Protection of Habitats: A Presentation and Assessment of Spanish Practice

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Spanish Yearbook of International Law, Volume VI, 1998

I. INTRODUCTION

Global protection of the area in which an animal or vegetable species lives is one of the essential requirements of a coherent environmental policy. The conservation and protection of habitats therefore preserves biodiversity[1] as provided in the *Convention on Biological Diversity* adopted by the 1992 United Nations Conference on the Environment and Development (Rio Conference).[2] Within this framework, Spain holds an outstanding position in the European Union as the country with the greatest diversity of natural assets.[3] The figures speak for themselves: Spain is in 4 of the 6 biogeographical regions and possesses 54 per cent of the types of habitat classified as important to the Community in Appendix I of Council Directive 92/43/EEC of 21 May, *Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora*[4] (hereafter the *Habitats Directive);* it further contains 44 per cent of the priority habitats, 33 per cent of the flora and fauna taxa in Appendix II of the Directive, and 42 per cent of the species awarded priority status.

In the national lists of protected sites compiled under the Directive for the Natura 2000 Network, Spain is the country that has so far proposed the largest area to the European Commission, accounting for almost 25 per cent of the EC total: in all there are 809 sites with an aggregate area of 8.5 million ha. According to these figures, around 17 per cent of the Spanish national territory should be

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[1] The term "biodiversity" or "biological diversity" embraces genetic diversity, the diversity of species and the diversity of the ecosystems in which species exist or live – that is, their "habitats". There are many threats to biodiversity: pollution and other disturbances in natural habitats and species caused by economic development, fires, floods, erosion, urbanization, farming and other human activities.

[2] *BOE*, 1 February 1994. This was adopted by the European Community in a Council Decision of 25 October 1993 (*OJEC* L/1 309, 13 December 1993).

[3] The number of "taxa" (systematic classification of living beings, including all hierarchies: group, class, order, family, genus, species and subspecies) estimated for Spanish territory is "almost 80,000, making Spain the country responsible for the largest portion of diversity in the continent". Spanish Ministry of the Environment, *Actuaciones Públicas en Materia de Medio Ambiente*, 31 October 2000 (henceforth, MMA, *Actuaciones Públicas)*, p. 16 (see *http://www.mma.es)*.

[4] *OJEC* 206, 22 July 1992. See also Directive 97/62/EC, 27 October, adapting scientific and technical progress in Directive 92/43/EEC (*OJEC* 305, 8 November 1997). In this context, almost all the types of habitat in Appendix 1 derive from the classification compiled in the course of the *Coordination, Information and Environment* (CORINE) environmental programme, approved by Council Decision 85/338/EEC, 27 July (OJEC L 176, 6 July 1885) and set forth in the *Biotope Project/CORINE Standard Manual*, 19 March 1988. Note that its considerable biological diversity qualifies Spain for the Alpine, Atlantic, Mediterranean and Macronesian regions, but not for the Continental and Boreal regions.

subject to conservation measures and initiatives designed to maintain its natural assets, habitats and plant and animal species.[5]

On top of this, the sources of environmental regulation in Spain are highly complex.[6] In terms of the formal source of regulatory provisions, such instruments fall into three theoretically autonomous blocks. One consists of the international treaties to which the Spanish state is a party. Another is the EC regulations, which apply to Spain as a member of the European Union. The third consists of internal Spanish statutes, where environmental regulations are present at all levels due to the distribution of competences among the different levels of government (state, regional and local). Environmental law is thus an outcome of interaction among different kinds of regulation –international, EC and internal.[7]

This situation highlights the importance of Spanish practice as regards protection of natural assets, particularly natural habitats and species.[8] In order to provide a picture of this body of regulations, we propose a brief review of the programmes and the international treaties applying to the protection of Spanish habitats.[9] Similarly, we propose a number of specific commentaries to illustrate the EC regulations and jurisprudence in this respect and to explain Spain's particular position as regards their application. Finally, we shall give an overview of Spanish legislative and judicial practice regarding the protection and conservation of habitats – the central point of this study – and the administrative planning instruments existing for that purpose.

II. SPAIN AND INTERNATIONAL PROTECTION OF HABITATS

1. From a conservationist to an integrative approach

The legal rules governing the protection and conservation of nature have developed in the same way as in all other areas of International Law regarding

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[5] Ministerio de Medio Ambiente de España, Dirección General de Conservación de la Naturaleza (DGCN), *(Informe 1999 sobre el Desarrollo de la Directiva Hábitats 92/43/CEE)* (hereafter, DGCN, *Informe 1999*), p. 2.

[6] Fernández de Casadevante Romani was already stressing and analysing these problems. See C. Fernández de Casadevante Romani, "La protección internacional del medio ambiente", *Cursos de Derecho Internacional de Vitoria-Gasteiz* (1988), 149–315, pp. 256–257.

[7] See section IV.1.C *infra*.

[8] The Community legislator innovates in distinguishing two categories of natural space susceptible of protection. On the one hand, States should promote the protection of the "natural habitats" listed in Annex I. And on the other hand, States should assure the conservation of the "habitats" of certain animal and plant species of interest to the Community", listed in Annex II. See Annexes I and II, *Habitats Directive*.

[9] The practice cited refers to both land and marine areas, but the article deals essentially with the protection and conservation of land habitats.

the environment.[10] The 1972 United Nations Conference on the Human Environment (Stockholm Conference) marked the beginning of a series of initiatives in the sphere of universal and regional international organizations to address international cooperation for the protection and general improvement of the environment. Nature protection in particular has gradually evolved from an exclusively conservationist to a more broad-based approach. The basic purpose of regulation has been to provide legal protection for certain species inhabiting certain areas. At the outset, protection consisted in isolating designated habitats and species from any human activity in protected areas; the next stage was to gradually promote the integration of protected species with the other components of a shared ecosystem, an approach which culminated in the protection and conservation of biological diversity as a whole. This new approach calls for the sustainable utilization of biological diversity. It also addresses the need to secure the economic development of states and see that they receive a fair and equitable share in the benefits derived from the exploration and exploitation of these resources.[11]

The international instruments dealing with the creation of specially protected areas include the first instance in which Spain was party to a treaty on the environment. This was the *Convention on the Conservation of Fauna and Flora in a Natural State,* London, 8 November 1933, with a Protocol bearing the same date and place. Both were ratified by Spain on 19 July 1936,[12] one week before

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[10] As regards this development, Juste Ruiz points out that over time international environmental law has entered an "expansive phase" resulting in "progressive expansion beyond its original boundaries". In connection with the conventional methodology used, Professor Juste Ruiz highlights "three outstanding features": "conventional asymmetry" produced by diversification of the parties' obligations and rights, the "reality" of commitments, and the "continuity" of the process through the drafting of framework conventions subsequently supplemented by series of protocols. J. Juste Ruiz, "La evolución del Derecho internacional del medio ambiente", in *Hacia un nuevo orden internacional y europeo. Estudios en homenaje al Profesor Manuel Díez de Velasco*, Madrid, 1993, 397–413, p. 402 and 407. See also, A. Ch. Kiss, "Nouvelles tendances en droit international de l'environnement", *GYIL*, vol. 32 (1989), 241–263, pp. 259–263.

[11] Art. 1, *Convention on Biological Diversity* (see note 2 *supra* and section II.2.A.b *infra*). For developments in the protection of species, see P. Van Heijnsbergen, *International Legal Protection of Wild Fauna and Flora,* Amsterdam/Berlin/Oxford/Tokyo/ Washington, 1997, pp. 51–52 and M. C. Maffei, "Evolving Trends in the International Protection of Species", *GYIL*, vol. 36 (1993), 131–186, pp. 134–148.

[12] *Gaceta de Madrid,* 25 July 1936. The approach to nature protection in article 45.2 of the Spanish Constitution of the Second Republic of 1931 is similar to that of the London Convention. This article declares that "the state shall also protect places of outstanding natural beauty or of acknowledged artistic or historical value". That Constitution viewed nature as a static entity whose preservation simply required measures to guarantee its survival as a series of landscape or natural areas of particular aesthetic merit. The protective measures proposed did not therefore call for a global

the start of the Civil War of 1936–39; the letter of ratification was deposited on 13 July 1950, fourteen years later, and came into force three months thereafter.[13] This Convention obliges the signatory states to set up national parks and other protected spaces in Africa, and to protect their flora and fauna. Today, the treaty is of little more than historical interest for Spain since its colonies are now independent, and the treaty is applicable only to the Autonomous Cities of Ceuta and Melilla.[14]

In a second phase characterized by an integrative approach, Spain signed the vast majority of the treaties embodying international protection in this respect. It first acceded, in 1955, to the *Convention for the Protection of Birds Useful to Agriculture*, Paris, 18 October 1950,[15] which besides promoting the total defence of species in danger of extinction or of scientific interest, protects all avian species at least during their breeding period, and likewise migratory birds while returning to their nesting places. Hence, in order for the Convention to be effective, an internal legal base is required to guarantee the protection of ecosystems which provide a food chain and habitat for migratory birds. In the case of Spain, accession to the Convention is significant in that when the

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defence of nature and sought only to prevent changes in certain aspects of the rural environment. A. E. Pérez Luño, "Articulo 45: medio ambiente", in O. Alzaga Villaamil, *Comentarios de la Constitución española de 1978*, vol. IV, Madrid, 1998, 237–279, p. 250. For the position of the current Spanish Constitution, see section IV.1 *infra*.

[13] In 1933 Spain participated in the Conference for the Protection of Fauna and Flora in Africa at the invitation of the United Kingdom, following the recommendations of the International Congress for the Protection of Nature, held in Paris in 1931. The London Convention was drawn up and signed at that Conference. I. Rodríguez Muñoz and R. Ortega Domínguez, *Tratados internacionales sobre medio ambiente suscritos por España*, Ministerio de Obras Públicas y Transportes (MOPT), 1993, p. 23.

[14] *Ibid.* For the regulatory framework applying to cross-border cooperation on environment protection between the cited Spanish cities in Africa and neighbouring Morocco, see the *Spanish-Moroccan Treaty of Friendship. Good Neighbourship and Cooperation*, 4 July 1991, especially article 6.b (*BOE*, 26 February 1993). Spain also concluded a *Treaty of Friendship. Good Neighbourship and Cooperation* with the Republic of Tunisia on 27 October 1995 (*BOE*, 9 January 1997). As regards the other countries in the region, the London Convention was replaced by the *African convention for the conservation of nature and natural resources*, Algiers 15 September 1968, under the auspices of the OAU, and supplemented by the *Protocol on Protected zones and wild fauna and flora in East Africa* of 1985. F. Mariño Menéndez, "La protección internacional del medio ambiente (II): regímenes particulares", in M. Díez de Velasco, *Instituciones de Derecho Internacional Público*, 13th ed., Madrid, 2001, Ch. XXXII, 660–683, p. 674.

[15] The 1950 Convention replaced the *Convention for protection of birds useful to agriculture*, Paris, 1902. The Convention reflects the ideas of a time in which nature protection was addressed by conservation methods based on the "utility of the protected species" – in the case in point, birds useful for agriculture. The importance of this ratification lies in Spain's geographical situation on one of the main natural routes for bird migration (*BOE*, 13 September 1955).

Convention came into force in 1963, the country had no Constitution. At that time, Spain was governed by the so-called "fundamental laws" of the State born on 18 July 1936.[16]

The London and Paris Conventions lack legal means of monitoring and control. Again, both Conventions lack institutions of their own (Conference of Parties, Secretariat and Subsidiary Organs, etc.) and possess no means of financing. This regulatory and institutional lacuna is one of the reasons why they are ineffective as treaties.[17]

2. Developments since the Constitution of 1978

A) Universally

a) International cooperation for the protection of habitats

Focusing on the conservation of specially protected areas, Spain is a signatory of the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention)*, Ramsar, 2 February 1971,[18] and the Amending Protocol, Paris 3 December 1982,[19] which are intended to foster the conservation of an invaluable resource by establishing nature reserves in wetlands. Recognizing that migrating waterfowl cross frontiers, the Convention classifies such species as "international resources", which means that no state may freely use them even if they are in its territory.[20] This approach is clearly a qualitative step forward in the protection of species.[21]

These two instruments likewise represent an advance on the road to international cooperation for the protection of habitats, in that the Parties acquire the obligation to coordinate and actively support policies and

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[16] The Spanish Constitution dates back to 27 December 1978 (*BOE*, 29 December 1978). The period prior to the 1978 Constitution was characterized by the construction of large reservoirs throughout the country and by the drying-up of more than half of all natural lagoons and marshes, in the mistaken belief that such areas were useless and unhealthy. As a result, wetlands were the ecosystems that suffered most aggression from human intervention in Spain. See sections IV.2.B and C *infra* and note 158 *infra*.

[17] In this connection, see C. de Klemm, "Voyage à l'intérieur des conventions intemationales de protection de la nature", in *Les hommes et l'environnement. Quels droits pour le vingt-et-unième siècle? Études en hommage à Alexandre Kiss*, Paris, 1998, 611–652, pp. 611–614.

[18] *BOE*, 20 August 1982.

[19] *BOE*, 14 July 1987.

[20] Ramsar Convention, Preamble, paragraphs one and five.

[21] A. Ch. Kiss, "La protection internationale de la vie sauvage", *AFDI*, t. XXVI (1980), 661–686, p. 686.

regulations for the conservation of wetlands and their flora and fauna.[22] The Convention does not state what measures the Parties may adopt for conservation, but it does provide that the Parties will convene conferences on the subject whenever they deem it necessary. Moreover, the Convention includes its own institutions and sources of funding.

The *Ramsar Convention* also obligates signatory states to draw up and present a List of Wetlands subject to established criteria. Moreover, the parties must designate at least one wetland in the instrument of accession to the Convention.[23] The content of such lists may be discussed at the Conferences of Parties, which will be empowered to promote additions and changes. This formula, which enables the Convention organization to exercise control over state lists, will be incorporated in future instruments for the protection of species and habitats.

At the 1996 Brisbane meeting, which Spain attended, the Conference of Parties drew up a strategic plan with a list of actions for the period 1997–2002. This was the first time that the Parties and Organs of a convention on the protection of habitats were equipped with an instrument of this kind. Under the new framework, there is intensified international control with respect to compliance with the *Ramsar Convention,* for which there is now also a Permanent Office. Control consists in analysing the information furnished by the Party States in the Lists of Wetlands, regular inspection of the state of wetlands, and where necessary the dispatch of technical missions subject to acceptance by the investigated state. Finally, the recommendations deriving from

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[22] International cooperation as a postulate of the general duty of States to protect the environment is enshrined in the *Stockholm Declaration on the Human Environment* (Principle 24, Doc. A/Conf.48/14 and Corr. 1) and is addressed in several documents [see Preamble and Principle 21 of the *World Nature Charter,* AG. Res. 37/3, 28 October 1982. Doc. A/37/51 (1982)] and Principle 7 of the *Rio Declaration on the Environment and Development* [U.N. Doc. A/CONF.115/5 and I.L.M., vol. XXXI (1992–4), 874–880, p. 879]. The specific elements of this principle include not only the duty to promote treaties and other international instruments for this purpose, but also the duty to exchange information relating to the protection of the environment, to undertake other initiatives to that end, and the duty of States to notify other States and offer assistance in situations where there is a risk of environmental damage. The *Ramsar Convention* may therefore be seen as one of the first international treaties to incorporate that principle.

