Spain's Bilateral Agreements on Foreign Workers: a New Instrument of Spanish Immigration and Development Policy

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INTRODUCTION: FUNDAMENTS OF SPANISH IMMIGRATION POLICY

1. During the 20th century, Spain went from being a source of emigration (to the Americas at the beginning of the century, and to Europe in the fifties and sixties) to a recipient of immigrants. The past twenty years have witnessed a reversal of these demographic trends owing to a dual phenomenon: on the one hand, a steady flow of former emigrants returning to Spain (a total of as many as 350,000 between 1985 and 1999);[1] and on the other, a very significant increase in the number of immigrants, leading the number of foreign nationals residing in Spain to increase fourfold between 1980 and 1999. According to statistics published by the Ministry of Labour and Social Affairs (MTAS), the census of foreign residents has grown from 182,045 in 1980 to 801,329 in 1999.[2]

The causes of both trends are basically the economic development and social

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[1] Ministerio de Trabajo y Asuntos Sociales (MTAS), *Anuario de Migraciones 2000*, p. 46.

[2] MTAS, *Anuario de ..., op. cit.*, p. 176 et seq.

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changes Spain has experienced. As for immigration, it is worth pointing out three factors: 1) Spain's membership of the European Community, which in itself "is proving to be an attraction", 2) "demographic pressure of the developing countries, particularly on the southern shore of the Mediterranean", and 3) "the quality differences in the European labour market, which, in certain sectors of the economy such as agriculture, urban services, domestic service and the hotel and catering trade, is not managing to attract European labour". These three circumstances have given rise to a larger migratory flow towards Spain.[3]

2. The significance of the migration phenomenon undoubtedly lies in the complex process, witnessed in 2000, of regulating the situation of aliens in Spain, which eventually materialized in the passing of Organic Law 8/2000, of 22 December, on the Reform of LO 4/2000, of 11 January, on the rights and freedoms of aliens in Spain and their social integration.[4] The Global Programme for the Regulation and Coordination of Aliens and Immigration in Spain (GRECO Programme) approved by the Council of Ministers on 30 March 2001 also springs from this situation.[5] The GRECO Programme, which considers it essential to approach immigration from a global perspective, as a "state policy", envisages 23 actions, to be carried out during the 2000–2004 period. These actions in turn comprise 72 concrete measures to be implemented, depending on each case, by one or several of the ministries involved.[6]

This wealth of envisaged actions includes the signing of bilateral agreements on immigration with states whose migratory flows towards Spain are particularly significant, also taking into consideration the relations between the two states and the characteristics of the country of origin. So far agreements

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[3] Congreso de los Diputados, *Situación de los españoles que viven fuera y de los inmigrantes y refugiados que han llegado a España. Informe de la Comisión de Política Social y Empleo*, Madrid: Congreso de los Diputados, 1999, pp. 29–30.

[4] *BOE* 23 December 2000.

[5] Resolution of 17 April 2001, of the Government Department of Aliens and Immigration, on the publication of the Agreement of the Council of Ministers of 30 March 1991 approving the GRECO programme. *BOE* 27 April 2001.

[6] Ministries of: Foreign Affairs; the Interior; Education, Culture and Sport; Labour and Social Affairs; Public Administrations; Health and Consumption. The Programme is structured into four basic areas: 1) A global and coordinated design of immigration as a desirable phenomenon for Spain in the framework of the European Union; 2) Integration of foreign residents and their families, who contribute actively to our country's growth; 3) Regulation of migratory flows in order to guarantee coexistence in Spanish society; and 4) Maintenance of the system for protecting refugees and displaced people. The reference to the European framework (present both in the Introduction to the GRECO Programme and in the preamble to Law 8/2000) reminds us that the approval of the Treaty of Amsterdam establishes Community competence for immigration and asylum (Art. 63 EC Treaty), the basic elements of which were defined by the Tampere European Council (October 1999). These principles are developed in the *Communication from the Commission to the Council and European Parliament on a community migration policy*, COM (2000) 757 final, 22 November 2000.

of this kind have been concluded with Colombia (21 May 2001),[7] Ecuador (29 May 2001),[8] Morocco (25 July 2001)[9] and the Dominican Republic (17 December 2001),[10] and similar agreements are due to be signed with Poland and Romania in the near future.

