Parliamentary Procedure in the Conclusion of International Treaties in Spain

Cristina Izquierdo Sans[1]

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[1] Cristina Izquierdo Sans is a Lecturer in Public International Law at the Faculty of Law of the *Universidad Autónoma de Madrid.*

Spanish Yearbook of International Law, Volume V, 1997

1. INTRODUCTION

The existence of a democratic political system in a country rightfully entails the intervention of different State powers in assuming international obligations, since the need for democratic control is recognised over the international activities promoted by the Government, specifically its treaty-making-power.

The problem arises of the degree of intervention, since it is also acknowledged that the Government should enjoy a certain amount of freedom to protect and serve the interests of the State as best it can. Achieving a balance between these two aspects is the goal that all democratic States have pursued. In pursuing this aim, the Spanish Constitution[2] opted for a system of a positive list of matters for which parliamentary authorisation would be required (arts.93 and 94.1 of the *CE*) when the Government concludes an international treaty on such subjects. At the same time, it empowered the Government to conclude other international treaties without requiring the intervention of the legislature, albeit obliging the executive to inform Parliament when this power is exercised (art. 94.2 of the *CE*). This entails refraining from concluding treaties of which the two Houses of parliament are not aware, or, in other words, rejecting the existence of secret treaties.

The 1978 Constitution was not much more specific than this. Art. 74.2 established the procedure for authorising the treaties on matters listed in art. 94.1 and referred to the procedure of organic law for treaties of the kinds cited in art. 93 (art. 81 of the *CE*). The system established was schematic and logically needed to be developed through legislation.

However this legislative development has not occurred – at least, not to the extent that is desirable – and only the parliamentary rules of order have completed the constitutional system, which otherwise continues to draw on earlier legislative provisions. Decree 801/72 on the regulation of the activity of the Government administration with respect to treaties[3] deserves special attention. This decree was designed to adapt Spanish laws to the 1969 Vienna Convention on the Law of Treaties and furthermore establish the internal procedure whereby the administration would take part in the treaty-making process. However, Decree 801/72 had lacunae in important sections of the Law of Treaties, which were only partly covered,[4] and, in addition, it was partly repealed and superseded by the Constitution and by subsequent laws that regulate here and there certain aspects relating to international treaties (particularly the Organic Law of the *Consejo de Estado*[5] and Organic Law of

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[2] Hereinafter *CE*.

[3] Decree 801 of 24 March 1972, *BOE* n. 85, 8 April 1972.

[4] Ministerial Order of 17 February 1992 of the Under-Secretariat for Foreign Affairs establishing rules for the procedure to be followed for international treaties by the agencies of this department. See: *Boletín Oficial del MAE*, n. 592, February 1992.

[5] The *Consejo de Estado* (Council of State) is the supreme advisory body of the Spanish Government.

the Constitutional Court[6]). Thenceforth the virtues, problems and shortcomings of Spanish legislation on treaties have come to light through practice. These are the elements used in this paper, which goes on to describe parliamentary procedure for the conclusion of international treaties by Spain.

2. CLASSIFYING INTERNATIONAL TREATIES

2.1. Government Classifying

The fact that the system of parliamentary intervention established in the 1978 Constitution does not apply to all international treaties but only to some of them[7] calls for a prior task to be performed: identifying which treaties do in fact require the intervention of the *Cortes Generales*.[8] This operation is known as classifying international treaties.[9]

Despite the obvious importance of classifying international treaties, this operation is not expressly mentioned in any of the rules of the Spanish laws regulating the conclusion of treaties. The option of making the Government responsible for carrying out this classification clearly has a disadvantage: the Government is handed on a plate the chance to skip the parliamentary stage

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[6] Hereinafter *LOCE* and *LOTC*, respectively.

[7] Art 93: By means of an organic law, authorisation may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organisation or institution. Art. 94: Before contracting obligations by means of treaties or agreements, the State shall require the prior authorisation of the *Cortes Generales* in the following cases: treaties of a political nature; treaties or agreements of a military nature; treaties or agreements affecting the territorial integrity of the State or the fundamental rights and duties established under Title 1; treaties or agreements which imply financial liabilities for the Public Treasury; treaties or agreements which involve amendment or repeal of some law or require legislative measures for their execution.

[8] This is the name for the legislative power in Spain, which is bicameral with a Congress and a Senate.

[9] See: A. Remiro Brotóns, "Comentario a los arts. 93 y 94 de la Constitución", in *Comentarios a la Constitución española de 1978* (O. Alzaga, ed.), vol. VII, Madrid, 1998, p. 491 *et seq.*, especially 527; by the same author: "La autorización parlamentaria de la conclusión de los tratados internacionales: el problema de la calificación", *REDI*, 1980, p. 123; A.J. Rodríguez Carrión, "Regulación de la actividad internacional del Estado en la Constitución", *Revista de Derecho Político* (UNED), 1982, p. 95; by the same author, *Control de los tratados internacionales en el sistema parlamentario español*, Seville, 1981; L.I. Sánchez Rodríguez, *El proceso de celebración de los tratados internacionales y su eficacia interna en el sistema constitucional español, Teoría y práctica*, Madrid, 1984, p. 57 and 108; R. Riquelme Cortado, "La tramitación de los tratados internacionales y el reglamento del Congreso de los Diputados de 1982", *REDI*, 1982, p. 409.

when it considers that this could be politically disadvantageous.[10] However, the other option, vesting Parliament with the power to classify treaties, would not only entail less smooth international relations and show a lack of confidence in the Government, but would furthermore be out of keeping with a list system, since, if the Houses must be informed of all the treaties for classification purposes, what would be the point of having a list?

Accordingly, art. 94 of the *CE* implicitly acknowledges the Government's power to classify treaties,[11] as after listing the types of treaty that require parliamentary authorisation in paragraph 1, it establishes in paragraph 2 that the Houses shall be informed forthwith on the conclusion of other kinds. This means that the Government decides which treaties it informs the Houses about after concluding them – a decision that presupposes and requires classification to be carried out previously by that same body.[12] Furthermore, the new Law on Government[13] confirmed this power by providing that it falls to the Council of Ministers[14] to decide whether or not to send an international treaty to Parliament, as established in art. 94 of the *CE*.

In practice, classification is actually carried out by the Foreign Office, as a Government body, and specifically by the Directorate-General responsible for the matter in question, who requests a report from the International Legal Office attached to the ministry. The Legal Office draws up a report on the appropriate procedure to be followed by a treaty in order for consent to be expressed, which presupposes classifying the treaty. This report is requested immediately after the international treaty is adopted and before the conclusion of the treaty.

The Government was vested with the power to classify treaties, but not unconditionally. The Constitution did not rule out the possibility that the Government could be supervised by other State bodies, and this was set forth in subsequent legislation: the Organic Law on the *Consejo de Estado* (*LOCE*) and the Organic Law on the Constitutional Court (*LOTC*).[15]

2.2. The Role of the *Consejo de Estado*

The Organic Law on the *Consejo de Estado* of 22 April 1980 vested the *Consejo*

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[10] In legal terms, the need for authorisation can be highly debatable – it all depends on how the Government interprets the provisions of the Constitution.

[11] See: A. Remiro Brotóns, "La autorización parlamentaria de la conclusión de los tratados internacionales...", *op. cit.*, p. 223; R. Riquelme Cortado, "La tramitación de los tratados internacionales y el Reglamento del Congreso...", *op. cit.*, p. 419.

[12] The Government's decision must also include the specific precept of the *CE*, into which the international treaty is subsumed, as our Constitution establishes different ways of authorising treaties referred to in arts. 93 and 94.1.

[13] Law 50/1997 of 27 November 1997, *BOE* n. 285, 28 November 1997, p. 35082.

[14] The Council of Ministers is the collegiate body of the Government.

[15] See section 5: *The Supervision of international treaties by the Constitutional Court.*

de Estado with the power to classify international treaties. Art. 22.1 thus establishing that: *the Comisión Permanente del Consejo de Estado shall be consulted ... in all international treaties or agreements on the need for authorisation from the Cortes Generales, prior to the State's expressing its consent thereto.*

In accordance with art. 2.3 of the *LOCE*, the Committee's opinion is not binding for the Government, in which the power to classify continues to rest, but there is no doubt that it conditions the Government's freedom of action by making it compulsory for the most senior advisory body to take part. The Government may or may not then act in accordance with the Committee's opinion; however, it is obliged to request one in every case. This report is requested from the *Consejo de Estado* after the Council of Ministers authenticates the text or expresses its authorisation for accession – for international treaties already in force.

Whether our legislators did the right thing is questionable.[16] There are many cases in which no doubts arise at all and there is no difference in opinion as to whether or not a treaty needs to pass through Parliament before it is concluded, as the nature of the treaty and its content make classification an easy task. In such cases, the compulsory request for the opinion of the *Consejo de Estado* will only slow down and hinder the working of the Government machinery.

Shortly after the *LOCE* came into force, the *Comisión Permanente del Consejo de Estado*, answering a consultation made by the Ministry of Foreign Affairs,[17] considered, in Opinion 43.320,[18] that the Government could miss out the advisory stage when it was deemed that none of the circumstances listed in art. 94.1 of the Constitution applied to a treaty, and there were no doubts that it should be classified in accordance with art. 94.2 *CE*. The application of this doctrine triggered the first clashes over classification between the legislative and the executive, as the *Cortes* stated their disagreement about certain treaties which the Government had concluded without parliamentary authorisation, on the understanding that no such authorisation was required. The doctrine of the *Comisión Permanente del Consejo de Estado* was immediately called into question and the Ministry of Foreign Affairs again furnished a legal opinion. The reply, which is stated in Opinion 46.901,[19] was to confirm that the mandatory consultation provided for in art. 22.1 of the related Organic Law refers to all international treaties.

The fact is that the opposite would have been logical: to miss out the advisory stage when the Government had already decided that the treaty required

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[16] A. Remiro Brotóns, "La autorización parlamentaria de la conclusión de los tratados internacionales: el problema de la calificación...", *op. cit.*, p. 227 *et seq.*

[17] The Ministry of Foreign Affairs carried out the consultation aware of the unnecessary work and the bureaucracy that the literal sense of art. 22.1 of the *LOCE* entailed.

[18] Opinion of the *CPCE* 43.320, 23 April 1981.

[19] Opinion of the *CPCE* 46.901, 7 March 1985.

parliamentary authorisation. The intervention of the *Comisión Permanente del Consejo de Estado* would thus only be compulsory when the Government intended to classify a treaty as the kind established in art. 94.2 of the Constitution, and when it had doubts about classification, that is, when it did not clearly intend to send a treaty to Parliament. This would simplify the procedure for many treaties and put an end to fears that Government could skip the parliamentary stage, as the *Comisión Permanente del Consejo de Estado* would, as far as possible,[20] supervise such cases. Economic considerations, together with respect for the real purpose of the precept – to provide technical support for the Government in classifying treaties as provided for in arts. 93 and 94 of the Constitution[21] – suggest it would be reasonable to propose amending article 22.1 of the *LOCE* as described. This proposal is backed by a consensus of doctrine on the rather broad literal meaning of the precept.

Without prejudicing the debate on how appropriate the precept is, the intervention of the *Comisión Permanente del Consejo de Estado* should be valued very highly. On the one hand, surveys on practices following the enactment of the Constitution but before the *LOCE* came into force show Governments' tendency to restrictively interpret art. 94.1.[22] In this connection, J. Cardona cites the supplcmentary agreements to the Treaties of Friendship and Cooperation with Guinea Ecuatorial signed between October 1979 and October 1989, which were concluded by the Government without parliamentary authorisation[23] and subsequently classified by the *Comisión Permanente del Consejo de Estado* as treaties that implied financial liabilities for the Public Treasury.[24] Similarly, L.I. Sánchez Rodríguez,[25] points out that the fishing agreement of 22 September 1978 between the Kingdom of Spain and the EEC was also classified by the Government under art. 94.2 of the *CE*. In the author's opinion, such a

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[20] The possibilities of the *Comisión Permanente del Consejo de Estado* are limited by the non-binding nature of their opinion, though in practice the Spanish Government does not in fact fail to abide by the decisions of this advisory body.

[21] See: L.I. Sánchez Rodríguez, *El proceso de celebración de los tratados internacionales...*, *op. cit.*, p. 52 and, by the same author, "Problemas básicos de la práctica española en materia de celebración de tratados: propuestas legislativas", in: *La celebración de tratados internacionales por España, problemas actuales: actas del seminario organizado por el Ministerio de Asuntos Exteriores... (et al.) Escuela Diplomática, 13 a 16 de noviembre de 1989*, Ministerio de Asuntos Exteriores, pp. 81–82.

[22] The Spanish Government carried out classification without supervision from the enactment of the Constitution until January 1981. See: J. Cardona Llorens, "La autorización parlamentaria de los tratados: los primeros seis años de práctica constitucional", *ADI*, 1983–4, p. 113-145, especially p. 116.

[23] J. Cardona Llorens, "La autorización parlamentaria de los tratados: los primeros seis años de práctica constitucional", *op. cit.*, p. 117.

[24] Opinion of the *CPCE* n. 43.416, 11 June 1981.

