endorsing the attacks of states with long coastlines on the principles of freedom of the high seas and the jurisdiction of the flag state, traditionally defended by the maritime powers. On the contrary, actively or passively, the United States has participated on all fronts (that of the rich states and that of the states with long coastlines) in the process of revising the consensus reached in 1982 in the context of the UNCLOS, clearly to the detriment of the interests of Spain.

#### (E) SPANISH PARLIAMENTARY APPROVAL OF THE TREATIES

In light of all the above, the parliamentary approval of these international treaties in Spain, which was done by means of the emergency procedure and in the absence of any sort of parliamentary debate, is surprising. It was a Socialist administration that sent the two treaties to Parliament in November 1995. However, the process was temporarily suspended as a result of snap elections and was not resumed until 17 June 1996, by which time a new administration was in office. Because the agreements required the prior authorization of Parliament before consent to be bound by them could be granted,<sup>41</sup> they were referred to the Foreign Affairs Committees for an opinion and to the full Congress and Senate for approval without any particular incident. The full Senate ultimately authorized their ratification on 5 November 1996.<sup>42</sup>

Very few statements, generally commonplaces of little interest, were made at the Congressional Foreign Affairs Committee sessions or at the full Senate session. It was accepted at face value, and despite not being entirely true, that “Spain was not in favour of ratifying the Convention unless the regime provided for in Part XI was modified”.<sup>43</sup> The lack of legal recognition of the status of state archipelagos was lamented in good form,<sup>44</sup> and the interpretative declarations by the Executive to be submitted with the ratification were accepted, naturally acknowledging that certain problems, such as the delimitation between the Canary Island archipelago and Morocco, would remain unsolved and

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<sup>41</sup> See Art. 94(1) of the Spanish Constitution (CE) and the opinions of the Council of State No. 2.411/94, of 16 December 1994, for the Agreement relating to Part XI, and No. 2.376/95, of 26 October 1995, for the LOSC, both in this regard. Whilst the content of these opinions does not offer any technical novelties, it is worth reading at least the opinion on the LOSC, as it provides information of interest on the reports of the interested ministries used in these proceedings. We already know, as recorded in Opinion No. 2.376/95, at 20, that the “competence of the Council of State in matters of international treaties or conventions is limited, according to Article 22(1) of its Organic Law, to giving its opinion on the need for parliamentary approval prior to the granting of the state’s consent, without entering into additional considerations regarding their content. However, as the bodies that have previously reported [in these proceedings] have done, in this specific case it is necessary to stress the transcendence and significance of the Convention submitted for review.”

<sup>42</sup> For the entire legislative process, see *BOCG-Congreso*. C, VI Leg., No. 7-1 and 9-1, 17 June 1996; No. 7-2 and 9-2, 26 June 1996; and No. 7-3 and 9-3, 10 September 1996 (recommendation of an opinion by the emergency procedure and extension of the deadlines for the submission of proposals by the Congressional Executive Committee). *DSC-C*, VI Leg., No. 61 (unanimous approval of the opinion by the Congressional Foreign Affairs Committee at its session of 26 September 1996). *BOCG-Congreso*. C, VI Leg., No. 7-5 and 9-5, 14 October 1996 (approval by the full Congress of both conventions at its session of 10 October 1996). *DSS-C*, VI Leg., No. 51 (approval without discussion or observations by the Senate Foreign Affairs Committee at its session of 24 October 1996). *BOCG-Senado*. IV, VI Leg., No. 5(d) and 6(d), 12 November 1996 (approval by the full Senate of both conventions at its session of 5 November 1996).

<sup>43</sup> Remarks by Mr Soriano Benítez de Lugo in the Congressional Foreign Affairs Committee (session of 26 September 1996). The statement is taken verbatim from Opinion No. 2.376 of the Council of State, at 15; strictly speaking, the MPs paraphrased parts of this opinion in their remarks.

<sup>44</sup> Remarks by Mr Martínón Cejas in the same Committee and session.

advocating that an agreement be concluded to settle them.<sup>45</sup> The Spanish MPs did not seem particularly concerned with the other issues raised in the present contribution, such as the legal regime governing fishing or international straits, and thus simply endorsed the previous work of the Executive, especially with regard to the interpretative declarations, with which they expressed their agreement. As can be seen, there was very little knowledge of the matter, and it is necessary to refer to opinion No. 2.376/95 of the Council of State to get a vague idea of what that preliminary work conducted by the central government on the advisability of the ratification by Spain of the two treaties consisted of.