[23] Art. 2.4 of the Convention. Spain has added the following wetlands to its original List: Tablas de Daimiel National Park, Doñana National Park and Laguna de Fuente de Piedra (A. Troya and M. Bernues (Eds.), *Humedales españoles en la lista del Convenio de Ramsar,* ICONA, Madrid, 1990). By the year 2000, 115 States had acceded to the Ramsar Convention, and 970 wetland areas totalling 70 million hectares had been declared of international importance. Spain has added to the Ramsar Wetlands List a total of 38 zones covering a total of 158,288 hectares. These are classified by Autonomous Communities, and most of them have been declared "Special zones for protection of birds" (SZPBs) (see section III.1.A *infra*). MMA, *Actuaciones Públicas,* p. 21.

this control are presented to the Conference of Parties and the investigated state.[24]

It is significant that Spain should have acceded to the *Ramsar Convention* in 1982, a time at which we now had the Constitution of 1978 and there was nascent but growing awareness of ecological issues, so that we were more prepared to accept international commitments entailing stricter demands for the protection of environmental resources. The protection of wetlands in Spain currently comes under a "Strategic Plan for Conservation and Rational Use of Wetlands within the Framework of the Aquatic Systems on which they Depend", drawn up by the Ministry of the Environment as part of the Spanish Strategy for the Conservation and Sustainable Use of Biological Diversity, 1998.[25]

Again in 1982, Spain acceded to the *Convention for the Protection of the World Cultural and Natural Heritage*, Paris, 23 November 1972, which urges states to adopt, as far as possible, "appropriate legal, scientific, technical, administrative and financial measures" to preserve their heritage.[26] This Convention recognizes cultural and natural assets as a universal heritage for whose protection the international community is bound to cooperate. To achieve this goal, the Convention coined the notion of a "world human heritage" for certain cultural and natural assets of exceptional interest warranting their conservation as they are.[27] It further promoted the creation

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[24] The functions of the Ramsar permanent office include the following: to act as depositary of Wetland Lists, to receive information from Parties on any changes in the ecological conditions of registered wetlands, to pass on to interested Parties the recommendations of conferences on the Wetland Lists, and to assist in the convening and organization of the Conferences (arts. 6 and 8.2 of the Convention). Sec C. de Klemm, "Voyage à l'intérieur des conventions internationales...", *loc. cit.*, pp. 645 and 649.

[25] See section IV.2.C *infra*. The Strategy is the general framework indicating the guidelines to be followed by future sector plans and specific programmes for conservation of biodiversity, and also the measures to be instituted by the various Spanish public authorities concerned – Spanish Environment Ministry, Department of Nature Control, Spanish strategy for conservation and sustainable use of biological diversity, 1998 (hereafter, DGCN, Spanish biodiversity strategy). See in particular, "El estado actual de los instrumentos para la conservación de los humedales", 48–73, pp. 60–73 and "Humedales de Ramsar", pp. 70 and 97.

[26] *BOE*, 1 July 1982. The Convention takes up the idea, developed in the 1930s and consolidated in national legislation in the 1970s, of comparing landscapes and other elements of nature with man-made historical and artistic assets. Thus, a new need arises – to protect nature in the same way as only man's historical heritage had been protected hitherto (see art. 45.2 of the Spanish Constitution of 1931, note 12 *supra*). For that purpose, the Seventeenth Meeting of the UNESCO General Conference adopted the Convention in question in 1972.

[27] Each participating State will submit an inventory of items of cultural and natural heritage located in their territories to the World Heritage Committee, which is dependent on UNESCO. This inventory will not be exhaustive and will contain documents indicating where these assets are situated and their points of interest. It will also be used to compile a list of the World Heritage and another list of the Endangered World Heritage, to be reviewed every two years. *Ibid.* See note 179 *infra*.

of funds for such conservation, another major advance which made it possible to draw up protection plans.[28]

More conventions followed in the wake of the Stockholm Conference. The *Convention on the Conservation of Migratory Species of Wild Animals*, Bonn, 23 July 1979, extended the protection of such animals to the totality of land or water areas that they inhabit, frequent or traverse in the course of their habitual migratory pattern. This is a framework convention containing provisions which have to be implemented by the parties in other supplementary agreements.[29]

The advances attained in this Convention are a good example of the state of constant evolution in international protection of the environment. This is further borne out by the fact that the Convention follows the line of Ramsar – that is, protected species are treated as constituting a whole irrespective of political frontiers. They are thus recognized as a cross-border resource, and as such, states are obligated to cooperate to protect them and to conserve the environment where they live.[30] Spain ratified the Convention ten years after its conclusion, in 1985, This further confirms the assertion that in the years following the Constitution of 1978, a framework came into being which propitiated the acceptance of international cooperation for the protection of habitats and development of the concepts of "protected species" and "habitats".[31]

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[28] For the conservation of nature as a part of world heritage, and of species and habitats in particular, see A. Ch. Kiss, "La notion de patrimoine commun de l'humanité", *Recueil des Cours*, t. 175 (1982), 99–256, pp. 175–176 and A. Blanc Altemir, *El patrimonio común de la humanidad. Hacia un régimen jurídico intemacional para su gestión*, Barcelona, 1992, pp. 170– 175 and 178–189.

[29] *BOE*, 29 October 1985, with corrections in *BOE*, 11 December 1985. The amendments and corrections of errors were published in *BOE*, 11 February 1987, 7 April 1987, 19 September 1990. For Appendices I and II of the Convention incorporating amendments by the Conference of Parties in 1985, 1988, 1991, 1994, 1997 and 1999: *BOE*, 10 February 2000. It was approved on behalf of the EEC by Council Decision of 24 June 1982 (*OJEC* L 210, 19 June 1982; EE 15/03, p. 215).

[30] Preamble, paragraphs four, five and six of the *Bonn Convention*. *Ibid.* The commitments negotiated within the framework of that Convention included the *Agreement on the Conservation of Migratory Waterbirds of Africa and Eurasia* of 1995, ratified by Spain on 12 March 1999 and the *Agreement on the Conservation of Cetaceans in the Black Sea, the Mediterranean Sea and Contiguous Atlantic Area*, 1996, ratified by Spain on 2 February 1999. See MMA, *Actuaciones Públicas*, p. 6 and *BOE*, 11 December 2001. On species as cross-border resources, see A. Ch. Kiss, "La protection internationale de la vie sauvage", *loc. cit.*, p. 680 and C. Fernández de Casadevante Romani, *La protección del medio ambiente en Derecho internacional, Derecho comunitario europeo y Derecho español*, Vitoria-Gasteiz, 1991, pp. 237–245, especially 244–245.

[31] In the treaties by which Spain is bound, there are also examples of supplementary conservation measures *ex situ*. One such is the *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, Washington, 3 February 1973, to which Spain acceded in 1986. This convention promotes the protection of wild species of flora and fauna by means of international trade regulations; in other words,

b) The universal duty to protect habitats

Spain has also ratified the *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982.[32] Article 192 of this Convention establishes protection of the environment as a universal duty, one of the fundamental principles of international law on the environment. This is a general provision and applies to all sectors of the environment in all spaces, whether governed by particular states or not subject to any territorial governance,[33] and it therefore has a proper place in any study of the protection and conservation of land habitats. With regard to the subject of international protection of nature, the Convention addresses the problem of habitats through provisions which urge the Parties to take all necessary steps to protect and preserve rare or vulnerable ecosystems, and likewise the habitats of marine species and other life forms which are decimated, threatened or endangered.[34]

In addition, the *Convention on the Law of the Sea* is still the only treaty which actually creates a universally-applicable *ad hoc* settlement system on a jurisdictional basis,[35] and to that end the International Tribunal for the Law

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trade is only allowed in specimens where this does not threaten the survival of the species concerned (*BOE*, 30 July 1986 and 10 August 1991). For amendments to Appendices I, II and III approved at the Tenth Meeting of the Conference of Parties at Harabe, 1997 (*BOE*, 13 April 1998). The EEC had previously signed and adopted this Convention by virtue of EEC Regulation 3626/82,3 December 1982 (*OJEC* L 384, 31 December 1982). At Community level, the applicable regulation is CITES 338/97, 9 December 1996, governing the protection of species of flora and fauna by means of trade control. This was amended by regulation (EC) 939/97, 26 May (*OJEC* L 140, 30 May 1997) and also partially amended by Regulation (EC) 2307/97, 18 November (*OJEC* L 325, 27 November 1997).

[32] *BOE*, 14 February 1997.

[33] J. Juste Ruiz, *Derecho Internacional del Medio Ambiente*, Madrid, 1999, p. 69.

[34] Art. 194.5. of the Convention. With respect to the provisions dealing with the exploitation and conservation of species, particularly certain groups of species such as marine mammals or anadromous, catadromous and sedentary species, the clause providing for an exclusive economic zone where exploitation is permitted is not applicable until optimum utilization of the species is achieved. Arts. 63–68, 116 b) and 120. *Ibid.*

[35] The Convention constitutes a major step forward from preceding treaties as regards the peaceful settlement of disputes in order to guarantee the integrity of the terms, control of their application and implementation by the parties. The system involved is based on the free choice of means and allows for compulsory settlement procedures through the courts (arts. 279–299 and Appendices V–VIII of the Convention). See V. Carreño Gualde, "El arreglo pacifico de las controversias internacionales en el ámbito de la protección del medio marino contra la contaminación", *ADI*, vol. XVI (2000), 39–64, pp. 53–59.

of the Sea (ITLOS) was created.[36] Like the ICJ, acceptance of its jurisdiction is not compulsory, and Spain, as a signatory state, has not yet accepted it.[37]

Following on the United Nations Conference on the Environment and Development (Rio Conference), Spain was a party to various documents,[38] including the *Rio Declaration on the Environment and Development* (*Rio Declaration*) of 14 June 1992, principle seven of which asserts that "states must cooperate in a spirit of world-wide solidarity to conserve, protect and restore the health and integrity of the Earth's ecosystems". Principle seven also includes a new concept of shared but differentiated responsibility of states for the degradation of the world environment.[39]

Another principle enshrined in the *Rio Declaration* is that of "sustainable development", which links the right of development to the exercise of that right in a manner "that equitably meets the developmental and environmental needs of present and future generations".[40] Programme 21, a document containing a comprehensive study of the subject and adopted by the Conference, lays down a plan of action designed to achieve sustainable development.[41] The four sections

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[36] Statute in Appendix VI of the Convention.

[37] For relevant comments, see J. A. Pastor Ridruejo, "La solución de controversias en la III Conferencia de las Naciones Unidas sobre el Derecho del Mar", *REDI*, vol. XXX (1977), 11–32, pp. 13–30 and R. M. Riquelme Cortado, "El arreglo pacífico de controversias internacionales, con especial referencia a la política convencional española", *Cursos de Derecho Internacional de Vitoria-Gasteiz* (1998), 213–313, pp. 298–300.

[38] Addressing the General Assembly on 5 November 1992, Ambassador Yáñez Barnuevo, the Spanish Representative at the UN, declared that Spain "is prepared to contribute in the most effective way possible to the practical application of the agreements arrived at in Rio. The first step, nationally, was the setting up of an interministerial Committee in which the various departments are represented. The Committee has already begun its work of following up and implementing the agreements reached at the Conference as far as Spain's participation is concerned". UN Doc. A/47/PV.58, pp. 51–52. See "Spanish Diplomatic and Parliamentary Practice", *SYIL*, vol. II (1992), pp. 179–180. The Spanish strategy for biodiversity is the principal direct outcome of the work of the interministerial committee referred to. See note 25 *supra*.

[39] Principle 7 paragraph two states that "since they have contributed to different extents to the degradation of the world environment, States have common but differentiated obligations. The developed countries acknowledge the responsibility that rests with them in an international quest for sustainable development, in view of the pressures that their societies exert upon the world environment and of the technologies and financial resources that they possess". See note 22 *supra* and *Rapport de la Conférence des Nations Unies sur l'environnement et le Développement, vol. I, Resolutions adoptées por la Conférence* (Rio de Janeiro, 2–14 June 1992), 3 vols, New York, 1993.

[40] Principle 3. *Ibid.*

[41] U.N. Doc. A/CONF. 151/26/Rev.1 (Vol. I). Although like other soft law documents these instruments are not legally binding on States, they possess an undeniable political value and in practice are essential elements in the development of regulations on the subject.

into which Programme 21 is divided analyse issues which directly or indirectly affect the conservation and protection of biological diversity: the social and economic dimensions of the relationship between the environment and development, guidelines for the conservation and management of resources for development, reinforcement of the role of the involved parties, and lastly, the means required to ensure their implementation.[42]

We should not forget that Spain ratified the United Nations Framework Conventions on nature conservation that emerged from the Rio Conference: the *Convention on Biological Diversity* of 5 June 1992[43] and the *United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa*, of 17 June 1994.[44] The *Convention on Biological Diversity* establishes types of conservation along the lines laid down by the *World Conservation Strategy*. On the subject of protection of habitats, we would draw attention to the Parties undertaking to set up a system of protected areas, to draw up directives for the selection of such areas, to protect ecosystems, to promote the development of zones adjacent to protected areas with varying degrees of protection, and to cooperate in financing conservation, particularly where this involves developing countries.[45]

It is worth noting that the *Convention on Biological Diversity* was a culmination of rather than a substitute for sector or regional treaties on protection of species and habitats.[46] Consequently, every Conference of Parties

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[42] Chapter 15 deals exclusively with the protection of biological diversity. See note 1 *supra*. The implementation of this programme was analysed by the UN General Assembly in a special session on 23–27 June 1997 (GA. Res. 51/181 20 January 1997). Another evaluation session is scheduled for the year 2002 (GA. Res. S-19/2 19 September 1997).

[43] See note 2 *supra*. On the relationship between the approaches adopted to biological diversity and protection of ecosystems, see M. C. Maffei, "The relationship between the Convention on Biological Diversity and the other International Treaties on the Protection of Wildlife", *ADI*, vol. XI (1995), 129–169, pp. 157–158.

[44] *BOE*, 11 February 1997. The Conference further proposed the drafting of a Forestry Convention, which is still pending, to include the "International Programme of Cooperation for Sampling and Evaluation of the Effects of Atmospheric Pollution on Forests" (ICP/Forest).

[45] Arts. 8 and 9.d, *Ibid.* However, the Convention contains no list of areas to be protected. In the course of negotiations on the Convention it was mooted that "there should be caution in the development of Global Lists, because such a list has the potential to undermine areas not on the list". Annex I to the *Report of the "Ad Hoc" Working Group on the Work of its Third Session in Preparation for a Legal Instrument on Biological Diversity on the Planet*, Doc. UNEP/Bio.Div. 3/12 of 13 August 1990.