[25] L.I. Sánchez Rodríguez, "El proceso de celebración de los tratados internacionales y su eficacia interna en el sistema...", *op. cit.*, p. 122.

classification was unacceptable, since this agreement, far for being politically neutral, *was patently political and controversial in content.*

The *Consejo de Estado* has furthermore interpreted the treaty types established in articles 93 and 94.1 of the *CE*, clarifying their scope and, basically, adjusting their content. This task is extremely important if one considers that in Spain the Government is excessively influenced by the prior technical classification of the *Consejo de Estado*: there are no Government decisions on this area which stray from the opinion of this advisory body. Let us examine this doctrine.

2.3. The scope of the treaty types established in articles 93 and 94.1 of the 1978 Spanish Constitntion

2.3.1. Article 93 of the CE

Spain's clear readiness to join the European Communities – whose treaties could hardly be held not to alter the working of the powers and the distribution of constitutional responsibilities – when the Constitution was drawn up justifies the wording of article 93,[26] which provided a suitable framework for concluding the Accession Treaty.[27]

This precept should not be judged unfavourably. To start off with, it is quite clear that the body to which the exercise of powers is transferred must be an international organisation or institution, but, under no circumstances, another State or others subject to International Law. Care was furthermore taken to specify that what is transferred is the *exercise* of these powers rather than title thereto[28] – it seems that the formation of a federal Europe would not be admissible on the basis of this precept. Lastly, the powers that are transferred

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[26] See art. 93 of the *CE* in note 6.

[27] In this connection, see: A. Remiro Brotóns, "Comentario a los arts. 93 y 94 de la Constitución", in *Comentarios a la Constitución española de 1978*, *op. cit.*, p. 534; L.I. Sánchez Rodríguez, "El art. 93 de la *CE* y el bloque de constitueionalidad: algunos problemas", *Estudios sobre la Constitución española, Homenaje al Prof. E. García de Enterría*, Madrid, 1991, p. 219; O. Alzaga Villaamil, *La Constitución de 1978*, Madrid, 1978, p. 589; M. Herrero de Miñón, "Constitución Española y Unión Europea. Comentarios al art. 93 de la *CE*", *RCG*, n. 26, 1992, p. 7; "Nota de la Secretaría del Congreso de los Diputados relativa a la tramitaeión parlamentaria del proyecto de ley orgánica por la que se autoriza la ratificación por España del Tratado de la Unión Europea", *RCG*, n. 26, 1992, p. 135; S. Muñoz Machado, *El ordenamiento jurídico de la Comunidad Europea y la Constitución Española*, Madrid, 1980, p. 32.

[28] M. Herrero de Miñón deals with this question in "Constitución Española y Unión Europea. Comentarios al art. 93 de la *CE*", *op. cit.*, p. 10.

must be derived from the Constitution and exercised within that framework,[29] and can be transferred successively[30] or to several organisations.[31]

Two questions, both of which show lack of precision, are not dealt with so well in art. 93 of the *CE*. First, the precept does not prevent an overall transfer of State powers as it does not – as it should – state that the powers which are transferred must be specific. Secondly, the precept does not characterise the supranational organisations to which powers may be ceded. This has given rise on several occasions to doubts as to whether or not the powers vested in an international organisation entailed a transfer of the exercise of constitutional powers. The *Comisión Permanente del Consejo de Estado*[32] has stated in this connection that in order for such a transfer to have occurred, *there must be evidence of a direct decision-making capacity of the international organisation, which is automatically imposed on the State, with no need for State intervention.*

Art. 93 has only been used to authorise an international treaty on four occasions in Spain: for Spain's accession to the Treaties establishing the European Communities and its subsequent ratification of the treaties amending the aforementioned instruments.[33]

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[29] Powers cannot be transferred other than those which the Constitution vests in the national authorities, and these must be exercised within the framework of the Constitution. The authorisation of a treaty as established in article 93 cannot be used to amend the Constitution. This issue, which has been termed "constitutional self-rupture", has been addressed by L. I. Sánchez Rodríguez. See: L.I. Sánchez Rodríguez, "El art. 93 de la *CE* y el bloque de constitucionalidad: algunos problemas", *op. cit.*, p. 233 and A. Mangas Martín, "La Declaración del *TC* sobre el art. 13.2 de la Constitución (derecho de sufragio pasivo de los extranjeros): una reforma constitucional innecesaria o insuficiente", *REDI*, 1992, p. 419.

[30] As has effectively occurred, the transfer of powers to the organisation does not have to be carried out only once; rather, it can be done on several occasions.

[31] There is nothing in article 93 to prevent powers being transferred to more than one international organisation, as the precept does not refer exclusively to the Community. See L.I. Sánchez Rodríguez, "El art. 93 de la *CE* y el bloque de constitucionalidad: algunos problemas", *op. cit.*, p. 219.

[32] See Opinion of the *CPCE* 43. 647 of 27 August 1981, on Spain's accession to the NATO alliance and Opinion 46.073 of 26 January 1984 on the agreement between Spain and the United States of America on jurisdiction over Spanish vessels using the Louisiana Offshore Oil Port. This agreement analyses whether granting powers to the US with respect to Spanish vessels fishing in the American EEZ entailed ceding sovereign powers.

[33] On this subject, see the related note of the Secretariat of the Congress of Deputies on the passage through parliament of the draft of the organic law authorising Spain's ratification of the Treaty on European Union: "Nota de la Secretaría del Congreso de los Diputados relativa a la tramitación parlamentaria del proyecto de ley orgánica por la que se autoriza la ratificación por España del Tratado de la Unión Europea", *RCG*, n. 26, 1992, p. 135.

2.3.2. Article 94.1 of the CE

a) Treaties of a political nature

This is not the first time that political treaties appear as a category in Spanish constitutional history,[34] and it is therefore not surprising that this category was included in the 17 April 1978 draft of the Constitution.

It is difficult to define accurately the concept of political treaty, because this expression has only a practical rather than a legal value, hence the broad variety of types of political agreements that can be distinguished,[35] as the *Comisión Permanente del Consejo de Estado* has commented. Bearing this in mind, different identification criteria have been established on the correct understanding that the political nature of an international treaty can stem from different factors. On the one hand, the content/subject-matter of the provisions of the treaty. Also, the circumstances surrounding its conclusion and, lastly, the role that the agreement plays in political relations between the parties, providing that it entails a stable and significant commitment in Spain's political relations.

The Standing Committee of the Spanish *Consejo de Estado* reached these conclusions by progressively broadening the scope of the constitutional precept. Taking the treaties with a political content or subject matter as a starting point, this was extended first to the treaties whereby Spain assumes a significant political or legal position within the international community[36] and to those which determine to some extent political relations between two States.[37] In its well-known Opinion 46.901 of 7 March 1985, the *Comisión Permanente del Consejo de Estado* subsequently added the criterion to regard as political treaties those which entail a *stable and serious commitment in the State's political relations.* Accordingly, cooperation treaties[38] have become consolidated as

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[34] The Constitution of the Second Republic in 1931 (art. 76, e), paragraph 2) incorporated political treaties.

[35] Opinion 42.948 of the *CPCE* of 30 October 1980 on the Convention between Spain and Morocco on compensation for land nationalised by the Moroccan State.

[36] Opinion 42.903 of the *CPCE* of 9 October 1980 on Spain's accession to the Protocol to the Treaty between the Republic of Panama and the United States of America on the permanent neutrality and working of the Panama Canal, signed in Washington on 7 September 1977.

[37] Opinion 45.737 of the *CPCE* of 29 October 1983, on the Agreement on Cooperation in Maritime Fishing with the Kingdom of Morocco.

[38] Opinion 51.025 of the *CPCE* of 9 June 1987, on the basic general Convention on Scientific and Technical Cooperation between the Kingdom of Spain and the Republic of El Salvador; Opinion 96/95 of 23 February 1995, on the Treaty between the Kingdom of Spain and the French Republic on Cross-border Cooperation between Territorial Entities; Opinion 1803/95 of 27 July 1995, on the Agreement on Economic and Industrial Cooperation between the Kingdom of Spain and the Republic of Ukraine; Opinion 3046/95 of 19 February 1996, on the Convention on Ibero-American Cooperation; and Opinion 226/96 of 22 March 1996, on the Treaty of Amity, Good Neighbourliness and Cooperation between Spain and Tunisia.

political treaties, excepting those containing obligations that are deemed to be insubstantial and flexible,[39] and those which constitute stable and serious commitments from the State, such as, for example, the amendment of the WHO Treaty[40] and the Treaty on Conventional Forces in Europe.[41]

In any event, we should not ignore the residual value of this type of treaty, since a treaty that can be classified as a political treaty will normally fall into another of the categories specified in article 94.1 and the *Comisión Permanente del Consejo de Estado* has pointed out that *a treaty shall not be deemed to be political in nature if it falls into any other category established in article 94.1.*[42]

b) Treaties or agreements of a military nature

The content of this subparagraph of article 94.1 has gradually been shaped by practice. In this connection, J. Cardona[43] states, with respect to these types of treaties, that while this paragraph was initially intended to mainly cover the cooperation, intervention or use of Spanish military forces, in practice the concept has been extended to actual policy – that is, any area of military cooperation with other countries even if direct reference is not made to Spanish military forces.[44]

This perception coincides with the classification made by the *Comisión Permanente del Consejo de Estado*,[45] according to which military treaties include the following: 1) treaties of alliance, mutual defence and guarantee and treaties establishing military cooperation organisations; 2) treaties authorising the presence of foreign troops in Spanish territory and that of Spanish troops overseas; 3) treaties for the exchange of military technology or the specialised training of military personnel;[46] and 4) treaties on the protection of classified information, provided that they specify that this information relates to defence

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[39] Opinion 50.276 of the *CPCE* of 19 February 1987, on the Convention between the Government of the Kingdom of Spain and the Government of Thailand on Economic Cooperation.

[40] Opinion 55.017 of the *CPCE* of 27 September 1990 on amendments to articles 24 and 25 of the Constitution of the WHO of 12 May 1986.

[41] Opinion 55.613 of the *CPCE* of 13 December 1990, concerning the Conventional Forces in Europe Treaty of 19 November 1990.

[42] This entails giving obvious priority to all treaties that come under art. 94.1 over those classified under subparagraph a). An example is Opinion 43.927 of the *CPCE* of 22 December 1981, on the Second Protocol of the Agreement for the protection of Human Rights and Fundamental Freedoms of 6 May 1963.

[43] J. Cardona Llorens, "La autorización parlamentaria de los tratados...", *op. cit.*, p. 121.

[44] Opinion 46.430 of the *CPCE* of 10 May 1984.

[45] Opinion 46. 901 of the *CPCE* of 7 March 1985.

[46] See: A. Remiro Brotóns, *Política exterior de Defensa y Control Parlamentario*, Madrid, 1988, p. 132 *et seq.*

matters.[47] Despite this broader scope, the doctrine of the *Comisión Permanente del Consejo de Estado* is reductive[48] and treaties are rarely classified as being military. We are witnessing in practice a tendency to classify treaties under any other category established in article 94.1, taking advantage of the fact that treaties are generally of more than one type, with the exception of paragraph a), which, as we know, is used as a residual category.

c) Treaties or agreements affecting the territorial integrity of the State or the fundamental rights and duties established under Title I

For incomprehensible reasons, these two categories are linked in the Spanish Constitution. It is nonetheless advisable to analyse them separately as they lack common elements.

With respect to treaties or agreements affecting the territorial integrity of the State, the *Comisión Permanente del Consejo de Estado* was apparently very restrictive with this category, though, as has occurred with other paragraphs of this precept, the scope has been broadened in practice. Thus, Opinion 46.901 of 7 March 1985 states that the wording of the Constitution refers to treaties in which *any part of Spanish territory was to be alienated, ceded or exchanged*, and *treaties on the return of territory that could be established in the future and any other treaties entailing increases in national territory*. As a result, treaties involving, in some way or another, the modification of the national territory or influence of State powers over adjacent maritime areas would fall into this category. Initial practice revealed that the precept goes much further than this, and that treaties concerned directly with the delimitation of territory, even if they do not vary established criteria,[49] treaties adjusting borders in purely technical terms or treaties affecting the exclusive jurisdiction of the State over its territory would be classified by the *Comisión Permanente del Consejo de Estado* under art. 94.1. c).[50]

The precept has been criticised for allowing Spanish territory to be ceded with no more than an authorisation approved by a simple parliamentary majority, and this could apply to the cession of Ceuta and Melilla.[51] In other countries,

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[47] Opinion 131 of the *CPCE* of 6 July 1995, on the Agreement on the Protection of Classified Information between the Kingdom of Spain and the Republic of Korea.

[48] A. Remiro Brotóns, *Política Exterior de defensa...*, *op. cit.*, pp. 132–133.

[49] Opinion 42.985 of the *CPCE* of 29 January 1981, on the Convention between Spain and France to establish the delimitation of borders inside the Bielsa-Aragnouet trans-Pyrenean tunnel.

[50] Opinion 43.467 of the *CPCE* of 27 August 1981, concerning Spain's accession to the North Atlantic Treaty Organization.