That opinion does evidence at least a certain degree of consideration of some of the problems this ratification posed for Spain. It proposed possible interpretative declarations on the regime for transit passage through straits,<sup>46</sup> raised doubts regarding the possible economic obligations that Spain might acquire in relation to joint ventures,<sup>47</sup> cited potential difficulties that certain provisions of the LOSC might pose to Spain's position as a coastal state of the Strait of Gibraltar and for the delimitation of its EEZ with Morocco in the Alborán Sea,<sup>48</sup> and recorded verbatim the declarations approved by the Inter-ministerial Committee on International Maritime Policy at its meeting of 27 September 1995.<sup>49</sup>

It was obvious that both the LOSC and the Agreement relating to Part XI would require parliamentary approval before Spain could grant its consent to be bound by them, because they were subject to various sections of Article 94(1) of the Spanish Constitution (CE). In addition to affecting matters reserved to the law in the Spanish legal system (Article 94(1)(e) CE) or entailing financial liabilities for the Public Treasury (Article 94(1)(d) CE), the most important factor without a doubt was the fact that the Council of State considered the LOSC to be a treaty of a political nature (Article 94(1)(a) CE).<sup>50</sup> It would thus have been logical and desirable for Spanish lawmakers to have taken more time and trouble in the parliamentary approval of these treaties, at least to the same extent as their counterparts in the EP, who took the legal dispute with Canada into account. Instead, Spanish lawmakers sidestepped the issue, despite the fact that Spain was the member state most affected by it.

Since this ratification process, and strictly with regard to the key concerns expressed in the country's interpretative declarations, Spanish practice has continued to develop in accordance with the same basic parameters. Without going into too much detail, as this practice is examined elsewhere in this volume, it should be noted that Spain is still beset by the same problems of pending delimitations with its neighbours, especially Portugal and Morocco.<sup>51</sup> These problems are related to

<sup>45</sup> Remarks by Mr Mardones Sevilla in the same Committee and session.

<sup>46</sup> Opinion No. 2.376/95 of the Council of State, at 11.

<sup>47</sup> *Ibid.*, at 12.

<sup>48</sup> *Ibid.*, at 12-13.

<sup>49</sup> *Ibid.*, at 16-19.

<sup>50</sup> In the words of the opinion itself, "it is appropriate to classify as such the 1982 United Nations Convention on the Law of the Sea, given its importance in the relations between the subjects of international society and the international political order, the stable and serious commitment that it implies for Spanish foreign policy in the maritime area, and its institutionalization of a new system of cooperation in the exploration and exploitation of certain marine areas" (*Ibid.*, at 23 *in fine*-24).

<sup>51</sup> On this question, see the contribution in this volume by Gutiérrez del Castillo on "[Delimited maritime zones](#)". See further E. Orihuela Calatayud, *España y la delimitación de sus espacios marinos* (Murcia, 1989), at 172-173 and 197-204; and



the lack of recognition of the archipelagic legal status of the Canary Islands, which constrains Spain's negotiating position vis-à-vis Morocco by preventing it from drawing baselines that surround all the islands of the archipelago. The Royal Decree of 21 December 2001, granting oil prospecting permits for the marine subsoil off the coasts of the islands of Fuerteventura and Lanzarote to the company Repsol,<sup>52</sup> sparked an immediate note of protest from Morocco, which does not accept the equidistant line between the Canary Island and Moroccan coasts advocated by Spain as a boundary until the two states can reach a delimitation agreement, maintaining instead that the Canary Islands lie within the Moroccan continental shelf.<sup>53</sup> This is aside from the uncertainty regarding the future legal status of the territory of Western Sahara, under Moroccan administration, which makes any calm and measured process of delimitation of these maritime areas unviable for the time being. The LOSC is of little use in this endeavour, as it advocates agreement between the interested states as the first and main component of the delimiting rule, followed, as the second component, by the rule of equitable delimitation, which is imbued with only slight regulatory content and contains a very abstract and general obligation, always subject to subsequent detailed specification. A feasible delimitation solution for the Canary Islands thus seems unlikely at present.<sup>54</sup>

With regard to the new regime for international straits and its application to Gibraltar, Spain's full incorporation into NATO coupled with Spanish practice in relation to overflights of the strait by the military aircraft of other states in certain crisis situations, points to a clear change of position in this regard. The US bombing of targets in Libya in April 1984 is a distant and relevant precedent; the Spanish government neither opposed nor protested the ensuing overflights, foreshadowing an evolution in the Spanish position<sup>55</sup> towards acceptance of the right of transit passage provided for under the LOSC. This would explain the declarations it ultimately made upon ratification, which do not question the new right of transit passage and seem perfectly compatible with the LOSC.

