THE SPANISH DECLARATION OF ACCEPTANCE OF THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

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1. SPAIN'S GENERAL POSITION ON THE JURISDICTIONAL RESOLUTION OF INTERNATIONAL DISPUTES

a) On October 29, 1990, Spain deposited a declaration of acceptance of the compulsory jurisdiction of the International Court of Justice with the Secretary General of the United Nations as stipulated in paragraph two of article 36 of its Statute. By doing so, our country joined the 54 others that had made this type of declaration by December 31, 1991[1]. (Although this figure is slowly but surely rising, it represents less than one third of the members of the United Nations). This was undoubtedly an event of great magnitude in Spanish foreign legal policy as it clearly demonstrated Spain's willingness to abide by the rules of this legal order. As such, it rightly occupied a place of honor in the *Revista Española de Derecho Internacional (The Spanish Journal of International Law)*[2]. And as the *Consejo de Estado* (Council of State) so very well said in a statement we will refer to later, "any State that issues a declaration such as this one not only demonstrates its confidence in the International Court of Justice and in the Law as a means for resolving conflict, but also shows a belief in the correctness of its own conduct as it is clear that its support rests more on expectations of the protection the Court can provide than on fear of sanctions that the Court might impose". These considerations led the highest consultative organ of the country to declare the formulation of the declaration "very favorable"[3].

As our main purpose here is to analyze the unilateral declaration, and

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1. *Multilateral Treaties deposited with the Secretary General. Status as of 31 December 1991*. United Nations, New York, 1991, pp. 12 *et seq.*

2. J. D. González Campos, "España reconoce como obligatoria la jurisdicción de la C.I.J. de conformidad con el art. 36.2 del Estatuto", *REDI*, vol. XLII, 1990-2, pp. 361 *et seq.*

3. Opinion number 54.285/54.089, dated January 25, 1990.

although it does not seem necessary to undertake a preliminary study of the type of declarations that we are concerned with nor the compulsory jurisdiction of the Court, for purposes of introduction it does seem wise to recall as succinctly as possible the general position our country has taken as regards the compulsory submission to jurisdictional means (both judicial and arbitrational) for the settlement of international disputes.

b) It is worthwhile to point out that along these lines, Spain, throughout its history, has not been totally opposed to this type of conflict settlement, be it through arbitration or judicial arrangement. Furthermore, the monograph published in 1982 by Professor Andrés Saenz de Santa María shows that between 1794 and 1978 Spain was a party to 52 arbitration treaties and that between 1776 and 1930 our country submitted 14 cases for settlement by this procedure[4]. Professor Orihuela Calatayud has compiled some 50 multilateral agreements and treaties Spain has been a party to which include a clause requiring signatories to submit disputes to the International Court of Justice[5]. There also exist many bilateral agreements in which Spain has accepted the jurisdictional settlement of disputes that arise from the application or interpretation of the treaties themselves. Therefore, in terms of specific binding clauses — that is, those restricted to the conflicts that arise from the treaty in question — our country's position is not at all a rejection of compulsory jurisdiction.

c) Nevertheless, the *a priori* general acceptance of the compulsory jurisdiction of the Court of the Hague (Permanent Court of International Justice — PCIJ from now on — or the International Court of Justice — ICJ) is another matter altogether. It is true that on September 21, 1928, Spain signed a unilateral declaration accepting the compulsory jurisdiction of the PCIJ for a period of ten years with the only exceptions being the settlement of disputes which predated the signing of the declaration, those related to situations or events that predated the declaration (exception *ratione temporis*), and those for which another means of settlement had been determined[6]. But

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4. M.P. Andrés Sáenz de Santa María, *El arbitraje internacional en la práctica convencional española (1794-1978)*, Oviedo, 1982, pp. 72 et seq.