[51] In the hypothetical case of cession of Ceuta and Melilla, the Statutes of Autonomy of these two cities must also be borne in mind. See: A. Remiro Brotóns, "Comentario a los artículos 93 y 94 de la Constitución", in *Comentarios a la Constitución de 1978*, *op. cit.*, p. 547; by the same author "Ceuta y Melilla, Représentations espagnoles et marocaines", Hérodote, *Revue de géographie et de géopolitique*, n. 94, 1999, p. 54.

modifications of this kind stemming from an international treaty require the latter to follow a special procedure.[52]

With respect to treaties affecting the fundamental rights and duties established in Title I, this category relates to treaties that concern fundamental rights and duties either directly or indirectly, by completing or developing them, but not damaging them, as this would be contrary to the Constitution.[53] The *Comisión Permanente del Consejo de Estado* has pointed out that the category includes all treaties that address fundamental rights in some way, even if they do not complete or develop them or are not the chief object of the treaty. The aim is to avoid making references to fundamental rights and freedoms in treaties concluded without parliamentary authorisation if they do not fit into any other category established in article 94.1.

The *Comisión Permanente del Consejo de Estado* has clarified another issue discussed by doctrine in connection with the articles of Title I of the *CE*. Strictly speaking, Title I covers from article 10 to article 55, though it is clearly divided into two sections: on the one hand, the rights regulated in articles 14–29 and 30.3, which require an organic law in order to be developed and are protected by the possibility of lodging an appeal with the Constitutional Court; and, on the other, the rights regulated in the rest of the precepts up to art. 55. Subsequent practice, in recent years, clearly shows that treaties concerning the matters dealt with in articles 30 to 55 of the *CE*[54] are not included in art. 94.1.c).

d) Treaties or agreements which imply financial liabilities for the Public Treasury

This category, owing to its vagueness, has given rise to the biggest problems of interpretation in Spain.[55] Initially, the *Comisión Permanente del Consejo de*

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[52] On this subject, see: A. Remiro Brotóns, "Comentario a los artículos 93 y 94 de la Constitución", in *Comentarios a la Constitución de 1978*, *op. cit.*, p. 572 and M. J. Roca, "El control parlamentario y constitucional del poder exterior. Estudio comparado del estado actual de la cuestión en el Derecho alemán y español", *Revista española de Derecho Constitucional*, n. 56, 1999.

[53] In such cases a constitutional reform would be required, pursuant to art. 95 of the *CE*.

[54] See Opinion 43.525 of the *CPCE* of 6 July 1981 and Opinion 43.616 of 27 August 1981. In the latter, for example, which affected art. 40.2 of the *CE* – safety and hygiene at work – the *Comisión Permanente del Consejo de Estado* maintains that *if the precept were interpreted broadly and if the rest of article 94.1 were interpreted in a similar way, we would come to the conclusion that all treaties require parliamentary authorisation under our system, and this goes against the rationale of the precept.*

[55] See: J.M. Martín Queralt, "Competencias de las Cortes Generales en la conclusión de tratados internacionales que se refieren a la Hacienda pública", *Funciones Financieras de las Cortes Generales*, Madrid, 1985, p. 451; A. Dastis Quecedo, *La noción de tratados que implican obligaciones financieras para la Hacienda Pública*, *op. cit.*, p. 135; A. Martínez Lafuente, Las *Cortes Generales*, vol. III, Madrid, 1987, p. 1637 *et seq.* and A. Fernández Tomás, *La celebración de tratados bilaterales de cooperación por España*, Valencia, 1994, p. 56.

Estado was in favour[56] of allowing the Government to conclude unilaterally international treaties involving expenses that could be covered by the appropriations established in the current State budget for the public body which was to execute the treaty, as these appropriations had already been approved – and therefore authorised – by the *Cortes Generales*. By contrast, the Government would require authorisation from the *Cortes Generales* for treaties implying liabilities that could not be met by the current budget, that is, treaties whose execution fell outside the usual area of responsibility of the Department of the Treasury and for which it is necessary to apply for an extraordinary or supplementary appropriation.[57]

This approach was criticised for encouraging the Government to inflate the ordinary budget to allow for the outlays arising from certain treaties. There was also the problem that whereas the State budget is governed by the principle of annuality, this is rarely the case of international treaties. Therefore, the Government either committed the State budget for the following year through the State's international obligations, or else had to squeeze its treaty policy into the straitjacket of a yearly framework.[58]

A new Opinion (n. 46.016 of 5 July 1984) marked a volte-face in the doctrine which had prevailed until then, when it stated that:

> "Treaties which imply financial liabilities for the Public Treasury and accordingly require authorisation from the *Cortes Generales* are exclusively international treaties which give rise to active or passive appropriations or liabilities for the Treasury, whether in the form of monetary appropriations or legal appropriation for monetary liabilities.
>
> International instruments other than the foregoing which foreseeably require an extraordinary or supplementary appropriation in order to be executed are included in the second category referred to in subparagraph e) of the same article of the Constitution, and authorisation is likewise required for their final conclusion.

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[56] Opinion 43.008 of the *CPCE* of 2 April 1981 on the Agreement on Cooperation in matters of Radio-astronomy between the Kingdom of Spain and the Republic of France, done at Granada on 16 May 1980.

[57] When applying this criterion subsequently, the *Consejo de Estado* included treaties containing conditioned public spending, that is, treaties which allowed for the possibility, albeit remote, of committing the Public Treasury and cases in which the public spending was indirect, meaning that this spending was not actually committed in the treaty itself, but would be in the treaties implementing or developing it, and its cause would stem from the action envisaged in the main treaty (Opinion of the *CPCE* 43.506 of 9 July 1981 concerning the EURODIF convention and Opinion 42.995 of 5 May 1981 on the Memorandum of the Hispano-Italian Agreement on cooperation in defence matters).

[58] The question was highlighted by A. Dastis Quecedo, *La noción de tratados que impliquen obligaciones ..., op. cit.*, p. 142.

International instruments which in order to be executed entail expenses that can be covered by the budgetary appropriations of the current year may be concluded by the Government – without prior authorisation from the *Cortes Generales* – provided they do not surpass the annual timeframe, otherwise they will require an extraordinary appropriation and, therefore, parliamentary authorisation in order to be concluded, as they will be classified under subparagraph e) of article 94.1".

The application of this doctrine by the *Consejo de Estado* has been characterised by its continuity and constancy.[59] But interpretation is a highly complex task, as at times it is very difficult to distinguish between expenses or credit operations. Besides, not all the institutions which take part in classifying international treaties agree unanimously on this .[60] This leads us to question the advisability of the doctrine of the *Comisión Permanente del Consejo de Estado*, which could have opted for its initial stance as regards interpretation, agreeing that expenses in excess of the yearly timeframe would require an extraordinary appropriation and, therefore, parliamentary authorisation for their conclusion, pursuant to either subparagraph d) or subparagraph e) of art. 94.1.

e) Treaties or agreements which involve amendment or repeal of some law or require legislative measures for their execution

The list of treaties in art. 94.1 ends with a provision designed to safeguard the law-making power of the *Cortes* on any subject matter. This precept is directly intended to confirm and state that power to make laws is vested in the *Cortes* and cannot be compromised by the Government[61] without parliamentary authorisation.

This precept fails to deal with one issue – the uncertainty of what will happen with treaties that regulate a field reserved for the law but do not involve the amendment, repeal or development of existing domestic law. Doctrine has

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[59] See the Opinions of the *CPCE* 48.151 of 25 September 1985, 48.218 of 26 September 1985, 52.574 of 3 November 1988, 54.492 of 8 March 1980, 54. 931 of 26 July 1990, 1155 of 30 June 1994, 1743 of 29 September 1994, 1969 of 27 October 1994, 1802 of 27 July 1995, 2046 of 21 September 1995, 2228 of 28 September 1995, 2374 of 26 October 1995, 2867 of 14 December 1995, 2710 of 18 January 1996, 205/96 of 29 February 1996 and 1278/96 of 11 April 1996.

[60] See subsection 3.2.1: reclassification of treaties by the *Cortes Generales*.

[61] The *Comisión Permanente del Consejo de Estado* has referred to this purpose of subparagraph 94.1.e) in very many of its Opinions. See, for example: 43.008 of 2 November 1980, 43.498 of 8 July 1981, 44.015 of 20 May 1982, 44.027 of March 1982, 44.045 of 25 March 1982, 44.186 of 15 July 1982. In more or less similar terms, the *Consejo de Estado* first ascertains the matters addressed by the agreement and then analyses what kind of rules regulate these matters in domestic law. Once the Council has concluded that these matters are regulated by rules with law status, it ascertains whether the treaty involves the amendment, repeal or development of law in order to decide on the need for parliamentary authorisation.

replied that, as this is an area reserved for the law, its regulation is the responsibility of Parliament, and it seems that such treaties must be authorised by the *Cortes*. The significance of treaties of this kind should not be underestimated, as once they are concluded they could determine the path and scope of legal reforms.[62]

A superficial analysis of the doctrine of the *Comisión Permanente del Consejo de Estado* shows this same position: any treaty which in some way affects matters reserved for the law will require parliamentary authorisation. Thus, opinion 52.858[63] concerning the Extradition Treaty between the Kingdom of Spain and the Republic of Venezuela states that *it can be clearly inferred from art. 13.3 of the Constitution that extradition is a matter reserved for Law, and the treaty therefore requires parliamentary authorisation.* Similarly, in Opinion 53.075[64] on the 59th ILO Convention on the retraining and employment of disabled persons, we read that *while the Convention neither repeals rules with law status nor requires the intervention of the legislature for its execution, it addresses a matter regulated in our legal system by a formal law, and therefore comes under subparagraph 94.1.e) of the Constitution.*[65]

It should be pointed out that it is sometimes very difficult to determine whether or not a particular matter is reserved for the law, as in Spain there is no set list of matters of this kind, just as there is no list of regulated subject matter. The *Comisión Permanente del Consejo de Estado* is very respectful of the powers of Parliament – something which we find positive. Disagreements occasionally arise between the *MAE*'s International Legal Office and the *Comisión Permanente del Consejo de Estado*. In such cases, it is always the decision of the *Consejo de Estado* that takes precedence as it is invariably endorsed by the Government. In any event, the differences of opinion between the two bodies do not stem from contradictory positions but from different perceptions as to the scope of a particular agreement. Furthermore, thorny issues only arise when the *Comisión Permanente del Consejo de Estado* classify treaties under article 94.2 of the *CE* and the Government endorses this classification, against the *MAE*'s opinion, and the *Cortes Generales* agree with the Ministry rather than with the *Comisión Permanente del Consejo de Estado*.[66]

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[62] A. Remiro Brotóns, "Comentario a los arts. 93 y 94 de la Constitución", in *Comentarios a la Constitución de 1978...*, *op. cit.*, p. 559.

[63] Opinion 52.858 of the *CPCE* of 16 February 1989. See also Opinion 48.070 of 19 December 1985.

[64] Opinion 53.075 of the *CPCE* of 13 April 1989.

[65] This is also true of more recent doctrine: Opinion 679/96 of 25 April 1996, concerning the Extradition Treaty between the Kingdom of Spain and the Eastern Republic of Uruguay and Opinion 2222/96 of 13 June 1996 on the Agreement between Spain and Egypt on Judicial Assistance in Criminal Matters.

[66] See subparagraph 3.2.1: *Reclassification of treaties by the Cortes Generales.*

3. PROCEDURE FOR PARLIAMENTARY AUTHORISATION

3.1. The Government's Role in the Process

3.1.1. The deadline for submitting a request for authorisation

Once the Government has classified an international treaty under art. 94.1 of the *CE*, it must then, if it wishes to conclude the international treaty, submit it to the *Cortes* in order for the latter to authorise expression of consent.[67] The policy decision to send the treaty to the *Cortes*[68] is taken by the Council of Ministers.[69] The Government then has ninety days from this decision to submit the treaty to Congress.[70] In justified cases, the deadline can be extended to one hundred and eighty days.[71]

In our opinion, this is a sensible precept. The provision does not oblige the Government to request authorisation for all the treaties it authenticates; rather, it depends on the decision to conclude them at a later date.[72] This prevents cases

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[67] Art. 5 of the new Government law, Law 50/1997 of 27 November 1997, *BOE* n. 285, 28 November 1997, p. 35082 and art. 155 of the Rules of Procedure of the Congress of Deputies. Though deputies logically lack the capacity to initiate the parliamentary process, the *Cortes* can and should use traditional and general methods of politically controlling the Government in order to be informed of the state of negotiations on an international treaty, and to pressure the Government with respect to its position or intentions regarding an international treaty for which negotiations have been finalised.

[68] Art. 18 of Decree 801/72 on the activity of the Government administration with respect to matters of treaties.

[69] This is the last time the treaty will pass through the Council of Ministers. Subsequently, when it has been authorised and the Government is willing to give its consent, it is not required by Spanish law to pass through the Council of Ministers. This means that in Spain, the Council of Ministers authorises the expression of consent to an international treaty when it agrees to send it to the *Cortes* in order to request parliamentary authorisation.

[70] Art. 155.3 of the Rules of Procedure of the Congress of Deputies.

[71] The Government is obliged to send Congress a communication, documenting the reasons for the delay.

