SPANISH JUDICIAL DECISIONS IN PUBLIC INTERNATIONAL LAW, 1995 AND 1996

The group that selected these cases was headed by Professor Fernando M. Mariño of the University Carlos III. The following lecturers from the same university served on that panel: Daniel Barea, M. Amparo Alcoceba, Alicia Cebada, M. Carmen Pérez and Jorge Zavala.

I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

III. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

1. The Application and Interpretation of International Rules by Domestic Authorities

– Sentence delivered on 17 January, 1996. (jurisdiction for suits under administrative law). Appeal 3253/1995.
Reporting Judge: Mr. Eladio Escusol Barra
Source: RJA 1996/187

Section four of the National Criminal Court's Courtroom for Suits under Administrative Law delivered a sentence on 19 January 1995 allowing part of the appeal filed by Ms. Silvia Cristina S. against the dismissal, by virtue of the Administration's failure to reply, of her petition for recognition of equivalency of her medical degree as a Specialist in Roentgen Diagnosis earned in the Republic of Argentina after having passed an examination on both the theoretical and practical body of knowledge required for the equivalent Spanish medical degree -- Specialist in X-ray Diagnosis.

The Supreme Court ruled to allow this appeal filed by Ms. Silvia Cristina S. to the High Court thus nullifying the sentence challenged. It allowed the administrative law appeal formulated against the refusal to recognise the Specialist in Roentgen

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Diagnosis medical degree, thus nullifying that administrative decision and ruling that the degree holder has the right to have her foreign degree officially recognised by the administration as the equivalent Spanish degree – Specialist in X-ray diagnosis.

"Legal Grounds:

First.– The sentence which was object of the appeal partly allowed the administrative law appeal filed by Ms. Silvia Cristina S. who had requested that her medical degree as a Specialist in Roentgen Diagnosis earned in the University of Buenos Aires' medical school (Republic of Argentina) be recognised by the administrative authorities as being equivalent to the corresponding Spanish degree of Specialist in X-ray Diagnosis. The Court of First Instance nullified the contested act (it rejected the request made by declining to answer) because it was not admissible in a court of law and ruled that the subject had the right to sit an examination on the body of theoretical and practical knowledge required for the equivalent Spanish degree. Upon passing this examination, the specialist medical degree in question was to be awarded.

Second.– The following issue was raised once the sentence was appealed and the administrative law appeal filed by the petitioner was admitted under the conditions indicated: if the act of recognition of degree equivalency involves the simple verification of the existence and authenticity of the Argentinean degree along with recognition of its official validity by the administration without taking any other facts into consideration or if the act of recognition of degree equivalency involves the verification of the academic requirements necessary for the awarding of the degree and also an appraisal of those requisites with regard to the rules or norms in Spain for the practice of that speciality. The sentence object of the appeal concludes by indicating that the act of recognition of degree equivalency is strictly limited to academic and professional aspects which means that 'the issuing of an academic degree awarded by the *Universidad de la República Argentina* in a medical speciality does not carry with it the automatic and full recognition by the Spanish State because this case is not limited to the purely academic but rather enters into the realm of regulations designed for professional practice...'.

Furthermore, the sentence, supported by Art. 2 of the 23 March 1971 Spanish--Argentinean Agreement (*RCL* 1973/633 and *NDL* 26101), explicitly states that the conditions under which foreign higher education diplomas are recognised are set out in the 16 January Royal Decree 86/1987 (*RCL* 1987/204). It concludes by stating that the act of recognition of degree equivalency is not always a simple verification of degrees but rather (it is said) that it is clearly the legislator's intention that through this equivalency process 'accredited training" can be proven which is at least comparable to that required in Spain. According to the sentence, it is for that reason that the administration should base its resolution on the professional training received by the petitioner (Arts 6 and 7 of Royal Decree 86/1987) and, in the event that this training is not considered equivalent to that received through studies leading up to the

corresponding Spanish degree, 'the equivalency recognition could be contingent upon passing an examination on the basic knowledge required for the corresponding Spanish degree' (Art. 2 Royal Decree 86/1987).

Third.– The complainant's legal representative, in accordance with Art. 95.1.4 of the *LJCA* (RCL 1956/1890 and *NDL* 18435), expressed the following argument: the sentence infringed upon Art. 2 of the Cultural Co-operation Agreement signed between Spain and Argentina in 1971.

Analysis of this first argument for annulment leads to the following considerations:

1. Included in its legal reasoning, the sentence being appealed does not ignore Art. 2 of the Cultural Co-operation Agreement between Spain and Argentina signed on 23 March 1971, ratified on 17 November 1972 and subsequently published in the *Boletín Oficial del Estado* (Official Gazette of the Spanish State) on 3 April, which establishes the following: 'The parties agree to mutually recognise academic degrees of all types and levels in the same way that they are officially conferred or recognised by the other country'.

2. Although the case at hand does not require a distinction to be drawn between Treaty–Law and Treaty–Agreement, the Spanish–Argentinean agreement, considered as a cultural co-operation agreement, is an expression of the mutual desire to achieve the following goal: to mutually recognise academic degrees conferred by each of the two states 'in the same way that they are officially conferred or recognised by the other country.'

3. The enforcement of any international agreement often leads to specific difficulties. In this particular case, the agreement, considered a rule of international law, properly ratified and officially published in Spain, thus became part of our internal rules which means that its provisions can ouly be repealed, modified or suspended by following the protocol established in the treaties themselves or in accordance with the general rules regarding international law (Art. 96 *CE* [*RCL* 1978/2836 and *ApNDL* 2875]). Given that there is no evidence showing that this agreement has been repealed, modified or suspended, it should be considered as having been in force at the time that the petitioner requested the equivalency recognition of her advanced degree.

4. The 25 August Organic Law 11/1983 (RCL 1983/1856 and *ApNDL* 13793) dealing with University Reform, in accordance with Art. 149.1.30 of the Constitution, states that it is the Government that regulates equivalency recognition conditions in the case of foreign diplomas (Art. 32.2 of Organic Law 11/1983). The mandate established in the Constitution and in the Organic Law on University Reform gave rise to the 16 January Royal Decree 86/1987 through which the conditions for equivalency recognition in the case of advanced degrees are regulated. These rules (both legal and regulatory as well as the 1 July Organic Law 7/1985 [*RCL* 1985/1591 and *ApNDL* 5093] on the rights and freedoms of aliens in Spain and their regulation [*RCL* 1986/1899 and 2401] in the case of aliens who want their diploma officially

recognised) are, in conjunction with the aforementioned Spanish–Argentinean agreement, the rules which apply to this case.

Fourth.– Now that these observations have been made, we should turn our attention to the reasons for reversing the sentence.

The complainant's attorney alleged that the sentence wrongly applied Art. 2 of the above mentioned Spanish–Argentinean Agreement and this estimation should be allowed for the following reasons:

1. As has already been mentioned, the rules applying to this case are found in the Spanish Constitution, Organic Law 11/1983, Royal Decree 86/1987 and the 1971 Spanish–Argentinean Agreement. Art. 6 of Royal Decree 86/1987 states that resolutions either granting or refusing the equivalency recognition of foreign higher education degrees will be adopted in accordance with the following:

a) Bilateral or multilateral international treaties or agreements to which Spain is party as well as any possible recommendations or resolutions adopted by international government institutions or organisations of which Spain is a member.

b) The curriculum equivalency tables and the degrees approved by the Ministry of Education and Science following a report drafted by the Council of Universities' Academic Commission.

2. Art. 6 of Royal Decree 86/1987, which is closely linked with Organic Law 11/1983 and with the Spanish Constitution, principally points to the international treaty or agreement to which Spain is party when it comes to the equivalency recognition of foreign university degrees. In this case, as was already mentioned above, this agreement exists and was in force and should therefore be applied given that Art. 2, Paragraph 1 is an imperative regulation: 'the parties agree to mutually recognise all types of academic degrees in the same way that they are officially conferred or recognised by the other country'.

The recognition of higher education degrees as they are awarded in Argentina does not limit the Spanish State with regard to applying to the pertinent institutions for the right to practice for those that hold a degree recognised in accordance with Paragraph 1 of Art. 2 of the Agreement and with no detriment to the regulations to which Spanish nationals are subject (Art 2, Paragraph 2 of the Spanish--Argentinean Agreement).

Fifth.– The legal representative of Ms. Silvia-Cristina S., in accordance with Art. 95.1.4 *LJCA* presented a second argument for reversal of the sentence stating that it infringes upon jurisprudence applicable to this case. This argument should also be evaluated.

The numerous sentences cited are based on Art. 2, Paragraph 1 of the 23 March 1971 Cultural Cooperation Agreement between Spain and Argentina as the imperative rule which mandates the automatic recognition of higher education degrees. This is the jurisprudence that should be applied since the Agreement recognises Spanish and Argentinean higher education degrees as being equal. The Administration should therefore validate (confer academic validity in one country to degrees conferred by

the other) the degrees automatically. Paragraph 2, Art. 2 of the Agreement makes sense if the degrees are automatically recognised.

The second argument for reversal of the sentence was thus admitted.

Sixth.– In accordance with Art. 95.1.4 *LJCA* a third argument for reversal was presented by stating that the sentence infringes upon Arts. 42 to 72 of the Vienna Convention (*RCL* 1980/1295 and *ApNDL* 13520) which regulates Treaty Law, as well as the Spanish Constitution with regard to the application of international agreements. And finally, a fourth argument was expressed in accordance with Art. 95.1.4 *LJCA* stating that the sentence was an infraction of Spain's internal rules with respect to foreign university degree equivalency and specifically of Art. 6 of Royal Decree 86/1987.

The admittance of the first two arguments presented by the complainant's legal representative makes it unnecessary to examine the latter two which were alluded to in the arguments presented above.

Seventh.– Given that the first and second argument for a reversal of the sentence were admitted, the sentence can be annulled (Art. 102.1 *LJCA*) and a resolution can be taken in this administrative law appeal within the limits defined by the debate, and:

1. The complainant, Silvia-Cristina S., has been accredited in the administrative file and in the court with an equivalency degree of her Licentiate Degree in Medicine and Surgery by virtue of the 18 September 1990 recognition of her Medical Degree granted by the University of Buenos Aires (Argentina).

2. The complainant has been accredited in the administrative file and in the court with the recognition of her degree as a Specialist in Roentgen Diagnosis earned in the University of Buenos Aires Medical School (Argentina).

3. In summary, and considering Art. 2 Paragraph 1 of the Spanish--Argentinean Cultural Agreement, in order to obtain equivalency recognition of higher education degrees earned in Argentina, the only requirements are that the petitioner holds Spanish or Argentinean nationality, that the higher education degree was actually awarded and that the documents attesting to the awarding of the degree in Argentina are validated by means of the corresponding legalisation process. Given that the administration expressed no doubt whatsoever with regard to the documents presented by the petitioner, nothing further is required to grant the equivalency recognition of the foreign degree with the corresponding Spanish degree. In cases similar to this one, it is not necessary to carry out a comparative analysis of the curricula followed in Spain and Argentina.

Eighth.– For all of the above reasons and the admitting of motions for annulment one and two of those expressed by Silvia-Cristina S., the sentence was annulled and the administrative law appeal was allowed resulting in a declaration affirming that the decision challenged in this process does not conform to established laws and that the petitioner has the right to have her degree as a Specialist in Roentgen Diagnosis recognised as being equivalent to the Spanish degree Specialist in X-ray Diagnosis.

Nine.– In accordance with Art. 102.2 in relation with Art. 131 of the

Jurisdictional Law it is not incumbent on the court to rule with regard to court costs associated with the first instance. With regard to this appeal filed by Silvia-Cristina S., each of the parties should pay their own costs".

