the SPANISH YEARBOOK of INTERNATIONAL LAW

The rules of international jurisdiction in Spanish law

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I INTRODUCTION

1. The statutory distinction between laws *ad ordinandam litem* and rules *ad decidendam litem* is often cited as a doctrinal precedent of so-called "conflicts of jurisdiction". This reference could mistakenly lead one to believe that conflicts of laws and conflicts of jurisdiction have a common doctrinal origin and have developed in parallel. Obviously, this has not been the case: "on a étudié pendant des siècles les conflits de lois sans reprendre parallèlement l'étude de la compétence judiciaire".[1] Today, however, the intense attention given in the scholarly literature to what is also known as "international procedural law",[2] due to both its substantive importance and the increasingly obvious interconnection

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Ed.: As in previous cases in this same section, we have tried to adapt the original format of this contribution to the the format normally used in *SYbIL*.

[1] H. Batiffol, "Observations sur les liens de la compétence judiciaire et de la compétence législative", in *De Conflictu Legum: Essays presented to R. D. Kollewijn and J. Offerhaus* (Sijthoff, Leiden, 1962), at 66.

[2] In the most generic sense, this subject comprises the set of issues involved at the procedural level in the domestic legal regulation of so-called private international relations or situations (also called "multinational" or "extranational relations" or "private international transactions"). The subject still lacks a clear substantive delimitation in the general scheme of legal disciplines. This is mainly due to the disparities in the scholarly works offering conceptual and systematic descriptions of it. Whilst a detailed analysis of the terms in which the subject is approached in the literature falls beyond the scope of this essay, it should be recalled that the core question consists in determining the interdisciplinary relations between private international law *sensu stricto*, primarily made up of conflicts of laws, and the subject at hand. For one school of thought, the latter is a fully integrated part of private international law, constituting a primordial dimension thereof (Anglo-Saxon conceptions) or one of its special parts (the thesis generally held in French doctrine and defended in Spain by Trías de Bés, Miaja de la Muela and Aguilar Navarro, amongst others), whereas for another it is a separate discipline (Italian and German doctrine) or a substantive chapter of "external state law" or "state law concerning external relations" (Von Bar, Morelli). Other particularly nuanced conceptions frame it as "procedural law for foreign nationals" (Goldschmidt) or, more recently, "procedural assistance law" combined with rules of domestic law referring to the involvement of foreign nationals in the process (Cf. N. Alcalá-Zamora, "Bases para unificar la cooperación internacional procesal", in *Cursos monográficos de la AIDCI*, Vol. VI (Havana, 1957), at 46-47). This diversity of doctrinal conceptions has clear methodological, terminological, and even substantive consequences. Methodologically, each conception gives rise to a different degree of interdisciplinary relationship between private international law and the subject at hand. Terminologically, advocates of including the latter in private international law prefer to speak of conflicts of *jurisdiction* (thus, in Anglo-Saxon terminology, the "conflict of laws" comprises "the choice of law and the choice of jurisdiction"); in contrast, those who defend an independent conception of the subject include it in what they call "international procedural law", although, naturally, there are exceptions in each current in favour of the prevailing terminology of the other (in the Spanish doctrine, Trías de Bés speaks of "conflictos de competencia judicial" (conflicts of jurisdiction) whilst Miaja de la Muela uses the generic term "Derecho procesal internacional" (international procedural law)). Finally, variants can also be found in the substantive content. In general, the following are recognized as core matters: the determination of the rules of international jurisdiction (cf. *infra*, No. 5), the law regulating the process, and the enforcement of foreign judgments (although at least one Anglo-Saxon author, Graveson, excludes "the recognition of judgments of foreign courts" from the "choice of jurisdiction").

 DOI: 10.17103/sybil.21.1

between legislative and jurisdictional conflicts, is clear. Although a detailed examination of the new perspectives arising from this viewpoint falls beyond the scope of this essay, the fact is that the attention being given to the latter form of conflicts is gradually increasing. In this regard, whilst the comparative method has been, in our view, firmly and definitively established in the context of conflicts of laws, in the context of conflicts of jurisdiction — or international procedural law — it has proved essential to enabling a scholarly examination of the matter; hence, the urgent need for a comparative overview of the various national positive law systems prior to attempting such an examination.

This essay, of a very modest scope due to the imposed brevity, will attempt to present a synthetic overview of the principles of international jurisdiction in Spanish law, "locating" them within the framework of comparative law already outlined in the scholarly literature. As relatively little has been written on this matter,[3] the interest of the present essay is heightened by the propitious situation arising from recent *ad hoc* case law, generally as scarce as it is ambiguous in this area of private international law.[4]

Fundamental preliminary concepts

2. In what terms is the problem of *international jurisdiction* generally posed?

By analogy, first, with conflicts of laws, one could say that the problem primarily consists of the specification of the rules of domestic procedural law in the matter of disputes over multinational situations or relations.[5] In other words, whilst in conflicts of laws the central question is which system

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Others also include as core issues the study of the procedural status of foreign nationals, international procedural assistance law, etc.

For the purposes of this essay, it is sufficient to take as a generic starting point the close and undeniable functional connection between conflicts of laws and conflicts of jurisdiction and to note how, in any case, the specific topic at hand — the determination of the rules of international jurisdiction — is regarded as a primary matter of the latter or, if one prefers, of "international procedural law".

[3] Aside from the attention given to the issue in general works on procedural law and private international law, the literature specifically dealing with the topic is quite scarce. See: W. Goldschmidt, "Problemas de competencia en el Derecho Internacional Procesal de España", in *Mélanges Streit* (Pyrsos, Athens, 1939) 429-443; P. Fernández Viagas, "Cuestiones de competencia interjurisdiccional entre tribunales de distinta nacionalidad", *Revista de Derecho Procesal* (1958) 325-334; J. M. Trías de Bés, "Las reglas de «competencia general»: ensayo de Derecho procesal internacional español", *Revista jurídica de Cataluña* (1960) 7-19.

[4] Cf. J. M. Manresa y Navarro, *Comentarios a la Ley de Enjuiciamiento Civil*, 7th ed., Vol. I (Instituto Editorial Reus, Madrid, 1955), especially at 226-260 and 418-423; and M. Fenech, *Doctrina procesal civil del Tribunal Supremo*, Vol. I (Aguilar, Madrid, 1956), especially at 558-609 and 1909-1910.

[5] The terminological ambiguity between the concepts of *jurisdiction* and *competence* is reproduced in the field of international procedural law. In principle, the term *jurisdiction* is understood to refer to the special right and duty of the state to administer justice (Guasp), i.e. the jurisdictional power of the state as a whole and, at the same time and appropriately attributed, of each specific branch in which it is manifested (ordinary or civil jurisdiction, administrative jurisdiction, military jurisdiction, etc.). In contrast, the notion of *competence* refers to the specific power of each homogeneous group of courts, i.e. in an objective sense, to the set of matters and procedures over which the court or tribunal can exercise its jurisdiction in accordance with the law (Gómez Orbaneja). In the context of international procedural law, the power of domestic courts to hear disputes over international situations or relations is referred to interchangeably with the terms *jurisdiction* (*jurisdicción*, *giurisdizione*), *jurisdictional competence* (*competencia jurisdiccional*, *compétence juridictionnelle*, *competenza giurisdizionale*), *general competence* (*competencia general*, *compétence générale*, *abstrakte Zuständigkeit*), *international competence* (*competencia internacional*, *compétence internationale*, *internationale Zuständigkeit*),

of rules should determine the substantive law applicable to extra-, multi-, or international situations, in conflicts of jurisdictions, the core issue is: what rules —and how and with what scope— regulate the jurisdictional function applicable to such situations or relations in the various domestic legal systems?

Of course, the parallelism of the approaches to legislative and jurisdictional conflicts breaks down in many places. Although a detailed description of the differences would exceed the scope of this essay, it should be stressed that they are especially sharp with regard to the *methods used to solve* or *respond* to each one. Conflicts of laws are usually solved by means of a system of rules (conflict rules or indirect rules) that determine the law applicable to the situation or relationship at issue based on a connection criterion that can lead *equally* to the application of substantive rules of the forum or to the application of substantive rules of a foreign legal system. In contrast, in conflicts of jurisdiction, international jurisdiction is determined by each national system according to a set of rules that *can only result in the acceptance or declination of the jurisdiction of the forum* to hear the various potential extra-, multi- or international disputes. In other words, whilst rules of conflict delimit the various legislative jurisdictions virtually involved in the dispute (Betti), rules of international jurisdiction merely delimit the territorial scope of the forum's jurisdiction, such that each domestic system of rules of international jurisdiction "ne règle pas le sort des matières qu'elle ne s'attribue pas, leur objet étant de fixer la compétence des tribunaux (nationaux) dans les matières où, en raison d'un élément étranger, plusieurs rattachements s'offrent: elles constituent une délimitation du champ d'application de la loi (interne) de compétence vis-à-vis des éléments étrangers qui peuvent tomber sous le cou de ses dispositions".[6]

The explanations given for this scope of the rules of international jurisdiction —limited to the jurisdiction itself— are manifold, but ultimately they are all based on a common argument, namely, that, due to their very sovereign nature, each jurisdiction is free to determine its own jurisdictional scope. At the same time, however, "il résulte de la souveraineté et de l'égalité des Etats dans l'ordre international que chaque Etat est exclusivement compétent pour entreprendre ou permettre des actes de pouvoir sur son territoire, ainsi que pour annuler ou modifier ces mêmes actes. Les actes de pouvoir émanent de la souveraineté des Etats et les juridictions étrangères ne peuvent intervenir".[7]

The idea of conflicts of sovereignty —definitively abandoned in the scholarly dialectics of the conflict of laws— retains its full importance in the doctrinal explanation of conflicts of jurisdiction, leading to its most logical and direct consequence: the exclusive admission of *unilateral rules* in the context of so-called *conflicts of jurisdiction*.

3. From what has been said thus far, and strictly with regard to the question of the rules of

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etc. In the author's view, this terminological issue can be resolved by clearly defining the meaning of the term one prefers to use. The present paper will use the term *international jurisdiction*, understood as the jurisdictional ability of the courts of the forum to hear disputes concerning international situations or relations. As will be seen below, the rules governing this ability can take the form of delimited rules of domestic jurisdiction *in genere* in relation to foreign jurisdictions or be expressed in specific rules of jurisdiction *sensu stricto*.

6 H. Batiffol, *Traité élémentaire de droit international privé*, 3rd ed. (Paris, 1959), at 749.

7 N. Fragistas, "La compétence internationale en droit privé", 104 *Recueil des cours de l'Académie de Droit International de la Haye* (1961-III), at 170-171.

 DOI: 10.17103/sybil.21.1

international jurisdiction, three main preliminary conclusions can be drawn:

1st. In principle, the rules of international jurisdiction are totally independent of the rules of conflict.

2nd. Except where otherwise established by the very few rules of general international law or international agreements, each state is free to determine, according to whatever criteria it deems most appropriate, the scope of its jurisdiction to hear disputes over international situations or relations *within its territorial jurisdiction*.

3rd. Consequently, unlike in conflicts of laws, domestic rules on international jurisdiction cannot declare a foreign jurisdiction applicable, at least not in a binding sense. Therefore, an exception to international jurisdiction may only be expressed if a court declines jurisdiction *ex officio*; it cannot, strictly speaking, be ordered to do so *ex parte*.

4th. Again strictly with regard to the rules governing international jurisdiction, any study of the various positive law systems clearly must begin with the principles of the *exclusive and unilateral nature* of such rules. However, a comparative analysis shows that various Western legal systems can be grouped into certain standard types of systems that share common features and guiding principles. For the purposes of the present essay, a brief description of these standard types of systems would be helpful in order to determine where the Spanish model falls in the comparative legal context.

II THE DIFFERENT SYSTEMS OF INTERNATIONAL JURISDICTION IN THE CONTEXT OF WESTERN LEGAL SYSTEMS

5. Various criteria have been proposed to classify these systems. Miaja de la Muela has generically distinguished between Continental and Anglo-Saxon legal systems.[8] Fragistas recently further subdivided the former group, yielding a total of four types of systems: Latin, Germanic, Anglo-American and Swiss.[9]

Setting aside, for the time being, the latter two —whose respective singularities are explained, in the case of the former, by the traditional particularism with which Anglo-Saxon countries think about and apply the law, and, in the Swiss case, by the interference of cantonal law— here we will briefly review the defining particularities of the first two.

The most salient feature of the *Latin system*, exemplified by the French system, is its use of the *nationality of the parties* as the criterion to determine international jurisdiction. A forum thus has jurisdiction provided one of the parties —plaintiff or respondent— is a national of the corresponding country.[10] In contrast, the *Germanic* system settles matters of international jurisdiction by directly applying the rules of domestic territorial jurisdiction, which "implique que la compétence internationale est la résultante des compétences territoriales internes".[11]

[8] A. Miaja de la Muela, *Derecho internacional privado*, II, 2nd ed. (Madrid, 1956), at 414.

[9] Fragistas, *supra* n. 7, at 205 et seq. On the terms of this problem in the Soviet positive system, see the interesting study by L. García Arias "El sistema de Derecho Internacional Privado de la Unión Soviética", 12 *TEMIS Revista de la Facultad de Derecho de Zaragoza* (1962), especially at 29 et seq.

[10] French, Italian and Greek systems (Cf. Fragistas, *supra* n. 7, at 205).

[11] Fragistas, *supra* n. 7, at 212. German, Austrian and Portuguese systems.

A narrower comparison of only the most generic features of these two systems reveals very different approaches in their respective criteria. In using the foreign nationality of one of the parties as the basis for international jurisdiction, the Latin system approaches the question *in terms of private international law*. Thus, the determination of international jurisdiction *ratione personae* works as a spatial delimitation of the state's jurisdiction with regard to foreign jurisdictions.[12] In contrast, the Germanic system approaches the problem of international jurisdiction *in terms of domestic law*, which can be interpreted, at least at first glance, as an application of the principle of equal treatment of nationals and foreigners in that context.[13]

A detailed examination of the specific forms of each of these systems shows that these general criteria undergo appreciable changes in actual practice. In Latin systems, case law has clearly evolved towards the application of the rules of domestic territorial jurisdiction.[14] In Germanic systems, the application of special jurisdictions extends the territorial jurisdiction of domestic courts to the detriment of persons domiciled abroad, which ultimately entails discrimination against non-nationals.[15]

Although it is not possible to explore these comparative observations in greater depth here, it should be underscored that, as a result of this dual convergent trend in actual practice at the legislative and, especially, jurisprudential level, the differences between the two systems have grown less stark. In this regard, there is now a widespread tendency to transpose the rules of domestic territorial jurisdiction to the context of international jurisdiction.[16]

III THE RULES OF INTERNATIONAL JURISDICTION IN THE SPANISH LEGAL SYSTEM

6. As in the case of conflicts of laws, in the case of conflicts of jurisdictions, the positive regulations contained in Spanish law are insufficient and ambiguous. Nor has case law completely filled the "existing gaps", and its interpretation of legal texts has often been contradictory. This combination of factors may explain why the scholarly literature —both the strictly proceduralist and the strictly internationalist— has yet to formulate a unanimous opinion on the principles and rules that determine international jurisdiction in Spanish law.[17]

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[12] For a current rethinking of private international law *ratione personae*, see M. Jezdic, "*L'élément étranger et l'étendue du droit international privé*", in *De Conflictu Legum*, *supra* n. 1, at 268 et seq.

[13] This general criterion is also the one applied in the Soviet positive system (see García Arias, *supra* No. 9, at 29).

[14] Signs of this phenomenon can be seen in the French system (see Batiffol, *Observations sur les liens*, *supra* n. 1, at 268); in contrast, the Italian system continues in the traditional vein (see E. Redenti, *Diritto Processuale Civile*, Vol. I (Milan, 1952), at 152).

[15] For example, by means of the jurisdiction of the property (*Gerichtsstand des Vermögens*) or of the place of invoice (*Gerichtsstand der Faktura*) (see E. von Riezler, *Internationales Zivilprozessrecht* (Berlin-Tübingen, 1949), at 219 et seq.).

[16] The *Anglo-Saxon system* (cf., for example, Ehrenzweig, *Conflict of Laws* (St. Paul, 1959), especially at 91 et seq.) and *Swiss system* (Cf. Guldener, *Das internationale und interkantonale Zivilprozessrecht der Schweiz* (1951), especially at 37 et seq.) have undergone a similar evolution.

[17] The following is the list of the general and monographic works that have addressed the issue at hand. Hereinafter, they will be cited solely by the author. I) *Proceduralist doctrine*: J. Guasp, *Comentarios a la Ley de Enjuiciamiento civil*, Vol. I (Madrid, 1943), 2nd edition (Madrid, 1948); J. Guasp, *Derecho procesal civil* (Madrid, 1956); E. Gómez Orbaneja and V. Herce Quemada, *Derecho procesal*, Vol. I, *Derecho procesal civil* (Madrid, 1955); L. Prieto Castro, *Derecho procesal civil*, Vol. I; J. M.

The present study aims to present certain overall conclusions based on the data available on these three dimensions —positive law, case law and scholarly literature— in the most recent examples thereof.

7. Under current Spanish procedural law, international jurisdiction is regulated by two main texts: Articles 51 and 70 of the Civil Procedure Law of 1881 [hereinafter, LECiv from the Spanish]. Under the former:

> "The ordinary courts shall be the only ones competent to hear civil actions arising in Spanish territory between Spaniards, between foreigners, or between Spaniards and foreigners."

Article 70, referring to Articles 56 to 69, which determine the jurisdiction of the Spanish courts, provides:

> "The foregoing provisions regarding jurisdiction shall include foreigners who petition the Spanish courts for matters of non-contentious jurisdiction, intervene in them, or appear in court as plaintiffs or defendants, against Spaniards or other foreigners, when the Spanish courts are competent to hear such matters according to the laws of the Kingdom or to treaties with other powers."[18]

All problems concerning international jurisdiction in the Spanish system are related to the significance and scope of these provisions. However, since neither the scholarly literature nor case law have produced a uniform interpretation, attention should be called to the specific issues that must be addressed with regard them both. Formulated as questions, they are as follows:

Manresa, *Comentarios*, Vol. I, *supra* No. 4; P. Aragoneses, "Problemas del proceso civil con elementos extranjeros", 2 *Revista de Derecho Procesal* (1961), at 125 et seq.; P. Fernández Viagas, *Cuestiones de competencia interjurisdiccional*, *supra* n. 3; M. de la Plaza, "Excepciones procesales con carácter internacional", XXIX *Revista de Derecho Privado* (1945), at 673 et seq.; U. Ruiz Gutiérrez, "La competencia de los tribunales españoles en actos en que intervienen elementos extranjeros, con referencia a los de jurisdicción voluntaria" 1 *Revista de Derecho Procesal* (1962) at 9 et seq. II) *Private international law doctrine*: J. M. Trías de Bés, *Derecho Internacional Privado. Sistema del Derecho español positivo* (Barcelona, 1932); A. Miaja de la Muela, *supra* No. 8; W. Goldschmidt, *Sistema y filosofía del Derecho internacional privado*, 2nd ed. (Buenos Aires, 1952-1954), especially Vol. III; J. G. Verplaetse, *Derecho internacional privado* (Madrid, 1954); W. Goldschmidt, *Problemas de competencia*, *supra* n. 3; A. Luna García and J. Hernández Canut, "Dictámenes sobre competencia de los Tribunales españoles en juicio de alimentos provisionales entre extranjeros", *Anuario de Derecho Civil* (1951), at 1527 and et seq.; J. M. Trías de Bés, *Las reglas...*, *supra* n. 3.

[18] Prior to the LECiv of 1855, the matter was regulated by the Royal Decree of 17 November 1852, on alienage [hereinafter, RDExtr., from the Spanish], specifically by Arts. 29, 32 and 33 thereof, which provided as follows: Art. 29: "Resident and non-resident foreigners are subject to the laws of Spain and to the Spanish courts for any crimes they may commit in Spanish territory and for the fulfilment of any obligations they may undertake in or outside Spain, provided they are in favour of Spanish subjects."; Art. 32: "Resident and non-resident foreigners are entitled to the administration of justice by the Spanish courts in accordance with the laws in any actions they may bring for the fulfilment of obligations undertaken in Spain or that should be met in Spain or concerning assets located in Spanish territory."; Art. 33: "In business matters between foreigners or against foreigners, even if they are not the result of real action or of personal action due to obligations undertaken in Spain, Spanish judges shall nevertheless be competent when the aim is to prevent fraud or adopt urgent and provisional measures...". As the LECiv of December 1855 contained no provisions on the matter, it can be properly understood to have left the rules of the RDExtr. in force (in this regard, see: Manresa, at 217; Ruíz Gutiérrez, at 13). Of course, the question of the current validity of the provisions of the RDExtr. is, in view of the aforementioned Arts. 51 and 70 of the current LECiv of 1881, one of the most controversial fundamental problems. To this end, it must be recalled that, between the LECiv of 1855 and the current one, two legal texts were enacted affecting matters of jurisdiction and competence as a whole: the Decree on Unification of Jurisdictions of 6 December 1868 and the Organic Law on Judicial Power of 1870 [hereinafter, LOPJ from the Spanish]. Art. 1 of the Decree and Art. 267 of the LOPJ were included "with slight modifications, affecting the wording more than the concept" (Manresa, at 227, translated from the Spanish) in Art. 51 of the LECiv of 1881 in force today. Similarly, the current Art. 70 coincides with Art. 319 LOPJ.

– What is the meaning of Article 51 within the Spanish procedural system in relation to the matter of international jurisdiction?

– What is the significance of the relationship between said Article 51 and Article 70 of the same legal text?

– With regard to Article 70, how should the formula "when the Spanish courts are competent to hear such matters according to the laws of the Kingdom" be interpreted?

8. As we have repeatedly stated, the *case law* has not established a clear, univocal doctrine in this matter. With regard to the outline of the generally recognized fundamental principles,[19] the Spanish Supreme Court [hereinafter, TS] has adopted the following position:

1st. Recognition of the existing independence between the rules governing conflicts of laws and the regulations applicable to matters of international jurisdiction.[20]

2nd. Emphatic affirmation of the sovereign power of the Spanish legal system to delimit the scope of its jurisdiction within the scope of its territorial jurisdiction.[21] This principle has been expressed in some judgments as the absolute and unlimited jurisdiction of the Spanish courts to hear all types of actions brought before them "except where otherwise agreed in an international treaty"[22] and has been positively based on Article 51 LECiv.[23] A direct consequence of this conception has been the non-acceptance of submission to a foreign court to the detriment of a Spanish one.[24] In other judgments, however, this absolute formulation has been less rigorous.[25]

3rd. In general, the TS has recognized the exclusive unilateral scope of its rules of international jurisdiction.[26]

The interpretation of the positive rules *potentially applicable* to problems of international jurisdiction has been much less consistent in case law.

With regard to the meaning and scope of Article 51 LECiv, and in keeping with the interpretation thereof in the aforementioned judgments, the TS has, on several occasions, considered it an exclusive

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[19] Cf. *supra*, at 6-7 [*sic*].

[20] This distinction is clearly contained in the judgments of 10 October 1901, 10 February 1915 and 27 January 1933. It is also noted, albeit less clearly, in the judgment of *1 June 1929*. A recent judgment, that of 22 February 1960, exceptionally diverged from this correct interpretation of the nature of the rules of international jurisdiction, basing the jurisdiction of the Spanish courts on Art. 10.2 of the Spanish Civil Code, a provision which, of course, refers to conflicts of laws and in no way to conflicts of jurisdiction (see the criticism of this judgment in Aragoneses, at 140, and Ruiz Gutiérrez, at 25).

[21] Unanimously and expressly ratified in all the decisions affecting these matters (most recently in the judgment of *30 May 1961*).

[22] The judgment of 28 November 1928 affirmed the "attractive nature" of Spanish jurisdiction; likewise, the judgments of 10 February 1915, 31 January 1921, 16 December 1927, 1 June 1921 and 21 February 1935. The judgment of 27 February 1933 based the jurisdiction of the Spanish courts in matters of divorce between an Italian and a Spaniard on the grounds of "public necessity".

[23] Judgments of 12 May 1886 (referring to Art. 267 LOPJ, whose content is analogous to that of Art. 51 LECiv), *13 October 1890* and those cited in the previous note.

[24] Judgment of 20 November 1894. The judgment of 17 January 1912 held that "because the appellant has the status of Spaniard, he may not invoke the jurisdiction of foreign courts" (translated from the Spanish).

[25] The sentences of 28 October 1921 and 3 May 1929 expressly declare the lack of jurisdiction of the Spanish courts. Those of 10 December 1906 and 1 June 1924 point to the possibility of submission to foreign courts.

[26] The judgment of 22 February 1960 is also an exception in this regard, insofar as the operative part of the judgment declares the Bolivian jurisdiction competent.

general principle in the matter,[27] although in other decisions it has related it to Article 70 LECiv.[28]

The jurisprudential solutions regarding the interpretative problems posed by Article 70 LECiv are even more ambiguous and contradictory. Does this provision entail the pure and simple application of the rules of domestic jurisdiction to matters of international jurisdiction? Should the formula "when the Spanish courts are competent to hear such matters according to the laws of the Kingdom" be understood to leave Articles 29, 32 and 33 RDExtr. in force? In that case, are they the "laws of the Kingdom" to be used to resolve such issues?

The continued validity of the provisions of the RDExtr. has been affirmed in some judgments;[29] others have questioned it;[30] and some TS decisions have resolved the question of international jurisdiction without taking the existence of these provisions into account at all, affirmatively or negatively.[31]

Equally varied interpretations have been given to Article 70: whilst various judgments have held that it applies in cases of international jurisdiction,[32] others have categorially denied it.[33]

Finally, on two occasions, the TS has established the principle of reciprocity as a general rule in the matter.[34]

9. The contradictory nature of the various solutions adopted in the case law is clear. To wit:

(a) in some cases, the TS has located the rules governing international jurisdiction in Articles 29, 32 and 33 RDExtr.;

(b) other times, the case law has asserted the absolute, unlimited nature of Spanish jurisdiction within the scope of its territorial jurisdiction based on an extreme interpretation of Article 51 LECiv;

(c) a large number of judgments have settled the corresponding questions of international jurisdiction through direct application of the rules of domestic territorial jurisdiction;

(d) twice, the principle of reciprocity has been cited as a decisive criterion in the matter; and

(e) in one (quite recent) case, the TS used a rule of conflict to settle an issue of international jurisdiction.

10. The lack of unequivocal positive regulations coupled with this jurisprudential shape-shifting have also given rise to divergent theses at the theoretical level.

Leaving aside solutions (b), (d) and (e), which have been unanimously rejected in the literature based on wholly incontrovertible reasonings,[35] one finds that the controversy has arisen between those

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[27] See the judgments cited *supra* nn. 23 and 22.

[28] Judgments of 31 January 1921, 10 June 1933 and 30 May 1961.

[29] Categorically in the judgment of 13 June 1917. It can also be inferred from the judgments of 15 November 1898 and 17 October 1901.

[30] In the judgment of 10 February 1915.

[31] Judgments cited *supra* n. 23, and *infra* n. 32.

[32] Judgments of 1 July 1897, 17 January 1912, 13 June 1917, 10 June 1933 and 30 May 1961.

[33] Judgments of 10 February 1915, 31 January 1921 and 1 June 1929.

[34] As a sole criterion in the judgment of 10 February 1915; cumulatively in that of 27 January 1933.

[35] Against the solution in the judgment of 22 February 1960, expressly: Aragoneses, at 140-141, and Ruiz Gutiérrez, at 25. The criterion of reciprocity is ruled out even from a *de iure condendo* perspective (Guasp, *Comentarios*..., 2nd ed., at 285), as this thesis is considered to have been "doctrinally surpassed" (Ruiz Gutiérrez, 26). The interpretation of Art. 51 LECiv in the sense of solution b) is unanimously rejected by both the proceduralist and internationalist literature; the article simply declares the exclusivity of the ordinary jurisdiction or, in other words, the principle of the territoriality of Spanish

who defend the continued validity of Articles 29, 32 and 33 RDExtr. and those who, understanding those articles to have been repealed, advocate the application of the rules of domestic territorial jurisdiction in cases of international jurisdiction.

The continued validity of the provisions of RDExtr. has been based: 1) on the lack of any express provision on the matter; 2) on the logical interpretation imposed by the wording of Article 70 LECiv; and 3) on the existence of confirmatory case law. Thus, under this thesis, in Spanish law, international jurisdiction is governed by Articles 29, 32 and 33 RDExtr., which ultimately places the Spanish system within the generic framework of the Latin system.[36]

In contrast, a majority of scholars considers those articles of the RDExtr. to have been repealed, whether as a result of the Decree on Unification of Jurisdictions,[37] Article 51 LECiv itself —in relation to Art. 2.182 of the same legal text[38]— or Article 27 of the Spanish Civil Code.[39] Consequently, questions of international jurisdiction should be resolved by applying the provisions governing domestic territorial jurisdiction.[40] This interpretation therefore places the Spanish system in the generic line of the Germanic system.

IV CONCLUSIONS

11. A joint assessment of the data obtained at all three levels —positive law, case law and the literature— points, above all, to the impossibility of formulating a conclusive solution in absolute terms. The two scholarly theses considered here —given the doctrinal unviability of the other solutions the TS has adopted in different cases— are based on arguments that, although suitable, are in neither case definitive. The existing gaps in the positive regulations and, even more importantly, the jurisprudential contradictions (which make it possible to "skew" the doctrine of the TS in either of the chosen directions) render pure hermeneutic reasoning, limited strictly to the texts, insufficient. This is even more true with regard to the testimony to the fundamentals of positive law made by an ambiguous, when not outright contradictory, case law.

Based on these perspectives, we are inclined to formulate a response based on the guiding principles of jurisprudential practice and, more specifically, on the *outcomes sought* by this practice. In this regard, as noted, the Spanish courts have clearly favoured a *maximalist* interpretation of the

procedural law "regardless of the nationality of the parties or the law of the derived right" (Gómez Orbaneja, at 34, translated from the Spanish).

[36] Proceduralists who maintain this thesis include Manresa, at 227; Prieto Castro, at 84; Fenech, at 559; and Fernández Viagas, at 329, amongst others. It was also the initial stance taken by Guasp (*Comentarios...*, 1st ed., at 289 et seq.; 2nd ed., at 282 et seq.) until the first edition of *Derecho procesal civil* (1956, at 197). Internationalists include Trías de Bes (*Derecho internacional privado*, at 117, and *Las reglas...*, *supra* n. 3, at 9-10) and Luna and Hernández Canut, at 1530.

[37] In this regard, see Miaja de la Muela, at 420.

[38] Thus, Plaza, at 673; Goldschmidt, III, at 63. With reservations, Ruiz Gutiérrez, at 17-18. Against: Fernández Viagas, 328; Trías, *Las reglas...*, at 9; and Luna and Hernández Canut, at 1529.

[39] Art. 27 of the Civil Code provides: "Foreigners in Spain have the same civil rights as Spaniards, except as provided in special laws and in treaties." This thesis is championed by: Guasp, *Derecho procesal civil*, at 118; Aragoneses, at 142; Goldschmidt, III, at 63; Ruiz Gutiérrez, at 27 et seq. Against: Fernández Viagas, 328; Luna and Hernández Canut, at 1530.

[40] This conclusion is obtained *directly*, from a strict interpretation of Art. 70 in relation to Art. 51, or *derivatively*, as a result of Art. 27 of the Civil Code (in the latter regard, see especially: Guasp and Ruiz Gutiérrez).

virtual nature of Spanish jurisdiction in cases of international jurisdiction. In any case, the chosen basis of positive law has tended to serve that purpose.[41]

Under these conditions, a realistic interpretation of the system effectively applied in the Spanish legal system fits with the thesis that holds that Articles 29, 32 and 33 RDExtr. remain in force, a thesis that requires an extensive interpretation of those provisions.[42] On the other hand, the opposite thesis seems more appropriate: *in fact, the practice followed by the Spanish courts could be said to reflect, in general, the criteria followed by the Germanic systems*, i.e. the application of the rules of domestic territorial jurisdiction in cases of international jurisdiction. However, as in those systems, this does not result in clearly equal treatment of nationals and foreigners.[43] In this regard, Spanish practice has expanded domicile to the detriment of those domiciled abroad (through Article 69.2 LECiv) and has also established the jurisdiction of the property with regard to companies with branches or representation in Spain (Article 15 of the Commercial Code in relation to Article 65.2 LECiv).

The trend marked by the recent judgment of 30 May 1961 —which resolved a case of international jurisdiction by designating the rules of domestic territorial jurisdiction as applicable to it "in accordance with Art. 70 LECiv"— could be the first step towards an unequivocal jurisprudential confirmation of a system of rules of international jurisdiction that the predominant line of Spanish practice has in fact already been following.[44]

41 Cf. the judgments cited *supra* nn. 22, 23, 24 and 25.

42 Cf. Guasp (*Comentarios...*, 1st ed., at 291). Trías (Aragoneses, at 142, No. 18). The generic feature of the Latin system, literally reflected in the provisions of the RDExtr., is lost by dint of exceptions.

43 Cf. Miaja, II, at 410; Verplaetes, at 644. That is why, in the author's view, basing the system on Art. 27 of the Civil Code is "premature".

44 In this regard, it should be noted that in all cases in which Spanish jurisdiction has been declared competent in accordance with the provisions of the RDExtr., the application of the rules of territorial jurisdiction would have produced the same outcome. This predominant line also bears witness to the jurisprudential acceptance of submission to the Spanish courts to the detriment of foreign ones "without conditions or restrictions".

the SPANISH YEARBOOK of INTERNATIONAL LAW

Sustainable Development Approaches in the New Law of the Sea

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Abstract: Due to the emergence of sustainable development and in relation with the Law of the Sea, a new set of principles and rules has emerged at the crossroads of LOSC and the CBD; it defines *a renewed legal framework* (A), especially in terms of rights and obligations of coastal states over maritime spaces and marine resources, but also of environmental protection and preservation. This new approach supposes, for example, to be able to strike a balance between exploitation of marine resources and protection of marine biodiversity, and is at the core of current *challenges of economic exploitation* (B), both in the superjacent waters and on the seabed and subsoil.

Keywords: Sustainable development - Law of the Sea - LOSC - CBD - coastal state - marine environment - marine biodiversity - marine resources - economic exploitation

INTRODUCTION

The matter of the *Chagos Marine Protected Area Arbitration*, between Mauritius and United Kingdom, which was decided on 18 March 2015,[1] is a very relevant case in order to illustrate the importance and pertinence of *sustainable development approaches in the new Law of the Sea.*

The case opposed Mauritius, a developing country, and furthermore a Small Island Developing State, to its former colonizer, United Kingdom, about a part of the national territory, the Chagos Archipelago, and the right of their inhabitants to live in their native islands. United Kingdom had detached the Chagos Archipelago from the colony in 1965, before the independence of Mauritius in 1968, and had then administrated it as the British Indian Ocean Territory (BIOT) in order for the Diego Garcia Island to become a United States military base.[2] The detachment was realized under conditions, including fishing rights of native population, reversion to Mauritius of the benefit of any minerals or oil discovered in or near the Chagos Archipelago, and above all the UK's undertaking that if the need for defence purposes disappeared the islands should be returned to Mauritius. But,

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1 Permanent Court of Arbitration, Award, 18 March 2015, *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom).

2 A. Oraison, 'À propos du litige anglo-mauricien sur l'archipel des Chagos (La succession d'États sur les îles Diego Garcia, Peros Banhos et Salomon)', *Revue belge de droit international* (1990) 5-53; 'Diego Garcia : enjeux de la présence américaine dans l'océan Indien', *Afrique contemporaine* (2003) 115-132 [DOI: 10.3917/afco.207.0115]; 'Histoire et actualité de la base militaire de Diego Garcia. Les circonstances de la création et de la militarisation du British Indian Ocean Territory (BIOT)', *Outre-mers* (2005) 271-289 [DOI: 10.3406/outre.2005.4173]. The US military base of Diego Garcia had been granted to the United States in 1966 for a period of 50 years, which could be extended by 20 years, and the territory could therefore have been returned in 2016. On 16 November 2016, the concession was finally renewed and should therefore last until 30 December 2036.

 DOI: 10.17103/sybil.21.2

between 1968 and 1973, the United Kingdom proceeded to remove the Chagossian population from the Archipelago; since then, deported Chagossians unsuccessfully attempted to assert their rights to return and live in their native islands.[3]

The dispute between the Parties concerned a decision of the United Kingdom, taken on 1 April 2010, by which it established a large no-take Marine Protected Area around the Chagos Archipelago,[4] using environmental concerns as a pretext to assert territorial jurisdiction against the interests of a Small Island Developing State and the right of abode of native populations, depriving them of their economic livelihood,[5] as was revealed by a WikiLeaks cable.[6] But the Arbitral Tribunal, constituted under LOSC, has confirmed the legally binding character of the conditions stated in 1965, especially the United Kingdom's undertaking to return the Chagos Archipelago to Mauritius, when no longer needed for defence purposes; moreover, it has declared that, in establishing the MPA surrounding the Chagos Archipelago, the United Kingdom breached its obligations under the Law of the Sea Convention.[7]

De facto, the Chagos dispute appears a case study: it recalls the indivisibility and interdependence of the three dimensions of sustainable development, and underlines that environmental concerns cannot be opposed to social and economic preoccupations. On the contrary, they have to be balanced and implemented jointly, and this is also an essential requirement in the new Law of the Sea, as evidenced by recent developments within the United Nations. The Sixteenth meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, held in April 2015, was precisely dedicated to *Oceans and sustainable development: integration of the three dimensions*

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3 The Decision of the European Court of Human Rights, of 11 December 2012, has rejected the application in the case *Chagos Islanders against the United Kingdom*; on 29 June 2016, the Supreme Court ruled against setting aside the 2008 Lords verdict on the lawfulness of the 2004 Orders abolishing the right to return, but this judgment may have opened the way to a legal challenge to the ban on resettlement. Cf. C. Alexandre & K. Koutouki, 'Les déplacés des Chagos. Retour sur la lutte de ces habitants pour récupérer leur terre ancestrale', *Revue québécoise de droit international* (2014) 1-26; R. Le Mestre, 'L'archipel du chagrin ou la lutte des habitants des îles Chagos pour gagner un droit au retour sur leur terre', *Annuaire de Droit Maritime et Océanique* (2010) 197-227; J. Lunn, 'Disputes over the British Indian Ocean Territory: December 2016 update', House of Commons Library, Briefing Paper Number 6908, 1 December 2016.

4 Proclamation N° 1 of 2010.

5 E.M. De Santo, P.J.S. Jones, A.M.M. Miller, 'Fortress conservation at sea: a commentary on the Chagos MPA', *Marine Policy* (2011) 258-260 [DOI:10.1016/j.marpol.2010.09.004]; N. Monebhurrun, 'Creating Marine Protected Areas to assert territorial jurisdiction against the Right of Abode of Native Populations: The Case of the Chagos Archipelago', in C. Cinelli & E.M. Vásquez Gómez (Ed.), *Regional Strategies to Maritime Security: a Comparative Perspective*, MARSAFENET (Tirant lo Blanch, Valencia, 2014) 79-99; P. Sand, 'The Chagos Archipelago - Footprint of Empire, or World Heritage?', *Environmental Policy and Law* (2010) 232-242; 'The Chagos Archipelago Cases: Nature Conservation Between Human Rights and Power Politics', *The Global Community Yearbook of International Law & Jurisprudence* (2013) 125-150.

6 HMG Floats Proposal for Marine Reserve Covering the Chagos Archipelago (British Indian Ocean Territory), Date: 2009 May 15, 07:00 (Friday), Canonical ID: 09LONDON1156_a.

7 "B. In relation to the merits of the Parties' dispute, the Tribunal, having found, inter alia, (1) that the United Kingdom's undertaking to ensure that fishing rights in the Chagos Archipelago would remain available to Mauritius as far as practicable is legally binding insofar as it relates to the territorial sea; (2) that the United Kingdom's undertaking to return the Chagos Archipelago to Mauritius when no longer needed for defence purposes is legally binding; and (3) that the United Kingdom's undertaking to preserve the benefit of any minerals or oil discovered in or near the Chagos Archipelago for Mauritius is legally binding; DECLARES, unanimously, that in establishing the MPA surrounding the Chagos Archipelago the United Kingdom breached its obligations under Articles 2(3), 56(2), and 194(4) of the Convention"; Arbitral Award, 18 March 2015, Chapter VIII - Dispositif, at 215, § 547.

of sustainable development, namely, environmental, social and economic.[8] In the same way, the UN 2030 Agenda for Sustainable Development, adopted by the General Assembly on 25 September 2015, identified a Sustainable Development Goal 14 (SDG 14),[9] especially dedicated to *Life below water* and named *Conserve and sustainably use the oceans, seas and marine resources for sustainable development,*[10] as one of the 17 Sustainable Development Goals and as part of a highly inter-connected agenda including nine other goals supposed to be closely linked with oceans and seas.[11]

Actually, progressive emergence of sustainable development has implied a new legal approach, linking development and environmental concerns.[12] In relation with the Law of the Sea, a new set of principles and rules has emerged at the crossroads of LOSC and the Convention on Biological Diversity, defining *a renewed legal framework* (A), especially in terms of rights and obligations of coastal states over maritime spaces and marine resources, but also of environmental protection and preservation. This new approach of the Law of the Sea supposes, for example, to be able to strike a balance between exploitation of marine resources and protection of marine biodiversity, and is at the core of current *challenges of economic exploitation* (B), both in the superjacent waters and on the seabed and subsoil. The new Law of the Sea as a whole is concerned, from sustainable management of fisheries to IUU fishing, from biodiversity beyond national jurisdiction to offshore exploitation and deep-sea mining in the Area.

Sustainable development approaches are all new stakes for the future of the Law of the Sea, not only in the perspective of possible negotiations, but also in terms of effectivity and governance of oceans and seas.