I. BILATERAL AGREEMENTS ON FOREIGN WORKERS. NATURE AND DESCRIPTION

3. The conclusion of bilateral treaties between states affected by migratory movements is common practice owing to necessity. This issue used to be regulated by means of treaties of amity, commerce and navigation, some of the clauses of which established conditions for allowing nationals of the states Parties to enter and remain in their respective territories and attributed each other's nationals certain rights, generally of a civil nature.

Since the thirties (following the US policy of recruiting Mexican workers, the *bracero program*), the conclusion of bilateral treaties specifically designed to regulate movements of workers between states has become common practice. Treaties of this kind involve an offer by the host country, which is generally more developed economically, of a number of jobs for nationals of the source country who, if chosen, would benefit from certain social rights laid down in the treaty during their period of residence authorized by the receiving state. Accordingly, as Ch. Nguyen Van Yen points out, certain parallels have been drawn (though not fully) between these treaties and employment contracts subject to national law.[11]

Finally, other bilateral agreements governing more specific issues relating to migratory flows are often signed. Such is the case of treaties on dual nationality, on the abolition of visas, on social security and on the recognition of the right to vote or stand as a candidate in municipal elections, to cite a few examples.

4. The bilateral agreements Spain concluded with Ecuador, Colombia, Morocco and the Dominican Republic in May and July 2001 undoubtedly spring from this tradition. Indeed, the respective preambles stress the connection with the general treaties of cooperation and friendship or with other existing agreements on this matter between the two Parties.

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[7] Provisional application of the Agreement between Spain and Colombia on the regulation and organization of migratory flows for employment. *BOE* no. 159, 4 July.

[8] Provisional application of the agreement between the Kingdom of Spain and the Republic of Ecuador on the regulation and organization of migratory flows. *BOE*, no. 164, 10 July.

[9] Provisional application of the Agreement on labour between the Kingdom of Spain and the Kingdom of Morocco. *BOE*, no. 226, 20 September.

[10] Provisional application of the Agreement between the Kingdom of Spain and the Dominican Republic concerning the regulation and organization of migratory flows for employment, *BOE*, no. 31, 5 February 2002.

[11] Ch. Nguyen Van Yen, *Droit de l'immigration*, Paris, PUF, 1986, pp. 59–63.

The structure of the treaties is similar. The preamble is followed by a preliminary chapter with a twofold aim: to designate the competent authorities for each contracting Party (Art. 1)[12] and to determine the personal scope of application of the treaties. They apply to migrant workers, who are defined as "citizens (of the nationality of the contracting State) authorized to engage in remunerated activities as employed persons on Spanish territory" (Art. 2). Chapters I to IV constitute the backbone of the agreement, as they regulate the cycle for migrant workers, distinguishing the following phases: a) notification of job offers (Chapter I: Art. 3), b) selection of candidates, signing of the employment contract, travel and reception in Spain (Chapter II: Arts. 4 and 5), c) working and social conditions of workers in Spain, specifying the rights to which they are entitled (Chapter III: Arts. 6 to 9), and d) return to their country of origin (Chapter V: Arts. 13 to 17). An additional chapter, number IV, deals with seasonal workers (Arts. 10 to 12).

The agreements end with a chapter providing for application. A joint coordinating committee is established for this purpose; it is self-regulatory and entitled to set up as many ad hoc committees as it deems necessary. This committee, which is to meet in each of the States alternately, is competent to: a) monitor the implementation of the agreements and decide on necessary measures, b) propose a review of the treaty, if necessary, c) see to the dissemination of appropriate information on the content of the agreement in both countries, d) settle any differences arising from its application, and e) discuss and formulate proposals on migration-related issues between both states. The treaties, for which provisional application is provided, are to enter into force by means of an exchange of instruments. Their duration is indefinite and provision is made for the possibility of denouncement and full or partial suspension for reasons of state security, public policy or public health, should the Parties so decide.