[72] According to R. Riquelme Cortado, an opposite system for determining the documents the Government must send the *Cortes* could influence the Government in several ways, leading it: 1) to delay authenticating the texts negotiated once it is sure of concluding the international treaty in question; 2) to use forms of authentication other than signature, thus taking advantage of the literal meaning of the precept; 3) to violate the Rules, as frequently occurred in practice with those of 1977. See: R. Riquelme Cortado, "La tramitación de los tratados internacionales y el Reglamento del Congreso de los Diputados en 1982...", *op. cit.*, p. 416 and, along the same lines: A. Rodríguez Carrión, *Control de los Tratados Internacionales en el sistema parlamentario español*, Seville, 1991, pp. 151–152 and 160.

arising of treaties which are authorised by the *Cortes*, but, owing to different circumstances, are never concluded by the Government.

Once the decision to send the treaty to *Cortes* has been taken, one should not forget that this is now subject to the period of time established by Congress. In Spain it is not frequent for the Government to delay sending a treaty to the *Cortes* following the agreement of the Council of Ministers. On some occasions however, the Government takes over long to send the treaty to the Council of Ministers in order to ensure the latter will authorise sending the treaty to the *Cortes*. However, this is not significant as there is no established period for taking this policy decision, though such practice is inappropriate when the treaty is to be applied provisionally, as we will see later on.[73]

3.1.2. Documents the Government must submit to the Cortes

According to art. 155.2 of the Rules of the Congress of Deputies, *the Government shall request the said authorisation from the Cortes Generales by sending the Congress of Deputies*: 1) the agreement of the Council of Ministers; 2) the text of the treaty or agreement; 3) a report justifying the request, to help the *Cortes* understand the Government's policy decision to conclude the international treaty; 4) any reservations and declarations that the Government may intend to formulate.

This precept is not wholly satisfactory, as those responsible for drafting the Rules of Congress failed to establish the requirement of certain documents. The solution is found in an earlier text, Decree 801/72, which also incorporates the requirements of: 1) specification of the States or international organisations which are negotiators, contracting parties or parties to the treaty; 2) any appendix or supplementary document to the treaty signed by the negotiating States, and any other international act relating to its provisional application; 3) reservations and declarations formulated by other State parties and, finally, specification of the place and date of signature of the treaty. The Government is bound by both regulations, since Decree 801/72 remains in force except for certain clauses which are contrary to the Constitution, and the overall requirements of the executive with respect to the documents that must accompany the request for authorisation of an international treaty are currently satisfactory. If in the future Decree 801/72 is superseded by a law on treaties, both provisions should be taken into account, and furthermore it would be appropriate to add another requirement: objections to reservations made by other parties that our country intends to formulate[74] and the opinion of the *Comisión Permanente del Consejo de Estado*, which is in fact submitted in practice.

The Government's conduct with respect to complying with these precepts is positive in most cases, although there has been an absence of certain necessary

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[73] See subsection 3.1.3: *The practice of provisional application.*

[74] In this connection, see: R. Riquelme, "La tramitación de los tratados internacionales...", *op. cit.*, pp. 418–419.

documents on some occasions. This is particularly true of exchanges of letters, where sometimes only one letter is sent to the *Cortes*. To cite an example,[75] the Exchange of Letters constituting an agreement between Spain and Paraguay to amend the 12 May 1976 Agreement on Air Transport and the Exchange of Letters constituting an Agreement between Spain and Thailand on Air Transport.[76] In both cases, the Government submitted verbal draft notes to the *Cortes* for authorisation for the embassies of Paraguay and Thailand, respectively. These documents established that they would constitute an international treaty together with each country's response. The Government sent the notes to the *Cortes* for authorisation before receiving a reply from the other State, as if they had waited for the reply, the treaty would already have been concluded. However, they sent the text of a treaty which had not yet been accepted by the other party and could have been altered in the reply. In our opinion, these are cases in which the Government requests *premature* authorisation,[77] before the letters have been exchanged, so the treaties are able to come into force when both letters have been received by the respective Governments. The correct procedure is to carry out the exchange of letters, subject its entry into force until confirmation from the parties that the respective constitutional procedure has been completed. The fact that the Government took a different course of action, probably for reasons of urgency, cannot be justified from any viewpoint.[78]

3.1.3. The practice of provisional application.

As is well known, the provisional application of treaties, envisaged in article 25 of the Vienna Convention of 1969, means that a treaty, or a part thereof, can be applied pending its entry into force if the text so provides or if the negotiating

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[75] See also the Exchange of Letters constituting an Agreement between Spain and Argentina amending the Convention between Spain and Argentina on civil air services (*BOCG, Congreso, IV leg., serie C*, n. 314); Convention between the Kingdom of Spain and the Republic of Guatemala on judicial cooperation, signed *ad referendum* in Guatemala on 23 March 1993, (*BOCG, Congreso, V leg., serie C*, n. 54) and the Exchange of Letters constituting an Agreement between the Kingdom of Spain and the Republic of San Marino on the abolishment of passport requirements (*BOCG, Congreso, serie C, V leg.*, n. 55).

[76] See: *BOCG, Congreso, serie C, IV leg.*, n. 328 and *V leg.* n. 41.

[77] It is not apt to speak of early authorisation, as in such cases the *Cortes* are unfamiliar with the final text of the international treaty to be concluded, which does not apply to this case as the *Cortes* are familiar with the text of one of the letters and presuppose that the text of the other is identical.

[78] The *Cortes* save the situation by processing the letters they have received – classified under art. 94.1 – and requesting the Government that *if the other State party makes any type of alteration to the content of the Spanish note in its reply, the Cortes Generales be informed immediately of this circumstance, in order to proceed to grant, as the case may be, the necessary new parliamentary authorisation.*

States have in some other manner so agreed. This provision is intended to allow for the urgent application of a treaty which has completed the initial stage but cannot proceed quickly to the final stage owing to domestic law requirements of the negotiating States. Such decisions rest solely with the Government. The legal grounds are established in the Government's responsibility for the direction of foreign policy (article 97 of the *CE*) and currently also in art. 5 d) of the recent Government Law.[79]

From the point of view of our analysis, the importance of provisional application lies in the fact that this technique makes it possible for the Government to delay and even avoid real parliamentary control through States' improper use of this provision domestically. P. Picone[80] stated in this connection, that the problem is common to the different constitutional systems, and some have therefore expressly provided for this situation. Unfortunately, our system has not done so, and this is a discouraging fact, particularly if we recall that the provisional application figure has already been incorporated into our legal system when the Constitution was formulated, since it was allowed in Decree 801/72, though it has not been regulated as thoroughly as such a figure requires. Neither the Constitution nor the subsequent legislation developing it filled this legal lacuna, as no related provisions were made in the basic principle. Neither did the Order of the Under-Secretary for Foreign Affairs of 17 February 1992 go any further in regulating the provisional application.[81] However, Governments have availed themselves more and more frequently of this figure. Thus, we are faced with a situation in which the only precautions our legal system takes with respect to provisional application are that, when the Government decides to apply a treaty provisionally: 1) the treaty must be published in the Official Journal of the State (*BOE*) (art. 30, Decree 801/72) and 2) the *Cortes* must be informed of this decision when authorisation is requested for the treaty in question (art. 20.2).

With such scanty and deficient rules relating to provisional application, there is a possibility that in Spain – as has indeed occurred – this figure may be used improperly in practice. An example is when the Government delays requesting the *Cortes* to authorise an international treaty that is being applied provisionally. Another, more flagrant case is the provisional application of treaties whose object and purpose are very short-lived, so that by the time they are submitted to Parliament for approval, the treaties are no longer effective, and the intervention of the legislature is therefore totally irrelevant. In these cases the cause of improper use of provisional application is the Government's lack of foresight,

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[79] Law 50/1997 of 27 November 1997, *BOE* n. 285, 28 November 1997, p. 35082.

[80] P. Picone, *L'applicaziones in via provvisoria degli accordi internazionali*, Naples, 1973, p. 23 *et seq.*

[81] See in this connection: A. Fernández Tomás, "Comentario a la Orden de 17 de febrero de 1992 de la Subsecretaría de Asuntos Exteriores por la que se establecen normas para la tramitación de los tratados internacionales por parte de los órganos de este Departamento", *REDI*, 1998.1, p. 349.

that is, carelessness. Not-so-remote examples are the Exchange of Letters of 13 December 1994 and 22 March 1995 constituting the Agreement between the Kingdom of Spain and the United Nations Organisation concerning the international conference on biosphere reserves held in Seville from 20 to 25 March 1995. The Agreement reached the *Cortes* for authorisation on 17 November 1995,[82] *a mere* seven months after the Conference was held. These are the so-called *ex post facto agreements*.

Spanish internationalist doctrine has attempted to regulate the use of provisional application in our country. It has not ignored the fact that the advent of the Constitution in Spain has made the use of provisional application more complex, since the establishment of different procedures for international treaties depending on the matters they address raised the question of whether provisional application was recommendable for all types, or whether it was advisable to make certain distinctions, excluding some treaties from provisional application on the basis of their subject matter or other criteria. In any event, the basic aim[83] is to preserve the advantages of provisional application without undermining the powers of the Houses of parliament.

In general, doctrinal construction is inflexible with respect to the Government's possibilities of using provisional application. Strict interpreters consider that provisional application is not admissible in the following cases: 1) treaties classified under subparagraphs c), d) and e) of article 94.1, since their execution can cause irreversible situations and 2) treaties of the kind referred to in articles 93 and 95, in order to protect areas for which special guarantees have been established, given the major consequences arising from them, which specifically gave rise to this special treatment. All in all, provisional application would only be possible for treaties classified under article 94.2 and subparagraphs a) and b) of article 94.1.

The administration has upheld almost radically opposite views.[84] It considers that it is wrong to only be able to use provisional application for treaties in

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[82] *BOCG, Congreso, V legislatura, Serie C*, n. 525.

[83] See: A. Remiro Brotóns, *Derecho Internacional Público.2. Tratados Internacionales...*, *op. cit.*, pp. 248–252; M.P. Andrés Sáenz de Santa María, "La aplicación provisional de los tratados internacionales en el Derecho español", *REDI*, 1982, p. 31; A.J. Rodriguez Carrión, "Regulación de la actividad internacional del Estado en la Constitución", *op. cit.*, p. 95; L.I. Sánchez Rodríguez, *El proceso de celebración de los tratados internacionales y su eficacia interna...*, *op. cit.*, p. 61 and 118; D. Vignes, "Une notion ambiguë: la mise en application provissoire des traités", *AFDI*, 1971, p. 181 *et seq.*; J. García Fernández, "La aplicación provisional de los tratados", in: *La celebración de...*, *op. cit.*, p. 95; A Fernández Tomás, *La celebración de tratados bilaterales de cooperación...*, *op. cit.*, p. 84 *et seq.* and F. Dorado Frias, "La autorización parlamentaria de la conclusión de los tratados internacionales", *RCG*, n. 42, 1997, p. 35.

[84] See J. García Fernández, "La aplicación provisional de los tratados", in *La celebración de tratados internacionales en España*, *op. cit.*, p. 95 *et seq.*

exceptional situations or for urgent reasons, since it is a form natural of expression from the Government and, far from defrauding the parliamentary system, it is a product of the latter and is legally grounded in the Constitution. In any event, even these positions recognise the need to establish certain guarantees which, logically, only coincide in part with those imposed by doctrine: the exceptions to article 95 and exceptions to the subparagraphs of arts. 94.1 and 93 in which irreversible situations were caused.

In practice, the Government frequently avails itself of provisional application, both for treaties in which parliamentary authorisation is required for consent to be expressed and for cases where it is sufficient to inform the *Cortes* of its decision. As P. Andrés[85] has pointed out, the executive's conduct in situations of provisional application of an agrcement with respect to compliance with the obligations of domestic law is mostly positive, particularly regarding the publication of the treaty text in the *BOE*. This is also the case when it comes to informing the *Cortes* of the provisional application of a treaty when the necessary parliamentary authorisation is requested, particularly from the 5th parliamentary term onwards, when Government's provisional application notices ofer agreements start to be published regularly in the *BOCG*. No reaction of any kind has been observed from the *Cortes* regarding the provisional application of an international treaty, even in the cases of *ex post facto agreements*. Basically, they cannot question such Government decisions, as what reference could they quote to question them? The lack of regulation does not allow this. The matters for which provisional application is generally used are commercial matters, economic cooperation, transport – particularly air – treaties of friendship and collaboration and responsibilities in fishing issues. Such treaties are classified by the Government as belonging to categories d) and e) of art. 94.1, that is, treaties for which doctrine advises against provisional application.

In our opimon, the reality is that the areas in which provisional application is not admissible or should not be recommended could become less important if a provisional guarantee were established.[86] This provisional guarantee would consist of establishing a maximum period for the provisional application of a treaty, and would thus force the Government and Parliament to complete the parliamentary procedure as quickly as possible. Spurred on by the time factor, the Government would fulfil the obligation to send the treaty immediately to the *Cortes*, even before publishing it the *BOE*. Once submitted to the *Cortes*, according to current practice – particularly in recent years – it would not generally take more than six months for the international treaty to be authorised. Indeed, the system for authorising international treaties, irrespective of the

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[85] M.P. Andrés, "La aplicación provisional...", *op. cit.*, p. 77.