2. Agreements and International Treaties. Direct Applicability

– STS 20 November 1996 (Civil Court). Supreme Court Appeal 1748/1998
Reporting Judge: Mr. Ignacio Sierra Gil de la Cuesta
Source: RJA 1996/8641

Ms. Rita H. B. filed suit with the Supreme Court requesting that, in light of the sentence handed down by the European Court of Human Rights on 9 December 1994 in the case Hiro Balani versus Spain, the sentence pronounced on 30 April 1990 be overturned in due legal manner and substituted by a new sentence conforming to justice and law.

The Attorney General's Office released a report opposing the annulment requested. The Supreme Court declared there to be no grounds for the appeal for annulment requested by Rita H.B. against the 30 April 1990 sentence in proceedings regarding a trademark dispute.

"Legal Grounds:

First.– With regard to this call for the annulment of the sentence delivered by this Court on 30 April 1990 (*RJ* 1990/2811), it should be clearly stated from the outset that it does not have even the slightest possibility of legal success given the applicable rules of law.

Definitive resolutions, including the arrêt of 9 December 1994, pronounced by the European Court of Human Rights, also known by the name of the city in which it is located (Strasbourg), are only declaratory, as can be inferred not only by Art. 50 of the European Convention on Human Rights and Fundamental Freedoms (*RCL* 1979/2421 and *ApNDL* 3627, referred to as 'The Convention') but also by solid jurisprudence from the European Court of Human Rights like the emblematic sentences of 25 April 1983 (Pakelli Case) and 24 February, 1984 (Digeon Case) which both assert that the Convention does not give the Court the authority to overturn a sentence or to order the de-authorisation of the subject of the complaint.

With relation to and as a consequence of the above as concerus the case under scrutiny, it should be pointed out that European Court of Human Rights resolutions do not have a direct or executory effect within the Spanish judicial system. To corroborate this, it must be stated that the Spanish judicial system does not contemplate the execution of international sentences; this should not, however, be confused with sentences pronounced by foreign courts which can be executed through Spanish courts. Furthermore, the European Court of Human Rights is not a

supranational judicial institution and the recognition given by the Spanish State to the jurisdiction of that Court cannot exceed that which is stipulated in Art. 46 of the Convention and which collaterally prohibits interpreting sentences delivered by the Strasbourg Court as the final and definitive ruling in cases originating in National courts. Further argument is found in Art. 117.3 of the Spanish Constitution (*RCL* 1978/2836 and *ApNDL* 2875) which states that jurisdictional authority in all types of legal proceedings, judgments and enforcement of judgments belongs exclusively to the Spanish courts stipulated under law. Given the legal structure as it stands today, the participation of the European Court of Human Rights in the Spanish Judicial System would only be possible through a 'lex data' similar to that stipulated in Art. 81.1 of the Spanish Constitution.

Second.– All of the above leads to the unequivocal conclusion that sentences pronounced by the European Court of Human Rights or decisions taken by the committee of Ministers cannot override sentences delivered by a Spanish court due to Spanish legal system rules. This would only be possible if: a) the legal structure were modified as is the case with Norway, Luxembourg, Malta and the Swiss canton of Appenzell, setting up a new protocol for the revision of a final judgment; or b) a new Agreement protocol were signed establishing a procedure for the enforcement of European Court of Human Rights judgments or decisions taken by the Committee of Ministers in the defendant States. In the absence of these two situations, this question can ouly be resolved declaring it impossible to execute the 9 December 1994 arrêt affecting the two parties in this lawsuit and upholding the final judgment handed down on 30 April 1990 by the Spanish Supreme Court, the highest institution on all questions of law except in cases involving constitutional issues which would be the jurisdiction of the Constitutional Court. If this were not the case, suits could be filed with a higher international court which could overturn final judgments and would be a way of 'inventing' a new motive for appeal for revision.

All of the above is supported by the decision taken on 2 December, 1994 by the European Human Rights Commission in the Ruiz-Mateos case in which an appeal to overturn final judgments, basing the arguments on Art. 6 of the aforementioned Convention, was rejected as incompatible 'ratione materia'.

For reasons of logic and due to a lack of legal base to assign court costs, no decision will be taken with regard to these costs".

IV. SUBJECTS OF INTERNATIONAL LAW

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. Human Rights and Fundamental Freedoms

a) The Right to not be judged by the former court judge

– STC 60/1995,17 March 1995, unconstitutionality issue, accumulation of cases 2536/94 and 2859/94 (BOE, 25.4.95).
Reporting Judge: Mr. Vicente Gimeno Sendra

The Constitutional Court dismissed two cases of unconstitutionality which alleged the violation of a fundamental right to not be judged by the same person who was previously the instructor and consequently involved in the pre-trial investigation of the case. In support of its decision, the Constitutional Court analysed European Court of Human Rights jurisprudence on the topic.

The 5 June Organic Law 4/1992 that reformed several articles, among them Art. 15 which is under scrutiny here, of the *LORCPJM*, makes two statements in its stated purpose: the system of trial guarantees applies in its entirety in hearings involving minors and specifically with regard to minors, the right to an impartial judge is indisputable. This statement is reaffirmed by Art. 40.2, b) iii), of the 20 November 1989 United Nations Convention on Children's Rights, ratified on 30 November 1990 (*BOE*, 31.12.90) (*RCL* 1990/2712) which states that 'any child who has allegedly violated a penal law ... is guaranteed a hearing instructed by an impartial judicial authority'. It is also supported by the Beijing rules on the Administration of Justice in the case of Minors (1985); by the Riad Directives on juvenile delinquency (1990); and by the *SsTC* 71/1990 (*RTC* 1990/71), 36/1991 (*RTC* 1991/36) (legal grounds, point 6) and 233/1993 (*RTC* 1993/233), among others. A similar declaration is also found in Art. 6.1 of the European Convention on Human Rights and Fundamental Freedoms (*RCL* 1979/2421 and *ApNDL* 3627), in Art. 10 of the Universal Declaration of Human Rights (*ApNDL* 3626) and in Art. 14.1 of the International Covenant on Civil and Political Rights (*RCL* 1977/893 and *ApNDL* 3630).

For the purposes of this case, European Court of Human Rights doctrine can be expressed in the following two points:

a) A restrictive interpretation should not be made of the guarantee of judicial impartiality.

b) Two classes of impartiality can be defined: subjective which is the absence of prejudice and partiality on the part of a specific judge in a specific case (De Cubber and Piersack cases) which is always presumed unless there is evidence to the contrary (European Human Rights Commission report on the Hauschildt case), and objective or functional impartiality which includes the guarantees that the judicial institution offers to exclude all reasonable doubt with regard to its impartiality from a functional

or organic point of view. This latter impartiality could be considered in danger when the sentencing judge has done direct investigative work into the crime in question and has directly intervened in the pre-trial enquiry, i.e., when the same person acts as both investigator and judge or when the ruling judge has intervened indirectly in the pre-trial enquiry, has supervised it or has intervened as a district attorney (Piersack case).

The concept of an impartial hearing should not be interpreted in an abstract sense. Not all of a judge's interventions in the pre-trial period are of an investigative nature. 'A material rather than a formal interpretation of the issue must be made and the specific circumstances of each case must be analysed in order to determine whether a particular issue has been judged by an impartial court.'

In general terms, our Constitutional Court follows the same doctrine as the European Court of Human Rights and the European Human Rights Commission with respect to the distinction between subjective and objective impartiality as well as the detailed analysis of the latter.

In accordance with this doctrine and its components, it can be stated that pre-trial investigation is not the mere organisation of the formal judicial process but rather is that sort of activity that puts the judge in direct contact with the evidence and requires that he evaluates it in some way that could predispose him either in favour or against the accused. This same situation could come about as a result of indirect contact that the judge may have with the evidence".

b) The Right to domestic privacy

– STC 50/1995, 23 February 1995, Appeal for constitutional protection 709/1991. (*BOE*, 31.3.95).
Reporting Judge: Mr. Rafael Mendizábal Allende

Recognition of the petitioner's fundamental right to domestic privacy following authorisation granted by Madrid trial court 15 to Inland Revenue investigators to enter a private domicile without granting sufficient guarantees or providing adequate control.

The constitutional duty to pay taxes is founded on the principle of solidarity and all citizens contribute to the defrayment of public costs within a fair system (Art. 31 *CE*). This logically points to the necessity of impeding "an unjust distribution of the fiscal burden because if some citizens do not pay what they owe, others with a stronger civic conscience or who are simply not as good at cheating the government will have to pay the difference. This situation gives rise to the need for an efficient tax inspection system although this may sometimes be considered a nuisance" (*STC* 119/1984 [*RTC* 1984/119]). This constitutes the underlying justification of such an obligation as well as the material illegality of fiscal crime and the correlative infraction. Failure to fulfil this constitutional obligation is called tax evasion. "The

fight against tax evasion is a goal as well as a mandate imposed by the constitution upon all public authorities and specifically upon legislators and the Inland revenue authorities" (*STC* 76/1990 [*RTC* 1990/76]), and the judge plays a particularly important role in this process as the defender of the balance between individual rights and the duties of the Inland Revenue service in light of the constitutioual mandate mentioned above. The European Court of Human Rights ruled along these same lines when it considered entering a private domicile for the purpose of a tax investigation as legitimate (European Court of Human Rights judgment, 25 February 1993, Funke case).

(...)

Nevertheless, even though entering and searching a private Home may be justified from the perspective of the arguments expressed above, this is a necessary requisite but is not enough from a constitutional point of view. In this case the principle of proportionality must be painstakingly applied and this requires a weighted evaluation of the means employed to achieve a particular end in order to avoid the unnecessary or excessive sacrifice of fundamental rights (*STC* 66/1985 [*RTC* 1985/66]), the essential content of which is intangible. This principle, inherent in the very concept of justice and intimately related to the value of equality, is diametrically opposed to the arbitrary exercise of public authority which is prohibited by Art. 9 in our Constitution. Furthermore, this has also been the object of jurisprudence delivered by the European Court of Human Rights and based on the supreme Law (Art. 10.2 *CE*) as has been mentioned innumerable times. Ever since the Chappell and Niemietz cases (European Court of Human Rights judgments of 30 March 1989 and 16 December 1992) there has been a call for guarantees and cautionary measures to avoid arbitrary behaviour in the event that a pre-trial conference is not held. According to this jurisprudence limits must be established with respect to the duration and the time of the entrance as well as to the number of people who have access to the domicile even in the event that they are not individually identified prior to the operation. In a recent decision, the European Court itself emphasised the fact that any authorisation to enter a private Home for the purpose of tax inspection should be granted with sufficient guarantees and adequate control thus making it possible to balance both general and individual interests (European Court of Human Rights judgment of 25 February 1993, Funke Case). This Constitutional Court had already issued a warning prior to and in consonance with the jurisprudence described above, stating that any measures restricting fundamental rights must be held to a minimum and considered indispensable, adopting the necessary precautionary measures under the supervision of a judge in the event that they must be employed (*SsTC* 22/1984, 137/1985, 144/1987, 160/1991 and 7/1992 [*RTC* 1992/7]).

c) The Right to personal freedom

— STC 128/1995, 26 July 1995, appeal for constitutional protection 993/1995

(*BOE*, 22.8.95).
Reporting Judge: Mr. Carles Viver i Pi-Sunyer

In fulfilment of its role as protector of the fundamental right to personal freedom, the Constitutional Court allowed an appeal for constitutional protection and ruled in favour of the right of the petitioner to be released on bail once it determined the lack of sufficient reason to justify the provisional custody that was ordered in his case.