With regard to the new regime for the EEZ, a tough restructuring of the fishing fleet, coupled with a determined investment and bilateral and multilateral conventional cooperation effort in the field of fisheries by the EU, saved the sector, which emerged quite lean from the crisis entailed by the establishment of the EEZ.<sup>56</sup> Additionally, Spanish law has respected the conduct-related content provided for under the LOSC and EU law on the matter, which has entailed the full integration of

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D.H. Anderson, "Portugal-Spain", in J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (Martinus Nijhoff, Dordrecht, 1993), vol. 2, at 1791-1800. Seven volumes have been published so far.

<sup>52</sup> Royal Decree 1462/2001, 21 December 2001 (BOE No. 20, 23 January 2002). See M. Requena Casanova, "España concede a la empresa REPSOL YPF permisos de investigación de hidrocarburos en aguas situadas, en aplicación del método de la equidistancia, más allá del mar territorial de las Islas Canarias frente al litoral marroquí", 54 REDI (2002), 501-505. A map of the prospecting areas authorized by the Council of Ministers was published in the newspaper *El País*, on 30 December 2001, at 26. Repsol subsequently renounced the prospecting.

<sup>53</sup> *Ibid.*, at 502-503. In its note of 31 January 2002, Morocco described the Spanish initiative as a unilateral, debatable and unfriendly act.

<sup>54</sup> On this question, see the contribution in this volume by Orihuela Calatayud on "[Pending delimitations](#)".

<sup>55</sup> Which was very strict during the Third Conference: see V. Bou and R. Bermejo, "Espagne et le droit de la mer", in T. Treves (ed.), *The Law of the Sea: The European Union and its Member States* (The Hague, 1997), 449-493, at 458-461.

<sup>56</sup> See the works published in Vol. 1 (2000) of *Cuadernos de Derecho pesquero* for an idea of the state of the Spanish fishing sector following the entry into force of the LOSC. On this question, see the contribution in this volume by Casado Ración on "[Fisheries](#)".

the institution of the EEZ into the Spanish legal system. To cite just a few precedents from around that time as proof of this integration, attention might be called to Royal Decree 1315/1997, 1 August 1997, establishing a Fisheries Protection Zone in the Mediterranean,<sup>57</sup> amended by Royal Decree 431/2000, 31 March 2000, or the sanctions regime established for both the EEZ and the aforementioned Fisheries Protection Zone under Law 3/2001, of 20 March, on State Marine Fisheries,<sup>58</sup> and under Royal Decree 1797/1999, 26 November 1999, on the Monitoring of Fishing Operations by Vessels of Third Countries in Waters under Spanish Sovereignty or Jurisdiction.<sup>59</sup> All this legislation adheres to the Community regulations and has been implemented without detriment to the specific provisions established in the fisheries agreements between the EU and third countries.<sup>60</sup>

Finally, mention should be made of the claims of states with long coastlines, endorsed in parallel by both the 1995 Agreement and the policy of facts on the ground pursued by Canada when it seized the Spanish trawler *Estai* on 9 March 1995.<sup>61</sup> Article 63(2) LOSC establishes an obligation of conduct (negotiation between the interested parties), rather than one of result, to ensure the conservation and development of straddling and highly migratory species. This prevents the coastal state from unilaterally imposing conservation measures on these species outside its EEZ by virtue of a presumed special interest in those areas of the high seas adjacent to its EEZ.