5. E. Orihuela Calatayud, "España y la jurisdicción obligatoria del Tribunal Internacional de Justicia," *REDI*, vol. LXI, 1989-1, pp. 69 *et seq.*

6. See *Publications of the PCJI, series E, num. 5, Fifth Annual Report, 1928-1929*, p. 392. The text, in French, is the following: "Au nom du Gouvernement de S.M. le roi d'Espagne, je déclare reconnaître comme obligatoire, de plein droit et sans convention spéciale vis-a-vis de tout autre Membre ou Etat acceptant la même obligation, c'est à dire sous condition de réciprocité, la jurisdiction de la Cour pour une période de dix années, sur tous le différends qui s'élèveraient après la signature de la présente déclaration, au sujet de situations ou de faits postérieurs à cette signature, sauf le cas ou les Parties auraient convenu ou conviendraient

when the declaration expired in the middle of the Spanish Civil War, it was not renewed. It is also true that in 1930 Spain acceded to the General Act for the Pacific Settlement of Disputes adopted in Geneva on the 26th of September, 1928, by the General Assembly of the League of Nations. This document provided for the submission to the PCIJ of all conflicts in which the parties were disputing a reciprocal right except for those in which an arbitrated solution was possible[7]. Nevertheless, on April 1, 1939, the newly victorious Spanish government renounced the Geneva Act[8] in a very significant gesture which was interpreted as a rejection by this new political system of general compulsory jurisdiction. Underlying this attitude there undoubtedly could be found an exacerbated sense of national sovereignty typical of authoritarian regimes and a more or less conscious mistrust of International Law and the ideology of the United Nations. This attitude completely ignored the important consideration that for medium sized powers such as Spain, a jurisdictional solution of disputes is of great interest from a political point of view. Nevertheless, all of this did not prevent independent doctrinal sectors from taking a divergent position on foreign legal policy and insisting that the acceptance of the compulsory jurisdiction of the ICJ could be beneficial. Of particular interest in this sense are the ideas of Professor Carrillo Salcedo who argued in favor of acceptance as early as 1960[9].

d) After the Spanish transition to democracy, and once the 1978 Constitution was in force, there was no longer any basis for the ideological rejection of general compulsory jurisdiction. As the Constitution had already accepted the concept of rule of law for domestic law, there was no reason in principle why this concept could not be applied, as much as possible, to interstate relations as well. There was also the feeling, from the perspective of foreign legal policy[10], that compulsory jurisdiction couldn't but favor the general interests of our country given that as a medium sized power in the family of nations, but one with increasing participation in the area of international relations, it was important to demonstrate a high degree of respect for International Law. The acceptance of the compulsory jurisdiction of the ICJ

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d'avoir recours à un autre mode de règlement pacifique. Genève, le 21 septembre 1928, J. Quiñones de León".

7. See *Publications of the PCIJ, series E, no. 16, Sixteenth Report (1939-1945)*, p. 51.

8. For the changes in this complaint, see J. González Campos, *op. cit. supra*, footnote 7.

9. J. A. Carrillo Salcedo, "La excepción automática de competencia doméstica ("domestic jurisdiction") ante el Tribunal Internacional de Justicia. Examen de la práctica reciente," *REDI*, vol. XIII, 1960-1, pp. 214 *et seq.*

10. In the sense that G. de Lacharriére uses this expression in *La politique juridique extérieure*, Paris, 1983.

fit well within our country's splendid legal tradition in the area of international relations. This tradition dates back to the 16th century, the dawning of modern international society, when jurists and philosophers from the Salamanca School, reacting to the Conquest, set down the foundations for International Law. However, a good deal of time would have to pass before these considerations would manifest themselves in the political decision to formulate a unilateral declaration of acceptance of the compulsory jurisdiction of the ICJ.

II. A FIRST STEP: SPAIN'S ACCESSION TO THE WESTERN EUROPEAN UNION

a) In this new climate, the first evidence of the general acceptance of the compulsory jurisdiction of the International Court of Justice, still limited to a restricted circle of European states, would appear in a rather conventional way. It was during the winter of 1987 that negotiations were initiated for the accession of Spain to the March 17, 1948, Treaty of Brussels which was amended by the Paris Protocol of October 23, 1954, of the Western European Union (hereinafter WEU). This was basically a mutual defense alliance within the framework of article 51 of the Charter of the United Nations, but it also implied the acceptance of the compulsory jurisdiction of the International Court of Justice in all disputes covered in paragraph 2 of article 36 of its Statute (the one dealing with unilateral declarations) which arise between the parties to the treaty "with the only exception being the reservations that each of them makes at the time of acceptance of the clause on compulsory jurisdiction and to the extent that each Party upholds them". (art. X)