II. OBJECTIVES OF BILATERAL AGREEMENTS ON FOREIGN WORKERS

A. Organization of the labonr market and control of migratory flows

5. Although the content of these agreements focuses on migration for employment, they pursue very diverse aims. Some of these are of direct interest to Spain as a recipient of immigrants.

Indeed, immigration can counteract Spain's negative demographic trend and

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[12] The quotes refer (unless expressly stated) to the articles of the Agreement with Colombia, as it was the first to be concluded.

the imbalance this fall is causing in the labour market.[13] The concept of replacement immigration, coined by the United Nations Population Division in a recent report,[14] is in keeping with this idea, as is the "new approach to immigration" which inspires the European Union's nascent policy on this matter.[15] There is no doubt that the treaties concluded with Colombia, Ecuador, Morocco and the Dominican Republic share this approach.

For these purposes, the GRECO Programme, on the basis of certain analyses and studies on labour requirements in Spain – drawn up by the Permanent Immigration Observatory – sets out to quantify the need to fill job vacancies and establish an annual "quota for admitting nationals of third states, non-resident in Spain, for employment purposes". In one of the agreements examined, for each State Party "a list of job vacancies will be drawn up indicating the number of vacancies, professional sectors, necessary qualifications, geographical location where the vacancies have arisen and conditions".[16] This list of job vacancies will be sent, via the corresponding embassies, to the authorities of the other State Party, where candidates will be selected by means of a process conducted by the Spanish authorities (with the possible participation of employers or their representatives). Once the selection process has been completed, the workers will sign an employment contract, "the clauses of which must adapt to Spanish legislation". The Spanish consular authorities will process the visa and residence applications urgently (Arts 3 and 4).

6. The aforementioned provisions on the entry of migrant workers relate to a second objective of these treaties, which is also of interest to Spain: review of the policy of controlling migratory flows.

It is a fact that in recent years – in response partly to demographic trends and partly to the economic crises of the eighties – most, if not all, developed states

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[13] An OECD publication from the mid-eighties (1986) described this trend as follows: the developed industrial countries "are experiencing a birth-rate crisis that is leading to a standstill in the number of inhabitants and, in the case of many of them, lack of generational renewal. In quite a few of these countries the overall population is growing slowly and this trend will continue in coming years and the working population will remain practically stable during the same period. But this population is ageing progressively: as they grow old workers will be replaced less and less by younger elements as new generations will not be able to provide them". Translation of extract from OECD, *El futuro de las migraciones*, Madrid, MTAS, 1989, pp. 55–56.

[14] Population Division. Department of Economic and Social Affairs, *Replacement Migration: A Solution For Declining And Ageing Populations?*, ESA/P/WP.160, New York, United Nations, 21 March 2000. See Ph. Farine, "Démographie et immigration", *Migrations société*, vol. 12, n. 68, March–April 2000, pp. 3–6, which criticizes the Report very harshly (on account of its oversimplification).

[15] COM (2000) 757 final, paragraphs 1 and 3.2. On the origins and development of this policy, see, J. Martín y Pérez de Nanclares, *La inmigración y el asilo en la Unión Europea. Hacia un nuevo espacio de libertad, seguridad y justicia*, Madrid, COLEX, 2002.

[16] Greco Programme, paragraphs IV.1.2 and 3.

have chosen to close their frontiers and prevent migrant workers entering their national territories. This policy of closing frontiers was considered a deterrent to immigrants. Time has shown that this policy was mistaken, as there is no doubt that it has not prevented the entry of immigrants. Indeed, what is more, as C. de Wenden has pointed out, this policy is no longer legitimate in view of the various forms of mobility that have arisen and are based on human rights (political asylum), constitutional principles (reunification of families) or humanitarian concerns (temporary protection of displaced people).[17] Despite resorting to these formulas, clandestine – or irregular – immigration has not ceased to grow. Overwhelmed by this situation, Spain and other countries have resorted to regularization or amnesty measures. But the adoption of these special measures is not "an adequate response to labour market needs" and, inasmuch as it fosters illegal immigration, "plays into the hands of well organized traffickers and unscrupulous employers".[18]