The 1995 Agreement establishes a special treatment for straddling and highly migratory species, regulates the control of fishing vessels on the high seas as an exception to the exclusive jurisdiction of the flag state, replacing it with a sort of shared jurisdiction with other states over the activity of these vessels in the high seas, and even exceptionally authorizes the use of force against them by the inspecting state (see Art. 22(1)(f) of the 1995 Agreement). This latter provision is undoubtedly the most serious violation of the LOSC, Article 301 of which safeguards the principles of international law included in the UN Charter in its application. In light of the risks of the extension of this creeping jurisdiction to the high seas adjacent to the EEZs of certain coastal states, doubts arose

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<sup>57</sup> Royal Decree 1315/1997, 1 August 1997, establishing a Fisheries Protection Zone in the Mediterranean ([BOE No. 204](#), 26 August 1997), amended by Royal Decree 431/2000, 31 March 2000 ([BOE No. 79](#), 1 April 2000). Establishing a fisheries protection zone in the Mediterranean, between Cabo de Gata and the French border, to prevent the uncontrolled exploitation of fisheries resources therein by third-country factory vessels and to preserve the activity of the traditional Spanish fleet that has habitually fished in these waters. France protested the creation of this zone, but due to its disagreement with the application of the equidistance principle advocated by the Royal Decree to delimit it with those neighbouring states with which there was no delimitation agreement. Cf. D. Blázquez Peinado, “El Real Decreto 1315/1997, de 1 de agosto, por el que se establece una zona de protección pesquera en el Mar Mediterráneo”, XLIX REDI (1997), 334-339; V.L. Gutiérrez Castillo and E.M. Vázquez Gómez, “La zone de protection de la pêche établie par l’Espagne en Méditerranée”, 13 *Espaces et Ressources Marines*, (1999-2000), 207-231.

<sup>58</sup> Law 3/2001, of 20 March, on State Marine Fisheries ([BOE No. 75](#), 28 March 2001).

<sup>59</sup> Royal Decree 1797/1999, 26 November 1999, on the Monitoring of Fishing Operations by Vessels of Third Countries in Waters under Spanish Sovereignty or Jurisdiction ([BOE No. 301](#), 17 December 1999).

<sup>60</sup> See, in summary, Arts. 2, 4 and 38-40 and Title V of Law 3/2001, in relation to Arts. 2 and 10 of Royal Decree 1797/1999. On this question, see the contribution in this volume by Pastor Palomar on the “[Exclusive Economic Zone and fisheries zones](#)”.

<sup>61</sup> As a result of this seizure, Spain filed an application against Canada before the International Court of Justice, which declared itself incompetent: ICJ Reports 1998, paras. 44-60, 66, 71 and 76. Cf. the various contributions devoted to this case in 51 REDI (1999).

regarding the advisability for the EU and its member states of signing and ratifying the 1995 Agreement. The dust from the establishment of the EEZ was only just beginning to settle when this phenomenon ushered in a new set of dangers for the stability of the LOSC and, of course, Spain's maritime interests.<sup>62</sup>

(F) DYSFUNCTIONS AND RISKS OF THE CODIFICATION PROCESS

The codification process culminating in the LOSC was never truly closed and has thus become a small trap for many states, including Spain, which had placed their faith in the consensus mechanism as a reasonable formula for reaching global agreements on the regime for maritime zones. The hegemonic unilateralism of the United States, seconded by the maritime powers and the most developed states, and the ambitions of states with long coastlines have altered and hurt the codification process, giving rise to a climate of political instability and legal uncertainty ill-suited and contrary to the nature of the codification of international law. Its paradigm would be the illegal seizure on the high seas of the Spanish trawler *Estai* by Canadian patrol boats in March of 1995, as the culmination of various unilateral acts of conservation and management of the exploitation of fisheries resources in the high seas adjacent to its EEZ by Canada and other states with long coastlines.

In short, first the rich states forced an in-depth revision of the institutions and regime for the exploitation of the Area agreed in 1982; immediately thereafter, states with long coastlines, likewise dissatisfied with the LOSC and encouraged by the success of the 1994 Agreement, secured an overhaul of the cooperation regime for the conservation and management of straddling and highly migratory fish stocks in the high seas contiguous to the EEZ that violated both the letter and the spirit of the consensus reached in this regard in the LOSC. The first claim, of course, was not intended for the benefit of Spain but rather of the industrialized powers, which have managed to reduce to virtually nothing the institutionalization of the principle of solidarity provided for in the regime for exploitation of the mineral resources of the Area based on the international management thereof. However, the second claim was clearly detrimental to Spain's interests. This, coupled with the damage already done by the transactions agreed in 1982, gave Spain, together with other states similarly harmed, the dubious honour of becoming, to use a culinary metaphor, the ham in the international sandwich prepared by the richest states and states with long coastlines on the one hand and developing states on the other.