(A) A RENEWED LEGAL FRAMEWORK

International Law, and especially International Law of the Sea, forms the legal framework for global sustainable development; but conversely, requirements of sustainable development contribute to define the *new conceptual dimensions* (1) that characterize its *current legal approaches* (2).

(1) New Conceptual Dimensions

Thoroughly linked with development issues, the *emergence of sustainable development* (a) has shown at once an ontological *relationship with the Law of the Sea* (b).

(a) Emergence of Sustainable Development

Both developmental needs and environmental preoccupations are at the *origins of sustainable*

8 Sixteenth meeting of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea.

9 A United Nations Conference to Support the Implementation of SDG 14 will be convened at the UN Headquarters from 5 to 9 June 2017.

10 Sustainable Development Goal 14.

11 Poverty eradication (SDG 1), food security and sustainable agriculture (SDG 2), health (SDG 3), clean water and sanitation (SDG 6), modern energy (SDG 7), growth and employment (SDG 8), climate (SDG 13), ecosystems and biodiversity (SDG 15) and partnerships (SDG 17).

12 A. Aranha Corrêa do Lago, *Conferências de desenvolvimento sustentável* (FUNAG, Brasília, 2013).

 DOI: 10.17103/sybil.21.2

development (i); based on a triple dimension, the *definition of sustainable development* (ii) conceptually reflects this ontological approach.

(i) *Origins of Sustainable Development*

International Law of Development appeared in the 1960's, characterized by an ideological dimension, linking development and decolonization, international cooperation and economic development.[13] But during the 1970's, a new concept seemed emerging, destined to completely change the conception and philosophy of development, integrating a comprehensive approach, together ecological, economic and social: the concept of sustainable development.[14]

Environmental awareness is a relatively recent preoccupation;[15] it is contemporaneous of the end of the last century and especially of the 1970's, with the United Nations Conference on the Human Environment, having met at Stockholm from 5 to 16 June 1972. This first environmental conference created the United Nations Environment Programme (UNEP), to work in close relation with the United Nations Development Programme (UNDP) established in 1966. It also adopted the Stockholm Declaration,[16] a soft law contribution, encompassing twenty-six principles; combining economic and social development and preservation and improvement of human environment, it is a step forward towards the future emergence of sustainable development.[17]

The expression was first employed in 1980 by IUCN, the International Union for Conservation of Nature, in its report *World Conservation Strategy: Living Resource Conservation for Sustainable Development*,[18] and then officially in 1983 in the General Assembly Resolution creating the World Commission on Environment and Development,[19] known as the Brundtland Commission after its Chairman, the Norwegian Prime Minister Gro Harlem Brundtland, after the failure of the Nairobi Conference in May 1982. The report of this Commission was published in 1987; it is entitled *Our Common Future*, and is famous for its Chapter 2 *Towards sustainable development*, popularizing the expression and concept.[20]

De facto, the Brundtland Report is an essential source of inspiration for the United Nations Conference on Environment and Development (UNCED), held in Rio de Janeiro from 3 to 14 June 1992, which led to the adoption of five documents: two international conventions (the Convention on Biological Diversity and the Convention on Climate Change) and three soft law instruments, the Statement of Principles on Forests, the Rio Declaration and the International Action Plan *Agenda 21*,

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13 G. Feuer & H. Cassan, *Droit international du développement* (Dalloz, Paris, 1985).

14 On the origins of the concept, J-G. Vaillancourt, 'Action 21 et le développement durable', *VertigO - la revue électronique en sciences de l'environnement*, Volume 3, Numéro 3, décembre 2002, § 1-10 [DOI: 10.4000/vertigo.4172].

15 J. Juste Ruiz, 'L'evolució del dret internacional del medi ambient', *Autonomíes*, núm 15, desembre de 1992, Barcelona, 45-57.

16 Declaration of the United Nations Conference on the Human Environment.

17 A.Ch. Kiss & J-D. Sicault, 'La Conférence des Nations Unies sur l'environnement (Stockholm, 5/16 juin 1972)', *Annuaire français de droit international* (1972) 603-628 [DOI: 10.3406/afdi.1972.1717].

18 World Conservation Strategy: Living Resource Conservation for Sustainable Development.

19 United Nations General Assembly, Resolution 38/161 *Process of preparation of the Environmental Perspective to the Year 2000 and Beyond*, 19 December 1983.

20 Our Common Future.

which both enshrine the concept of sustainable development.

The Rio Declaration on Environment and Development states twenty-seven principles setting forth the philosophy of sustainable development, twelve of which expressly refer to it.[21] As a starting point, Principle 1 specifies that "Human beings are at the centre of concerns for sustainable development". "Development of international law in the field of sustainable development" is one of the objectives set by Principe 27 and directly refers to the *definition of sustainable development.*

(ii)*Definition of Sustainable Development*

The first definition of sustainable development is given by the Brundtland Report; it is probably still the best and simplest formula to understand the concept: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[22]

From the vantage point of International Law, and notwithstanding doctrinal controversies on the legal value of the concept of sustainable development,[23] the International Court of Justice has underlined that the "need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development", pursuant to its Judgment of 25 September 1997, in the case concerning the *Gabcikovo-Nagymaros Project* (Hungary/Slovakia).[24] In its Order of 13 July 2006, in the case concerning *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), the Court has also highlighted "the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development"[25] Both arbitral jurisprudence[26] and WTO Appellate Body and Panels decisions confirm this approach,[27] and the conception developed by international case law thus perfectly fits with Principle 4 of the Rio Declaration: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".

From the perspective of International Law, sustainable development has to be understood not only according to its three essential dimensions, namely, environmental, social and economic, but also to a double approach, both spatial and temporal.

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[21] Principles 1, 4, 5, 7, 8, 9, 12, 20, 21, 22, 24 and 27.

[22] The whole definition reads as follows: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs".

[23] For a recent analysis, V. Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm', *European Journal of International Law* (2012) 377-400 [DOI:10.1093/ejil/chs016].

[24] ICJ Reports 1997, at 78, § 140.

[25] ICJ Reports 2006, at 133, § 80.

[26] See, for example, and by direct reference to the Judgment of the Court in the *Gabcikovo-Nagymaros* case, Award in the Arbitration regarding the *Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, RIAA, Volume XXVII 2008, at 66-67, § 59.

[27] Ph. Sands, 'International Courts and the Application of the Concept of "Sustainable Development"', *Max Planck Yearbook of United Nations Law* (1999) 389-405; D. Luff, 'An Overview of International Law of Sustainable Development and a Confrontation between WTO Rules and Sustainable Development', *Revue belge de droit international* (1996) 91-144.

The spatial logic of the concept refers to development, in the global context of disparities still shown by North-South relations, and imposes the need to resolve current conflicts of interests between industrialized countries, now conscious of the ecological future of the planet, and developing countries, primarily concerned about their own economic development.

The temporal logic of the concept refers to sustainability and imposes an intergenerational approach so that the immediate needs of the present generation will not compromise the future of forthcoming generations.

Both approaches appear interdependent and indivisible in International Law, as required by Principle 3 of Rio: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations", as perfectly reflected by the *relationship with the Law of the Sea.*

(b) *Relationship with the Law of the Sea*

In 1972, Principle 7 of the Stockholm Declaration provides that "States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea". In 1992, the Rio Declaration does not make any direct reference to oceans and seas, but *Chapter 17 of Agenda 21 and developments* (i) related define the relationship between sustainable development and the Law of the Sea, when *Small Island Developing States* (ii) appear a case study.

(i) *Chapter 17 of Agenda 21 and Developments*

Chapter 17 of Agenda 21, the implementation action plan of the Rio Conference, is especially dedicated to *Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources.*[28]

This chapter defines the marine environment —including the oceans and all seas and adjacent coastal areas— as an integrated whole, an essential component of the global life-support system and a positive asset presenting opportunities for sustainable development.

It recalls that International Law, as reflected in the provisions of LOSC, sets forth rights and obligations of states and provides the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources.

In this perspective, Chapter 17 requires new approaches to marine and coastal area management and development, as reflected in seven programme areas encompassing a global approach of the new Law of the Sea: 1 - Integrated management and sustainable development of coastal areas, including exclusive economic zones; 2 - Marine environmental protection; 3 - Sustainable use and conservation of marine living resources of the high seas; 4 - Sustainable use and conservation of marine living resources under national jurisdiction; 5 - Addressing critical uncertainties for the management of the marine environment and climate change; 6 - Strengthening international, including regional,

[28] Chapter 17 of Agenda 21.

 DOI: 10.17103/sybil.21.2

cooperation and coordination; 7 - Sustainable development of small islands.[29]

Most of these issues remained essential twenty years after the Earth Summit, as evidenced by the follow up developments, especially the Rio+20 Conference and its final document called *The future we want*,[30] in its developments devoted to *Oceans and seas* (§ 158-177), in close connection with LOSC but also taking into consideration new challenges,[31] such as illegal fishing, preservation of the marine environment, biodiversity protection, climate change, and obviously *Small Island Developing States* (§ 178-180).

(ii) *Small Island Developing States (SIDS)*

In 1992, Chapter 17 last programme area was especially dedicated to *Sustainable development of small islands*.[32] Small Island Developing States and islands supporting small communities are a special case both for environment and development. Chapter 17 called for developing and strengthening inter-island, regional and interregional cooperation and information exchange, including periodic regional and global meetings on sustainable development of Small Island Developing States (SIDS).

This was the starting point of specific follow up actions such as the Global Conference on Sustainable Development of Small Island Developing States held in Barbados in 1994, with the adoption of the Barbados Programme of Action (BPOA), further complemented by the Mauritius Strategy of Implementation (MSI) of 2005 and MSI+5 Outcome document (2010), the Rio+20 Conference and the SAMOA (SIDS Accelerated Modalities Of Action) Pathway adopted by the Third SIDS Conference in 2014.[33]

The SAMOA Pathway reaffirms that SIDS are a special case for sustainable development and remain constrained in meeting their goals in all three dimensions of sustainable development; they are afflicted by economic difficulties and confronted by development imperatives similar to those of developing countries generally, but the difficulties they face in the pursuit of sustainable development are particularly severe and complex, because of their own peculiar vulnerabilities and characteristics: small size, limited resources, geographic dispersion and isolation from markets, but also climate change[34] and sea-level rise, including natural and environmental disasters.[35] The long-term effects of climate change may even threaten the very existence and viability of some SIDS.[36]

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[29] For a critical analysis of Chapter 17 of Agenda 21, cf. U. Beyerlin, 'New Developments in the Protection of the Marine Environment: Potential Effects of the Rio Process', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht - Heidelberg Journal of International Law* (1995) 544-579.

[30] The future we want.

[31] G.A. Oanta, 'Protection and Preservation of the Marine Environment as a Goal for Achieving Sustainable Development on the Rio+20 Agenda', *International Community Law Review* (2014) 214-235 [DOI: 10.1163/18719732-12341277].

[32] 17G, 17.123-17.136.

[33] SAMOA Pathway.

[34] On this general issue, cf. A. Gillespie, 'Small Island States in the Face of Climatic Change: The End of the Line in International Environmental Responsibility', *UCLA Journal of Environmental Law and Policy* (2003/2004) 107-129.

[35] For a pluridisciplinary approach, *VertigO - la revue électronique en sciences de l'environnement*, Volume 10 Numéro 3, décembre 2010, Les petits États et territoires insulaires face aux changements climatiques : vulnérabilité, adaptation et développement.

[36] M.J. Aznar Gómez, 'El Estado sin territorio: la desaparición del territorio debido al cambio climático', 26 *Revista*

This is part of the *current legal approaches* reflected both in the field of sustainable development and in the framework of the Law of the Sea.

(2) Current Legal Approaches

Indeed, the concept of sustainable development appears to be correlated with *a new set of principles and rules* (a) defining *rights and obligations of states* (b) in International Law, and especially in the Law of the Sea.

(a) A New Set of Principles and Rules

The new International Law framework appears to be at the crossroads,[37] between the *contribution of LOSC and the new Law of the Sea* (i) and the *contribution of the Biological Diversity Convention and Rio outcomes* (ii).

(i) *Contribution of LOSC and the New Law of the Sea*

Although LOSC predates the emergence of sustainable development, the Third Conference began in 1973, one year after the first environmental conference, and it may be considered an innovative experience because it is looking for a balance between economic development and environmental concern, rights of coastal states over maritime areas and resources and an anthropocentric conception of environmental protection.

As regards the rights of coastal states over maritime areas and resources, and considering the dates, LOSC appears largely influenced by the ideology of development, especially the doctrine of permanent sovereignty over natural resources, stated by UN General Assembly Resolution 1803 (XVII).[38] It is mainly pursuant to this approach and under the influence of developing states that the 1982 Convention has realized the dynamic of creeping jurisdiction initiated by the Geneva Conventions in 1958, intensifying the territorialization of the oceans and seas, both in terms of distance and competences.[39]

But coastal nationalism may, and has, also to be construed as a claim for economic sovereignty, as evidenced by the chronological history of the concept of economic exclusive zone (EEZ). Indeed it originates first in the claims of South American states bordering the Pacific (Chile, Peru, and Ecuador)[40] in order to benefit the rich Humboldt Current, in 1947 and under the famous Santiago Declaration of 1952.[41] Then it was developed during the negotiation thanks to the activism of

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Electrónica de Estudios Internacionales (2013).

37 Cf. R. Wolfrum & N. Matz, 'The Interplay between the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity', *Max Planck Yearbook of United Nations Law* (2000) 445-480.

38 Resolution 1803 (XVII), 14 December 1962, Permanent sovereignty over natural resources; cf. G. Fischer, 'La souveraineté sur les ressources naturelles', *Annuaire français de droit international* (1962) 516-528 [DOI: 10.3406/afdi.1962.985]; N. Schrijver, *Sovereignty over natural resources: Balancing rights and duties* (Cambridge University Press, 1997), especially Chapter 7 'The Law of the Sea: Extension of Control over Marine Resources', at 202-230.

39 Cf. G. Apollis, *L'emprise maritime de l'Etat côtier* (Pédone, Paris, 1981).

40 Cf. H. Llanos Mansilla, 'Los países del sistema del Pacifico Sur ante la Convención sobre derecho del mar', *Revista chilena de derecho* (1983) 21-38.

41 Declaración sobre Zona Marítima, Santiago, 18 de agosto de 1952.

developing states, the contribution of Latin-Americans, especially with the Declaration of Santo Domingo of 1972[42] which articulated the notion of patrimonial sea, and the work of the Asian-African Legal Consultative Committee, culminating with the Addis Ababa Declaration of 1973, and the final African proposition.[43] Developed states were originally reluctant and even strongly opposed to the concept, adopted in Caracas in 1974, before understanding it would also be of great benefit for them and finally supporting it.[44]

Furthermore, such an approach is associated with an anthropocentric conception of environmental protection. Indeed, in the spirit of LOSC, this economic sovereignty, conceived as an instrument of development, is supposed to be balanced with some environmental concerns stemming from Stockholm principles, especially Principle 7 declaring that "States shall take all possible steps to prevent pollution of the seas". De facto, LOSC only deals with marine pollution; in accordance with the traditional approach[45] reflected in the agenda of the Third Commission of the Conference, Part XII is devoted to *Protection and preservation of the marine environment.*[46] Its first disposition, Article 192 transposes into the Law of the Sea the *General obligation*, already well-known in the Law of the Environment, stating that "States have the obligation to protect and preserve the marine environment". According to Principle 21 of Stockholm,[47] "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment", as provided for in Article 193 on the *Sovereign right of States to exploit their natural resources.*

Within the context of the Convention, all environmental concerns must be understood, in reference to a utilitarian kind of logic, finalized and functional, and essentially in connection with economic usages of the sea. The need to fight against pollution gives rise to an anthropocentric approach, primarily focused on the impact of human activities, and first of all related to the prevention of, preparedness for and response to marine pollution. Basically, Part XII is aimed at

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[42] Declaración de Santo Domingo aprobada por la Reunión de Ministros de la Conferencia Especializada de los Países del Caribe sobre los Problemas del Mar (1972).

[43] A. Del Vecchio, *Zona economica esclusiva e Stati costieri* (Le Monnier - Libera Università Internazionale degli Studi Sociali, Roma, 1984), at 61-113; F. Orrego Vicuña, 'La zone économique exclusive : régime et nature juridique dans le droit international', 199 *Recueil des cours de l'Académie de droit international de La* Haye (1986), at 20-26.

[44] See, for example, in France the adoption of the *loi n° 76-655 du 16 juillet 1976 relative à la zone économique et à la zone de protection écologique au large des côtes du territoire de la République*. Cf. R. Ladreit de Lacharrière, 'La zone économique française de 200 milles', *Annuaire français de droit international* (1976) 641-652 [DOI: 10.3406/afdi.1976.2006].

[45] L.A. Teclaff, 'International Law and the Protection of the Oceans from Pollution', *Fordham Law Review* (1972) 529-564.

[46] Articles 192 to 237. Cf. A.E. Boyle, 'Marine Pollution under the Law of the Sea Convention', *American Journal of International Law* (1985) 347-372; P-M. Dupuy & M. Rémond-Gouilloud, 'La préservation du milieu marin', in R-J. Dupuy & D. Vignes (Dir.), *Traité du Nouveau Droit de la Mer* (Economica Bruylant, Paris Bruxelles, 1985) 979-1045; A.Ch. Kiss, 'La pollution du milieu marin', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht - Heidelberg Journal of International Law* (1978) 902-932; M.L. McConnell & E. Gold, 'The Modern Law of the Sea: Framework for the Protection and Preservation of the Marine Environment', *Case Western Reserve Journal of International Law* (1991) 83-105.

[47] "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

fighting the six highest forms of pollution identified at the time of the negotiations[48] and likely to affect the marine environment:[49] *Pollution from land-based sources* (Article 207); *Pollution from seabed activities subject to national jurisdiction* (Article 208); *Pollution from activities in the Area* (Article 209); *Pollution by dumping* (Article 210); *Pollution from vessels* (Article 211); *Pollution from or through the atmosphere* (Article 212). States shall adopt laws and regulations to prevent, reduce and control all forms of pollution, and contain and limit as much as possible the potentially harmful effects of corresponding economic activities.

But, the *contribution of the Convention on Biological Diversity and Rio outcomes* have considerably enlarged the scope of environmental protection of oceans and seas, as defined by the 1982 Convention.

(ii) *Contribution of the Convention on Biological Diversity and Rio Outcomes*

Indeed, the CBD has contributed to the legal consecration of the concept of biodiversity and the development of new principles in the global context of the Rio Conference and Declaration.

Obviously LOSC neither expressly mentions nor recognizes biodiversity as such, and it would have been hard for it to be otherwise, because biodiversity, as a concept, appeared later than the adoption of the Convention. Indeed, although the term "biological diversity" was used first in 1968,[50] it has been widely adopted, in science and environmental policy, only in the 1980's.[51] The term's contracted form "biodiversity" seems to have been coined in 1985;[52] more communicative, it began to be employed in 1986 and appeared first in a publication in 1988.[53] There was no consecration of biodiversity, in International Law, till the adoption of the Convention on Biological Diversity in 1992, during the Rio Conference. The first legal reference in conventional Law of the Sea came later, with

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[48] Since then, new manifestations of pollution have been clearly identified such as acoustic pollution; cf. H.M. Dotinga & A.G. Oude Elferink, 'Acoustic Pollution in the Oceans: The Search for Legal Standards', *Ocean Development & International Law* (2000) 151-182; I. Papanicolopulu, 'Acoustic Pollution of the Oceans', in G. Andreone, A. Caligiuri, G. Cataldi (Dir.), *Droit de la mer et émergences environnementales / Law of the Sea and Environmental Emergencies*, Cahiers de l'Association internationale du Droit de la Mer 1 (Editoriale Scientifica, Napoli, 2012) 159-190.

[49] On the most important forms of marine pollution addressed by UNCLOS, cf. D. Bodansky, 'Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond', *Ecology Law Quarterly* (1991) 719-777; A. Griffin, 'MARPOL 73/78 and Vessel Pollution: A Glass Half Full or Half Empty?', *Indiana Journal of Global Legal Studies* (1994) 489-513; V. Labrot, 'Pollutions marines : introduction au droit international des pollutions par les navires', in A. Monaco & P. Prouzet (Dir.), *Gouvernance des mers et des océans*, Collection Mer et Océan Volume 6 (ISTE Editions, London, 2015) Chapitre 3, 87-114; N. Ros, 'La pollution résultant de l'exploitation du sol et du sous-sol : le cas du plateau continental', in *Droit des sites et sols pollués. Bilans et perspectives* (L'Harmattan, Paris, 2017) forthcoming; L. Taschereau, 'La nouvelle convention sur le droit de la mer et la lutte contre la pollution marine d'origine tellurique', *Les Cahiers de droit* (1983) 323-377 [DOI: 10.7202/042550ar]; Y. Tanaka, 'Regulation of Land-Based Marine Pollution in International Law: A Comparative Analysis Between Global and Regional Legal Frameworks', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht - Heidelberg Journal of International Law* (2006) 535-574; T. Treves, 'La pollution résultant de l'exploration et de l'exploitation des fonds marins en droit international', *Annuaire français de droit international* (1978) 827-850 [DOI: 10.3406/afdi.1978.2128].

[50] R.F. Dasmann, *A Different Kind of Country* (Collier Books, 1968).

[51] It is supposed to have been officially used first by the biologist Thomas Lovejoy in his preface of the book M.E. Soulé, *Conservation biology: an evolutionary-ecological perspective* (Sinauer Associates, 1980).

[52] It was invented by W.G. Rosen, during the preparation of the National Forum on Biological Diversity organized in 1986 by the National Research Council, an American NGO.

[53] The term was widely used during the aforementioned forum, convened in 1986, and it was chosen to be the title of the publication of its proceedings by American sociobiologist Edward Osborne Wilson; cf. E.O. Wilson, *Biodiversity* (National Academies Press, 1988).

the Agreement for the Implementation of the Montego Bay Convention of 1995, relating to straddling and highly migratory fish stocks; its Article 5 paragraph g was the first disposition to state an obligation to "protect biodiversity in the marine environment".[54]

Etymologically, "biodiversity" is a neologism based on the Greek "bios", meaning "life", and "diversity" designating the variety and diversity of the living world; it can be defined as the natural diversity of living organisms as it develops in space and time, and consequently that of ecosystems, species and genes. In legal terms, the Rio Conference has not only defined the concept as such under Article 2 of the CBD,[55] but it has also imposed biological diversity as a component of sustainable development, through the adoption of the whole Convention. Indeed, the 1992 Convention has stated the importance of biological diversity and the need to conserve it and use it sustainably.[56] Its Preamble has not only reaffirmed "that States have sovereign rights over their own biological resources", but also that they "are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner". As stated by Principles 21 of Stockholm and 2 of Rio, and recalled by Article 3, "States have [...] the sovereign right to exploit their own resources pursuant to their own environmental policies". In the specific case of marine biodiversity, the meaning and scope of the equation "sovereign rights over resources/obligations to conserve biological diversity" are confirmed under Article 22 *Relationship with Other International Conventions*, which paragraph 2 states: "Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea".[57]

Development of new principles complements this contribution as regards sustainable development. One of the most important of these principles is the principle of common but differentiated responsibilities which stems both from Rio Declaration and the CBD. According to Principle 7 of the Rio Declaration, and "in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities"; and pursuant to Principle 6, "the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority". Implementing these provisions, the CBD establishes a differentiated approach in favor of developing countries, least advanced countries and small island states, including access to and transfer of technology, technical and scientific cooperation, financial resources and mechanism. One of its objectives is the fair and equitable sharing of the benefits arising out of the utilization of genetic resources,[58] which has been confirmed by the Nagoya

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[54] J-P. Beurier, 'La protection juridique de la biodiversité marine', in *Pour un droit commun de l'environnement : mélanges en l'honneur de Michel Prieur* (Dalloz, Paris, 2007) 803-815.

[55] "'Biological diversity' means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems".

[56] The conception adopted in 1992 was largely influenced by developing states, against the conservationist approach supported by developed states; cf. M-A. Hermitte, 'La convention sur la diversité biologique', *Annuaire français de droit international* (1992) 844-870 [DOI : 10.3406/afdi.1992.3098]. For a legal analysis, cf. J-P. Beurier, 'Le droit de la biodiversité', *Revue Juridique de l'Environnement* (1996) 5-28 [DOI: 10.3406/rjenv.1996.3255].

[57] Cf. R. Wolfrum & N. Matz, 'The Interplay between the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity', *Max Planck Yearbook of United Nations Law* (2000) 445-480.

[58] The Convention's three objectives are the conservation of biological diversity, the sustainable use of its components

Protocol adopted on 29 October 2010 and entered into force on 12 October 2010.[59]

According to an approach that is now widely adopted by most of the legal systems, Article 14 states the principle of "environmental impact assessment" also included in the Rio Declaration (Principle 17). But, for the future of Environmental Law, the most important principle emerging during the Rio Conference is the "precautionary approach", only mentioned in the soft law Declaration of Rio (Principle 15). Other new soft law principles are also considered as Rio outcomes, although they are not all expressly mentioned in the Rio Declaration or *Agenda 21*: such as, for example, "polluter pays principle", "integrated management of the coastal zones", "best available techniques" and "best environmental practices". *Rights and obligations of states* must be understood in this global hard and soft law framework.

(b) *Rights and Obligations of States*

Indeed, in contemporary International Law, and in a perspective of sustainable development, *sovereign rights of coastal states* (i) and *correlative obligations of coastal states* (ii) are to be defined in this new double legal context.

(i) *Sovereign Rights of Coastal States*

Coastal states have economic rights, both on the resources of the superjacent waters and on the continental shelf and its resources.

As regards the resources of the superjacent waters, and in addition to the sovereignty the state exercises over its territorial sea, it has sovereign rights and jurisdiction in the exclusive economic zone.[60] The rights are economic and exclusive, but extend over natural resources, not over the zone itself. As stated under Article 56 § 1 a, "the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent [...], and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds"; both fishing activities and marine renewable energies are at stake, and can be considered sustainable development challenges.

It is well known that the most important part of these economic rights is traditionally devoted to fishing activities; this is perfectly explained by the history of the EEZ concept. Although the special situation of developing (Article 62 § 2 & 3), landlocked (Article 69) or geographically disadvantaged states (Article 70), is supposed to be taken into consideration, according to sustainable development

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and the fair and equitable sharing of benefits arising from the utilization of genetic resources.

[59] On related issues, cf. T. Burelli, 'Faut-il se réjouir de la conclusion du Protocole de Nagoya ?', *Revue Juridique de l'Environnement* (2012) 45-61; E. Chege Kamau, B. Fedder, G. Winter, 'The Nagoya Protocol on Access to Genetic Resources and Benefit Sharing: What is New and What are the Implications for Provider and User Countries and the Scientific Community?, *Law, Environment and Development Journal* (2010) 246-262; R. Zahluth Bastos *et al.*, 'Le régime international de l'accès aux ressources génétiques au prisme de l'entrée en vigueur du Protocole de Nagoya', *Revista de Direito Internacional - Brazilian Journal of International Law* (2016) 130-146 [DOI: 10.5102/rdi.v13i2.4069].

[60] F. Orrego Vicuña, 'La zone économique exclusive : régime et nature juridique dans le droit international', in 199 *Recueil des cours de l'Académie de droit international de La Haye* (1986) 9-170.

principles, the Convention creates a monopolistic situation for the coastal state, both as regards the conservation (Article 61) and the exploitation (Article 62) of living resources. Neither the temporal dimension of sustainable development nor the spatial one are properly implemented; as regards conservation of biological resources, states are more eager to ensure the profitability of the exploitation, with the "objective of optimum utilization" (Article 62 § 1), according to the logic of LOSC, than to preserve biodiversity.

The sovereign rights the coastal state enjoys in the EEZ are complemented by a triple jurisdiction, with regard to "the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment". Under Article 60, the coastal states have exclusive rights and jurisdiction over artificial islands, installations and structures located in the exclusive economic zone and used for economic purposes; of course, offshore wind and hydro-electric farms are considered sustainable development challenges, but more traditional offshore industries are also concerned.[61] Nevertheless, and notwithstanding such an ambiguity, Article 56 § 3 provides that "the rights set out [...] with respect to the seabed and subsoil shall be exercised in accordance with Part VI", that is to say with regard to the continental shelf.

As stated by Article 77 of LOSC, "the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources" (§ 1); these "rights [...] are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without [its] express consent" (§ 2); furthermore, "the rights of the coastal state over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation" (§ 3).

In other words, there exists a state monopoly and the coastal state is exclusively competent to define the legal regime of exploitation of the resources on the continental shelf.[62] It is the one and only authority competent to explore (including the preliminary phase of prospection), exploit or authorize offshore activities. It delivers licenses, permits and any kind of authorizations, according to its domestic legislation.[63] Furthermore, "the coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes" (Article 81) and also the exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, installations and structures on the continental shelf, with exclusive jurisdiction over them (Article 80).[64]

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[61] As evidenced in the Mediterranean, taking into consideration recent EEZ proclamations; cf. N. Ros, 'Les nouvelles zones économiques exclusives en mer Méditerranée', in N. Ros & F. Galletti (Dir.), *Le droit de la mer face aux "Méditerranées", Quelle contribution de la Méditerranée et des mers semi-fermées au droit international de la mer ?*, Cahiers de l'Association internationale du Droit de la Mer 5 (Editoriale Scientifica, Napoli, 2016) 7-33.

[62] V. Marotta Rangel, 'Le plateau continental dans la Convention de 1982 sur le droit de la mer', 194 *Recueil des cours de l'Académie de droit international de La Haye* (1985) 269-428.

[63] Therefore, legal differences are very important from one state to another. For a very interesting study of comparative legislation, conducted in France by the *Division de Législation comparée de la Direction de l'Initiative parlementaire et des délégations*, at the request of the *Délégation sénatoriale de l'Outre-Mer*, cf. Note sur L'exploration et l'exploitation pétrolières en mer (Australie – Brésil – Mexique – Norvège – Royaume-Uni), République française, janvier 2013.

[64] Cf. G. Andreone, 'The Powers of Coastal States over Offshore Oil Platforms', in A. Caligiuri (Ed.), *Governance of the Adriatic and Ionian Marine Space*, Final publication MaReMaP-AIR, Cahiers de l'Association internationale du Droit de la

 DOI: 10.17103/sybil.21.2

The coastal state's rights are not only sovereign and exclusive, but also economic and finalized, in that they are oriented towards the exploration and exploitation of the "natural resources" of the continental shelf, which "consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species" (Article 77 § 4). Obviously, the most important part of the natural resources of the continental shelf are mineral resources and especially hydrocarbons, oil and gas; but seabed mining for other minerals may also be involved, as well as exploitation of underwater sand deposits to replenish beaches. As far as living resources are concerned, only sedentary species are expressly mentioned,[65] which traditionally refers to some crustaceans but now includes deep-water corals and other sedentary species inhabiting seamounts and hydrothermal vents likely to be considered as marine genetic resources; although prospectively, these living resources represent a significant issue, particularly in the context of current negotiations at the United Nations. For developing and developed states, all the resources of the continental shelf are promises of economic development; in this perspective, sustainable development objectives can hardly be considered priorities, such as *correlative obligations of coastal states.*

(ii) *Correlative Obligations of Coastal States*

Pursuant to LOSC and International Law, most of these obligations are conceived especially for environmental protection, but it seems actually impossible to strike a balance between exploitation and protection, a fortiori taking into consideration the economic context, in particular the current systemic crisis.

LOSC, especially its Part XII, imposes a legal objective of conservation and preservation of the marine environment. According to Article 194 *Measures to prevent, reduce and control pollution of the marine environment*, and in a general way, "States shall take [...] all measures [...] that are necessary to prevent, reduce and control pollution of the marine environment from any source". As regards the EEZ, Article 56 § 1 b provides coastal state jurisdiction with regard to "the protection and preservation of the marine environment", especially to fight against pollution from land-based sources, dumping and vessels. With respect to fishing activities, and in order to support their economic profitability, Article 61 § 2 disposes that coastal state "shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation". On the continental shelf, coastal states are under a special obligation to prevent, reduce and control *Pollution from seabed activities subjects to national jurisdiction*, as provided for under Article 208, including "pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 and 80" (§ 1). Considered to be one of the most important and most dangerous forms of marine pollution, offshore is thus directly addressed by LOSC and the new Law of the Sea, and the coastal state is vested with all the

Mer 4 (Editoriale Scientifica, Napoli, 2016) 191-202.

[65] Article 77 § 4 refers to "sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil".

 DOI: 10.17103/sybil.21.2

general competences in order to fight against its dangers.[66]

In reality, the problem is twofold: despite sustainable development objectives, environmental concerns cannot be a priority, especially for developing states; furthermore, states, even developed countries, are more and more confronted to a lack of means, together human, logistic, financial and material, in order to effectively address pollution and non-sustainable exploitation practices. Despite the general rule stating that the right to exploit resources, living or non-living, shall not prevent states from protecting the marine environment and its biodiversity, the consequence is an impossible balance between exploitation and protection; on the contrary, both aspects have to be balanced in accordance with sustainable development, at the crossroads of LOSC and CBD requirements. The difficulties resulting from underdevelopment largely explain that economic promises of the exploitation of natural resources prevent these states from adopting a balanced approach, integrating environmental concerns, in accordance with sustainable development logic. The needs of present and future generations appear impossible to conciliate. But the most deceiving point is that most of the time, the exploitation of non-renewable resources does not even serve economic development purposes and does not benefit the people but a minority, connected with industrial lobbies, especially in the case of offshore activities,[67] or even to mafias as regards illegal fishing.[68] The most significant, but also the most disheartening, in a sustainable development perspective, is that these situations also exist in developed countries, where old democratic systems and their political leaders prove to be unable to strike a balance between the short term prospects of economic exploitation and the long term objectives of environmental protection, a fortiori in the current context of crisis.

These are the current *challenges of economic exploitation* of sea resources, given that a sustainable development approach should always imply that wisdom prevails over greed...

(B) CHALLENGES OF ECONOMIC EXPLOITATION

Indeed, receptive to environmental concerns and obviously geopolitical, the new Law of the Sea is also characterized by its economic dimension; thus, a great number of sustainable development objectives appear to be at stake, both *in the surperjacent waters* (1) and *on the seabed and subsoil* (2).

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[66] Cf. J.W. Kindt, 'The Law of the Sea: Offshore Installations and Marine Pollution', *Pepperdine Law Review* (1985) 381-426; N. Ros, 'La pollution résultant de l'exploitation du sol et du sous-sol : le cas du plateau continental', in *Droit des sites et sols pollués. Bilans et perspectives* (L'Harmattan, Paris, 2017) forthcoming; and for a regional approach, 'Exploration, Exploitation and Protection of the Mediterranean Continental Shelf', in C. Cinelli & E.M. Vásquez Gómez (Ed.), *Regional Strategies to Maritime Security: a Comparative Perspective*, MARSAFENET (Tirant lo Blanch, Valencia, 2014) 101-132.

[67] This was evidenced by the Petrobras scandal in Brazil and in fine by the French *Code minier* since an amendment to the 1994 Finances Law, adopted in 1993, and never challenged since then; indeed in accordance with this provision, offshore exploitation on the French continental shelf is free from all financial and fiscal rights, taxes and other royalties... Cf. N. Ros, 'Au-delà de la borne 602 : la frontière maritime entre l'Espagne et la France en mer Méditerranée', 4 *Journal du Droit international Clunet* (2014), at 1107-1110; 'La pollution résultant de l'exploitation du sol et du sous-sol : le cas du plateau continental', in *Droit des sites et sols pollués. Bilans et perspectives* (L'Harmattan, Paris, 2017) forthcoming.

[68] J.M. Sobrino Heredia, 'Una nueva manifestación de delincuencia organizada internacional: las actividades de pesca ilegal, no declarada y no reglamentada', in J. Juste Ruiz & V. Bou Franch (Dir.), *Derecho del mar y sostenibilidad ambiental en el Mediterráneo* (Tirant lo Blanch, Valencia, 2013) 147-174.

 DOI: 10.17103/sybil.21.2

(1) In the Surperjacent Waters

Fishing activities (a) are still an essential issue in terms of sustainable development, but *biodiversity on the high seas* (b) is the most current preoccupation.

(*a*) *Fishing Activities*

Since the late 20th century, imperatives of *sustainable management of fisheries* (i) have imposed the necessity of *fighting against illegal fishing* (ii).

(i) *Sustainable Management of Fisheries*

Fishing activities are a potential for sustainable development, but the traditional regime of freedom, based on the alleged myth of inexhaustibility of living resources, erroneously attributed to Grotius,[69] led to overexploitation with the introduction of industrial methods. Coastal states reactions led to the creation of the EEZ, and the adoption of dedicated International Law including for high seas fisheries,[70] both normative under LOSC and the 1995 Agreement,[71] and institutional with the development of Regional Fisheries Management Organizations (RFMOs);[72] but this evolution was unable to introduce a sustainable approach because of short term economic priorities.[73]

In terms of sustainable development, great problems remain for the future: overexploitation,

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[69] In fact, Grotius can be considered to have sensed the exhaustible character of biological resources: *piscaturam qua dici quodammodo potest pisces exhauriri*, in other words "*fisheries, about which it can in some way be maintained that fish stocks are exhaustible*" (translation in modern English is by the author); H. Grotius, *Mare Liberum The freedom of the seas*, 1608, the quotation is at the end of Chapter V, Carnegie Endowment for International Peace (Oxford University Press, New York, 1916), at 43.

[70] Cf. M. Le Hardy, *Que reste-t-il de la liberté de la pêche en haute mer ? De l'exploitation individuelle à la gestion collective. Essai sur le régime juridique de l'exploitation des ressources biologiques de la haute mer* (Pédone, Paris, 2002); F. Orrego Vicuña, *The Changing International Law of High Seas Fisheries* (Cambridge University Press, 2003); E.M. Vázquez Gómez, 'La obligación de cooperar para conservar los recursos pesqueros del alta mar frente a la *creeping jurisdiction* institucionalizada', in J.M. Sobrino Heredia (Dir.), *La contribution de la Convention des Nations Unies sur le droit de la mer à la bonne gouvernance des mers et des océans / La contribución de la Convención de las Naciones Unidas sobre el Derecho del Mar a la buena gobernanza de los mares y océanos / The Contribution of the United Nations Convention on the Law of the Sea to Good Governance of the Oceans and Seas*, Cahiers de l'Association internationale du Droit de la Mer 2 (Editoriale Scientifica, Napoli, 2014) Volume I, 429-438.

[71] W.T. Burke, *Fisheries regulations under extended jurisdiction and international law*, FAO Fish.Tech.Pap. 223 (FAO, Rome, 1982); C.A. Fleischer, 'La pêche', in R-J. Dupuy & D. Vignes (Dir.), *Traité du Nouveau Droit de la Mer* (Economica Bruylant, Paris Bruxelles, 1985) 819-956; D. Momtaz, 'L'accord relatif à la conservation et à la gestion des stocks de poissons chevauchants et de grands migrateurs', *Annuaire français de droit international* (1995) 676-699 [DOI: 10.3406/afdi.1995.3350]; J.A. de Yturriaga Barberán, 'Perspectives on High Seas Fisheries after UNCLOS', in J.M. de Faramiñán Gilbert & V.L. Gutiérrez Castillo (Dir.), *Coopération, sécurité et développement durable dans les mers et les océans. Une référence spéciale à la Méditerranée / Sea and ocean-related cooperation, security and sustainable development. An analysis with a special focus on the Mediterranean* (Huygens Editorial Lex Científica, Barcelona, 2013) Chapter 11, 230-257.

[72] J. Beer-Gabel & V. Lestang, *Les Commissions de pêche et leur droit. La conservation et la gestion des ressources marines vivantes* (Bruylant, Bruxelles, 2003); E.M. Vázquez Gómez, *Las Organizaciones Internacionales de Ordenación Pesquera. La Cooperación para la Conservación y la Gestión de los Recursos Vivos del Alta Mar*, Sociología y Política Pesquera (Junta de Andalucía Consejería de Agricultura y Pesca, 2002).

[73] Cf. W. Edeson, 'Sustainable Use of Marine Living Resources', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht - Heidelberg Journal of International Law* (2003) 355-376; O. Spijkers & N. Jevglevskaja, 'Sustainable Development and High Seas Fisheries', *Utrecht Law Review* (2013) 24-37; G. Winter (Ed.), *Towards Sustainable Fisheries Law. A Comparative Analysis*, IUCN Environmental Policy and Law Paper N° 74 (IUCN, Gland, 2009).

depletion of some stocks and announced disappearance of certain species, unsustainable fishing practices, such as bottom fishing, or bycatches and discards equivalent to more than one quarter of global captures.[74] A large part of fishing activities is unsustainable, but they have also failed to become a mean of economic development for developing countries. In theory, special needs of developing states are always supposed to be taken into consideration and a differentiated approach is recommended but, in practice, these countries still lack financial, human and logistic means. Furthermore, the crisis of fisheries, both industrial and artisanal in developed states, has also indirectly affected their situation, in particular because it has transferred fishing efforts and some unsustainable practices, schematically from North to South. The necessity to reduce overcapacity in fishing fleets, especially thanks to the prohibition of fisheries subsidies, as in the World Trade Organization, is also a good example, because developing states logically claim for a special and differential treatment;[75] but developing states can also serve as flags of convenience, without effective incomes likely to better economic development.

The development of International Law of fisheries, the progressive extension of sovereign rights and interests of coastal states, and the conditioning of freedom even on the high seas, in particular with the development of Regional Fisheries Management Organizations (RFMOs), led to illegal fishing practices,[76] and invested the international community with the obligation of *fighting against illegal fishing.*

(ii) *Fighting against Illegal Fishing*

IUU fishing, illegal, unreported and unregulated, is a real scourge in terms of sustainable development. It is not only one of the most serious threats to sustainable exploitation of living resources, but also to marine biodiversity preservation; it also undermines social standards and distorts markets. From all these points of view, it is an obstacle to the three dimensions of sustainable development.