[86] In this connection, in its new Federal Law on International Treaties, the Russian Federation establishes a period of six months from the beginning of the provisional application of the treaty in which to carry out *ratification* (art. 23). See: *ILM*, 1995.5, p. 1370.

improvements and clarifications that could be made, is today considerably consolidated as regards duration, and takes a very reasonable length of time. Furthermore, this would be a very appropriate occasion for using the urgent procedure, which trims the period down to scarcely three months. Another technique that would lead to fewer situations in which provisional application of treaties would be necessary, is to incorporate into our system the figure of tacit authorisation,[87] which would indeed reduce the length of time needed to authorise an international treaty.

Despite the foregoing, exceptional and urgent situations will unavoidably arise in which the provisional application is the most appropriate measure. In such cases, the previous paragraphs have shown that this is one of the areas in which it is particularly urgent and indispensable to adopt precautionary regulations in order to prevent the technique of provisional application from being used improperly or too frequently – whether deliberately or involuntarily. We would opt for the following preventative measures: One, banning the provisional application of treaties classified as belonging to the categories established in arts. 93, 95[88] and 94.1.c), though the latter would need some clarification, as the broad interpretation of the *Comisión Permanente del Consejo de Estado* advises against excluding it totally from the scope of provisional application. Consider, for example, treaties regulating State powers on adjacent maritime areas or treaties only affecting fundamental rights indirectly and minimally. Two, banning the provisional application of treaties whose legal effects are short-lived or those which are executed in a single act.[89] The exclusions affecting subparagraphs d) and e) of art. 94.1 are more debatable, and can be left to the Government's casuistry. The *Cortes* would retain the power to censure the action of the latter when the treaty comes up for authorisation. In

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[87] For further information on tacit authorisation and Spanish legislation, see the section on Ordinary procedure, paragraph entitled: Procedure for the authorisation of treaties of the types established in article 94.1.

[88] Under the Dutch law on the approval and enactment of treaties of 20 August 1994, the only exception to provisional application is treaties that contravene the Constitution. However, we find this excessively flexible. See: J.K. Klabbers, "The new Dutch Law on the Approval of Treaties", *ICLQ*, Vol. 44, July, 1995, p. 636.

[89] In such cases it is preferable even to use the premature authorisation technique mentioned earlier, which enables the *Cortes* to authorise a treaty before the final version is drawn up. The validity of the authorisation is conditional on the non-alteration of the authorised terms, which must be accepted by the other contracting party or parties. The Dutch law on the approval and enactment of treaties of 20 August 1994 takes a very different approach – and one that is worth considering – to treaties of this kind, since it provides that international treaties which do not imply significant financial liabilities and will be in force for less than a year or are concluded for the purpose of specific, short-lived events, do not require parliamentary authorisation. Introducing this rule into our set of laws could clash with article 94.1, but apart from this, it seems sensible and appropriate. See: J.K. Klabbers, "The New Dutch Law on the Approval of Treaties", *op. cit.*, p. 632.

any event, specifically in subparagraph e) of art. 94.1, treaties affecting the rights of individuals could be excluded from provisional application. As for what procedure to adopt following the Government's decision to apply a treaty provisionally, the publication of the treaty in the *BOE* should logically follow immediately after the decision on provisional application, and the same applies to the sending of the treaty to the *Cortes*, the request for authorisation and notification of its provisional application.

3.1.4. Treaties which are withdrawn

Common legislative procedure acknowledges the possibility that a procedure that is under way may not be completed if it is interrupted by the body which initiated it. When applied specifically to our study, this means that the procedure for authorising an international treaty can be interrupted by a decision from the Government, the body, which, in this case, always sets the procedure in motion. Indeed, the Rules of Procedure of the Congress of Deputies – article 128 – allow for the possibility that the Government may withdraw the text submitted to the Houses for approval, provided that a final agreement has not been reached, and the withdrawal initiative takes effect in its own right.

The Spanish Government has availed itself of this option on several occasions. For example, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington on 3 March 1973,[90] which was submitted to the *Cortes* on 17 June 1980 and withdrawn on 26 March 1981; the Agreement on the European Economic Area, Oporto on 2 May 1992, submitted to the *Cortes* on 23 October 1992 and withdrawn on 28 December 1992[91] and the Cooperation Agreement between the Spanish, French, Moroccan and Portuguese Governments and the European Economic Community for the protection of the coasts and waters of the Northeast Atlantic against pollution, appendices, final act and two resolutions, signed in Lisbon on 17 October 1990, which was submitted to the *Cortes* on 28 December 1993 and withdrawn on 10 June 1994.[92] In all the above cases, the Congressional Steering Committee accepted the Government's wishes and considered the treaty to have been withdrawn, since Congress had not reached an agreement on the latter and the decision had been published in the official journal of the *Cortes*, the *BOCG*.

What is the rationale of this power? It does not serve the purpose of allowing for the possibility of withdrawing the treaty if the Government changes its policy decision to ratify or accede to it, since an authorised treaty does not

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[90] *BOCG, Congreso, serie C, I legislatura*, n. 61, *DS, pleno*, n. 125.

[91] *BOCG, Congreso, serie C, IV legislatura*, n. 292. After this agreement was withdrawn, the Treaty on the EEA was again submitted to the *Cortes* for authorisation during the 5th parliamentary term, *BOCG, Congreso, serie C, V legislatura*, n. 5, *DS, pleno*, 17, 18, *comisión*, n. 33; *Senado, DS, pleno*, 32.

[92] *BOCG, Congreso, serie C, V legislatura*, n. 70.

compulsorily have to be concluded by the Government,[93] and there is no reason why the procedure for parliamentary authorisation should not be completed even if the decision has been taken not to ratify or accede to the treaty. However, adverse circumstances affecting the treaty in the *Cortes*, an unfavourable public opinion or the resumption of international negotiations could make it advisable to wait, and in such cases it might be useful to be able to withdraw a treaty from the procedure of parliamentary authorisation.

3.2. Procedure and deadlines for the decision of the *Cortes Generales*

3.2.1. Reclassification of treaties by the Cortes Generales

In 1980, the process for parliamentary authorisation of the North Atlantic Treaty highlighted the possibility that the Houses could disagree with the classification previously carried out by the Government. Congress attempted to alter the procedure for granting authorisation for the conclusion of this treaty by reclassifying it.[94] Although this attempt failed, the precedent had been set for the *Cortes* to reclassify international treaties. A clear distinction needs to be drawn between two different cases. On the one hand, cases such as the NATO Treaty, where the Government decides to submit the conclusion of a treaty to parliamentary authorisation and reclassification is carried out on a treaty which has not yet been concluded. On the other hand, international treaties which the Government sends to the *Cortes* only for the purpose of informing of their conclusion and which have previously been classified under article 94.2, in which case reclassification relates to a treaty which has already been concluded.

The first case concerns treaties classified by the Government under art. 94.1, which the *Cortes* consider should follow the procedure for art. 93, or treaties which the Government has classified under art. 93, though the *Cortes* deem that the procedure of art. 94.1 is more appropriate. This type of reclassification has

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[93] See subparagraph 3.1.1: The deadline for submitting a request for authorisation.

[94] The debate focused on the fact that the Government had classified the treaty as a political and military treaty which did not involve the transfer of the exercise of sovereign powers to the organisation. In a green paper and amendment proposal, the Socialists, the Andalusian party and the Basque Nationalist minority maintained that the accession procedure for the Atlantic Alliance should be according to article 93 of the Constitution and, as such, authorised by an organic law procedure. However, none of the participants was able to come up with a weighty argument to demonstrate that constitutional powers would be transferred to the Alliance, and the proposal therefore did not prosper. See *DS, Congreso, Comisión*, 6 and 7 October 1981 n. 41 and 42; *Pleno*, 27 October, n. 191; *Senado, Pleno*, 24 November, n. 127. On this issue: A. Remiro Brotóns, *La Acción Exterior del Estado*, Madrid, 1984, p. 131; *idem, Política Exterior de Defensa y control parlamentario...*, *op. cit.*, p. 128 and A. Mangas Martín, "El procedimiento constitucional para la eventual adhesión de España al Tratado del Atlántico Norte, *REI*, 1981, p. 81 *et seq.*

only been attempted once and has never been carried out in practice. It does not pose any problems in the international sphere, since it does not so far entail any international obligations. It is a domestic issue: do the Houses have the power to modify the classification carried out by the executive with respect to the authorisation procedure?

There are many examples of the second case in practice. These are agreements classified by the Government under paragraph 2 of article 94 *CE*, which have already been concluded when they reach the *Cortes*. The latter proceed to reclassify them under paragraph 1 of article 94. This practice could place Spain in a very awkward position internationally. If the *Cortes* reclassify a treaty and refuse to grant the authorisation required for expressing consent to be bound by the treaty, we are faced with the problem of a treaty which is in force internationally yet raises serious doubts as to its extrinsic or formal constitutionality in the domestic sphere. In some cases this issue can be resolved internationally, either by denouncing the treaty, if the latter provides for such as possibility, or by invoking a violation which invalidates consent, as provided in art. 46 of the Vienna Convention, as long as the violation concerns a rule of fundamental importance and is manifest, in which case, this would not be easy to prove. So far, the *Cortes* have always initiated the authorisation procedure of international treaties *a posteriori*, thus avoiding international problems. But this does not solve the currently confusing internal situation. Do the Houses have the power to classify an international treaty which has already been classified and concluded by the Government?

The first international treaty to be reclassified was the supplementary agreement to the Convention on Scientific and Technical Collaboration between the Government of Spain and the Government of the Republic of Cuba to develop a programme on socio-labour matters.[95] The Convention, which, as stated in the official record of the sessions of parliament *was submitted as provided in article 94.2 of the Constitution*, was reclassified as falling into category 94.1.d) by the parliamentary Steering Committee that deliberated on the text of the agreement and considered that it entailed financial liabilities for the Public Treasury. The Committee argued that *the existence of a generic budgetary appropriation merely entails allowing for the availability of the appropriation, but should not be confused with the State's contracting an obligation in the international sphere, which, in its opinion, requires parliamentary authorisation in each case.*[96] The Committee agreed to its following the procedure established in art. 94.1. The agreement thus passed to the committee for foreign affairs, which, following debate, also proposed to Congress in full session that it should

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[95] See *BOCG, Congreso, III legislatura, DS, Pleno y Diputación Permanente*, n. 129 and *BOCG, Congreso, III Legislatura, Serie C*, n. 105.

[96] The *Comisión Permanente del Consejo de Estado* later used the same expression to argue that a treaty fell into the category established in art. 94.1.d) See Opinion of the *Consejo de Estado* n. 938/95 of 4 May 1995.

be authorised in accordance with art. 94.1. Congress did not deliver a judgment, but merely directly accepted the reclassification made by the congressional Steering Committee.

Many more reclassifications followed this first case, giving rise to a practice that became more and more frequent over time. During the second parliamentary term, for example, twenty-five treaties were reclassified. In each case, practically no debate took place, either by the House in full session or by a congressional committee, regarding the reclassification carried out by the *Cortes*,[97] which means that Congress accepted the Steering Committee's power to reclassify treaties. During the 3rd term, as many as thirty-six treaties were reclassified, because they all came under subparagraph d) of art. 94.1. It was during this period that the Government began to send many treaties which it had classified under art. 94.2 before expressing consent and, only if the *Cortes* did not reclassify them, was consent then expressed.[98] Following the Exchange of Letters to amend the agreement on technical cooperation between the Spanish Government and the Government of Equatorial Guinea,[99] the Congressional Steering Committee varied this measure. According to the records, the Steering Committee did not reclassify but actually classified treaties, under article 94.1 d), since the Government had not previously classified them. Furthermore, when the Steering Committee agreed on the need for authorisation, it added that it would inform the Government of this in order for it not to proceed with the expression of the State's consent or publication until the *Cortes Generales* decided whether to authorise the treaty. This formula continued to be used during the 4th and 5th parliamentary terms. This does not, in any event, amount to total relinquishment of the power which art. 94.2 vests in the Government. There are treaties which were classified by the Government according to this precept and sent to the *Cortes* simply for the purpose of information. But there is also a gradual decrease in reclassification by the Houses, so much so that nowadays this

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[97] At most, there are addresses such as the one regarding the exchange of letters constituting the Agreement on Technical Cooperation supplementing the Convention on Social Cooperation between Spain and Uruguay for the development of a programme to advise the ministry of labour and social security of Uruguay (*expediente 110/126, II legislatura*). Mr Durán Corsanego, addressing the committee for foreign affairs, drew attention to the fact that *yet again, a treaty which has already been authorised and partly executed has arrived in Parliament to be authorised, and it would therefore have been senseless to veto and send it back.* In his opinion, *the consent of the Cortes is more of a ratification of what has been done, though he believes it is appropriate to note for the record the delay in the procedure.* Mr. Durán's address shows to an extent that the Houses do not consider the possibility of rejecting the treaty by refusing authorisation to be feasible.

[98] AA.VV., *La celebración de tratados...*, *op. cit.*, see the address by J.A. Pastor Ridruejo, pp. 210–212, particularly p. 211.