[46] Article 22 of the convention states generally that its provisions "do not affect the rights and obligations of every Contracting Party arising out of any existing international agreement, except where the exercise of such rights and the fulfilment of such obligations may seriously harm or endanger biological diversity". This position differs from that of the Convention on Maritime Law (art. 311.1) as it relates to the Geneva Conventions of 29 April1958.

to protection conventions has full autonomy to set out guidelines for its own work. In our own case, a *Spanish strategy for biodiversity* has been set in motion to mitigate the internal consequences of this situation and to catalyse Spain's position in these international forums.[47]

Finally, as regards the settlement of disputes, the *Convention on Biological Diversity* provides for a system based on the free choice of means, which includes the option of jurisdictional procedures.[48] This clause provides for optional jurisdiction of the ICJ; it is not widely accepted and has not been applied in practice.[49] At all events, a dispute can always be settled by opting for ICJ intervention through the channels provided in the terms of the ICJ Statute.[50] In this connection, it is worth noting that Spain accepted mandatory jurisdiction of the ICJ in 1990.[51]

B) In Europe

Regionally,[52] the Council of Europe promoted the action of states through the Declaration of the European Nature Year in 1970, One consequence of that Declaration was the *Convention on the Conservation of European Wildlife and Natural Habitats,* Berne, 19 September 1979.[53] This treaty, which Spain has ratified, adopts the view that conservation of natural habitats is one of the most

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[47] See notes 25 and 38 *supra.*

[48] Art. 27 and Appendix II (arbitration and conciliation), *Convention on Biological Diversity.*

[49] Art. 27.3.b). *Ibid.* Of the 174 Parties to the Convention, only Austria, Cuba, Georgia and Latvia accepted this procedure for the settlement of disputes.

[50] Given that the aspiration to create a special jurisdiction in respect of environmental protection generally has yet to be realized, it is important to note that in 1993 the ICJ inaugurated a permanent special Section devoted to the environment, as provided in its Statutes (art. 26.2). R. M. Riquelme Cortado, "Constitución por la CIJ de una Sala especializada en medio ambiente", *REDI,* vol. XLVI (1994), 895–899, pp. 897–898.

[51] *BOE,* 6 November 1990. See J. A. Pastor Ridruejo, "The Spanish Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice", *SYIL,* vol. I (1991), 19–34, pp. 25–32.

[52] For the conventions concluded by Spain in the sphere of bilateral relations with neighbouring states, see C. Fernández de Casadevante Romani, *La protección del medio ambiente en Derecho internacional, Derecho comunitario europeo y Derecho español, op. cit,* pp. 321–329, "La protección internacional del medio ambiente", *loc. cit,* pp. 306–313 and "La cooperación transfronteriza: su aplicación a las ciudades de soberanía", in I. García Rodríguez (Ed.), *Las ciudades de soberanía española: respuesta para una sociedad multicultural,* Alcalá de Henares, 1999, 131–152, p. 140.

[53] *BOE,* 1 October 1986, 7 June and 5 December 1988. For the treaty signed on 5 May 1997, listing the endemic species of Canary Islands flora proposed by Spain for inclusion in Appendix I (*BOE,* 25 May 1997), and the amendments to Appendices I and II, which should be included in Appendix I of the Convention (*BOE,* 7 June 1997). The Community acceded to the *Berne Convention* by Council Decision of 3 December 1981 (*OJEC* L 38, 10 February 1982).

important factors for the protection and conservation of wild flora and fauna.[54] Hence, the object of the Convention is to guarantee the conservation of habitats and to foster the cooperation of the Parties to that end, which again clearly reflects the fundamental principle whereby all states have a duty to promote environmental protection. It also devotes particular attention to threatened and vulnerable species, including the migratory species listed in its appendices.[55] To that end the Convention adopts the course of creating categories of obligation, whether or not a species is in danger of extinction.[56] Bern also allows for the accession of non-European countries to the Convention, thus reinforcing the argument that migratory species, and by extension their habitats, should be classified as "international resources".[57]

Following on the guidelines laid down by the Rio Conference, the United

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[54] For species and habitats targeted for conservation, see Appendices I–III of the Convention. See also comments on the *Berne Convention* in the Conclusions of Attorney General Walter Van Gerven, presented on 5 December 1990 (ECCJ, Case C-57/89, Commission v. German F.R.), *Rec.* I (1991–2), pp. I-907–908.

[55] *See* arts. 1 and 10, and Appendices II and III of the Convention.

[56] Outwith the sphere of land habitats, Spain is a party to a number of important regional treaties applying to marine habitats. These include the Instrument of Spanish Ratification of the *Protocol on Specially Protected Areas and Biological Diversity in the Mediterranean* and its appendices, adopted respectively in Barcelona on 10 June 1995 and in Monte Carlo on 24 November 1996 (*BOE*, 18 December 1999). See also Council Decision 99/800/EC of 22 October 1999, on conclusion of this protocol, and the acceptance of the related appendices *OJEC* L 322, 14 December 1999. For Spanish doctrine, see V. Carreño Gualde, *La protección internacional del medio marino mediterráneo,* Madrid, 1999, 89–149, V. Bou Franch, "Hacia la integración del medio ambiente y el desarrollo sostenible en la región mediterránea", *ADI*, vol. XII, 201–251, pp. 230–234 and 237–242, and V. Bou Franch and M. Badenes Casino, "La protección internacional de zonas y especies en la región mediterránea", *ibid*, vol. XIII (1997), 33–130, pp. 72–85. Again regarding regional treaties, Spain has ratified the *Antarctic Treaty,* Washington, 1 December 1959 (*BOE*, 26 June 1992). This treaty has provided the framework for promotion of the *Convention on the Conservation of Antarctic Marine Living Resources,* (CCAMLR) Canberra, 20 May 1980 (*BOE*, 25 May 1985) and the *Protocol on Environmental Protection to the Antarctic Treaty* (Madrid Protocol), Madrid, 4 October 1991 (*BOE*, 18 February 1998). Also, in 1994 Spain ratified the *Oslo and Paris Convention for the Protection of the Marine Environment of the North-East Atlantic* (OSPAR), Oslo-Paris, 22 July 1992, on protection of the North West Atlantic marine environment, protocol V of which, on biodiversity, was signed in 1998 (*BOE*, 24 June 1998). See MMA, *Actuaciones Públicas,* p. 4 and J. Juste Ruiz, *op. cit.*, pp. 240–257 and "La Convention pour la protection du milieu marin de l'Atlantique Nord-Est", *RGDIP*, t. 97 (1993), 365–393, pp. 369–382. Readers will not require an exhaustive list to realize the importance and the significance of this.

[57] Senegal (since 13 April1987) and Burkina Faso (since 14 June 1990) are Parties to the Convention. Other international instruments have also used this model. For example, *the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean* is not limited to the Mediterranean region, nor is it exclusively binding on its signatories. The purpose of its provisions is to protect endangered or threatened species throughout the territory in which they make their lives.

Nations Economic Commission for Europe organized the Sofia Conference on 25 October 1995. There, the Environment Ministers of 49 countries from Europe, North America and Central Asia, together with the representatives of the European Commission, Australia, Japan and Mexico, adopted the *Strategie Paneuropéenne de la Diversité Biologique et Paysagère,* to be implemented over twenty years (1996-2016). The objectives there defined include conservation and rehabilitation of the principal ecosystems and habitats of the region. Spain is a member of Geographical Group,[58] and the tasks allotted to it fit in perfectly with the guidelines of the *Spanish Strategy for Biodiversity.*[59]

III. COMMUNITY ACTION

1. Community regulations

A) The Birds Directive

The protection of species and habitats is a good example of the interdependence between international and Community statutes.[60] Within the Community context, protection of habitats is addressed in derived EC Law. The first instrument on protection is Council Directive EEC 79/409, 2 April, *Directive on the Conservation of Wild Birds* (hereafter the *Birds Directive*).[61] This Directive was adopted in light of the decline in the population of wild avian species, largely migratory, for the purpose of protecting, administering and regulating these species and their exploitation. In the Preamble to the Directive, the Council announces a position on the protection of species and habitats similar to the

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[58] The other members of Group II are: Slovenia, Italy, San Marino and Monaco. For full details of Spanish strategy and participation, see M. Déjeant-Pons, "La stratégie paneuropéene de la diversité biologique et paysagère", in *Les hommes et l'environnement. Quels droits pour le vingt-et-unième siècle? Études en hommage à Alexandre Kiss, op. cit.*, 583–609, pp. 583–586, 595–598 and 604.

[59] See notes 25 and 38 *supra.*

[60] In exterior relations, the European Community has concluded or signed various international treaties which recognize that habitats are an international asset and that there is a duty to protect them. In this connection see notes 2, 29, 31, 53 and 56 *supra.*

[61] *OJEC* L 103, 25 April1979. See also Commission Directive 49/97 EC, 29 July, amending Council Directive 79/409/EEC (*OJEC* L 223,13 August 1997). The loss of wildfowl living spaces resulting from certain land planning initiatives was one of the grounds cited in the recommendations of the Commission prior to the Directive. These documents acknowledge the "international dimension" of the problem and urge member states to accede to the relevant international treaties, in particular the Paris Convention (1950) and the Ramsar Convention (1971). Commission Recommendation 75/651 of 20 December 1974 on protection of architectural and natural heritage, and Commission Recommendation 75/66/EEC of 20 December 1974 on protection of birds and their living spaces (*OJEC* L 21, January 1975).

position set forth in the *Ramsar Convention*: that is, migratory birds as classified as an "international resource", so that no state may freely dispose of them even when they are in its territory and consequently the notion that effective protection of birds and habitats is a cross-border problem entailing shared responsibilities for member states. The Preamble also reflects the Council's resolve to hold states responsible for breach of the regulations,[62] something that was only expressly incorporated in declarations and conventions emerging from the Rio Conference in the 1990s.[63] Also, it is important to note that the *Birds Directive* does not specifically mention the concept of "habitat". For this reason the ECCJ has adopted the definition in the Bonn Convention:[64] "any zone within the area of distribution of a migratory species that offers living conditions necessary to the species concerned".[65] This is then a clear example of how principles and regulations from the sphere of public international law are useful to EC Law and confirms the interdependence of the two systems.[66]

To attain its objectives, the Directive outlines a policy of global protection embracing species, their lives and their habitats.[67] The conservation of habitats in marine and land areas is pursued through the creation of Specially Protected Zones for Birds (SPZBs); at the same time, maintenance and regulation of habitats must be carried on both inside and outside these SPZBs. In addition, it is intended to re-establish biotopes that have been destroyed and to develop new biotopes.[68] For this purpose, conservation procedures will be based on the classification and demarcation of special conservation zones and sites, which will be registered in the lists of SPZBs – firstly by the member states and then subsidiarily by reasoned recommendation of the European Commission, subject to a final decision that must be unanimously adopted by the Council.[69] The

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[62] Preamble to the *Birds Directive*. See Conclusions of Attorney General Walter Van Gerven presented on 5 December 1990 (Commission v. German F.R., case C-57/89), *Rec.* I(1991–2), p. I-903.

[63] In this connection see Principle 7 of the *Rio Declaration*.

[64] See section II.2.A)a) *supra*.

[65] Art. I, point g.l of the *Bonn Convention*. In this connection, see Conclusions of Attorney General Walter Van Gerven presented on 5 December 1990 (Commission v. German F.R., case C-57/89), *Rec.* 1 (1991–2), pp. 904–905.

[66] On this subject, see J. Diez-Hochleitner, "La interdependencia entre el Derecho Internacional y el Derecho de la Unión Europea" *Cursos de Derecho Internacional de Vitoria-Gasteiz* (1998), 39–88, pp. 43–48 and 67–68; and C. Jiménez Piernas, "El incumplimiento del Derecho comunitario por los Estados miembros cuando median actos de particulares: una aportación al debate sobre la interdependencia entre Derecho comunitario y Derecho internacional", *RDCE*, vol. 7 (2000), 15–48, pp. 15–21.

[67] Art. 1 of the *Birds Directive*.

[68] Art. 3. (*ibid*). There is also provision for special protection in wetlands, especially those used by migratory species. There is additionally a policy of indirect protection entailing the establishment of bans on the trading of products derived from certain species and evaluation of the environmental impact of certain public and private projects on wild birds and their habitats (Art. 4, *ibid*).

requirement of unanimity on the Council undermines the control of Lists as contemplated in the *Birds Directive*.[70]

B) The Birds Directive *and the Natura 2000 Network*

Fifteen years passed before the Council adopted the *Habitats Directive* in 1992, based on a proposal by the Commission in 1988.[71] Like the *Birds Directive*, the *Habitats Directive*[72] addresses nature protection as a whole, linking the conservation of natural habitats and the habitats of species to other measures for the protection of species. But the importance of these regulations have clearly been enhanced by advances in the protection of habitats.

In the Preamble to the Directive, the Council declares that the adoption of measures for conservation of the natural habitats of species of interest to the Community is the "common responsibility of all the member states" and at the same time places a limit on the applicability of the *Habitats Directive*. This is an economic limitation, based on the assumption that conservation places a financial burden on certain member states, given "on the one hand that such habitats and species are unequally distributed in the Community, and on the other hand that the principle whereby those who contaminate most should pay most can only be applied up to a point in the special case of nature conservation".[73] This argument benefits Spain given that, as noted in the Introduction, Spain has the greatest biological diversity of any European Union country and hence bears the largest burden in terms of nature conservation.[74]

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[69] Art. 4 and Appendices I and II (*ibid*) and note 80 *infra*.

[70] In addition, for the requisite assessment States must inform the Commission of special protection and conservation measures as required by the Directive. On the obligation to inform the Commission, see ECCJ, dec. of 17.01.1991, Commission v. Italy, case C-334/89, *Rec.* I (1991–1), 102–106, p. 106, b.i.l. 9.

[71] *OJEC*, C 247, 21 September 1988.

[72] See note 3 *supra*. It should be remembered that 1992 is the year that the TEU was adopted. The Treaty expressly incorporated protection of the environment as one of the institutional objectives of the Community, and it became Community policy. See arts. 2, 3, 174–176 and 95 TEU and section III.3 *infra*.

[73] Preamble, *Habitats Directive*. The principle that "he who pollutes, pays" is, of all the principles of international environmental law, the one that verges closest on the sphere of economics. Briefly, the purpose of this principle is to ensure that the person causing pollution is made to defray the cost of measures to prevent and combat it, without in principle receiving any compensatory financial aid. It was initially limited to the costs of measures implemented by the owner of a polluting industrial plant to prevent and reduce such pollution. Over time, it has come to be applied to other types of cost such as administration, payment of damages and compensation, or to other situations such as cases of environmental pollution. H. Smets, "Le principe polluer payeur, un principe économique erigé en principe de droit de l'environnement?", *RGDIP*, t. 97 (1993), 339–364, pp. 340–355.