The first reason why IUU fishing is a particularly critical issue today is that many fish stocks are already overexploited by legal fishing activities; therefore, illegal practices put fish stocks under additional pressure, exacerbating overfishing problems and consequences. As regards the environmental dimension of sustainable development, IUU fishing mortgages the future, both in terms of volume of captures and depletion of stocks and species.

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74 The State of World Fisheries and Aquaculture. Contributing to food security and nutrition for all (FAO, Rome, 2016).

75 Cf. C. Teijo García, 'El desarrollo progresivo de las normas sobre subvenciones pesqueras en el Derecho de la OMC: una aproximación a la conservación de los recursos pesqueros desde la perspectiva del Derecho internacional del comercio', in J. Jorge Urbina & M.T. Ponte Iglesias (Coord.), *Protección de intereses colectivos en el Derecho del Mar y cooperación internacional* (Iustel, Madrid, 2012) 109-140.

76 J.M. Sobrino Heredia, 'La tensión entre la gobernanza zonal y la gobernanza global en la conservación y gestión de los recursos pesqueros', in J.M. Sobrino Heredia (Dir.), *La contribution de la Convention des Nations Unies sur le droit de la mer à la bonne gouvernance des mers et des océans / La contribución de la Convención de las Naciones Unidas sobre el Derecho del Mar a la buena gobernanza de los mares y océanos / The contribution of the United Nations Convention on the Law of the Sea to good governance of seas and oceans*, Cahiers de l'Association internationale du Droit de la Mer 2 (Editoriale Scientifica, Napoli, 2014) Volume II, 455-483.

 DOI: 10.17103/sybil.21.2

IUU fishing is a worldwide phenomenon, taking place on a large scale in the territorial waters or exclusive economic zones, and on the high seas.[77] Obviously, its development is easier in countries which cannot afford to set up costly and complex fisheries control structures, such as developing countries. In these states, illegal fishing hampers economic development and fosters the looting of natural resources, depriving fishermen from jobs and incomes, what can also be an incentive to piracy... and anyway prevents alleviation of poverty.

This is part of the social impact of IUU fishing, which contributes to the fisheries crisis worldwide, in developed and developing states. Indeed, due to its transnational criminal organization,[78] illegal fishing is also a social and human scourge. Vessels illegally fishing are very often flying flags of convenience;[79] working conditions on board are usually very bad, both from the standpoint of safety of fishermen and human rights.[80] In these conditions, fishermen from developing countries can be the designated victims of these kinds of human exploitation, from forced labor to trafficking and other slavery situations.

Fighting against IUU fishing is a prerequisite for sustainable fisheries development, a necessity but also a very complicated task. In this perspective, states, whether flag, coastal, port or market states, should cooperate and work together, in application and implementation of International Law.[81] The Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted by the FAO on 22 November 2009 and entered into force on 5 June 2016, is the cornerstone of the current international legal system.[82] But developing states need help in order to be able to fulfill their legal obligations, especially to control fisheries in their EEZ, and not to

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77 R. Baird, 'Illegal, Unreported and Unregulated Fishing: an Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence', *Melbourne Journal of International Law* (2004) 299-334.

78 G.A. Oanta, 'Illegal Fishing as a Criminal Act at Sea', in E.D. Papastavridis & K.N. Trapp (Eds.), *La criminalité en mer / Crimes at Sea* (Brill Nijhoff, Leiden Boston, 2014) 149-197; N. Ros, 'Halte au piratage halieutique !', *Annuaire du Droit de la Mer* (2002) 347-376; J.M. Sobrino Heredia, 'Una nueva manifestación de delincuencia organizada internacional: las actividades de pesca ilegal, no declarada y no reglamentada', in J. Juste Ruiz & V. Bou Franch (Dir.), *Derecho del mar y sostenibilidad ambiental en el Mediterráneo* (Tirant lo Blanch, Valencia, 2013) 147-174.

79 J.M. Sobrino Heredia, 'Pabellones de conveniencia y pesca ilegal', in M. Vargas Gómez-Urrutia & A. Salinas de Frías (Coord.), *Soberanía del Estado y derecho internacional: homenaje al profesor Juan Antonio Carrillo Salcedo* (Universidad de Sevilla, 2005) Vol. 2, 1331-1348; D. Warner-Kramer, 'Control Begins at Home: Tackling Flags of Convenience and IUU Fishing', *Golden Gate University Law Review* (2004) 497-529.

80 Cases of abuse, forced labor and modern slavery are obviously difficult to identify and prove on vessels engaged in IUU fishing, but actually they are of course all the more numerous and serious. Cf. N. Ros, 'Cuestiones actuales de Derecho del Mar', in J. Cabeza Pereiro & E. Rodríguez Rodríguez (Coord.), *El trabajo en el Mar: los nuevos escenarios jurídico-marítimos* (Editorial Bomarzo, Albacete, 2015), at 61; R. Surtees, 'Trapped at Sea. Using the Legal and Regulatory Framework to Prevent and Combat the Trafficking of Seafarers and Fishers', *Groningen Journal of International Law* (2013), at 95-96.

81 M. Morin, 'La lutte contre la pêche illicite et la responsabilité des Etats', in P. Chaumette (Dir.), *Maritime areas: control and prevention of illegal traffics at sea / Espaces marins : surveillance et prévention des trafics illicites en mer* (Gomylex Editorial, Bilbao, 2016) Chapter 2, 83-97; G.A. Oanta, 'New Steps in the Control of Illegal, Unreported and Unregulated Fishing', in H-J. Koch *et al.* (Eds.), *Legal Regimes for Environmental Protection: Governance for Climate Change and Ocean Resources* (Brill Nijhoff, Leiden Boston, 2015) 229-257; N. Ros, 'La lutte contre la pêche illicite', in G. Andreone, A. Caligiuri, G. Cataldi (Ed.), *Droit de la mer et émergences environnementales / Law of the Sea and Environmental Emergencies*, Cahiers de l'Association internationale du Droit de la Mer 1 (Editoriale Scientifica, Napoli, 2012) 69-122.

82 Cf. the trilingual revised edition of the 2009 Agreement; for a commentary, M. Morin, 'L'accord FAO sur les mesures de contrôle des navires par l'Etat du port', *Annuaire de Droit Maritime et Océanique* (2010) 393-410.

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be condemned to become flags or ports of convenience.

Obviously the high seas are also concerned by illegal fishing, but beyond national jurisdiction the most important challenge is now related to *biodiversity on the high seas.*

(b) *Biodiversity on the High Seas*

Immediately after the adoption of LOSC, problems remained concerning high seas fisheries, which led to the adoption of the 1995 Agreement on straddling and highly migratory fish stocks,[83] and the creation of RFMOs worldwide; some fisheries related issues are still at stake,[84] but the *current problematic* (i) is totally different as evidenced by the *challenges of negotiation* (ii).

(i) *Current Problematic*

Taking note of the threats and risks to vulnerable and threatened marine ecosystems and biodiversity in areas beyond national jurisdiction, especially seamounts, cold water corals, hydrothermal vents and other underwater features,[85] General Assembly Resolution A/RES/59/24, adopted on 17 November 2004, has established an ad hoc open-ended informal working group to study issues relating to the conservation and sustainable use of biodiversity beyond national jurisdiction (BBNJ).[86]

According to initial concerns, the first meeting of the working group, convened in 2006, focused its exchanges on IUU fishing and destructive fishing practices, marine genetic resources (MGRs), marine scientific research (MSR), and high seas marine protected areas (MPAs). But two years later, the second session gave up discussions on high seas fisheries and centered the debates on MPAs, MGRs, MSR and technology transfer, and environmental impact assessments (EIAs). In fact, it was only in 2011, during the fourth meeting, that the option of a multilateral agreement under LOSC was first mentioned, in connection with a consensus on a "package deal", or at least a "package", corresponding to the set of issues defined in 2008.

In 2012, the Rio+20 Conference adopted a document called *The future we want*, which paragraph 162 expressed a commitment to take a decision on the development of an international instrument under LOSC, before the end of the sixty-ninth session of the General Assembly, in 2015. In 2013 and 2014, three meetings were engaged in a more detailed substantive discussion on the scope, parameters and feasibility of an international instrument under LOSC and based on the thematic package defined in 2008.

Finally, the ninth meeting convened in January 2015 and reached consensus on a negotiating process, by establishing a preparatory committee to make substantive recommendations on elements of a draft text of a legally binding instrument to the General Assembly in 2017, and for the Assembly to decide at its seventy-second session, in 2018, whether to convene an intergovernmental conference to elaborate the text of the agreement. The recommendations of the working group have been

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[83] 1995 Agreement on straddling and highly migratory fish stocks.

[84] For example deep sea fisheries, bycatches and discards.

[85] On the general topic of marine biodiversity protection, M.C. Ribeiro, 'A protecção da biodiversidade marinha: importancia do poder do Estado na prossecução deste «interesse geral»', in J. Jorge Urbina & M.T. Ponte Iglesias (Coord.), *Protección de intereses colectivos en el Derecho del Mar y cooperación internacional* (Iustel, Madrid, 2012) 25-62.

[86] Resolution A/RES/59/24, § 73.

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endorsed, without a vote, by the General Assembly on 19 June 2015 under Resolution A/RES/69/292 *Development of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*.[87] In fine, nothing was decided and the recommendations of the working group, as approved by the General Assembly, can be considered a diplomatic victory both by the pros and cons, states favorable to a new agreement and so-called "unconvinced" countries according to UN official vocabulary.

The Preparatory Committee (Prep Com) began its work in spring 2016.[88] According to its mandate, Prep Com 1 has worked to make substantive recommendations on the elements of a draft agreement; the scope of an international legally binding instrument and its relationship with other instruments and bodies were considered, but principles were also discussed in particular the applicability of the principle of common heritage of mankind. The exchanges then focused on the set of issues identified in 2008 and considered as a package in 2011: marine genetic resources (status, definitions, access, benefit-sharing, intellectual property rights (IPRs) and institutional matters), area-based management tools including marine protected areas (definitions, objectives and principles, criteria, governance, institutional mechanisms, and links with regional approaches), environmental impact assessments (general concepts, definitions, thresholds, governance, transparency, and monitoring), capacity building and technology transfer (different approaches, specific capacity-building measures, institutional mechanisms, including a clearinghouse mechanism and a fund), institutional aspects (dispute settlement, responsibility and liability). On all these issues, the discussions have revealed significant differences of opinion, as to the legal regime likely to be adopted in the future.

The second session of the Prep Com (Prep Com 2) met a few months later, in the summer of 2016, to work on the basis of the achievements made by Prep Com 1 and with the objective of summiting a compilation of proposals to Prep Com 3.[89] The four issues included in the package were discussed again: marine genetic resources, in terms of definition of MGRs, including the possible inclusion of derivatives, data (*in silico*),[90] and fish,[91] approaches, access and benefit-sharing (monetary and non-monetary benefits, traditional knowledge, contributions to conservation and sustainable use), and intellectual property rights (IPRs); area-based management tools, with discussions focused on

[87] Resolution A/RES/69/292.

[88] The first session of the Preparatory Committee (Prep Com 1) convened from 28 March to 8 April 2016; cf. Earth Negotiations Bulletin, Summary of the first session of the Preparatory Committee on marine biodiversity of areas beyond national jurisdiction: 28 March - 8 April 2016, International Institute for Sustainable Development (IISD), Vol. 25 No. 106, Monday, 11 April 2016.

[89] Prep Com 2 convened from 26 August to 9 September 2016; cf. Earth Negotiations Bulletin, Summary of the second session of the Preparatory Committee on marine biodiversity of areas beyond national jurisdiction: 26 August – 9 September 2016, International Institute for Sustainable Development (IISD), Vol. 25 No. 118, Monday, 12 September 2016.

[90] The International Union for Conservation of Nature (IUCN) proposed to define resources *in silico* as "data containing DNA, RNA, proteins or enzymes"; Earth Negotiations Bulletin, Vol. 25 No. 118 aforementioned, at 3.

[91] The new actuality of fisheries issue is related to the problematic of the legal regime likely to be applicable to fish; indeed, some States considered that it should be different, depending on whether fish is traditionally used as food or as a MGR.

 DOI: 10.17103/sybil.21.2

definitions (MPAs and marine spatial planning - MSP), approaches and governance; environmental impact assessments, in terms of definition and approaches, transboundary EIAs (TEIAs), thresholds, strategic environmental assessments (SEAs), institutional arrangements and existing instruments; capacity building and technology transfer, with exchanges focused on differentiated and common approaches, institutional mechanisms and funding. But the discussions also focused on cross-cutting issues, such as objectives, principles, scope, relationships with other instruments, in particular with LOSC, institutional arrangements, responsibility and liability, dispute settlement and final clauses. Finally, it was decided to draw up a report on possible areas of convergence and issues for further discussion, in order to prepare Prep Com 3 to be held in spring 2017.[92] The Prep Com is expected to finish its work by the end of the year, and this undoubtedly complicates the *challenges of negotiation.*

(ii) *Challenges of Negotiation*

BBNJ is a real challenge for the future of the Law of the Sea, in particular in terms of sustainable development.[93] A twofold approach is needed in order to perfectly understand the real issues of these negotiations. On the one side, the negotiation encompasses environmental concerns devoted to the preservation of high seas biodiversity, such as marine protected areas and environmental impact assessments. On the other side, it focuses on development issues, in relation with marine scientific research and marine genetic resources, especially as regards access to genetic resources and fair and equitable sharing of benefits. Taking into consideration that developed countries are a priori more interested in environmental aspects and developing countries in development promises, the challenge is to strike a real balance in terms of sustainable development, a fortiori in the legal context of a package that recalls in fact a package deal approach to negotiations.

Notwithstanding, a realistic approach is needed in order to take into consideration that environmental concerns are very often used as pretexts, especially by developed countries, to achieve other objectives. Large marine protected areas, for example, are currently called for by environmental NGOs and the Charitable Trusts that fund them,[94] but they may be actually less justified in terms of biodiversity than of geopolitics,[95] as evidenced by the strategy of the United States in the Pacific

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92 The third session of the Prep Com is convened from 27 March to 7 April 2017.

93 Cf. F.M. Armas Pfirter, 'The Management of Seabed Living Resources in "the Area" under UNCLOS', 11 *Revista Electrónica de Estudios Internacionales* (2006); R. Rayfuse & R.M. Warner, 'Securing a sustainable future for the oceans beyond national jurisdiction: the legal basis for an integrated cross-sectoral regime for high seas governance for the 21st century', *The International Journal of Marine and Coastal Law* (2008) 399-421; T. Scovazzi, 'Negotiating Conservation and Sustainable Use of Marine Biological Diversity in Areas Beyond National Jurisdiction: Prospects and Challenges', *The Italian Yearbook of International Law* (2015) 61-93; 'The Exploitation of Marine Genetic Resources in Areas Beyond National Jurisdiction', in G. Andreone (Ed.), *Jurisdiction and Control at Sea. Some environmental and security issues*, MARSAFENET (Giannini Editore, 2014) 37-54, or S. Doumbé-Billé & J-M. Thouvenin (Dir.), *Mélanges en l'honneur du Professeur Habib Slim, Ombres et lumières du droit international* (Pédone, Paris, 2016) 175-190; Y. Tanaka, 'Reflections on the Conservation and Sustainable Use of Genetic Resources in the Deep Seabed Beyond the Limits of National Jurisdiction', *Ocean Development & International Law* (2008) 129-149 [DOI: 10.1080/00908320802013719].

94 Cf. the very well documented report, Y. Giron & A. Le Sann, *Blue Charity Business - la réforme des pêches européennes – premier panorama – 2000 à 2011*, Pêche et développement 2012; and also documents presented during the conference of Yan Giron, *Vers une privatisation des océans ?*, Lorient Maison de la mer, 8 décembre 2014.

95 F. Féral & B. Salvat (Dir.), *Gouvernance, enjeux et mondialisation des grandes aires marines protégées* (L'Harmattan, Paris, 2014); F. Féral, 'L'extension récente de la taille des aires marines protégées : une progression des surfaces inversement

Ocean,[96] and the stratagem used by the United Kingdom in the Chagos Archipelago which is totally at the opposite of sustainable development principles.

Given the difficulties of enforcement, and the limited use of MPAs in jurisdictional waters and on the high seas, in both regions where there is an indisputable legal basis to their proclamation, in the Mediterranean[97] and the Antarctic,[98] it is evident that the issue is above all political and economic.

There is no coincidence that unconvinced states include United States, Russia, Japan, Canada, South Korea, developed countries where bioprospecting is an industrial reality. Conversely, developing states are globally favorable to a multilateral agreement, even though it is also interesting to note that the Group 77/China was progressively losing its coherence, due to the fact that some members have greater stakes than others.

In order not to be deceived by the future, it can also be useful to remember some lessons learned,[99] in particular from the Third Conference, taking into consideration the fate of the concept of common heritage of mankind proposed by Arvid Pardo fifty years ago,[100] especially after the adoption of the Implementation Agreement of 1994,[101] and taking into consideration the current prevailing approach *on the seabed and subsoil.*

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proportionnelle à leur normativité', *VertigO - la revue électronique en sciences de l'environnement*, Hors-série 9, juillet 2011, *Gestion durable des zones côtières et marines : nouveaux discours, nouvelles durabilités, nouvelles frontières* [DOI: 10.4000/vertigo.10998]; Y. Giron, 'The other side of large-scale, no-take, marine protected areas in the Pacific Ocean', in E. Fache & S. Pauwels (Eds.), *Fisheries in the Pacific The Challenges of Governance and Sustainability* (Pacific-Credo Publications, 2016) 77-117; P. Leenhardt *et al.*, 'The rise of large-scale marine protected areas: Conservation or geopolitics?', *Ocean & Coastal Management* (2013) 112-118; S. Lelong, V. du Castel, Y. Giron, 'La croissance bleue. Puissances publiques versus puissances privées', *Diploweb.com La Revue géopolitique*, mardi 19 janvier 2016.

[96] As evidenced by the network of territorial influence into Pacific maritime areas, developed in particular via the Conservation Trusts formula, the twinning of MPAs, and the involvement of American territories (Guam, Northern Mariana Islands) in initiatives such as the Micronesia Challenge; this is part of the strategy used by the United States in order to assert their presence in front of Chinese positions, in the vicinity of the Russian zone of influence, and even to be able to interfere more or less discreetly in the French Pacific territories.

[97] In the framework of the Barcelona System, there is only one MPA incorporating high seas waters, with the legal status of Specially Protected Area of Mediterranean Importance (SPAMI), the Pelagos Sanctuary, established in 1999 by an international agreement between France, Italy and Monaco; all attempts to promote the development of a network of MPAs and other projects, such as the Franco-Spanish project in the Gulf of Lions, have failed. Cf. N. Ros, 'Environmental protection of the Mediterranean Sea', 11 *Revista de Estudios Jurídicos* (2011) 95-127; 'Régimes juridiques et gouvernance internationale de la mer Méditerranée', in S. Doumbé-Billé & J-M. Thouvenin (Dir.), *Mélanges en l'honneur du Professeur Habib Slim, Ombres et lumières du droit international* (Pédone, Paris, 2016) 205-231.

[98] Within the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), a MPA in the Ross Sea could finally be established on 28 October 2016, after five years of veto from China and then Russia; cf. K.N. Scott, 'Protecting the Last Ocean: the Proposed Ross Sea MPA. Prospects and Progress', in G. Andreone (Ed.), *Jurisdiction and Control at Sea. Some environmental and security issues*, MARSAFENET (Giannini Editore, 2014) 79-90.

[99] N. Ros, 'Procesos convencionales del Derecho del Mar: Lecciones aprendidas', in J.M. Sobrino Heredia (Coord.), *La toma de decisiones en el ámbito marítimo: Su repercusión en la cooperación internacional y en la situación de las gentes del mar* (Editorial Bomarzo, Albacete, 2016) 261-277.

[100] United Nations General Assembly, Twenty-Second Session, Official Records, First Committee, Agenda Item 92, *Examination of the question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and use of their resources in the interests of mankind*, Documents A/C1/1515 and 1516.

[101] 1994 Agreement relating to the Implementation of Part XI of UNCLOS.

(2) On the Seabed and Subsoil

In the International Seabed Area (b), the achievement of the legal regime is still underway, but *on the continental shelf, offshore exploitation* (a) is already a reality and a challenge for sustainable development.

(a) On the Continental Shelf: Offshore Exploitation

From the vantage point of International Law, the *weak legal framework* (i) applicable to offshore exploitation imposes a *need for governance* (ii), in order to strike a balance respectful of sustainable development objectives.

(i) *Weak Legal Framework*

At the universal level, there is no convention specially dedicated to offshore activities; besides the IMO Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC),[102] obviously more focused on ships than on platforms, the only legal framework is defined under LOSC, with general principles, in terms of maritime areas and by reference to the rights and obligations of the coastal state.[103]

In a sustainable development perspective, the continental shelf is a real challenge. Indeed, offshore activities are very lucrative economic activities, which can be economically and socially vital. In order to achieve economic development the continental shelf is an essential asset, both for developed and developing states, because its exploitation can provide incomes and jobs, but also independence in terms of energy. It explains why the establishment of the outer limits of the continental shelf beyond 200 nautical miles, and the submissions to the Commission on the Limits of the Continental Shelf, are also a great challenge in terms of future development.[104]

But offshore operations, including oil and gas, and other mining activities, involve a great potential of risks to the marine environment, especially because of the current use of deep and ultra-deep technologies, which are not only very expensive but also very dangerous and risky; before the dramatic accident occurred in April 2010, the *Deepwater Horizon* platform had established a depth

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[102] OPRC was adopted in 1999 and entered into force in 1995.

[103] In particular, Article 208 *Pollution from seabed activities subject to national jurisdiction* and Article 214 *Enforcement with respect to pollution from seabed activities.*

[104] INDEMER, *Le plateau continental étendu aux termes de la Convention des Nations Unies sur le droit de la mer du 10 décembre 1982. Optimisation de la demande*, Académie de la Mer (Pédone, Paris, 2004); S.V. Suarez, *The Outer Limits of the Continental Shelf. Legal Aspects of their Establishment*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Band 199 (Springer 2008); T. Treves, 'La limite extérieure du plateau continental : Evolution récente de la pratique', *Annuaire français de droit international* (1989) 724-735 [DOI: 10.3406/afdi.1989.2929]. The challenges are also important a contrario, because the outer limits of the continental shelves will be those of the International Seabed Area, and of the Common Heritage of Mankind; cf. A. Chircop, 'Managing Adjacency: Some Legal Aspects of the Relationship Between the Extended Continental Shelf and the International Seabed Area', *Ocean Development & International Law* (2011) 307-316 [DOI: 10.1080/00908320.2011.619364]; E. Franckx, 'The International Seabed Authority and the Common Heritage of Mankind: The Need for States to Establish the Outer Limits of their Continental Shelf', *The International Journal of Marine and Coastal Law* (2010) 543-567 [DOI: 10.1163/157180810X525377]; J. Yu & W. Ji-Lu, The Outer Continental Shelf of Coastal States and the Common Heritage of Mankind, *Ocean Development & International Law* (2011) 317-328 [DOI: 10.1080/00908320.2011.619366].

record, in 2009, in the same Gulf of Mexico, with a drilling of more than 10 km...

Coastal states have the sovereign rights to exploit, but most of the time they cannot do it themselves and authorize foreign companies to do so. In terms of economic and sustainable development, it can be unproductive due to the legal or contractual conditions. Transnational contracts are often unbalanced and although the legislation, including some monetary and fiscal aspects, is adopted by the coastal state, it is evident that it can be influenced by offshore companies. If a so-called old developed democracy such as France authorizes offshore exploration and exploitation without any financial compensation since 1993,[105] it is obviously very difficult for developing countries to resist the strong lobby of the oil and gas industry.

In this context, obligations to protect and preserve the marine environment are usually considered obstacles to economic development, and states, both developed and developing, do not naturally tend to prioritize them, taking into consideration sustainable development requirements.[106] These are the reasons that impose a *need for governance.*

(ii) *Need for Governance*

Indeed, in this context, and given that states are reluctant to the adoption of a global and universal convention devoted to offshore activities, and including in particular responsibility and liability mechanisms, a governance framework, international or regional as *a minimum*, appears the best option in order to strike a balance between exploitation and protection, in a perspective of sustainable development.

To be realistic, regional cooperation, in particular in the framework of UNEP regional seas programme, is the most effective solution. Indeed, in the world, there are only two existing treaties especially devoted to offshore activities, and they were both adopted under UNEP regional seas systems.[107] The first is the Protocol Concerning Marine Pollution Resulting from Exploration and Exploitation of the Continental Shelf,[108] adopted on 29 March 1989 and entered into force on 17 February 1990, in the framework of the 1978 Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution,[109] in the ROPME (Regional Organization for the Protection of the Marine Environment) Sea Area, including the Persian Gulf and the Sea of Oman, a region where offshore issues are very important.[110] The second is the Protocol for the

[105] N. Ros, 'Au-delà de la borne 602: la frontière maritime entre l'Espagne et la France en mer Méditerranée', 4 *Journal du Droit international Clunet* (2014), at 1107-1110; 'La pollution résultant de l'exploitation du sol et du sous-sol : le cas du plateau continental', in *Droit des sites et sols pollués. Bilans et perspectives* (L'Harmattan, Paris, 2017) forthcoming.

[106] N. Ros, 'Quel régime juridique pour l'exploitation offshore en Méditerranée ?', *Annuaire de Droit Maritime et Océanique* (2015) 205-261.

[107] In all other cases, states prefer non-binding instruments such as in the Arctic, OSPAR (North-East Atlantic), or West, Central and Southern Africa.

[108] Protocol concerning marine pollution resulting from exploration and exploitation of the continental shelf.

[109] Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution, adopted on 24 April 1978 and entered into force on 1 July 1979.

[110] D. Momtaz, 'La protection de l'environnement des mers fermées et semi-fermées : le cas du Golfe persique', in N. Ros & F. Galletti (Dir.), *Le droit de la mer face aux "Méditerranées", Quelle contribution de la Méditerranée et des mers semi-fermées au droit international de la mer ?*, Cahiers de l'Association internationale du Droit de la Mer 5 (Editoriale Scientifica, Napoli, 2016) 171-182.

 DOI: 10.17103/sybil.21.2

Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil,[111] adopted on 14 October 1994, in the framework of the Barcelona System in the Mediterranean Sea, but entered into force only on 24 March 2011.[112] It is interesting to note that this delay is due to coastal states, especially member states of the European Union, because of the high level of requirements of the Protocol, in particular the compulsory insurance or other financial security to cover liability of the operator. As regards the EU, the Directive on safety of offshore oil and gas operations, adopted on 12 June 2013,[113] has a limited spatial applicability and is a disappointment compared to the initially proposed regulation...[114]

In a perspective of sustainable development, offshore activities remain of great environmental and social concern. To improve environmental conditions and safety and health of workers, better governance is needed worldwide, to guarantee the financial responsibility of economic operators and prevent registrations of convenience, as in the case of *Deepwater Horizon* registered in the Marshall Islands... Obviously similar issues also exist *in the International Seabed Area.*

(*b*) *In the International Seabed Area*

The de facto revision of Part XI of LOSC devoted to the Area, resulting from the adoption of the 1994 Implementation Agreement,[115] has imposed a *new economic approach* (i) to seabed resources. In a

[111] Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil.

[112] On this Protocol and related Mediterranean challenges, cf. E. Raftopoulos, 'Sustainable Governance of Offshore Oil and Gas Development in the Mediterranean: Revitalizing the Dormant Mediterranean Offshore Protocol', Thursday 19 August 2010, *MEPIELAN E-Bulletin*; N. Ros, 'Exploration, Exploitation and Protection of the Mediterranean Continental Shelf', in C. Cinelli & E.M. Vásquez Gómez (Ed.), *Regional Strategies to Maritime Security: a Comparative Perspective*, MARSAFENET (Tirant lo Blanch, Valencia, 2014) 101-132; 'Quel régime juridique pour l'exploitation offshore en Méditerranée ?', *Annuaire de Droit Maritime et Océanique* (2015) 205-261; 'Vers une gouvernance régionale de l'offshore en mer Méditerranée ?', in A. Del Vecchio & F. Marrella (Dir.), *International Law and Maritime Governance. Current Issues and Challenges for the Regional Economic Integration Organizations / Droit international et gouvernance maritime. Enjeux actuels et défis pour les organisations régionales d'intégration économique / Diritto Internazionale e Governance Marittima. Problemi Attuali e Sfide per le Organizzazioni di Integrazione Economica Regionale*, Cahiers de l'Association internationale du Droit de la Mer 3 (Editoriale Scientifica, Napoli, 2016) 219-242.

[113] Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC, OJ 2013 L178/66-106; cf. J. Juste Ruiz, 'La directive européenne sur la sécurité des opérations pétrolières et gazières en mer', *Revue Juridique de l'Environnement* (2014) 23-43.

[114] On Euro-Mediterranean aspects, N. Ros, 'Environmental Challenges of Offshore Activities in International and European Union Law', in A. Caligiuri (Ed.), *Governance of the Adriatic and Ionian Marine Space*, Final Publication MaReMaP-AIR, Cahiers de l'Association internationale du Droit de la Mer 4 (Editoriale Scientifica, Napoli, 2016) 203-220; 'Problems of Marine Pollution resulting from Offshore Activities according to International and European Union Law', in A. Caligiuri (Ed.), *Offshore Oil and Gas Exploration and Exploitation in the Adriatic and Ionian Seas*, MaReMaP-AIR (Editoriale Scientifica, Napoli, 2015) 34-42; 'La réglementation euro-méditerranéenne des activités offshore', in *Diritto del Commercio Internazionale* (2015) 93-136; L. Schiano di Pepe, 'Offshore oil and gas operations in the Mediterranean Sea: regulatory gaps, recent developments and future perspectives', in J. Juste Ruiz & V. Bou Franch (Dir.), *Derecho del Mar y Sostenibilidad ambiental en el Mediterráneo* (Tirant lo Blanch, Valencia, 2014) 363-387.

[115] Cf. F.H. Paolillo, 'Cuestiones institucionales en el Acuerdo de 1994 relativo a la parte XI de 1a Convención sobre el Derecho del Mar', *Estudios Internacionales* (1995) 431-449; J.A. Carrillo Salcedo, 'De la Déclaration de 1970 sur les Fonds marins et leur sous-sol à l'Accord relatif à l'application de la Partie XI de la Convention des Nations Unies sur le droit de la mer', in R. Casado Raigón & G. Cataldi (Dir.), *L'évolution et l'état actuel du droit international de la mer, Mélanges de droit de la mer offerts à Daniel Vignes* (Bruylant, Bruxelles, 2009) 83-91; also the proceedings of the Symposion *The Entry into Force of the Convention on the Law of the Sea: A Redistribution of Competences Between States and International Organisations*

perspective of sustainable development, *environmental challenges* (ii) are obviously also at stake under the jurisdiction of the International Seabed Authority.

(i) *New Economic Approach*

As of today, International Seabed Authority has issued the Mining Code, a set of three regulations on prospecting and exploration for polymetallic nodules (13 July 2000, updated on 25 July 2013),[116] polymetallic sulphides (7 May 2010)[117] and cobalt-rich ferromanganese crusts (27 July 2012);[118] meanwhile, it has also adopted recommendations for contractors. At the beginning of 2017, the International Seabed Authority has signed fifteen-year contracts for exploration activities with twenty-six contractors sponsored by states parties; sixteen contracts are for exploration for polymetallic nodules, fifteen in the Clarion-Clipperton Fracture Zone and one in the Central Indian Ocean Basin; six contracts are for exploration for polymetallic sulphides in the South West Indian Ridge, Central Indian Ridge and the Mid-Atlantic Ridge, and four contracts for exploration for cobalt-rich crusts in the Western Pacific Ocean.[119]

Seven of these exploration contracts have already come to an end, but exploitation is not yet on the agenda and its economic dimension has changed a lot since the adoption of LOSC, in its real perception as in its imaginary dimension... The principle is still stated as under Article 136, "the Area and its resources are the common heritage of mankind", and consequently Article 140 provides that "activities in the Area shall [...] be carried out for the benefit of mankind as a whole [...] and taking into particular consideration the interests and needs of developing States". Although adopted before the official emergence of the concept, Part XI was the greatest sustainable development promise... But the 1994 Agreement, combined with the political and economic evolution, has converted the common heritage into a myth;[120] the existing legal regime is far below the Pardo proposal.[121] It seems

in Relation to the Management of the International Commons?, Heidelberg, January 26 - 28, 1995, published in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht - Heidelberg Journal of International Law* (1995) 273-658.

[116] ISBA/19/A/9, Decision of the Assembly of the International Seabed Authority regarding the amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area; ISBA/19/C/17, Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters.

[117] ISBA/16/A/12 Rev. 1, Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area.

[118] ISBA/18/A/11, Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area.

[119] Deep Seabed Minerals Contractors.

[120] On the initial concept, cf. A.Ch. Kiss, 'La notion de patrimoine commun de l'humanité', 175 *Recueil des cours de l'Académie de droit international de La Haye* (1982) 99-256; R. Wolfrum, 'The Principle of the Common Heritage of Mankind', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht - Heidelberg Journal of International Law* (1983) 312-337; concerning its evolution, M. Bourrel, T. Thiele, D. Currie, 'The common of heritage of mankind as a means to assess and advance equity in deep sea mining', *Marine Policy* (2016) forthcoming; E. Guntrip, 'The Common Heritage of Mankind: an Adequate Regime for Managing the Deep Seabed?', *Melbourne Journal of International Law* (2003) 376-405; A. Jaeckel, K.M. Gjerde, J.A. Ardron, 'Conserving the common heritage of humankind - Options for the deepseabed mining regime', *Marine Policy* (2017) 150-157; M.T. Ponte Iglesias, 'La zona internacional de los fondos marinos como patrimonio común de la humanidad: una aspiración truncada', *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz* (Ponencias publicadas, Universidad del País Vasco, 1997) 177-205.

[121] J.A. Carrillo Salcedo, 'De la Déclaration de 1970 sur les Fonds marins et leur sous-sol à l'Accord relatif à l'application

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satisfactory for developed states, obviously representing most of the current contractors of the Authority. As for developing states, the benefits are more uncertain and, even taking into consideration their interests and needs, some risks exist as regards their international responsibility, a fortiori in the hypothesis of a sponsorship of convenience, as evidenced by the Advisory Opinion issued by ITLOS on 1 February 2011, as regards *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.*[122] Nevertheless, all states are concerned by the *environmental challenges* of the future exploitation of the Seabed Area and its mineral resources.

(ii) *Environmental Challenges*

In the perspective of a future exploitation, another objective of sustainable development is the *Protection of the marine environment*, a conventional obligation under Article 145 of LOSC: "Necessary measures shall be taken [...] to ensure effective protection for the marine environment from harmful effects which may arise from [...] activities" in the Area. The International Seabed Authority has the responsibility to establish international rules, regulations and procedures to prevent, reduce and control pollution of the marine environment from mining activities, especially exploitation of seabed non-living resources, and to protect and conserve the great but fragile biodiversity of the Area, preventing damage to specialized and quite pristine ecosystems, both flora and fauna.

In 2012, the Council of the Authority adopted an Environmental Management Plan (EMP) for the Clarion-Clipperton Zone, in the Pacific Ocean, to be implemented on a provisional basis over an initial three-year period;[123] it includes the establishment of a network of nine areas of particular environmental interest intended to protect the biodiversity and ecosystem structure and functioning of the Zone from the potential impacts of seabed mining.[124] Nevertheless, these areas are situated at the periphery but within the limits of the current exploration zone;[125] according to specialists they will be necessarily impacted by deep seabed mining. Furthermore, they are the only examples of environmental protection, in the only case of polymetallic nodules exploration; so far, nothing similar

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de la Partie XI de la Convention des Nations Unies sur le droit de la mer', in R. Casado Raigón & G. Cataldi (Dir.), *L'évolution et l'état actuel du droit international de la mer, Mélanges de droit de la mer offerts à Daniel Vignes* (Bruylant, Bruxelles, 2009) 83-91.

[122] ITLOS, Advisory Opinion of 1 February 2011. Cf. J.N. Guerrero Peniche, 'La opinión consultiva del Tribunal Internacional del Derecho del Mar: Aspectos relativos a la determinación del vínculo efectivo entre los Estados y las personas jurídicas a las que patrocinan para llevar a cabo actividades en la Zona', *Anuario Colombiano de Derecho Internacional* (2012) 153-218; M.T. Ponte Iglesias, 'La prospección y exploración de la zona internacional de los fondos marinos y oceánicos de una manera ambientalmente responsable. Aportes de la primera opinión consultiva de la Sala de Controversias de Fondos Marinos', in J. Jorge Urbina & M.T. Ponte Iglesias (Coord.), *Protección de intereses colectivos en el Derecho del Mar y cooperación internacional* (Iustel, Madrid, 2012) 63-107; and with a more general point of view, J-P. Beurier, 'L'autorité internationale des fonds marins, l'environnement et le juge', *VertigO - la revue électronique en sciences de l'environnement*, Hors-série 22, septembre 2015, *La représentation de la nature devant le juge : approches comparative et prospective* [DOI: 10.4000/vertigo.16169].

[123] ISBA/18/C/22, Decision of the Council relating to an environmental management plan for the Clarion-Clipperton Zone; ISBA/17/LTC/7, Environmental Management Plan for the Clarion-Clipperton Zone.

[124] M. Lodge, 'Some Legal and Policy Considerations Relating to the Establishment of a Representative Network of Protected Areas in the Clarion-Clipperton Zone', *The International Journal of Marine and Coastal Law* (2011) 463-480; M. Lodge *et al.*, 'Seabed mining: International Seabed Authority environmental management plan for the Clarion-Clipperton Zone. A partnership approach', *Marine Policy* (2014) 66-72.

[125] Exploration Areas.

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is planned for polymetallic sulphides and cobalt-rich ferromanganese crusts.

When exploitation will begin, it will be even more necessary to reach a balance, in order not to destroy once and for all the treasures of this unknown biodiversity. Otherwise, it will be hardly possible to refer to sustainable development, given the very slow development pace of such ecosystems, irremediably lost for future generations...

CONCLUSION

After the CoP 21 of United Nations Framework Convention on Climate Change, convened in Paris from 30 November to 11 December 2015 and concluded by the adoption of the Paris Agreement[126] —a diplomatic success but a climatic failure given its material soft law character— entered into force on 4 November 2016, climate challenges linking sustainable development and Law of the Sea cannot be ignored anymore, even though the issue of oceans and seas has so far been addressed only marginally and in no way from a legal perspective.

Indeed, climate change and related effects on the oceans, especially warming, sea level rise and ocean acidification are inevitably expected to continue in the future, with substantial risks to marine environment, especially polar ecosystems and coral reefs, and potentially detrimental consequences for marine activities, primarily fisheries. Ocean-related sectors, for example shipping and fishing, have worked for a number of years towards developing sectoral energy-efficiency measures with a view to reducing their greenhouse gas emissions, particularly following FAO and IMO initiatives. The 70th session of the Marine Environment Protection Committee (MEPC) of the International Maritime Organization, convened in London from 24 to 28 October 2016, precisely adopted a set of dedicated measures, such as mandatory data collection system for fuel oil consumption and a roadmap for reducing greenhouse gas (GHG) emissions.[127] But the effects and risks associated with climate change remain a great concern, especially in low-lying coastal zones, Small Island Developing States and other small islands. In addition to human and environmental impacts, the loss of land along the coastlines or the disappearance of an island could have serious legal consequences, for example regarding the definition of the baselines used to measure maritime areas, and indirectly to delimit them, but also in terms of existence and viability, especially in the case of a small island state...

In this context, it is important to consider how the relevant policy and regulatory frameworks interlink, even if conventional provisions related to this approach are really very few... In the case of LOSC, only three articles can be mentioned in this perspective and in close connection with sustainable development imperatives and requirements: Article 192 stating as a *General obligation* that "States have the obligation to protect and preserve the marine Environment", Article 212 dealing with *Pollution from or through the atmosphere*, and Article 222 dedicated to *Enforcement with respect to pollution from or through the atmosphere*. The 1992 United Nations Framework Convention on Climate Change is applicable insofar Article 2 gives a very broad definition of the objective of the

[126] Paris Agreement, United Nations, 2015.

[127] IMO, 70th session of the Marine Environment Protection Committee (MEPC).

 DOI: 10.17103/sybil.21.2

Convention, and any related legal instruments that the Conference of the Parties may adopt, i.e. "to achieve [...] stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system"; obviously this requirement also applies to oceans and seas. Last text regulates marine geo-engineering which are methods that aim to deliberately alter natural systems to counter climate change, including ocean fertilization, defined as "any activity undertaken by humans with the principal intention of stimulating primary productivity in the oceans";[128] these are the 2013 amendments to the 1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter. These new provisions will enter into force sixty days after two-thirds of the Contracting Parties have deposited an instrument of acceptance with the IMO; they prohibit all ocean fertilization activities, other than those specifically referred to in the new annex 4, that is to say, unless the proposed activity is assessed as constituting legitimate scientific research.

Climate change is expected to become one of the key points of interaction between sustainable development and Law of the Sea; and it would be an error to continue to believe that only Small Island Developing States will be affected by this dialectic.

[128] Under new annex 4 on marine geoengineering, "Ocean fertilization does not include conventional aquaculture, nor mariculture, nor the creation of artificial reefs".

 DOI: 10.17103/sybil.21.2

the SPANISH YEARBOOK of INTERNATIONAL LAW

Relations between the European Union and Russia in the light of the notion of Empire

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Abstract: This article has the object to analyse the relationship between the European Union and Russia in the light of the Empire notion. Research focuses not what is happening today but in their interpretation, taking into account Empire notion, in the European Union and Russia. The core idea is that the Empire notion continuous to have relevance in the State system; the evidence is the international practice and the history of International relations. The notion of Empire has not been taking into account sufficiently in the analysis of International law. Furthermore we have analysed the situation in the globalisation and the de-territorialisation of power. The conflicts and the practice of International law have been analysed.