[99] *BOCG, Congreso, III legislatura, DS, Comisiones*, n. 166 and *BOCG, Congreso, III legislatura, DS, Pleno y Diputación Permanente*, n. 67.

practice has disappeared[100] and this is undoubtedly related to the aforementioned phenomenon.

It is certainly better and more reasonable for the Government and Parliament to reach a sufficient degree of consensus on the scope of articles 93 and 94.1 of the Constitution. If consensus were reached on the content of article 94.1, the Government and the *Cortes* would only disagree on details. J.A. Pastor Ridruejo[101] argues, with respect to the Constitution, that any assumption of the supremacy of the *Cortes* over the Government is unfounded and that there are no express grounds for supporting the existence of the *Cortes*' power to reclassify treaties. In our opinion, there is indeed no legal basis for arguing for the existence of the power of the Houses of parliament to classify treaties which have been classified by the Government under art. 94.2 and which have already been concluded. In such cases, we believe that the Houses only have the power to contest the Government's classification by lodging an appeal on the grounds of unconstitutionality with the Constitutional Court. In view of the possibility that the Court may declare a treaty unconstitutional, it is necessary to prevent the problems that could arise by establishing a guarantee against the irreversibility of *faits accomplis*. Thus, if the treaty were to be concluded without the authorisation of the *Cortes*, there should be a possibility of denouncing it, whereas treaties which do not allow for this possibility should require parliamentary authorisation. In this connection, it is interesting to note that a considerable nnmber of treaties include a clause on denouncement without statement of reasons, and this tendency is undoubtedly increasing progressively.[102]

Treaties for which the Government requests authorisation from Parliament – such as the NATO Treaty – are a different matter. In such cases it is not the requirement of authorisation which is contended, but rather the procedure for granting or refusing this. This is obviously a matter of minor importance which does not impair the Government's essential role in classifying treaties and the intervention of the *Cortes* is admissible here. In this connection, A. Remiro Brotóns[103] points out that reclassification must, in any event, be possible, since the *Cortes* themselves by confirming or modifying the Government's initial classification will decide whether to grant authorisation under article 93 or article 94.1 of the Constitution, or whether to deny authorisation. What is more, should the Government disagree with the course of action of the *Cortes* – such as in the case of treaties which have not been concluded – the former has the option of lodging an appeal with the Constitutional Court.

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[100] Eleven treaties were reclassified during the 4th term and four during the 5th term.

[101] AA.VV., *La celebración de tratados...*, *op. cit.*, see J.A. Pastor Ridruejo's contribution to the colloquy, pp. 210–212, particularly p. 211.

[102] By way of an example, all the treaties reclassified during the 4th and 5th terms allowed for denouncement without statement of reasons.

[103] See A. Remiro Brotóns: "La autorización parlamentaria...", *op. cit.*, p. 142.

3.2.2. Ordinary procedure

a) Procedure for the authorisation of treaties classified under article 93 of the *CE*

As we know, authorisation for the conclusion of a treaty which falls into the category described in article 93 must be granted by means of an organic law. This precaution is in itself an unwise choice. It sprang from an attempt to introduce stricter procedure for art. 93-type treaties as opposed to the kind described in art. 94.1 when the draft of the Constitution provided that the latter type could be approved by ordinary law. After the requirement of ordinary law for art. 94.1-type treaties disappeared, reference to organic law was not the appropriate means of granting art. 93 treaties special protection, particularly bearing in mind that in the procedure approved for art. 94.1-type treaties, the Senate has a more prominent role than in the procedure of organic law.

However, things remained that way. Neither the Constitution nor the parliamentary rules of procedure provide for any special procedure for approving these enabling statutes, and it should therefore be understood that the process is the same as for other organic laws. As a result, a bill must be passed by an absolute majority of Congress in full session and then goes to the Senate, which should issue an opinion within two months – or twenty days if urgent procedure is established – vetoing it or introducing amendments. A proposal for veto will only prosper if it has absolute majority support from the Senators, and if the bill is vetoed or amended, it has to be sent back to Congress for confirmation or refusal of the new wording. A simple majority of Congress is overriding with respect to the amendments and an absolute majority in the first two months, and simple majority thereafter, overrides the veto. The scanty practice has always been in accordance with the applicable regulations and no problems have arisen.

b) Procedure for authorising treaties classified under article 94.1 of the *CE*

The procedure for authorising treaties which fall into one of the categories established in article 94.1 was initially outlined in the Constitution, specifically article 74.2,[104] which provides for authorisation by *ad hoc* procedure as opposed to through a law.[105]

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[104] Art. 74.2 of the *CE* states literally that: The decisions of the *Cortes Generales* outlined in Articles 94.1, 145.2 and 158.2 shall be passed by majority vote of each of the Houses. In the first case, the procedure shall be initiated by Congress, and in the remaining two by the Senate. In both cases, if an agreement is not reached between the Senate and Congress, an attempt to reach agreement shall be made by a Joint Committee consisting of an equal number of Deputies and Senators. The Committee shall submit a text which shall be voted on by both Houses. If this is not passed in the established manner, Congress shall decide by absolute majority.

[105] The previous texts of the Spanish Constitution, except that of 1812, expressly required

It has always been said that the wisest aspect of this precept was that it strengthened – dignified – the role of the Senate with respect to ordinary legislative procedure established in article 90 of the *CE*. This is true, since whereas in the latter a veto from the Senate can be overridden by a simple majority of Congress, once two months have elapsed since the veto, the second paragraph of article 74 requires the absolute majority of Congress in every case.

The precept was developed by the Rules of Procedure of the Congress of Deputies and of the Senate, specifically, articles 155–156 of the Rules of Congress and 144–145 of the Rules of the Senate.

As for Congress, its agreement to grant or refuse an authorisation request *must be adopted within sixty days*. This rule is meaningless and lacking in any legal effect,[106] since failure by the *Cortes* to respond will not have any positive effects. Once the sixty-day period established in article 155.4 has elapsed, the process which has been initiated will be deemed to have expired and authorisation for concluding the international treaty can only be obtained by setting a new procedure in motion.

The rules do not therefore provide for the mechanism of tacit authorisation, which, as we know, consists of deeming that authorisation has been granted when a given period of time has elapsed since the treaty was sent to the Houses.[107] Its incorporation into our system would have been desirable.[108] The lack of this mechanism gives rise, in practice, to an unsatisfactory phenomenon:

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a special law, like some current constitutions of other countries – Belgium, France, Greece, Portugal and the Federal Republic of Germany. Such a proposal was also made when drawing up the current Spanish Constitution, but it was soon rejected – rightly so, according to the unanimous opinion of the doctrine. Despite the advantages that establishing a law as a form of authorising international treaties would entail, such as, for example, the compulsory publication of treaties (which is not laid down in the Constitution), more importance was given to the fact that an ad hoc procedure raised awareness of the special nature of regulatory texts which, as such, required a suitable treatment. In this connection, see: A. Remiro Brotóns, *Derecho Internacional Público. Derecho de los Tratados*, vol. 2, Madrid, 1987, p. 17 *et seq.*; by the same author: "Comentario a los arts. 93 y 94 de la Constitución", in *Comentarios a la Constitución...*, *op. cit.*, p. 569. By contrast, the need for a law to authorise international treaties is argued for by: F. López Santaolalla, "Los tratados como fuente de Derecho en la Constitución española", in *La Constitución española y las Fuentes del Derecho*, Madrid, 1979, pp. 1935–1938.

[106] R. Riquelme Cortado, "La tramitación de los tratados internacionales y el Reglamento del Congreso de los Diputados de 1982", *op. cit.*, 1982, p. 422 and A. Rodríguez Carrión, *Control de los tratados internacionales en el sistema parlamentario español*, *op. cit.*, p. 147.

[107] See: A. Remiro Brotóns, *Derecho Internacional Público. Derecho de los Tratados. 2...*, *op. cit.*, p. 134.

[108] Those who were against introducing such a mechanism argued that it contravened precepts such as articles 74.2 and 94.1 of the *CE*, since in their opinion the spirit of these precepts refers to authorisation as a positive agreement.

the voting on authorisation for concluding many international treaties is almost mechanical and routine and deputies show no interest, since there is scarcely any debate and the discussion that does take place is anodyne. J.D. González Campos[109] has stated in defence of tacit authorisation that it does not amount to delegating legislative powers[110] and that incorporating this option into the procedure for international treaties would lead to a substantial improvement on current practice, which is excessively rigid and restricted by a dual shift of responsibility to consultative bodies: the Government by the *Consejo de Estado*, and the *Cortes* by their legal advisers of the *Cortes*. Indeed, it seems to have been forgotten that this issue affects political relations between Governments and parliament.

As for parliamentary procedure strictly speaking, this *must adapt to common legislative procedure, with the particular characteristics contained in the related chapter*[111]. *Thus, once the treaty has been sent to Congress, the Steering Committee will issue an order for it to be published in the Official Bulletin of the Cortes Generales* and sent to the Committee. The Committee must complete the procedure within two months.[112] At the same time, Deputies and parliamentary groups will have the possibility of presenting proposals for a period of fifteen working days.[113] Pursuant to section 2 of article 156 of the Rules, proposals from Deputies and parliamentary groups concerning international treaties shall be deemed to be amendments, though these amendments may apply to the whole of the treaty or to the articles – article 110.2 – and a distinction must accordingly be made between proposals. Thus, proposals for the refusal or postponement of authorisation and those aimed at formulating reservations or declarations not provided for in the treaty or agreement will be considered amendments to the treaty as a whole.[114] Proposals containing reservations and declarations of the

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[109] See the contribution by J. González Campos in the colloquy published in: *La celebración de Tratados internacionales por España...*, *op.cit.*, pp. 207–208.

[110] This distinguishes it from early authorisation, which indeed amounts to delegating legislative powers. In this connection, see: A. Remiro Brotóns, *Derecho Internacional Público. Derecho de los tratados...*, *op. cit.*, pp. 133–134.

[111] Chapter 1 of Title VII of the Rules of Procedure of the Congress of Deputies – arts. 154, 155, 156, 157 and 158. See: F. Dorado Frias, "La autorización parlamentaria de la conclusión de los tratados...", *op. cit.*, p. 40.

[112] Article 43.3 of the Rules of Procedure of the Congress of Deputies.

[113] Articles 110.1 and 90.1 of the Rules of Procedure of the Congress of Deputies. On the basis of article 91, by agreement of the congressional Steering Committee, this period may be extended or reduced and, except for special cases, the reduction will be to half and the extension by the same period of time.

[114] Although they exist, amendments of this kind are not very common and, indeed, have never prospered. See, by way of an example, the debates held during the passage through parliament of two agreements with clearly political undercurrents: the Defence Agreement between the USA and Spain of 1 December 1988 (*DS, Congreso, III legislatura, Pleno*, n. 176) and the Complementary Agreement on the Basic Convention on Scientific and Technical Collaboration with Cuba, for the development of a social

kind provided for in the treaty, or those which the Government intends to formulate, will be regarded as amendments to the articles.

The Committee's work ends with the drawing up of a report informing of its decision to propose or refuse authorisation to conclude the international treaty. This report is extremely brief and concise and, in practice, the result is usually approval of the international treaty by consent, with a few subsequent addresses by the spokesmen of parliamentary groups with the sole aim of explaining the vote. The Committee finally sends the full records to Congress, which must deliberate on the issue. In practice, if no amendments have been made to the treaty, deliberation merely consists of voting. Congress in full session has the final decision on whether to approve or reject the request for authorisation. Once the treaty has been authorised by Congress, the president of the latter sends it on to the Senate.

The Rules of Procedure of the Senate are fairly similar – though not identical – to those of Congress which have been analysed above. Thus, having received the text, the Steering Committee of the Senate orders it to be published and distributed among the Senators, in addition to specifying which committee is to deal with it and opening the ten-day period for submitting proposals for reservations[115] or for postponing authorisation,[116] which are regarded as amendments to the articles,[117] and proposals for non-ratification – *i.e.* refusal of authorisation – which amount to proposals for veto.[118]

When the period for submitting amendments to the articles, proposals for postponement and proposals for veto has expired, if none has been presented, the treaty passes directly to the Plenary meeting, as established in article 107 of

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and labour programme (*DS, Congreso, II legislatura, Pleno,* n. 129). In these cases, the proposals of certain parliamentary groups not to authorise the treaties did not in fact intend to prevent the international treaty from being concluded, but rather to express their political opinions on relations with the contracting parties.

[115] According to article 144.3 of the Rules of Procedure of the Senate, proposals for reservations may only be formulated with respect to treaties or agreements which provide for this possibility or which allow for it in their content. This treatment and description differ from those established in the Rules of Procedure of Congress. See subsection 3.3.1 on reservations and declarations: The procedural system for reservations in the rules of parliamentary procedure.

[116] Proposals for postponement are treated as amendments to the articles, as opposed, as seen earlier, to they way they are regarded in Congress, which considers them to be amendments to the treaty as a whole.

[117] J. J. Lavilla Rubira, "Las enmiendas en la tramitación parlamentaria de los tratados internacionales", in *La celebración de tratados internacionales por España...*, *op. cit.*, p. 108 *et seq.*, particularly 110.