b) Therefore, accession to the WEU carried the same consequences within the restricted circle of the member States as the formulation of the unilateral declaration provided for in the aforementioned article of the Court's Statute. Of course, if Spain wished to introduce some reservations, there were two possible ways of doing so: the first would be to formulate the unilateral declaration before joining the WEU, in which case article X of the incorporating treaty would admit them automatically, or include the reservations in a more conventional manner, that is, on the occasion of the accession protocol to the WEU. And although there is no doubt that the first option was preferable, political pressure to speed up Spain's membership in the WEU led to the election of the second. And that is how our country, wishing to exclude the existing disputes with Great Britain over Gibraltar from the compulsory jurisdiction of the Court, was able to obtain the addition to that protocol of a

series of bilateral Exchanges of Notes among the Ministers of Foreign Affairs of the respective countries and the Spanish Minister related to the Spanish reservation to article X of the WEU treaty, a *ratione temporis* reservation which had been negotiated prior to that point with the United Kingdom and whicb excluded from the compulsory jurisdiction of the International Court of Justice all disputes which had arisen prior to the Treaty's entry into force in Spain and those related to events which had taken place prior to that date[11].

III. PREPARATION OF THE DECLARATION AND THE POLITICAL DECISION TO PRESENT IT

a) In April, 1987, the *Asesoría Jurídica Internacional del Ministerio de Asuntos Exteriores* (the International Legal Service of the Ministry of Foreign Affairs) was charged by the Under Secretary of the Department with the creation of a small working group whose task it would be to write a draft of a unilateral declaration. Expert members of the group included Santiago Torres Bernáldez, who had been *greffier* to the Court; Juan Antonio Yáñez Barnuevo, advisor to the President on international affairs; Juan Manuel Cabrera, General Director of International Conferences and Organizations (hereinafter ICO); and professors Juan Antonio Carrillo Salcedo, Antonio Remiro Brotons and Luis Ignacio Sánchez Rodríguez. The group's coordinator was professor José Antonio Pastor Ridruejo, head of the Legal Service, assisted by professor Javier Díez Hochleitner, at that time deputy director of the Service. The group was advised by the ambassador and jurist José Manuel Lacleta Muñoz, who had been a member of the United Nations Commission of International Law and head of the Legal Service.

b) In spite of the fact that there already existed the precedent of Spain's accession to the Western European Union, the final political push necessary for the presentation of the unilateral declaration came only after support from the highest levels of government was evident. This support came from the President himself who had traveled during the winter of 1989 to The Hague and had held conversations there with the President and the *Greffier* of the Court. His support encouraged the group to work more quickly. With several drafts prepared by Santiago Torres and professor Pastor Ridruejo to

11. The Accession Protocol and the exchange of letters are signed November 14, 1988, and are ratified by an instrument dated August 2, 1989. See the texts in the *Boletín Oficial del Estado n.* 110, 8.5.1990.

work with, the group prepared a proposed declaration and submitted it to the ICO on May 16, 1989[12].

IV. THE INTERNAL PROCESSING OF THE DECLARATION

a) Once the declaration was written, the working group asked about what the Constitution and current legislation stipulated in regards to the internal processing of a unilateral instrument. Did it have to be treated in the same way an international treaty would be? There were several opinions on this matter within the group itself, but it was clear that if the answer to that question was yes, the declaration would have to be authorized by the *Consejo de Ministros* (Council of Ministers). Then it would have to be sent to the *Consejo de Estado* so that its members could decide whether or not, according to organic law, parliamentary authorization was necessary, and finally, if necessary, the authorization would have to be obtained.

b) The group finally agreed that the internal processing of the declaration was the same as for conventional instruments. This conclusion was based on the following arguments: 1) Paragraphs a), b), c), d) and e) of article 94.1 of the Constitution require the authorization of Parliament in order to be "bound by treaties and covenants." This is understood to mean that legislative authorization would be needed if the unilateral declarations of a treaty created new obligations for the State. 2) There was also a doctrine established by the *Consejo de Estado* that stipulated that unilateral declarations to a treaty should be incorporated into international treaties for internal processing[13]. The working group considered this doctrine to be correct and pertinent.

c) These arguments were also contemplated in the report made by the International Legal Service on the issue of internal processing[14]. This report stated that the declaration had to be authorized by Parliament according to paragraph 1 of article 94 of the Constitution for the following reasons: because the declaration was part of a treaty whose political nature was patent

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12. International Legal Service Report, n. 5734.