Keywords: Empire - European Union-Russia relationships. International law

(A) EU-RUSSIA RELATIONS

The purpose of this article is to analyse relations between Russia and the European Union from the perspective of their respective identities, as players on the stage of international relations, and of the idea of Empire, nowadays neglected and ignored by international legal doctrine.

Excellent analyses, such as that by Antonio Blanc Altemir[1], have already been published on commercial, energy and other relations between the two regions, as well as on the framework of the various conventions, from the 1994 agreement to the TACIS and ENPI programmes, the four common spaces and the more recent partnership for modernisation. These relations have traditionally been marked by conflict and cooperation and can be divided into three distinct stages: one under Yeltsin (19912000) and two under Putin, before and after the conflict over Georgia (and subsequently over Ukraine), all of them conditioned by Issues such as oil, Chechnya, political and economic instability, Georgia, Ukraine and Crimea.

Russia has historically claimed specific differential treatment from the EU, in recognition of its role as a global player. The combination of disputes with some Member States on the one hand, and recent events on the other, however, has led to a hardening of relations that steadily worsened over the period between the 2008 Russo-Georgian War and the annexing of Crimea in 2014, as Blanc points out in his analysis. At the time of writing the situation has not improved, in spite of the mutual interdependence in commerce and energy between the two regions. Furthermore, on 21 November 2013 the Ukraine government decided to suspend negotiations over the Association Agreement with

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[1] A. Blanc, *La Unión Europea y los BRICS (Brasil, Russia, India, China y Sudafrica)*, (*Ed* Thomson Reuters Aranzadi, 1st edition 2015), 212.

 DOI: 10.17103/sybil.21.3

the EU, opting instead to form part of the Eurasian Economic Union, promoted by Russia. The way in which events have subsequently evolved has led to the current critical situation, one on which both sides need to reflect, but from a much broader perspective. The focus of this article is therefore not so much on recent events as on analysing EU-Russia relations in the light of the idea of Empire.

(B) RUSSIA AND THE EUROPEAN UNION: TWO DIFFERENT VIEWS OF EMPIRE

When it comes to analysing the relations between the EU and Russia one has to consider the matter of a nation's soul, its very nature, if such an expression can be used, in the broadest possible sense. Russia has from the outset been characterised by its imperial nature, first under the Tsars, then under the Soviet system[2] and subsequently down to the present day. In contrast, the EU is a region of lost empires in search of an identity.

Russia started on its process of geographical expansion under Ivan the Terrible, growing in size from approximately 24,000 square kilometres (9,265 square miles) in 1462 to 13.5 million square kilometres (5.2 million square mile) in 1914 as a consequence of strategic and economic causes: an imperial system based on the ideology of Russian exceptionalism (and the doctrine of the Third Rome). The Tsarist Empire toppled as a result of World War One and the Soviet Revolution, being replaced by the Soviet Empire, that of the USSR, which extended its control (by military means when necessary) over a large number of territories.

Furthermore, after World War Two the USSR expanded the area under its control to include the countries falling within its sphere of influence, its external Empire, covering a large part of Central and Eastern Europe, and created a number of international organisations as one of the various ways in which it exercised its influence. With the collapse of the Soviet Empire the internal empire disintegrated, its fifteen republics becoming independent states. Nowadays, the Putin doctrine has led Russia to attempt to maintain an imperial stance in a multipolar world. Russia sees the EU and the US as obstacles restricting its capacity to influence; it is rebuilding its international position with the help of powerful resources such as its territory, its nature as a Eurasian country, its nuclear forces and military might, its natural resources, its historical role and sphere of influence, the reorganisation of alliances and the existence of minority Russian populations in third countries, amongst others[3].

In contrast, the European Union came into existence at a time when European empires were collapsing; in this sense a parallel can be drawn with the Eurasian Economic Union promoted by Russia. The Spanish and Portuguese Empires, with their seaborne expansion in Asia and the Americas, followed by the French, British and Dutch Empires and later, in the nineteenth century, by the Belgian, German and Italian Empires in Africa, meant that European countries acquired an imperial identity as individual states, not as the United States of Europe and much less as the European Union. Europe's rise and fall occurred between the beginning of the modern era and World

[2] G. Graeme, "Russia: los dos Imperios", in G. Graeme (Ed), *La era de los Imperios* (The Age of Empires), (Blume, 2007) at 176-196

[3] N. Melvin, "Russia: Europe's revisionist power", in *Challenges for European foreign policy in 2015. How others deal with disorder*. (Fride, Bruxelles, 2015) 31-39, at. 35

War Two: empires such as that of Spain helped to lay the foundations of international society and international law[4]; classical international law was the product of imperialism and a means, as Anghie points out[5], by which European nations promoted their own interests.

The nineteenth century witnessed a huge expansion of European power during which the world's land surface controlled by its countries increased from 35% to 85% between 1800 and 1914, aided by capitalism and the rapid growth of technology[6]. Hobsbawm, in his excellent analysis of the age of empire (1875-1914), analyses how most of the world outside Europe and the American continent, which by then formed part of the international system of civilised (and, according to Truyol[7], Christian) states, were either formally governed by, or came under the informal political sway of, the United Kingdom, France, Germany, Italy, the Netherlands, Belgium, the United States and Japan; Western powers established areas of influence or direct rule in the traditional large Asian empires[8], whilst Africa belonged to European empires alone. Europe, as a political concept, thus came into existence at a time when the European empires that once ruled the world were crumbling, and has still not succeeded in taking their place in that dimension. Europe's imperial strength meant that the universalization of international society took place in its own image and likeness, Euro centrism being a significant factor in the international order[9].

Nowadays, however, we are faced with a post-imperial Europe that is still seeking its place in the world[10]. As Crespo Maclennan points out, the main conclusion that Europeans have come to, after two World Wars, is that they cannot afford to be divided and thus the unification of Europe has become an ambition, not merely a pipe dream. True unification would bring with it formidable economic and political power, sufficient to enable it to recover its world hegemony. The project, however, is still to solidify, probably because it needs more time to ripen, or so we hope.

The European Union's difficult position in the face of globalisation and its enlargement, the failure to approve a European Constitution in 2005, the economic crisis that started in 2008 and the subsequent social crisis have led to an identity crisis for the European model. The last 25 years have seen reforms such as those of Maastricht, Amsterdam and Nice, culminating with that of Lisbon. But this is not enough: the EU needs to renew its project of integration along much clearer lines in order to face the challenges of globalisation and enhance its current degree of integration, for which larger doses of collective ambition are needed. It is not just a matter of defining, from a legal perspective, whether the EU is a state, an international organisation, a federation, a confederation or a super-state;

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4 On the Spanish Empire: s H. Thomas, H. *El Imperio español. De Colón a Magallanes*/Rivers of Gold. (Editorial Planeta, Barcelona, 2003) 894. H. Kamen, *Imperio La forja de España como potencial mundial/Spain's Road to Empire. The making of a world power. 1492-1763. (Editorial Santillana, 2003)*, 939. The perspective of international law has been studied by, amongst others: H. Koskenniemmi, "Imperio y Derecho internacional. La verdadera contribución española", in Y. Gamarra (Ed), *Historia del pensamiento iusinternacionalista español del siglo XX* (Editorial Thomson Reuters, Madrid, 2012) at. 379.

5 A. Anghie, *Imperialism, sovereignty and the making of international law* (Cambridge University Press, 2004) 352, at 5.

6 D.R. Headrick, *El poder y el Imperio* (Editorial Crítica, Barcelona, 2010, 2011) at 10.

7 A. Truyol *La sociedad internacional* (Editorial Alianza, Madrid 1991).

8 E. Hobsbawm, *La era del imperio* (Editorial Crítica, Barcelona, 2012) 728.

9 C. Fernández Liesa, *Cultura y Derecho internacional* (Editorial Universidad Alcalá de Henares, Madrid, 2012), 225

10 C. Maclennan, *Imperios. Auge y declive de Europa en el mundo, 1492-2012.* (Editorial Galaxia Gutenberg, Madrid, 2012) 518 pp, at 425 .

it is a question of it having a global ambition to match its history and its economic and cultural power.

(c) Discussions on Empire in the political system and in international law.

The creation of the system of European states, in the modern era, saw the beginning of the dilution of the idea of empire in studies on international law, an error that distorts the perspective. Legal formalism and the lack of interdisciplinary analyses on the part of many international law scholars have led to state-centric views of society and international law that have no place in today's globalised world.

(1) On the continuity of Empires in the system of European states and their universalization

There is nothing to allow us to think that the birth of the system of European states caused the disappearance of empire. Empires are characterised by their expansive nature and develop through expansion, through the conquest or annexation of new territories. Although it is true that the conquering of territories is prohibited under international law, it is a very recent phenomenon in the international order, only having been introduced in the UN Charter. This prohibition therefore, cannot be the reason for the end of imperial expansion and conquest: empires came to an end, or their expansionism was greatly reduced, when the whole world fell under their domination, two world wars had taken place and the Cold War had arrived.

As Carl Schmitt has explained, land-appropriation was a constitutive act of law, that of 'radical title'. In the modern era, the division and distribution of space commences with the conquest of the New World, which rather than a foe was seen as "*free space*, as an area open to European occupation and expansion". European public law, he states, ended when the New World began, as did a "struggle for land-appropriation which knew no bounds". But with the dissolution of the *jus publicum europaeum*, which Schmitt places during the period between 1890 and 1918, its place was occupied by an empty normativism of allegedly recognised rules that obscured consciousness of the fact that a concrete order of previously recognised powers had been destroyed and that a new one had not yet been found. The period between 1890 and 1939 saw the end of that spatial order of the earth that had supported traditional, specifically European international law and the bracketing of war it had achieved.

Leaving Schmitt's Nazism (criticised in a previous article[11]) to one side, there can be no doubt that the universalization of international society during the twentieth century brought about a transformation and change of meaning of empire and imperialism, in the classical sense, once the failure of Hitler's plans for Lebensraum had come to nothing. The earth's land mass is finite, and its redistribution is no longer possible under the rule of law, but that is not to say that empires or

[11] C. Fernández Liesa, A. Kramarz, "*Estudio sobre el libro de C. Zarka Un detalle nazi en el pensamiento de C. Schmitt*", 21 Derechos y libertades (2009), 285-292, at 290.

imperialism have ceased to exist, nor that geopolitics has ceased to have a function.

Burbank and Cooper[12] have analysed the world of nation-states we now know, which is little more than sixty years old, in comparison with the thousands of years of empire, whose politics, practices and cultures continue to shape our world. For their part, Buzan and Little highlight the exaggerated role given to state centrism in the analysis of the structure of the international system[13].

Luard, after analysing the different types of international society down the ages[14], demonstrates that forms of hegemony have prevailed between the members of all international societies. Watson, after studying the evolution of international society[15], highlights the role of hegemony during the various different historical periods, including ancient systems, medieval European society, the Renaissance, the Westphalian system, European expansion, the collective hegemony of the concert of Europe and today's global international society, from the collapse of European domination to the East-West conflict, decolonisation and contemporary international society.

It is thus appropriate to consider that the study of empires over the course of history points to the significant role they have played, and continue to play, in the international system and international law, to the extent that it is in our view legitimate to affirm the continuity of empires within the system of states. They have proved to be contemporaries of the dinosaurs that survived a total transformation of the system, hidden under the formalism of law and demonstrating their vitality on many an occasion.

If historians have debated the continuity of empires[16], then no less can be expected in the field of international law. Authors such as Truyol[17] have in the past produced studies highlighting the fact that the idea of empire was a factor common to all systems of international law. Thus, ancient Eastern civilisations had their Concert of Empires, China considered itself to be the Middle Empire and the Great Mogul Empire enjoyed an importance that is nowadays forgotten, whilst the Roman Empire (*arbiter mundi*) came back to life in Charlemagne's court, becoming the *Imperium christianum* (*sacrum Imperium*).

Although all this changed with the advent of the Westphalia system, it should not be forgotten that the new order of the modern era was in fact compatible with all the European empires that would thenceforth be built, with the existing ancient empires in other civilisations and with imperialism and other forms of hegemony and domination that are compatible with international law and the idea of sovereignty and equality between states, except for those notions that are incompatible with reality. For this very reason authors such as Anghie are of the opinion that we live in an era of ongoing

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12 J. Burbank, F. Cooper, *Imperios. Una nueva visión de la historia universal*, (Critica, Barcelona, 2011) 699.

13 B. Buzan, R. Little, *International system in world history. Remaking the study of international relations* (Ed. Oxford University Press, 2010) 447

14 The societies he analyses are the ancient Chinese system (771-221 BC), the Greek city-states (510-338 BC), the age of dynasties (1330-1559), the age of religions (1559-1648), the age of sovereignty (1648-1789), the age of nationalism (1789-1914) and the age of ideology (1914-19). E. Luard, *Types of international society* (London, 1976), at 381.

15 A. Watson, *The evolution of International society. A comparative historical analysis* (Ed. Routledge 1992, 2009) at 334.

16 E. Hobswabw, *La era del imperio*, supra n. 8, p. 678.

17 A. Truyol Serra, *Historia del Derecho internacional publico* (Spanish language version by Paloma García Picazo, Ed. Tecnos, Madrid, 1998), in toto.

empire, under a variety of new forms[18].

(2) On the future of Empire in an age of unilateralism, bipolarism and multilateralism

In more recent times the transformation of the state, the end of the Cold War and the constraints of globalisation have led to a transformation in the theory of empire.

On the one hand, North American unilateralism[19], after the end of the East-West conflict, alerted the doctrine and nations to the dangers it supposed for the healthy evolution of international law[20]. The state-centric vision of the US government, especially under George W. Bush, reflected the behaviour of an empire, the 2003 Iraq war being the paradigm of its imperial policy. North American unilateralism was reflected from the mid-1990s onwards in measures such as the change in the strategic concept of the Atlantic Alliance, announced on 24 April 1999, which envisaged actions outside its boundaries (backed by a large number of EU Member States). There has been a growing number of unjustified hegemonic behaviours, in defiance of the international order, coinciding with a lack of support for initiatives to protect the environment or combat the impunity of major crimes against humanity. Here, however, is not the place to enumerate the failings of the greatest power of the present moment.

On the other hand, neither has the transformation of the balances with Russia appeared to announce a multipolar world, as was seen in the case of the 1998-99 war over Kosovo. The attacks against the Twin Towers on 11 September 2001 brought the USA's national security strategies to the summit of unilateralism, ignoring international law and rejecting multilateralism, a prelude to the Iraq War and the doctrine of the pre-emptive use of military force.

National conceptions of international law[21], which shape to excess the interpretation of the international order in the light of national interests, have always existed. In the event of a conflict between national interest and international law, many states and their jurists put forward a forced interpretation of principles and rules; this has led to a structuring of these national conceptions of international law, which aim to legitimate the unsustainable in order to defend vital or special

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[18] A. Anghie, *Imperialism, sovereignty and the making of International law*, supra n. 5 at 355.

[19] A. Remiro Brotons, "Universalismo, multilateralismo, regionalismo y unilateralismo en el nuevo orden internacional", *Revista española de derecho internacional (1991)*, at 15 ; A. Remiro Brotons, "Desvertebración del Derecho internacional en la sociedad globalizada", 5 *Cursos euromediterráneos Bancaja de Derecho internacional*, (2001), at 214.; various authors, "Unilateralism in International law: Its Role and limits", II, 1,2 *European Journal of International law*, (2000); J.I. Sánchez Rodríguez, "El desafío del poder imperial al ordenamiento internacional general", in *Derecho internacional y crisis internacionales*, Madrid, Iustel, 2005, at 223-250; P. M. Dupuy, "The place and role of unilateralism in contemporary international law", *European Journal of international law*, 2000, at. 19-29; F. Fukuyama, *America en la encrucijada. Democracia, poder y herencia neoconservadora* (Barcelona ed. B, 2007); various authors, *El nuevo orden americano. ¿La muerte del derecho?* (*Almuzara*, Córdoba, 2005); T. Todorov, *El nuevo desorden mundial* (Ed. Atalaya, Barcelona, 2003); M. Byers, G. Nolte (Eds),*United States hegemony and the foundations of International law*. (Ed. Cambridge, 2001) 531; P. Sands, *Lawless world. America and the making and breaking of global rules* (Ed. Viking, 2005) 326; Various Authors, "Hegemonic law revisited", 97, 4 *American Journal of International law* (2003).

[20] C. Fernández Liesa, "La relación entre Poder y Derecho en el Derecho internacional", *Estudios en homenaje al profesor Gregorio Peces Barba* (Dykinson, vol. II, Madrid, 2008), 1189, at 449-497.

[21] C. Rousseau, "Les conceptions nationales du droit des gens", *Mélanges offerts à Paul Reuter. Le Droit international: unité et diversité*. (Ed. Pedone, París, 1981) 441-446.

interests.

Thus, for example, the retrocession of Crimea to Russia can be seen as perfectly sustainable. It had been donated at a time when it was thought that the USSR would last a thousand years; thus, the separation of Ukraine as a result of the disintegration of the USSR would have been the time to negotiate the retrocession. But as this happened at a time when Yeltsin betrayed Gorbachev, it was impossible for this to be done at the right time or in accordance with international law. What has now been done cannot be right: national conceptions of international law seek to shape the latter to their own ends, no easy matter because to do so they would have to control and/or lead the international community as a whole, an imperial power that not even the United States has managed to achieve in the contemporary era.

We have to return to the time of the East-West conflict in or to understand how sovereignty, in both the USSR and the USA, was envisaged from the perspective of their hegemonic power. Thus, the Soviet doctrine of international law up to the Tunkin era and the right to co-existence projected the basic ideas of Marxism-Leninism on relations between states and the role of international organisations on international relations, reflected in its position on the nature of the Charter and its restrictive interpretation of international treaties[22]. The same occurred in the case of the United States' conception of America[23]; we should remember the famous moment of the Cuba missile crisis in 1962 that led Dean Acheson, the US Secretary of State, to say, not at a political rally, but in a book that "law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty." No law, he was later to declare, can destroy the state creating the law. The survival of states was not a matter of law[24].

Although the above by no means calls international law into question, it does reveal that the relationship model between law and power is, in an international society without a global state, a dialectical relation of complementarity, from which the evolutionary characteristics of the international order proceed. This notwithstanding, international law does help to prevent inequalities in power, territory, population or wealth becoming a literal translation of relationships of power in the norms, even though they reflect the consent of those who have the power to create, interpret and transform them. From a historical perspective, we can talk about an objectification of order, a progressive distancing from state-specific interests in favour of more general ones.

In the twenty-first century, it would appear that we are heading towards a multipolar international system, overcoming to a certain extent the preceding situation of unilateralism and bipolarism. However, this multilateralism does not imply that imperial tendencies have also been overcome, since the different points constituting such a multipolar world can be identified with empires, obliging us to keep the idea of empire under consideration.

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[22] McWhinney, "Contemporary soviet general theory of international law: reflections on the Tunkin era", XXV, Canadian Yearbook of International law, (*1987*), 187-217; C. Zorgbibe, "La doctrine soviétique de la souveraineté limitée", 4 Révue Générale de Droit international public (1970), at 872.

[23] R. Charvin, "La doctrine américaine de la souveraineté limité", *Révue belge de Droit international*, I (*1987*) 527, at 6

[24] E McWhinney, *Conflit idéologique et ordre public mundial* (Pedone, Paris, 1970) 29

(3) On the idea of Empire in an era of globalisation and de-territorialisation

The interstate nature of the international order has been called into question by the new role being played by international civil society or as a result of the weakening of the state, amongst other factors.. Authors such as Hardt and Negri[25] analyse the idea of empire not so much from the perspective of borders or territorial expansion as from new paradigms. Globalisation, in their view, has created a new situation, a significant historical shift, in which law, authority, territory and the idea of sovereignty and power are mutable. They consider that states can longer constitute the nucleus of an imperialist project, and henceforth no single nation will be a world leader as modern European nations once were. The empire, they affirm, will be the political subject that regulates global exchanges, the sovereign power that rules the world in an irreversible and implacable process of globalisation. They use the word 'empire' to refer to this new global form of sovereignty, in a way that strikes us as somewhat indeterminate and ambiguous, although it does highlight the importance of the de-territorialisation of power.

The relation between law and space is a highly significant one and forms the foundation of international law, which is based on the European concept of legal space linked to the notion of national borders that circumscribe a state's sovereignty. But, as Losano points out[26], the end of the Cold War, globalisation and the de-territorialisation of the economy means that space in law is no longer what it was a century ago; globalisation has nullified national borders and new notions have appeared (global law without a state, law without borders or the global legal space, amongst others) that indicate that we have moved on from the concept of state space (the territory occupied by a state) both as a result of the existence of rules of non-state origin and of the geopolitical demands of an energy-related or military nature; in this author's opinion the solution is for the pyramidal and hierarchical structure of law to exercise its regulatory function and, even though the phenomenon of globalisation might be irreversible, the state or supranational organisations should have instruments at their command to control it, particularly in the case of multinational companies. This, he says, is possible because history has shown it to be. After World War Two the multinational companies that had acted in oligopolistic or monopolistic contexts shrank in size. Empires, like energy, transform themselves but it is hard to imagine their *debellatio*.

(D) THE EUROPEAN UNION AND RUSSIA AS DISSIMILAR GEOPOLITICAL PLAYERS: EMPIRE VS CIVILIAN POWER.

In this section, we will look at relations between the EU and Russia in the light of some of the factors that have led to a number of recent crises, and the resources available in each case for tackling them. The results of this analysis reveal that in all probability the European dream of being a civilian power cannot always be maintained, and that in any event it is no easy matter for such a dream to challenge

[25] M. Hardt, A., Negri, *Imperio*, (Ed. Paidós, 2000, 2005) at. 13.

[26] See M Losano, *Discurso de investidura como Doctor honoris causa por la Universidad Carlos III de Madrid*, 28 January 2010.

or oppose an empire.

(1) Russia as Empire and the EU as civilian power

The EU aims to be a civilian power in a globalised world that has undergone a transition from geopolitics to geo-economics. As far as globalisation is concerned, military power is less relevant than other resources to which the EU is better suited, a fact that cannot be denied. Nevertheless, some authors adopt a different view and prefer to see the issue in terms of a blatant decline of European power and influence[27]. I will not offer any opinion on this subject in general terms, since I believe that the EU is necessary; however, it is a process that will take time to solidify and affirm its status on the international stage as well as domestically.

There can be no denying that the EU possesses a number of significant resources to enable it to become a major player in a globalised world. In this regard, it is a leader in the fields of commerce and finance; a supportive player and a defender of values that has managed to maintain a positive image in spite of recent doubts arising from the refugee crisis[28]; a point of reference for democracy, human rights, culture and values; and it agglutinates a group of the world's leading economies that whilst retaining their individual identities as countries have succeeded in achieving a high level of economic integration.

On the other hand, the EU also displays a number of weaknesses that debilitate it in the sphere of international relations and have prevented it from becoming a decisive player on the international stage. One of these is the difficulties it experiences in reaching consensus, when means that European foreign policy is more reactive than pro-active, constantly lagging behind events. What is more, it is hard to overcome the heterogeneity of its Member States' interests, which has increased even further as a result of the EU's enlargement, through its decision-making consensus mechanism. Another factor that does not help in this respect is the lack of definition of the European Union's borders.

The EU thus faces a problem of definition of its own interests on the world stage, a problem that does not affect Russia, whose leaders display an extremely clear and firm political will. To put it another way, the EU's foreign policy model is complex, ineffective and not yet fully developed, reducing its effectiveness in the process of globalisation. One only has to contemplate the situation in its immediate environment in the Middle East, North and Central Africa or Eastern Europe to reach the conclusion that the EU has been unable to create safe, prosperous and democratic spaces, in spite of its policies. The blame for this state of affairs may not lie directly at the EU's door, but neither has it been able to prevent it from happening.

Russia is an empire that has suffered a relative erosion or weakening of its power, but has no desire to be anything else. In Kissinger's opinion[29], after the fall of the Roman Empire pluralism became the defining model in the Middle Age; over time this pluralism adopted the characteristics of a model of world order, and when the Peace of Westphalia ushered in the concept of equality between states the

[27] See, for example, R. Youngs, *Europe's decline and fall. The struggle against global irrelevance* (Profile books, 2010) 228

[28] See, for example, a highly critical analysis from this standpoint: J. Lucas, *Mediterráneo: el naufragio de Europa.* (Tirant Humanidades, 2015) 155

[29] H. Kissinger, *Orden mundial*, (Debate, 2016) at 23

model's foundations became the balance of power in Europe, a status that came to an end before the international system, present or past. In other words, the international system was the result of the expansion of a pluralist European system, the result of Europe's history.

Russia, Kissinger tells us[30], had learnt its sense of geopolitics from the hard school of the steppe. If Europeans associate security with balance of power and constraints on the exercise of power, in Russian history such constraints have resulted in disaster; the expansionist Russian vision gave rise to a different concept of political legitimacy, far removed from that of EU Member States.

When it comes to analysing its future as a power, we should remember that Russia is a Eurasian power, whilst the EU is only a European one. In this regard Russia has never been an exclusively European country, and its European identity, as Remiro has pointed out, is a complex and controversial issue[31]. Despite its Westernisation at various different times and the fact that it was one of the driving forces behind the Congress of Vienna, it has never become (or been allowed to become) fully integrated into the Western European system. Proof of this can be seen in the Crimean War, the immediate cause of which was the protectorate of the Holy Places in Jerusalem. Subsequently, one of the consequences of both World War One and World War Two was to distance Russia from the centre of Europe, this being accompanied by the creation and rise of the Soviet system.

29 May 2014 saw the signing of the Treaty of the Eurasian Economic Union, which came into force on 1 January 2015. Russia is also a member of BRICS and the Shanghai Cooperation Organisation, amongst other international forums and bodies, all of which constitute some of the pieces that Russia is using to attempt to restore its international position and set itself up as a world power. If we reflect on this issue we have to agree with John Darwin[32] and other authors that the Western narrative of world history is increasingly being called into question, with Europe (and the West in general) being seen in a wider context, in oblique projection. This standpoint has led to a rewriting of the history of European expansion, challenging the Eurocentric view of the history of the modern world. It is now being put forward that Europeans were the last to become members of a vast seaborne network of trade pioneered by Asia, linking China, Japan, Korea, South-east Asia, India, the Persian Gulf, the Red Sea and East Africa; the global economy already existed, and there was no need to await the Promethean touch of merchants from Europe[33]. Looked at from this angle, the position of Europe in world history and that of empires changes considerably, and authors such as Mishra have even announced the rebellion of Asia against the West[34]. It is not a question of announcing a wholesale transformation of our world view, but as Western Europeans we should make an effort to see the world not just from our European windows, but from those of the entire world, thereby diminishing our stature and importance in our own eyes. Such a perspective, in the context of a multilateral world, would make it possible to alter our focus and even adopt new approaches.

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[30] *Orden mundial*, ibid. p. 61.

[31] For an analysis of Russia's European identity from a variety of standpoints see A. Remiro Brotons and others, *Los límites de Europa*, Academia Europea de ciencias y artes, España, 2008, 459, at 253.

[32] J. Darwin, *El sueño del imperio. Auge y caída de las potencias globales. 1400-2000* (Taurus, 2012) 610

[33] *J. Darwin, El sueño de imperio. Auge y caída de las potencias globales. 1400-2000*, (Taurus, 2012) at 33

[34] See P. Mishra, *De las ruinas de los Imperios. La rebelión contra occidente y la metamorfosis de Asia* (Galaxia Gutemberg, 2015) 519.

(2) Some of the conflicts between Russia and the EU, seen in the light of their nature

If we look at some of the issues on which the EU and Russia have come into conflict from a geopolitical standpoint, it becomes clear that the theory of civilian power is not wholly sustainable, as shown by the former's dependence on Russia for energy. International conflicts generated by a shortage of resources can occur on a grand scale[35]. The European Union's energy dependency affects European security and is a source of weakness in its relations with Russia. Energy diplomacy is a core element for the US, Russia, China and, indeed, the majority of states in general. To date the EU has failed to play a relevant role in this regard in order to ensure its energy supply, despite its significant dependence on external sources and the fact that it is the leading importer and second largest consumer in the energy market. Russia has no direct involvement in Energy Charter activities, believing that it only benefits energy purchasers, and nor does the United States, which prefers to see no change in the EU's current situation. Another element of uncertainty comes from the transport of energy by means of gas pipelines: the efforts of Russian, North American and European diplomacy have been to little avail in clarifying the situation, which affects Europe's energy supply. Countries such as Germany, Italy or France, along with the majority of other European nations, have signed long-term energy supply agreements with Russia (or with Gazprom), leaving the EU and collective interests to one side in a further demonstration of the former's weak position as an international player.

Furthermore, the EU also suffers from a noteworthy military dependence, especially since the United States and the EU (or some of its Member States, at least) diverge in their appreciations of international law and the role it should play. Kagan[36], for example, considers that the difference in perspective between the US and the EU in questions of power is a consequence of the weakness of the latter, which has created a transatlantic divide (aided by the lack of a common strategic culture) that may be impossible to reverse. For his part, Habermas[37] considers that "the dispute (between the US and the EU) revolves around whether the law is the appropriate means through which to achieve this objective [the defence of international security and stability, global attainment of the intercultural core of democracy and human rights) or whether the best means, on the other hand, is the unilateral policy of a world power that aims to impose order". At all events there is a certain difference of conception between the EU and the US that has led to certain problems with Russia for which Europeans must obviously shoulder much of the responsibility. These include:

(i) The Anti-Missile Shield. In 2008 the United States signed agreements on the anti-missile shield with Poland and the Czech Republic, which were part of the system designed by the US to "face

[35] Thus, taking water as an example, we can cite the real or potential conflicts generated by the shortage of this resource in Sudan, the Nile basin, Lake Chad, the Middle East and the Dead Sea, amongst others. See J. Solana, *El acceso al agua. Un nuevo desafío* (Ed. Exposición Internacional de Zaragoza. Expoagua, Tribuna abierta, 2008); M. Klare, *Guerras por los recursos. El futuro escenario del conflicto global* (Editorial Urano tendencias, 2003). E. Menéndez, A. Feijoo Lázaro, *Energía y conflictos internacionales* (Editorial Netbillo, 2005).

[36] R. Kagan, *Poder y debilidad. Europa y Estados Unidos en el nuevo orden mundial* (Editorial Taurus, 2003) 159.

[37] J. Habermas, J. Derrida, *El Derecho internacional en la transición hacia un escenario posnacional. Europa: en defensa de una política exterior común* (2003, 2008) 9.

the twenty-first century threat of long range missiles launched from countries such as Iran or North Korea". These agreements were made without any consultation with the EU or its Member States, and much less with their prior agreement, in spite of their direct impact on European defence, security and relations with Russia. The project was subsequently cancelled.

(ii) The expansion of the Atlantic Alliance, the United States and Russia. The Atlantic Alliance is the foundation stone of the collective defence of EU Member States and the US. The policy of expanding NATO, sponsored by the United States, would have a profound impact on global balances that Russia finds unacceptable[38]. The possibility of extending the Alliance to include Georgia or Ukraine stretched tensions to the maximum, as would subsequently also occur in the case of the EU association agreements. There is no advantage to be gained from increasing the strategic gap between Europe and Russia and EU Member States need to adopt a consistent position on international security, the expansion of NATO and security relations with Russia. Relations with Russia are characterised by Europe's defensive weakness and energy dependence, which restrict, as they do with regard to the United States, its room to manoeuvre.

(E) ON THE EU'S DEFENCE OF THE APPLICATION OF INTERNATIONAL LAW AND ITS INTERNATIONAL PRACTICE WITH RUSSIA.

Article 21.1 of the Lisbon Treaty states that the EU's action will be guided by a series of principles that include, amongst others, respect for the principles of the United Nations Charter and international law. The declaration of independence by Kosovo[39], adopted on 17 February 2008 and supported by the majority of EU Member States, poses the question of whether the EU's reaction was in agreement with international law. The answer is clearly no.

The EU's practice in such matters dates from 1983, when it agreed not to collectively recognise the Turkish Republic of Northern Cyprus. The subsequent declarations adopted on 16 December 1991, one presenting guidelines on the recognition of new states in Eastern Europe and in the Soviet Union and the other on Yugoslavia established conditions for recognition linked to democracy and human rights. Did the Kosovo people, by virtue of international law, have the right to split from? Kosovo was not a colony, was not occupied and was not oppressed and the theory of it constituting a 'unique case', as claimed by the EU Council, does not hold. Kosovo, at the time of its Declaration of Independence and during the previous ten years, had been under international administration, so it is impossible to consider that its people were oppressed. UN Security Council Resolution 1244 (1999) provided the framework for a multilateral solution that respected the territorial integrity of Serbia and was based on the consensus achieved between the Security Council's permanent members.

When drawing up his plan for Kosovo, the Finnish jurist Ahtisaari appeared to have forgotten the

[38] The Atlantic Alliance's current members are: Iceland, the United Kingdom, Denmark, the Netherlands, Belgium, Luxembourg, France, Portugal, Spain, Italy, Estonia, Latvia, Lithuania, Germany, Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Rumania, Turkey, Bulgaria and Greece. The countries aspiring to membership are Georgia, Ukraine, Macedonia, Albania and Croatia.

[39] On this issue, and prior to the Declaration itself, see R. Bermejo, C. Gutiérrez España, *La independencia de Kosovo a la luz del Derecho de libre determinación* (Documento de trabajo nº 7/2008, Real Instituto Elcano).

Aaland Islands question[40], an example that deserves citing here. The Council of the League of Nations considered that the right of self-determination of peoples was not a generally recognised one, a positive rule of the Law of Nations. On the contrary, its opinion was that "international law does not recognize the right of national groups to separate themselves from the State of which they are a part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation", concluding that "the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted". It did, however, consider that "the separation of a minority from the State of which it forms a part and its incorporation into another State can only be considered as an altogether exceptional solution, a last resort when the State either lacks the will or the power to enact and apply just and effective guarantees; separation would be possible, as an exceptional measure, if the State oppresses a part of its population, in violation of the law, at which time the minority would be entitled to do the same"[41]. The independence of Kosovo was determined by geopolitical considerations, not by legal reasons. Time will tell whether Kosovo succeeds in consolidation itself as a state by virtue of the principle of effectiveness, of great importance for the creation of states[42].

There would be no difficulty in affirming that the creation of Kosovo took place in contravention of the principle forbidding the use of force, even though the territory was under international administration, due to the prior use of force by NATO in 1999 with neither UN consent nor in legitimate defence, merely invoking humanitarian reasons, which do not enjoy majority support in international law. Nor would it be difficult to affirm that the creation of Kosovo took place against Serbia's territorial sovereignty or other principles. Russia therefore declared it "null and void" in a statement issued by the Russian Foreign Ministry on 17 February 2008. The recognition of Kosovo by such a large number of EU Member States calls the compliance of their behaviour with the norms of international law into question.

Above all, however, it should not be forgotten that subsequent events in Ukraine, Crimea, South Ossetia and Abkhazia are not wholly unrelated to Western behaviour in Kosovo: one reaps what one sows. The reason invoked by Russia for its effective and immediate counter-offensive in support of South Ossetia and Abkhazia[43] was the protection of the lives of the inhabitants of South Ossetia, who

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[40] See F. Visscher, "La questions des Iles d'Aaland", *Révue de Droit international et de législation compare* (1921), 45 ; Colijn, *La decisión de la Société des Nations concernant les Iles d'Aaland*, Amsterdam (1923); *Boursot, La question des Iles d'Aaland et le droit des peuples à disposer d'eux-mêmes*. Ed. Dijon (1923).

[41] See C. Fernández Liesa, C. Díaz Barrado, F. Mariño Menéndez, *La protección internacional de las minorías*, (Ed. Ministerio de Trabajo y Asuntos Sociales, Madrid) (2001), at 136.

[42] See C. Visscher, "Observations sur l'effectivité en droit internacional public", 2 LXII, *Révue de droit international public*, LXII (1958), at 601; A. Miaja de la Muela, *El principio de efectividad en Derecho internacional* (Cuadernos de la Cátedra Dr. J. Brown Scout, Valladolid, Universidad de Valladolid, 1958,) at 114; J. Touscoz, *Le principe d'effectivité dans l'ordre internacional* (LGDJ, Paris, 1964) pp. 255 ff.; J. Salmon, "La construction juridique du fait en droit internacional", 32 *Archives de philosophie du droit -Le droit internacional*, (1987) 135-151.

[43] South Ossetia broke off relations with Georgia in the 1991-92 war, and maintains close relations with North Ossetia. Its leader at the time, Eduard Kokoity, was in favour of independence: many South Ossetians are Russian passport holders, the majority of them Christians. In the case of Abkhazia 10,000 people lost their lives in the war with Georgia (1992-94) for its independence, and a further 250,000 were displaced, out of a total population of 340,000, according to figures provided by

were being subject to genocide. The EU mediated between Russia and Georgia to achieve a ceasefire and used diplomatic channels to monitor its effective compliance. After first negotiating with Georgia, President Sarkozy of France met with the Russian President in Moscow, entering with a 4-point peace plan and leaving with a 6-point plan to offer to Georgia. The commitments appearing in this final plan, which makes no reference to Georgia's territorial integrity, were the following:

1. The non-use of force
2. The definitive cessation of hostilities
3. Free access for humanitarian aid
4. The withdrawal of the Georgian military forces to their usual bases
5. The withdrawal of Russian military forces to the lines they held before hostilities broke out
6. The opening of international discussions on the modalities of security and stability in Abkhazia and South Ossetia.

The cessation of hostilities decreed by Russia was provisional on Georgia's acceptance of the Peace Plan, which was made effective by President Saakashvili on 14 August, after US Secretary of State Condoleezza Rice had persuaded him to put aside his initial misgivings. On 25 August the Russian Parliament voted unanimously in favour of recognising the regions of Abkhazia and South Ossetia as independent nations, and the following day President Medvedev signed the corresponding decrees of recognition. To justify their stance Russia alleged that Georgia had chosen genocide as a means of achieving its political ends, thereby scuppering any hope of peaceful coexistence between Ossetians, Abkhazians and Georgians in the same state. Furthermore, President Medvedev published an article in the *Financial Times* explaining his reasons for recognising the breakaway of these two Georgian regions, which mirrored those alleged at the time to justify the independence of Kosovo. He began by referring to the way in which minorities were treated, with specific reference to the stripping of the autonomy of the two regions in question by Georgia, which inflicted a "vicious war on its minority nations", a similar argument to that invoked in the case of Kosovo. He then went on to argue that the Georgian attack in early August had created a wholly new situation, saying that the precedent of Kosovo had been a decisive factor, since "in international relations, you cannot have one rule for some and another rule for others". Similar arguments have also served as the basis for the situation in Crimea and Ukraine and the justification given by Russia for its unlawful international acts.

All other considerations apart, the EU needs to hold to uniform interpretations when the same principles are invoked in different situations if it wishes to avoid being accused of acting purely in accordance with its own interests. Europe's straying from the correct interpretation of international law in Kosovo and Iraq allowed Russia to do the same in Crimea and Ukraine at a later junction. Lessons have to be learnt in order to avoid any future repetition of the same mistakes; consistency is of paramount importance if we want a world that functions in accordance with values and rights rather than imperial interests. It is to be hoped that these reflections will serve to highlight the risk of abandoning values as and when interests dictate, due to the effect of such a course of action on the

the then president Sergei Bagapash. The region's coasts account for almost half of Georgia's total coastline and almost half of its population (45%) is of Georgian origin, the rest being Abkhazians (18%) and members of other ethnic groups, above all Russians and Armenians. 80% of its inhabitants are Russian passport holders.

behaviour of other players and subjects that form part of the modern International Community.

(f) On Russia and the principle of non intervention in internal affairs

More recently, it is obvious that Russia is trying to destabilise the western world. This is an answer to the western economic sanctions. In reality, Russia is not as strong as it would like the world to believed. We are forced to understand each other in a few years. From now to then Russia is engineering a division among the western world, in different scenario, such as United States of America, United Kingdom, Greece and Spain (in Catalonia affair).

In United States of America, Russian secret services helped Donald Trump candidature against Hilary Clinton, by propagating false accusations which helped Trump to get is way. Because of this some American authorities are investigating Trump Administration and candidature.

In the case of Great Britain, Russia supported *Brexit* just to divide European Union (*divide et Impera*; divide and rule), knowing that Britain is one of the largest countries that contributes economically and politically to the European Union. Furthermore, this also divide British nation; and finally the negotiations between the European Union ant the United Kingdom for *Brexit* will be a difficult ending.

Talking about Greece during its crisis, Russia stimulated the division; at a certain time Greece opposed to the sanctions given to Russia. This shows that Russia has been in contact with Greece, in a context of weakening of entire European Union.

Recently, experts from the European Union have said that Russia is helping in propagating false messages in favour of Catalan secessionist crisis. From the point of view of Public International Law Catalonia's steps of holding independence are inconsistent with International law. The population of Catalonia is not a people entitled with the right to self determination.

From this perspective, third States can violate the principle of non-intervention in international affairs. For example, Ecuador has told "wikileaks" founder Julian Assange, to avoid making statements that could affect the country's international relations after he expressed support for Catalonia independence. The Ecuadorian authorities —says the Press— have reiterated to Mr. Assange his obligation not to make statements or activities that could affect Ecuador's international relations, which must be preserved, as is the case with Spain. Responding on twitter, Assange accused Ecuadorian President Moreno of attempting to silence him. He wrote: "if President Moreno want to gag my reporting of human rights abuses in Spain he should say so explicitly, together with the legal basis". The Australian hacker, who has been sheltered at Ecuador Embassy in London last years, is believed to be wanted by USA for reveal state secrets.