The various allegations made by the complainant should be set aside in order to focus on the appeal's important underlying issue: the basis for determining incarceration in the case of the petitioner. There are no grounds for incarceration and therefore the only argument required for dismissal is the right to presumption of innocence (Art. 24.2 *CE*) and to not be held in preventive detention for longer than is strictly necessary (Art. 17.2 *CE*). It is a fact that the petitioner was not declared guilty, nor had he ever been arrested and thus there are no grounds for overriding these rights. The European Court of Human Rights, in its interpretation of Arts. 5.1 c) and 5.3 of the European Convention on Human Rights and Fundamental Freedoms, states that an arrest constitutes a loss of freedom until which time "a decision is taken with regard to the grounds of the accusation even if this is in first instance" (Wemhoff case, European Court of Human Rights ruling of 27 June 1968, legal ground 9). This semantic broadening of the concept of arrest, however, obviously does not authorise the application of Art. 17.2 Spanish Constitution (preventive detention) in cases like this one. What it does call for in accordance with Art. 10.2 Spanish Constitution is an interpretation of the precepts of preventive detention (Arts. 17.1 and 17.4 in accordance with the tone of the Agreement articles cited and keeping the criteria used by the European Court in their application in mind).

(...)

Our fundamental rule makes very little specific mention of preventive detention. Article 17, having guaranteed the right to freedom for all individuals, goes on to state in section one that "no one may be deprived of freedom unless it is in accordance with this article and in the cases and the form established under law." It is not until the last section (section 4) that specific mention is made of preventive detention stating that a maximum time limit will be established under law. This interpretation, isolated from the constitutional context, from references pertaining to international treaties and agreements on fundamental rights ratified by Spain and from the meaning itself of the institution that is now in need of our analysis, could give rise to the erroneous conception that this law is nothing more than a legal configuration the application of which only meets with the formal constitutional restrictions and the limitation of which requires no further legitimacy analysis than the simple fact that it is legal. In order to move away from this conclusion, far removed from the importance of the right to freedom and the spirit of our Constitution, this Court had the early opportunity to affirm that the "institution of preventive detention, situated between

the state's obligation to efficiently combat crime on the one hand and the state's obligation to guarantee an environment of freedom for all citizens, on the other", is not only limited by the above mentioned precepts, but also by Art. 1.1 charging the social and democratic state with "defending the higher values of freedom, justice, equality and political pluralism" and by Art. 24.2 which states that everyone has the right "to a public hearing without undue delay and the presumption of innocence" *STC* 41/1982 [*RTC* 1982/41], legal ground 2).

All of these rules, plus the corresponding provisions in the 1948 Universal Human Rights Declaration (*ApNDL* 3626) (Art. 9), the European Convention on Hnman Rights and Fundamental Freedoms of 1950 (Art. 5) and the 1966 International Covenant on Civil and Political Rights (*RCL* 1977/893 and *ApNDL* 3630) (Art. 9) categorically reject, without diminishing the constitutional relevance of the legal application of their content, that the nature of this right "can be mechanically placed in the category of legal configuration rights" (*SsTC* 206/1991 [*RTC* 1991/206], legal ground 4, 13/1994 [*RTC* 1994/13] legal ground 6) and conclude that incarceration decreed "when acting under the inappropriate protection of the law can be as illegitimate as acting against the law" (*SsTC* 127/1984 [*RTC* 1984/127], legal ground 2; 34/1987 [*RTC* 1987/34], legal ground 1; 13/1994, legal ground 6; 241/1994 [*RTC* 1994/241], legal ground 4; and also in other terms *SsTC* 32/1984 [*RTC* 1984/32], legal ground 4 a); 3/1992 [*RTC* 1992/3], legal ground 5.).

d) The Right to not suffer discrimination by reason of race

– STC 176/1995, 11 December 1995, appeal for constitutional protection 1421/1992 (*BOE*, 12.1.96).
Reporting Judge: Mr. Rafael Mendizábal Allende

Refusal to admit an appeal for constitutional protection requested by the director and the editor of a publication promoting racism through a series of predominately graphic episodes which depict Jews as the victims of inhuman, vile and despicable acts, focusing mainly on sexual aberrations. The publication praised the torturers and justified their acts to the humiliation of their victims.

A page by page examination of the comic book, which here is being judged from a purely constitutional perspective, reveals that it "depicts a series of episodes that take place within Nazi concentration camps or extermination camps, with Germans from the *Schutz- Staffel* (SS) and Jews as the protagonists and antagonists of inhuman, vile and despicable acts, focusing mainly on sexual aberrations". "The transport of prisoners as if they were cattle, ridicule and deceit in the distribution of bars of soap upon entering the gas chamber, the smell of the gas and the cadavers, the use of the human remains", along with a number of other episodes which are narrated in a mocking tone and seasoned with insulting and demeaning expressions ("animals" and

"carrion" to name a few) according to the sentence which is the object of this appeal. The victims are graphically depicted as physically decrepit while the torturers, in contrast, are depicted as arrogant. That is the nauseous content. The text leaves no doubt as to the general aim of the book, to humiliate those that were prisoners in extermination camps; not exclusively but mainly Jews.

Each strip, word and drawing is aggressive in and of itself offering a rude and grotesque message, completely off colour. Although it is not incumbent upon us to delve into the issue of good or bad taste, the contents of this book is an outward sign of its offensive nature. In an analysis of content, it is very important to get to the very root in order to reveal the real meaning of the overall message. In a context such as this, in what is both written and reading between the lines to interpret what is left unwritten, the context is derogatory with respect to an entire race, the Jews, because of their ethnic characteristics and their beliefs; a racist attitude which goes against a whole set of constitutionally protected values. Furthermore, in this case there are two circumstances which make it even more significant. One of them is the media used, a comic book, which is predominately graphic and supported by text, aimed principally at children and adolescents. Given the age group targeted with this message, one should reflect on the influence it could have on impressionable, immature personalities that could be adversely affected, corrupted and deformed (European Court of Human Rights judgment 7 December 1976, Handyside case).

This racist and destructive message is accompanied by a libidinous context created with the words, gestures and attitudes of the characters that could be considered, in more than one instance, pornographic, above and beyond what could be considered tolerable for the Spanish society today. Furthermore, it is absolutely void of any socially positive aesthetic, historic, sociological, scientific, political or educational values. Throughout its almost 100 pages, it speaks the language of hate charged with a high level of hostility that sometimes directly, sometimes subliminally incites its readers to an abusive form of violence. The explosive effect of this mixture of ingredients is something that experience can allow us to predict with hardly any possibility of error because of the link between cause and effect. It is self-evident that all of this openly goes against the principles of a democratic system based on peaceful co-existence and reflects clear contempt for fundamental rights and the educational guidelines established, by constitutional mandate, for our children and youth (Art. 27.2). What now comes into play are the constitutional limits established to protect these rights and also respect for the moral content of the Rome Convention (Art. 10.2; European Court of Human Rights judgment of 7 December 1976, Handyside case and *STC* 62/1982 [*RTC* 1982/62]). In this same seuse, mention should be made of the New York International Covenant on Civil and Political Rights (*RCL* 1977/893 and *ApNDL* 3630), Art. 20.2 of which states that it is prohibited by law "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence...".

e) The Right to not suffer discrimination by reason of sex

— STC, 136/1996, 23 July 1996 (Courtroom 1). Appeal for constitutional protection 1793/1994.
Source: BJC 136/1996.
Reporting Judge: Mr. Pedro Cruz Villalón.

In this sentence, the Constitutional Court rules on the appeal for constitutional protection formulated against a sentence delivered by the Social Court of the Madrid Supreme Court on 30 October 1992 which dismissed an appeal for reversal filed against the 10 January 1992 sentence pronounced by the Madrid Social Affairs Court dealing with cases of dismissal. The Constitutional Court decided to grant legal protection to the petitioner and annul the sentences. The dismissal was thus completely annulled in recognition of the petitioner's right to not suffer discrimination by reason of sex.

"Legal grounds:
(...)
Five.- What remains is to decide whether we are facing a case of discriminatory dismissal, in conflict therefore with Art. 14 *CE*. Discrimination by reason of sex includes pejorative treatment which is based not only on the simple fact of the victim's sex, but rather the concurrence of reasons or circumstances that this treatment has a direct and unequivocal counection with the person's sex. This is the case with pregnancy, a differentiating factor which, for obvious reasons, only affects women (*STC* 173/1994 [*RTC* 1994/173], legal ground 2). Unfavourable treatment based on pregnancy, given that it affects only women, constitutes discrimination by reason of sex, prohibited by Art. 14 *CE*. This court has had the occasion to rule along these same lines even with regard to ad nutum business decisions like the resolution of the labour relationship during the trial period (*SsTC* 94/1984 [*RTC* 1984/94] and 166/1988 [*RTC* 1988/166]) or the refusal to renew a temporary contract (*STC* 173/1994) and the conclusion should clearly extend to causal decisions like dismissal.

An examination of the rules, the interpretation of which is based on Art. 10.2 *CE*, corroborates this conclusion. Art. 5 d) of lLO Convention 158 (*RCL* 1985/1548 and *ApNDL* 3016) states that pregnancy is not a just cause for the termination of a labour relationship. lLO Convention 103 more clearly defines the limits and time parameters of this prohibition stating that the national legislation should provide a supplementary pre-natal rest period in case of illness which, if proven by a medical certificate, is the consequence of pregnancy (Art. 3.5); lt is illegal for an employer to dismiss a woman due to or during her absence from work (Art. 6). Analogous previsions are included in Art. 4 of Convention 3. Furthermore, according to Art. 4.1 of ILO Recommendation 95, the period of time during which it would be illegal for an employer to dismiss a woman should begin from the day he was notified of the pregnancy by medical

certificate. And with respect to the 1975 Declaration on equal opportunity and treatment for all workers, a pregnant woman is protected against dismissal due to her condition during the entire pregnancy (Art. 8.1).

An analysis of Community rules leads to an analogous solution. It can be interpreted from Arts. 1.1 and 2, sections 1 and 3 and 5.1 of Directive 76/207/EEC that the dismissal of a woman worker because of a pregnancy is direct discrimination based on sex (ECJ 8 November 1990, Hertz case), as is the refusal to hire a pregnant woman (Sentence handed down on the same date on the Dekker case) and the termination of a contract can not even be justified in the face of a legal prohibition, imposed as a result of the pregnancy, which temporarily keeps a woman worker from fulfilling her night work duties (ECJ 5 May 1994, Habermann-Beltermann case). At a later date, Directive 92/85/EEC (*LCEur* 1992/3598) made it illegal to dismiss a pregnant worker who has communicated her situation to her employer within the period of time between the beginning of the pregnancy and the end of maternity leave, except in exceptional cases unrelated to her state which are recognised by national legislation or practices (Art. 10.1). This precept, highlighted by the EC Court of Justice 14 July 1994, Webb case, 'did not admit any exceptions to the prohibition of dismissing a pregnant woman during that period, except in exceptional cases not related to the state of the interested party'".

f) Right to a clean environment. Right to due process

– STC, 199/1996, 3 December 1996 (Courtroom 1). Appeal for constitutional protection 3344/1993.
Source: BJC 199/1996.
Reporting Judge: Mr. Enrique Ruiz Vadillo

In this case, the Constitutional Court decided to refuse the appeal filed against the ruling made by the La Coruña Provincial Court on 6 October 1993 which, in an appeal process, confirmed the initial decision taken by trial court 2 in La Coruña in preliminary proceedings under way for a crime against the environment with relation to the Bens refinery (La Coruña). The Constitutional Court bases this refusal on the fact that no fundamental rights were violated in obtaining due process and using pertinent evidence for its defence.

"Legal grounds:
(...)
Two.– The penal proceedings which are the objective of our ruling, from the perspective of the fundamental rights of the complainant, concern an oil refinery. There is no doubt that this type of industrial activity is one of the most notorious polluters of the atmosphere (annex II, group A of 6 February Decree 833/1975 on protection of the atmospheric environment) and is therefore subject to strict limits the

purpose of which are to defend the environment and peoples' health that could be at risk due to its operation.