13. Opinion n. 46.092 states the following as regards the declaration included in article 41 of the United Nations Covenant on Civil and Political Rights: "Certain declarations formulated within the framework of an international treaty can be incorporated into those treaties both for the purposes of article 94 of the Constitution and those having to do with the requirement to consult this Council of State. A clear example of this type of declaration is the one that entitles the country formulating it to implement article 41 and the related provisions of the Covenant. Another example might be found in certain kinds of reservations".

14. Report of the International Legal Service, n. 5836.

(clause a); because it could affect a dispute on delimitation (clause c); because a sentence of the Court could impose financial burdens on the Public Treasury (clause d); and finally because even if the procedure before the Court was not a request for annulment, a sentence could indeed declare that a Spanish law did not conform to International Law (clause e). We should point out that these legal arguments recognize the political expediency of having an act of such importance approved by the legislature.

d) In keeping with the opinion of the International Legal Service, the declaration, which had received a favorable report from the Ministry of Justice on July 31, 1989, was submitted to the *Consejo de Ministros* which approved it in its meeting of October 13 of the same year. It was then sent to the *Consejo de Estado*, which issued a statement on January 25, 1990, to the effect that the declaration should be approved by the Parliament[15]. The appropriate authorization was requested from the Government, and was granted on June 14, 1990 (Congress) and on September 20 of the same year (Senate). Once these preliminary steps were completed, the declaration was signed by the Minister of Foreign Affairs on the following October 15, deposited with the Secretary General of the United Nations on the 29th of that month and finally published in the *Boletín Oficial del Estado* (Official Journal of the State) on November 16, 1990[16]. As was suggested in the report issued by the Ministry of Justice, as part of the last step in the process the United Nations Charter and the Statute of the International Court of Justice were published along with the declaration as they had not been officially published any where else in Spain prior to that time.

V. ANALYSIS OF THE DECLARATION

a) When comparing the declaration being studied in this article[17] with the

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15. Opinion n. 54.285/54.089.

16. *Boletín Oficial del Estado* n. 275.

17. See in *op.* and *loc. cit.* in footnote 1 *supra*. The text of the declaration is as follows:

"1. The Kingdom of Spain accepts as compulsory *ipso facto* and without special agreement, the jurisdiction of the International Court of Justice, in conformity with article 36, paragraph 2, of the Statute of the Court, in relation to any other State accepting the same obligation, on condition of reciprocity, in legal disputes not included among the following situations and exceptions:

a) Disputes in regard to which the Kingdom of Spain and the other party or parties have agreed or shall agree to have recourse to some other method of peaceful settlement of

text of the declaration formulated by Spain for the Permanent Court of International Justice in 1928[18], it is immediately clear that the 1990 version is much longer and more complex. For purposes of analysis, the following elements of the declaration currently in effect merit mention: 1) the acceptance of compulsory jurisdiction; 2) the right to make exceptions and reservations to this jurisdiction; 3) the ability to add to, amend or withdraw the reservations; and 4) the right to withdraw or substitute the declaration itself. The distinction between these different elements is only for the purpose of analysis, and clearly does not mean that there is no substantive relation between them, particularly between numbers three and four, which will be shown later in this paper.

b) We also want to point out that in the Spanish version of the declaration deposited with the Secretary General of the United Nations, the term "tribunal" is used and not the term "court." The Charter and Statute use this last term, which is absolutely correct; however, the press and most university professors

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dispute;

b) Disputes in regard to which the other party or parties have accepted the compulsory jurisdiction of the Court only in relation to or for the purposes of the dispute in question;

c) Disputes in regard to which the other party or parties has accepted the compulsory jurisdiction of the Court less than 12 months prior to the filing of the application bringing the dispute before the Court;

d) Disputes arising prior to the date on which this Declaration was deposited with the Secretary General of the United Nations or relating to events or situations which occured prior to that date, even if such events or situations may continue to occur or to have effects thereafter.

2. The Kingdom of Spain may at any time, by means of a notification addressed to the Secretary General of the United Nations, add to, amend or withdraw, in whole or in part, the foregoing reservations or any that may hereafter be added. These amendments shall become effective on the date of their receipt by the Secretary General of the United Nations.