Mr. Janis Sarts (Head of NATO strategic communication centre), declared 22 November 2017 that the ultimate goal of Russia is not to encourage Catalan independence, but rather to underscore divisions that will weaken the European Union and North Atlantic Treaty Organization itself. NATO intelligence Report shows that Russian online networks have been focusing their activities on Catalonia in order to make the most of the secessionist. The basic reason for those activities is to create confusion and aggravate western problems. According to NATO specialists there are various

Russian actions in the interference process in Catalan crisis. The Catalan issue is internal and must be resolved with the Spanish constitutional order, declared NATO representative. The practice of disseminating and 'viralizing' contents about foreign crisis is aimed at creating the sense that everybody has problems, that the west is full of hypocrisy, and that all governments act in similar ways. Even though President Putin has claim that Catalan problem is an internal question, on the other hand it seems as if he is involved in a shadowy way.

In a final reflexion all the above shows that Putin want to destabilise western world. To that purpose some times Russia has violated the principle of non-intervention in international affairs, although it is difficult to prove.

 DOI: 10.17103/sybil.21.3

the SPANISH YEARBOOK of INTERNATIONAL LAW

Hegemony in International Society. Conceptual and Methodological Proposal towards a New Analytical Framework

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Abstract: Hegemony has been a widely debated concept in the discipline of International Relations. However, analyses tend to confuse notions of primacy and hegemony and, therefore, foster the gap between material and social structures. The present article aims to propose an eclectic methodology that examines both material and social structures towards a comprehensive analysis of hegemony. This way, it is possible to understand the bases of hegemony both materially and socially, examining the material power of the hegemon as well as the social structure created by the system's leader. Along all these variables, legitimacy is considered a transversal variable to analyse hegemony, as changing legitimacy principles constitute cornerstone events on the continuity and change of the international society.

Keywords: Hegemony – International – Society - Legitimacy

(A) INTRODUCTION

In the discipline of International Relations, there coexist a wide range of lenses to conceptualize and analyse hegemony. Needless to say, some of these visions are considered rivals or even antagonistic. However, the aim of this research is to converge different paths towards a more comprehensive and complete approach to hegemony that diminishes the barriers between paradigms. In doing so, it is particularly useful to think about research not as dividing, but as a bridge building practice, tackling such important topics through an analytical eclecticism. As Sil and Katzenstein suggest, these eclectic approaches stimulate the transgression of theoretical boundaries both in the research questions and in the perspectives of the discipline[1]. This way, it will be possible to identify logics that rely on different paradigms and bear with the complexity of some phenomena as the present one[2].

Often build on opposition to other theories, paradigms usually highlight several faces of the phenomenon while obscuring others. Moreover, IR as a discipline often bears with several events that do not necessarily fit into the expectations of theories[3]. Taking that into account, it is possible to argue that an eclectic framework has more chances to minimize these anomalies by opening the analytical scope.

In the case of hegemony, different approaches stand into divergent definitions of the term that, hence, provide alternative answers. Therefore, it should be clearly stated which question will be addressed and

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1 R. Sil and P. J. Katzenstein, *Beyond Paradigms. Analytic Eclecticism in the Study of World Politics*, (Palgrave Macmillan, Basingstoke, 2010) at 21.

2 Ibid, at 19.

3 The end of the Cold War and the advent of unipolarity caught several scholars by surprise. As a result, some delayed for years the proclamation of unipolarity. Examples include prominent scholars such as Waltz, Kaplan or, to some point, Krauthammer. See K. N. Waltz., "The Emerging Structure of International Politics", 18(2) *International Security*, (1993) 44-79 [doi: 10.2307/2539097]; R. D. Kaplan, *The Coming Anarchy. Shattering the Dreams of the Post Cold War*, (Random House, New York, 2000); C. Krauthammer, "The Unipolar Moment", 70(1) *Foreign Affairs*, (1990/1991) 23-33 [doi: 10.2307/20044692].

 DOI: 10.17103/sybil.21.4

what each term means. As a starting point, hegemony will be understood as an eclectic concept bringing together features highlighted by different theoretical traditions. Concretely, for the purpose of this research, hegemony will be understood as an institution of the international society. Hence, an English School framework will be applied, even though contributions of other schools of thought will be applied to enrich and criticize this view. Under this approach, hegemony is defined as a relation of social and informal hierarchy build on a legitimized and socialized international order. This order is mainly composed of a strong institutional network and a dominant set of identities, interests, and practices underpinned by an extraordinary portfolio of material capabilities and resources[4]. In other words, hegemony is embedded on a hierarchical network model, in the words of Oatlet, Winecoff, Pennock and Danzman. However, the hierarchical network model proposed by these authors differs from the traditional hegemonic structure. In the former state capabilities and influence are derivative from the network, whereas in the later the structure is derivative from the capabilities of the units[5].

However, as the definition of hegemony exemplifies, the conceptualization of the concept of international order is complex. Even though some have defined it solely as a reflection of the material distribution of power, as Gilpin did, the international order has also a societal nature as a pattern of the international behavior that advances towards the primary goals of the society such as preserving peace and state sovereignty or the endurance of the system and the international society[6].

International order, nowadays, is hybrid not only by its composition, but also in the coexistence of anarchical and hierarchical structures within it. While anarchy refers to the absence of governments and/or rule, hierarchy is related to specific relations of subordination or domination. This hybridity is essential to understand the contemporary international order and, moreover, to better conceptualize its shape and future development. In this equation, hegemony is the result of a unipolar polarity and superordinate authority that creates a certain form of hierarchy that takes place in an anarchical

4 For the composition of this definition, I have relied mainly on several conceptualizations of the concept considered as constructivist or English School's. See I. Clark, *Hegemony in International Society*, (Oxford University Press, Oxford, 2011); C. Beyer, "Hegemony, Equilibrium and Counterpower: A Synthetic Approach", 23(3) *International Relations*, (2009) 411-427, [doi: 10.1177/0047117809340499]; M. Bukovansky, *Legitimacy and Power Politics: The American and French Revolutions in International Political Culture*, (Princeton University Press, Princeton, 2010). However, it should be noted that the exploration of a common ground that the English School and constructivism share regarding hegemony does not necessarily omit the differences between these two theoretical traditions. In fact, theorists from both perspectives have explored the common grounds (mainly, their concern for the social dimensions in the analysis of the international realm) as well as their differences. Several authors get more in deep on the common grounds and differences of both theories. See, for example, T. Dunne, "The Social Construction of International Society", 1(3) European Journal of International Relations, (1995) 367-389 [doi: 10.1177/1354066195001003003]; T. Dunne, *Inventing International Society: A History of the English School* (Macmillan, London, 1998); C. Reus-Smit, "Imagining Society: Constructivism and the English School", 4(3) *British Journal of Politics and International Relations*, (2002) 487-509 [doi: 10.1111/1467-856X.00091]; C. Navari and D. M. Green (ed.), *Guide to the English School on International Studies* (Wiley Blackwell, Chichester, 2014); C. Navari (ed.), *Theorising International Society: English School Methods* (Palgrave Macmillan, Basingstoke, 2009).

5 T. Oatley *et al.*, "The Political Economy of Global Finance: A Network Model", 11(1) Perspectives on Politics, (2013) 133-153, at 136 [doi: 10.1017/S1537592712003593].

6 R. Gilpin, *War and Change in World Politics*, (Cambridge University Press, Cambridge, 1981); H. Bull, *The anarchical Society. A Study of Order in World Politics*, (Palgrave, London, 2002) at 8. For a further exploration of different conceptualizations of the notion of international order, see J. A. Hall, *International Order* (Polity Press, Cambridge, 1996); J. M. Parent and E. Erikson, "Anarchy, hierarchy and order", 22(1) *Cambridge Review of International Affairs*, (2009) 129-145 [doi: 10.1080/09557570802683912].

environment[7].

Even if this definition mentions material resources as a source of hegemonic power like realists do, the present article does not understand them as the main components of hegemony. Material capabilities constitute the cornerstone of primacy or unipolar structures[8]. As Ikenberry argues in the case of the United States after WWII, the new redistribution of power offers to the unipole a broad bunch of choices including domination, transformation or abandonment[9]. Whatever the unipole decides, the outcomes are not automatic, agency is involved. In this case, the transformation of these power disparities into hegemony constitutes a conscious strategy of order creation and institutional restraint.

In this process, the unipole's identity, interests, and recurrent practices are translated into the progressive institutional web. Although it was constructed with a global ambition, the postwar order was liberal and Western in its identity and practices. It can be argued that the creation of a normative and institutional order is a probe of the impossibility of maintaining the stability of the system only through material power and public goods' provision. Institutional binding offers stability and reduces leadership costs, but at the same time restraints the exercise of the hegemon's power. To achieve these gains, the unipole needs to socialize and legitimize this order. As Clark remarks, the legitimating practices under hegemony do not legitimate a particular state's exercise of power, but the order it has built[10].

Even if this definition brings together several aspects highlighted by the main theories of the discipline, there can be identified several points of disagreement between them that may contribute to the enrichment of the concept.

(B) MATERIAL AND SOCIAL VARIABLES IN THE ANALYSIS OF INTERNATIONAL SOCIETY. CONVERGING PERSPECTIVES

The main approaches of the discipline are usually divided by its emphasis on material or social factors. Even if the materialist perspective led by realism constitutes the main lens to analyse the international, the end of the Cold War has boosted many social analyses to the main debates. The materialist approach's principal works portray hegemony as a result of the accumulations of high amounts of material power. Even if this approach has been usually attached to the realist tradition in its broader sense, it is undeniable that the material analysis has commonly been used as a ground to develop other theories, such as neoliberalism. As Ikenberry put it, polarity and power distributions only offer a

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7 J. Donnelly, "Sovereign Inequalities and Hierarchy in Anarchy: American Power and International Society", 12(2) *European Journal of International Relations*, (2006) 139-170, at 139 and 141-142. [doi: 10.1177/1354066106064505].

8 Hegemony and unipolarity/primacy are terms commonly seen as synonyms. However, unipolarity and primacy describe a situation of preponderance of capabilities. Hegemony, in contrasts, defines a unipolar configuration in political and economic terms that results in a structure of influence. D. Wilkinson, "Unipolarity Without Hegemony", 1(2) *International Studies Review*, (1999) 141-172, at 143, [doi: 10.1111/1521-9488.00158]; Clark, *supra* n. 4, at 34.

9 G. J. Ikenberry, *After Victory. Institutions, Strategic Restraint and the Rebuilding of Order after Major Wars*, (Princeton University Press, Princeton, 2001) at 3-4.

10 I. Clark, "China and the United States: A Succession of Hegemonies?", 87(1) *International Affairs*, (2011) 13-28, at 24, [doi: 10.1111/j.1468-2346.2011.00957.x].

description of national capabilities but cannot explain the political formation that the hegemon builds around these material assets[11]. In other words, if the possession of several material capabilities was the sole indicator, the results will only determine the polarity of the system or, more precisely, to what extent it remains the United States' primacy over the system.

The second perspective, focused on social variables, has been explored from a great range of theories that have added different social variables to their analysis. At this point, it is important to remember that different kinds of social variables coexist within the liberal, constructivist, English School and Chinese Approaches (mainly in the theory of relationality by Qin Yaqing but also in Yan Xuetong's Moral Realism). It is widely known that an analysis of systemic transformations and, more precisely, of hegemony and rising states, must tackle the question of how the order has been constructed by the dominant state. Material capabilities cannot determine nor the exercise of power, neither the building of the hegemonic order[12]. In the task of disentangling the superstructure of the United States hegemonic institution, several variables must be addressed through a qualitative methodology. Following Clark's works on hegemonic institutions, it is possible to point that legitimacy will play a crucial role[13], not forgetting the importance of socialization or identity.

Undoubtedly, an analysis of material distributions of power provides interesting information about the structure of the system and the constrains faced by great powers. Even constructivism admits that changes in the distribution of power matter, because they produce changes in great powers' attitudes towards the normative structure, pushing them to defend, oppose or even boost new norms[14]. However, in cases of high imbalances of power as the present one, materialist analyses say little about the international order built by the powerful state. It is true that material preponderance or primacy offer multiple opportunities to the dominant state to spread its influence and strength, but there is a need to legitimate it and construct a hegemonic status[15]. Therefore, primacy constitutes the first and compulsory step towards hegemony, but a materially dominant state does not always become a hegemon. In other words, hegemony is a socially achieved status, built on rights, consent, and legitimacy. Moreover, this distinction unfolds what it is usually called as hegemonic decline in two (intertwined) phenomena. The first, related to primacy and the inability of the dominant state to maintain itself as a world leader in terms of resources and capabilities. The second one is the crisis of the social order built by the hegemon to sustain its position. Both faces of the same coin, hegemony needs primacy, but primacy does not

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[11] G. J. Ikenberry, *Liberal Leviathan. The Origins, Crisis, and Transformation of the American World Order*, (Princeton University Press, Princeton, 2012) at. 46-47.

[12] Ibid. at 39.

[13] See Bukovansky, *supra* n. 4; I. Clark, *Legitimacy in the International Society*, (Oxford University Press, Oxford, 2005): M. Finnemore, "Legitimacy, Hypocrisy, and the Social Structure of Unipolarity. Why Being a Unipole Isn't All it's Cracked Up to Be", 61(1) *World Politics*, (2009) 58-85, [doi: 10.1017/S0043887109000082]; D. P. Rapkin and D. Braaten, "Conceptualising Hegemonic Legitimacy", 35(1) *Review of International Studies*, (2009) 113-149, [doi: 10.1017/S0260210509008353].

[14] A. R. Young, "Perspectives on the Changing Global Distribution of Power: Concepts and Context", 30(1) *Politics*, (2010) 2-14, at 4, [doi: 10.1111/j.1467-9256.2010.01390.x]; R. Price, "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines", 52(3) *International Organization*, (1998) 613-644, at 635, [doi: 10.1162/002081898550671].

[15] I. Hurd, "Breaking and Making Norms: American Revisionism and Crisis of Legitimacy", 44(2/3) *International Politics*, (2007) 194-213, at 204, [doi: 10.1057/palgrave.ip.8800184].

necessarily imply hegemony. Thus, any analysis of hegemony must address both realities: the power structure and the social order[16].

In this vein, it is necessary to advance towards a reconciliation of material and social approaches to understand, as Beyer notes, US predominance in a multidimensional way[17]. Material power should be understood as the way to achieve the monopoly of the production of cultural, social and symbolic capital justified and legitimized through multiple social structures[18].

As Guzzini rightly noted, the nature of international society does have an impact on the value of abilities, resources and the relevant issue areas[19]. Understanding the contemporary environment in a complex way —not just as a Hobbessian order, but with mixed characteristics of Lockean and Kantian societies— any materialist view should understand power resources as, at the same time, hybrid and in constant evolution.

Moreover, what materialist lenses cannot explain is the character and the relationship between emerging powers and the international order. Materialist scholars tend to portray rising states as potentially dangerous, understanding that rising powers will likely use their material status to overturn the system. However, as others point out, the dissatisfaction of the rising state cannot be taken for granted. At this point, it is possible to agree with Schweller and Pu when they highlight that the future international order and a hypothetical rise of unipolarity depend directly on the roles played by emerging powers. In this vein, they draw three alternative options, going from support to the order and sharing of responsibilities, spoiling and dismantlement of the existing order and replacement, and finally, a free rider behavior that gets the privileges of this power position without contributing to global governance[20].

Definitely, states' attitudes towards the international system are not solely materially determined. One can argue, as some realist did, that states with growing capabilities will definitely be revisionist or/and challengers[21], but as the hegemonic succession between the United Kingdom and the United States exemplifies, some transitions can be progressive and peaceful. Therefore, the rise of the conflict not only depends on how the emergent state behaves, but also how the former hegemon manages its decline.

At this point, the identities that the rising state performs gain special attention. However, it is necessary to have in mind that great powers' rise not only involves the emerging state, but also the relation between this state, on the one hand, and the hegemon and the international order it has built, on the other. Therefore, it constitutes a two-way process that cannot be isolated. As Buzan and Cox

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[16] The distinction between power structure and social order as components of hegemony is developed by Barry Buzan. B. Buzan, *The United States and the Great Powers. World politics in the twenty-first century*, (Polity, Cambridge, 2004) at 48.

[17] Beyer, *supra* n. 4.

[18] R. L. Schweller and Pu X., "After Unipolarity. China's Visions of International Order in an Era of U.S. Decline", 36(1) *International Security*, (2011) 41-72, at 49, [doi: 10.1162/ISEC_a_00044].

[19] S. Guzzini, "From (alleged) unipolarity to the decline of multilateralism? A power-theoretical critique" in E. Newman, R. Thakur and J. Turman (eds.), *Multilateralism under challenge? Power, international order and structural change*, (United Nations University Press, New York 2006) 119-138, at 124.

[20] R. L. Schweller and Pu X., *supra* n. 18.

[21] Examples include, among others, J. J. Mearsheimer, *The Tragedy of Great Power Politics*, (Norton, Nueva York, 2001); R. Gilpin, "The Theory of Hegemonic War", 18(4) *The Journal of Interdisciplinary History*, (1988) 591-613 [doi: 10.2307/204816].

summarize, rising powers can emerge conflictively or peacefully. The conflictual scenario, as drawn by realism, supposes that emerging powers will try to overturn the system to gain the most. On the contrary, the peaceful model involves a war free scenario, although the negative peaceful rise may involve growing threateningly. This taxonomy suggests that, for peaceful rise to be achieved, the rising power should be able to get both material and social gains in absolute and relative terms without the need to precipitate an open as war[22]. Undoubtedly, the hegemon has in its hands the chance to accommodate the rising power and balance the gain and status inequality to improve rising state's satisfaction with the system, but it will inevitably narrow the gap between both states' relative power distribution and conflict with the hegemon's own interests.

(C) THE ROLE OF INSTITUTIONS IN INTERNATIONAL SOCIETY. CONSTRUCTION, CHANGE, AND ACCOMMODATION IN INSTITUTIONALIZED SOCIAL ORDERS

The international order constructed around the hegemon's dominance is a topic of special concern for various IR scholars. As Clark points out, hegemonic legitimacy is bestowed no to the actor itself, but to the institutional order it has built around its power[23]. However, that order may have different characteristics and suffer transformations in response to the changing systemic dynamics. As a response to the latest changes in the distribution of power, scholars hold the expectation that these changes will challenge the US liberal institutional order[24]. It should be noted that the order build by the hegemon is not only rooted in institutions, but also in informal norms, meanings, and behaviors. Therefore, institutions constructed by the hegemon are not the only important objects of study, but also the underlying doctrines of this institutional net[25].

The focus on institutions builds a bridge between the social approaches of the English School and constructivism, on the one hand, and the liberal institutionalist approach, especially in the analysis of the contemporary liberal order, on the other. On the contrary, realism does not pay much attention to institutions, understanding them as a result of power distributions and created for selfish purposes[26]. However, it is possible to agree that institutions are, at first, created for achieving these selfish outcomes, mainly for locking the leadership in the system by a wide institutional practice. As even critical theorists

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[22] B. Buzan and M. Cox, "China and the US: Comparable Cases of 'Peaceful Rise'", 6(2) *The Chinese Journal of International Politics*, (2013) 109-132, at 112, [https://doi.org/10.1093/cjip/pot003].

[23] Clark, supra n. 10, at 24.

[24] Young, *supra* n. 14, 11 4.

[25] For this author, institutions are defined as a corpus of norms, rules, and principles that have the capacity to transform social relations. Institutions and international organizations usually play a key role as legitimizers of the hegemon's exercise of power and, to that extent, they also get weakened by several hypocritical behaviors of the hegemon. In Reus-Smit's words, political power is tightly rooted in the network or social interchange and mutual constitution. Hence, legitimacy and institutions become the bases of stable political power as the institutionalization of the hegemonic power transforms the social structure of the system. C. Reus-Smit, *American Power and World Order*, (Polity Press, Cambridge, 2004) at 41. Gradually, these institutions become stronger non-state actors and gain autonomy from the hegemonic power and, at the same time, stabilize and transform the international realm, setting new goals that slowly become socialized both for the hegemon and for the rest of the states on the international society. Finnemore, supra n. 13, at 61.

[26] J. J. Mearsheimer, "The False Promise of International Institutions", 19(3) *International Security*, (1994-1995) 5-49, at 7, [doi: 10.2307/2539078].

admit, hegemony is extremely linked to the model of international order that the hegemon wants to lead[27], a project in which institutions are essential tools. Going further, in the international society approach, Clark suggests that hegemony can be defined as a "legitimated social arrangement" in which institutions play a crucial role[28]. So, rather than as a way to administrate hegemony, institutions must be taken as its cornerstone.

Nevertheless, the institutional practices make these institutions less dependent upon the hegemon, at least apparently. As Keohane concluded, international regimes can survive hegemony[29]. However, that conclusion seems risky, as the survival of regimes is highly linked to the character of the new international order that arises after the decline of the hegemon. In other words, it must be theorized to what extent the new unipole will support the institutions that mirror a share of gains related to the old distribution of power. It may be possible to envisage a gradual irrelevance of the institutions or the rise of new institutional frameworks that serve the same needs but that accommodate better to the new world order.

Moreover, the important question to be addressed is to what extent do international norms and institutions constraint material power[30]. This way, it is possible also to question the impact of changes in the material distribution on the institutional and normative structure of the international society and the accommodation of rising powers to the existing system. Needless to say, institutions are an important point of analysis of a state's compliance with the status quo. A pro status quo power agrees both with the institutions of the international society and also with its status within them. Therefore, as these regimes reflect an unbalanced distribution of power, rising states do not usually agree with its status and try to improve it and push for a new distribution. Hence, they constitute unequal grounds of negotiation and not a multilateral structure as it is sometimes pretended.

The hypothetical process of accommodation of the new poles, especially China, may involve a change in the conception of governance. In the western understanding, governance is focused on institutions, both formal and informal, and processes conceived to guide and restraint states' activities[31]. However, it is not a unique conception of governance. As Qin suggests, relational governance is more rooted in Confucian cultures as a form of governance that does not govern actors but relationships. With its multidimensional character, it is not about control, but about negotiation[32].

As this comparison shows, the identity of the ruling elites is embedded in the character of the international order. Therefore, different actors have different relationship with the order, as the sharing

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[27] R. W. Cox, *Approaches to World Order*, (Cambridge University Press, Cambridge, 1996) at 136.

[28] Clark, *supra* n. 4, at 4. It should be noted that Clark makes a distinction between primary institutions of the international society (war, international law, balance of power or hegemony, among others) and secondary institutions (or international organizations).

[29] R. O. Keohane, *After Hegemony. Cooperation and Discard in the World Political Economy*, (Princeton University Press, Princeton, 1984).

[30] I. Clark, "International Society and China: The Power of Norms and the Norms of Power", 7(3) *The Chinese Journal of International Politics*, (2014) 315-340, at 317, [doi: 10.1093/cjip/pot014].

[31] R. O. Keohane and J. S. Nye, "Governance in a globalising world" in R. O. Keohane (ed.), *Governance in a Partially Globalized World*, (Routledge, London, 2002) 193-218, at 202.

[32] Qin Y., "Rule, Rules, and Relations: Towards a Synthetic Approach to Governance", 4(2) *The Chinese Journal of International Politics*, (2011) 117-145, at 133, [doi: 10.1093/cjip/por008].

of status and the participation is unequal. Understanding the performative role of institutional networks provides clues on the satisfaction of a state with the status quo. In other words, institutions are of special concern to analyse the accommodation of rising powers to the existing order and their relations with the institution of hegemony.

Any approach to the institutional scenario in situations of hegemony should, firstly, consider institutions as organizations in constant evolution that develop their own logics as they become more stable[33]. For the purpose of analysing hegemonic institutional context, it should also be noted the context in which they are born and how this context is transformed after the creation. It is possible to argue that this pre-institutional context is defined by a situation of material primacy of a state for a period that is usually characterized as post conflictual[34]. In this specific moment, the most powerful power decides to institutionalize its exercise of power through a set of regimes, organizations, and norms which are profoundly influenced by its interests and identities. In the afterward of the WWII, for instance, United States promoted the regulation of the international economic and financial systems through the Bretton Woods institutions. This institutional complex, even if created through agreement with other 43 countries, reflected the capitalist and liberal identities of the United States and served to their interest, especially in commercial, monetary and financial terms.

Accordingly, the leading state will achieve several goals with the construction of these institutional networks. On the one hand, and more evidently, it binds secondary states into a certain post-war order that offers predictable patterns of behavior and reduces uncertainty[35]. On the other hand, and more importantly, it constitutionalizes, socializes, legitimates and decentralizes its exercise of power. At the same time, it establishes a certain hegemonic narrative of the international society that contains concrete meanings and boundaries that marginalize other actors and narratives.

Once institutions became the grounds of negotiation and some regular patterns of contacts are established, they influence, in different ways, both actors and the international context. The development of a constitutional international order transforms primacy into hegemony[36]. The outcomes on the international arena can be summarized in the following five. Firstly, as liberals advanced,

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33 Ikenberry, *supra* n. 9, at 42; Finnemore, *supra* n. 13, at 68-69.

34 Clark, *supra* n. 4; Ikenberry, *supra* n. 9.

35 Ikenberry, *supra* n. 9, at 51.

36 Even though both Clark and Ikenberry highlight the constitutional nature of certain international orders, their visions differ. Ikenberry describes the chances of the leading state after a war, domination, abandonment or hegemony. The leading state has incentives to construct "a mutually acceptable order" and, towards this goal, the institutionalization of cooperation is the tool to overcome secondary states' fears of domination and abandonment. This way, the leading state's decision to create an institutionalized order in the form of cooperation through international organizations is what legitimizes the hegemon. Clark's view differs in several points. For this author, the international organizations that have been created under US hegemony are secondary institutions derivative from the primary institution of hegemony, adopting English School's terminology. This way, Clark questions the notion that "the principal strategy of hegemony adopted by the United States after the war was itself institutional", which is the basic argument to defend that these institutions are what bestowed the US with legitimacy. In his opinion, the hegemon does not directly create institutions, but an institution of hegemony that contains a certain order and concrete narratives of what is considered as rightful state conduct. Secondary states, at this phase, are the ones who judge the legitimate character of this institution and, eventually, bestow the order that the hegemon has built (or the institution of hegemony) with legitimacy, but not the actor itself. In other words, it is the hegemonic superstructure what is legitimated, not the United States as the hierarchical leader at its top. Ikenberry, *supra* n. 9, at 51-53; I. Clark, *Hegemony in International Society* (Oxford University Press, Oxford, 2011) at54 and 124.

 DOI: 10.17103/sybil.21.4

institutions transform the contexts of cooperation. The availability of more and better information increases trust and multilateral cooperation, as the multiplication of actors does not necessarily imply an increase of cheating options. Secondly, institutions also provide instrumental legitimation to certain hegemonic decisions, as the United States has done, for example, through the establishment of multilateral forces with NATO members for several military conflicts. Thirdly, institutions also become sources of contestation to the hegemon, for example, through veto in the United Nations Security Council. Fourthly, they also constrain the exercise of hegemonic power. They set the boundaries on the exercise of material power, but they also offer different alternatives to the hegemonic state. In the view of Brooks and Wohlforth, constrains emerged from institutions, especially reputation, are minimal[37]. However, their analysis focuses more in the direct constraint, obviating the long term erosion of the hegemon's legitimacy. As Finnemore affirms, the hegemon feels the constraints of institutions through punishment and trap and, as a response to it, develops hypocritical behaviors, eroding its legitimacy[38]. Finally, institutions shape the actors' identity, values, and interest[39] by promoting, for example, a more important status inside the organization. This accommodation strategy is usually mentioned as a way to promote China's turn into a status quo power. However, the case study should address to what extent contemporary institutions perpetuate the Cold War power distribution and whether they are still reluctant to adjust their power-sharing.

(D) STABILITY IN INTERNATIONAL SOCIETY. THE ROLE OF HEGEMONY AND THE PROSPECTS OF CONTINUITY AND CHANGE

The stability of the international system is an issue of special concern, considering the anarchical character of the system. In a general sense, stability is linked to the structure of the system, considering some distributions as more stable. Proponents of the Hegemonic Stability Theory pointed to the power inequality as a source of stability, defending that the hegemon plays an important role maintaining the system and providing global public goods such as security or economic order[40]. Moreover, Gilpin stated that hegemony, not anarchy, constituted the organizing principle of the system at least for two decades[41].

However, in the realist tradition, the balance of power theories continued to link bipolarity with stability, as a source of restriction on the great powers. Hegemonic and balance of power approaches,

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[37] S. G. Brooks and W. C. Wohlforth, *World out of Balance. International Relations and the Challenge of American Primacy*, (Princeton University, Princeton, 2008).

[38] Finnemore, *supra* n. 13, at 61.

[39] P. J. Katzenstein, *The culture of national security: norms and identity in world politics*, (Columbia University Press, New York, 1996) at 22; R. D. Duvall and A. Wendt, "Institutions and International Order: Approaches to World Politics for the 1990s" in E.-O. Czempiel and J. N. Rosenau (eds.), *Global Changes and Theoretical Challenges: Approaches to World Politics for the 1990s*, (Lexington Books, Lexington, 1989) 51-73, at 60.

[40] Even Carr was convinced that the "working hypothesis of an international order was created by a superior power". E. H. Carr, *The Twenty Years' Crisis 1919-1939. An Introduction to the Study of International Relations*, (Macmillan, London, [1939], 1946) at 232. In the same vein, realists as Wohlforth affirm that the broader is the concentration of power in the hands of the hegemonic state, the more stability and order in the international system. W. C. Wohlforth, "The Stability of a Unipolar World", 24(1) *International Security*, (1999) 5-41, at 23.

[41] Gilpin refers to the two decades before the publication of his book, War and Change in 1981. Gilpin, *supra* n. 6, at 7 and 144.

despite these confronting arguments, converge on pointing to a particular structure of the system as the source of stability. However, for Gilpin, hegemony needs prestige to overcome the logic of the balance of power. This way, other powers will understand that the hegemon will restrain its power and provide public goods. In other words, the less powerful states decide that they gain more with the rule of the hegemon that with confrontation and balancing. As Power Transition Theory proposes, satisfaction constitutes a key variable in continuity and change, but at the same time is a slippery unit of analysis[42].

In the same vein, in the realist school, some refuted balance of power theories and declared that it was not polarity, but the balance between status quo and revisionist forces in the system what makes a system stable[43]. Again, this statement goes back to the consideration of rising power as a risk to the system. That constitutes a point of convergence in most hegemonic theories and also for some of the pro-balancing scholars. However, the rise of a new power and the distribution of power are not the only variables to consider. As Schweller points out, when explaining the practices of bandwagoning, even if these dynamics push the system in the direction of change, this change may not always mean a more unstable system[44]. Moreover, he also contends that modern realists tend to assume that states would pay higher costs to protect the values they already possess (a status quo position) but would take lower risks to improve their position in the system (revisionist)[45]. Undoubtedly, this dichotomy goes back to the realist debate over which one is states' primary goal, security or power. Yet, this distinction is false to the extent that ignores the changing goals of emerging states, the evolution of their interests and its possible accommodation in the system and future satisfaction.

Therefore, the source of stability is not the pattern of power, but the relationship between the power distribution and the international order. Even if the previous approaches may seem as contradictory, they refer to different orders. In this vein, Ikenberry distinguishes between three orders that vary in their sources of stability. In the case of balance of power, there are the balancing practices; in hegemonic orders, the unipole and in constitutional orders is the normative corpus in which the power limiting institutions are based[46]. However, in constitutional orders, it may be argued that institutions per se are not a source of stability, it is the legitimacy bestowed to the order of which these institutions take part that assures the stability of the system. Therefore, legitimacy, and not institutions, is the source of

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42 A. F. K. Organski, *World Politics*, (Alfred A. Knopf, New York, 1965); A. F. K. Organski and J. Kugler, *The War Ledger*, (University of Chicago Press, Chicago, 1980); J. Kugler and D. Lemke (eds.), *Parity and War. Evaluations and Extensions of The War Ledger*, (University of Michigan Press, Ann Arbor,1996); D. Lemke, "Great Powers in the Post-Cold War World: A Power Transition Perspective" in T.V. Paul, J. J. Wirtz and M. Fortmann, *Balance of Power. Theory and Practice in the 21st Century*, (Stanford University Press, Stanford, 2004) pp. 52-75; J. Kugler and D. Lemke, "The Power Transition Research Program" in M. I. Midlarsky (ed.), *Handbook of War Studies*, (University of Michigan Press, Ann Arbor, 2000) pp. 129-163.

43 J. Kirshner, "The Tragedy of Offensive Realism: Classical Realism and the Rise of China", 18(1) *European Journal of International Relations*, (2012) 53-75, at 58, [doi: 10.1177/1354066110373949]; R. L. Schweller, "Bandwagoning for Profit. Bringing the Revisionist State Back In", 19 (1) *International Security*, (1994) 72-107, at 93, [doi: 10.2307/2539149].

44 Schweller, *supra* n. 43, at 93.

45 Ibid at 85.

46 Ikenberry, *supra* n. 9, at 23-24.

stability of the system[47].

Even if we admit that a concrete power pattern generates stability, it does not automatically generate a society[48]. With the absence of a society, conflict would be permanent, because even if the system is stable and has a regular pattern of behavior, different conceptions of how the society should be are in conflict. That is to say, if we analyse the post-war periods with an English School lens, we will not totally agree with Ikenberry's description of these periods as terms used by the victorious great power to construct an order and provide stability. These periods can also be seen as struggles to establish which principles of legitimacy will be hegemonic in the system as happened after WWII. Later, these principles will constitute the cornerstone of the newly born international society. Therefore, the order is not the direct aim, but the outcome of the stabilization of these legitimacy principles[49]. So, if we consider that both hegemony and legitimacy constitute social phenomena that involve values (considered to a different extent depending on the theory)[50], we can conclude that the international society cannot be stable without the shared values that make possible these bunches of legitimate principles and sanction them as hegemonic and, hence, not even international society.

However, this emphasis on shared values must not be misunderstood with the notion of the standard of civilization, prominent among English School scholars in the last century. It is possible to draw a link to the school's prominent work on The Expansion of International Society. In this work, despite the attention given to the case studies, for Bull and Watson, the individual analyses serve to a more important research question: the new international system. Even if they dedicate a chapter to the emergence of the new international society, the work does not properly address the biggest uncertainties about the global international society, not even its existence, formation or consistency[51]. This gap makes it necessary to address these questions in the case of the contemporary international society: to what extent it is universal? Does it have any entry requirements as it had in previous centuries? The character of international society is again linked to stability, as the inclusion and accommodation of new or peripheral powers in this society and the socialization of the society itself are crucial issues to provide continuity and also to assure that change is less dramatic. The very existence of this society implies shared norms and institutions which, in reality, are usually established by a great power to assure its order. Therefore, this conclusion, besides reinforcing Clark's asseveration that the English School and hegemonic analysis are complementary, also strengths the argument that this society in its universal sense would be better achieved under hegemony. In a hypothetical case of a struggle for systemic dominance, different sets of norms, regimes and alternative hegemonic institutions based on

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47 C. Reus-Smit, "International Crisis of Legitimacy", 44(2/3) *International Politics*, (2007) 157-174, at 170, [doi: 10.1057/palgrave.ip.8800182].

48 C. Navari, "What the Classical English School was Trying to Explain, and Why its Members were not Interested in Causal Explanation" in C. Navari (ed.), *Theorising International Society: English School Methods*, (Palgrave Macmillan, Basingstoke, 2009) 39-51, at 45.

49 Y. Zhang, "China and the Struggle for Legitimacy of a Rising Power", 8(3) *The Chinese Journal of International Politics*, (2015) 301-322, at 305, [doi: 10.1093/cjip/pov008].

50 I. Clark, "How Hierarchical can International Society be?" in K. Booth (ed.), *Realism in World Politics*, (Routledge, London, 2011) 271-287, p. 277.

51 B. Vigezzi, *The British Committee on the Theory of International Politics (1954-1985): The Rediscovery of History*, (Edizioni Unicopli, Milan, 2005) at 100.

confronting identities anticipate a fragmentation of the global entity of international society. Change, in this case, cannot be explained just as a power transition, but as a hegemonic succession[52].

As Clark contends the right of the declining hegemon to keep on institutionalizing an order at its own shape expecting that the eventual successor will simply adapt to it is at least questionable[53]. In this case, the order will not constitute a source of stability, but of conflict, as a struggle between two alternative hegemonic institutions. In the event of a lack of agreement on the definition of the legitimate hegemonic institutions and as a cause of the transition in progress, it may be possible to witness a fragmentation of international society toward different legitimacy principles and confronting considerations of how international order should be.

(E) METHODOLOGICAL PROPOSAL TOWARDS A COMPOSED UNDERSTANDING OF HEGEMONY. THE ROLE OF MATERIAL AND SOCIAL VARIABLES

The hybrid nature of the actual contemporary international society and its changing nature complicate any analysis of its structure. Concretely, the present society is hybrid both in its origins and in its expansion. As Hurrell notes, this society is defined by a "deformity" resulted from two phenomena. On the one hand, the interests and preferences of the great powers have an important influence in the society and, on the other, there is growing pluralism of ideas, values, and identities that seek recognition within the society[54].

As Buzan and Lawson note, in public policy, the term international society has been usually interchanged with "international community". On the long term, this creates a false understanding that raises an idea of an effective and identity-based community, shadowing the reality of an international society that it is constantly negotiated and pluralist in its core[55].

Due to these continuous processes of negotiation, dynamics of contestation regarding the unequal distribution of rights and status are common within international society. This contestation constitutes a force of transformation and globalization of the international society, pushing towards a restructuration of the social relations that take place within it[56].

This constant evolution results on a changing nature of the society, supported by four main reasons. The first one is the multiplication of non-state actors and their growing relevance in the system. Even if the state continues to be the most important actor for the majority of IR scholarship, the geopolitical relevance of these new poles of power grows dramatically, particularly in the case of terrorist groups, transnational corporations, and cities, among others. Secondly, the society of states is evolving towards

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52 Clark, *supra* n. 10, at 13-14.

53 Clark, *supra* n. 4, at 191.

54 T. Dunne and C. Reus-Smit, The Globalization of International Society, (Oxford University Press, Oxford, 2017) at 32.

55 B. Buzan and G. Lawson, The Global Transformation. History, Modernity and the Making of International Relations, (Cambridge University Press, Cambridge, 2015) at 302.

56 A. Hurrell, *On Global Order: Power, Values and the Constitution of International Society*, (Oxford University Press, Oxford, 2007) at 9-10; Y. Zhang, "China and the Struggle for Legitimacy of a Rising Power", 8(3) *The Chinese Journal of International Politics*, (2015) 301-322, at 306, [doi: 10.1093/cjip/pov008].

a less Western ruled society with the emergence of new poles of power. The economic rise of emerging economies and their influence as poles of dynamism is gradually translating to the political sphere. Thirdly, the concept of power has evolved towards definitions that are less materialist, opening a research ground for new notions as influential as soft power. Moreover, more classic theoretical concepts such as diplomacy, institutions or identity have vividly resurged and its influence spreads both within the system and also among political leaders. Finally, economic interdependence and globalization have erased Cold War's considerations about the poles of influence and even the most antagonistic states maintain strong economic relations.

(1) The materialist analysis of hegemony

Despite the transformations that are shaking international society, power distribution constitutes one of the most important variables in IR. The literature around power dynamics and distribution generally agrees in the difficulties to make power measurable[57]. Needless to say, historically power has been one of the most contested concepts in the literature, and the ways to measure it are, at least, plural. Moreover, any aggregated analysis of power must tackle the question of power fungibility, as different power resources are not interchangeable[58]. However, the alternative analyses also pose problems. On the one hand, the relational power approach, developed by Dahl, despite being useful, has been usually accused of mixing the concepts of power and control[59] and poses some difficulties to be studied. On the other hand, the concept of structural power, defined as the ability to establish the rules and influence other actors, is especially focused on the economy and regime theory that has not completely spilled over to the IR literature. Moreover, this last concept is profoundly influenced by the distribution of capabilities within the system, so both approaches are, in some way, interrelated[60].

The role of the distribution of power and the structure of the international system has been a particular concern of realism. As Barnett and Duvall rightly affirmed, rival theories have just confronted argumentatively realists' concepts of power, but have not tried to construct their own definition of the concept and, at the same time, have strongly neglected to explicitly explain how it operates in their own theories[61]. With its interest rooted as back as in Ancient Greece's philosophy, Thucydides believed, in Gilpin's words, that "the hierarchy of power among these states defined and maintained the system and

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[57] Underneath any power analysis, it coexists a debate between the consideration of power as resources or power as relational. As Baldwin notes, "the multidimensional nature of power makes it difficult to add up the various dimensions in order to arrive at some overall estimate of an actor's power". D. Baldwin, "Power and International Relations" in W. Carlsnaes, T. Risse-Kappen and B. A. Simmons (eds.), *Handbook of International Relations* (Sage, London, 2002) 273-297, at 275. Among realists, the notion of power as resources has been the more common one. However, this approach usually equates resources with power itself, neglecting the problems of conversion and the differences between capabilities and resources. Reus Smit, *supra* 47, at 161-162.

[58] D. Baldwin, "Power Analysis and World Politics: New Trends versus Old Tendencies", 31(2) *World Politics*, (1979) 161-194, at 180, [doi: 10.2307/2009941].

[59] R. Dahl, "The Concept of Power", 2(3) *Behavioral Science*, (1957) 201-215, at 202-203, [doi: 10.1002/bs.3830020303].

[60] J. A. Hart, "Power and Polarity in the International System" in A. N. Sabrosky (ed.), *Polarity and War. The Changing Structure of International Conflict*, (Westview Press, Colorado, 1985) 25-40, at 25 and 30.