[74] See note 3 *supra*. The principle that "he who pollutes, pays" was articulated in Principle 16 of the Rio Declaration. Since then it has appeared in sector and regional

The Birds and Habitats Directives are complementary rather than mutually exclusive.[75] One classifies habitats and the other organizes a system of protection based on that classification. The lists of protected habitats are the means utilized by the *Habitats Directive* to build up an ecological network of specially protected zones – Natura 2000.[76] Its purpose is to guarantee the maintenance or the re-establishment, in a "favourable state of conservation", of the types of habitat required by species in their natural area of distribution, and of taxa of flora and fauna classified as useful to the Community.[77]

For construction of the Natura 2000 Network, the Directive directs states to propose a List of Sites to the Commission between 1992 and 1994. The Commission will then declare them Sites of Importance to the Community (SICs).[78] Such a declaration imposes an obligation to institute preventive measures for protection and conservation. The member states must then classify these sites as Special Conservation Zones (SCZs). In addition to the SICs, the Natura 2000 network includes all SPZBs coming under the *Birds Directive*. In both cases conservation measures must be determined in the form of management plans, as part of development plans or otherwise, plus whatever regulatory, administrative of contractual measures may be appropriate. Also, the environmental impact of public and private projects will be assessed in order to prevent any deterioration of natural habitats and species in any zone.

The Lists, along with the data on each site, are to be sent to the Commission within three years of notification of the Directive. This information is to include a map of the site and its name, location, extent, etc.[79] A Community procedure has been created to control the Lists[80] and the sites selected by states for

conventions on protection of the environment. J. Juste Ruiz, *op. cit.*, pp. 82–83.

[75] On the relationship between the cited Directives, see W. P. J. Willis, "La protection des habitats naturels en droit communautaire", *Cahiers de Droit Européen*, no 3–4 (1994), 388–430, pp. 413–414.

[76] See note 8 *supra*. The *Habitats Directive* rules that the Natura 2000 network is to be composed of sites containing types of natural habitat and of species listed in the Appendices. On the basis of the criteria set forth in Annex III of the Directive and of the relevant scientific information, each member state must put forward a list of sites indicating the types of natural habitat and the habitats of autochthonous species.

[77] See note 7 *supra*, Preamble to the *Habitats Directive* and comments by N. de Sadeleer, "La directive 92/43/CEE eoncemant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages: vers la reconnaissance du patrimoine naturel de la Communauté Européenne" *Revue du Marché Commun et de l'Union Européenne*, n. 364 (1993), 24–32, p. 27.

[78] For this decision, the European Commission followed a methodology developed by The European Topic Centre on Nature Conservation. See S. P. Johnson and G. Corcelle, *The Environmental Policy of the European Communities*, 2nd ed., London/The Hague/Boston, 1996, pp. 310–311.

[79] These notices were sent in June 1992. See note 70 *supra*.

[80] In exceptional cases where the Commission finds that a site containing a type of natural habitat or a species of priority status and classified as indispensable is not included in the national list, there is a procedure whereby the State concerned and the Commission will compare notes to check the scientific data used by either party. If the

inclusion in the Natura 2000 Network. However, this procedure suffers from the same defect as the control of Lists in the *Birds Directive* – i.e., it requires the unanimous agreement of the Council.[81]

2. Control of the application of Community regulations

Land planning and economic activities in or close to SPZBs and SICs have forced the Commission to initiate proceedings against member states. The vast majority of these proceedings have been settled without coming to court. Where they do reach court, the most common type are proceedings for breach of regulations.[82] These tend to fall into two areas of subject matter: protection of species[83] and protection of habitats. Of the cases concerning problems with

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discrepancy still stands at the end of the verification period, the Commission will submit a proposal to the Council regarding its selection as a site of importance to the Community. Another important achievement is the inclusion in the Directive of precautionary protection; this means that for the duration of the verification procedure until a final decision is reached, the protected site concerned will come under the provisions of the Directive. The Council has consistently adapted the *Habitats Directive* to the dictates of scientific and technical progress by means of other Directives, among them Directive 97/62 EC. In the same vein, the Commission has issued a series of decisions approving the various standard forms for remittal of the pertinent information.

[81] One of the means used by the Commission to control the implementation of the Directive are the reports that non-member states are required to compile every six years. These reports must include adequate information on all conservation measures adopted and an assessment of the effects of these measures on the state of conservation of habitats and species (art. 17 of the *Habitats Directive)*.

[82] Regulated by arts. 226–228 TEC. ECCJ case law contains decisions on preliminary requests for interpretation of the relevant EC regulations (regulated in art. 234 TEC). The nature of the cases originating these procedures varies: criminal proceedings for hunting, capture or trading of protected species, and administrative appeals by ecologist organizations against the national legislation on species. There are no cases entailing interpretation on issues of habitats; all the appeals have been on the interpretation of provisions on the protection of species. The decisions referred to are: ECCJ, dec. of 23.05.1990, case 169/89, *Rec.* I (1990–5), 2160–2165; ECCJ, dec. of 19.01.1994, case C-435/92, *Rec.* I (1994–1), 88–98; ECCJ, dec. of 8.02.1996, case C-202/94, *Rec.* I (1996-1/2), 380–388; ECCJ, dec. of 8.02.1996, case C-149/94, *Rec.* I (1996-1/2), 322–329; ECCJ, dec. of 7.03.1996, case C-118/94, *Rec.* I (1996-3), 1242–1252; and ECCJ, dec. of 12.12.1996, case C-10/96, *Rec.* I (1996–12), 6793–6802.

[83] In this connection see the following Decisions: ECCJ, dec. of 8.07.1987, Commission v. Belgium, case C-247/85, *Rec.* I (1987-7), 3057–3072; ECCJ, dec. of 8.07.87, Commission v. Italy, case C-262/85, *Rec.* I (1987-7), 3094–3107; ECCJ, dec. of 17.07.1987, Commission v. German Federal Republic, case C-412/85, *Rec.* I (1997-8), 3514–3519; ECCJ, dec. of 17.09.1987, Commission v. Netherlands, case C-236/85, *Rec.* I (1987-9), 4005–4012; ECCJ, dec. of 28.04.1988, Commission v. France, case C-254/85, *Rec.* I (1988-4), 2261–2270; ECCJ, dec. of 15.03.1990, Commission v. Netherlands, case C-339/87, *Rec.* I (1990-3), 878–888; ECCJ, dec. of 17.01.1991, Commission v.

habitats, there are two principal types – failure to transpose the Directive and failure to implement the Directive. In the latter group there are cases of breach for failure to fulfil the obligation of members states to create protection zones[84] and for allowing activities not compatible with protection zone status. There is no doubt that these decisions constitute major achievements in the process of Community control over protection of the environment and in the definition of Community and national competences in environmental matters.[85]

As regards transposition, particularly the legal machinery whereby states have to carry out such transposition, ECCJ case law suggests that this cannot be effected by means of non-binding administrative instruments, such as administrative circulars or internal instructions.[86] However, the ECCJ has allowed transposition by means of regional provisions.[87] Such a position suits Spain, where an important part of the transposition of the requirements of the Birds

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Italy, case C-334/89, *Rec.* I (1991-I), 102-106; ECCJ, dec. of 17.01.1991, Commission v. Italy, case C-157/89, *Rec.* I (1991-1), 83–91.

[84] The relevant decisions are: ECCJ, dec. of 28.02.1991, Commission v. German Federal Republic, case C-57/89, *Rec.* I (1991-2), 924–933; ECCJ, dec. of 2.02.1993, Commission v. Spain, case C-355/90, *Rec.* I (1993-8), 4272–4286; ECCJ, dec. of 19.05.1998, Commission v. Netherlands supported by the German Republic, case C-3/96, *Rec.* I (1998-5), 3054–3074; ECCJ, dec. of 18.03.1999, Commission v. France, as. C-166/97; ECCJ, dec. of 15.11.1999, Commission v. France, case C-96/98; ECCJ, dec. of 6.04.2000, case C-256/98, Commission v. France.

[85] In this connection, see the comments of M. Díez de Velasco Vallejo, *Aspectos jurídicos actuales de la protección del medio ambiente en la Comunidad Europea, y en especial, la contribución de su Tribunal de Justicia*, Granada, 1991, pp. 34–41 and L. Riechenberg, "La Directiva sobre la protección de las aves salvajes: un hito en la política comunitaria del medio ambiente", *RIE*, vol. 17 (1990), 369–402, pp. 388–392.

[86] See ECCJ, dec. of 8.07.1987, Commission v. Belgium, case 239/85, *Rec.* I (1986-12), p. 3645, b.i.l. 9 and comments by K. Riechenberg, "La Directiva sobre la protección de las aves salvajes: un hito en la politica comunitaria del medio ambiente", *RIE*, vol. 17 (1990-2), 369–400, p. 377. Particularly relevant here is the ECCJ Decision of 11 December 1997 in Case C-83/97. This was an appeal in a complaint of non-compliance lodged by the Commission against the German Federal Republic for failure to meet the obligations incumbent on it, in that it did not adopt the legislative, regulatory and administrative measures required to conform to the *Habitats Directive* (art. 23) within the stipulated time (2 years). The problem is therefore one of transposition. The German federal government did not deny having instituted all necessary measures to adapt its internal law to the Directive. It further declared that since the expiration of the said period the competent authorities had been applying the Directive directly and that the national statutes then in force were interpreted in accordance with EC law. The ECCJ considered this insufficient, allowing the Commission's appeal and declaring that the German Federal Republic had failed to meet its obligations under the *Habitats Directive* (ECCJ, dec. of 11.12.97, Commission v. German F.R, case C-83/97), b.i.l. 8 and 9.

[87] See ECCJ, dcc. of 15.03.1990, Commission v. Netherlands, case 339/87, *Rec.* I (1990-3), 878– 888, b.i.l. 6 and 7.

and Habitats Directives has been implemented in regional legislation since the autonomous communities are responsible for environmental matters under the Spanish Constitution.[88]

The ECCJ has tended to award priority to ecological requirements, rejecting the economic arguments put up by the member states except where they address "a higher general interest", a concept which has not been defined in case law.[89] The Court has also taken the view that article 2, the provision of the *Birds Directive* that deals with economic and recreational requirements, does not constitute an autonomous exception to the system of protection established by the Directive.[90]

As regards Court decisions referring to Spain, the most noteworthy aspect is the only appeal for non-compliance brought against Spain, Case C-355/90 (Leading Opinion M. Díez de Velasco Vallejo). Here, the ECCJ convicted Spain for having omitted the Santoña Marshes (an ecological sanctuary on the north coast and one of the most important ecosystems for aquatic birds in the Iberian Peninsula) from classification as a special protection zone. In fact these marshlands provide a place of hibernation or a staging-point for numerous birds on their migratory journeys from Northern European countries to Southern Africa. Among these birds are many species in danger of extinction, which find food and rest in the Marshes and are listed in the relevant appendix of the *Birds Directive*.[91]

It follows from that Decision that the fact of having classified the marshes of Santoña and Noja as a Nature Reserve[92] does not prevent the EECJ from finding Spain in breach of Community Law. In the Court's view, the act of transposition does not meet the requirements set forth in the Directive as regards either the territorial extent of the zone[93] or its legal protected status.[94]

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[88] See section IV.1 and 2, especially IV.1.8) *infra.*

[89] See ECCJ, dec. of 2.08.1993, Commission v. Spain, case C-355/90, *Rec.* I (1993-8), pp. 4276– 4277, ff. 11. Cf. the position of the Spanish Constitutional Court (hereafter, TC), TC Decision 64/1982, 4 November, basis in law (hereafter, b.i.l.) 2 (*BOE*, 10 December 1982) and TC Decision 102/1995, 26 June, b.i.l. 4 (*BOE*, 31 July 1995). See section IV.I.A *infra.*

[90] See ECCJ, dec. of 8.07.1987, Commission v. Italy, case C-262/85, *Rec.* 1(1987-7), 3094–3107.

[91] For comments on this decision, see C. Fernández de Casadevante Romani, "El incumplimiento del Derecho comunitario en las Marismas de Santoña" *(Comentario a la Sentencia del TJCE de 2 de agosto de 1993. Comisión c. España,* C-355/90), *RIE*, vol. 21 (1994), 137–156.

[92] See section IV.2.C) *infra.*

[93] On territorial extension, the Court took the view that "it must be placed on record that the territory of the Nature Reserve does not embrace the whole of the marshes, there being a total of 40,000 sq.m. excluded. However, this terrain is especially important for aquatic birds under threat of extinction according to article 4, section 1 point a) of the Directive, since it has been shown that the spaces available for nesting in the other zones near the coast are becoming progressively reduced". ECCJ, dec. of 2.08.1993, Commission v. Spain, case C-355/1990, *Rec.*, 1 (1993-8), p. 4279, ff. 29. In this connection, see ECCJ, dec. of 19.05.1998, Commission v. Netherlands, case C-3/96, b.i.l. 39 and 44.

The most recent decisions of the EECJ confirm the position adopted in the decision on Case C-355/90: i.e., not only must there be an ideal number of sites and an adequate area, based on general and specific assessments, but the protection zone must also be awarded the requisite legal status.[95]

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[94] Regarding the legal status of protection, the Court opined that "it should be further noted that they have not ordered the necessary protective measures, even for the marshes situated in the classified zone. Thus, from the record of proceedings it appears that the competent authorities have not approved a Plan for the Regulation of Natural Resources (PORN) as provided in article 4 of the Act. And yet such a Plan is of primary importance for the protection of wildfowl and is intended to identify the activities that constitute a disturbance of the ecosystem of the zone". The Court concluded: that "given the failure to institute such essential measures as those required to order the zone or to regulate the use of the marshes and the activities carried on there, they cannot be said to have met the requirements of the Directive". ECCJ, s. 2.08.1993, pp. 4279– 4280, b.i.l. 30. On the allusions to the PORN in the Decision, see comments by C. Fernández de Casadevante Romani, "El incumplimiento del Derecho comunitario en las Marismas de Santoña...", *loc. cit.*, p. 149, note 30.

[95] In this context, the population trends of species or European protection levels are relevant to both types of obligation. In this connection, see Conclusions of Attorney General Nial Fennelly, 9 October 1997, [ECCJ, dec. of 18.05.1998, Commission v. Netherlands, case C-3/96], *Rec.* I (1998-5), 3033–3053, p. 3045. Article 4 of the *Birds Directive* as modified by the *Habitats Directive* deals with measures for the conservation of habitats of birds mentioned in Appendix I as the target of conservation measures to ensure their survival and reproduction within their area of distribution. These obligations include the classification of SZPBs and the institution of appropriate measures to prevent the contamination or deterioration of habitats within these zones. An important, and moreover recent, decision (February 1999) on the subject was that of Case C-166/97. In 1992, the Commission sent a summons to the French government for failing to comply with these Directives in respect of the Seine estuary, to wit: firstly, the area of the protection zone created by France in 1990 was insufficient to meet the pressures of bird population, and secondly, the legal protection regime was not satisfactory. The Commission further indicated that the construction of a titanium gypsum store in the vicinity of the zone contravened the *Birds Directive*. The French government replied that the provisions were transitional [Agreement of 11 April 1985 between the French Ministry of the Environment and the autonomous ports of Le Havre and Rouen] and that it intended to introduce measures enabling it to guarantee, both in the short term and permanently, the protection of the most sensitive zones in the estuary. France further argued, among other things, that the Commission had not demonstrated that France had made no effort to prevent the pollution or deterioration of the habitat where the titanium gypsum plant was built. In fact, as regards pollution the Commission itself recognized that the plant had no significant effects. The ECCJ partially upheld the Commission's appeal for non-compliance and declared that the French Republic had failed to honour its obligations under article 4 sections 1 and 2 of the *Birds Directive*, in that it did not classify a sufficiently large area of the Seine estuary as a special protection zone and did not institute measures to provide the classified special protection zone with an appropriate legal regime. ECCJ, dec. of 18.03.1999, Commission v. France, case C-166/97, b.i.l. 15 and 26.