It is also quite apparent that the right to a proper environment is of the utmost importance, especially in a modern industrialised and urban society. This fact is recognised in Art. 45 of the Constitution which upholds everyone's right to live in an environment which allows for personal development, highlighting the duty to conserve it. This is a constitutional precept which, in section 2, charges public authorities with the responsibility for overseeing the rational use of all natural resources with a view to protecting and improving life quality and defending and restoring the environment as this court has had the opportunity to point out (*SsTC* 64/1982 [*RTC* 1982/64] and 227/1988 [*RTC* 1988/227]).

The importance of the environment has also been upheld by the European Court of Human Rights which has stated that in especially serious cases, environmental damage could violate a person's right to his personal and family life guaranteed by Art. 8 of the Rome Convention (*RCL* 1979/2421 and *ApNDL* 3627) (European Court of Human Rights sentences Powell and Rainer v. United Kingdom, 21 February 1990 and Lopez Ostra v. Spain, 9 December 1994).

Three.– Nevertheless, it cannot be iguored that Art. 45 of the Constitution is a ruling principle and not a fundamental right. The courts should undoubtedly insure respect of the environment but in accordance with the laws associated with the constitutional precept (Art. 53.3 *CE*, *SsTC* 32/1983 [*RTC* 1983/32], legal ground 2, 149/1991[*RTC* 1991/149], legal ground 1 and 102/1995 [*RTC* 1995/102], legal grounds 4–7).

Spanish legislation, both of its own accord and by virtue of Community law, has developed an appreciable *corpus* of regulations the purpose of which is to protect the environment. It should be pointed out, however, that the majority of these regulations are corrective and preventive measures taken on the administrative level, dealing with a complex series of problems within its collective reach. This is the case in other European countries as well (European Court of Human Rights sentence, Powell and Rainer, section 44). This is the case with the law protecting the atmosphere (Law 38/1972, 22 December) which has had such an influence in this controversial case with its extensive list of rules, now made even more extensive by the Autonomous Community legislation (*STC* 329/1993 [*RTC* 1993/329]).

Four.– Allowances were also made for penal provisions, typifying certain particularly serious acts as crimes against the enviroument (*e.g.* Arts. 347 *bis* and 565 of the 1973 Penal Code, substituted today by Art. 325 and successive of the new Code, and *STC* 127/1990 [*RTC* 1990/127]. Citizens suffering damages can exercise their right to a clean environment in a variety of ways through the current legislation (Art. 53.3 Spanish Constitutiou and *STC* 90/1985 [*RTC* 1985/90], legal ground 5). In the case of a Constitutional appeal however, the situation is completely different because the citizens affected seek protection of their rights through a penal procedure or through an administrative/civil suit (*STC* 31/1996 [*RTC* 1996/31], legal grounds 9--

11).

It should be pointed out that the so called environmental penal law constitutes the primary or basic legal response to the most serious attacks against nature but does not substitute the important role played by punitive administrative law in these cases.

As was stated by the accused company, this case was not filed under administrative law against the competent government administration's failure to react but rather was an attempt to seek punishment for certain individuals for acts which were conceived as a crime. For that reason, the invocation made in the appeal suit to the doctrine resulting from the European Court of Hnman Rights Sentence López Ostra cannot be accepted for this was related to a different situation.

(...)

Six.– The right to domestic privacy, physical integrity and free movement (Arts. 18, 15 and 19 *CE*) are not considered relevant in this case since they were not invoked in the penal process (Art. 44.1, c), *LOTC*). After having filed the appeal suit, the reference document throughout the entire constitutional process, the expanding of existing charges or the filing of further claims is not acceptable (*SsTC* 74/1985 [*RTC* 1985/74], legal ground 1 and 180/1993 [*RTC* 1993/180], legal ground 1).

It is also impossible to make a separate analysis of the allegation regarding the right to 'use pertinent evidence for its defence', found in Art. 24.2 *CE*. Constitutional jurisprudence highlights the fact that this right especially protects the accused in a penal process in accordance with section 3 of Art. 6 of the European Human Rights Agreement. On the other hand, when it is the prosecutor and he requests *ius puniendi* from the State, his allegations with regard to right to evidence should be analysed in the broader context of his right to effective legal protection without prejudice to his rights and legitimate interests (*SsTC* 89/1986 [*RTC* 1986/89], legal ground 2, and 351/1993 [*RTC* 1993/351], legal ground 1); allegations regarding evidence could only be taken into consideration to the degree that they affected the final decision of the hearing (*STC* 150/1988 [*RTC* 1988/150], legal ground 2). As was stated in the first sentence, 'constitutionally protected rights are to assure that no one is left without the necessary means to exercise his right in a fair trial which respects the equality of the two parties and in which each side can express the arguments that support their allegations and can present the evidence necessary to lend them credibility in order that they be accepted by the judge or court.' (*STC* 89/1985 [*RTC* 1985/89], legal ground 2)".

g) Right to secrecy of communications

– STC 49/1996, 26 March 1996 (court 1). Appeal for constitutional protection number 534/1994.

Source: BJC 49/1996

Reporting Judge: Manuel Jiménez de Parga y Cabrera.

In this sentence the Constitutional Court ruled to grant legal protection to the petitioner, Mr. Lorenzo Bravo Morcillo, sentenced for bribery. The Constitutional Court was of the opinion that the verdict was based on illegally obtained telephone taps and therefore decided to partially annul the sentences delivered by the Barcelona Provincial Court on 17 June 1991 and by the Supreme Court on 7 October 1993 in light of the proven fact that Mr. Bravo's fundamental rights to secrecy of communications and presumption of innocence were violated.

"Legal grounds:

(...)

Three.– Our doctrine brings us this far. We must now verify whether the evidence which was used to support the sentencing of the person who is now the complainant in this appeal procedure was obtained in a way which violates the fundamental rights named.

The analysis should commence with the evidence obtained from the telephone tapping ordered by the Judge of Trial Court 3 in Barcelona. It must be determined whether this line tapping violated the right to secrecy of communications (Art. 18.3 *CE*) and the right to a hearing with all the guarantees (Art. 24.2 *CE*) as claimed by the complainant. If one of these violations is indeed proven and, since this is the source of the evidence that led to the penal process against the complainant for the crime of bribery, not only would this direct evidence have to be thrown out of court, but all evidence either directly or indirectly derived from that would be considered invalid as well.

Article 18.3 *CE* establishes that: 'Secrecy of communications is guaranteed especially with regard to the post, telegraph and telephone unless a judicial order instructs otherwise.' Article 8 of the 4 November 1950 European Convention which speaks of the protection of human rights and fundamental liberties (*RCL* 1979/2421 and *ApNDL* 3627), provides a detailed look at the right to privacy, family and Home residence and correspondence. Its aim is to safeguard and eliminate any threat with regard to these fundamental rights:

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authoroty with the exercise of his right except such as is in accordance with the law and is necessery in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others'.

The European Court of Human Rights has applied this precept in a number of sentences. Among the most significant are the 6 September 1978 judgment (Klass case), in which it was ruled that 'telephone communications are included within the definition of a private life and correspondence'; the 2 August 1984 sentence (Malone case) also declared that 'the interception of a telephone conversation in the case at

hand implied the interference of a public authority in the exercise of a right that is guaranteed under section 2 of the Convention's Art. 8'; the 24 April 1990 sentences (Huvig and Kruslin cases) dealt with the subject of telephone taps carried out by order of the investigating judge and declared that 'the taps, along with other procedures used to intercept telephone conversations, are a serious attack against private life and correspondence' that should be protected by 'an extremely precise law. It is essential that the rules regulating phone taps be clear and detailed.' This 2 August 1984 sentence states that if the interference is to be considered legitimate, in addition to being within the law, 'it must pursue one or several legitimate objectives described in paragraph 2, Art. 8 of the aforementioned Convention and it must also be considered necessary to achieve these objectives in a democratic society.'

Following this European Court of Human Rights doctrine and along the same lines as our own jurisprudence, we have recently affirmed (*STC* 86/1995 [*RTC* 1995/86]) that 'the right to secrecy of communications can only be limited by a sufficieutly founded cause. The existence of a judicial order authorising the tap, along with strict adherence to the principle of proportionality in the execution of the investigation proceeding, are constitutionally mandated requirements that affect the very essence of the right to secrecy of communications to such a degree that the lack of judicial authorisation or the lack an adequate motive automatically constitute the violation of a coustitutional right and therefore the nullification of any piece of evidence that is related to the content of the tapped telephone conversations. This applies uot only to the phone tapping itself but also to any other piece of evidence derived from a phone tap as long as there is a cause-effect relationship between both pieces of evidence' (legal ground 3).

(...)

Effective judicial control is indispensable when this investigative method is used if the restriction of this fundamental right is to remain within constitutioual boundaries. The judge authorising a phone tap shonld, first of all, be privy to the results obtained from the tap and, in the event that there is a discrepancy between the crime which was the initial object of the investigation and the crime which is actually being investigated, he should make a well founded ruling because if he does not (European Court of Human Rights sentence of 6 September 1978, Klass case, Malone case, of 2 August 1984 and the Kruslin case, of 24 April 1990) the taps wonld be considered an interveution by public authorities in the exercise of a fundamental right protecting correspondence and privacy. If a sentencing court bases its judgment on evidence obtained through the violation of fundamental rights (either by the police or trial judge) the presumption of innocence will prevail as the fundamental right that it is despite the evidence.

(...)

Five.– By virtue of judicial authorisation granted for the investigation of an alleged crime against public health and through the telephone tap of a particular individual, Ramón Solano Deirós, an investigation was actually being carried out on

other individuals for an extended period of time (Monserrat Santaeularia and Lorenzo Bravo Morcillo) through tapping of their telephone conversations without informing the judge, who authorised the initial wiretapping, of the new facts discovered, allegedly constituting a crime of bribery. The police also concealed these facts and their source from successive judges who intervened. In addition to violating the accused's right to secrecy of communications, the right to a hearing with full guarantees was also violated ex art. 24.2 *CE*.

Along these same lines, the two European Court of Human Rights sentences of 24 April, 1990 (Huvig and Kruslin cases) declared that 'the Court in no way reduces the importance of several guarantees (the guarantees regarding phone taps and other forms of wiretapping), especially when it comes to authorisation granted by a trial judge or independent judge; to inspections carried out on members of the judicial police or on the judge himself by the indictment division of the competent court or the annulment court; to the exclusion of misleading deeds which go beyond strict intervention and can be considered a trap or a provocation; to the obligation of respecting the privileged nature of the relationship shared by the lawyer and the suspect or accused.'

The European Court of Human Rights concludes stating that 'both written and unwritten French law does not establish with sufficient clarity the limits and discretional procedures applying to public authorities' or, stated in different terms, that 'to date the system has not provided adequate protection against possible abuses.' For this reason it was concluded that in the Huvig and Kruslin cases Art. 8 of the Agreement had been violated. The case being studied here merits the same conclusion.

Once it was established that the tapping of Montserrat Santaeularia's telephone conversations was a violation of her fundamental rights, we must conclude that all evidence proceeding from the content of the tapped conversations should not be admitted in court. The Barcelona Provincial Court and Courtroom two of the Supreme Court, not having reached this same conclusion, violated the complainant's right to presumption of innocence".