[61] M. Barnett and R. Duvall, "Power in International Politics", 59(1) *International Organization*, (2005) 39-75, at 41, [doi: 10.1017/S0020818305050010].

determined the relative prestige of states, their spheres of influence, and their political relations"[62]. Even though power has been understood in different ways among realists, it is undeniable that it constitutes the cornerstone for all the realist school. In neorealism, power was given even a stronger relevance. In Waltz words, international politics is a reflection of the distribution of power[63]. In the same vein, Gilpin specified that the important factor was not the static power distribution, but the evolution of the dynamics of power relations[64]. Thus, power is not such important in absolute terms, but in relative ones.

At this point, it is possible to tag the distribution of power among great powers as a crucial variable for the materialist analysis. Great powers are usually defined by the combination of capabilities in several scopes ranging from economic strength, military budget or technology[65]. In contrast, Levy offers a less materialist vision, maintaining that great powers can be identified by three main characteristics. The first is their huge military capability and their projection of power abroad. As a result, great powers tend to be strategically self-sufficient and have strong foreign policy targets. Secondly, their concept of security is not only regional but global. Finally, they have both the capacity and the assertiveness to defend their interests globally[66]. This composed conceptualization of great powers supports the present multidimensional analysis that will start, but not finish, with the material structure.

By turning to a more analytical definition, Levy avoids the criticism towards materialist views, led by Waltz, which tend to wrongly equate capabilities and resources. In Reus-Smit's view, some of the components of Waltz' lists are resources, and just two can be equated as capabilities (economic and military strength)[67]. Therefore, most of IR literature assumes the equation that sees capabilities and resources as synonyms and analyses power just in terms of the addition of all of them.

Despite of analyzing each variable individually, it is also interesting to apply an index that offers a broader picture of the structure of international society. In the power transition literature, the Correlates of War (COW) project launched its own index to determine the outbreak of war caused mainly by power transition[68]. As a result of this project and applying different variables (population, military personnel, military expenditures, energy consumption and iron and steel production), it came

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[62] Gilpin, *supra* n. 21, at 595.

[63] K. N. Waltz, "Structural Realism after the Cold War", 25(1) *International Security*, (2000) 5-41, at 27, [doi: 10.1162/016228800560372].

[64] Gilpin, supra n. 6, at 93.

[65] Waltz, for example, lists the following variables: size of population and territory; resource endowment; economic capability; military strength; political stability; and competence. K. N. Waltz, *Theory of International Politics*, (McGraw-Hill, London, 1979) at 131.

[66] J. Levy, *War and the Modern Great Power System, 1495-1975*, (University Press of Kentucky, Lexington, 1983) at 11-19.

[67] Reus-Smit, *supra* 47, at 161-162.

[68] The main works in the COW Project are Singer's introductory books that enunciate which variables and indicators will be included in the analysis. J. D. Singer, *The Correlates of War*, (Collier Macmillan, New York, 1979); J. D. Singer and P. Diehl, *Measuring the Correlates of War*, (University of Michigan Press, Michigan, 1991). For applications of the Correlates of War to power transitions see, for example, I. de Soysa, J. R. Oneal and Y.-H. Park, "Testing Power-Transition Theory Using Alternative Measures of National Capabilities", 41(4) *The Journal of Conflict Resolution*, (1997) 509-528 [doi: 10.1177/0022002797041004002]; H. Houweling and J. G. Siccama, "Power Transitions as a Cause of War", 32(1) *The Journal of Conflict Resolution*, (1988) 87-102, [doi: 10.1177/0022002788032001004]; D. Lemke and S. Werner, "Power Parity, Commitment to Change, and War", 40(1) *International Studies Quarterly*, (1996) 235-260, [doi: 10.2307/2600958].

up a Composite Index of National Capability (CINC) that ranked the states on the basis of its aggregate share of capabilities[69]. As Chan points out, the index was not very sensitive to economic changes, due to the importance given to variables such as population and the omission to adapt to the technological changes. As a result of that, the author maintains, this index did not reflect the decline of USSR power during the 1970s and 1980s and has lost most of its validity for the study of power transitions both in the 21st century and in the second half of the 20th[70]. Therefore, Chan proposes an alternative measure that comprises economic power (through the indicator of GDP in US dollars on Purchasing Power Parity standard), defensive power (military expenditures in current US dollars) and technological power (total number of internet hosts)[71].

In the case of geographical variables such as population and territory, this methodology proposes to exclude them. As relative stable variables, they tend to bias the data by exaggerating the index of large and highly populated states such as Russia, China, India or the United States. It is not to say that they do not play a role as a factor of national power, but definitely is not a crucial one[72].

In the same vein, with the purpose of offering an index that matches contemporary changes in international society, important attention should be paid to technological developments, both in the field of general innovation and to technologies on the military sector. In the latter, it is possible to state that, even if years ago the number of national troops was one of the most important indicators of each state's national military strength, recent developments in the military research and development sector provide the opportunity to develop a more lethal military with less personnel.

That being said, the aggregate power of a state is highly influenced by its economy. In the globalized world, national economy continues to be the most important material factor, even if its influence has diffused. Countries' economic strength determines most of the budget spent on military or social targets and also modifies their international strategy. Following economic variables, military, energy and technological ones will be individually addressed.

(a) Economic, financial and technological variables

Economic trends and the dynamism of national growth are usually marked as the most important variables of material power. Economic strength has been labelled as the most convertible form of power[73]. As Kirshner says, changes in the global economic map are one important source of international political

[69] CINC includes the ratios of countries' (1) total population, (2) urban population, (3) iron and steel production, (4) primary energy consumption, (5) military expenditure, and (6) military personnel. It is, in fact, a multiple index that reunited demographic, industrial and military variables.

[70] S. Chan, *China, the U.S., and the Power-Transition Theory. A Critique*, (Routledge, London, 2008) at 12.

[71] Ibid, at 13.

[72] Chan is also a supporter of this claim. In his analysis, he has found that the addition of these variables has sometimes biased past analyses, as in the case of the United Kingdom. Ibid, at 2. Even if several leading scholars continue to include them in their analysis, the author understands that in the contemporary era both variables maintain relatively stable figures, unless a sudden loss of territory or population happens as a result of a war, for instance.

[73] D. M. Lampton, *The three faces of Chinese power: might, money, and minds*, (University of California Press, California, 2008) at 114.

conflict, as economic change is believed to redistribute relative power among states[74].

Needless to say, the size of a state's economy is the cornerstone of great power status, and the economic surplus dedicated to military and technology is a reinforcing factor for rising powers[75]. Due to the more important role of emerging markets in the global economy, it is also important to look at the dynamism of the economy and its annual growth rate. As several authors argue, an economy's ability to grow is directly related to its maturity. Even if the technological revolution and reliable political environments maintain stable growth rates among developed societies, they are strongly confronted by developing economies whose growth-rates are far more dynamic[76].

The measure of national economies and its international comparison has been commonly addressed through the use of Gross Domestic Product (GDP) indicators. However, there are several measurements for this task and lately there has been a wide controversy due to the different results that each one offered. Since the World Bank (WB) revised its indicators in the last decade, the measurement of GPP in Purchasing Power Parity (PPP) terms has witnessed a strong rise. As the Asian Development Bank (ADB) explains, this measure, "adjusts for differences in purchasing power of local currencies"[77]. With an admitting margin of error of 5%, the WB advises to use this index to group economies, for example, in terms of their income, rather than ranking international economies[78]. Moreover, several economic analyses point out that the PPP is particularly troublesome in the case of larger countries with diverse prices between regions[79]. As in the case of China, the difference between urban areas (where most of the data is collected) and poorer rural areas creates an overestimation of actual prices[80]. As a result, economists tend to believe that PPP based index is not a proper tool for comparison, especially in cases like China[81]. Therefore, the GDP measure will be calculated in terms of nominal considerations. This way, the GDP at market prices in current dollars will not reflect the effects of inflation[82].

To address the material bases of hegemony, the economic review should inevitably explore the

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74 J. Kirshner, "The Tragedy of Offensive Realism: Classical Realism and the Rise of China", 18(1) *European Journal of International Relations*, (2012) 53-75, at 54, [doi: 10.1177/1354066110373949].

75 Gilpin, *supra* n. 21, at 596.

76 R. L. Tammen, J. Kugler, D. Lemke, et. al., *Power Transitions. Strategies for the 21st Century*, (Chatham House, Nueva York, 2000) at 16.

77 Asian Development Bank, "Purchasing Power Parities and Real Expenditures", Asian Development Bank, Manila, 2007, <http://siteresources.worldbank.org/ICPINT/Resources/270056-1255977254560/Asia&Pacific_2005Report.pdf> [25th April 2016], at 8.

78 World Bank, "Global Purchasing Power Parities and Real Expenditures – 2005 International Comparison Program", World Bank, Washington DC, 2008, <http://siteresources.worldbank.org/ICPINT/Resources/icp-final.pdf> [25th April 2016], at 6.

79 A. Deaton and A. Heston, "Understanding PPPs and PPP-based national accounts", 2(4) *American Economic Journal: Macroeconomics*, (2010) at 1-35, [doi: 10.1257/mac.2.4.1].

80 R. C. Feenstra et al., "Who Shrunk China? Puzzles in the Measurement of Real GDP", 123 (573) *The Economic Journal*, (2013) 1100-1129, at 1101, [doi: 10.1111/ecoj.12021]. In the case of China, the prices were collected in 11 municipalities and extrapolated by the World Bank and the Asian Development Bank. World Bank, *supra* n 77, at 7.

81 Even admitting that the data provided by the World Bank is "reasonable", Wolf and Pillingm strongly proclaim that they "don't mean that China is the largest economy". M. Wolf and D. Pillingm, "China: on top of the World", Financial Times, 2nd May 2014. See Y. H. Ferguson, "Rising powers and global governance. Theoretical perspectives" in J. Gaskarth (ed.), *Rising powers, global governance, and global ethics*, (Routledge, London, 2015) 21-40.

82 This measure can be found, for example, in Chan, *supra* n. 70.

dynamics of trade. Needless to say, exportations have been an important variable for the rise of new powers and, in the way of becoming a mature economy, the balance of payments usually tends to equalize. Moreover, the relations between imports and exports provide a tool to identify imbalances in a national economy, as continuous trade deficits need strong injections of external capital in the domestic economy.

In this case, there is a strong advice to select the balance of payments in current market prices as an indicator. It is also important to examine the growth rates of both imports and exports to identify a tendency in each economy.

As it has been enunciated, the present methodological proposal prioritizes technological variables among geographical and demographical ones. It is not only that technological systems constitute a part of the international system, but also, as Herrera argued, produce a social, economic and political change[83]. Therefore, the transformative power of technology can be said to be a source of international change and, moreover, an important facet of national power. However, how to operationalize technological variables is sometimes a slippery issue[84].

Hence, in the practical application, technological developments could be addressed via two main indicators. Firstly, the government expenditure on research and development (R&D) measured by the percentage of national GDP. It is true that this indicator constitutes only one part of the R&D investment, as private companies are, nowadays more than ever, important investors in this area. Secondly, there is important to trace exportations in high technology goods, as it reveals how competitive and innovative the national technology industry is.

(b) Energy variables

Besides the strong association between energy, geopolitics, foreign policy and diplomacy, this concept has also important implications in power status. As realists have remarked, resource shortage and reserves' insecurity may lead to a security dilemma[85]. Thus, states pursue, on the one hand, an improvement in the efficiency of their energy consumptions and, on the other, assuring their energy security. Therefore, energy variables can provide interesting information about systemic change in two different ways. First of all, energy consumption and the composition of each country's energy mix is a strong sign of the country's future energy needs. Even if this indicator can provide interesting information, it says merely nothing about power, but has the ability of suggesting the foreign policy projections of the hegemon and the rising power.

Secondly, energy indicators, particularly those linked to GDP, are useful to reveal a country's energy productivity and efficiency. In this vein, data linking GPD production and energy consumption digs into the technological and innovative character of a country, especially of its industry. Even if excluded

[83] G. L. Herrera, *Technology and International Transformation, The Railroad, the Atom Bomb, and the Politics of Technological Change*, (State University of New York, New York, 2006) at 3.

[84] Because of the novelty of several technological innovations, it is really difficult to select technological variables and indicators that offer a determinant and reliable data for an extensive period of time.

[85] J. A. Garrison, *China and the energy equation in Asia. The determinants of policy choice*, (FirstForumPress, Colorado, 2009) at 2.

from the data, energy consumption and energy imports are also significant variables to analyse a country's national portfolio. However, towards an international comparison, productivity is by far a more determinant variable.

(c) *Military variables*

As Robert Art rightly pointed out, military force is integral to foreign policy[86]. Employed forcefully through its physical use or peacefully through intimidation, military power is a vital component of the great powers' portfolio of capabilities. Usually, military power is only described in its destructive sense[87], but in addition, it includes others such as the ability to back up threats in coercive diplomacy, the capacity to protect and the provision of international assistance[88]. Therefore, the role of military power in the great power status is not only related to its capacity to win a war, but also to protect allies or to provide assistance in accidents or disasters.

Consequently, military expenditure and the size of an army continue to be a crucial facet of great power status. However, it must be noted that recent technological developments have expanded the effectiveness to kill with less personnel. The superiority of the US army, not just in terms of numbers, but also of technology, supports the counter-hegemonic claims towards military modernization. For this reason, military budgets of states should be understood not only as efforts to consolidate a stronger army, but also as an attempt to modernize their capabilities to match those of the hegemon.

An analysis of military power needs to start from state's annual military expenditures. However, this data is not totally reliable. Military issues continue to be sensitive topics and budget are usually released in accordance with governments' interests. Therefore, data had to be taken carefully, as budgets do not always include all the categories of military expenditure[89]. In this case, military power should be analysed, firstly, by the national expenditures in current US dollars and, secondly, by the weight of the military budget in national GDP.

(2) The social analysis of hegemony

The article has theoretically highlighted the complex and hybrid nature of the concept of hegemony. Even if material variables have been presented as relevant to the study of state's role, it is also necessary to understand them in a broader social picture. It is not only necessary to contextualize material variables within the dynamics and practices of international society. Moreover, how states decide to organize, understand and project them has a vital explanatory power. On this vein, in methodological

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[86] R. J. Art, "The Fungibility of Force" in R. J. Art and K. N. Waltz, *The Use of Force. Military Power and International Politics*, (Maryland, Rowman & Littlefield, 2006) 3-19, at 3.

[87] Mearsheimer, for example, strongly supports that "great powers are determined largely on the basis of their relative military capability. To qualify as a great power, a state must have sufficient military assets to put up a serious fight in an all-out conventional war against the most powerful state in the world". Mearsheimer, supra n 21, at 5.

[88] J. S. Nye, *Soft power: the means to success in world politics* (Public Affairs, New York, 2004) at 42.

[89] In the case of China, for example, the military expenditure proclaimed by the Chinese Government excludes some categories as, for instance, the procurement of foreign weapon systems. Department of Defense, "Annual Report to Congress. Military and Security Developments Involving the People's Republic of China 2014", Government of United States of America, Washington D.C., 2014, at 43.

terms, there are three poles of social variables to advance towards a complete examination of hegemony in international society. The first one addresses the institutional practice of hegemony, through an analysis of the regimes and organization promoted by the hegemon from 1945 and its actual accommodation, as well as the nascent web of non-hegemonic institutions that are gradually concentrating alternative practices. Secondly, identity and socialization practices need to be addressed, paying special attention to the multiple identities that the hegemon and the rising state hold, as well as the processes of socialization, accommodation, and confrontation. Finally, the third pole suggest advancing towards an analysis of the legitimacy practices that take place within international society, which are highly influenced by material, institutional and identity variables.

(a) Institutional order

Even if institutions usually constitute a controversial object of study in international politics, the contemporary international society's growing institutional network raises its importance as relevant variables on the international. One can agree that institutions are a reflection of the distribution of material capabilities and that serve as tools of promotion of the interest of the dominant states, as neorealist have more than once stated. However, that seems a too simplistic argument to omit them in the analysis. Liberals' emphasis on institutions as the way to strengthen cooperation fails in the same mistake as the realist one[90]. As Reus-Smit argues, neither of these perspectives can explain why some institutions endure changes in the balance of power and why institutions that may seem conflictual emerge in the same structural conditions[91].

As Keohane and Nye rightly expressed, hegemonic states usually opt to transform international norms and institutions instead of adjusting their own policies to the existing international environment[92]. Norms and institutions emerge as sources of consensual order derived from different interrelated dynamics. It can be argued that some norms and institutions emanate directly from critical changes that highlight the necessity of an institutional action, as environmental policies, for example. However, the hard corpus of contemporary institutional map derives from a given distribution of power within the system, in this case, a hierarchical one. Undeniably, the hegemon's normative and institutional preferences are not only a result of national policy calculations, but also influenced by subnational groups, elites and, to a lesser extent, imitation.

The case study will take advantage of different methodological tools to offer a broad map of the contemporary institutional practice and outline future institutional scenarios. Firstly, it is necessary to tackle the contemporary liberal international order, its main institutions, and the most recurrent patterns of institutional order and the global character of this order. Moreover, it is also interesting to

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[90] Up to some point, liberal institutionalist theory accepts the realist premise that point to the lack of information as the cause of the nonsuccess of cooperation. Even though realist treat information as a non-changing variable, liberal institutionalist argue that a more strengthened institutionalization contributes to a better and more regular information that may reduce uncertainty.

[91] C. Reus-Smit, "The Constitutional Structure of International Society and the Nature of Fundamental Institutions", 51(4) *International Organization*, (1997) 555-589, at 556, [doi: 10.1162/002081897550456].

[92] R. O. Keohane and J. S. Nye, *Power and Interdependence. World Politics in Transition*, (Little Brown, Boston, 1977) at 44.

focus on the hegemon's participation in this order and its preference towards, for example, bilateral or multilateral cooperation depending on the area. As Mastanduno argues, U.S. institutional practices are driven by pragmatism, switching to bi- or multilateral patterns depending on the nature of its foreign policy targets and the opportunities and constraints of the international context[93].

Secondly, the participation of the rising state in this international order must be addressed. As Buzan affirms, in the case of the actual rising state, China, it is important to think about how best to characterize the relationship between this state and the international society[94]. In other words, it has to be contrasted Qin's opinion that maintains that China is increasingly pro status quo, not just instrumentally, but ideationally, as it accepts the values underlying the international society[95]. Following Buzan, the dualism between status quo and reformism/revisionism comprises two questions at the same time: on the one hand, if the rising state is satisfied with its status in the international society and, on the other, whether it accepts or contests the institutions of the society.

The task of disentangling Chinese participation in the liberal institutional order should be addressed both quantitatively and qualitatively, through its participation in the institutions, its vote-share, its contribution to the budget (if there is any), and its decision-making. Moreover, it should be analysed the discursive use of institutions, in positive, neutral or negative sense, as well as its importance in the nations' foreign policy goals. However, prior to analysing states' behavior and strategies in the context of the selected institution, it should be examined each institution's resistance to change and its own paths to reform, if possible.

As a third main point, Chinese institutional building strategies should be studied, as an alternative to the hegemonic international order. For that purpose, the main driving principles to this strategy and the serving interest should be outlined. In other words, the alternative institutional frameworks constitute a basic clue to disentangle how China sees the world and which strategies will it follow in the future. In recent years, China has outlined which can be considered as the first steps towards this alternative institutional framework, with the launch of initiatives as the Asian Investment and Infrastructure Bank (AIIB), but also with the strengthening of bilateral cooperation and regional cooperation especially in Asia, Latin America, and Africa. Therefore, both the creation of these institutions, their goals and U.S. responses to these strategies should be carefully studied.

(b) Identity and socialization

In IR analysis, the role of identity gains special relevance in certain contexts defined by its complexity. Far from the ontological security that characterized the Cold War, the actual context is increasingly uncertain due to the rapid transformations of the international system. Identities, along with institutions and legitimacy, transform and give meaning to the distributions of power. Therefore,

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93 M. Mastanduno, "Institutions of Convenience: U.S. Foreign Policy and the Pragmatic Use of International Institutions" in G. J. Ikenberry and T. Inoguchi (eds.), *The Uses of Institutions: the U.S., Japan, and Governance in East Asia*, (Palgrave Macmillan, New York, 2007) 29-50, at 31.

94 B. Buzan, "China in International Society: Is 'Peaceful Rise' Possible?", 3(1) *The Chinese Journal of International Politics*, (2010) 5-36, at 16, [doi: 10.1093/cjip/pop014].

95 Qin Y., "Nation Identity, Strategic Culture and Security Interests: Three Hypotheses on the Interaction between China and International Society", (2) SIIS Journal, (2003).

identities constitute important elements in the two-way relationship between agents and structure.

In the specific case of US hegemony and China's rise, identities play different roles. In a general sense, identities serve three main social functions: they tell the subject how is it, they tell the rest who the subject is and, finally, they tell the subject who are the rest[96]. However, the role of identities, in this case, becomes more complex. The relations between different subjects is usually understood as a Hegelian alter and ego relationship, where the alter transforms the ego's identity. In other words, this type of relation mirrors the victory of one of the subjects over the other. In great power relationships and power transitions, the Hegelian pattern is represented by portraying the rising challenger as a threat, both the identities of the hegemon and the rising power being exclusive. The struggle for great power status, therefore, is an exclusive relationship with only one victor.

As a result, the Western IR widespread view misunderstands emerging countries' processes of socialization that could break the forecasted spirals of power struggles in the international society. As an alternative, Qin Yaqing proposes the zhongyong (中庸) or Chinese dialectics, an inclusive relationship in which both subjects interact and complement themselves, giving rise to a new synthesis. The process plays an essential role, helping to the definition and redefinition of identities in the course of these relationships. Hence, as Wendt affirms, identities are always relational. The link between, on the one hand, actors' preferences and actions and, on the other, their identities and the ones they attribute to others, is an indivisible tie in the case of our discipline[97]. Moreover, identity definitions, as tools to distinguish alter and ego, involve specific definitions of which interest and threats affect national security[98].

Even if identities are important for every state, they matter in different ways. In the case of the United States, as the hegemon of the system, its role implies the clash between two identities, as Cronin rightly illustrated[99]. The first one is its identity as a hegemon, related to notions of legitimacy and leadership; the second is its great power identity, connected to its material capabilities and its believed exceptional nature. Both maintain a tension between the audiences they relate to, international and domestic, and the clashing interests they demand. Therefore, it is important to address the identities the United States plays in international society and which type of actions corresponds to each of them. Moreover, following Yan Xuetong's works on the types of leadership, there must be addressed what type of leader the United States is, ranging from a tyrannical leadership based on military power, a hegemony founded in material power and strategic alliances and, finally, a model of human authority with a high degree of moral power[100].

In the case of China, its label as a rising power leads, at least for realist theories, to tag it as a

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[96] H. Tajfel, *Human Groups and Social Categories: Studies in Social Psychology*, (Cambridge University Press, Cambridge, 1981) at 255.

[97] T. Hopf, "The Promise of Constructivism in International Relations Theory", 23(1) *International Security*, (1998) 171-200, at 175 y 178, [doi: 10.1162/isec.23.1.171].

[98] Katzenstein, *supra* n 39, at 18-19; K. Booth, "Security and Self: Reflections of a Fallen Realist" in K. Krause and M. C. Williams (eds.), *Critical Security Studies: Concepts and Cases*, (University of Minnesota Press, Minneapolis, 1997) 83-120, at 88.

[99] B. Cronin, "The Paradox of Hegemony: America's Ambiguous Relationship with the United Nations", 7(1) *European Journal of International Relations*, (2001) 103-130, at 104-105, [doi: 10.1177/1354066101007001004].

[100] Yan X., "International Leadership and Norm Evolution", 4(3) *The Chinese Journal of International Politics*, (2011) 233-

revisionist and as a threat to the system's stability. In these theories, a rising power has been purely defined by its increasing material capabilities. However, as Miller suggests, "rising powers are distinguished by very specific kinds of domestic beliefs" [101]. Rising powers, as candidates for great power status, will have an increasing influence in the international structure, the mayor processes and even the future developments of the international system. The development of a more inclusive category of rising power, with the addition of beliefs, identities, and interests, makes it possible to analyse Chinese future aspirations as a great power and its engagement with international responsibilities[102]. To advance an analysis of China's identity as a rising state, it is interesting to analyse the three types of behavior that usually these states accomplish[103]. Firstly, emerging powers seek to acquire more material capabilities to match those of the status quo states. The material approach will explore China's national power dynamics and their relative weight related to other states. Secondly, rising powers' national interests expand from a regional scope to a global one and become more complex. Therefore, its implication in the institutions and diplomatic arenas increases and its grand strategy evolves in that particular direction. Thirdly, rising states witness an increasing internal recognition of its growing status and wish to extend into external audiences. For this purpose, they usually develop communicative acts towards a reaffirmation of their role and their growing interests.

An analysis of identity provides the foundations of the alternative hegemonic institutions that both states propose. It will help in the identification of clashes and convergences and will provide the perfect starting point to determine the prospects to establish a legitimate hegemony.

(c) *Hegemonic legitimacy*

Legitimacy plays a crucial role in international society as the base of shared knowledge and the normative structure of the system[104]. As it has been stated previously, it constitutes an essential factor in the international system and constitutes a vital concept to understand hegemony. Moreover, as a practical concept, legitimacy is inherently linked to the other three constitutes of hegemonic power: material resources, institutional order, and identity. Firstly, although usually misunderstood, the relationship between the material resources of power and legitimacy is quite relevant. Material resources, in relative terms, have been usually considered as the unique source of power.

However, researchers that understand power as relational rather than relative stress the contribution of legitimacy to compulsory power by inducing voluntary compliance within the international society. Under this statement, power is not material, but social, because legitimacy is perceptual and, moreover, these perceptions are rooted in other social variables such as norms, beliefs, and values[105]. Two reasons strength this point. Firstly, legitimacy is linked to the institutions and regimes as well as to the

264, [doi: 10.1093/cjip/por013].

[101] M. C. Miller, "The Role of Beliefs in Identifying Rising Power", 9(2) *Chinese Journal of International Politics*, (2016) 211-238, at 211, [doi: 10.1093/cjip/pow006].

[102] Ibid, at 237.

[103] Ibid, at 217.

[104] Bukovansky, *supra* n. 4, at 2.

[105] M. Bukovansky, I. Clark, R. Eckersley et al., *Special Responsibilities. Global Problems and American Power*, (Cambridge University Press, New York, 2012) at 69-70.

normative structure, not only because the perception of an actor as legitimate is made within the boundaries of these norms, but because of the role of the institutional structure as a legitimizing field. In other words, institutional participation is often a tool to gain legitimacy, as well as a recurrent violation of international norms and counter-institutional practice can eventually lead to legitimacy crisis.

Secondly, identities and legitimacy constitute two permeable fields. As legitimacy, especially in its substantive variant, is profoundly influenced by the actor's values, the identities above these values influence the perception of an actor as legitimate. That is, the identity it plays in certain contexts will profoundly influence others' perceptions. For instance, when the United States decided to contravene international norms and intervene in Iraq, it played its role as a great power to its internal audiences, instead of its identity as a hegemon bestowed with special responsibilities. This way, the practices derived from these actions undermined its legitimacy and, for some authors, generated a crisis or soft balancing behaviours[106]. On the same vein, legitimacy processes transform and determine the units in the social system, constituting not only a two-way process but a mutually transformative one.

Therefore, the analysis of legitimacy will inevitably derive from some of the conclusions drawn from other variables. However, legitimacy should be understood in its deeper sense. It is possible to identify two narratives of the concept in its relation with hegemony, the superficial and the constitutive. The superficial narrative highlights the notion of legitimate domination achieved with the internalization by secondary states of norms and principles socialized by the hegemon. This process, as defined by Ikenberry and Kupchan, results on the internalization of these norms and principles that guide these states' conceptions of order[107]. However, this notion only highlights the direct returns of legitimacy and defines the process as unidirectional, missing the transformative effects of legitimacy on the hegemon's identity and the institution of hegemony as a whole. On the contrary, the constitutive notion understands legitimacy practices as dynamic and continuously contested narratives that transform endlessly the hegemon and secondary states' identity, as well as the international society.

As a consequence of this complexity, any analysis accomplished from the constitutive perspective will inevitably face methodological difficulties. Despite the difficulties derived from the social character and normative references of legitimacy, any constitutive notion must capture the transformative dynamics of legitimacy both in actors and in structures. In the present legitimacy analysis, there will be two referents (the United States and China) and the same dispensers of the legitimacy (i.e. the majority of the states in the international society). For that research purpose, it is helpful to apply Rapkin and Braaten taxonomy on the dimensions of legitimacy to identify the variables and indicators of the analysis[108].

The first dimension is substantive legitimacy, directly related to shared values and norms, as well as

[106] R. A. Pape, "Soft Balancing Against the United States", 30(1) *International Security*, (2005) 7-45, [doi: 10.1162/016228805489460 7]; Reus-Smit, *supra* n 46; Reus-Smit, C., "International Crisis of Legitimacy... op. cit."; Hurd, *supra* n 15.

[107] G. J. Ikenberry and y C. A. Kupchan, "The Legitimation of Hegemonic Power" in D. Rapkin (ed.), *World Leadership and Hegemony*, (Rienner, Boulder, 1990) 49–69, at 49.

[108] Rapkin and Braaten, *supra* n. 13.

shared knowledge. Concretely, it is composed of common goals, principles, and values that serve as justifications for any initiative or action[109]. As substantive values are used as referential in hegemon's action, it must be addressed if clashes between the hegemon's and secondary states regarding particular policies are driven by differences in values or interest. To address the question of substantial legitimacy, two variables should be assessed. Firstly, it must be analysed if the differences between the referents and the dispensers of legitimacy are based on different values or different policies. In other words, it is necessary to resolve if these clashes between referents and international society are a result of differences in values (as, for example, constant references to human rights) or policy behaviour. Secondly, there must be tackled the main values of the idea driven international society for the different referents, as well as its resemblance with those of other states.

Understanding legitimacy not only as something substantive but also as procedural highlights the importance of the decision process. This process, in the contemporary institutional frame, is constitutional as it is open to participation and mitigates the asymmetries of power, in Ikenberry's view[110]. The procedural dynamic is divided into two levels, one related to the accessibility of the decision-making process and, the other related to strategic restraint in its broader sense. Regarding the first procedural constitutionalism, two variables may derive. Firstly, the existing tension between conflicting identities of the referents. As it has been addressed before, actors compile different identities with sometimes conflicting values[111]. The second variable is related to the implication of the dispensers of legitimacy in the policies and initiatives launched by the referents. Consequently, it must be analysed to what extent the states of the international society participate in concrete initiatives of the hegemon in the context of the War on Terror. Therefore, as an indicator, it should be investigated what is the main driver of foreign policy: the referents self-interests or the special responsibilities they are bestowed with by the international society[112].

Regarding the second procedural constitutionalism, related to strategic restraint, it advances in the study of the referents role's in the world, implying issues of self-restraint, reduced returns on power, moderation in policy, adherence to international law or institutional binding. There can be identified several indicators in this issue, such as the state's adherence to international law or, in other words, its involvement both in quantitative and qualitatively (the number of treaties signed or its role as leader or follower, for example), its institutional participation or its role as a great power bestowed by some

[109] Ibid, at 122.

[110] Ibid; Ikenberry, *supra* n 8; G. J. Ikenberry, "Institutions, Strategic Restraint, and the Persistence of American Postwar Order", 23(3) *International Security*, (1998-1999) 43-78, [doi: 10.2307/2539338].

[111] As Cronin illustrated, the hegemon plays different identities to different audiences. On the one hand, it is a hegemon for international audiences and should act as a responsible power. On the other hand, it plays the role of a great power, especially in its material sense, for the internal audiences that sometimes demand a more interest driven role. Cronin, *supra* n 98.

[112] The notion of special responsibilities, as developed by Bukovanski et al., is understood as a type of hierarchy profoundly related to the normative and ideational structures. They are defined as a "differentiated set of obligations, the allocation of which is collectively agreed and they provide a principle of social differentiation for managing collective problems in a world characterized by both formal equality and inequality of material capability". Bukovanski, Clark, Eckersley et al, *supra* n 104, at 13-16.

special responsibilities.

Finally, the third legitimacy dynamic is related to the effectiveness of the state's exercise of power. Obviously, this will be more easily addressed in the case of the hegemon, but as the rising state's power practice is still in progress, there should be investigated through projects more than outcomes. This way, two variables are identified: the referents influence in the world, operationalized by an analysis of the formal and informal alliance map; and the different leadership models' compliance within global society through surveys and statistical data.

The application of this complex methodology will offer a multidimensional and multilevel understanding of the legitimacy of the confronting hegemonic institutions lead by the United States and China. Understanding legitimacy as a concept with continual references to material capabilities, identities, and institutions, the final analysis about conflicting hegemonic institutions will summarize the whole case study by offering a complete understanding of both models and the responses of the members of the international society.

(F) CONCLUSION

There is an evident need to build bridges between different research projects to construct a comprehensive approach that understands hegemony both as social and material concept. This lack of comprehensive approaches evidences the absence of fruitful dialogue between social and materialist research projects. As this article evidences, approaching the materialist analysis within the broader understanding of structure that is simultaneously material and social contextualizes better the data and empowers social analysis dialoguing directly with the main materialist understandings.

As Pu rightly expresses, "the gap between material power and ideational power constitutes a major disequilibrium in the international system, and this disequilibrium drives the major international political change"[113]. It is in this gap where this methodological proposal navigates, on identifying the disequilibrium between the material and the social that produce change on the overall structure.
Hence, the composed approach transforms conflicting approaches in complementary and spurs dialogue. This way, the transgression at this point is not the creation of new terms, but the elaboration of a "conceptual geography" of the discipline to advance analytically[114].

In a practical sense, the source of conflict under hegemonic leadership is the tension between the real distribution of material power and the hierarchical hegemonic international system. The different transformations that take place on the social and material structures translate in different ways; distribution of material power, for instance, changes more rapidly but social changes in the hegemonic international society are more profound even if they require longer periods of time.

The hierarchical hegemonic system was born under a certain distribution of power in which the state's primacy has no challenge. This system, once it becomes more and more operationalized through

[113] Pu X., "Socialisation as a Two-way Process: Emerging Powers and the Diffusion of International Norms", 5(4) *The Chinese Journal of International Politics*, (2012) 341-367, at 353, [doi: 10.1093/cjip/pos017].

[114] A prominent example of this transgression is Barkin's work. J. S. Barkin, *Realist Constructivism. Rethinking International Relations Theory*, (Cambridge University Press, Cambridge, 2010) at 155.

instruments such as alliances, socialization and legitimacy practices, and institutions, orders a hierarchy of distribution of gains. As this distribution is locked by the social role of the hegemon, it automatizes and maintains nearly stable over time. However, simultaneously, the hegemon's material power base raises its maturity and the exercise of power raises the cost of hegemony, even if some of the burdens are spread among the system. More dynamic states rise in this distribution of power, especially in economic terms, while its status in the social hierarchy does not match its new material position. It does not only involve questions of status, identities or responsibilities, but also involvement in the decision-making processes and a better position in the hierarchy of the distribution of gains.

The neglect to accommodate its rising challenger constitutes, under this view, the worst scenario for the hegemon, as the rising state will push for overcoming that hierarchy once the gains of doing it overcome the costs. Evidently there is an inevitable clash of interest between both states, but this is worsened by the apparently independent functioning of both of them. Hence, the isolation of both structures spurs this absence of dialogue between them and stimulates the hegemon's blindness on the changes that the material distribution is pushing for. Theoretical analysis can, modestly, try to transform this and stimulate processes of accommodation that, at least, reduce the costs for the rising state.

 DOI: 10.17103/sybil.21.4

the SPANISH YEARBOOK of INTERNATIONAL LAW

Uncovering labour exploitation: lights and shadows of the latest European Court of Human Rights' case law on human trafficking

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Abstract: For the first time, the European Court of Human Rights (ECtHR) qualified two labour exploitation cases as human trafficking. In examining these two latest judgments in the light of the Court's earlier trafficking case law, this study highlights that, despite some positive contributions, a regressive trend prevails. The Court fails to establish a clear distinction between the concepts of human trafficking and forced labour - the very existence of the latter being threatened by its conflation with trafficking - and substantially lowers standards with respect to states' positive obligations, mainly in relation to the establishment of an adequate normative framework and to judicial cooperation in cross-border trafficking cases. Worryingly, while confusion persists around the understanding of the international definition of trafficking and its relevance under Article 4 ECHR, the holistic approach to positive obligations initially taken by the Court in *Rantsev* is progressively being eroded, in full contradiction with its positive obligations doctrine and European anti-trafficking law.

Keywords: human trafficking - forced labour - irregular migrants - positive obligations - human rights-based approach - slavery

(A) INTRODUCTION

While the ECtHR's two first human trafficking rulings related to sexual exploitation,[1] the Court recently issued two judgments on a more hidden but not less prominent form of trafficking: trafficking for labour exploitation. *J. and Others v Austria*[2] and *Chowdury and Others v Greece*[3], which relate to trafficking into domestic and agricultural work respectively, bring to light the plight of some of the million victims coerced or deceived into labour exploitation around the globe. They also reveal the extent to which European states still fail in their endeavour to address this phenomenon. The Council of Europe (CoE)'s Group of Experts on Action against Trafficking in Human Beings (GRETA) alerted that trafficking for labour exploitation is on the rise: despite being already the predominant form of trafficking in several European countries,[4] the number of identified victims may still be artificially low since "trafficking for labour exploitation is not recognized and addressed by policy and practice in most parties".[5]

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1 *Rantsev v Cyprus and Russia*, Application no. 25965/04, Merits and Just Satisfaction, 7 January 2010 (*Rantsev*); and *L.E. v. Greece*, Application no. 71545/12, Merits and Just Satisfaction, 21 January 2016 (L.E.) (only available in French).

2 *J. and Others v Austria*, Application no. 58216/12, Merits and Just Satisfaction, 17 January 2017 (*J. and Others*).

3 *Chowdury and Others v Greece*, Application no. 21884/15, Merits and Just Satisfaction, 30 March 2017 (*Chowdury*) (only available in French).

4 Belgium, Georgia, Ukraine (in GRETA, Fourth Annual Report (2015), at 35) and the United Kingdom (in GRETA Report on the United Kingdom (2016), GRETA(2016)21, at 17).

5 GRETA, Fourth ..., *supra* n. 4, at 35.

 DOI: 10.17103/sybil.21.5

After briefly describing the two cases (Part B), this article undertakes a comparative analysis of the reasoning developed by the Court in these rulings. It will first examine how the Court's findings contribute to the understanding of the international definition of trafficking and its relevance under Article 4 ECHR, in particular with regard to the relationship between trafficking and forced labour, servitude and slavery respectively (Part C). It will then turn to examine to what extent these judgments contribute to clarifying the scope of states' positive obligations under the human trafficking prohibition in terms of prevention, protection and prosecution (Part D). In that context, the author will point to a number of weaknesses in the Court's reasoning and findings, highlighting the need for the Court to engage with a clearer and at the same time more comprehensive approach to human trafficking (Parts C, D and Conclusion). Indeed, this study highlights how the ECtHR is still far from providing a clear picture of how the concurrent application of both European and international human trafficking and human rights law is to be achieved under the umbrella of a human rights-based approach to trafficking.[6]

(B) BRIEF DESCRIPTION OF THE CASES

J. and Others v Austria concerns the human trafficking allegations brought by three Filipino women who went to work as maids in a household in the United Arab Emirates (UAE). Two of them were recruited by an employment agency in Manila, and the third one travelled at the suggestion of the first one. They alleged that their employers took their passports and mobiles away from them and exploited them. Abuses in the UAE included working for nine months without any day off, extremely long hours (from 5.00 a.m. to midnight), not being allowed to leave the house without supervision, punishment such as being forced to sleep on the cold floor, being slapped and hit and prevented from taking medicines when ill. They claimed that this type of treatment continued during a three days' stay in Vienna where their employers took them, continuing to withhold their passports. After an incident where they were subjected to extreme verbal abuse and threats to their physical integrity, they managed to escape with the help of a Filipino hotel employee. A few months later they filed a criminal complaint in Austria, but the authorities found that they did not have jurisdiction over the alleged offences committed abroad and discontinued the investigation concerning the events in Austria, establishing that they did not amount to trafficking. In their complaint before the ECtHR, the applicants argued that the treatment they were subjected to in Austria amounted to trafficking since those events could not be viewed in isolation, and that the Austrian authorities had failed to adequately investigate and prosecute their trafficking. The ECtHR found that Austria had complied with its positive obligations under Article 4 ECHR.

The second case, *Chowdury and Others*, concerned 42 Bangladeshi nationals who were recruited without having work permits between October 2012 and February 2013 to pick strawberries on the

[6] On the extent to which the two regimes are mutually reinforcing, see V. Milano, "The International Law of Human Trafficking: At the Forefront of the Convergence between Transnational Criminal Law and International Human Rights Law?", in P. De Hert, S. Smis and M. Holvoet, *Convergences and Divergences between International Human Rights Law, International Criminal Law and International Humanitarian Law* (Intersentia, 2018, in press).

 DOI: 10.17103/sybil.21.5

Manolada farm in Greece. They had been promised a wage of 22 euros for seven hours' work and three euros for each hour of overtime. They worked every day from 7 a.m. to 7 p.m. under the supervision of armed guards, and did not receive any pay. When asking for their wages, their employers warned them that they would only receive them if they continued to work. The applicants lived in makeshift huts without toilets or running water. In February, March and April 2013, the workers went on strike demanding payment of their wages, without success. On 17 April 2013, they learned that other Bangladeshi migrants had been recruited. Fearing that they would not be paid, 100 to 150 workers went to the two employers to demand their wages, when one of the armed guards opened fire, seriously injuring 30 workers, including 21 of the applicants. The wounded were taken to hospital and questioned by police. The two employers, together with the guard and an armed overseer, were arrested and tried for attempted murder - subsequently reclassified as grievous bodily harm - and for trafficking in human beings. In July 2014, the assize court acquitted them of the trafficking charges. It convicted the armed guard and one employers of grievous bodily harm, but their prison sentences were commuted to a financial penalty. They were also ordered to pay 43 euros each to the 35 workers who had been recognised as victims. The workers asked the public prosecutor at the Court of Cassation to appeal against the judgment because the human trafficking had not been properly examined, but their request was summarily dismissed. The ECtHR found that Greece has failed to comply with its positive obligations under Article 4 ECHR to protect the victims, prosecute the traffickers and compensate the victims.