3. The present Declaration, which is deposited with the Secretary General of the United Nations in conformity with article 36, paragraph 4, of the Statute of the International Court of Justice, shall remain in force until such time as it has been withdrawn by the Spanish Government or superseded by another declaration by the latter.

The withdrawal of the Declaration shall become effective after a period of six months has elapsed from the date of receipt by the Secretary General of the United Nations of the relevant notification by the Spanish Government. However, in respect to States which have established a period of less than six months between notification of the withdrawal of their declaration and its becoming effective, the withdrawal of the Spanish declaration shall become effective after such shorter period has elapsed.

Done at Madrid on October 15, 1990.

(Signed) Francisco Fernández Ordóñez
Minister of Foreign Affairs

18. See footnote 6 *supra*.

in Spain prefer the word "tribunal". In the proposal made by the International Legal Service the word "court" was used, but it was substituted by "tribunal" during the internal processing of the proposal. The author of this paper does not know at exactly what point or at what stage of the process the word "court" was lost.

1. Acceptance of compulsory jurisdiction

a) The acceptance of the Court's compulsory jurisdiction is found in the first paragraph of section 1 of the declaration, and its wording is quite similar to the terminology used in paragraph 2 of article 36 of the Statute with the addition of the phrase "on condition of reciprocity" which is covered by paragraph 3 of the same article. This last addition, in accordance with the Court's jurisprudence, assures Spain's right to invoke the reservations made by another state to the declaration when it is involved in a dispute with that State[19], and it was introduced for just such a purpose. It is true, however, that this interpretation of reciprocity does limit the scope of the Court's compulsory jurisdiction.

b) During the discussions that took place among the members of the working group, one of the participants suggested the inclusion in this section of the declaration of not only the idea of reciprocity, but also the very novel idea of mutuality. This term refers to the idea that the declaration would only be enforced among the states that had actually made a declaration, regardless of what the content of that declaration was. The majority of the participants believed that it was not necessary to include this term, and not only because it would constitute a barbarism in this context, but also because the idea was already sufficiently covered in the phrase "as regards any other State that has accepted the same obligations".

c) But, in keeping with the usual procedures, and always keeping the best interests of our country in mind, Spain's acceptance of the Court's compulsory jurisdiction is not pure and unconditional, but rather conditioned by the four reservations and exceptions that we will now analyze.

2. Exceptions and reservations

a) Let us first state that in the discussions that took place within the working group on the question of reservations, there was serious reflection

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19. See for example H.W. Briggs, "Reservations to the acceptance of compulsory jurisdiction of the International Court of Justice", *R. des C.* vol. 93, 1958-I.

given to the advisability of including the exception regarding matters of domestic jurisdiction as it is understood in International Law, that is, there was a desire for a reasonable and moderate exception and not an abusive version that would consequently give the State itself the power to determine the scope of its own domestic jurisdiction[20]. One of the members of the group advocated the inclusion of the reservation with moderate wording, but the rest of the group pointed out that the exception, in addition to sounding bad, was not really necessary. This is because when paragraph 2 of article 36 of the Statute lists the types of legal disputes which would be affected by the acceptance of the jurisdiction (the interpretation of a treaty; any question of International Law; the existence of any fact which, if established, would constitute a breach of an international obligation; and the nature or the extent of the reparations to be made for the breach of an international obligation) it refers to question that, due to their nature and essence, pertain to the field of International Law and therefore do not fall under the purview of the domestic jurisdiction of the States. Consequently, the working group decided not to include this exception in the declaration. The reservations that were included are the four that we will analyze next.

b) The first proposed exception that is included in the declaration is the one concerning "disputes in regard to which the Kingdom of Spain and the other party or parties have agreed to have recourse to some other method of peaceful settlement of the dispute". This is a very well-known reservation[21] which would give priority to the remedies established in an agreement (including, of course, those that are non-jurisdictional) over the Court's compulsory jurisdiction as provided for in the unilateral declaration.