VI. ORGANS OF THE STATE

1. Diplomatic Immunity

– STC 140/1995 of 28 September 1995, appeal for constitutional protection number 1951/1991 (*BOE*, 13.10.95).
Reporting Judge: Mr. Julio Diego González Campos

Considering the privilege from jurisdiction for diplomats guaranteed in Art. 31 of

the 1961 Vienna Convention and the right to effective protection of the court provided through Art. 24.1 of the Spanish Constitution, the Constitutional Court recognised an Italian diplomat's immunity from civil jurisdiction when charges were filed against him for not paying the rent owed for his personal family housing. Dissenting opinion.

A close look will now be taken at the constitutional legitimacy of this obstacle or limitation to the jurisdiction of Spanish courts in civil matters. It should be pointed out that if in our STC 107/1992, legal ground 3 it was stated that "immunity granted to foreign states is not contrary, regardless of the state in question, to the right to effective protection of the court granted by virtue of Art. 24.1 of the Spanish Constitution", the same must be true in this case with regard to privilege from civil jurisdiction granted to diplomats.

This limitation should indeed be considered legitimate from a constitutional point of view because it is based on two objective and reasonable arguments: first of all, it is based on the principle of the sovereign equality of all states outlined in Art. 2.1 of the United Nations Charter, a direct reference to which is made in the Preamble to the 1961 Vienna Convention; and secondly, it is based on the principle of peaceful cooperation which is also derived from that international treaty. If the first argument implies judicial equality among all states and mutual respect for their legal personality, it stands to reason that a sovereign state cannot, in principle, subject another state to its justice system without its consent *(par in parem non habet imperium).* This result is clearly reflected in the institution of privilege from civil jurisdiction for diplomats because it is granted through international law to guarantee the efficient functioning of diplomatic missions which are, and this should be made perfectly clear, organs of a foreign state representing that state in the host country. If the Preamble of our Constitution proclaims the will of the Spanish nation to "collaborate in the strengthening of peaceful relations and efficient co-operation among all peoples on earth", there can be no doubt that the role played by diplomatic missions contributes to this strengthening (Art. 3.1 of the 1961 Vienna Convention). This is confirmed in Art. 63.1 *CE* of the basic principle given that the explicit reference to the "King who confirms the appointment of ambassadors and other diplomatic representatives" and "foreign representatives must report to him", indicates the importance that the basic principle attributes to diplomatic missions in the development of peaceful relations and co-operation between Spain and all other peoples and nations.

This objective and reasonable basis for privilege from jurisdiction for diplomats can be further supported through examination of the jurisprudence from other States, and, of special interest to this case, by examination of Italian court decisions given that this case deals directly with immunity for a member of the Italian diplomatic mission stationed in Madrid. The Italian court, in its 18 January 1940 sentence in the Meeus v. Forzano affair, definitively cleared up any existing doubts and confirmed that diplomats were exempt from Italian civil jurisdiction, even in cases judged under

private law. It is of particular significance that the Constitutional Court, confronted directly with the possible contradiction existing between the jurisdictional limits set out in Art. 31.1 of the 1961 Vienna Conventiou and the right recognised in the Constitution's Art. 24, paragraph 1, ruled in its 18 June 1979 sentence that such an exclusion could not be considered incompatible with the right to individual judicial protection to the degree that it is necessary to guarantee the functioning of the diplomatic mission, an indispensable institution in international law. This further justifies jurisdictional limitations for individuals found in Art. 31.1 of the 1961 Vienna Convention which is based on the principle of reciprocity. This limitation not only benefits foreign diplomatic missions stationed in our country, but also protects Spanish missions sent abroad to other States, including Italy.

VII. TERRITORY

VIII. SEAS, WATERWAYS, SHIPS

IX. INTERNATIONAL SPACES

X. ENVIRONMENT

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

XII. INTERNATIONAL ORGANISATIONS

XIII. EUROPEAN COMMUNITIES

1. Problems of Constitutionality in European Community Law

– STC 67/1996, of 18 April 1996 (plenary session). Jurisdiction dispute number 1013/1987.
Source: BJC 67/1996
Reporting Judge: Mr. Carles Viver i Pi-Sunyer.

The Constitutional Court partially allowed the jurisdiction dispute initiated by

the Catalonian government's Executive Council with regard to Arts. 3,4, 9.1, 13 (last paragraph) and 14 of the 20 February Royal Decree 418/1987 on substances and products used in animal feed. The Constitutional Court ruled that jurisdiction in the areas referred to in Arts. 3, 4 and 14 belongs to the Catalonian government, that the jurisdiction attributed to the Ministry of Agriculture, Fisheries and Food in sub-section 1 of Art. 9.1 belongs to the Catalonian government and that the jurisdiction attributable to the Ministry of Health and Consumer Affairs in this same sub-section belongs to the Spanish State as long as the animal feed additives have some effect on human health.

"Legal grounds:

(...)

Three.– It is true that, as the Treasury Counsel affirmed, Community legislation requires the Spanish government to publish, on a yearly basis, a list of manufacturers of additives, feed mixtures and processed ready-made feed. This fact in and of itself, however, does not mean that the controversial jurisdiction belongs to the State. This is even true if this issue is focused from the perspective of international relations because it is reiterated doctrine that Spain's inclusion in the European Communities in no way altered the internal distribution of jurisdictions between the central government and the autonomous communities established in the Constitution and a series of statutes (*SsTC* 252/1988 [*RTC* 1988/252], 64/1991 [*RTC* 1991/64], 236/1991, 79/1992 [1992/79], 80/1993 [*RTC* 1993/80]). Of the body of obligations that European law puts on the Spanish government, *i.e.* a list of authorised products and substances on the one hand and forwarding of data supplied by the manufacturers, on the other, the central government should fulfil those that come under its jurisdiction and which do not enter into this discussion (for example, obligations under Art. 2 or those calling for a central register which is meant to be the 'sum of the autonomous community registers' as is stated in *STC* 102/1995 (*RTC* 1995/102), legal ground 29, and the autonomous communities should deal with those which, internally judged as merely administrative in nature, come under their jurisdiction (in this case of the Catalonian government, obligations described in Arts. 3, 4 and 14). It is the responsibility of both levels of government to establish the all important collaboration and reciprocal information mechanisms that allow for the fulfilment of international obligations that the Spanish State in its entirety must answer to (*SsTC* 18/1982 [*RTC* 1982/18] and 236/1991 [*RTC* 1991/236]).

The generic reference made by the Treasury Counsel with regard to the State's jurisdiction in the general planning and co-ordination of economic activity without offering any concrete figures to support his allegations is not enough to attribute state jurisdiction to the executive activity regulated through the controversial precepts.

The same conclusion should be reached with respect to alleged State jurisdiction in foreign trade. As was stated in *STC* 313/1994 (*RTC* 1994/313), legal ground 2, with regard to a public activity similar to the one being judged here, if the focus is on the

object, the content and even the objective of the process of establishing the requirements that should be met before animal feed can be manufactured and sold, we arrive at the conclusion that this activity is *in prius* with respect to the process of mediation or change which constitutes the fundamental nucleus, although not the only one, of commercial activity. 'Regulation of the characteristics (technical-sanitary, quality, packaging, consumer information or safety) that these products should comply with, does not imply regulation of trade although it certainly does affect it' (*STC* 313/1994). 'Furthermore, we added, when referring to products from within the EEC, constitutional jurisprudence has pointed out that great care must be taken when using the term foreign trade when referring to the commercial ties among Community Members since, as a number of recent judgments have indicated, the extensive use of this terms would render void of meaning the premise consolidated in the constitutional doctrine by virtue of which Spain's joining the EEC and the corresponding change in secondary community law regulations did not alter the constitutional rules governing the distribution of responsibilities 'since it would be very difficult to find Community regulations that had no effect on foreigu trade if this trade is directly identified with inter-community trade' (*STC* 236/1991 and in a similar sense *STC* 79/1992)'. To further illustrate the point, it should not be forgotten that the regulation contained in Royal Decree 418/1987 refers to the conditions that should be met equally by products manufactured in Spain as well as in third countries and it would therefore be 'both artificial and unnecessary to group the same conditions in different jurisdictional areas due to the mere fact that some are manufactured in Spain while others are produced in other EEC member states' (*STC* 313/1994).

Four.– The Executive Council also points to the unconstitutionality of sections 1 and 3 of Art. 9 of Royal Decree 418/1987. The first section refers to the use of new additives in scientific animal feed tests. In the initial stage before the actual experiments took place, the double intervention on the part of the Ministry of Agriculture, Fisheries and Food as well as the Ministry of Health and Consumer Affairs was foreseen. In order to actually perform the experiments authorisation was required of the former, contingent upon a favourable report issued by the latter. In the second phase, once it is proven that the additives met the requirements established in Art. 7 of EEC Directive 84/587 (erroneously cited in the Royal Decree as 85/587), the Ministry of Agriculture once again intervenes once having received a favourable report from the Ministry of Health and Consumer Affairs, to submit the paperwork to the European Commission for the inclusion of the additive in the corresponding annexes.

What the Executive Council actually disputes is the State authorisation required to initiate experimentation with new additives. It is assumed that the scientific experiments are principally aimed at discovering the effects that these new products have on the animals with a view to discovering additives that improve livestock production and it is only after a product of these characteristics is found that it would

be necessary to perform health tests in order to determine that these products are harmless to humans. The Executive Council adds that to prove that these experiments have no effect on human health, in accordance with section 4 of the same article, the animal upon which the experiments are performed will not be used for human consumption. The institution directly responsible would therefore be the livestock farm and not the Health Ministry. The petitioner does not, however, say anything with regard to the second sub-section of section 1 which, as has already been mentioned, provides for communication with the Commission of the European Community.

This allegation should only be partially accepted. It is true that the primary and fundamental objective of new additive experiments is to improve livestock production. The short-term objective of the experiments is to increase both the quality and quantity of the livestock sector. That is why intervention by those entities responsible for authorisation in this area being analysed here can not be rejected. The entity referred to in this case is no other than the autonomous community initiating the appeal. It should therefore be concluded that the reference made in the first sub-section of section 1, Art. 9 to the Ministry of Agriculture, Fisheries and Food, thus assigning jurisdiction to the State, violates the constitutionally established order.

Five.– And lastly, the Executive Council of the Catalonian government affirms that in the last paragraph of Art. 13 of Royal Decree 418/1987 that 'requires all packaging or documentation related to animal feed products and substances shipped to Spain from other Member States to be written in the official language of Spain' hinders the exercise of rights established in Art. 3 *EAC* attributed to the Catalonian government and is a violation of the principle of co-officiality protected by Art. 3 of the Spanish Constitution and Art. 3 *EAC* because it does not allow for a regulation that permits the sole use of the Catalan language in the packaging and documentation of products imported to Catalonia, despite the fact that the Directives make only a general reference to 'at least one of the national or official languages of the receiving country.'

This allegation should be rejected because it is not a denouncement of a recent and real violation of autonomous community jurisdiction, but is rather, at most, a merely preventive argument based upon a literal interpretation of the article. What actually occurs here is that the disputed precept is made to say something that it actually does not say. It does not impose the use, in the singular and with a definite article, of the official language of the Spanish State, but rather requires that the packaging and documents be written 'in official language of Spain' and the official language of the State in the case of autonomous communities with their own official language other than Castilian Spanish are both Castilian Spanish and the language of the autonomous community. This is not only because the autonomous communities may also be considered as the State, but rather because in this territory both languages are official for public state authorities in the strict sense. This has been the ruling of this court in a number of sentences such as *STC* 82/1986 (*RTC* 1986/82) which affirmed that 'the designation of a Spanish language other than Castilian Spanish as

an official language affects both the public authorities of the autonomous community in question and the public authorities of the central government which carry out their functions in that community' (legal ground 7).