At the outset, a number of common and distinctive features between the two cases can be identified. In both cases the applicants are victims of labour exploitation and migrants, coming from poor Asian countries. On the other hand, there are important distinctive points that relate to the type of exploitative work, the gender dimension, and the country where they were exploited. In *Chowdury*, exploitation took place in agricultural work, a professional field that is particularly exploitative but that tends to be recognized as work in the formal economy (although not subjected to adequate controls). On the contrary, Ms. J., G. and C. where exploited into domestic work, an activity that has largely been confined to the informal economy and does thus not benefit from the same standards of protection under labour laws.[7] Moreover, domestic work is almost exclusively carried out by women, which brings us to the second element.

In *Chowdury* the victims were exclusively men and in *J. and Others* they were all women, which highlights a clear gender dimension, where each of these activities disproportionately affect men and women respectively. Therefore, an assessment must be made of the extent to which the gender element has been taken into consideration by national authorities. While exploring in detail the gender dimensions of this case law does not fall under the scope of this study, attention should be drawn to the fact that the Court avoided again, as in its previous trafficking decisions, referring to the

[7] See ILO, Domestic workers across the world: global and regional statistics and the extent of legal protection (2013); see also UN Committee on Migrants Workers, General comment nº 1 on migrants domestic workers, CMW/C/GC/1 (2010). On the lack of legal protection for women migrant domestic workers in the UAE, see A. Gallagher, "Exploitation in Migration: Unacceptable but Inevitable", 68 *Journal of International Affairs* (2015) 55-74, at 62.

gender element,[8] even though the European Trafficking Convention (ETC),[9] the instrument it refers to in order to interpret Article 4 ECHR, requires states to adopt a strong gender perspective in all anti-trafficking interventions.[10] This is regrettable, considering that the CoE is concerned that "persisting inequalities between women and men, gender bias and stereotypes result in unequal access of women and men to justice".[11]

Finally, contrary to *Chowdury* where the exploitation took entirely place in Europe, which made the investigation much easier, in *J. and Others* most of the exploitation took place in the UAE, and a small part only in Austria. This circumstance provides an opportunity to explore the scope of CoE states' obligations with regard to investigation and judicial cooperation in cases of cross-border trafficking with non-European states.

(c) Engagement with the definition of trafficking under Article 4 ECHR

(1) The confusion around how trafficking falls under the definitional scope of Article 4

In *Rantsev*, the Court first found that trafficking was prohibited under Article 4 ECHR.[12] However, it found it unnecessary to identify whether the trafficking situation constituted slavery, servitude or forced labour, finding that trafficking itself, as defined in the Palermo Protocol[13] and the ETC, fell within the scope of Article 4.[14] While the finding that human trafficking is prohibited under the ECHR has generally been welcomed, the Court's failure to explain how trafficking falls within the realm of Article 4 and how it relates to the conducts established therein has been widely criticized.[15] In *L.E.*, the Court avoided the issue again and entirely relied on the reasoning made in *Rantsev*.[16] *J. v Others* and *Chowdury* also rely on that reasoning[17], but they bring in some additional elements. While *J. and Others* only adds some elements of confusion, in *Chowdury* the Court develops its reasoning a step further.

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8 See A. Timmer, "Toward an Anti-Stereotyping Approach for the European Court of Human Rights", 11 *Human Rights Law Review* (2011) 707-739.

9 CoE Convention on Action against Trafficking in Human Beings 2005, CETS n. 197.

10 See Articles 1(1)(a) and (b), 5(3), 6(d) and 17 of the Convention. The Explanatory Report to the ETC clarifies that: "[e]quality must be promoted by supporting specific policies for women …", para 54 and 211. See also European Commission, Study on the gender dimensions of trafficking in human beings (2016).

11 CoE Gender Equality Strategy 2014-2017. See also CoE, Equal access to justice in the case-law on violence against women before the European Court of Human Rights (2015), which concludes that in the ECtHR's case law "overall there is little examination under Article 14 of the question of equality between the sexes in the context of access to justice", at 35.

12 *Rantsev*, at 277 and 282.

13 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000, 2237 UNTS 319.

14 *Rantsev*, at 279 and 282.

15 R. Piotrowicz, "States's Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations", 26(2) *International Journal of Refugee Law* (2012) 181-201, at 196; J. Allain, "Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery", 10(3) *Human Rights Law Review* (2010) 546-557, at 554; and V. Stoyanova, *Human Trafficking and Slavery Reconsidered, Conceptual Limits and States' Positive Obligations In European Law* (CUP, 2017), at 298-299.

16 *L.E*, at 58.

17 *J. and Others*, at 104; and *Chowdury*, at 93.

 DOI: 10.17103/sybil.21.5

As far as *J. and Others* is concerned, it is quite surprising that the Court reiterates the assertion made in *Rantsev* that trafficking "is based on the exercise of powers attaching to the right of ownership".[18] Indeed, since this is the central part of the definition of slavery, this is tantamount to saying that trafficking is a form of slavery, which is intrinsically wrong considering that slavery is only one of the numerous forms of exploitation included in the definition of trafficking.[19]

Moreover, the Court makes a statement that may add more confusion to the matter. When referring to the supposed "identified elements of trafficking" —the ones it identified in *Rantsev* in order to demonstrate that trafficking is based on the exercise of powers attaching to the right of ownership—, i.e. "the treatment of human beings as commodities, close surveillance, the circumscription of movement, the use of violence and threats, poor living and working conditions, and little or no payment", the Court declares that these elements "cut across these three categories", referring to the conduct prohibited under Article 4.[20] Such a statement can be misleading. If it is true that these elements might be present to different degrees in forced labour, servitude and slavery, the Court fails to mention that the difference between these three conducts lies in the degree to which these elements are present and, as a consequence, control is exerted over the victim(s).[21] If this is not added to the assertion that these elements "cut across all three categories", it sends the message that these three conducts are very similar and that there is no real need to distinguish between them.

This is a dangerous path to take. The inability to distinguish between these conducts is generating serious impunity at the national level, as will be discussed in the next section. It is therefore essential that the distinct features and corresponding gravity of these three conducts be clarified and preserved when addressing human trafficking cases, to avoid, inter alia, the trafficking definition "to swallow up [these] other prohibited practices".[22] However, *J and Others* does not bring any clarity on the distinctive features of these conducts and their relationship with trafficking. Regrettably, in this case the Court lost an opportunity to develop its reasoning any further on this point by avoiding reviewing the adequacy of the Austrian legal framework and - too easily - agreeing with Austrian authorities' view that it was appropriate to stop their investigation at an early stage.[23]

Two months later, the Court finally establishes that link in *Chowdury*. It found that the facts under scrutiny constitute trafficking, that they amount to forced labour and thus constitute a violation of Article 4(2). For the first time, the Court qualifies a trafficking situation as amounting to one of the three conducts proscribed under Article 4. Later, we will reflect on why this has not happened before. But we should first have a closer look at the reasoning developed by the Court in *Chowdury* in relation to trafficking and forced labour, essentially under two angles. First, to what extent it contributes to clarifying the concept of forced labour and how it relates to human trafficking

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[18] *J. and Others*, at 104.

[19] See Allain, *supra* n. 15, at 554; and Stoyanova, *supra* n. 15, at 298-299.

[20] *J. and Others*, at 104.

[21] On the gradational model based on the level of control exercised over a person, see J. Allain, *Slavery in International Law: of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers, 2013), at, inter alia, 127-129 and 310-312; and Stoyanova, *supra* n. 15, at 285-287.

[22] A. Gallagher, *The International Law of Human Trafficking* (CUP, 2010), at 50.

[23] See *infra* Part D(4)(b).

 DOI: 10.17103/sybil.21.5

and differs from servitude. And secondly, how it creates some confusion between the concepts of trafficking for forced labour and forced labour per se.

(2) Clarifying the concept of forced labour and how it relates to human trafficking and differs from servitude

In *Chowdury*, the Court clarifies at the outset that, as opposed to *Rantsev*, this case is not about sexual exploitation but about labour exploitation, a form of exploitation included in the definition of trafficking,[24] which "highlights the intrinsic relationship between forced and compulsory labor and trafficking in human beings"[25]. The Court eventually acknowledges an intrinsic relationship that was quite obvious.

Before qualifying the form of exploitation endured by the applicants as forced labour, the Court describes the general principles that surround the concept of forced labour. In that context, it relies on its findings in *Van der Mussele*[26] where it pointed to the need to rely on the definition included in Article 2(1) of the ILO Forced Labour Convention in order to define forced labour. It recalls that this definition includes two fundamental elements. First, the fact that the work has been extracted "under the menace of any penalty". And second, that it lacks voluntariness: it is a work for which the person "has not offered himself [or herself] voluntarily".[27] In that framework, it recalls two principles established in *Van der Mussele* that relate to these elements. First, in relation to voluntariness, prior consent to perform the work is not the key element to look at and is only to be given relative weight: lack of voluntariness is to be assessed against all the circumstances of the case since these, taken globally, may invalidate the consent initially given.[28] Second, the Court considers that not all work performed under the menace of a penalty necessarily constitute forced labour and that it should be found that a "disproportionate burden" has been imposed on the person, in light of the nature and volume of the work performed.[29]

One of the mayor contributions of this case is that the Court sheds light on how these principles apply to the exploitation of migrants in an irregular situation. It is particularly welcome that the Court addresses this phenomenon, establishing that, in light of a number of factors, undocumented migrants may be considered as finding themselves in a situation of vulnerability that, if abused by the employer, may invalidate a possible initial consent to their work.[30] According to the mentioned

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[24] Reference is made to the definition as per Article 4(a) of the ETC, which reflects the one included in the Palermo Protocol.

[25] *Chowdury*, at 93 (translation by the author).

[26] *Van der Mussele v Belgium*, Application no. 8919/80, Merits and Just Satisfaction, 23 November 1983 (*Van der Mussele*).

[27] *Chowdury*, at 90.

[28] *Ibid.*, at 90, referring to *Van der Mussele* at 37.

[29] *Ibid.*, at 91, referring to *Van der Mussele* at 39.

[30] Irregular status had already been considered as a vulnerability factor in the context of forced labour by the International Labour Organization (ILO), see ILO, Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children (2012), at 16; and ILO, Forced Labour and Human Trafficking: A Handbook for Labour Inspectors (2008), at 10. See also Gallagher, *supra* n. 22, at 36. For a consideration of migrant's irregular status as a position of vulnerability in the context of the trafficking definition, see UNODC, Abuse of a position of vulnerability and other "means"

general principles, the Court assesses the voluntariness of the work performed against all the circumstances of the case, considering the following as relevant: - the applicants worked without perceiving their salary; - their living and working conditions were particularly harsh, as they worked every day from 7 to 19 hours under the control of armed men, lived in makeshift huts, and their employers threatened not to pay them if they stopped working; - since their irregular situation put them at risk of being arrested, detained and deported, leaving their work would have meant increasing the prospect of deportation and losing their salaries; - without any salary, they could not move to another place.[31]

The Court finds that the applicants where in a situation of vulnerability when they started working since they were in an irregular situation, had no resources and knew that if they stopped working they would never get their due wages.[32] Therefore, even if they had initially consented to that work, the conduct of the employers had changed the nature of the situation, as follows: "[W]hen an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer their work voluntarily".[33] In a European and world context where the exploitation of irregular migrants is widespread and perceived as "inevitable",[34] this is a significant contribution by the Court.

On the menace of a penalty, the Court's reasoning is not as clear. A number of circumstances are referred to by the Court, but without stating which element they actually contribute to substantiate. The Court notes that the applicants worked in extreme physical conditions and were subject to constant humiliation, and that the accused imposed themselves without scruple through the use of weapons and threats. The day of the shootings, the employer threatened to kill them if they did not continue to work for him. When they refused, he told them to leave and threatened to burn their huts if they stayed.[35] These elements clearly constitute a menace of a penalty. However, when mentioning these elements, the Court fails to state that they constitute a menace of a penalty. Moreover, while these elements refer to the duress of the working conditions, the Court fails to examine whether they amount to an "excessive or disproportionate burden", according to the requirement it had established a few paragraphs earlier.

There is another important issue on which the Court conveys a clear message: the distinction between forced labour and servitude. This is a vital point: failure to understand the distinctive thresholds required under these two notions may end up generating impunity for forced labour situations, as happened in this case.[36] Indeed, the Patras Court applied a too high threshold to the

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within the definition of trafficking in persons (2013), at, inter alia. 3, 15, 16, 34, 45 and 46.

31 *Chowdury*, at 94-95.

32 *Ibid*, at 97.

33 *Ibid*, at 96 (translation by the author).

34 See European Union Agency for Fundamental Rights (FRA), Severe labour exploitation: workers moving within or into the European Union. States' obligations and victims' rights (2015), which refers to EU states "accepting systemic labour exploitation" of migrants, at 3.

35 *Ibid*, at 98.

36 For a reflection on how conflating trafficking for forced labour with slavery equally risks "raising the threshold for what counts as trafficking", undermining prosecutorial efforts and access to redress for victims, see J. Chuang, "The Challenges and Perils of Reframing Trafficking as 'Modern-Day Slavery'", 5 *Anti-Trafficking Review* (2015) 146-149, at 147.

situation experienced by the applicants: conflating forced labour with servitude, and finding that the constituent elements of servitude where not satisfied, it ruled that forced labour allegations had not been substantiated and acquitted the accused.

In *Chowdury*, the Court recalls that the fundamental feature that distinguishes servitude from forced labour "lies in the victims' feeling that their condition is permanent and that the situation is unlikely to change".[37] This feeling is closely linked to the fact that the person is excluded from the outside world through the deprivation of his or her freedom of movement, and can thus not alter his or her situation because it has no possibility to abandon it. It that sense, servitude is an "aggravated" form of forced labour, as the Court had already established.[38] The Court found that the fact that the applicants could not have felt that feeling —since they were not in a situation of exclusion from the outside world nor in the impossibility of abandoning their employment— is not relevant for the purposes of qualifying the situation as forced labour, since "restriction to freedom of movement is not a *sine qua non* condition in order to qualify a situation as forced labour".[39] Restriction to freedom of movement is an element that relates to aspects of the life of the victims —and not so much their work— that infringe Article 4 under another angle: the prohibition of servitude. On that basis, the Court concludes that the applicants were put into forced labour,[40] and that Article 4(2) had been violated.

The reasoning developed by the Court on what constitutes forced labour and how it is different from servitude is to be praised, in particular in relation to the situation of vulnerability of irregular migrants. However, more clarity in terms of identifying which facts contribute to fulfil each of the elements required under the forced labour definition and when the "excessive or disproportionate burden" condition is fulfilled would have contributed to enhance its quality. Also, no explanation is provided on how the Court jumps from finding that the facts constitute forced labour to finding that they constitute trafficking into forced labour, a point that will be addressed hereunder.

(3) Trafficking for forced labour v. forced labour

What the Court fails to do in *Chowdury* is to make clear how the facts of the case constitute trafficking into forced labour as opposed to simply forced labour. While the Court reviews to some extent the existence of the two elements of forced labour, it fails to assess the existence of the three constituent elements of trafficking. When finding that the facts constitute forced labour, the Court qualifies the situation alternatively as "trafficking in human beings", "forced labour as a form of exploitation for the purpose of trafficking", "trafficking in human beings and forced labour", giving

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On the risks of an expansionist vision of slavery and a narrow understanding of trafficking, see A. Gallagher, "Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway", *Virginia Journal of International Law*, vol. 49(4), 2009.

[37] *Chowdury*, at 99, quoting *C.N. and V. v. France*, Application nº 67724/09, Merits and Just Satisfaction, 11 October 2012, at 91 (C.N. *and* V).

[38] C.N. *and* V, at 91. The distinction between forced labour and servitude was also examined in depth in *Siliadin v France*, Application No. 73316/01, Merits and Just Satisfaction, 26 July 2005 (*Siliadin*), at 123-129.

[39] *Chowdury*, at 123.

[40] *Ibid*,, at 99-100.

 DOI: 10.17103/sybil.21.5

the impression that it is referring to them interchangeably.[41] This creates considerable confusion.

In fact, the Court simply says that "the facts in question fall within the definition of trafficking in human beings of Article 3a of the Palermo Protocol and Article 4 of the European Anti-Trafficking Convention". I wonder: on what basis? When has this been established? What the Court determined in the previous paragraphs is exclusively that the facts fall within the definition of forced labour. In fact, just after having established that the facts clearly constitute "trafficking in human beings and forced labour",[42] instead of explaining why and how, the Court jumps to the assertion that it is for national authorities to interpret national law and that the Court should only verify compatibility with the Convention. It then finds that Greek courts' interpretation of *trafficking* was too restrictive as it identified it with servitude.[43] The confusion between trafficking into forced labour and forced labour per se is plain in this sentence: the elements of forced labour only were identified as having been fulfilled by the ECtHR. But at no time was the existence of the elements of trafficking examined by the ECtHR.

Indeed, in its previous case law the Court has equally failed to establish these elements.[44] However, since the Court developed its reasoning further in *Chowdury*, linking trafficking with forced labour, it could have been hoped that the Court would have finally examined these elements. One may wonder: could the constitutive elements of trafficking somehow be subsumed? As is well known, the ETC and the Palermo Protocol's trafficking definition require the existence of three elements: an action, a means and a purpose. It can surely be argued that the purpose has been checked by the Court when finding that the applicants were put into forced labour (an exploitative purpose included in the trafficking definition), and that the means have also been established since the use of threats, of force and the abuse of a position of vulnerability - means included in the trafficking definition - have been ascertained when establishing the existence of forced labour. However, the action element, which emerges as the distinctive feature between forced labour per se and trafficking into forced labour, has not been addressed by the Court.[45]

The Court does not seem to be aware of the confusion it generates by assimilating the two concepts. If the Court finds that the facts constitute trafficking for forced labour, it should identify the elements that make it a trafficking case as opposed to a forced labour one.[46] The Court seems to simply follow the approach taken by the applicants in their allegations, where that same confusion is

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41 *Ibid.*, at, inter alia, 99-101 and 123.

42 *Ibid.*, at 100.

43 *Ibid.*

44 For an analysis of that same failure in *Rantsev*, see Stoyanova, *supra* n. 15, at 299-301.

45 ILO holds that "While most victims of trafficking end up in forced labour, not all victims of forced labour are in this situation as a result of trafficking. For example, people who are coerced to work in their place of origins have not been considered in ILO's own estimates of forced labour as trafficking victims", in ILO, Fighting Human Trafficking: the Forced Labour Dimensions (2008).

46 In its first human trafficking case, the Inter-American Court of Human Rights (IACtHR) made that finding: after establishing that the exploitation endured by the applicants amounted to slavery, it established that the situation also amounted to trafficking since the victims were recruited from the poorest regions of Brazil and moved to the ranch through fraud, deceit and false promises, thereby substantiating the "action" element; IACtHR, *Case of the Hacienda Brasil Verde Workers v. Brazil*, Judgment of 20 October 2016, Series C No. 318 (*Hacienda Brasil Verde*), para 305.

to be found.[47] Also, the Court failed to highlight that the absence of a specific provision criminalizing forced labour in the Greek Penal Code certainly contributed to that assimilation under Greek law, where servitude does appear in a specific provision, while forced labour does not appear per se but only in the context of human trafficking.[48] While that confusion should have been highlighted by the Court, the Court actually perpetuates it.

In sum, it is welcome that the Court indicates for the first time for what specific purpose trafficking has taken place and thus establishes a clearer link between trafficking and a conduct proscribed under Article 4. This provides a more solid justification for holding that human trafficking falls within the scope of that Article. However, there is still a lack of clarity around the way trafficking relates to these conducts, under different perspectives. While some more reflections on these grey areas will be developed in the next section, it can be said at the outset that the Court seems to have gone from one extreme to the other: while it had until now refused to establish any link between trafficking and the conducts prohibited under Article 4, now that it eventually decided to do so it does so in excess, by assimilating the two concepts (trafficking and forced labour in this case).[49] While before *Chowdury* these two concepts were unrelated, now they end up being the same! It appears that the Court has still not reached the point where these two concepts might coexist in a balanced way. Neither separated nor assimilated, but connected, through the interplay of the trafficking definition and Article 4 ECHR, with each of them keeping its distinct identity.

(4) Conclusions on a possible clarification of the links between trafficking and the conducts prohibited under Article 4

While in the two first cases on trafficking into sexual exploitation, the ECtHR had failed to establish a link between trafficking and one of the conducts prohibited under Article 4, it is only in *Chowdury*, a case on trafficking into labour exploitation, that it ends up doing so. Thus, a first question arises: is the Court's definitional problem on how trafficking fits into Article 4 related to the specificity of trafficking for sexual exploitation, because this form of exploitation is not expressly referred to in Article 4?

When considering this hypothesis, we note that its main argument is highly questionable. In *Rantsev*, the Court already established that trafficking "treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere".[50] This statement refers to forced sex work as a sub-category of forced labour. This is indeed an adequate approach. Clearly, "a forced labour situation is determined by the nature of the relationship between a person and an "employer", and not by the type of activity performed [...] A woman forced into prostitution is in a forced labour situation because of the involuntary nature of

[47] *Chowdury*, at 58.

[48] See a more detailed analysis in Part D(2).

[49] The Court thus contributes to the assimilation of trafficking with other related concepts that has been termed "exploitation creep", in J. Chuang, "Exploitation creep and the Unmaking of Human Trafficking Law", 108(4) *The American Journal of International Law* (2014) 609-649.

[50] *Rantsev* at 281; reiterated in *J. and Others* at 104.

 DOI: 10.17103/sybil.21.5

the work and the menace under which she is working".[51]

There is therefore no obstacles for the Court to proceed to qualify trafficking for sexual exploitation as a violation of article 4(2) if the constituent elements of forced labour are present, which appeared to be the case of both Ms Rantseva and Ms L.E. Similarly, the Court should be prepared to find trafficking for sexual exploitation (as well as sexual exploitation per se, for that matter) as potentially falling under the realm of Article 4(1) when the exploitation involved amounts to servitude or, alternatively, to slavery, i.e. if the degree of control over the victim, in particular in relation to the limitation of the victim's freedom of movement, is found to be higher and thus reaches the threshold of sexual servitude or sexual slavery.

If we work on that basis, we would suggest that the Court takes the view that trafficking is not a separate or additional form of exploitation prohibited under Article 4, but that it falls under Article 4 because of its intrinsic connection with the conducts prohibited under Article 4 under the "purpose" element of its definition. From this perspective, trafficking should be considered as a preliminary conduct or process that leads to the forms of exploitation described in Article 4. Logically, recruiting a person through deceit or transferring a person through coercion in order to exploit that person in any of the possible forms of forced labour, servitude or slavery, would fall under Article 4 in the same way that these same forms of exploitation would fall under that Article if the distinctive element of trafficking - the action to recruit, transfer etc - were to be absent.

To say it differently, both forced labour and trafficking into forced labour would fall under the prohibition of Article 4(2) ECHR, both servitude and trafficking into servitude would fall under the prohibition of Article 4(1) ECHR, and both slavery and trafficking into slavery would fall under the prohibition of Article 4(1) ECHR. Each of these six offences is still different from the criminal law perspective and must be criminalized as a distinct offence under domestic law. But under international human rights law, which is not aimed at determining the gravity of a punishment against an individual but at promoting adequately protective polices by the state for the community at large, it appears reasonable that trafficking should fall under the prohibition of the exploitative conduct it aims to fulfil, as a preparatory process that leads or intends to lead to it. This should be so at least until human trafficking is not provided for as a separate human rights violation, as was done, for example, in the EU Charter of Fundamental Rights.[52]

This line of reasoning raises another important question. Are all forms of trafficking susceptible of falling under one of the conducts prohibited under Article 4? In addition to the forms of exploitation we already referred to, trafficking is mostly taking place for the purpose of organ removal, forced begging, forced marriage, criminal activity and the use of children as soldiers.[53] The difficulty seems to arise with regard to trafficking for the removal of organs. All other forms of trafficking entail a form of subjugation of the victim to another person's influence or control in order to provide a work or service, and would therefore fall under one of the conducts prohibited under Article 4. In cases of organ removal, the person is not forced to provide a work or service, but is taken away a bodily part.

[51] ILO, The Cost of Coercion (2009), at 26.
[52] Article 5(3).
[53] UNODC, Global Report on Trafficking in Persons (2016), at 8.

The nature of the exploitation is indeed different, and it appears to be difficult to make it fit under the prohibition of forced labour, servitude or slavery. It may be wise to reflect on whether trafficking for organ removal could fall under a separate prohibition under the Convention. For instance, under Article 3 ECHR.

In conclusion, I consider that it was unwarranted for the Court to avoid assessing which of the three types of conduct prohibited under Article 4 ECHR are engaged in a trafficking case. With the exception of trafficking for organ removal, which is believed to constitute less than 5% of trafficking cases,[54] there is no particular difficulty for making the other forms of trafficking exploitative purposes fit into one of the conducts proscribed by Article 4. This would provide a more solid legal basis for the fight against human trafficking under international human rights law. Indeed, this same connection has already been established at the universal level, without any particular difficulty. The Human Rights Committee (HRC) has stated that under Article 8 of the International Covenant on Civil and Political Rights[55], which prohibits slavery, servitude and forced labour, states should report on their efforts to eliminate trafficking,[56] thus recognizing that the prohibition of trafficking falls under the scope of these prohibitions.

However, caution is required in ensuring that this connection does not negatively affect the possibility of finding violations of Article 4 solely based on slavery, servitude and forced labour, where trafficking elements are absent or difficult to prove. Although this may seem obvious, it is regrettably not. The greater visibility achieved by trafficking has had a negative repercussion on these three conducts where judicial bodies at the national – and possibly international – level are readier to establish violations of the prohibition of trafficking than of the prohibition of slavery, servitude and forced labour.

As far as trafficking for sexual exploitation is concerned, this line of reasoning would also be beneficial. The perception that sexual exploitation is something separate from slavery, servitude and forced labour has not well served the cause of protecting its victims. Similarly to the late recognition under international criminal law that rape and other forms of sexual violence against women fell under the definition of well-established international crimes, it might now be required to state in much clearer terms that under international human rights law trafficking for sexual exploitation is a human rights violation that amounts to either slavery, servitude or forced labour and clearly falls under the realm of these prohibitions. An additional advantage of ascribing this form of trafficking to these three conducts is that it would allow to graduate the gravity of trafficking for sexual exploitation in relation to the degree of exploitation and control exerted: that has not been the case until now.

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54 *Ibid.*

55 International Covenant on civil and political rights (1966), 999 UNTS 13971.

56 Human Rights Committee, General Comment n. 28 (2000), CCPR/C/21/Rev.1/Add.10, at 12.

(D) SCOPE OF STATES' POSITIVE OBLIGATIONS

(1) What is the object of the Court's scrutiny? *J. and Others* and a sudden change in the scope of the obligations under review

In *Chowdury*, the Court reiterates the scope of states' positive obligations under Article 4 and the general principles that guide their implementation as identified in *Rantsev* and *L.E.* It recalls that "States party's positive obligations under Article 4 of the Convention must be interpreted in the light of the aforementioned CoE [Trafficking] Convention and require, in addition to the adoption of measures related to prevention, victim's protection and investigation, the criminalization and effective punishment of any act aimed at keeping a person in such situations".[57] It adds, for the first time, that it draws its inspiration from the manner the ETC is interpreted by GRETA,[58] which is particularly positive since the adjudication of such complex cases requires relying on specialized expertise. Finally, it follows the same analytical framework used in *Rantsev* and *L.E.*, reviewing compliance with three categories of duties: (1) to put in place an appropriate legal and administrative framework; (2) to take protective operational measures; and (3) to effectively investigate and prosecute.

J. v Others, however, appears as a worrying discordant note. In this case, the Court modifies the three broad categories of obligations around which it had structured its assessment since *Rantsev*. It does so in two ways. On the one hand, the first category disappears: the obligation to put in place an appropriate legal and administrative framework is not at all considered. Secondly, the scope of the second category of obligations is considerably modified.

Concerning the first point, it is hardly justifiable that the Court suddenly avoids reviewing states' compliance with the obligation to put in place an appropriate legal and administrative framework, a central obligation under its case law,[59] including with respect to the right to life[60] and to freedom from torture and the right to family life in the context of sexual or domestic violence.[61] It is also the obligation that was first identified by the Court in its positive obligations' case law under Article 4.[62] Once the Court admits a case and starts reviewing whether Article 4 has been complied with, it is difficult to see how the particular circumstances of any given case would allow the Court to assess compliance with that Article without reviewing the adequacy of that state's legal framework, without reviewing whether the conducts proscribed under that Article are adequately criminalized under

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[57] *Chowdury*, at 104 (translation by the author).

[58] *Ibid.*

[59] See L. Lavrysen, "Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights", in E. Brems and Y. Haeck, *Human Rights and Civil Liberties in the 21st Century* (Springer, 2014), 69-129; and R. Pisillo Mazzeschi, "Responsabilité de l'Etat pour violation des obligations positives relatives aux droits de l'homme", *333 Collected Courses of the Hague Academy of International Law (2008) 175-506*, at 311-344 and 390-414.

[60] See, for example, *Osman v. the United Kingdom*, Application n. 23452/94, Merits and just Satisfaction, 28 October 1998, at 115. For relevant ECtHR, IACtHR and HRC case law, see Pisillo Mazzeschi, *supra* n. 59, at 311-344.

[61] See, for example, *M.C. v. Bulgaria*, Application n. 39272/98, Merits and just Satisfaction, 4 December 2003, where it established that "effective deterrence against grave acts such as rape [...] requires efficient criminal-law provisions", concluding that "States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape", at 150 and 153.

[62] *Siliadin*, at 89, 112 and 130-49.

national law[63] or whether effective measures for the identification and protection of victims, or for preventing trafficking to flourish, are provided for in domestic law.

In this case, no assessment of the adequacy of the Austrian regulatory framework is made, despite the Court's assertion that "States are also under an obligation to put in place a legislative and administrative framework to prohibit and punish trafficking, as well as to take measures to protect victims".[64] This omission is highly worrying, as this first category of obligations is the only one that allows looking into structural problems that prevent states to address the trafficking phenomenon *a priori* (as opposed to the other two categories that address states' response to a trafficking situation *a posteriori*, in terms of protecting victims and investigating the case). Moreover, the Court does not provide any explanation for that omission.

Turning to the second point, the heading "positive obligation to take protective and/or operational measures" (with minor variations depending on the judgment) becomes "positive obligation to identify and support the applicants as victims of human trafficking".[65] Again, this creates some confusion. Looking at the way these concepts have been applied in their respective judgments, it appears that the concept of operational measures is broader than the one used in *J. and Others*, as will be described in the section devoted to this issue.

To conclude, the unexplained and one-off change of structure in *J. and Others* might reveal two things. First, the lack of priority given by the Court to the establishment of a comprehensive legal and administrative framework to combat trafficking. And second, some lack of coherence or coordination within the Court. Where a Court's Chamber decides not to follow the same structure of reasoning followed by the other Chambers in previous cases, this ultimately affects the overall clarity and coherence of the Court's case law in a specific field. Of course, I do not question the fact that the Court might consider that it needs to modify the way it addresses a specific issue. However, if it does so, I would hope that it would, for the sake of clarify, provide some explanation on why it departs from examining potential violations of a specific provision on the basis of an established set of obligations.

(2) Legislative and administrative framework

First of all, the Court points to states' duty to establish a legislative and administrative framework that is "adequate to ensure the practical and effective protection of the rights of victims or potential victims"[66]. Indeed, in *Rantsev* and *L.E.* the Court explains that the regulatory framework should address three areas: it should not only be directed at punishing traffickers but also at preventing

[63] In that context, Dearing rightly underlines that "under Article 13 ECHR individuals are entitled to criminal law provisions incriminating grave interferences with essential aspects of their human rights" for three reasons: preventing harm, acknowledging as significant the protected right and the wrong done to victim and, finally, because "criminal law provisions provide the basis for granting victims access to justice in compliance with Article 7 ECHR", in A. Dearing, *Justice for Victims of Crime, Human Dignity as the Foundation of Criminal Justice in Europe* (Springer, 2017), at 41-42.

[64] *J. and Others*, at 106.

[65] *Ibid.*, at 110.

[66] *Rantsev*, at 284; *L.E* at 65; and *Chowdury*, at 87.

 DOI: 10.17103/sybil.21.5

trafficking and at protecting victims.[67] In *Rantsev*, it reviews whether that threefold requirement has been fulfilled in the concrete case, and finds that it was not, while in *L.E.* it checked it in a very superficial way. In *Chowdury*, the need for the framework to address these three areas is neither reiterated not applied to the facts at stake. In *J. and Others*, finally, the legislative and administrative framework is not even considered as a set of duties to be reviewed. We will examine this marked regressive trend in more detail.

(a) The criminal law framework

What is striking in both *J. and Others* and *Chowdury* is that the Court is satisfied that the national criminal framework around trafficking and labour exploitation is adequate, while in both cases the Court fails to review that framework and to identify important shortcomings.

In *Chowdury*, we have seen that the main reason that lies behind the Greek courts' failure to punish the perpetrators is the confusion between the concepts of forced labour and servitude. But that confusion did not come out of nowhere, it is chiefly due to the inadequacy of the Greek criminal law. A look at the Penal Code reveals that what is sanctioned under Greek criminal law is only servitude (and slavery, since the definition assimilates the two concepts)[68] and human trafficking.[69]

This criminal framework poses a number of problems. First, the definition of trafficking under Article 323A is not sufficiently comprehensive. As far as the exploitative purposes are concerned, it only refers to trafficking for the extraction of organs and for the exploitation of labour and begging. No reference is made to servitude and slavery, nor to sexual exploitation. While the latter is covered by a separate article (Article 351),[70] there is a lack of clarity regarding the term "exploitation of labour". It may be argued that exploitation amounting to servitude, slavery or forced labour may all be subsumed under that concept. However, this would not satisfy the principle of legal certainty, which is particularly stringent in criminal law, where the *Nulla poena sine lege* principle applies. In this context, GRETA has stressed that the offence of trafficking in national law should expressly refer to "forced labour, forced services, slavery and practices similar to slavery and servitude", and that "failure to do that may lead to difficulties in complying with the state's positive obligations under Article 4".[71] Indeed, the Court should not that easily have reached the conclusion that the Greek criminal framework is satisfactory and should have urged Greek authorities to bring it in line with international standards.

Secondly, the criminalization of forced labour per se is lacking, contrary to states' obligation as already clearly established in *Siliadin*,[72] and reiterated in *Chowdury*:

> "In order to fulfill the positive obligation to criminalize and effectively punish any act referred to in

[67] *Rantsev*, at 285; and *L.E.* at 65.
[68] Article 323.
[69] Article 323A.
[70] See the amendments brought by Law n° 4198/2013.
[71] GRETA, Fourth ..., supra n. 4, at 37.
[72] *Siliadin*, at 89, 112 and 130-49. On this point, see Piotrowicz, *supra* n. 15, at 187-189.

 DOI: 10.17103/sybil.21.5

> article 4 of the Convention, States must establish a legislative and administrative framework prohibiting and punishing forced or compulsory labor, servitude and slavery"[73]

The Court itself finds that the Penal Code does not contain specific provisions criminalizing forced labor,[74] where the applicants also refer to that absence and the Government does not contest it.[75] Why is it then that the Court establishes a duty and, finding that that duty has not been fulfilled, concludes that the state's conduct is satisfactory?[76] This raises serious concerns on the quality of the Court's reasoning and on the negative impact of these shortcomings, considering the gravity of the human rights abuses involved. It has been rightly highlighted that "law enforcement authorities need clear guidelines on how to apply their own national legislation and how to identify a case of forced labour, trafficking in persons or slavery", since "[a]ny confusion between the concepts can hamper proper identification, investigation and prosecution of cases".[77] A third party submission in *Chowdury* also refers to the lack of separate forced labour offence and the importance that national legal orders contain precise provisions in conformity with the principle of strict interpretation of criminal law.[78]

ILO takes the same approach when providing technical support for Penal Code reforms: it promotes the establishment of standalone forced labour offences, in addition to the trafficking in persons offences, with the aim of ensuring full coverage of labour exploitation cases in terms of investigation and prosecution.[79] In the case of Greece, the absence of a separate forced labour offense in the Penal Code means that if forced labour practices are not found to be taking place in the context of trafficking, they are not sanctioned. A recent EU study on labour exploitation in EU member states also addresses these concerns, reaching the conclusion that:

> "A common denominator emerged from the expert interviews which cut across several professional groups. This is the difficulty in understanding, distinguishing and applying the various concepts of severe labour exploitation, ranging from slavery to particularly exploitative working conditions as per the Employer Sanction Directive. As a result, there is a tendency to apply one label —frequently the category of trafficking— to most forms of severe labour exploitation. This comes with the risk that investigations or prosecutions will fail, because all the elements of the crime of trafficking may not be present or may be difficult to prove."[80]

The EU study finds that the patchy coverage in criminal law of severe labour exploitation is a risk factor impeding victims' access to justice.[81] Also, the study includes Greece in the list of countries where, in national legislation, "the protection of workers against the most severe forms of labour exploitation is not as comprehensive and strong as could be expected" and "slavery, servitude and

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73 *Chowdury*, at 105 (translation by the author).
74 *Ibid.*, at 35 and 107.
75 *Ibid.*, at 72.
76 *Ibid.*, at 109.
77 M. Paavilainen, "Towards a Cohesive and Contextualised Response: When is it necessary to distinguish between forced labour, trafficking in persons and slavery?", 5 *Anti-Trafficking Review* (2015) 158-161, at 159.
78 *Chowdury*, at 81.
79 Paavilainen, *supra* n. 77, at 160.
80 FRA, *supra* n. 34. at 42; see also at 39-40.
81 *Ibid.*, at 42.

forced labour are criminalized only in specific contexts".[82] In a context where governmental and non-governmental organizations raise this concern, the Court does worryingly not point to that failure.

As far as *J. and Others* is concerned, it has already been mentioned that the Court entirely omits reviewing the obligation to put in place an appropriate legal and administrative framework. However, if it had done so, it would have found that even if the Austrian Penal Code covers in a relatively comprehensive manner the offences of trafficking, forced labour, servitude and slavery, some important shortcomings are still to be found. First, criminal law does not punish the exploitation of the forced labour of nationals, but only of foreigners. A discriminatory provision that, despite its laudable intent of focusing attention on the exploitation of migrant's work, ends up leaving a large part of the population unprotected. And secondly, the definition of trafficking in Austrian criminal law is not fully compliant with international standards. As far as the exploitative purposes are concerned, the definition refers to sexual exploitation, organ transplant, labour exploitation and, following a 2013 reform, begging and exploitation into criminal activities.[83] Here again, exploitation into servitude or slavery are not explicitly referred to.

In conclusion, we must point with concern to the Court's failure to identify the Greek and Austrian criminal law shortcomings in terms of establishing a separate and inclusive forced labour offense and a comprehensive definition of trafficking that covers all the exploitative purposes required as a minimum under the international trafficking definition.

(b) The preventive and protective function of the broader non-criminal normative framework

In *Rantsev*, the Court examined the adequacy of the legislative and regulatory framework on aspects other than criminalization. It examined both the anti-trafficking legal framework and the broader legal and administrative framework – in particular immigration laws – and its impact on human trafficking from the perspective of both prevention and protection. Importantly, it relied heavily on national and international bodies' assessment, such as the National Ombudsman, the CoE Commissioner for Human Rights and the United States of America's State Department. Considering that their reports had repetitively urged Cypriot authorities to improve their immigration regulatory framework in order to halt the entry of young women sexually exploited in cabarets through the artiste visa regime, the Court found Cyprus responsible for violating Article 4 for its failure to revise that framework.[84]

The next judgment, *L.E.*, already constituted a strong regression on this point. The Court failed to examine whether the regulatory framework was promoting or tolerating trafficking of foreign women into prostitution in Greece. Prevention is not even mentioned, and concerning protection, the Court is simply satisfied that the law includes provisions on protection and assistance to victims, without pushing its assessment any further. The Court omits any reference to the numerous national and international reports that had urged Greece to address the serious failures of its legal framework in

[82] *Ibid.*, at 36.

[83] *J. and Others*, at 35; and *J. and Others*, Concurring Opinion of Judge Pinto de Albuquerque joined by Judge Tsotsoria (*J. and Others* Concurring Opinion), at 45 and 48.

[84] *Rantsev*, at 290-293. See Piotrowicz, *supra* n. 15, at 196-198; and V. Milano, "The European Court of Human Rights's Case Law on Human Trafficking in Light of L.E. v. Greece: a Disturbing Setback?", 17(4) *Human Rights Law Review* (2017), at 712-713.

 DOI: 10.17103/sybil.21.5

terms of protection and prevention.[85] Thus, information that allowed making that finding in *Rantsev* was not even considered in *L.E.*

J. and Others and *Chowdury* confirm this trend: the setback is complete, with the absence of any reference to the regulatory framework in the first one, and the absence of any reference to both preventive and protective aspects under the regulatory framework assessment in the second one. In the latter, authorities' failures in terms of protecting the applicants and preventing their exploitation are only examined under the angle of the duty to take operational measures in that case, as will be examined in the next section, which does not address the structural inadequacies of immigration or labour laws that allow trafficking and labour exploitation of irregular migrants to take place.