Now, as regards this exception the following problem could arise. As we all know, in the Brussels Declaration of November 27, 1984, the Kingdom of Spain and the United Kingdom established a negotiating process by which to deal with all of their differences over Gibraltar, including the question of sovereignty. Keeping in mind that the Brussels Declaration is not really an international treaty, but rather a simple political agreement established by the respective Ministers of Foreign Affairs of the two countries, the questions arises as to whether it could be argued that, as regards the exception we are concerned with here, the parties to this dispute have "agreed" upon a different means of settlement. As we will explain a little later, the disputes over Gibraltar are excepted by the *ratione temporis* reservation which is also included in the declaration, but in our judgement, they can also be excluded

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20. See *op. cit.* in footnote 9.

21. E. Orihuela Calatayud, *op. cit. supra,* footnote 89.

under the terms of this exception because it is true, isn't it, that the parties to the dispute agreed to another specific means of settlement in the Brussels Declaration?

c) The second exception included by Spain in its declaration has to do with "disputes in which the other party or parties have accepted the compulsory jurisdiction of the Court only in relation to or for the purposes of the dispute in question." This formula is included in some other unilateral declarations[22] and is based on the idea that these declarations are designed to accept the Court's compulsory jurisdiction in general terms, that is for a generic set of disputes, and not for a specific dispute. What is really hoped for when making a unilateral declaration is that the consequences of *ad casum* unilateral declarations that another State might make can be avoided. Other than this, the terms of the Spanish reservation are quite broad and really cover not only the acceptance of the Court's jurisdiction in specific disputes, but also the assumption that this acceptance could be exclusively applied to the specific details of the case in question. In this sense the reservation could be said to be somewhat vague and open to broad interpretation. This is really an *ex abundanti cautela* clarification.

d) The third exception, which has become relatively well-known in recent years[23], covers "disputes in regard to which the other party or parties have accepted the compulsory jurisdiction of the Court less than 12 months prior to the filing of the application bringing the dispute before the Court." The underlying idea here is that at the time the unilateral declaration was made, the State included some provisions based on the unilateral declarations made by other States regarding the disputes that could come before the Court. If another State makes a declaration at a later date, the kind of disputes that would be submitted to compulsory jurisdiction would be changed in a way not contemplated in those provisions, and among them there might be a dispute that one party would prefer not to submit to judicial settlement. In such a case, this exception allows the first State a grace period which according to the Spanish declaration would last for 12 months. Of course, in terms of the application of this reservation, it was necessary to have foreseen the possibility of excluding disputes during this period of time or of withdrawing or replacing the declaration. In other words, the declaration must foresee the possibility of adding or modifying an exception and even the withdrawal or substitution of the declaration itself, and it must establish a deadline for the implementation of these additions or the withdrawal which would prevent

22. E. Orihuela Calatayud, *op. cit. supra,* footnote 91.

23. E. Orihuela Calatayud, *op. cit. supra,* footnote 91.

the submittal of the undesired dispute to the Court. What this all means is that this reservation should include the time limits and deadlines for the effectiveness of the addition of reservations to the declaration or the withdrawal or substitution of the same. And it is for this reason, as we will see later on, that the addition of reservations in Spain's case takes effect on the date the Secretary General of the United Nations receives the appropriate notification; the withdrawal or substitution of the declaration, on the other hand would not go into effect until six months after notification is received.

This, then, is a procedural reservation that allows us to exclude disputes which we do not wish to have submitted to the Court which might otherwise have to be if any other party made a later declaration. This type of reservation requires a State to pay close attention to the declarations made by other States and to react to them quickly, but it does have the advantage of avoiding the unpleasantness of substantive statements.

e) The fourth Spanish reservation is in relation to "disputes arising prior to the date on which this declaration was deposited with the Secretary General of the United Nations or relating to events or situations which occurred prior to that date, even if such events or situations may continue to occur or to have effects thereafter." Here an attempt is made to start at zero in terms of the compulsory jurisdiction of the Court, by invoking the *ratione temporis* exception, which is also quite well-known[24] and which as we know, Spain had already formulated in 1928 when it accepted the compulsory jurisdiction of the Permanent Court and in the exchange of notes attached to the Protocol of Accession to the WEU.