There is no doubt that in paragraph 2 of this Art. 13 where it refers to the language for packaging and documents sent from Spain to other Member Countries a clearer reference is made that 'they will be written in at least one of the official languages of the receiving country. The change in the literal expression introduced in paragraph 3 however, does not lead to the conclusion, applying even the most elemental interpretation criteria, that the drafting 'in official language of the Spanish state' refers only to Castilian Spanish".

— STC 146/1996, of 19 September 1996 (Plenary session). Appeal for unconstitutionality number 308/1989.
Source: BJC 146/1996.
Reporting Judge: Mr. Manuel Jiménez de Parga y Cabrera.

In this sentence, the Constitutional Court rejects the appeal for unconstitutionality filed by the Basque government against the 11 November General Advertising Law 34/1988. The Constitutional Court ruled that this law does not attribute undue jurisdiction to the central government as the Basque government claimed, nor can it be considered as a violation of autonomous community jurisdiction.

"Legal grounds:
(...)

Two.– The lawyer representing the Basque government as well as the Treasury Counsel argued that the precepts involved in this jurisdictional dispute overlap with a development and transposition rule stipulated in a specific EEC Directive and both made extensive comments on the way jurisdiction was distributed between the central government and the autonomous communities in order to meet the obligations acquired as a result of Spain's joining the European Community. They are of the opinion that the internal regulations regarding advertising were affected by the pre-existence of the 10 September 1984 EEC Council Directive 84/450/EEC regarding the harmonising of legal, regulatory and administrative provisions of the Member States with regard to false advertising. This Directive gives each Member State the authority to choose the legal or administrative channels through which to control false advertising and resolve conflicts arising from this type of illicit publicity.

Judging from the issues being discussed in this lawsuit, however, and from the allegations made by the two parts, it can be concluded that these reflections are void of any practical relevance in determining which government is the holder of the controversial jurisdiction. The representative of the Basque government argues that the need to adapt our internal regulations to the European norms does not necessarily

mean an increase in central government jurisdiction and therefore the criteria established in the Constitution and statutes should be followed in assigning areas of jurisdiction. On the other hand, the Treasury Counsel, while admitting that Spain's joining the European Community does not theoretically alter the jurisdictional balance between the central government and the Autonomous Communities, he does argue that the acquired commitment to adapt and modify territorial regulations in response to Community norms often gives rise to the need to establish a basic set of jurisdictional guidelines given that these should be adhered to in the same proportion throughout the whole of the Spanish state.

In this sense, it should not be forgotten that, as this Court has pointed out on several occasions, 'the transfer of Community regulations related to internal law must necessarily adhere to constitutional and statuary criteria in the assigning of jurisdiction between the central and autonomous community governments and these criteria should not be altered either by Spain's joining the EEC or by the promulgation of Community regulations' given that 'the yielding of jurisdiction to Community institutions does not mean that the national authorities are no longer bound, with regard to their public authority, to the Constitution and any other legal regulations in accordance with Art. 9.1 of the Basic Rule.' (*SsTC* 252/1988 [*RTC* 1988/252], legal ground 2, 64/1991 [*RTC* 1991/64], legal ground 4.b); 76/1991 [*RTC* 1991/76], legal ground 3, 115/1991 [*RTC* 1991/115], legal ground 1, 236/1991 [*RTC* 1991/236], legal ground 9, 79/1992 [*RTC* 1992/79], legal ground 1, 117/1992 [*RTC* 1992/117], legal ground 2, 80/1993 [*RTC* 1993/80], legal ground 3, 141/1993 [*RTC* 1993/141], legal ground 2, 112/1995 [*RTC* 1995/112], legal ground 4). In conclusion, it is the internal rules that establish the jurisdictional limits which serve as the basis for resolving jurisdictional disputes arising between the central and the autonomous governments (*SsTC* 252/1988, legal ground 2, 76/1991, legal ground 3). The enforcement of Community law therefore, is the responsibility of the institution that is the material holder of the specific jurisdiction in accordance with the rules of internal law given that 'there is no specific jurisdiction solely for the enforcement of Community law' (*SsTC* 236/1991 [*RTC* 1991/236], legal ground 9, 79/1992, legal ground 1). What this all means is that the present controversy must be resolved exclusively in accordance with the internal rules governing jurisdictional limits between the State and the Autonomous Community".

2. Application of Community Law

— STS of 14 July 1995. (Court three, section 1) Appeal 261/1994.
Source: RJA 1995/6240
Reporting Judge: Mr. Enrique Cancer Lalanne

The court assigned to suits under administrative law of the High Court of Justice

in Andalusia, the headquarters of which is in Seville, handed down a sentence on 30 July 1993, partially allowing the appeal filed by the trading company "Super Roma, SA" against the 20 December 1991 decision taken by the Ceuta Town Hall which rejected the appeal for reversal filed with regard to the payment of a municipal import tax on goods imported in 1991. The court ruling did not admit a Supreme Court appeal to uphold the law enforced by the municipal government levying the tax.

"Legal grounds:

One.– This appeal case came about in much the same way as the case which was resolved by the sentence delivered by this court on 14 June 1995 (*RJ* 1995/5090), appeal 244/1994, the doctrine of which was essentially reproduced by the sentence on the 16th (*RJ* 1995/5093), appeal 492/1993. In order to preserve consistency with regard to doctrine, a transcription of what was said in the first of those sentences is reproduced here and will form the basis for this sentence:

'The Ceuta Town Hall intended to file a Supreme Court Appeal to uphold the law regulated by Art. 102.b) of this Jurisdiction (*RCL* 1956/1890 and *NDL* 18435) (Amendment to Law 10/1992 [*RCL* 1992/1027]) that we declare to be legal doctrine to be followed in the future which, according to the regulatory framework in force before the 25 March Law 8/1991 (*RCL* 1991/785 and 2295), by virtue of which the tax on production and imports was passed for the cities of Ceuta and Melilla, the goods import tax levied by the Ceuta Town Hall has subsisted after Spain's entry into the European Economic Community (EEC) and, more specifically, 'the Municipal Corporation of Ceuta has the right to 100 percent of the duties levied on importers in Ceuta established in the fiscal ordinance and is not limited to the 22.5 percent established in the ruling by the Seville court which we dispute.' This contested sentence was handed down on 30 July 1993 by the Andalusian High Court of Justice in Seville and partly recognised the appeal made by the import company 'Super Roma, SA' to apply the reduced fee being of the opinion that only with a reduction of this sort for fiscal year 1991 during which the goods were imported would the municipal tax be compatible with Spain's signing of the original European Community Treaties (today the European Union). The tax would thus be considered a fee equivalent to customs import duties in accordance with Art. 6 of Protocol 2 of the Act of Accession of the Kingdom of Spain (*RCL* 1986/2/05 *ApNDL* 2643 and *LCEur* 1986/6) to the EEC Treaty (*LCEur* 1986/8), referred to in Art. 25.2 of this Act of Accession'.

The underlying argument presented by the petitioning Municipal Corporation is that this municipal tax does not constitute an equivalent effect exaction but is rather a tax integrated within the internal fiscal system as provided for in EEC Treaty Art. 95 (*LCEur* 1986/8), and which is not in conflict with this precept. It therefore contends that it should receive the full amount of the tax in accordance with the regulatory Fiscal Ordinance adopted by the Ceuta city government on 30 December 1985.

(...)

The Ceuta and Melilla city governments have been receiving, given their peculiar geo-economic and historic situation, as income into their municipal treasuries or ordinary budgets (a major source of budget income) by virtue of the old 30 December 1944 Law (*RCL* 1945/22), a tax imposed on the import of goods into these two cities and, in accordance with Art. 4 of the regulatory Fiscal Ordinance adopted by the Ceuta Town Hall is levied on 'the import into Ceuta of all types of merchandise, cloth, articles and all other goods, regardless of the final use to which they will be put, and will be paid by the importer. Imports are defined as goods entering Ceuta, definitively or on a temporary basis, through any import regime.' The enforcement of this municipal tax continued after the 22 December 1955 Law (*RCL* 1955/1757 and *NDL* 5201) on the Economic and Financial Regime of the Territories of Ceuta and Melilla despite Base section 7 and was simply a tax on the import of merchandise into those territories through a system of tax collection check points. This tax, know as 'Aforo' (privilege), was finally abolished on the date that the new 'Tax on Production and Import' came into force for these cities. This tax was created by the 25 March Law 8/1991, the regulation of which is beyond the bounds applicable to this case.

It should also be pointed out that Ceuta is not excluded by any means from the governing or fundamental principles and other norms derived from the original European Union treaties (in this case the EEC Treaty) because it is part of Spanish territory as is clearly stated in Art. 25.1 of the Act of Accession of Spain and Portugal: 'Treaties and other acts adopted by the European Communities are applicable in the Canary Islands and in Ceuta and Melilla with the exception of special cases provided for in sections 2 and 3 and throughout the rest of the provisions of this Act'. The special conditions concerning the application of EEC and ECSC treaties are defined with regard to the free movement of goods in Protocol 2 of the Act.

The central point of conflict revolves around whether the controversial municipal tax can be defined as an equivalent effect exaction comparable to a customs import duty or whether it is an internal tax within the fiscal system. If the former is true, upheld by the Seville court, the tax would be prohibited as of Spain's accession to Community regulations or would be subject to a progressive reduction in its rates (customs disarmament) by virtue of the fact that it goes against the founding principle (referred to as 'Foundations of the Community' in the second part of the 25 March 1957 EEC Treaty where free movement of goods is introduced) of the free movement of goods. If the latter premise prevailed, the taxation regime would remain completely intact and would not be affected by the free movement of goods defended under Community law. It would be protected under Art. 95 of the EEC Treaty as an internal tax and would therefore not be a violation of the prohibition of levying a higher tax on goods from other Member States in comparison with similar national products. This is the premise supported by the Ceuta city government in this unique Supreme Court appeal. Elucidation of this pivotal issue calls for the careful examination within Community law of the founding principle 'free movement of goods' devised as a way to achieve a single domestic market and set out in Arts. 9.1, 12 and 13 of the EEC

Treaty. A forerunner to this concept is found in Art. 4.a) of the European Community Coal and Steel Treaty of 18 April 1951 (*LCEur* 1986/7). Art. 13.2 of the above mentioned EEC Treaty states that: 'the equivalent effect exactions comparable to customs import duties in force in Member States will be progressively eliminated during a transition period.' Community law therefore recognises the clear link between customs import duties (and export duties as well but which do not enter into this case) and other types of taxation that produce the same effect as the former. This Community rule does not, however, provide a concrete, regulatory definition of the notion of 'equivalent effect exaction', which is precisely why it is incumbent upon this court to make a ruling based on jurisprudence in this area from the European Community Court of Justice. This is what the Seville court correctly did in the sentence delivered in this case.