3. Strategies for protection based on the Treaty on European Union

The Treaty of Amsterdam consolidated the reforms in the area of Community protection of the environment which were initiated with the AEU and confirmed with the TEU. The Preamble of the TEU, following in the footsteps of the *Rio Declaration* and the *Convention on Biological Diversity*,[96] declared the Union's resolve to "promote the social and economic progress of its members with due consideration of the principle of sustainable development". The European Community's economic and social activities and all its policies and actions must therefore evaluate and incorporate all the studies necessary to accomplish that objective from the various different standpoints. Moreover, the inclusion of protection of the environment as one of the objectives of the EU (arts. 2–3 of the TEU) and the EC (arts. 2–3 and 174–176 of the TEC) enshrine the importance of Community policy in this matter. In addition to the changes referred to, the principle of integration of environmental objectives in the sum of the Community's policies was incorporated for the first time with the reform of the TEC and the AEU. And again, from the provisions incorporated by Maastricht in Title XVI of the TEC (now Title XIX of the TEC), it became clear that the Community's competences in the sphere of environmental protection were concurrent with those of the member states. Community environmental policy is thus horizontal and as such must be integrated in the Community's other policies and actions.[97]

One concrete outcome has been the integration of environmental objectives in the Common Agricultural Policy (CAP)[98] and the augmenting of the role that farmers have to play in the management of natural resources and conservation of the environment.[99] Moreover, the new CAP, reinforced by the concept of subsidiarity, will allow member states more freedom to design programmes and apply structural funds, In this connection, the *Habitats Directive* establishes a framework of action for co-financing, with Community funds, of conservation measures applicable to SCZs.[100] The new Operational Programmes drawn up for the use of structural funds and other funds to implement the provisions of the

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[96] See notes 2, 22 and 40 *supra*.

[97] For all this paragraph, see N. Navarro Batista, "La protección del medio ambiente", in M. López Escudero and J. Martín y Pérez de Nanclares (coords.), *Derecho comunitario material*, Madrid, 2000, Ch. 20, 283–230, pp. 289–290.

[98] Regulated by arts. 32-38 TEC. For a comprehensive review of the CAP and the outlook for the period 2000–2006 (Agenda 2000), see Doc. COM EC (97) 2000 final.

[99] For the Spanish administration, "there is nothing to prevent the authorities within their respective purviews, parallel to the establishment of the Natura 2000 network as a set of spaces structuring Spanish natural and rural territory on ecological principles in the form of Special Conservation Zones, from designing another coherent network closely linked to the first, but in this case a network of Special Rural Development Zones". DGCN, *Informe 1999*, p. 18.

[100] See Preamble to the *Habitats Directive*.

2000 Agenda, and also the new Rural Development Regulations, therefore favour the linking of rural and local development planning with the Natura 2000 network.[101] The two will be linked in terms of financing and integration in the Spanish socio- economic fabric.[102] Also, the Cohesion Fund will finance the construction and commissioning of Natura 2000 Network interpretation and assessment centres, plus a shared information and communication network that will lend coherence to the Natura Network.[103]

Another innovation in the TEU is the inclusion in harmonization measures (directives or regulations) of a safeguard clause which authorizes member states to institute provisional measures for non-economic environmental reasons, subject to an EC control procedure (arts. 174 and 176 TEC). Finally, we would also stress the change in the procedure for the adoption of decisions in connection with the environment. Under the new procedure, environmental regulations can now be adopted through co-decision procedures. What is really new in this procedure is the importance of the role assigned to the European parliament, an institution closely tied to the interests of European citizens which has always been extremely sensitive to public concern about the environment.

IV. INTERNAL LEGAL REGULATIONS

1. The *Spanish Constitution*

A) Protection of the environment: article 45 of the Constitution

One of the purposes of the Spanish Constitution declared in its Preamble is that of promoting cultural and economic progress to "ensure a decent quality of life

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[101] Regulation 2081/93, *OJEC* L 193,1 December 1993 and Doc. COM EC(97) 2000, in particular the last part. Community structural funds are financial instruments whose essential purpose is to prevent the single market from negatively affecting the least developed regions by reducing the main existing regional imbalances so as to achieve economic and social cohesion of the Community as a whole. For comments on financial instruments for Community action in the sphere of environmental protection, see V. Carreño Gualde, *op. cit.*, pp. 146–150.

[102] As in the other EC countries, the tendency in Spanish rural areas has been a drastic reduction in the number of farms and the workers in the sector. Regarding the area of available farmland in Spain and its socio-economic importance, see J. Lamo de Espinosa, *La nueva política agraria de la Unión Europea*, Madrid, 1998, pp. 16 and 55.

[103] The Cohesion Fund was set up to support environmental projects and trans-European transport infrastructure networks (art. 161 TEC). See Council Regulation 1164/94 of 16 May 1997 creating the Cohesion Fund, *OJEC* L 130, 25 May 1994. This Fund is intended for those states of the Union whose per capita GNP is less than 90 per cent of the EC average. Since 1993, the beneficiaries have been Spain, Greece, Portugal and Ireland. A. Valle Gálvez, "La intervención financiera estructural", in M. López Escudero and J. Martín y Pérez de Nanclares (coords.), *op. cit.*, 353–367, pp. 366–367.

for one and all".[104] This declaration, whose meaning is quite clear, is further implemented in article 45.[105] This article recognizes the right of everyone to enjoy the environment and a universal duty to conserve it, while mandating public authorities to protect and improve the quality of life and to defend and restore the environment, predicated necessarily on collective solidarity.[106]

The impact of the environment on human existence and its importance for the development and the very possibility of human society, is enough to warrant its inclusion in the list of fundamental rights.[107] Therefore, the subject of the environment in constitutional precepts should fall into the category of fundamental rights. This is not apparently the case in Spain, given that article 45 comes in Chapter III of Title I, which deals with "the guiding principles of social and economic policy".[108] This impression is strengthened by the fact that the Constitution (articles 53,1 and 2) reinforces the protection of the rights and freedoms recognized in Chapter II of Title I by establishing the right of "appeal to the Constitutional Court.[109] This means that there is no such appeal for environmental rights.[110]

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[104] *See* Appendix 1.

[105] O. Alzaga Villaamil reminds us that the interpretative value of the Preamble to the Constitution lies in the fact of its being "a solemn declaration of intent collectively made by the constituent power". O. Alzaga Villaamil, *La Constitución española de 1978 (Comentario sistemático)*, Madrid, 1978, p. 69.

[106] *See* Appendix 1 and TC Decision 102/1995, 26 June, b.i.l. 4 (*BOE*, 31 July 1995).

[107] A. E. Pérez Luño, "Artículo 45: medio ambiente", loc. cit., p. 252.

[108] R. Martin Mateo, *Tratado de Derecho Ambiental*, vol. I, Madrid, 1991, p. 150 and G. Escobar Roca, *La ordenación constitucional del medio ambiente*, Madrid, 1995, p. 66. Following this restrictive criterion, the Constitutional Court considers that the catalogue of fundamental rights embraces only those contained in Chapter II section 1 of the Spanish Constitution. In this connection, see TC Decision 161/1987, 27 October, which classifies conscientious objection as an autonomous but not a fundamental constitutional right. That interpretation would apply to the rights referred to in articles 30 to 38 of the Constitution (Chapter II, section 2), whereas those contained in articles 39 to 52 (Chapter III) would be neither autonomous nor fundamental (*BOE*, 12 November 1987). For a position opposed to this, see A. E. Pérez Luño, *Derechos humanos. Estado de derecho y Constitución*, 5ª ed., Madrid, 1995, pp. 83–84 and *loc. cit*, pp. 257–259, and J. Jordano Fraga, *La protección del derecho a un medio ambiente adecuado*, Barcelona, 1995, p. 81. The latter position, which is also grounded on the Spanish Constitution, associates the right to the environment with the "right to quality of life", a fundamental right enshrined in the socio-economic provisions (art. 45.2). This idea is supported by the Supreme Court (hereafter TS) (3rd Division), 7 November 1990.

[109] *See* Appendix 1.

[110] One international consequence of the TC's refusal to admit an appeal for a declaration of fundamental rights was a Decision of the ECHR against Spain on 9 December 1994, based upon breach of article 8 of the *European Convention on Human Rights*, Rome 1950 (*BOE*, 10 October 1979), Case López Ostra v. Spain. Ms. López Ostra appealed to the European Commission on Human Rights (ECHR) after being forced to abandon her home and later purchase another house for environmental reasons –

The heading of Chapter III and the substance of article 53.3 give an idea of the "programmatic scope" of article 45.[111] On this subject the Constitutional Court has ruled that the principles of this Chapter do not in themselves generate legally enforceable rights.[112] Despite this peculiarity, the article concerned has in fact been cited in the ordinary courts in conjunction with the implementing provisions and has been raised in the Constitutional Court in cases where the ordinary legislator has failed to heed the constitutional mandate to promulgate implementing provisions.[113]

The tendency of the jurisprudence has been to favour an interpretation that harmonizes the demands of the environment and economic development. Citing the Preamble and article 45 in connection with the relationship between the protection of nature and the rational use of natural resources, in 1982 the Constitutional Court ruled that "an examination of the constitutional precepts clearly indicates that the protection of the environment and economic

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cont.

namely, the pollution caused by a solid and liquid waste treatment plant built with public subsidies in the town of Lorca. Before lodging this appeal. Ms. López Ostra sought the protection of fundamental rights in Spain (articles 15, 17, 18, 19 and 45 of the Spanish Constitution), but received an adverse verdict in the High Court of Murcia on 31 January 1989. The TS dismissed her appeal in a decision of 27 July 1989. In both instances, the Public Prosecution reported favourably on Ms. López Ostra's case. Finally, the TC declared that the appeal lodged for a declaration of fundamental rights was inadmissible in that it was manifestly groundless. Eur. Court HR, *López Ostra v. Spain, Judgment of 9 December 1994,* series A n. 303-C, pp. 41–66. We would also note at this point that the Spanish legal system lacks any means of ensuring execution of Decisions of the European Court of Human Rights. See Dissenting Vote of Gimeno Sendra in TC Decision 245/1991 16 December, on the appeal for a declaration of fundamental rights submitted by Barberà, Messegué and Jabardo. *BOE*, 15 January 1992. On the doctrine, see D. Liñan Nogueras, "Efectos de las Decisions del Tribunal Europeo de Derechos Humanos y Derecho español", *REDI*, vol. XXXVII (1985), 355-376, pp. 367–374, C. Escobar Hernández, "Problemas planteados por la aplicación en el ordenamiento español de la Decision Bultó (Comentario a la Decision del Tribunal Constitucional español 245/1991, de 16 de diciembre)", *RIE*, vol. 19 (1992), 139–163, pp. 148–163 and J. Ferrer Lloret, *Responsabilidad Internacional del Estado y Derechos Humanos,* Madrid, 1999, 61–63.

[111] *See* Appendix 1.

[112] TC Decision 36/1991, 14 February 1991, b.i.l. 5 (*BOE*, 18 February 1991).

[113] In a Decision of 25 April 1989 overturning the appealed decision which upheld the right of a householder to oblige his/her local authority to take the necessary steps to prevent problems arising out of deficiencies in waste water disposal facilities, the TS took the view that "although coming under the heading of guiding principles of social and economic policy, the precepts enshrined in Title I Chapter III of the Constitution are no mere programmatic guidelines applying only to political rhetoric or the empty words of the demagogue. Therefore, this article 45, like all the other articles in the said chapter, possesses regulatory force and compels public authorities, each in their own sphere, to put them into effect. Clearly, therefore, the appellant has every justification for bringing the issue here debated to the courts of justice".

development – both constitutional rights – must be rendered compatible in whatever way the competent legislator shall decide".[114] More recently, the Constitutional Court ruled that "it is ultimately a question of balanced, rational, sustainable development that provides for future generations, highlighted in 1987 in the Bruntland Report commissioned by the United Nations General Assembly under the title *Our Common Future*".[115] This interpretation brings our constitutional legislation closer to the fundamental standards and principles of International Law on the environment.[116]

Article 45 is also the basis of a number of functions of public authorities in connection with protection of the environment: prevention (the "duty to see to" the rational utilization of natural resources, "to conserve and protect the quality of life" and "to defend the environment");[117] promotion (initiatives by public authorities should be oriented towards "improving quality of life")[118] and restoration (to "repair" damage and aggression to the environment wherever possible).[119] The actions of public authorities are therefore designed to protect and improve the quality of life and to protect and restore the environment. In line with these postulates, the Constitutional Court defines "protection " as an act of safeguard, aid, defence or custody, either preventive or repressive. In the view of the Constitutional Court, protection is "the essence of a function whose prime purpose must be the conservation of what exists, but which also tends to improve, both of which are contemplated in the Constitution (article 45.2), and also in the Act of European Union, article 130R and the Stockholm and Rio Declarations".[120]

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[114] TC Decision TC 64/1982, 4 November, b.i.l. 2 (*BOE*, 10 December 1982).

[115] TC Decision 102/1995, 26 June, b.i.l. 4 (*BOE*, 31 July 1995). However, in other decisions the TC has not hesitated to invoke the value of quality of life and the need to watch over the environment as legitimating constraints on property rights and other economic activities harmful to these values and constitutional goods. See TC Decision 227/1988, 27 November 1988, b.i.l. 7 (*BOE*, 23 December 1988), TC Decision 66/1991, 22 February 1991, b.i.l. 3 (*BOE*, 24 April 1991) and TC Decision 273/1993, 30 September 1993, b.i.l. 5 (*BOE*, 26 October 1993).

[116] Given the need for development to be rendered compatible and harmonized with the environment, an effective system for the protection of biodiversity is contingent upon respect for the fundamental principles of international environmental law, in particular as regards sustainable development (see notes 22 and 40 *supra*) and evaluation of the environmental impact of projects that may significantly affect the medium. See Principle 11, C) of the World Nature Charter and Principle 17 of the *Rio Declaration on the Environment and Development* (see note 22 *supra*). For the application of that principle, see *Gabcíkovo-Nagymaros Project (Hungary/Slovakia), Judgment*, I.C.J., *Reports 1997*, pp. 67–68, para 112.

[117] Art. 45.1 and 2. Appendix 1.