It is no secret that when this reservation was written, one of the main goals was to assure that disputes between Spain and Great Britain regarding Gibraltar would not be submitted to the Court. The Spanish government feels that the correct channel for resolving this kind of dispute (one that has existed for a long time and has a marked political dimension) is the negotiating process consistently recommended by the General Assembly of the United Nations and institutionalized by the Brussels Declaration of November 27, 1984[25]. Keeping disputes related to Gibraltar out of the Courts is indeed an important goal, but it is not the only goal, and when making a reasonable prediction about the disputes that could be submitted to the World Court — even though the exception can work in our favor or against us — it is preferable to start from zero, from the idea of a *tabula rasa*.

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24. E. Orihuela Calatayud, *op. cit. supra,* footnotes 92, 93 and 94.

25. See for general information on this subject J. Díez-Hochleitner, "Les relations hispano-britanniques au sujet de Gibraltar: Etat actuel", in *AFDI,* 1989, pp. 168 *et seq.*

It seems clear then that the *ratione temporis* exception was written by Spain *ex abundanti cautela*. It is important to point out here that the reservation does not only cover the disputes that arose before the key date, but also those related to events or situations that took place before that date, regardless of whether or not those events or situations continue to exist or have effects.

f) In conclusion, the exceptions made by our country to the compulsory jurisdiction of the Court are more technical or procedural in nature than substantive. In other words, none of them is based on the material aspects of a general category of disputes but rather on criteria of another nature: that another means of settlement has been agreed to or will be agreed to in the future; that one or another of the parties accepts the jurisdiction of the Court only as regards specific disputes; that the declaration of the other party or parties was made less than twelve months before the initiation of a case brought before the Court; and finally, that the reservation be *ratione temporis*. It would be useless to deny that these exceptions limit the scope of the compulsory jurisdiction of the Court that has been accepted by Spain.

3. The right to add to, amend or withdraw reservations

a) In section 2 of the declaration, Spain reserves the right to at any time add to, amend or withdraw all or part of the existing exceptions or those that might be introduced in the future, by notifying the Secretary General of the United Nations. We have already pointed out the usefulness of this provision in relation to the reservation in clause c) of section 1 of the declaration, which it, in fact, complements. If another party or parties were to introduce a declaration that postdated the Spanish one, and this declaration contemplated a dispute that our country did not wish to have submitted to compulsory jurisdiction, the Spanish government would have the right to introduce a new reservation that would be substantive in nature and completely credible.

b) Any addition to, or amendment or withdrawal of a reservation would take effect immediately upon receipt by the Secretary General of the United Nations of the appropriate notification ; however, the substitution or withdrawal of the declaration itself would only take effect six months after the corresponding notification was delivered.

4. Withdrawal or substitution of the declaration

Section 3, the last section of the declaration, states that the declaration itself will remain in force until it is withdrawn or replaced. Therefore, there is no set period of effectiveness for the declaration, but it can be withdrawn

or replaced.

However, in keeping with the principle of reasonableness and good faith, the withdrawal or substitution of the declaration would not take effect immediately, but only after six months had passed from the time the appropriate notification was given to the Secretary General of the United Nations. That is to say that if Spain wished to withdraw or replace the declaration in order to avoid the submittal to the Court of a dispute arising from a subsequent declaration made by another State, the period of time allowed to effect the withdrawal or substitution (six months) is shorter than the period required for the addition of a reservation (twelve months as we have seen above). Under normal conditions, therefore, that exclusion would be made by adding a new exception.

The Spanish declaration also states that as regards States that establish a period shorter than six months between the notification and the entry into force of the withdrawal of a declaration, said withdrawal will go into effect once the period stipulated has passed. This is a detail that was not included in the text proposed by the working group, but rather was suggested and accepted by the *Consejo de Estado.* In the aforementioned report, the highest advisory body in the nation wondered "in light of the principle of reciprocity inspired by article 36 of the Statute of the International Court of Justice . . . when would the withdrawal of the Spanish declaration take effect compared to a State that set a shorter notification period or to one that set no period at all? Even though there is no definite answer to this question, we accept that any reasonable guideline could be used by the International Court of Justice"[26]. And the guideline that was proposed by the *Consejo de Estado* and which was finally incorporated into the text of the declaration is the one we explained above.