This is a view of the situation from a finalist perspective that guards against taxes or other monetary burdens other than customs tariffs that have the same effect as the latter by raising the prices of goods traded within the Community and hindering the essential principle of free movement of goods. Community jurisprudence has been honing the debated concept of 'equivalent effect exaction' and in its 14 December 1962 ruling ('*Spice Bread*' case) it further refines the concept by introducing the element of discrimination or protection of national industry or products (strictly along the same conceptual lines as customs tariffs). In the last 'consideration' under point 1 of this ruling 'on the equivalent effect exaction comparable to a customs import duty' is expressed in the following terms: '...with regard to the interpretation of Arts. 9 and 12 (of the EEC Treaty), equivalent effect exaction can be considered, regardless of its denomination or form of payment, as a unilaterally established right, either at the time of import or later and, specifically levied upon a product imported from a Member Country and not levied on a similar national product, which produces an alteration in its price and thus has the same effect on free movement of goods as a customs duty.' Two clarifications merit further mention in this jurisprudence: a) the tax is levied only on imported goods and not on goods produced within the territory levying the tax and b) the decisive factor is the result or final effect of the tax; i.e. the alteration of prices restricting the free movement of goods in just the same way as a customs duty. A further case in point making a clear allusion to the protective and discriminatory nature of the tax is the 18 June 1975 sentence (the case of a tax levied by the Italian entity *Ente Nazionale per la Cellulosa e per la Carta*), handed down as a preliminary rulings in accordance with Art. 177 of the EEC Treaty. In its interpretation of Art. 13.2 of the EEC Treaty it ruled that: 'As was already established through the 19 June 1973 sentence ('*Capolongo/Azienda Agricola Maya*' Case) referred to by the national judge, the prohibition established in Art. 13, paragraph 2, referring to any tax levied on an imported product and which is not levied on the corresponding national product thus altering its price, has the same restrictive effect on the free movement of goods as a customs tariff.' Further jurisprudence along these same lines which makes the scope of equivalent effect exaction even more extensive is found in the '*Legros–Reunion*

Island' Case which was cited by the disputed sentence and by virtue of its factual similarity to the circumstances surrounding this case. The 16 July 1992 sentence in this pre-trial hearing compares the equivalent effect exaction to the so called 'octroi de mer' levied by the Reunion Island overseas French department, highlighting the fact that this tax is applied in a general sense to all products shipped to the region of Reunion for the simple reason that they were shipped to this part of French territory while all products proceeding from Reunion are systematically free of any taxation precisely due to their regional origin and not because of any objective criteria which led to the court ruling (consideration I2, *in fine*) 'that these factors clearly indicate that the tax under scrutiny in this suit can not be considered as an internal tax.' Further on, in legal ground 13, the same idea is expressed in the following terms: 'In this sense, the court has already ruled stating that the unilaterally imposed tax burden, independent of its denomination or form of collection, applicable to national or foreign goods for the simple reason that they have crossed the border and not officially considered a customs tariff, constitutes an equivalent effect exaction as described in Arts. 9 and 12 of the Treaty. This is still the case even if the state is not the beneficiary of the taxes, if the taxes do not discriminate in favour of local goods and the product in question is not competing with a national product (see 1 July 1969 sentence '*Sociaal Fonds voor de Diamanterbeiders*' Case, subject 2/1969 and 3/1969, repertoire 1969, p. 211). Particularly relevant given its similarity to the municipal tax issue under scrutiny here is the court's clarification with regard to two possible objections to the comparison of this equivalent effect exaction with the 'octroi de mer': a) It is irrelevant whether the tax is levied at a regional or interior border rather than at a national border. It goes on to state that '...the levying of a tax on products shipped to a Member State region constitutes a barrier to the free movement of goods at least as serious as a tax collected at the national border for the import of goods into the totality of a Member State's territory' (consideration 16, *in fine*). b) It is equally irrelevant that the tax be levied on goods proceeding from other regions of the taxing Member State. According to legal ground 17 of that sentence this fact 'does not modify the scope that a tax of this sort has for the entirety of the Community customs territory.' Based on all of this, it concludes that the *ad valorem* tax (proportional to the customs value of the goods) collected by a Member State for entry into a region or territory of the first Member State constitutes an equivalent effect exaction comparable to a customs duty 'despite the fact that the tax (exaction) is applied uniformly to goods entering the region from another part of that same State' (*cf.* legal ground I8). It is now a matter of discerning, based on this jurisprudence comprising what is know as the 'community estate', whether the municipal tax levied on the import of goods by the Ceuta city government can be judged using these same criteria.

The answer must be affirmative. That tax must be considered as an 'equivalent effect exaction comparable to a customs import duty' as the Seville court correctly ruled in its sentence which is the object of this appeal. It is in fact a unilateral tax

(there is no Community authorisation or harmonisation provisions from the European Community Institutions) imposed by a Member State – a public entity forming part of that State, to be more exact -- levied on imported goods, *i.e.* the tax is imposed for the simple entry into Ceuta of all types of merchandise and does not depend in any way on where the product is actually consumed (merchandise in transit is also taxed). This tax is not levied -- this is a decisive issue in this case – on these same products when they are produced within the territory of the Ceuta city government. It is not, therefore, an internal tax forming part of a larger fiscal system that indiscriminately taxes categories of goods or products following purely objective criteria but rather it is levied because of the simple fact that the goods come from outside of Ceuta thus making it impossible to be considered under Art. 95 of the Treaty as was the intention of the city government.

The arguments made by the municipal corporation are not an obstacle to the application of the criteria described above despite the noteworthy dialectical effort noted throughout its juridical argumentation:

A) The fact that Ceuta does not form part of the customs territory of the European Communities will only affect, as the disputed sentence correctly affirms, trade relations between Ceuta and third countries or states which are not Community members as is inferred in Art. 9.1, *in fine* of the EEC Treaty.

B) The fact that the tax is not levied at a state or national border but rather when the goods enter the territory of Ceuta makes not difference whatsoever with regard to qualifying the tax as an equivalent effect exaction comparable to one collected at a national or regional border as was clearly indicated by the Community Justice Court in its 16 July 1992 sentence cited above. And finally,

C) The fact that goods or products proceeding from the rest of the Spanish territory are also subject to this municipal tax is also irrelevant because Spain forms part of Community territory in accordance with the concept of unified Community territory expressed in the sentence.

In conclusion, this municipal tax must be considered an equivalent effect exaction comparable to a customs import duty as was established in the sentence which is the object of this appeal.

Further support to the criteria established above is lent by the posterior regulation set out in the 25 March Act 8/1991 already alluded to. This law establishes a new tax on Production and Import in Ceuta and Melilla which is levied not only on imports but also on 'the production or elaboration of all goods.' The Treasury Counsel, upon presentation of the 7 December 1994 report filed by the Treasury Office, implicitly admits that the former regulation which taxed only the entry of goods, did not conform to the principle of free movement of goods within the EEC. The report indicates that the new tax is not an equivalent effect exaction because it does not focus exclusively on imports. *A sensu contrario* one must infer that that which is regulated by the 1985 Fiscal Ordinance and applied in this case does constitute this class of exaction. It is not incumbent upon this court to rule on this new tax, however, the issue

being outside of the present debate.

Since this is an equivalent effect exaction payable to the public entity, the Ceuta city government, Art. 35 of the Act of Accession is not applicable. This article states in general terms that 'the equivalent effect exaction comparable to a customs import duty that exists between the Community as it now stands and Spain will be eliminated on 1 March 1986.' As is specified for Ceuta, Art. 25 of that Act must come into force. In section 2 this article states that: 'The conditions under which the provisions of the EEC and ECSC treaties on the free movement of goods are to be applied, as well as the stand taken by Community institutions regarding customs legislation and trade policy in the Canary Islands and in Ceuta and Melilla, is defined in Protocol 2.' It is in Art. 6 of this Protocol that reference is made to Art. 31 of the Act of Accession regarding the progressive dismantling of customs or the progressive reduction of equivalent effect exaction. This is why the Seville court did not proceed to completely eliminate the tax as of 1 March 1986 and instead applied a gradual reduction to the tariffs relative to fiscal year 1991, reducing the base figure to 22.5% of its original cost. No legal error has been made in this sentence and the appeal case filed by the municipal corporation was rightly dismissed".

-- STC 130/1995 of 11 September 1995, appeal for constitutional protection number 2823/92 (*BOE*, 14.10.95).
Reporting Judge: Mr. José Gabaldón López

The Court allowed an appeal for constitutional protection filed by a Moroccan national who was an alleged victim of discrimination due to his nationality. The Court overturned the contested sentences and resolutions by which the public administration dismissed allegations. The Court applied international agreements and Community law in its ruling.

"Legal grounds:

Three.– The refusal to allow the petitioner's appeal is mostly based on the fact that he was not specifically included within the quota and was therefore not eligible for unemployment compensation provided for under the Bilateral Social Security Agreement signed between Spain and Morocco (8 November 1979), despite the fact that according to that agreement, Moroccan nationals are subject to Spanish social security legislation under the same conditions as Spanish nationals (Art. 4). With regard to the ILO Convention 97/1949 on emigrant workers, the petitioner was not included because there are no stipulations concerning unemployment benefits, simply declaring (Art. 2.2) that it is incumbent upon the member countries to make an effort to protect this group of workers (excluding workers at sea).

Four.– In addition to conventional international law, however, it can not be forgotten that Spain is a member of the European Communities as of 1 January 1986 in accordance with Art. 93 of the Spanish Constitution and is therefore subject to

Community regulations directly affecting citizens and these regulations take precedence over internal provisions as has been demonstrated by the European Community's Court of Justice (5 February 1963 rulings in the *Van Gend and Loos* Cases and the 15 July 1964 ruling in the *Costa v. ENEL* Case) and this fact has been recognised by the Constitutional Court (*SsTC* 28/1991 [*RTC* 1991/28] and 64/1991 [*RTC* 1991/64], among others).

As a result, as the Public Prosecutor's office has rightfully argued, in this case it must be acknowledged that, by virtue of Regulation 2211/1978 ratified by the EEC Council, the Co-operation Agreement signed in Rabat on 27 April 1976 between the European Community and the Kingdom of Morocco is in force. Art. 41.1 of that Agreement must be considered as directly applicable to the Community and implies a clear obligation which is not contingent upon, in its application or in its effects, to a later act tabled by the Member States as has been declared by the above-mentioned Court in its 31 January 1991 ruling in the *Kziber* Case.

Five.– There seems to be no doubt that, in accordance with Art. 41.1 of the above mentioned Agreement which states that workers of Moroccan nationality and members of their families residing within the territory of an EEC Member State are eligible, in the area of social security, to receive the same benefits as the nationals of the Member Country where they are employed without any type of discrimination based on nationality. This precept was interpreted by the Court of Justice of the European Communities in the above mentioned 31 January 1991 ruling indicating that the principle of no discrimination based on nationality implies that the subject who has met all the requirements required by national legislation to gain access to unemployment benefits can not be denied these benefits for reason of nationality. A statement made by the Luxembourg Court led to the 24 March Circular 11/1994 of the Directorate General ISM recognising that Moroccan nationals working at sea are also protected by unemployment benefits and have the same right to these benefits attributed to Spanish workers.

We must therefore conclude that a Moroccan national employed by a Spanish company can not be excluded from the same unemployment benefits that Spanish nationals are entitled to if he or she meets all the legal requirements regulating those benefits".

4. Preliminary Ruling

– STS of 20 September 1996 (jurisdiction for suits under administrative law). Appeal case 10628/1991.
Source: RJA 1996/6785
Reporting Judge: Mr. Rafael Fernández Montalvo

Administrative law appeals were filed against the 23 June 1986 and 27 July 1987

Orders from the Ministry of Agriculture, Fisheries and Food regarding distribution control of the base quota in the production of isoglucose applicable to several manufacturing companies. These appeals were dismissed in the 28 June 1991 ruling by the National Court, Section Four.

Appeals were filed and the Supreme Court ruled that the preliminary issues of interpretation and invalidation raised by the petitioners with regard to Community law were not appropriate for the Court of Justice of the European Communities. It proceeded to dismiss the appeal thus confirming the original sentence.