[118] Proposals for veto, which are really amendments to the treaty as a whole, are not debated on by the Senate in full session as occurs in Congress, but rather by the relevant committee, as established in article 114.1 on the rules of procedure of the upper house.

the Rules. Deliberation by the Committee of the Senate is only carried out to debate on proposals for veto and amendments to the articles[119] rather than to draw up a report, as occurs in Congress, proposing that the Plenary either grant or refuse authorisation to conclude the international treaty. However, if the Committee needs to deliver an opinion, it must do so within 30 days and, as in Congress, must draw up a proposal on whether or not authorisation should be granted. The international treaty is then read to the Senate in full session, which, without the prescribed deliberation, approves the international treaty by assent. The Senate is even more passive regarding international treaties than the Congress of Deputies.

Once the Senate has authorised the international treaty, this authorisation is reported to the Government. If the Senate has any reservations to the treaty,[120] the report is sent to Congress, which will debate and vote on them in full session. These reservations may be approved by simple majority and those which are accepted are incorporated into the text of the authorisation (arts. 121 and 123 of the Rules of Procedure of the Congress of Deputies). If the authorisation is vetoed, a joint committee is formed to draw up a text that is then voted on in both Houses. If this new text is not passed, Congress will decide by absolute majority.

Finally, it should be added that the ordinary procedure for international treaties is used for the most part – in 70% of cases – though there is an increasing use of the urgent procedure, which we will examine in the next section. Furthermore, the period for the procedure can stretch to between five and six months, though it tends to be five rather than six, in keeping with the periods established in the Rules of Procedure of Congress and the Senate.

3.2.3. Urgent procedure

Urgent procedure has been used for many international treaties and this practice is becoming progressively more frequent.[121] The Rules of Procedure of Congress provide for the possibility of declaring urgent parliamentary procedure for a

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[119] Articles 110–117 of the Rules of Procedure of the Senate.

[120] See subsection 3.3.1: The procedural system for reservations in the rules of parliamentary procedure.

[121] During the first parliamentary term only one international treaty was authorised by means of urgent procedure, as opposed to almost fifty during the 5th term. One of the main reasons for the increasing use of urgent procedure is the fact that the procedure of a single reading for authorising an international treaty, widely used during earlier parliamentary terms, has fortunately fallen into disuse. The Rules of Procedure of the Congress of Deputies provide for the procedure of a single reading in article 150, as do the Rules of Procedure of the Senate in article 129. The use of single-reading procedure entails eliminating the committee stage, which, in the case of international treaties, means that it is impossible for the Houses to formulate reservations as provided for in the treaty and to amend those formulated by the Government, and it is therefore clearly not a suitable procedure.

document, which entails shortening its passage, though not omitting or modifying any of the stages of ordinary procedure. Urgent procedure is therefore not a procedure as such, but rather a *procedural technique* which may accompany a procedure and can be used on top of any of the procedures carried out in Congress. There is therefore nothing to prevent this technique from being applied to the authorisation of an international treaty.

According to article 93 of the Rules of Procedure of the Congress of Deputies, a declaration of urgency must be agreed by the congressional Steering Committee and can be requested either by the Government, two parliamentary groups or one fifth of the deputies. A declaration of urgency is optional for the Steering Committee, which may refuse to grant it if it deems appropriate. A declaration of urgency cuts the periods established in ordinary procedure by one half at all stages of the procedure.

The use of urgent procedure in the Senate is enforced when decided by Congress. The Senate does, however, have the possibility of applying urgent procedure to matters that have not followed such procedure in Congress, as article 133.2 of the Rules of Procedure of the Senate establishes the possibility of urgent procedure being declared on the basis of a decision by the Steering Committee of the Senate, at the request of a parliamentary group or twenty five senators.

There is a tendency for declarations of urgency to spring less from Government requests and more from decisions of the Steering Committee.[122] Although the reasons which may lead the Government to request the Houses to apply urgent procedure are clear, it is hard to understand, on the surface of it, why the Congressional Steering Committee tends to declare urgent procedure for an international treaty. This could be because the Steering Committee is aware that, in many situations, the Rules of Procedure allow plenty of time for the passage of treaties and it does not consider it appropriate to draw out this process unnecessarily, particularly if it knows that there is a consensus on the treaty, as is often the case.

3.3. The passage of internatioual treaties through the Houses: reservatious and declarations

3.3.1. The procedural system for reservations in the rules of parliamentary procedure

The democratisation of the State's foreign relations entails the necessary participation of Parliament, not only in authorising treaties but also in making

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[122] This distribution of initiatives is reflected in the *BOCG*. We do not know if the request for urgency always originates from the Government, which would be logical; however, the Congressional Steering Committee echoes the decision.

reservations.[123] The Constitution established an initial limit to parliamentary intervention with respect to reservations, since the text clearly implies that only the Government may formulate any reservations it deems appropriate, with no possible parliamentary supervision, to treaties classified under article 94.2 of the *CE*. Parliament will be informed of these reservations once the treaty has been concluded, and in this case, lacks the power to formulate its own reservations.

The Constitution does not say anything about reservations to treaties requiring authorisation from the *Cortes*, and regulation in this field has been carried out by the Rules of Procedure of the Congress and the Senate. These rules distinguish between parliamentary supervision of the reservations and declarations formulated by the Government and the possibility that Congress and the Senate may formulate new declarations and reservations.[124]

As for the system for declarations or reservations that the Government should wish to formulate, the Rules of Procedure of the Congress of Deputies establish the need for the Houses to be informed of these reservations or declarations (art. 155.2) and give their opinion on them (art. 155.2 in fine) through proposals for elimination, addition or modification, which will be regarded as amendments to the articles. This is a sensible system, but it does not motivate the members of parliament. An analysis of what happens in practice shows that the attitude of deputies and parliamentary groups towards the reservations and declarations made by the Government is just as anodyne as in the parliamentary procedure for treaties. There is an established tendency not to counter reservations and declarations with proposals for modification or elimination.[125] It is somewhat

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[123] A. Remiro Brotóns points out that the failure of the Houses to participate in the reservations to international treaties does not appear to be compatible with a deepening of democracy, for if the very nature of the process of adopting an international text obliges parliaments, when their turn comes, to make certain relinquishments, these should be strictly kept to the minimum necessary, since the essential value does not lie in a greater degree of freedom for the executive, but in the highest level of popular participation in shaping foreign policy. See: A. Remiro Brotóns, "Las reservas a los tratados internacionales y la competencia de la Cámara legislativa", *REDI*, 1978–79, p. 65 *et seq.*, especially p. 70. Along the same lines: J. Quel López, *Las reservas a los Tratados internacionales. Un examen de la práctica española*, Bilbao, 1991, p. 345.

[124] We naturally limit members of parliament's possibility of proposing reservations or declarations to multilateral treaties, in the same way that the Government is subject to this same limitation that stems directly from the very nature of bilateral treaties. See: L.I. Sánchez Rodríguez, *El proceso de celebración de los tratados internacionales...*, *op. cit.*, pp. 117–118 and J.J. Lavilla Rubira, "Las enmiendas en la tramitación parlamentaria de los tratados internacionales", *op. cit.*, p. 108 *et seq.*, especially p. 112.

[125] See, for example, the amendment by the Catalan parliamentary group to the declaration accompanying the European Framework Agreement on cross-border cooperation between territorial entities or authorities, done at Madrid on 21 May 1980. The amendment in question aimed to eliminate the first two paragraphs of the declaration, arguing that they annulled regional and local autonomy, which was a basic element of the agreement. The amendment was not passed.

more common for the committee to intervene to express support for the reservations or declarations that have been formulated.[126] All in all, the *Cortes* do not value the practical significance of the possibility of making proposals.

With respect to proposals for reservations or declarations submitted by deputies, the Rules of Procedure of Congress draw a distinction between the treatment of proposals for the formulation of reservations or declarations that are not provided for in the treaty, which are regarded as amendments to the treaty as a whole, and reservations or declarations that are provided for, which are to be treated as amendments to the articles.[127] The distinction drawn in the Rules should be valued positively, though the terminology is inappropriate. The use of the terms *not allowed* and *permitted* would have been more sensible as these really do cover all the options which a reservation to an international treaty can contain,[128] unlike the terms "provided for" and "not provided for".[129] Moreover, the confusing terminology means that, in practice, the only proposals from deputies or parliamentary groups with respect to reservations which are considered amendments to the articles are reservations expressly provided for and permitted by the treaty, and this seems excessively restrictive. In practice, we find that the Houses actually relinquish exercising their powers. This may be due not only to the existing majority in the Houses, particularly during the 3rd and 4th parliamentary terms, but also to their literal interpretation of the precepts of the rules of parliamentary procedure, since deputies and parliamentary groups are faced with the dilemma of having to submit a proposal not to authorise the treaty

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[126] See, for example , *DS, Congreso, IV legislatura, Comisiones*, n. 122, p. 3664 and n. 133, p. 3939, n. 312, p. 8895; *V legislatura, Comisiones*, n. 33, p. 580, n. 52, p. 1493, n. 187, p. 5820, n. 348, p. 10812; *VI legislatura,* n. 31, p. 511, n. 61, p. 1323, n. 235, p. 6752.

[127] The Rules of Procedure of the Senate establish a single procedure for all proposals, which are to be treated as amendments to the articles.

[128] In this connection see R. Riquelme Cortado, "La tramitación de los tratados internacionales y el Reglamento...", *op. cit.*, p. 427 and A. Rodríguez Carrión, *Control de los tratados...*, *op. cit.*, p. 154.

[129] The expression *permitted* clearly refers to reservations and declarations which are accepted by the treaty, either because they are expressly provided for or because they are compatible with the object and purpose of the treaty, whereas *not allowed* refers to the rest of the possibilities, that is, proposals for reservations and declarations expressly prohibited by the treaty or incompatible with its object and purpose. With the terminology used in the Rules of Procedure of the Congress of Deputies, while a reservation that is expressly permitted does not pose any problems of classification since it is obviously a reservation that is provided for, other cases could be problematic. For example, how would a reservation that is expressly prohibited – that is, not allowed – be described? Provided for? Not provided for? Consider that its prohibition is provided for, but allowing it is not provided for. On the other hand, a reservation that is permitted, not expressly, but because it is compatible with the object and purpose of the treaty, must logically be classified as not provided for. And finally, reservations which are not permitted, as they are not compatible with the object and purpose of the treaty, but are not expressly prohibited either, would also have to be classified as not provided for.

even if all they intend to do is formulate a declaration or reservation not provided for in the treaty. It would seem sensible to amend the Rules of Procedure of the Congress of Deputies in order to allow proposals from deputies and parliamentary groups to be processed as amendments to the articles, or at least to be in favour of regarding all the reservations possible pursuant to article 19 of the Vienna Convention on the Law of Treaties as amendments to the articles.

The fact is that Spain's traditional treatment of amendments in parliamentary procedure with respect to reservations is confusing, since *in the Vienna Convention the actual concept of amendment bears no relation to the formulation of declarations and reservations.*[130] Identifying categories of International Law with categories of domestic law cannot be justified on the grounds of economy of procedure, as the two, despite certain similarities, differ considerably in purpose and content, and making them comparable ultimately leads to the Houses' failure to take part in formulating reservations and declarations on international treaties.

3.3.2. The Houses vis-à-vis reservations made by other parties

The Rules of Congress make no provision for the *Cortes*' intervention with respect to accepting and objecting to the reservations and declarations made by other parties. However, the participation of the legislature is justified on the same grounds as that of the State itself, since other parties' reservations and declarations are part of the web of international legal ties that affect the Spanish State. Therefore, the criteria should by rights be the same as those used by the State itself in formulating reservations and declarations.

This is not a problem when the reservations made by other parties are known before the State becomes a contracting party.[131] When the Government is informed of the reservations and declarations after the process of parliamentary authorisation, this should not be a problem either, since the Spanish Government has twelve months to deliver an opinion on these reservations (art. 20.5 of the Vienna Convention on the Law of Treaties), which is a much longer period than the Spanish Parliament is granted for the same reservations. In any event, there is no related Spanish practice – and this Government conduct needs to change.

3.3.3. The Houses vis-á-vis the withdrawal of reservations and objections

The withdrawal of reservations and objections is also required to pass through parliament, though there is nothing in Spanish law to oblige the Government to

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[130] See the address by L. I. Sánchez Rodríguez in: AA.VV., *La celebración de tratados internacionales por España: problemas actuales...*, *op. cit.*, p. 123.

[131] This practice is, to an extent, provided for in Decree 801/72, as articles 20.3 and 26 provide for the Government's obligation to inform the Houses of the reservations formulated by other States.

do so. What is more, the consequences could be more serious in this case. Consider, for example, that if it does not agree with this requirement, the Government could withdraw unilaterally a reservation made by the Houses during the parliamentary authorisation process.

Practice offers many cases of parliamentary participation in withdrawing reservations. The first cases[132] began to appear during the 4th parliamentary term and followed the procedure for international treaties – the Houses made a classification, so far under art. 94.1 of the *CE*, and authorised the withdrawal of the reservation by means of an agreement. In addition, not only the reservation but also the part of the treaty affected by the reservation was published in the *Official Gazette of the Cortes*. As occurs on occasions with the reservations formulated by the Government, it is not unusual for committees to intervene solely to express their support for the withdrawal of the reservation.[133]

With respect to the withdrawal of reservations and objections, members of parliament can be vested with the same power they are granted with respect to formulation: initiative. However, unless this power is incorporated into legislation by amending the rules, they will have to be satisfied with submitting green papers.