The signing of treaties with Colombia, Ecuador, Morocco and the Dominican Republic marks an effort to "regulate existing migratory flows" from each of these states towards Spain "in an ordered and coordinated manner" (preamble). We have pointed out earlier that selected Colombian, Ecuadorian and Moroccan workers sign employment contracts under the supervision of the Spanish authorities. The Spanish authorities thereby undertake to provide the selected workers with the "relevant permits for remaining and working" in Spain (Art. 5). These two measures are designed to prevent the formation of clusters of immigrants in an irregular situation, whose presence is perhaps the receiving States' main cause for concern. Among other reasons, this is because, from an economic-social point of view, "foreign nationals in an irregular situation can perform low-paid jobs that become vacant as a result of the ban on immigrant workers", encouraging parallel labour markets and, consequently, new waves of clandestine emigration.[19]

No less significant with respect to shaping a correct policy of migratory flows are the provisions whereby the Parties undertake to readmit their own nationals who fail to meet the requirements for entering, remaining or residing in the country of destination (Art. 13), and other precepts providing for cooperation in the fight against "irregular immigration, exploitation and violation of social rights, documentary fraud and particularly the illegal trafficking in human beings" (Arts. 15 and 16).

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[17] C. Whitol de Wenden, "La nouvelle donné migratoire", *Migrations société*, vol. 13, n. 74, March–April 2001, pp. 33–37.

[18] COM (2000) 757 final, subparagraph 3.1.

[19] See OCDE, *The Future..., op .cit.*, pp. 27–29, which reports the concerns of the representatives of the Federal Republic of Germany, France, Turkey and Italy in this connection.

B. Establishing the working and social conditions of migrant workers and protecting their human rights.

7. The agreements Spain has concluded with Colombia, Ecuador, Morocco and the Dominican Republic include a chapter III entitled *Employment and social rights and conditions of migrant workers*. This chapter is very important both for the migrant workers themselves, who are the direct beneficiaries of its articles, and also for Spain, since, as is known, it is generally believed that respect for such rights is a means of fostering the integration of the foreign population and this integration, in turn, is the best guarantee of social peace.

Chapter III refers solely to the rights of migrant workers during the period of employment for which they have been recruited; therefore, in order to examine this question, it is necessary to refer first to international law and national laws. For example, the rights and freedoms of aliens as recognized by Law 8/2000 are fully applicable.[20]

Regarding regulation of the employment rights and conditions of migrant workers, it should be pointed out that the bilateral agreements examined in this paper establish two basic principles: the first is the principle of subjection to the laws of Spain as the country that employs them. In this respect the concept of law should be taken in its broadest sense as it embraces both formal laws and collective bargaining agreements applicable to the professional sector in which the work is to be performed and even applicable international agreements (for example, on social security matters) to which Spain is a Party. The principle of equality with Spanish nationals is the second of the basic principles governing these provisions (Art. 6).

Both principles extend to all aspects of employment: payment of migrant workers and other working conditions (e.g. working hours, resting periods, paid holidays...), social security contributions (Art. 7), obligations and enjoyment of social security benefits (Art. 8), and even settlement of differences arising between employers and migrant workers since, as article 9 states, these differences "shall be settled in accordance with current Spanish laws and bilateral treaties".

8. Special mention should be made of article 6.2 of the agreements, which recognizes the right of migrant workers "to reunite the members of their family unit entitled to this right under Spanish law". Spanish law considers family reunification to be the expression of man's fundamental right to a normal family,[21] and it is therefore guaranteed to all foreign nationals residing in Spain.

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[20] Title I: *Rights and freedoms of aliens* (Arts. 3–24).

[21] Article 16 LO 8/2000: "*Right to a private family life*: 1. Foreign residents are entitled to a private family life as established in this Organic Law and pursuant to the international Treaties signed by Spain. 2. Foreign nationals residing in Spain are entitled to be reunited with family members established in article 17 (...)". See also articles 17 (*Family members who may be reunified*), 18 (*Procedure for family reunification*) and 19 (*Effects of family reunification in special circumstances*).