However, it is also worth highlighting the evidence of dysfunction and uncertainty surrounding the codification of international law, when, until recently, this codification seemed blessed by the belief that it encouraged the consolidation of norms and granted a greater degree of legal certainty not

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<sup>62</sup> J.A. Pastor Ridruejo, "La jurisdicción rampante de los Estados ribereños sobre la pesca en alta mar", in *Hacia un nuevo orden internacional y europeo. Estudios en homenaje al profesor Don Manuel Díez de Velasco* (Tecnos, Madrid, 1993), 521-527; J.A. de Yturriaga Barberán, "Acuerdo de 1995 sobre conservación y ordenación de las poblaciones de peces transzonales y altamente migratorios", 7 *Anuario Argentino de Derecho Internacional* (1996-1997), 15-61; and L.I. Sánchez Rodríguez, "Jurisdicciones rampantes y libertad de pesca en alta mar", in *Liber Amicorum in memoriam of Judge José María Ruda* (Dordrecht, 2000), 139-155.

only to the content of practice but also to the interpretations thereof. That legal certainty once offered by conventional law today seems naïve. Thus, a measured return to customary law might be advisable, as already noted and advocated by Roberto Ago a long time ago. Codes, conventional law, are not the salvation of international law and involve risks for the weakest states, that is, for most states, which in the present case might perhaps have better defended their legitimate interests and rights under the customary legal order.

It is obviously formalistic to state that the process of codifying in multilateral forums makes it possible to take the objectors' opinions into consideration, integrating them into the agreed texts to endow the codified laws with even greater authority. This may have been more or less the case until the regulatory havoc created around the LOSC, both by the maritime powers (against Part XI of the treaty, in defence of the market economy and free enterprise) and by the states with long coastlines (against the principles of freedom of the high seas and the exclusive jurisdiction of the flag state well established in the treaty). Both groups immediately set out to tear down the agreements reached on these matters in 1982 following a fourteen-year codification process, achieving their goals in the Agreements of 1994 and 1995.

The technique employed was quite simple: these states radically challenged the parts of the LOSC that did not suit their interests until they managed to amend it, keeping the codification process open indefinitely from a substantive perspective. To accomplish this, they took a great deal of licence with the law of treaties, in particular by replacing the institution of reservations, prohibited under the LOSC, with the surreptitious and *de facto* introduction in the conventional context of an institution with customary roots, the so-called persistent objection, which consists in expressly, unambiguously and persistently objecting to certain emerging norms before they become formally established so that they cannot be enforced against the objector. That sort of customary metamorphosis of conventional international law, also on display in the informality of the renegotiation process of the LOSC, in the great importance given to the willingness of the parties to reach an *arrangement* in this regard, and in the weakening of the properties of stability and certainty of conventional law that all of this entails, signified the triumph of a certain voluntarist and consensualist understanding of international custom and of the legal order itself. Beyond the theoretical debate, which is not germane here, this has important substantive consequences, such as the certainty that, under the current circumstances, international custom can afford better protection to the weakest states than a conventional international law that has been consistently reworked to the benefit of the most powerful states.

The same can be seen in the Community context. The risks of the power asymmetry that likewise dominates the process of European integration, as palpably demonstrated in the case of the LOSC, so warrant. Nor is the principle of supranational integration immune to these dangers, amongst other things because it coexists with the principle of intergovernmental cooperation in a delicate balance of tensions and compromises that has permeated the entire history of European integration. Spain has known what it is like to be on the receiving end of this asymmetry. How else to explain the signature and ratification by the EU and Spain of the Fish Stocks Agreement, so undeniably harmful to its fishing interests? It can only be attributed to a vicarious conduct within the EU, in which Spain



failed to convince its partners that the Agreement should never have been negotiated or signed by the EU and its member states, because it recognizes the special interest and preferential rights of coastal states over those of states that engage in deep-sea fishing, extending the jurisdiction of the former over both the living resources beyond the 200 miles of their EEZs and any vessels that might fish on the high seas under the flag of another state.

#### (G) CONCLUSIONS

The main outcome of this whole process has been very negative for the interests of Spain. Spain is one of the coastal states most affected by the various issues recounted here. However, the verification of this fact failed to prompt Spanish lawmakers at the time to take an interest in these matters in relation to the country's ratification of the treaties in question. Instead, their unremarkable passage through Parliament, executed with little fanfare, bears witness to a lack of interest and the absence of a true state policy on the matter, despite the political and economic importance of these treaties and the consequences for Spain of their ratification and entry into force.