4. INFORMING THE *CORTES GENERALES* OF TREATIES WHICH ARE *NOT AUTHORISED*

Article 94.2 of the *CE* obliges the Government to inform the *Cortes Generales* immediately regarding the conclusion of treaties which did not require their authorisation.[134] What is the point of the obliging the Government to inform the *Cortes*? – that is, how should we interpret this and what is the point of informing the *Cortes a posteriori* of international obligations which are already in force?

It is unanimously agreed that article 94.2 implies that under the current system the *Cortes* must be aware of all the treaties concluded by Spain[135] and

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[132] *BOCG, Congreso, IV legislatura, serie C*, n. 58 and 262; *BOCG, Congreso, V legislatura, serie C*, n. 195 and 166; *BOCG, Congreso, VI legislatura, serie C*, n. 76 and 125.

[133] *DS, Congreso, V legislatura, Comisiones*, n. 448, p. 13685; *DS, Congreso, V legislatura, Comisiones*, n. 490, p. 14929; *DS, Congreso, V legislatura, Comisiones*, n. 490, p. 14929; *DS, Congreso, VI legislatura, Comisiones*, n. 112, p. 3059.

[134] R. Riquelme Cortado draws attention to the fact that the obligation to inform about the conclusion of a treaty should apply to all international treaties, so that the *Cortes* would know when an authorised treaty was eventually concluded. See: R. Riquelme Cortado, "La tramitación de los tratados internacionales...", *op. cit.*, p. 431.

[135] Not all legal systems establish the requirement that Parliament be informed of all international treaties. For example, the Dutch law on the approval and enactment of treaties of 20 August 1994 allows secret treaties to be concluded when deemed necessary in the interests of the Kingdom, and these do not require parliamentary authorisation. See: Klabbers, J.K. "The new Dutch Law on the Approval of Treaties...", *op. cit.*, p. 632.

that there can be no secret treaties.[136] Nonetheless, the aim of providing this information is also to enable the Houses to react, politically and legally, if they consider that their powers have not been respected.[137]

The moment in which this obligation must be performed is immediately after the treaty is concluded and before it is published in the *BOE*.[138] When the treaty is submitted to the *Cortes*, its text is not published in the *BOCG* – all that is published is news of the conclusion of the treaty, and a copy of the treaty is given to the parliamentary groups. It is reckoned that this is sufficient guarantee of parliamentary control.[139]

During the years following the Constitution, Governments failed, in practice, to comply with this obligation to inform. Nowadays the Government does however send all international treaties which are concluded to the *Cortes*, although this information does not appear to be conveyed particularly swiftly. Unfortunately, there is no specific legal sanction for failing to meet this obligation, except for political trial, though this does not put much pressure on the Government.

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[136] In this connection R. Riquelme states that the chief aim of the rule is to make it easier for the Houses to review the classification of the treaty in order to check whether it has been concluded according to the proper formal procedure and to combat the practice of secret treaties. See: R. Riquelme Cortado, "La tramitación de los tratados internacionales...", *op. cit.*, p. 431. Similarly, in the opinion of O. Alzaga, international practice has opted for the existencc of a type of agreement that is concluded by simplified procedure; such agreements are binding for the State but do not require parliamentary intervention. These agreements cannot be ignored when establishing a constitutional system, and therefore not all international treaties can be subject to a system of prior control before authorisation. Although this kind of treaty is admissible, in a constitutional and democratic system it is necessary to declare secret or reserved treaties to be unconstitutional. Indeed, on a good many occasions in current practice in international relations, these are signed independently of or as supplements to a principal treaty and this justifies the existence of the second section of article 94 and the need to inform the *Cortes* established therein. See: O. Alzaga Villaamil, *La Constitución de 1978*, Madrid, 1978, p. 595.

[137] See: A. Remiro Brotóns, *Derecho Internacional Público. 2. Derecho de los Tratados*, *op. cit.*, pp. 135–136; "Comentarios a los artículos 93 y 94 de la Constitución", in *Comentarios a la Constitución española de 1978*, *op. cit.*, p. 583.

[138] A. Rodríguez Carrión, "Regulación de la actividad internacional del Estado en la Constitución", *RDP* (UNED), *Otoño*, 1982, p. 109.

[139] In this connection see: A. Rodríguez Carrión, "Regulación de la actividad internacional del Estado...", *op. cit.*, p. 109. Among other issues, Rodríguez Carrión states that, in his view, the obligation to inform should not apply only to the text of the treaty, as provided in article 159 of the Rules of Procedure of the Congress of Deputies, but also to the opinion of the *Consejo de Estado* on the treaty, in order to ascertain whether the latter agreed or disagreed with the Government's classification.

5. CONTROL OF INTERNATIONAL TREATIES BY THE CONSTITUTIONAL COURT

With respect to relations between the Constitution and international treaties, the 1978 Constitution establishes in art. 95.1 that *the conclusion of any international treaty containing stipulations contrary to the Constitution shall require prior Constitutional amendment.*[140] Spain thus requires that international treaties comply wholly with the provisions of the Constitution. In consequence, the system provided for the appropriate legal mechanisms to control the performance of the Government in the exercise of its *treaty-making power vis-à-vis* the Constitutional requirements. The creation of the Constitutional Court and the Organic Law on the Constitutional Court,[141] which regulates the former, established different control mechanisms that vary chiefly with respect to when they are carried out.

5.1. Control prior to the conclusion of the treaty

Unfortunately, the main weakness of the Spanish system of supervising the constitutionality of international treaties is the prior control stage,[142] since only the verification of the intrinsic (un)constitutionality of treaties and/or of their subject matter is provided for. Indeed, art. 95.2 of the *CE* establishes that *the Government or either of the Houses may request the Constitutional Court to declare whether or not there is a contradiction.* This control relates to content and does not affect procedural flaws or undue use of powers of the body which gave its consent. The constitutionality of these treaties must be measured in relation not only to the Constitution in the strict sense of the word, but to the whole *constitutional block*, since if this is what affects laws and other rules, why should there be less control over treaties?[143] The Constitution itself refers to active

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[140] See: A. Remiro Brotóns, "Comentario a los arts. 93 y 94 de la Constitución", in *Comentarios a la Constitución española de 1978...,op. cit.*, p. 598. As examples of this tendency, the author mentions the constitutions of Austria (art. 44.2 and 50.3) Iceland (art.21), the Netherlands (art. 63 and 64) and Morocco (art. 31.3) and the Basic Law of the Federal Republic of Germany (art. 79.1).

[141] Hereinafter *LOTC*.

[142] On this issue see: A. Remiro Brotóns, *Derecho Internacional Público. 2. Derecho de los Tratados...*, *op. cit.*, p. 137 and 335; by the same author: "Controles preventivos y reparadores de la constitucionalidad intrínseca de los tratados internacionales", *RDP*, 1982–83, p. 109 *et seq.* and, "La constitucionalidad de los tratados internacionales", *Instituto de Estudios Fiscales*, Madrid, 1981, p. 2229, particularly 2239. Likewise, A.S. de Vega, "Sobre el control previo de constitucionalidad de los tratados internacionales", *RCG*, 1993, n. 29, p. 21; L.I. Sánchez Rodríguez, *El proceso de celebración de los tratados internacionales y su eficacia interna en el sistema constitucional español*, *op. cit.*, p. 67.

[143] On this issue see: F. Rubio Llorente, "El bloque de constitucionalidad", *Homenaje a E. García de Enterría*, vol. I, Madrid, 1991, p. 3.

legitimisation, but it is not specified with what percentage of the Houses the initiative rests. The Rules of Congress put an end to the uncertainty, though not in a very fortunate way.[144] Finally, if the Court deems any or several of the provisions of a treaty to be unconstitutional, there are four possibilities: one, amend the Constitution; two, renegotiate the treaty; three, if the treaty allows for this option, formulate reservations to the precepts deemed unconstitutional[145]; and four, relinquish concluding the treaty. If option three is chosen, the Houses may go ahead with renew the procedure for authorising the treaty.

As regards the preventive supervision of the extrinsic or formal unconstitutionality of treaties, there is no specific provision for this in Spanish law, though A. Remiro has drawn attention to the possibility, provided by Spanish law, of lodging a prior appeal on the ground of unconstitutionality for organic laws against organic laws authorising an international treaty of the kind established in art. 93[146]

The only existing practice regarding this precept stems from Spain's intention to express its consent to the Treaty on European Union, which contained a precept – art. 8B of the EC Treaty, which appeared to be incompatible with art. 13.2 of the Constitution as it attributed the right to stand as a candidate in municipal elections to EU citizens who are not Spanish citizens. It was the Government who asked for a prior opinion from the Constitutional Court, and the Houses therefore had no opportunity to intervene. The Constitutional Court issued a declaration on 1 July 1992[147] considering that the provision of the EC

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[144] Article 157.1 of the Rules of Procedure of the Congress of Deputies requires the initiative of two parliamentary groups or of one fifth of the Deputies for a simple proposal to the House to ask for a report. The precept has been harshly criticised as it fails to legitimise minorities. The arguments put forward to deny the legitimacy of minorities are mainly that it could be used to delay conclusion of a treaty by a minority which opposed it politically, and would end up passing a political conflict to the Constitutional Court. In any event, had there been a political will to grant active legitimisation to minorities, a correction term would have been found for this risk. See: J. Pérez-Royo, "La regulación de algunos aspeetos del recurso de inconstitucionalidad", *Instituto de Estudios Fiscales*, Madrid, 1981, p. 1995, especially p. 2181.

[145] International law also provides an opportunity for a State to conclude an international treaty without being bound by provisions that contravene its fundamental rules: reservations to treaties. This practice has been used by Spain on some occasions: for example, when acceding to the European Convention on Human Rights a reservation was made to art. 11, which possibly contravened art. 28 of the *CE*, and reservations were made to some provisions of the Convention on the Political Rights of Women by our country as they clashed with the basic laws of the Franco regime. See: A. Remiro Brotóns, *Las Cortes y la Política exterior española (1942–1976)*, Valladolid, 1977.

[146] A.Remiro Brotóns, "Comentario a los artículos 93 y 94 de la Constitución", in: *Comentarios a la Constitución española de 1978...*, *op. cit.*, p. 612.

[147] The text of the Declaration can be found in *RIE*, 1992.2, vol. 19, p. 633.

Treaty contravened the Constitution, and the latter had to be reformed in order to authorise the conclusion of the Treaty.[148]

5.2. Control after the treaty is concluded

As regards supervising the constitutionality of treaties after they are concluded,[149] the *LOTC* has not established any special procedure bearing in mind the different nature of the treaties and laws or other rules. Reference to treaties thus begins and ends with art. 27.2 c) of the *LOTC*, which states that international treaties may be declared unconstitutional. This means that, by extension, we must apply the general system of controlling constitutionality to international treaties: the possibility of lodging an appeal on the grounds of unconstitutionality[150] and the submission of unconstitutionality.[151]

A declaration of unconstitutionality nullifies the precepts which are contended, has the effect of *res judicata* and is binding for all official authorities.[152] The effects of such a judgment are particularly disconcerting when applied to international treaties, since, basically, they clash with international rules on this matter – arts. 27 and 46 of the Vienna Convention on the Law of Treaties. The solution could be to include clauses of denouncement without statement of reasons in treaties,[153] which would be very appropriate from several angles.

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[148] See in this connection: A. Mangas Martín, "La Declaración del Tribunal Constitucional sobre el art. 13.2 de la *CE* (derecho de sufragio pasivo de los extranjeros): una reforma constitucional innecesaria o insuficiente", *REDI*, 1992.2, p. 381.

[149] A. Remiro Brotóns, *Derecho Internacional Público. 2. Derecho de los Tratados...*, *op. cit.*, p. 137 and 335; by the same author: "Controles preventivos y reparadores de la constitucionalidad intrínseca de los tratados internacionales...", *op. cit.*, p. 109 *et seq.*; and "La constitucionalidad de los tratados internacionales...", *op. cit.*, p. 2229.

[150] An appeal on the grounds of unconstitutionality, which is regulated in articles 31 to 34 of the *LOTC* and can be lodged by the president of the Government, the ombudsman, fifty deputies, fifty senators and the executive assemblies and bodies of the autonomous regions, insofar as the treaty affects their area of autonomy. The deadline for lodging this type of appeal is three months from the official publication of the treaty.

[151] Submission of unconstitutionality, which is made by a judge or court of its own motion or at the request of a party when there is a doubt about the constitutionality of a treaty whose application cannot be unilaterally disallowed. This is an essential requisite for judgment. The submission is made after the proceedings have been completed and within the period established for delivering judgment.

[152] G. Peces-Barba, *El Tribunal Constitucional*, Instituto de Estudios Fiscales, Madrid, 1981, p. 1995, especially 2033.

[153] See subparagraph 3.2.1 *Reclassification of treaties by the Cortes Generales.*