This consideration undoubtedly fosters the full integration of foreign nationals into our society; however, this aspect would appear to contradict the logic of the bilateral agreements Spain has concluded on migrant workers, which portray immigration as "an enriching factor for both peoples", and accordingly encourage workers to return to their country of origin.

In this connection it should be remembered that international treaties and recommendations on this matter do not conceive the right to reunite families as an absolute right or one that must compulsorily be acknowledged by host countries. Indeed, far from it, the main instruments drawn up by the ILO on the rights of migrant workers merely recommend that governments adopt measures to encourage family reunification. In order to mitigate the consequences of this situation, these treaties establish as a right that must compulsorily be recognized the right of migrant workers to be able to visit their families during their annual paid holidays after at least one year of service or, alternatively, the right of family members to visit the workers for a similar period.[22]

The United Nations convention on the protection of migrant workers (1990), not yet in force, conceives the right to family reunification in the same way. According to article 44 of this agreement, the States Party "shall take appropriate measures to ensure the protection of the unity of the families of migrant workers", and to facilitate the reunification of migrant workers with "their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children".

As already pointed out, Spanish law recognizes foreign workers' right to family reunification. However, according to international regulations, such recognition is conditional: in order for foreign nationals to be able to request family reunification from the competent administrative authority, they must have "adequate accommodation and sufficient resources to support the needs of the family once it has been reunified", must have resided legally in Spain for one year and, third, must be authorized to reside there for at least another year (Art. 18.1 and 2 LO 8/2000).[23]

It may therefore be interpreted that the bilateral agreements in question recognize migrant workers' right to family reunification provided that the duration of the employment contract which has brought them to Spain is more than two years and under no circumstances less than 12 months, as otherwise

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[22] Art. 13 of the ILO Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (1975); and, particularly, paragraphs 13 to 19 of the ILO Recommendation on migrant workers (1975).

[23] Faithfully reflecting article 12 of the European Convention on the Legal Status of Migrant Workers, done at Strasbourg on 24 November 1977.

they would not fulfil the requirements for being able to apply for reunification.[24]

9. Just as important as regulating migrant workers' rights during the period the contract is in force is establishing the rights to which they are entitled during the periods prior to their leaving their country of origin and while travelling to their country of destination. The employment contract, a key instrument in regulating employment conditions in Spain, is even more important in this respect as it lays down a long list of guarantees designed to protect the future migrant worker from possible forms of exploitation. In general, it can be said that the bilateral agreements with Colombia, Ecuador, Morocco and the Dominican Republic establish different subjective rights of migrant workers even before they arrive in Spain: the right to be informed, before leaving their country of origin, of the general living and working conditions offered; the right to be hired either by public authorities or by an employer or private agency, though in the case of the latter prior authorization of a public authority is required; the right to assistance in completing the formalities required for departure; the right to undergo a medical examination; and the right to receive the necessary training to ensure the correct performance of future activities (Arts. 4 and 5). Finally, chapter V refers to the performance by both States Parties of a number of activities designed to facilitate the voluntary return of the migrant worker. It would thus seem that the right to return, the right to recognition of the professional experience acquired in Spain and the right to assistance in facilitating reintegration into the society of which they are nationals are envisaged as programmatic rights of migrant workers. In keeping with this idea, it might well be said that these workers, part of whose income has been sent as remittances, have continued to contribute to their own country's and household economy while residing in Spain.

C. Encouraging the economic and social development of the country of which the migrant workers is a national

10. The precaution of certain provisions designed to promote the return of migrant workers should be examined from a further perspective – as a means of protecting the interests of the country of origin. It is undoubtedly true that these workers, who have had the chance to train and gain professional experience abroad, can prove to be important development agents in their countries of origin. This is the view taken by the treaties in question, which provide for the coordinated adoption of measures to aid voluntary return. "To this end", as article 12 of the agreement with Colombia states, "measures shall be put in place

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[24] On this point, see M. Moya Escudero, "Derecho a la reagrupación familiar (Arts. 16, 17, 18 and 19)", in M. Moya Escudero (Coord.), *Comentario sistemático a la ley de extranjería (LO 4/2000* and *LO 8/2000)*, Granada, Comares, 2000, pp. 673–707.

to encourage the reintegration of migrant workers in Colombia with the added value the experience of emigration constitutes as a factor of economic, social and technological development. For this purpose the Parties shall foster the development of projects – using capital of their own and funds from international cooperation organizations – designed to encourage: the professional training of migrants and recognition of the professional experience gained in Spain; the promotion of the establishment of small and medium-size enterprises by migrants returning to Ecuador; and the creation of binational undertakings associating employers and workers (...)".