[118] Art. 45.2. *Ibid.*

[119] Art. 45.3. *Ibid.*

[120] TC Decision 102/1995, 26 June, b.i.l. 7 (*BOE*, 31 July 1995).

B) The environmental competences of the Autonomous Communities: articles 148.1 and 149.1 of the Constitution

The *Spanish Constitution* places responsibility for the environment upon public authorities in general. As a result, the territorial distribution of competences in environmental matters between the State and the Autonomous Communities (CCAAs) is particularly complex.[121] According to article 148.1 of the Constitution, the CCAAs may acquire competences for "territorial regulation" and "management relating to the protection of the environment".[122] This provision must be analysed in conjunction with article 149.1, which provides that Spanish state holds exclusive competence in the following matters: "basic legislation on protection of the environment, ..."[123] A reading of these articles shows that the Constitution does not give rise to any conflict of exclusive competences with regard to the environment, since different levels of competence are attributed to the State (basic legislation) and to the CCAAs (implementing legislation and execution of the State's basic legislation).[124]

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[121] The situation is in fact worse if we consider that this distribution of competences does not entail an attendant distribution of subject matters. In the Constitution, the same environmental matters are subject to more than one different competence, the exception to this being competences relating to attributes of sovereignty (international relations, administration of justice, defence, etc.), which are the exclusive province of the State. The attribution of environmental competences to the CCAAs flows from the relevant Statutes of Autonomy and Decrees transferring functions. For the TC's position on matters of CCAA competence and transfer decrees, see TC Decision 329/1994, 15 December 1994, b.i.l. 6 (*BOE*, 18 January 1995).

[122] Art. 148.1. 3°) and 9°) (see Appendix 1). Regarding the competences of the Central Administration and the CCAAs, see also arts. 2,137, 147.2.d), 149 and 150. Also, with regard to the non-transferability of competences attributed to the Central Administration and to the CCAAs by the Constitution, see TC Decision 167/1993, 27 May 1993, b.i.l. 2 (*BOE*, 21 June 1993).

[123] Art. 149.1. 23°). Also on this subject, see arts. 2, 137, 147.2.d) and 150. And again, see TC Decision 69/88, 19 April 1988, b.i.l. 4 and 5, on articles 148 and 149 (*BOE*, 5 May 1988). Regarding the problems of determining what is or ought to be "basic legislation", see S. Muñoz Machado, *Las potestades legislativas de las Comunidades Autónomas,* Madrid, 1981, p. 202. For details of the administrative organization of nature protection in Spain, see L. Krämer and R. Cortes, "La proteccion de la naturaleza", in J. Picón Risquez (coord.), *Derecho medioambiental de la Unión Europea,* Madrid, 1996, Cap. X, 249–272, pp. 250–252 and http://www.mma.es/areainfor.htm#Organismos.

[124] TC Decision 156/1995, 26 October 1995, b.i.l. 4 (*BOE*, 28 November 1995). See also TC Decision 16/1996, 1 February 1996, b.i.l. 2.E (*BOE*, 2 February 1996). Regarding the TC's interpretation on the scope of the legislative competences of the State and the CCAAs in matters of environmental protection, see TC Decision 64/1992, 4 November 1982 (*BOE*, 10 December 1982), TC Decision 170/1989, 19 October 1989 (*BOE*, 7 November 1989), Decision 149/1991, 4 July 1991 (*BOE*, 29 July 1991), Decision 102/1995, 26 de January 1995 (*BOE*, 31 July 1995), TC Decision 156/1995, 26 October 1995 (*BOE*, 28 November 1995) and Decision 13/1998, 13 January 1998 (*BOE*, 12 February 1998).

Initially, there were two categories of Autonomous Community: those organized under article 141 of the Constitution with competences in respect of implementing legislation and execution of the basic state legislation on matters of the environment;[125] and those organized under article 143 of the Constitution, which initially were only competent in respect of "additional regulations to the state legislation" and "implementation of state legislation". This situation changed with Organic Law 9/1992, whereby these latter CCAAs were awarded competences similar to those already enjoyed by the former.[126]

Despite the relatedness of matters pertaining to the environment and protected natural spaces, public activities relating to the two subjects are materially distinct and involve different attributions of functions. In this connection the Constitutional Court has ruled that "the environment is a subject of general scope, as regards both its object and the type of protection, whereas the subject of protected spaces refers solely to a single element or object of the environment... and to a specific form of action – based principally on the conservation of nature in certain spaces by means of a list of prohibitions and/or restriction..."[127]. The *Spanish Constitution* makes no specific mention of protected natural spaces, but numerous regional statutes of autonomy provide to varying extents for exclusive competence, competence in respect of implementing legislation and competence to execute legislation in this matter. The legality of such an initiative has been upheld by the Constitutional Court,[128] one of whose decisions stresses "that ... six of the Autonomous Communities

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[125] The Statutes of Autonomy of the CCAAs and the corresponding provisions dealing with their respective competences on environmental matters are as follows: Organic Law 3/1979, 18 December, on a Statute of Autonomy for the Basque Country (*BOE*, 22 December 1979), art. 11.a); Organic Law 4/1979, 18 December, on a Statute of Autonomy for Catalonia (*BOE*, 22 December 1979), art. 10.6; Organic Law 6/1981, 30 December, on a Statute of Autonomy for Andalusia (*BOE*, 11 January 1982), art. 15.7; Organic Law 5/1982, 1 July, on a Statute of Autonomy for the Valencian Community (*BOE*, 19 June 1982), art. 32.6; Organic Law 10/1982, 10 August, on a Statute of Autonomy for the Canaries (*BOE*, 16 August 1982), art. 32.12; and Organic Law 13/1982, 10 August, on Restoration and Enhancement of the Foral Regime of Navarra (*BOE*, 16 August 1982 and correction of errors, *BOE*, 26 August 1982), art. 57.c.

[126] Organic Law 9/1992, 23 December (*BOE*, 24 December 1992). This Law transferred the relevant competences to the CCAAs of Asturias, Cantabria, La Rioja, Murcia, Aragon, Castilla-La Mancha, Extremadura, Balearics, Madrid and Castilla y Leon within the framework of basic State legislation, and, where appropriate and in the terms there established, the implementing legislation and the execution of "additional regulations for the protection of the environment" (art.3.b).

[127] TC Decision 195/1998, 1 October 1998, b.i.l. 3 (*BOE*, October 1998).

[128] In this connection, see TC Decision 64/1982,4 November, in judgment of Catalan Act 12/1981, 24 December on protection of sites of special interest affected by mining activities *BOE*, 10 December 1982); Decision 69/1982,23 November, in judgment of Catalan Act 2/1982, 3 May on protection of Garrotxa zone (*BOE*, 29 December 1982); Decision 82/1982, 21 December in judgment of Catalan Act 6/1982, 6 May classifying the Macizo de Pedraforca as a nature site (*BOE*, 15 January 1983).

possess exclusive competence in respect of protected natural spaces".[129] Given that these are overlapping areas, competences of varying kinds therefore coexist in the same space.[130]

C) Interaction between regulations of different kinds: articles 93, 95.1 and 96.1 of the Constitution

Alongside the international regulations concerning the protection of habitats there are also Community and internal regulations. International law being superior to internal law, Spain as a party to these international commitments must take particular care in the introduction of internal regulations on the protection and conservation of nature or in adapting existing regulations to the requirements of international law on the environment. It is therefore necessary at this point to briefly outline Spain's position on the reception and hierarchy of international regulations.[131]

The *Spanish Constitution* of 1978 makes no specific provision for the incorporation of general international law in Spanish law. Such an absence of

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[129] TC Decision 102/1995, 26 June (*BOE*, 31 July 1995). The Decision refers to exclusive competences in respect of PNSs attributed by the following Statutes of Autonomy: Andalusia (art. 13.7); Aragon (art.35.15); Canaries (art. 30.16); Catalonia (art. 9.10); Navarra (art. 50.d); and Valencia (art. 31.10). See note 126 *supra*.

[130] In the words of the TC (Decision 102/1995), "the determination of a physical ambit does not necessarily preclude the exercise of other competences in that space". In b.i.l. 4 of Decision 195/1998, 1 October, the TC recalled that "there can be no denying that, given its powers of basic legislation on the environment or legislation on procedure, or even in exercise of its functions relating to protection and conservation of public property as guardian thereof, the State may legitimately institute some of the regulatory provisions contained in any of the precepts of the Act at issue (Act 6/1992, 27 March, classifying the Marshlands of Santofia and Noja as Nature reserves). Nevertheless, it would be pointless and could even pervert the intention of the legislator to treat these regulations as equal and allow them to coexist in the legal system in isolation from the body of regulations in which they originated and in which their significance lies" (*BOE*, 30 October 1998).

[131] The hierarchy of statutes is one of the principles underlying the entire Spanish legal system and enshrined in article 9.3 of the *Spanish Constitution*. Under this principle, our statutes are governed by an "order of hierarchy", J. D. González Campos, L. I. Sánchez Rodríguez and P. Andrés Sáenz de Santa María, *Curso de Derecho Internacional Público*, 2ª ed., Madrid, 2002, p. 283. Also regarding the Spanish position on the reception and hierarchy of international regulations, see L. I. Sánchez Rodríguez, "Los tratados internacionales como fuente del ordenamiento jurídico español", *Cursos de Derecho Internacional Vitoria-Gasteiz* (1994), 139–189, pp. 147–166 and 170–175, and A. Remiro Brotons, "La Constitución y el Derecho Internacional", in *Administraciones Públicas y Constitución, Reflexiones sobre el XX Aniversario de la Constitución Española de 1978*, I.N.A.P., Madrid, 1998, 227–257 and Articulo 96: Tratados internacionales como parte del ordenamiento interno", in O. Alzaga Villaamil, *Comentarios a la Constitución española de 1978, op. cit.*, t. VII, 623-651, pp. 630– 636 and 640–646.

formal reception is interpreted in light of the preamble and article 96.1 of the Constitution as allowing for automatic reception "as from the time of its inception through the emergence of consensuses among the states".[132] Now, international law is only incorporated n the internal statutes where it is applicable to Spain internationally. In addition, such reception is automatic and applies to the entirety of general international law. As regards the rank, force or efficacy of general international law, article 96 of the Constitution is interpreted as implicitly placing it on the same level conventional regulations incorporated into Spanish law.[133]

The reception of conventional regulations by the Spanish legal system is addressed in article 9.1. This provides that "once officially published in Spain, [international treaties] shall form part of the internal legal order".[134] The Constitution is mute on how such publication affects the rank, prevalence or primacy of the treaty with respect to internal statutes. On the basis of the final paragraph of article 6.1, whereby "their provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law", both doctrine and jurisprudence place treaties in a supra-legal rank[135] which does not entail primacy over the Constitution (article 95.1).[136] At all events, treaties may only have primacy once they are validly concluded and officially published.[137]

With regard to the acts of international organizations binding on the member countries, the *Spanish Constitution* does not expressly regulate the issues of reception and rank. The prevailing view of the doctrine and case law on this

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[132] J. D. González Campos, L. I. Sánchez Rodríguez and P. Andrés Sáenz de Santa María, *op. cit.*, p. 274.

[133] *See* Appendix I.

[134] Article I.5 of the *Spanish Civil Code* (*Gaceta de Madrid*, 25 July 1889) made official publication of a treaty a condition of its enforceability *erga omnes* in Spanish law, See Appendix 2.

[135] But not always, as pointed out by A. Remiro Brotons, *Derecho Internacional. 2. Derecho de los Tratados*, Madrid, 1997, p. 339. Then again, assuming that the international treaty retains the status of an international regulation and its special legal force when transposed to Spanish law, its primacy follows from its very nature. This position follows the line upheld by international jurisprudence. A. Mangas Martin, "La recepción del Derecho internacional por los ordenamientos internos", in M. Díez de Velasco, *Instituciones de Derecho Internacional Público, op. cit.*, Cap. IX, 194–212, p. 200.

[136] For the TC's position regarding these assertions, see TC Decision 11/1985, 30 January (*BOE*, 5 February 1985), TC Decision 28/1991, 14 February (*BOE*, 15 February 1991) and TC Decision 140/1995, 28 September (*BOE*, 14 October 1995). For the position of the TS, see TS Decision (Bench 4), 27 February 1970 (*Aranzadi* n. 658) and TS Decision (Bench 1), 22 May 1989 (*Aranzadi* n. 3877).

[137] *See* comments by A. Fernández Tomás, "La válida celebración y la incorporación de los tratados en la jurisprudencia constitucional española", in *Hacia un nuevo orden internacional y europeo. Homenaje al profesor M. Díez de Velasco, op. cit.*, 341–359, pp. 356–357.

subject is that article 96 of the Constitution and article 1.5 of the *Spanish Civil Code* apply. The upshot is that while Spain is bound by the acts of international organizations from the moment they come into force internationally, its obligation thereunder is contingent upon their publication in the *Boletín Oficial del Estado* (BOE) or implementation by internal statutes.[138] In the case of acts of the European Community in particular, the situation is different. These are acts of an international organization to which Spain is tied by a treaty whose conclusion is authorized by Organic Law, this being a constitutional requirement for international commitments whereunder an international organization acquires competences derived from the Constitution. We would note that the constitutional provision for the use of an Organic Law in such cases is purely procedural; this is a formal and not a material law, given that the act whereby the two Houses express their will is in reality an authorization for Spain to consent to be bound by such treaties.[139] Therefore, for the purposes of derived Community Law, publication in the *OJEC* is considered sufficient.[140]

2. Ordinary legislation

The methodology followed by the Spanish legislator on the conservation of habitats and species follows the same line as other regulations for protection of the environment: administrative authorizations, criminal and administrative sanctions, fiscal devices, etc. Each of these procedures, having its own particular characteristics, is applied in order to allow or encourage certain types of conduct or to prevent undesirable types of conduct and to suppress or deter resort to such conduct.

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[138] Organic Law 15/1994, 1 June, for Cooperation with the International Tribunal for the judgment of persons accused of serious violations of international humanitarian law committed in the territory of the former Yugoslavia (*BOE*, 2 June 1994) and Act 4/1998, 1 July, for Cooperation with the International Tribunal for Rwanda (*BOE*, 2 July 1998) are outstanding examples of enforcement of acts of International Organizations by means of internal Spanish laws.

[139] Art. 93 of the Spanish Constitution (see Appendix 1). In opting for an Organic Law as a means of authorization the constitutional legislator sought "a more stringent procedure in terms of the required parliamentary majority (absolute majority) to validate such authorization, as distinct from the treaties referred to in article 94.1 of the Constitution, which require only a simple majority in Parliament". A. Mangas Martín, *Derecho comunitario europeo y Derecho español,* Madrid, 1986, pp. 50–51. See also, S. Muñoz Machado, *El Estado, el Derecho interno y la Comunidad Europea,* Madrid, 1986, pp. 208–210.