VI. AN EVALUATION

a) The reader might have noticed by now that this study is more a very compact chronicle and defense of the declaration than an independent and critical analysis of it. This is not surprising if we take into account that the author of this paper was the head of the International Legal Service of the Ministry of Foreign Affairs and therefore was largely responsible for the formulation of the declaration. The task of writing the document required not only technical and doctrinal expertise but also a clear understanding of

26. Opinion n. 54.285/54.089.

foreign policy regarding legal matters. Consequently, the evaluation that follows, which is quite brief and very general in nature, is not the only one possible; there are certainly many other critical approaches that could be taken and there is no doubt that further evaluations will come from the academic world. Of course, all of these will be welcomed.

b) It seems clear that by virtue of the declaration, a unilateral suit could be brought against Spain in the International Court of Justice, and from a political point of view, this is a risk that our country has accepted with full awareness of the possible consequences and with complete self-assurance. This risk is only relative, in any case, as the mere fact of being sued does not necessarily mean a total or even partial loss of the case. Likewise, it is also true that Spain could be the plaintiff in a case if it were in the nation's best interest to bring suit, and this advantage offsets the risks involved. However, this is also relative as it is also true that simply bringing suit does not guarantee a ruling that is completely or partially favorable to the plaintiff.

c) In any case, the advancement of peaceful relations between States is desirable, since one of the main goals at the international level included in the preamble to the Spanish Constitution is to create an awareness of international fellowship and cooperation among people that would erase any tinge of tragedy from the idea of being sued or even of losing a case before the International Court of Justice or before any other court with jurisdictional powers. In all jurisdictional proceedings — whether they be national or international — there must always be a total or partial loser, and this is a fact that State governments should accept calmly and naturally. Interest in the results of a specific piece of litigation should be offset by a general interest in assuring a high degree of respect for International Law. This statement might seem rather idealistic in today's world, and perhaps even too generous, but when Spain unilaterally declared to accept the compulsory jurisdiction of the International Court of Justice, it contributed, even though perhaps in a modest way, to the consolidation and advancement of this ideal.

SUMMARY

On the 29th of October, 1990, Spain deposited a declaration of acceptance of the compulsory jurisdiction of the ICJ with the United Nations in accordance with paragraph 2 of article 36 of its Statute.

Throughout its history, Spain has often been willing to accept commitments that have established a jurisdictional settlement of disputes (judicial or arbitrational). However, this has not always been true as regards the *a priori*

and general acceptance of the compulsory jurisdiction of the Court of The Hague. Although it is true that our country accepted this jurisdiction unilaterally in 1928, it is also true that it did not renew this acceptance and let it expire at the end of the 10 year period originally set in the agreement. And although Spain did accede to the 1930 General Geneva Accord, on April 1, 1939, it denounced it in a gesture that was interpreted as an ideological rejection of compulsory jurisdiction. This kind of rejection lost all validity once the transition to democracy began, and furthermore, from that time on, there was a new awareness of the fact that this kind of mechanism for the settlement of disputes was advantageous for countries like ours, medium-size powers in the family of nations but with an ever-growing role in international relations. It also fits well with our country's legal tradition as Spain was the birthplace of the science of International Law.

A first step in this area was Spain's accession to the Western European Union (WEU) in 1987. The unilateral declaration followed some time later with the support and encouragement provided by the president of the country.

The declaration was processed as a conventional instrument and therefore needed the authorization of Congress. The acceptance of the compulsory jurisdiction of the ICJ includes four exceptions: 1) disputes for which another means of settlement has been agreed to, 2) disputes in which jurisdiction is determined by a later *ad casum* declaration made by the other State, 3) disputes in which jurisdiction is based on a later declaration made by another State less than 12 months before, giving Spain a grace period in which to exclude a dispute by withdrawing the declaration or adding a news reservation to it, and 4) a *ratione temporis* exception, conceived principally for the disputes with Great Britain regarding Gibraltar. These are, in conclusion, reservations that are more technical and procedural in nature than substantive.

The Spanish declaration is complemented by provisions on the right to add to, amend or withdraw reservations and those that have to do with the withdrawal or substitution of the declaration itself. These provisions were written with the grace period included in the third reservation in mind.

And finally, a very general evaluation of the declaration is done in which it is emphasized that Spain has assumed the risk of being sued unilaterally before the ICJ. This risk is relative if we recognize that the defendant in a case does not necessarily lose the litigation, and it is more than compensated for by the possibility of being the plaintiff. In any case, the Spanish declaration has contributed to improving the degree of observance of International Law.