There is no doubt that in this respect the treaties concluded by Spain in 2001 are linked to the idea of joint development (co-development) advocated in 1997 by S. Naïr, senior official of the French government, whose general philosophy, for example, has been adopted by the European Community in the framework of its Mediterranean policy.[25]

The principles underpinning co-development policies are as follows: a) importance of controlling migratory flows as a guarantee of the social integration of immigrants, b) establishment of quotas of potential migrants as a means of organizing mobility and alternation, c) consideration of migrant workers as a possible development vector in their country of origin, d) shaping the process in a staggered manner and through bilateral agreements that take into account the specific features of the different source countries.[26]

From this viewpoint, the efficiency of the agreements examined in this paper will largely depend on the implementation of the treaties and, more specifically, on the adoption by the respective joint committees of modes of cooperation that are able to bring together the largest number and broadest variety possible of actors (NGOs, territorial groups, undertakings ...) from each state so as to enable migrant workers, for example, to orient "their savings to productive investments instead of sending them to cover the immediate expenses of their relatives living in their country of origin". Only in this way will their return be facilitated.[27]

In this respect, it should be recalled that the aforementioned trend is not unknown to Spain insofar as it is reflected in some aspects of Spanish development cooperation policy, which in recent years has focused on encouraging formulas of egalitarian, mutually beneficial bilateral cooperation on the basis of co-responsibility. This policy, based on the joint cooperation committees and funds, has been implemented since the mid-nineties and governs

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[25] C. Ramón Chornet, "Nuevas orientaciones de las políticas de cooperación y desarrollo de la Unión Europea: la propuesta del codesarrollo", *Cursos de Derecho internacional de Vitoria/Gasteiz 1998*, Madrid, Tecnos/UPV, 1999, pp. 145–173.

[26] S. Naïr, "La politique de codéveloppement liée aux flux migratoires", *Hommes & Migrations*, n. 1214, July–August 1998, pp. 47–57.

[27] F. J. Casas Álvarez, "Emigración, codesarrollo y cooperación para el desarrollo: reflexiones desde una óptica española", *Migraciones*, 8 (2000), pp. 101–126.

current Spanish cooperation with practically all the Latin American states. In other respects, relations with Morocco also reflect a policy of this kind.[28]

CLOSING REMARKS

11. The application of the bilateral agreements on foreign workers concluded by Spain with Colombia, Ecuador, Morocco and the Dominican Republic in 2001 is not without its difficulties. This paper has pointed out some of them. But perhaps the chief difficulty in achieving the wide-ranging objectives of the treaties analyzed is that these treaties do not deal with the full migratory cycle. The Agreement signed with Morocco (though also the other three) clearly illustrates this point. In order for a foreign policy on immigration to be effective it is important for it not to ignore the fact that this cycle, far from beginning on Moroccan territory, often begins in certain sub-Saharan African states, and Morocco is therefore merely a country of transit. The agreements examined fail to take this reality into account since, as pointed out earlier, their personal scope of application is limited to migrant workers who are "citizens (of the contracting States) authorized to engage in a remunerated activity on Spanish territory".

In any event, despite these implementation difficulties, it cannot be denied that the bilateral agreements concluded by Spain on migrant workers constitute an essential instrument for shaping a (necessary) government policy on inmigration. The importance of these agreements lies in what I consider to be their greatest virtue: their comprehensive and coordinated approach to the migration phenomenon in Spain; their broad view of all the related aspects; the fact they do not adopt only one perspective such as, for example, the control of flows, integration of foreign residents or co-development of the countries of origin; and their joint treatment of all these perspectives (LO 8/2000, preamble, paragraph one).

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[28] See Administrative Agreement concerning seasonal workers, 30 September 1999.