[140] Reception of directly applicable acts of derived law is deemed to take place as from the date of entry in force stipulated in that act. Consequently, "publication as required under article 96.1 of the Constitution and article 1.5 of the Civil Code would be simply excluded by article 93 of the Constitution, since one of the competences attributed is precisely publication of the acts of Community institutions". A. Mangas Martín and D. Liñan Nogueras, *Instituciones y Derecho de la Unión Europea,* 2ª ed., Madrid, 1999, p. 258. For all this paragraph, see Appendices 1 and 2.

A) The Spanish Penal Code: *offences against habitats*

The constitutional basis of criminal-law protection of the environment (article 45.3 of the *Spanish Constitution*)[141] dates back to the inclusion in the existing *Spanish Penal Code* of an article drafted in accordance with Act 8/1983, 25 June, which classifies various types of conduct as environmental offences.[142] The inclusion of this provision constituted a first step in adapting the current criminal statutes to international law in respect of the environment.[143] The Act establishes a basic category of sanctions for types of conduct liable to produce any kind of emission or effluent in the atmosphere, the soil or inland or sea waters which could seriously compromise human health or degrade conditions of animal life, natural woodlands or spaces or crops.[144] Thus, the various aspects and sectors of the environment were covered in a single article, 374 bis, with equal sanctions for all, This article is a criminal statute remitting to certain regulatory or administrative norms which in turn constitute a set of regulations entailing a definition of the offence – indispensable for criminal prosecution of the act

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[141] *See* Appendix 1. In the view of the TS, the third paragraph in question is the "penal response" to those in breach of paragraphs one and two of article 45. TS (2nd Division), Decision of 26 September 1994.

[142] In this legislative reform it was decided to include criminal provisions in respect of the environment in the *Spanish Penal Code* as opposed to other types of legislative model – i.e., a special, specific criminal law on the environment or the addition of criminal provisions to a general law on the environment. At all events, the issue affects the actual approach to protection largely in a formal rather than a practical sense. At the same time, "the efficacy of criminal provisions does not depend on which model of protection is chosen; the important point is the actual content of the criminal classification and the resolve of the public authorities to effectively use the criminal regulations to prevent offences against the environment". J. M. Prats Canut, "Análisis de algunos aspectos problemáticos de la protección penal del medio ambiente", in *La protección penal del medio ambiente*, Agencia de Medio Ambiente, 1991, 47–83, p. 58.

[143] At the time this regulation came into force, Spain had already ratified international treaties on the subject. See sections II.1 and 2 *supra*. Moreover, the legislation has followed the line of the recommendations of international associations in the sphere of criminal law. In this connection, see Resolution of the Twelfth International Congress on Criminal Law, Hamburg 1979. The complete text can be found in L. Cuesta Arzamendi and C. Fernández de Casadevante Romani (Eds.), *Protección internacional del medio ambiente y derecho ecológico*, V Curso de Verano de San Sebastian (1987), Serv. Ed. Univ. del Pais Vasco, pp. 315–318.

[144] The offence referred to in article 347 of the former *Spanish Penal Code is* defined as "an offence of specific endangerment. This means that for the purposes of commission, there need be no actual injury to the protected assets, in this case human health and conditions of animal and vegetable life; it is sufficient to act in any of the ways classified as dangerous to these assets. Hence, for the offence to have been committed, there need be no actual harm to the protected assets. Less will suffice; it is enough that there be serious danger or risk to these assets, as defined in the statute". Decision of the Provincial Audiencia (hereafter AP) of Girona, 26 January 1998.

concerned.[145] With regard to the protection of habitats and species, the general body contains numerous regulatory provisions, which are complex and in most cases difficult to pin down in the multifarious legislation on assets protected by the regulations, We would further note that the statute referred to does not treat the environment as an autonomous asset but includes it in the chapter of the *Spanish Penal Code* dealing with "offences against public health".

The regulation of criminal-law protection of the environment is clearer and more precise in Organic Law 10/1995, the current *Spanish Penal Code*.[146] Title XVI of the Law, which deals with "offences in connection with land planning and protection of the historic heritage and the environment", devotes two chapters to the subject: one on offences against natural resources and the environment, and another on offences in respect of the protection of flora and fauna.[147] There are thirteen articles in all, besides references to environmental problems in other articles.[148] Not only are the new regulations more detailed than their predecessors, but there is also a qualitative change in the way that Spanish regulations approach the subject. That is, internal criminal law has been consolidated in line with international law on the environment.

It is worth noting that like article 374 bis of the previous *Spanish Penal Code*, the current regulation remits to certain regulatory and administrative provisions. Thus, in connection with the protection of habitats, it refers to *Act 4/1989 on Conservation of Natural Spaces and Wild Flora*,[149] subject to the amendments introduced in obedience to Constitutional Court Decision 102/1995 in light of Acts 40 and 41/1997[150] and the various sector-specific laws governing aspects or

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[145] Where a criminal provision remits to certain regulatory or administrative norms, this is known as a "blank penal provision". In the doctrine, Rodríguez Ramos argues that "the new ecological offence is undoubtedly" of the nature of a blank criminal statute. L. Rodríguez Ramos, "La protección penal del ambiente en España", en L. Cuesta Arzamendi and C. Fernández de Casadevante Romani (Ed.), *Protección internacional del medio ambiente...*, 183-188, p. 187. The constitutionality of the use of blank penal provisions in the statute in question was examined by the TC in Decision 62/1994, 2 February (*BOE*, de 24 February 1994). In a more recent Decision, the Provincial Audiencia of Tarragona explained that "the conduct described in article 347 (bis) (art. 325 in the current Code) is dealt with by the procedure of a blank penal statute, remitting to the statutes protecting the environment, which must have been violated for the classified offence to have been committed. Thus, contravention of the administrative regulation is classified as an offence ... As a direct consequence of the use of a blank penal statute, the Administration is able to define areas of risk which are permitted in connection with criminal environmental law. The penal provision is therefore incorporated in both the state regulations and in the regional or Community regulations ...". Decision AP of Tarragona, 2 February 1999.

[146] *BOE*, 24 November 1995; correction of errors *BOE*, 2 February 1996.

[147] For Titles, Chapters and Articles, see Appendix 3.

[148] *See* arts. 325-337 and Common Provisions, arts. 338–340.

[149] *BOE*, 28 February 1989.

[150] *BOE*, 6 November 1997.

elements of the environment, all constituting a web of hundreds of regulations from different sources.

In addition to article 325, which contains the basic categories of offence,[151] there are others defining possible aggravating circumstances and one specifically referring to protected natural spaces – article 330, whereby any person seriously damaging "any of the elements used to classify" a protected natural space is liable to imprisonment for one to four years and a fine of twelve to twenty-four months.[152] This approach is consistent with the notion of biodiversity as a single whole enshrined in the *Convention on Biodiversity*.[153] Similarly, in the event that types of conduct defined in Title XVI "affect any protected natural space, the upper range of penalties shall be imposed".[154] Also relevant is article 332, which provides for more severe penalties for persons destroying or disturbing the habitat of "threatened" flora or fauna.[155]

B) The case of wetlands

Wetlands play a vital role in regulating water cycles and protecting coastal and inland areas from the danger of flooding. Particularly important in connection with those Spanish protected natural spaces which are also wetlands, is the *Ramsar Convention* of 1971 on humid zones, to which Spain, as noted, acceded in 1982.[156] The *Ramsar Convention* provides the legal foundation for protection of the variegated environmental types encompassed by the term "wetlands" – river banks, lakes, lagoons, peat bogs, pools or floodplains, coastal zones connected to estuaries and deltas, marshlands, fens, and also man-made sites such as reservoirs and gravel pits.[157] One immediate consequence of Spain's accession to the Convention was the promulgation of general laws containing explicit and implicit regulations for the protection of wetlands. The first of these was the *Waters Act 29/1995*, 2 August, which includes a provision repealing previous regulations providing for the draining and destruction of wetlands for agricultural and health purposes.[158] The second was the *Conservation of Natural*

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[151] *See* Appendix 3.

[152] In the case of the base offence, article 325, the margin for the prescribed penalty is less severe: six months to four years imprisonment, fine of eight to twenty-four months and one to three years disbarment from exercising a profession or holding office. *Ibid.*

[153] *See* section II.2.A)b) *supra.*

[154] Art. 338, see Appendix 3.

[155] *Ibid.*

[156] *See* section II.2 *supra.*

[157] *See* note 17 *supra.*

[158] Until the promulgation of this Act, the existing legislation allowed and encouraged the draining of wetlands, for instance the Act of 24 July 1918 on draining of lagoons, marches and swamps. In consonance with the notions of health and society prevailing at the time, numerous wetlands were reclaimed for farming, thus producing irremediable losses to Spain's natural heritage. I. Rodríguez Muñoz and R. Ortega Domínguez, *op. cit.*, p. 174. See also note 16 *supra.*

Spaces and Wild Flora and Fauna Act 4/1989, 27 March. This was more influenced by the Convention than its predecessor and contained numerous references to the conservation, protection and monitoring of wetlands in Spain. Added to these are acts creating all kinds of protected zones. In the same vein, Royal Decree 1997/1995 instituted measures to guarantee biodiversity through the conservation of natural habitats and wild flora and fauna,[159] subsequently amended by Royal Decree 1193/1998.[160] There are also regional and Community regulations in force.[161]

Thus, to deal with each and every problem concerning the conservation of such sites, for example dumping of toxic and hazardous waste, there are international, EC and internal regulations. A good example of this is the Supreme Court (2nd Division) decision in the judicial review of a conviction on an environmental charge for dumping waste in the waters of a Nature Reserve in the vicinity of the lagoon known as "Brazo del embarcadero" in Prat de Llobregat (Cataluña), which killed fish and birds including some protected species. In addition to the relevant article of the *Spanish Penal Code,* the Court found that the offence came under article 9 of Directive 78/319 EEC, 20 March 1978, on toxic and hazardous waste, plus a long list of other relevant regulations.[162]

There are undoubtedly difficulties involved in the practical application of this legislation, given the special nature and the dispersal of environmental regulations. But it is equally certain, as case law is now showing, that recourse initially to article 374 bis and now to the provisions of the new *Spanish Penal Code*, is gradually dispelling the generalized faith in impunity that has hitherto encouraged aggressions of this kind in Spain.

As regards administrative planning instruments, Spain is now putting in place

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[159] *BOE*, 28 December 1995.

[160] *BOE*, 25 June 1998.

[161] For the EC regulations on habitats, see section III.1 and 2 *supra.*

[162] In this specific case, the TS applied the following rules to the category of offence: "article 29 of Catalan Legislative Decree 2/1991, 26 September, in the same terms as the basic State law; article 34 a) of the said Legislative Decree, which classifies unauthorized dumping of such waste and the unsupervised and unauthorized storage thereof as a serious violation; article 4.2 of the Order of the Territorial Policy and Public Works Department of the Government of Catalonia, regarding the treatment and elimination of used oils, requiring express administrative permission for such activities; articles 6, 16, 17, 29 *et seq.* of the Regulations on Annoying, Unhealthy, Harmful and Dangerous Activities, 30 November 1961 and article 3 of the Order for its application, 15 February 1963; articles 89, 92, 95 et cetera of the Waters Act of 2 August 1985 and 259 of the Regulations on Public Water Resources of 11 April 1986, and also articles 3.1 and 7.2 of EEC Directive 76/464, 4 May 1976, regarding contamination by certain toxic substances in aquatic media of the EEC as it relates to the need for administrative authorization to dump any kind of contaminant waste, absent which, such dumping must be considered to be clandestine..." TS Decision (2nd Division), 26 September 1994, b.i.l. 5

the first Plan for implementation by sectors of the Spanish strategy for biodiversity,[163] the "Strategic Plan for the Conservation and Rational Use of Wetlands in the Context of the Aquatic Ecosystems on which they Depend", approved by the National Commission for Nature Protection on 19 October 1999. The Plan includes all the resolutions adopted at the *Seventh Conference of Parties to the Ramsar Convention* in Costa Rica in May 1999. The aim of the Plan is to update the inventory of wetlands, to institute a number of conservation measures and to bring it to bear more fully on the planning of water resources, land uses and the conservation of biodiversity.[164] Proposed conservation measures include the prevention and elimination of pollution from toxic substances.[165]

C) Transposition of the Habitats Directive

As in EC Law generally, the effectiveness of the *Habitats Directive* depends to a great extent on the regulatory, administrative and judicial action of the member states.[166] If we look at the application of this Directive in particular, we find that as a Directive it is binding upon member states as regards the required outcome, while the ways and means are left up to the national authorities.[167] In other words, its legal effect is contingent on the transposition rules in each country.[168] In Spain, the means of transposition have included *Royal Decree 1.997/1995*[169] with the amendments introduced by *Royal Decree 1.193/1998*,[170] which

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[163] *See* notes 25 and 38 *supra.*

[164] It is estimated that between 1950 and 1980, almost half of Spain's wetlands disappeared, the chief cause being draining for agricultural use. See note 16 *supra.*

[165] The Plan's objectives are based on the "Ramsar Convention Strategic Plan" (1997–2002), drawn up at the Sixth Meeting of the Ramsar Convention (1996) and on the "Strategy on Mediterranean Wetlands of International Importance" prepared by the Mediterranean Wetlands Committee (MEDWETCOM), which is backed up by the Secretariat of the Ramsar Convention. For the whole paragraph, see *Actuaciones Públicas,* p. 21, and *YIEL,* vol. 10 (1999), pp. 308– 311.

[166] C. Jiménez Piernas explains the dependence of EC Law "in light of the degree of dispersal still evident in its application, which is still not firmly in the hands of Community institutions and requires the cooperation of the member states (indirect application) ...". C. Jiménez Piernas, "El incumplimiento del Derecho comunitario por los Estados miembros...", loc. cit., p. 19.

[167] Art. 249 TCE.

[168] The TS analysed the transposition of Directive 92/43/EEC in a Decision upholding the administrative appeal brought by the Environmental Defence Organizations Co-ordinator (CODA) against article 13.2 of Royal Decree 1997/1995. In this decision, the TS accepted the interpretation of the ECCJ in relation to the vertical affect of Directives in certain circumstances. See TS Decision (3rd Division), 15 February 1999, b.i.l. 2.

[169] *BOE,* 28 December 1995.

[170] *BOE,* 25 June 1998.

establishes measures to help guarantee biodiversity through the conservation of natural habitats and wild flora and fauna.[171]

Also important in connection with protection of habitats is Act 4/1989 on the conservation of natural spaces and wild flora and fauna, which introduces *Plans for the Regulation of Natural Resources*,[172] the planning instruments best suited to development of the Natura 2000 Network contemplated in the *Habitats Directive*. Indeed, this Act may be considered to be the basic legislation for nature conservation in Spain. If we compare the provisions of article 6 of the *Habitats Directive* with the actual content of articles 4–8 of Act 4/1989, it is clear that the Act covers the commitments required by the EC: conservation, cooperation, participation, assessment of environment impact, socio-economic orientation, etc. Similarly, the Spanish strategy for biodiversity proposes the establishment of a number of guidelines for *Plans for Regulation of Natural Resources,* to be applied at least to the Natura 2000 Network to achieve homogeneity of management criteria and facilitate its integration with other plans affecting land and socio-economic activities that are to be maintained or encouraged.[173]

In 1992, the year the *Habitats Directive* was adopted, the knowledge of Spain's natural wealth, and particularly habitats, was insufficient for Spain to adhere to the terms of the Directive. In order to deal with this deficiency, application was made to the European Commission for approval of a *LIFE Project under Council Rule 1.973/92.*[174] With a view to preparing the list of SICs, in 1993 a National Inventory of Habitats was compiled along with twelve inventories of groups of taxa for flora and fauna throughout Spanish territory.[175] On completion of the inventory, the information was brought

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[171] This transposition also takes place at a regional level. For example, in the Community of Valencia, Act 11/1994 on protected natural spaces in the Community of Valencia and Decree 264/1994, which creates and regulates the Valencian Catalogue of threatened species of fauna and establishes categories and regulations for their protection (*DOGV,* 9 January and 19 January 1995).