"Legal grounds:

First.– The first issue to be resolved in this appeal case is whether to confirm or to overturn the 28 June 1991 sentence delivered by Section four of the National Court's Courtroom for Suits under Administrative Law. This ruling was applicable to the appeals filed against jurisdictional orders 46513 and 46879 and it dismissed the allegations which are reiterated in this appeal. 'Ceisa' appealed for the dismissal and a declaration of ineffectiveness of the 23 June 1986 Order by the Ministry of Agriculture, Fisheries and Food which effectively established the distribution of the base quota for the production of isoglucose for several manufacturing companies. It also appealed for the annulment of the 27 July 1987 ruling which dismissed the appeal for reversal it had filed and requested to be recognised as an individual before the court so as to receive compensation payment for damages caused by that ministerial Order. The appeal filed by 'Laisa' called for: 1. Annulment of the 23 June 1986 Ministerial Order that established the distribution of base production quantities of isoglucose for the 1986/1987 sales campaign and the 27 July 1987 Ruling dismissing the appeal for reversal; 2. Recognition of its right to receive compensation for damages caused by the Ministerial Order during the last four months of the 1985/1986 sales campaign and, by virtue of the Treaty of Accession signed in Lisbon and Madrid on 12 June 1985 (*RCL* 1986/1; ApNDL 2643 and *LCEur* 1986/1), the ratification of which was authorised by the Kingdom of Spain by virtue of the 2 August Organic Law 10/1985 (*RCL* 1985/1979 and *ApNDL* 2644); 3. Collaterally, in the event that the above mentioned compensation was not awarded, annulment of the 23 June 1986 Ministerial Order that established the distribution of base production quantities of isoglucose for several companies during the last four months of the 1985/1986 sales campaign and the 27 July 1987 Ruling dismissing the appeal for reversal.

Before further consideration, an examination should be made of whether the preliminary issues raised by the petitioners, first instance as well as appeals, should go before the Court of Justice of the European Communities in accordance with Art. 177 EC Treaty (*LCEur* 1986/8); the former for interpretation and the second for validation review. The first is based on the disputed 23 June 1986 Ministerial Order which established the distribution of base production quantities of isoglucose for several companies, allegedly violating Community provisions – specifically Art. 26

of the Act of Accession of Spain and Portugal to the EEC (*RCL* 1986/2/05 and *ApNDL* 2643; *LCEur* 1986/6) and Community regulations applicable, especially Arts. 24 and 25 of Regulation 1785/81 (*LCEur* 1981/240) that could lead to problems of interpretation that would affect the court's ruling. The argument concerning the preminilary issue of invalidation points out that Art. 1.2 of EEC Regulation 934/86 (*LCEur* 1986/1038) (and, as a natural subsidiary, Art. 1.5 of EEC Regulation 1107/88 [*LCEur* 1988/459] and Art. 1.3 of Regulation 305/91 [*LCEur* 1991/94]) lack validity to the degree that they have extended the effects of sections 2, 3 and 5 of Art. 24 of EEC Regulation 1785/81 of the Council in a clear violation of the general principles of Community regulations and specifically of Arts. 7 and 40.3 of the EC Treaty and jurisprudence handed down by the Court of Justice of the European Communities. This invalidation gives rise to the illegality of the 23 June 1986 Ministerial Order as well as the 27 July 1987 court decision denying appeal for reversal, producing the annulment of the Order with respect to sales campaigns successive to the cited 1986/1987 campaign inclusive to the 1992/1993 campaign.

Second.– Art. 177 EC Treaty allows for preliminary remittal to the Court of Justice of the European Communities in much the same way as the incidental suits concerning the unconstitutionality of the legal rules of the 'concentrated' constitutional justice regulations (Art. 163 Spanish Constitution for our purposes) and, in general terms, in the same way as preliminary remittal issues the objective of which is: to guarantee the uniformity of Community law, to foster its development and to assure the stability of secondary law, even providing protection of individuals' rights and interests gnaranteed under European Community legal regulations. If this Community law were not interpreted in a uniform manner, discrepancies would arise among rulings. In order to avoid such a situation, the above mentioned Art. 177 EC Treaty was conceived: to guarantee and maintain the uniformity and coherence of European Community regulations. In this sense, the Court of Justice of the European Communities in its 16 January 1974 ruling, *Rheinmühlen* Case, 166/1973, later reiterated in doctrine through other sentences such as the 29 May 1977 *Hoffmann-La Roche* Case, 107/1976, highlighted the fact that 'it is essential to safeguard the community character of law established by the Treaty's Art. 177 the objective of which is to insure that this law, under all circumstances, is equally applied in all Member States. This precept attempts to prevent divergence in the interpretation of Community law to be applied by national judicial institutions, providing national judges with a tool with which to eliminate the difficulties that could arise as a result of the obligation of fully enforcing Community law within the framework of the Member States' legal systems.'

Third.– The Treaty precept cited above includes two suppositions regarding two different types of preliminary issues in its system: remittal for interpretation applicable to the Treaty itself, original law and secondary law [Art. 177, a) and b)], and remittal for validation, reserved exclusively for secondary law [Art. 177, b)]. Despite this theoretical distinction, in practice there will sometimes be a close

connection between these two issues to the degree that the validation issue implies an interpretation of the rules that will condition the juridical validity of the secondary law under dispute.

The preliminary ruling procedure is based upon cooperation implying a sharing of functions between the national judge with competence to apply Community law to a particular lawsuit and the Court of Justice whose responsibility it is to guarantee the equanimous interpretation of Community law within all of the Member States (ECJ 16 December 1981, *Foglia/Novello* Case, 244/1980). It is the national judge alone who must evaluate the ueed for a preliminary ruling and the relevance of the issues raised by the parties, paying careful attention to the possible existence of a problem with the interpretation of applicable Community law that the lie himself can not resolve on his own. It should not be forgotten that it is also incumbent upon the national judge to enforce Community law and that the jurisdictional monopoly lield by the Court of Justice of the European Communities only applies in cases of an invalidation ruling concerning Community institutional acts (ECJ 22 October 1987, *Foto Frost* Case, 341/1985). Article 177 of the EC Treaty does not, therefore, provide an open appeal channel for the parties to a lawsuit before a national judge. In order to be granted a preliminary review, it is not enough that the parties claim that the suit is subject to Community law. The national judge must take a decision on the necessity of a preliminary review based upon the following elements: a) applicability of Community law provisions to the lawsuit; b) some doubt with regard to the significance or validity of an applicable Community law regulation which will effect the ruling in the lawsuit; and c) the impossibility of resolving the doubt himself without risking uniformity in the interpretation and application of Community law.

To sum up, Court of Justice doctrine itself substitutes the criteria of 'separation' with 'cooperation' in its design of the sharing of jurisdictional functions between the Community judge and the national judge (ECJ 11 December 1965, *Schwarze* Case, 16/1965). It is the national judge who is responsible for: taking the initiative to make a remittal (ECJ 16 June 1981, *Salonia* Case, 126/1980, and 6 October 1982, Cilfit, 283/1981); and to decide whether a preliminary decision is 'necessary in order to make a ruling' with the necessary interpretative authority (*STS* 3 November 1993), on some item of Community law ('relevant to the lawsuit at hand'). In accordance with the system established in Art. 177 EC Treaty, 'the national judge, the only person with the factual knowledge of the case and familiarity with the arguments presented by the two sides, and who should assume responsibility for the judicial decision, is better equipped to make a responsible decision regarding the relevance of the legal issues of the lawsuit and the need for preliminary review to be able to make a ruling' (ECJ 29 November 1978, *Pigs Marketing Board* Case, 83/1978).

Paragraphs 2 and 3 of Art. 177 EC Treaty cited above make a distinction between the faculty of referring issues that correspond to any of the Member States' jurisdictional institutions to the Court of Justice and the 'obligatory nature' of remitting an issue to the Court of Justice when it is a case of a 'national jurisdictional

institution, the decisions of which are not susceptible to an appeal process under internal law.' In this case, with a view to guaranteeing the uniformity and applicability of Community law while keeping in mind the value that decisions taken by that supreme jurisdictional institution has for national jurisprudence, a preliminary review becomes mandatory before a ruling may be delivered.

This does not mean however, that the judge of last instance or the national Supreme Court judge is stripped of his decision making capacity in determining the relevance of considering preliminary questions under the circumstances indicated below.

Fourth.– The evaluation of the relevance of the preliminary issue by the national judge, as was mentioned above, even when the internal judicial process has come to a close as can be derived from the wording of EC Treaty Art. 177 which states 'if a decision is deemed necessary in order to make a ruling', has been paradigmatically governed by the 'clear issue' criteria. This doctrine, used by the French State Council (A. 11604 *Ministre de l'Interieur* v. *Cohn-Bendit*, 22 December 1987 Resolution) as well as by the German Federal Finance Court (*Bundesfinanzhof*, Resolutions taken on 16 July 1981 and 24 April 1985), was questioned on the grounds that remittal to the Court of Justice of the European Communities should be automatic in the case of all questions raised before a national jurisdictional institution of last instance because this institution lacks jurisdictional competence, by virtue of EC Treaty Art. 177, section 3, to deal with the question because a pronouncement regarding the clarity of the issue is precisely the result of interpretation and because the notion of 'clear issue' can not be adapted to the complexity of Community regulations. Nevertheless, even though it seemed at the outset that the Court of Justice considered the obligation referred to in EC Treaty Art. 177, section 3 as absolute, at least ever since the *Cilfit* sentence (Court of Justice of the European Communities 6 October 1982) it has clearly defined two situations which dispense the last instance judge from remittal: the first is when the application of Court of Justice jurisprudence resolves the point of conflict, regardless of the nature of the procedures that gave rise to that jurisprudence; and the second is when the proper application of Community law is so obviously called for that it leaves no reasonable doubt with regard to the manner in which to resolve the issue; in its own words: 'the correct application of Community law is so clear that it leaves no reasonable doubt about the solution of the question raised.' If this is the case, assuming that the national jurisdictional institution is convinced that 'the resolution of the question would be equally clear for the jurisdictional institutions of the other Member States as well as for the Court of Justice,' it may abstain from remitting the issue to the Court of Justice. This 'clear issue' doctrine has been reflected in several decisions handed down by this High Court (*SsTS* 17 April 1989 [*RJ* 1989/4524] and 13 June 1990). It can therefore be understood that the exclusion of the preliminary review is justified: when it would have no bearing on the outcome of the ruling (irrelevant issue) so that regardless of what decision is taken by the Court of Justice of the European Communities, it will have no bearing on the decision in the lawsuit in the course of which the question was originally raised (SsECJ 22 November

1978, *Mattheus* Case, and 16 December 1981, Foglia/Novello, among others); when the resolution of the question is self evident because there is no reasonable or founded doubt with respect to the interpretation and/or validity of the applicable Community provision, not losing sight of, as was indicated by the Court of Justice of the European Communities, both the context as well as the set of regulations to which the rule being interpreted pertains; and when the issue has been 'clarified' given the similarity of the question with a case resolved by the Court of Justice of the European Communities and the corresponding doctrine can be cited or Community jurisprudence can be applied as was pointed out by the ECJ 27 March 1963, *Da Costa* Case, 28 to 30/1962, and reference is made in Art. 104.3 of the Court's own Procedural Regulations of 19 June 1991 (*LCEur* 1991/770).

Fifth.– It can be affirmed that the obligation expressed in Art. 177 EC Treaty with regard to preliminary remittal of a contended issue is not applicable when the court can coherently resolve the issue of interpretation and/or validity raised with regard to a Community rule keeping in mind, in addition to the criteria expressed above, the following principles: a) the national judge is the guarantor not only of the basic structural principles of Community law representing its direct effect and primacy, but also, from his position within an institution that creates jurisprudence with regard to the application of Community law; b) the preliminary issues subject to interpretation and determination of validity are sometimes linked given that they can be formulated jointly and frequently the examination of the validity of a Community act or rule gives rise to a problem prior to interpretation; c) the question of validity can not be raised with relation to the constituting treaties or founding Community law; and d) when the validity of a Community act or rule is called into question, the national jurisdictional institution does not have the authority to declare its annulment (ECJ 22 October 1987, *Foto Frost* Case, 341/1985). In other words, it does have the authority to dismiss objections formulated with respect to its validity but does not have the power take that decision regarding its annulment without remitting to the Court of Justice of the European Communities for a preliminary ruling".