[172] Besides the now traditional evaluation of consolidated protected natural spaces such as National Parks, the PORNs are intended to favour other places (internationally important wetlands, SCIs, SZPBs, etc.) where the only answer to funding is to exploit the endogenous natural resources in a manner compatible with their conservation.

[173] *See* DGCN, *Estrategia española de biodiversidad,* pp. 81–88 and 110 and DGCN, *Informe 1999*, pp. 17–18. One practical example is the cooperation agreement concluded by the Ministry of the Environment and the tourist authorities, which contemplates what is referred to as "nature tourism". *Ibid.*

[174] Council Regulation (EEC) no. 1973/92, 21 May 1992, which creates a financial instrument for the environment (LIFE) (*OJEC* L 206/1, 22 July 1992). This project was developed between 1993 and 1997, and the Community co-financed nearly 75 per cent of the value of all inventorying work and subsequent data processing.

[175] As a result of the inventory , more than 150,000 precincts or representations of 1600 types of habitat have been mapped throughout the national territory, with 1114 maps and 1,650,000 items of related data. There are a total of 633 of taxa included in Appendix II of the *Habitats Directive.* Of that number, 199 are fauna and 434 flora.

together in a Geographical Information System (GIS).[176] In the same way, minimum criteria were established for representation of habitats and taxa to be used in the Regional Lists drawn up by the Autonomous Communities, thus ensuring a national list that reflects the Spanish reality in a balanced, representative way.[177] At the same time, the sites included in the Lists were evaluated to ensure that every one was of "importance to the Community" before the data were passed on to the European Commission.[178]

In terms of the practical consequences of the *Habitats Directive,* the most palpable outcome for Spain has been the doubling of the area devoted specifically to protection and conservation.[179] Almost half of the SICs proposed

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cont.

The countries with the largest number are Spain (239), Portugal (208) and Italy (183). About 61 per cent are present in the Mediterranean Biogeographical Region, and only 8 per cent in the Boreal Region. See DGCN, *Informe 1999*, p. 8.

[176] For the general methodological approach to compilation of the National List, see J. C. Orella, J. C. Simón, J. Vaquero, A. Cuadrado, B. Matilla, M. A. Garzo and E. Sánchez, "La Lista Nacional de Lugares de la Directiva Hábitats 92/43 CEE: metodología y proceso de elaboración", *Ecologia,* n. 12 (1998), pp. 3–65, especially 8–11.

[177] Noteworthy in the Spanish Lists of Sites is the Macromesian Biogeographic Region, the first to be agreed on with the EC (it was drawn up in 1996) and the one with the largest area, embracing a total of 172 SCIs covering 35.4 per cent of the territory of the Autonomous Community of the Canaries. It is followed by other lists: the Alpine region, the second largest in terms of area, was delivered to the Commission in April 1997 and expanded in July 1999, with 30 sites (accounting, for example, for 41.91 per cent of the territory of the Autonomous Community of Catalonia). The Atlantic list, delivered in 1998 and expanded in 1999, contains 140 sites (covering, for example, 58.16 per cent of the territory of the Autonomous Community of Castilla y León). And lastly, the Mediterranean list was delivered in August 1998 and expanded in August 1999 and is currently being revised. It contains 378 sites. The communities of Madrid, La Rioja, Canaries, Andalusia and the Autonomous City of Ceuta contain the highest percentages of territory proposed by the Central Administration. For its part, the European Commission is still carrying out the requisite studies for its final declaration of sites to be included in the SICs. For all this paragraph, see J. C. Orella *et al*, "La Lista Nacional de Lugares de la Directiva Hábitats", loc. cit., pp. 43–47.

[178] The criteria applied in this study were those of the Thematic Nature Centre of the Museum of Sciences in Paris (CTE/CN), the body entrusted by the European Commission with the follow-up and assessment of the national lists.

[179] This phenomenon is due to the fact that "some Autonomous Communities, whose networks of Protected Natural Spaces were in their infancy, decided to develop their networks on the basis of the Community regulations or taking advantage of their impetus, as well as, naturally, complying with the mandate of the Directive itself". J. C. Orella et al, "La Lista Nacional de Lugares de la Directiva Hábitats...", loc. cit, p. 42. At the same time, areas of nature protection have been enlarged through the work of UNESCO in promoting Biosphere Reserves in the Man and Biosphere Programme. These Reserves constitute an international system of protection whose beginnings go back to 1970. Their aim is to reconcile the conservation of biodiversity, economic and social development and the maintenance of associated cultural values. Classified Biosphere Reserves in Spain currently occupy a total area of 1,116,997 hectares. MMA, *Actuaciones Públicas,* p. 13. See note 27 *supra.*

by Spain are currently SZPBs and/or PNSs. In those spaces which are SICs/ SZPBs and PNSs at the same time, conservation-oriented planning of use and management are linked, with adequate funding to allow their implementation as such. And here again, in light of the case law examined, we would stress that the relationship between the Central Administration and the Autonomous Communities on issues relating to the spaces concerned is generally satisfactory.

Also, in the Spanish case the Natura 2000 Network is expected to facilitate the integration of conservation activities with other sector-specific and economic development policies, particularly in the rural sphere.[180] In practice, in fact the Department of Nature Conservation has proposed the inclusion of specific guidelines for such integration in the Regional Development Plan for the period 2000-2006.[181] These guidelines range from the conservation of biodiversity (regulation and conservation of species, ecosystems and landscapes in the context of the Natura 2000 network, creation of ecological reserves and corridors) to forestry management (public and private woodlands incorporated in the Nature 2000 Network), in such a way that coherent conservation initiatives will be co-financed in Autonomous Communities so requesting and including similar guidelines in their Operational Programmes.[182]

V. FINAL CONSIDERATIONS

Thanks to the *Spanish Constitution* of 1978 and the growth of awareness about ecological issues, our country was enabled to acquire international commitments involving more stringent standards of protection over natural resources. As a result, in the light of international, sector and regional practice in respect of habitats, Spain's conduct in affairs proper to international relations, and particularly its accession to international treaties on conservation and protection, clearly indicates acknowledgement on Spain's part of the international nature of habitats and of the duty to cooperate in their preservation. Similarly, as a member of the European Union, Spain has taken part in the process of creating a body of Community regulations of similar content. Both of these circumstances have had direct repercussions on Spanish internal legal order.

To conclude, a legal system of protection of habitats is in place, with the

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[180] In the relevant report by the Central Administration, it was estimated that "the *Habitats Directive* requires that the social, cultural and economic characteristics of the areas where it is implemented be taken into account. In practice, implementation must proceed in concert with the social agents, so that the existing land uses – that is, agriculture and stockbreeding, tourism, infrastructure, etc. – can be converted to activities that allow sustainable development". DGCN, *Informe 1999*, p. 4. See section III.3 *supra*.

[181] *Ibid* p. 3.

[182] DGCN, *Estrategia española de biodiversidad*, pp. 79–109.

organizational structure and the financial resources duly provided for, and all susceptible of being controlled. This is a giant step, but it is insufficient in practice given the peculiarities of the subject and the difficulty entailed in linking international and Community procedures with their national counterparts. It is to be hoped that the existing machinery will incorporate other advances making it possible to dispense with the political will of governments when it comes to applying the regulations, and consequently to attain sufficiently strict protection in this area to halt the degradation of habitats in Spanish territory.

Appendices

Appendix 1

THE SPANISH CONSTITUTION

Preliminary Title

9.3. The Constitution guarantees the principle of legality, the ranking of legal provisions, the publicity to be given to legal enactments, the non-retroactivity of punitive measures that are unfavourable to or restrict individual rights, the certainty that the rule of law will prevail, the accountability of the public authorities, and the prohibition against arbitrary action on the part of the latter.

Title I

Concerning Fundamental Rights and Duties

Chapter III

Concerning the Governing Principles of Economic and Social Policy
45.1. Everyone has the right to enjoy an environment suitable for personal development, as well as the duty to preserve it.

2. The public authorities shall safeguard a rational use of all the natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on essential public co-operation

3. Criminal or, where applicable, administrative sanctions, as well as the obligation to make good the damage, shall be imposed, under the terms to be laid down by the law, against those who violate the provisions contained in the foregoing clause.

Title III

Concerning the Cortes Generales

Chapter III

Concerning International Treaties

93. By means of an organic law, authorization may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organization or institution. It is incumbent on the *Cortes Generales* or the Government, as the case may be, to guarantee compliance with these treaties and with the resolutions emanating from the international and supranational organizations in which the powers have been vested.

94.1. Before contracting obligations by means of treaties or agreements, the State shall require the prior authorization of the Cortes Generales in the following cases:

a) treaties of a political nature;
b) treaties or agreements of a military nature;
c) treaties or agreements affecting the territorial integrity of the State or the fundamental rights and duties established under Title 1;
d) treaties or agreements which imply financial liabilities for the Public Treasury;
e) treaties or agreements which involve amendment or repeal of some law or require legislative measures for their execution.

2. Congress and the Senate shall be informed forthwith regarding the conclusion of other treaties or agreements.

95.1. The conclusion of any international treaty containing stipulations contrary to the Constitution shall require prior Constitutional amendment.

2. The Government, or either of the Houses may request the Constitutional Court to declare whether or not there is a contradiction.

96.1. Validly concluded treaties, once officially published in Spain, shall form part of the internal legal order. Their provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law.

2. The same procedure shall be used for denouncing international treaties and agreements as that, provided in Article 94, for entering into them.

Title VIII

Concerning the Territorial Organization of the State

Chapter III

Concerning the Autonomous Communities
148.1. The Autonomous Communities may assume jurisdiction in respect of the following matters:

[...]
3) Town and country planning and housing.
[...]
9) Environmental protection management.
[...]
149.1. The State holds exclusive jurisdiction over the following matters:
[...]
3) International relations.
[...]
23) Basic legislation on environmental protection, without prejudice to the powers of the Autonomous Communities to establish additional protective measures; basic legislation on woodlands, forestry, and cattle trails.
[...]

Appendix 2

THE SPANISH CIVIL CODE

Preliminary Title

Legal regulations: application and enforceability

Chapter One
Sources of Law

1.1. The sources of the Spanish legal order are the law, custom and general legal principles.

2. Any provision contradicting another of higher rank shall be invalid.

3. Custom shall only rule in the absence of applicable law, provided that it is not inimical to morality and public order and that it is demonstrable.

Legal practices which are not merely interpretations of a declaration of will shall be deemed to be customs.

4. General legal principles shall apply in the absence of law or custom, without prejudice to their role as guides for the legal order.

5. Legal regulations contained in international treaties shall not be directly applicable in pain until such time as they are incorporated into the internal order by means of publication in full in the "Boletín Oficial del Estado".

6. The legal order shall be supplemented by case law with such doctrine as the Supreme Court shall repeatedly establish by interpreting and applying the law, custom and genera] legal principles.

7. Judges and Courts have the bounden duty in all events to resolve the questions put their judgment, with due consideration for the established system of sources.

Appendix 3

THE SPANISH PENAL CODE

Title XVI

Offences relating to land regulation and protection of historical assets and the environment

Chapter III
Offences against natural resources and the environment

(...)
325. Any person who, in contravention of the Laws or other general provisions protecting the environment, causes or directly or indirectly produces emissions, effluents, radiations, extractions or excavations, sludge buildups, noises, vibrations, injections or deposits in the atmosphere, the soil, the subsoil or inland, marine or underground waters, including where cross-border areas are affected, and uptake of waters where this could seriously affect the balance of natural systems, shall be liable to prison sentences of six months to four years, fines of eight to twenty-four months and disbarment from a profession or office for one to three years. Should there be a risk of serious prejudice to human health, the prison sentence shall be in the upper range.

326. The higher penalty shall be imposed, without prejudice to penalties in respect of other provisions of this Code, where any of the circumstances listed hereafter arise in connection with events described in the foregoing paragraph:

a) The industry or activity is clandestine and its facilities have not received the requisite administrative authorization or approval.
b) Express orders by the administrative authority to correct or suspend activities classified in the foregoing article have been disobeyed.
c) Information on the environmental aspects of the activity has been falsified or concealed.
d) Inspection by the Administration has been hampered.
e) There is a risk of irreversible or disastrous deterioration.
f) Waters are extracted illegally during a period of restrictions.

327. In all cases contemplated in the two foregoing articles, the Judge or Court may order any of the measures provided in article 129 sections a) or e) of this Code.

328. The penalty for the establishment of dumps or pools for toxic or hazardous solid or liquid waste which could cause serious harm to the balance of natural systems or to human health shall be a fine of eighteen to twenty-four months and eighteen to twenty-four weekends of house arrest.

329. 1. Any public authority or functionary who knowingly reports favourably for the grant of manifestly unlawful licences authorizing the operation of the contaminant industries or activities referred to in the preceding articles, or who for the purposes of inspections conceals breaches of the laws or general regulations regarding such activities, shall be liable to the penalty provided in article 404 of this Code, and likewise to imprisonment for six months to three years or a fine of eight to twenty-four months.

2. The same penalties shall apply to any public authority or functionary who either individually or as a member of a collective body decides or votes in favour of granting such an authorization in the knowledge that it is wrong.

330. Any person causing grievous harm to any of the elements on the basis of which a natural space has been classified shall be liable to one to four years' imprisonment and a fine of twelve to twenty-four months.

331. Where acts contemplated in this chapter were committed through culpable negligence, the lighter penalties shall be imposed on each count.

Chapter IV
Offences relating to the protection of flora and fauna

322. Any person cutting, felling, uprooting, gathering or illegally trafficking with any species or subspecies of threatened flora or descendants thereof, or destroying or seriously disturbing their habitat, shall be liable to imprisonment for six months to two years or a fine of eight to twenty-four months.

[...]

Chapter V
Common Provisions

338. Where the acts defined in this Title affect any protected natural species, the higher penalties shall be imposed on each count.

339. Judges or Courts may, on reasoned grounds, order the author of the offence to undertake measures to restore the disturbed ecological balance, and they may order any other precautionary measure necessary to protect the assets coming under this Title.

340. If a person guilty of any of the acts classified in this Title should have voluntarily made good the damage caused, Judges and Courts shall impose the lighter of the penalties contemplated for that offence.