In fact, the Court had relevant information in that regard. Under the operational measures section, the Court mentions that following reports on abuses in Manolada, three ministers ordered the preparation of texts aimed at improving the situation of migrants, but that these requests produced no concrete results.[86] Considering that authorities were put on notice that a modification of the normative framework was required to improve the situation of migrant workers, and that nothing was done about it, the Court should certainly have reviewed the legal framework in question. Similarly to *Rantsev*, this case is about a well-known, structural phenomenon. The exploitation of irregular migrants' labour force in strawberry plantations, described by the prosecutor as a barbaric situation which referred to "images of 'Slaveholders' South' having no place in Greece",[87] is known to authorities. The real problem behind it is the failure of public authorities to address it, to put in place effective regulations and controls. Such a structural problem requires broad policy responses, not only measures aimed at protecting migrants in a given case.

That preventive focus is required under a human rights-based approach to trafficking, based on the ETC but also on states' human rights due diligence duties to prevent, stop, investigate human trafficking and protect victims. Indeed, the Special Rapporteur on trafficking clarified how "due diligence on preventing trafficking also requires action to address the wider, more systemic processes or root causes that contribute to trafficking in persons, such as inequality, restrictive immigration policies, and unfair labour conditions, particularly for migrant workers."[88] Shouldn't it be a priority for the Court to look at those aspects that make national authorities all too often passive or even active accomplices of the exploitative situations they are supposed to combat?

Indeed, while criminal law enforcement is necessary, "systemic problems need to be addressed at their root through major social, economic and cultural reforms [„„]"[89]: this is what prevention is all about, but the ECtHR increasingly avoids giving to that part of the comprehensive anti-trafficking approach the weight it deserves. An effective approach to the prevention of forced labour and trafficking involves "promoting safe labour migration and improving labour protection in migrant-

[85] Milano, *ibid.*, at 713-715.

[86] *Chowdury*, at 111.

[87] *Ibid*, at 20 (translation by the author).

[88] Special Rapporteur on trafficking in persons, especially women and children, Report to the General Assembly, A/70/260 (2015), at 20.

[89] R. Plant, "Forced Labour, Slavery and Human Trafficking: When do Definitions Matter?", 5 *Anti-Trafficking Review* (2015) 153-157, p. 156.

dominated economic sectors", where the Forced Labour Protocol[90] and the Recommendation supplementing it provide guidance in that regard.[91]

GRETA also systematically insists on that aspect, stressing that "efforts to discourage demand for the services of victims of trafficking for the purposes of labour exploitation should include reinforcing labour inspections, in particular in sectors at high risks such as agriculture, construction, textile industry, the hotel/catering sectors and domestic work [...]".[92] In fact, in *Chowdury* the Court refers to numerous failures by Greece to establish prevention measures for trafficking for labour exploitation that GRETA had identified.[93]

Why is the Court so reluctant to look at these fundamental questions? How were these men recruited? Through which supply chain? What should be done to improve labour regulations and labour inspections in order to both prevent and detect these cases? What about the duty to train public officers on how to detect and respond to these situations? The failure of the Court to look at these major issue is of great concern. This is particularly so when considering that the EU report on labour exploitation identifies an inadequate legal and institutional framework as one of the 4 main risk factors for labour exploitation, where two factors stand out very clearly as increasing that risk: impunity - described as the low risk to offenders of being prosecuted and punished - and the lack of institutions that effectively monitor the situation of workers.[94] Within this second category, labour migration regimes that restrict regular employment for irregular migrants and corruption are singled out as determinant.

In that context, the EU study singles out Greece, together with Bulgaria, as a country where corruption —described as state inaction, avoidance or delay in intervening in cases of labour exploitation— is one of the main legal and institutional risk factors for labour exploitation.[95] Finally, the study considers that one of its most significant findings is that the lack of comprehensive and effective monitoring of working conditions is a fundamental determinant of labour exploitation, where deficiencies in monitoring are ultimately reflected in the exploitative employers' belief that nothing can happen to them.[96] Greece is mentioned again —with reference to its tourism industry— as one of the most illustrative examples of that sense of impunity, where the improbability of being inspected is so widely known that it conveys a clear message of impunity.[97]

As the EU study rightly underlines, member states "need to adopt a proactive approach by monitoring the labour conditions of workers who have moved within or into the EU [...]. If member states fail to provide effective monitoring structures, there is a serious risk that the rights of victims will not be upheld and that offenders will not be held to account".[98]

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90 Protocol of 2014 to the Forced Labour Convention of 1930, P029.
91 Paavilainen, *supra* n. 77, at 160.
92 GRETA, Fourth ..., *supra* n. 4, at 40.
93 *Chowdury*, at 44.
94 FRA, *supra* n. 34, at 44.
95 *Ibid.*
96 *Ibid.*, at 63.
97 *Ibid.*, at 65.
98 *Ibid.*, at 26.

I wonder, why is the Court giving crucial importance to the system of inspections and reporting in relation to other abuses, but not in relation to trafficking, in this context of well-known risk? If in *O'Keeffe* the Court extensively examined the system of inspections and the mechanisms for detection and reporting of child abuses within the private primary school system in order to establish whether the legal framework adequately protected children,[99] why is the same detailed examination of national inspections, detection and reporting mechanisms not undertaken by the Court under Article 4, in order to establish whether domestic legal frameworks sufficiently protect women, men and children against the risk of trafficking in labour sectors that are particularly at risk?

In conclusion, in accordance with its established positive obligations doctrine, the Court should review both criminal and non-criminal laws and regulations, including their monitoring structures, and assess their effectiveness in providing "practical and effective protection" to individuals from potential abuses prohibited under Article 4. And it should do so even in the absence of a causational link between the framework's shortcomings and the abuse suffered by the applicant. Indeed, as established in *Opuz v. Turkey*,[100] "a failure to take reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State"[101] where the main shortcoming identified by the Court in that case was that "the legislative framework then in force [...] fell short of the requirements inherent in the State's positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims".[102] Similarly, in *Rantsev* the Court found that the Cypriot immigration law encouraged trafficking and failed to protect migrant women from the risk of trafficking without requiring the establishment of a causational link between these shortcomings and the trafficking of Ms. Rantseva.[103]

(3) Operational measures for the protection of victims

(a) *Proactive victim protection duties*

Slightly adapting its well-established *Osman* test to the specificities of human trafficking cases, the Court established that in order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be established that

> "State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being trafficked [...]."[104]

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[99] *O'Keeffe v. Ireland*, Application n. 35810/09, Merits and Just Satisfaction, 28 January 2014 (*O'Keeffe*), at 162-169.

[100] *Opuz v. Turkey*, Application n. 33401/02, Merits and Just Satisfaction, 9 June 2009 (*Opuz*).

[101] *Ibid.*, at 136. Also *E. and Others v. the United Kingdom*, Application n. 33218/96, Merits and Just Satisfaction, 26 November 2002, at 99; and *O'Keeffe*, at 149.

[102] *Ibid.*, at 145. See also *O'Keeffe*, where the Court focused on "whether the State's framework of laws, and notably its mechanisms of detection and reporting, provided effective protection for children [...]", at 152.

[103] *Rantsev*, at 291-293.

[104] *Rantsev*, at 286, reproduced literally in *L.E.* at 66 and in *Chowdury* at 88. On the *Osman* test in general, see F.C. Ebert and R.I. Sijniensky, "Preventing Violations of the Right to Life in the European and Inter-American Systems: From the

If the answer is affirmative, the Court will find a violation of Article 4 where the authorities failed to take appropriate measures within the scope of their powers to remove the individual from that situation or risk, to the extent that these do not impose an impossible or disproportionate burden on authorities.[105] Under the concept of "operational measures", the Court has referred to measures to prevent trafficking to take place or to last, as well as to measures to identify, protect and, to a much lesser extent, support victims. It should be welcomed that the Court conceived this duty as a broad one.

Some of these measures require proactive action that leads to identification —as opposed to those that follow identification and are thus reactive (see next heading). Regarding the former, in *Rantsev* the Court found that there were sufficient elements for competent authorities to be put on notice of the trafficking situation of the victim and the risks she was exposed to, for two reasons. First, they were aware - or should have been aware - of the general situation of trafficking for sexual exploitation in the context where the victim was "working" (it was known that sexual exploitation of foreign women was taking place in cabarets).[106] And secondly, authorities became aware of elements that should have raised a suspicion about Ms Rantseva's possible trafficking (when she was at the police station, they became aware that she was young, had recently arrived from the ex-USSR and worked as a cabaret artiste),[107] Recalling that officers in relevant fields should receive appropriate training for them to be able to identify victims, the Court found that authorities failed to take appropriate measures to protect her, in violation of Article 4.[108]

In *Chowdury*, the Court equally focused on prevention and protection under this heading, adopting a broad approach. It followed a reasoning based on the same two aspects used in *Rantsev*. First, awareness of the general situation of trafficking for labour exploitation in Manolada's strawberry fields: the Court notes that the state was aware of the situation of abuse well before the shooting, since it had been denounced by the press, the Ombudsman and three Ministers who had requested the government to take appropriate measures.[109] Secondly, awareness of the particular situation of exploitation of the applicants: as foreign undocumented migrants, a couple of days before the shooting they had alerted the police that they were working without being paid, which should have triggered appropriate action.[110]

On that basis, the Court concludes that "the operational measures taken by the authorities were not sufficient to prevent trafficking in human beings and to protect the applicants from the treatment they were subjected to".[111] From this perspective, *Chowdury* is a good judgment, which recovers the

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Osman test to a Coherent Doctrine on Risk Prevention?", 15 *Human Rights Law Review* (2015) 343. On how the ECtHR applied it to trafficking cases, see Milano, *supra* n. 84, at 716-720; and Stoyanova, *supra* n. 15, at 400-407.

[105] *Rantsev*, at 287.

[106] *Ibid.*, at 294.

[107] *Ibid.*, at 295.

[108] *Ibid.*, at 296-298.

[109] *Ibid.*, at 111-112.

[110] *Ibid.*, at 114.

[111] *Ibid.*, at 115.

broad proactive approach to operational measures taken in *Rantsev*.[112]

When looking at *J. and Others*, however, we note again a lack of coherence, with the Court taking a very different perspective. It reduces the scope of measures considered under this operational duty, to the extent that it changes the title of that heading, which becomes the duty to "identify and support" victims. In fact, in *L.E.*, the Court already started narrowing its focus along those lines. When there were at least as many elements as in *Rantsev* for the state to become aware of "circumstances giving rise to a credible suspicion" that Ms L.E. was trafficked during the two years that preceded her self-identification as a trafficking victim, the Court did not establish the failure of authorities to protect her and prevent her exploitation, despite her repeated contacts with police, judges and asylum authorities. On the contrary, the Court found that the duty to identify and protect her was only triggered from the moment she self-identified.[113] This change of perspective is intrinsically wrong as it fully contradicts the Court's *Osman* test, which requires the adoption of measures from the moment when the circumstances give rise to a suspicion, which can and should happen in the absence of self-identification, as established in *Rantsev*.[114]

In *J v Others*, the Court more understandably does not look at the proactive aspects of protective measures since the applicants had only stayed in Austria for three days, limiting the capacity of Austrian authorities to proactively become aware of the situation. It therefore referred exclusively to the victims' reactive identification and their subsequent protection and support. While this is understandable, I don't believe that, in methodological terms, it was necessary to change the scope and title of this category of obligations. It would have been more coherent to apply its usual *Osman* test and find that Austria did not fail to its proactive duties since there were no elements for it to become aware of "circumstances giving rise to a credible suspicion" that the applicants were trafficked before they turned to the police.[115]

(b) *Reactive victim protection duties*

As mentioned, in addition to measures aimed at proactively preventing and detecting trafficking cases, there is a reactive component to this duty that requires states to adopt protective measures once a victim is identified. While in *Rantsev* the Court was not able to address this aspect since Ms. Rantseva was found dead before being identified as a potential victim, in *L.E.* the Court first referred to this type of measures. The immediate referral of the victim to specialized anti-trafficking police services for them to start an investigation, the termination of the deportation procedures, the granting of a residence permit and the official recognition of the status of trafficking victim by judicial authorities were identified as good practices.[116] On the contrary, the nine months' delay between Ms. L.E.'s self-identification and the official recognition of that status by the prosecutor was considered to

[112] However, as opposed to what it did in *Rantsev* (at 297-298), the Court does not point to which failures triggered the state's responsibility in this case, which deprives the reader of essential information on which actions or omissions constituted a violation of the state's obligation to adopt protective measures.

[113] *L.E.*, at 75.

[114] For a full reasoning on this point, see Milano, *supra* n. 84, at 716-721.

[115] *J. and Others*, at 110-111.

[116] *L.E.*, at 76.

violate the positive obligation to adopt operational measures to protect the victim because of the negative impact it had on her, in particular because she continued to be detained for three months after her self-reporting.[117]

J. and Others provides a better opportunity for the Court to refer to measures required under this duty, as Austrian authorities implemented a broader set of protective measures, that have rightly been considered as adequate by the Court:[118] - the police immediately treated the three women as (potential) victims of trafficking; - they were interviewed by specially trained police officers; - they were granted residence and work permits; - a personal data disclosure ban was imposed; - the applicants were supported by the specialized state funded NGO LEFÖ, including during domestic proceedings; and - they were given legal representation, procedural guidance and assistance to facilitate their integration in Austria.[119] Also, the Court's clear statement on the independence between victim identification and support and criminal investigation is welcome, in a context where too many countries still condition victims' protection and support to their cooperation with judicial authorities.[120]

Undoubtedly, the emphasis on protection and assistance measures is welcome as it consolidates the importance of states' obligations in this field, which are central to the entire anti-trafficking framework. It is only through victims' empowerment that the current trend can be inverted, that victims will feel confident enough to come out, investigations will take place and the current climate of impunity might finally be disrupted. However, I do not share the view that the Court framed "in very lucid and firm terms that Article 4 of the ECHR generates a positive obligation upon states to identify and support (potential) victims of trafficking and [that] for this purpose states have to build a legal and administrative framework".[121] Aside from the fact that the concept of identification the Court conveys in *J. and Others* is narrow —due to the circumstances of the case, it only covers the reactive aspects of identification, not the proactive ones— my main point is that the Court does regrettably not say that states *have to build a legal and administrative framework* for the purpose of identification and support. The Court simply noted that the "applicable legal framework was applied" and that it "appears to be sufficient",[122] which is quite different. Indeed, in relation to the obligation to build a legal and administrative framework, this is the worst ECtHR's judgment, as already mentioned, as it failed in the overall to consider states' duty to establish that framework. I do not believe that it is enough to state that the protective measures taken demonstrate that the legal framework was sufficient. Indeed, the fact that adequate measures have been taken in this case does not tell us that these are provided for in the law. Only a review of the legal framework would tell us whether these measures are set out in the law or whether they have been taken on a case by case basis.

Finally, as far as *Chowdury* is concerned, the judgment mentions some of the protective measures that are required in principle, referring to the need to adopt, inter alia, measures "to facilitate the

[117] *Ibid.*, at 77-78.
[118] *Ibid.*, at 111.
[119] *J. and Others*, at 110.
[120] *Ibid*, at 115.
[121] V. Stoyanova, "J. and Others v. Austria and the Strengthening of States' Obligation to Identify Victims of Human Trafficking", Strasbourg Observer (2017).
[122] *J. and Others*, at 111.

identification of victims by trained persons and to assist victims in their physical, psychological and social recovery"[123]. However, when it proceeds to examine the concrete case, the Court fails to assess possible failures in that regard. While it is welcome that the Court referred for the first time to the obligation to assist victims in their physical, psychological and social recovery, coherence would have required it to review compliance in this area, considering in particular that the applicants complained that the Patras Court had rejected their claim to receive psychological support.[124] No reference to it is made by the Court, which reveals an unjustifiably low level of attention given to this obligation. Unlike the Palermo Protocol, assistance measures under the ECT are mandatory. Then, what justifies the Court's lack of attention to Greek authorities' refusal to provide psychological support?

One cannot avoid noting, again, a certain lack of consistency. In *J. and Others*, the Court praises Austrian authorities for implementing a wide range of protection and assistance measures and, on that basis, finds that Austria complied with the positive obligation to take operational protective measures, while the applicants had not invoked any failure in that respect. And in *Chowdury*, the Court fails to assess whether protection and assistance measures have been implemented, while the applicants had pointed to failures in that regard.

(4) Procedural obligation to investigate and prosecute

Like Articles 2 and 3, Article 4 entails a procedural obligation to investigate situations of potential trafficking or other conducts prohibited under that article.[125] The Court has consistently highlighted that the relevant investigation should satisfy a series of requirements: authorities must act on their own motion once the matter has come to their attention, the investigation must be independent from those implicated in the events, it must be capable of leading to the identification and punishment of individuals responsible (an obligation not of result but of means), it requires promptness and, where the possibility of removing the individual from the harmful situation is available, even urgency, and the victims or next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interest.[126]

In *Chowdury*, the Court finds a violation of the procedural obligation to investigate and prosecute potential trafficking cases under Article 4(2)[127], while *in J. and Others* it finds no such violation.[128] In this section, I will explain why I consider the decision in *Chowdury* reasonable and well-argued, while, on the contrary, I consider the second decision inadequate.

(a) *Chowdury*

The first violation under the procedural limb of Article 4(2) identified by the Court refers to the dismissal by the Amaliada prosecutor of the complaints filed by a group of 120 Bangladeshi workers

[123] *Chowdury*, at 110 (translation by the author).
[124] *Ibid.*, at 71.
[125] *Rantsev*, at 288.
[126] *Rantsev*, at 288; *L.E.*, at 6; *C.N. v United Kingdom*, at 69; and *Chowdury* at 116.
[127] *Chowdury*, at 122 and 127.
[128] *J. and Others*, at 114 and 117.

 DOI: 10.17103/sybil.21.5

who were present the day of the shootings but filed a complaint with the police three weeks after the events. The Court finds that the dismissal represents a violation of the duty to investigate under Article 4 ECHR, since:

> "By failing to ascertain whether the allegations of that group of applicants were well founded, the public prosecutor failed in his duty to investigate even though he had the factual evidence to suggest that the applicants were engaged by the same employers as the applicants who participated in the proceedings before the Assize Court and were working under the same conditions to which the latter were subjected."[129]

The Court finds that the prosecutor's dismissal was wrong on two grounds. First, because the information was sufficient to trigger its duty to investigate. However, nothing in its decision shows that it examined and verified the trafficking allegations.[130] Indeed, irrespective of their presence the day of the shootings, the workers' trafficking allegations referred to a prolonged exploitative situation, over many months, that warranted investigation per se. Secondly, the Court refers to the prosecutor's main argument for dismissing the complaints, i.e. the fact that this group of workers filed the complaint three weeks after the shootings, which in his view demonstrated the lack of veracity of their allegations. Finding that argument untenable, the Court points at the prosecutor's lack of knowledge of the human trafficking regulatory framework, which provides, inter alia, for the granting of a "recovery and reflexion period" of a minimum of thirty days to potential trafficking victims for them to recover and escape the influence of traffickers and/or to take an informed decision on whether to cooperate with the authorities.[131]

It is indeed appropriate for the Court to draw attention to the need to provide victims with time. Trafficked persons feel traumatized and afraid, and they lack confidence and proper understanding of what has happened and may still happen to them. They need sufficient time to recover and take informed decisions on what to do. However, it should be clarified that the three weeks that have elapsed in this case cannot be considered as a recovery and reflection period, since that period is to be granted by authorities once they identify a person as a victim or suspect a person might be one. It does not refer to the time that elapses before that suspicion arises. However, reference to it by the Court is still welcome to the extent that it highlights the lack of any requirement of immediacy in victim's referral of their situation to authorities.

The second set of violations identified by the Court relates to the other group of workers, whose complaints were filed the day after the shootings and declared admissible. In that context, the Court finds a violation of Article 4(2) on a number of grounds. First, because the Patras Assize Court wrongly acquitted the accused because it confused two distinct purposes of exploitation for which trafficking may take place —forced labour and servitude— and applied to forced labour allegations the higher threshold of servitude, as has already been discussed in detail.[132] In that context, it also notes

[129] *Chowdury*, at 120 (translation by the author).

[130] *Ibid.*, at 119-120.

[131] *Ibid.*, at 121. Greek Law (Law n. 4251/2014) provides for a longer period, establishing a three months' recovery and reflection period. See GRETA, Reply to the Questionnaire from Greece, submitted on 16 June 2016, GRETA(2016)22, at 26.

[132] See Part C(2).

with concern that the Court transformed the penalty of imprisonment for serious bodily injury imposed on two of the accused into a minor pecuniary penalty.[133] Secondly, the Court of Cassation's prosecutor arbitrarily refused to appeal in cassation against the acquittal under the human trafficking charges. On the face of the workers' lawyers claim that the Assize Court had not adequately examined the human trafficking charges, the public prosecutor simply dismissed the appeal without explanation, simply stating that "the conditions laid down by the law to form an appeal were not met".[134] Thirdly, the Court considers that the compensation granted to each victim —43 euros— is inappropriate, in light of states' obligation under Article 15 of the ETC to guarantee victims' right to compensation from their traffickers, as well as to take additional measures to guarantee compensation, which may include, among others, the establishment by the state of a compensation fund for victims.[135] In sum, the Court's assessment of the failures relating to the procedural limb of Article 4(2) is reasonable and well-argued.

(b) *J. and Others*

The circumstances of the trafficking situation in J. and Others are more complex. The fact that the trafficking cycle the victims were subjected to mainly took place in Asian and Middle East countries, and for only three days in Austria, undoubtedly made Austrian authorities' task of investigating and prosecuting much more difficult. However, this should not be taken as a justification to relieve Austria of its obligations too promptly. The Court examines compliance by Austria with its obligations under two perspectives. On the one hand, the duty to investigate the crimes allegedly committed abroad, and, on the other hand, the duty to investigate the events that took place in Austria.

(i) *The duty to investigate the crimes allegedly committed abroad*

On the first point, the Court finds that there was no obligation incumbent on Austria to investigate the applicants' recruitment in the Philippines or their alleged exploitation in the UAE. The Court finds that Article 4 of the Convention does not require states to provide for universal jurisdiction over trafficking offences committed abroad, since "the Palermo Protocol is silent of the issue of jurisdiction and the Anti-Trafficking Convention only requires states parties to provide for jurisdiction over any trafficking offence committed on their own territory, or by or against one of their nationals".[136] Indeed, the conclusion reached by the Court cannot be questioned. However, the

[133] *Chowdury*, at 124.

[134] *Ibid.*, at 125.

[135] *Ibid.*, at 126. See Article 15 (3) and (4) ETC.

[136] *J. and Others*, at 114. On the use of systemic integration under Article 31(3)(c) of the Vienna Convention on the Law of Treaties by the ECtHR when interpreting the ECHR, see M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP, 2010), at 43-58; and S. De Vido, "States' Positive Obligations to Eradicate Domestic Violence: The Politics of Relevance in the Interpretation of the European Convention of Human Rights", 6(6) EJIL Reflections (2017).

reasoning deserves a brief comment in relation to the Palermo Protocol, as well as a broader reflection on whether something more could have been added to this conclusion.

First, it is surprising that the Court, once again,[137] states that "the Palermo Protocol is silent of the issue of jurisdiction". In fact, that silence is only apparent. The provisions that require states party to establish jurisdiction over trafficking offenses are set out in the mother convention, the Convention on Transnational Organized Crime (UNTOC),[138] as for all other provisions of a general character that are not specific to trafficking but concern all offenses established under the Convention and its Protocols: extradition, mutual legal assistance etc.[139] Indeed, UNTOC requires states to establish jurisdiction over trafficking offences committed on their own territory, while the establishment of jurisdiction over offenses committed by or against one of their nationals is optional.[140]

Clearly, the conclusion reached by the Court on the absence of universal jurisdiction would have been the same. However, recognizing this element might lead to a separate conclusion. The UAE, as a state party to the Palermo Protocol, are under the obligation to investigate and prosecute the exploitation side of the applicants' trafficking that happened in their territory, and Austria, also a state party, may legitimately raise that point using the Palermo Protocol as a legal basis for initiating cooperation. That obligation is reinforced by the Preamble to the Palermo Protocol that calls upon states to adopt a comprehensive international approach to trafficking in the countries of origin, transit and destination.[141] On that basis, Austria might have been required to at least inform the UAE of the elements of suspicion concerning two of their nationals, and indicate its willingness to cooperate in any investigation that the UAE might consider necessary to carry out. If one of the main purposes of the Palermo Protocol is to promote international cooperation in preventing and prosecuting trafficking, with the ultimate aim of avoiding impunity, I would suppose that the least states parties should do is to inform another state party when it holds information on traffickers of it nationality and/ or residing in their country. While I am not saying that the probability that the UAE would have initiated an investigation was high, I argue that the possible failures of some states should never become a justification for other states to fail to comply with their obligations under international law.

(ii) *The duty to investigate the events that took place in Austria*

Essentially, the Court agrees with the two main arguments developed by Austria. First, the events that took place during three days in Austria did not amount to trafficking. Second, even if the events that took place in the Philippines, the UAE and Austria were considered as a continuum and would thus constitute trafficking, there is not much the Austrian authorities could have done in terms of

[137] See *Rantsev*, at 289.

[138] United Nations Convention against Transnational Organized Crime 2000, 2225 UNTS 209 (UNTOC).

[139] Art. 1 of the Palermo Protocol establishes that "2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein". For an explanation, see UNODC, The Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2004), at 253-255 and 272-755; and Gallagher, *supra* n. 22, at 73-74 and 379-380.

[140] Article 15.

[141] Referred to in *Rantsev*, at 289.

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investigation and prosecution.

The events that took place in Austria did not amount to trafficking

In relation to the first point, the Court considered that the assessment made by Austrian authorities that the events did not constitute trafficking did not appear to be unreasonable.[142] I disagree with this statement. All reasons mentioned by the prosecutor to reach that conclusion and discontinue the investigation appear to be flawed. First, the prosecutor stated that no criminal action that might be qualified as trafficking had taken place in Austria "particularly because the offence had already been completed in Dubai". How could the offence possibly be considered as completed if the victims continued to be harboured, moved and exploited and were only able to escape from that treatment on the third day of their stay in Austria? Until that time, the trafficking offence was certainly on-going.

Secondly, the following statement reveals the prosecutor's lack of knowledge of both the regulatory framework and the reality of human trafficking: he considered that since the applicants were "[()]looking after children, washing laundry, cooking food [()], it did not appear that they had been exploited in Austria, especially since they had managed to leave their employers only two to three days after their arrival in Vienna". The prosecutor seems to ignore that what is relevant for qualifying the different types of labour exploitation under the definition of trafficking is not the type of duties the victims were carrying out, but the type of control that was exercised over them: whether they were subjected to threats and/or physical and verbal abuses, the degree of voluntariness of their work, the abuses in terms of long hours and insufficient pay, etc., elements that where quite clearly described by the Court in its next judgment, *Chowdury*, when qualifying the situation as forced labour, as has been discussed. If these are the elements that determine whether exploitation amounts to forced labour, servitude or slavery, one wonders why the prosecutor —and the ECtHR— failed to assess the constituent elements of the alleged exploitative situation. The events in Austria are described by the Court as follows:

> "They were still required to work from approximately 5.00 a.m. or 6.00 a.m. until midnight or even later. The third applicant was regularly shouted at by her employer, for example if she failed to get all children ready early every morning. In addition, their employers woke the first applicant up at around 2.00 a.m. and forced her to cook food for them. Further, the first applicant was forced to carry the employers' twenty suitcases into the hotel by herself. While the applicants were in Austria, their passports remained with their employers."[143]

On the last day, when a child went missing for some time, the Court reports that:

> "One of the employers started screaming at the first and third applicants in a manner which the applicants had not experienced before. The first applicant found the level of verbal abuse extreme, and this was a particularly distressing and humiliating experience for her. The employer threatened to beat the third applicant, and said that "something bad" would happen to her if the child was not found safe and well."[144]

However, these elements were not examined in order to identify the type of exploitation the

[142] *J. and Others*, at 116, with cross-references to 29 and 30.
[143] *Ibid.*, at 22.
[144] *Ibid.*, at 23.

applicants were subjected to.[145]

In sum, I consider that the elements of trafficking for forced labour are all present, looking only at the events that took place in Austria. The applicants were moved into Austria and harboured there, through the use of verbal abuse and intimidation as well as the threat of physical violence, where a situation of control was also established through the holding of their passports – a typical feature of trafficking -, with the purpose of exploiting them in domestic work.[146] Even if the definition of trafficking does not require exploitation to take place, exploitation took place in Austria, since the applicants were, among others, required to work excessively long hours (18 to 19 hours every day) and to perform excessively heavy physical tasks.

Thirdly, the Vienna Regional Criminal Court found that the elements of trafficking were not met since the applicants only spent three days in Austria while "exploitation of labour must be committed over a longer period of time". No such requirement exists under international or even Austrian law. As mentioned, for trafficking to take place, the exploitation does not even need to have started, the intention being sufficient. What is also surprising is that this argument was not at all taken into consideration when deciding to provide protection and social support to the three women: for social support measures, they were definitely trafficking victims, but for criminal prosecution purposes, they were clearly not trafficking victims.

Fourthly, to consider the fact that they escaped as an evidence that they were not exploited reveals, again, ignorance of the legal framework, in addition to a marked lack of logic and human compassion. There is no legal basis for that assessment, neither in law nor in practice[147]. In fact, the level of freedom of movement of a person subjected to exploitation is an element that should be taken into consideration when assessing the *type* of exploitation the person was subjected to, but not *whether* it was subjected to exploitation or not. As clearly explained when examining the concept of forced labour as described in *Chowdury*, freedom of movement generally exists in cases of forced labour, while it is greatly limited in cases of servitude (and even more so in cases of slavery).[148]

Nothing could have been done by Austria even if events had been viewed as a continuum

International judicial cooperation is one of the main purposes of international anti-trafficking instruments. While Austria argued that, even if they had looked at the facts as a continuum, there is not much judicial authorities could have done, and the ECtHR agreed with that position, I disagree with this conclusion. In cases of transnational trafficking, the Court established that "the need for a full and effective investigation covering all aspects of trafficking allegations from recruitment to exploitation is indisputable",[149] and that each state must investigate the part of the alleged trafficking offense that took part in its territory.[150] In that context, states should not lose sight of the fact that in

[145] The gender aspects of this failure are addressed in the conclusion.

[146] In the same vein, see *J. and Others* Concurring Opinion, *supra* n. 83, at 54.

[147] In *Rantsev,* Ms Rantseva had escaped from her traffickers. In *Hacienda Brasil Verde,* two of the applicants had escaped from a situation that the IACtHR qualified as slavery. Clearly, in none of these cases was the fact of being able to escape given any relevance.

[148] See Part C(2).

[149] *Rantsev*, at 307.

[150] *Ibid.*, at 207 and 289.

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cross-border trafficking, the events that took place in their territory are part of a broader cycle and that obtaining information on that overall cycle might be necessary for properly understanding the events that took place in their territory.

This leads us to my main point. As rightly identified by the Court, "Member States must take such steps as are necessary and available in order to secure relevant evidence, whether or not it is located in the territory of the investigating State".[151] Therefore, states have an obligation to seek cooperation from other states where relevant evidence might be found. On that basis, in *Rantsev* the Court found Cyprus to be in breach of its obligation to initiate transnational judicial cooperation in order to obtain evidence located in Russia.[152] In *L.E.*, a case that is even more relevant since it involved a non-European country (Nigeria) where it was believed the perpetrator had returned to, the Court similarly found Greece responsible for the failure to seek cooperation with Nigeria for the purpose of locating and arresting the alleged trafficker.[153] Why did it not apply that same reasoning to Austria? Instead, the Court failed to refer to this obligation, and simply agreed with Austria's justification that cooperation would not have had reasonable prospects of success, including because there is no mutual assistance agreement between the two countries.

This is a surprisingly weak engagement of the Strasbourg Court with states' duties to investigate and cooperate in cross-border trafficking, a point on which the Court had been much more demanding in previous cases. Again, prospects of success in judicial cooperation should not be used as a justification for failing to comply with essential cooperation duties in cross-border trafficking. On the contrary, it should form the basis for exploring other avenues, both at the bilateral and multilateral level. In this context, I fully support judges Albuquerque and Tsotsoria's view that when bilateral judicial cooperation fails, there are other international legal avenues that allow judicial authorities to promote investigation and the possible detention of alleged traffickers, such as the international warning notice systems and other tools used by EUROPOL, FRONTEX and INTERPOL.[154] None of them were used by Austrian judicial authorities.

Finally, it is hard to understand how the Court supported the prosecutor's argument that he has a margin of appreciation when deciding which cases to pursue. Aside from the fact that Austrian law does not seem to grant that margin,[155] the Court has consistently held that offenses under Article 4 should be investigated and prosecuted ex officio.

The only argument we can agree with concerns the difficulties linked to the fact the applicants alerted Austrian authorities almost a year after the events, which considerably reduced the chances of succeeding in the investigation and prosecution. However, this does not alter the duties we have just mentioned: judicial cooperation from the UAE and from international law enforcement organizations should have been sought, and no margin of appreciation exists as to whether or not to prosecute trafficking. In that context, we are of the view that the investigation should have been stayed instead

[151] *Ibid*, at 241.
[152] *Rantsev*, at 241.
[153] *L.E.*, at 85.
[154] *J. and Others* Concurring Opinion, *supra* n. 83, at 57.
[155] *Ibid.*, at 58.

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of being discontinued,[156] which would have maintained the case "active" and would hopefully have allowed —and continue to allow— intercepting the alleged perpetrators if travelling back to Austria and, hopefully, to any EU country. If EU judicial cooperation is there to function, what should not be tolerated is that, with the trafficking indicia collected, EU countries would let these suspected traffickers travel again freely through UE soil without activating the relevant mechanisms to stop and interrogate them. Or should Austria and the rest of EU countries allow them to continue trafficking domestic workers, including in the EU territory?

(c) Partial conclusion

The Court's reasoning under this limb leaves the impression that it has been too benevolent with Austria. Judicial authorities' failures in this case, although not as serious as the ones identified in *Chowdury*, might still have been qualified as a violation of the procedural duty to investigate trafficking under Article 4 ECHR. It is also quite striking that the Court reviewed the conformity of Austrian authorities' conducts in light of its national law instead of assessing it against international law requirement,[157] in particularly when considering that the assessment of the adequacy of it national law was entirely omitted. Ultimately, this decision sends a very weak message to states in relation to judicial cooperation duties in transnational human trafficking cases.

(E) FINAL CONCLUSION

Labour exploitation and trafficking for that purpose remain a huge challenge for European states. When a EU agency urges its member states to put an end to "the current climate of implicit acceptance of severe labour exploitation" in the EU,[158] the extent and gravity of the phenomenon are laid bare. As the last judicial instance for human rights' protection in the European continent, the Strasbourg Court has a key role in pointing to states' policies and conducts that allow trafficking for labour exploitation to take place and to last in the face of tolerance and impunity.

Has labour exploitation been addressed with the required forcefulness in these two latest judgements? I argue it has not. Of the two decisions, *Chowdury* deserves to be praised for some important contributions, including for highlighting migrants' irregular status as a vulnerability factor and for recovering the broad proactive approach to operational protective measures it had taken in *Rantsev*. However, in the overall negative aspects prevail, both on the definitional scope of Article 4 and on the positive obligations that Article entails.

On the one hand, the Court blurs the boundaries between the concepts of human trafficking and forced labour. It is welcome that trafficking be subsumed under Article 4, but not if this is done at the expenses of the autonomy of the forced labour prohibition, which is of utmost importance to allow the numerous forced labour cases where trafficking cannot be established to be prosecuted and

[156] In the same vein, *ibid*, at 59. I disagree, however, with the conclusion to vote for the finding of no violation despite the many shortcomings identified.

[157] *J. and Others*, at 116-117.

[158] FRA, *supra* n. 34, at 3.

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sanctioned. On the other hand, cross-border investigation duties and the preventive aspects of states' positive obligations are not properly addressed. In relation to the latter, in *J and Others* the Court's totally curtails the possibility of looking at the systematic shortcomings from a pre-emptive perspective. In *Chowdury*, it only reviews the criminal law framework, but not the way immigration and labour laws promote trafficking and fail to both scrutinize labour conditions and guarantee migrants' rights. As Chuang rightly underlines:

> "Conveniently obscured is the need to address the reality that trafficking is often labor migration gone horribly wrong and that it is at least partly due to the combination of tightened border controls, which have created a growing market for clandestine migration services, and lax labor laws, which permit employers and recruiters to coercively exploit their workers with impunity."[159]

Hopefully, the Court will in future cases provide a stronger response to the systemic aspects of this phenomenon, scrutinizing states' role in creating or maintaining "structures that permit, if not encourage, coercive exploitation of workers, particularly migrants".[160]

Trafficking is not a question of few criminals deceiving defenceless victims, it is about well-established economic structures that promote and maintain exploitation of the most vulnerable thanks to states' inaction, tolerance or complicity. In *Rantsev*, the Court had embraced this broad understanding of trafficking, when it established that prevention is about addressing state passivity and requiring action in the face of immigration regulations that provide criminal networks and companies easy ways to traffic people and ideal vulnerability conditions - linked to immigration status and lack of rights - for maintaining them in a situation of exploitation.[161]

Since then, the Court is steadily but inexorably abandoning that path, eroding the holistic approach initially taken. This is an extremely serious concern not only when considering the need to provide responses that are in line with the reality of today's human rights abuses, but also because it is betraying the human rights-based approach to trafficking enshrined in European law, as well as contradicting its own positive obligations doctrine and the broader due diligence duties established under international human rights law. The Special Rapporteur on trafficking and the Special Rapporteur on violence against women have referred to the "need to create a framework for discussing the responsibility of states to act with due diligence, by separating the due diligence standard into two categories: individual due diligence and systemic due diligence."[162] Will the Strasbourg Court contribute to that effort, insisting on state's systemic due diligence duties, or will it contribute to restrict states duties in the area of human trafficking, forced labour, servitude and slavery to a

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[159] Chuang, *supra* n. 49, at 638. In a similar vein, see the in-depth analysis by Gallagher and her proposals for addressing migration-related exploitation in Gallagher, *supra* n. 7, at 65-70.

[160] J. O'Connell Davidson, "Absolving the State: The Trafficking-Slavery Metaphor", 14 *Global Dialogue* (2012) 38, at 31 (cited in Chuang, *ibid.*, at 638).

[161] In the same vein, Thomas notes that "the focus of policy solutions tends to range from criminal law enforcement to the protection of the human rights of victims, but with little or no direct discussion of the destructive impact of strict immigration law". For an analysis of this impact, see C. Thomas, "Immigration Controls and "Modern-Day Slavery", Cornell Legal Studies Research Paper No. 13-86 (2003).

[162] Special Rapporteur on trafficking in persons, *supra* n. 88, at 20; and Special Rapporteur on violence against women, its causes and consequences, Report to the Human Rights Council, A/HRC/23/49 (2013), at 70 and 71.

comfortable minimum?

Finally, a couple of reflections on the role discrimination plays in the adjudication of trafficking cases. Firstly, one wonders whether the decision to find Greece responsible for violating its obligations with respect to the Bangladeshi men while no violation was found to have occurred with respect to the Filipino women may have something to do with gender. After reading *J. and Others*, I was left with the impression that domestic exploitation of women had been treated as being less serious, in some way normalized. I wonder, why did the Court fail to explore the role gender may have played in judges' decision-making at the national level? It has already been mentioned that European law requires state to adopt gender-specific strategies in order to prevent, recognize and combat trafficking in women. Therefore, attitudes such as the one shown by the Austrian prosecutor that end up normalizing women working 18-19 hours per day in domestic work under the menace of violence and with their passport being taken away since they "only clean up and take care of children" are to be strongly condemned. It is hoped that the Court will eventually address the gender-aspects of trafficking, including the scourge of gender discrimination and gender stereotyping within the judiciary,[163] as an important aspect of states' positive obligations under Article 4 ECHR. Discrimination based on multiple grounds —also referred to as intersectionality— as identified in *B.S. v. Spain*,[164] one of the few cases where the Court acknowledged the intersecting gender, racial and "social status" stereotyping in relation to an assault on a young Nigerian woman practicing prostitution and her lack of access to justice, should also be considered as a possible obstacle for trafficking victims to access justice.

And finally, might the Court itself have unconsciously fallen into another sort of stereotyping, i.e. the presumption that northern European states are addressing trafficking more effectively than southern European states? I hope that the Court will soon find an opportunity to contradict this inference through submitting northern and southern European states to the same level of scrutiny. This would be another good reason in favour of using the same analytical framework when reviewing how states fulfil their positive obligations under Article 4: in addition to promoting legal clarity for all stake-holders, it would greatly contribute to dispel any doubts that double standards might have been used.

[163] See Timmer and the CoE Report, *supra* n. 8.

[164] *B.S. v Spain*, Application n. 47159/08, Merits and Just Satisfaction, 24 July 2012. See K. Yoshida, "Towards Intersectionality in the European Court of Human Rights: The Case of B.S. v Spain", 21 *Feminist Legal Studies* (2013) 195–204.

 DOI: 10.17103/sybil.21.5

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Back to the Future: the Rio Declaration on Environment and Development and its Principles in their 25th anniversary with a Spanish perspective

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Abstract: The Rio Declaration and its principles had a ground-breaking impact in international law as well as in domestic legal orders. They went beyond their soft-law nature and became a normative horizon that has guided the evolution of international environmental law. Some of the principles then became customary law and others found their way into international agreements. Changes in the global scenario have led to their revision in the form of an affirmation of the principle of sovereignty "taking into account national circumstances" and responding to challenges of implementation and compliance at both international and national levels. Moreover, they empowered non-state actors that became unexpectedly their enforcers. The Rio Principles have the capacity to project themselves into the future, as shown in the case of the proposal of a Global Pact for the Environment that would incorporate most of them in a future treaty. In Spain, the Rio Declaration and its Principles have been referential for the development of environmental law and through the European Union have acquired a stronger normative intensity. However our commitment as a country has depended more on our obligations towards the European Union than on an individual pledge towards the planet.

Keywords: Rio Declaration – Sustainable Development – Principles of International Environmental Law, Soft Law, Environmental Governance

(A) INTRODUCTION

The Rio Declaration on Environment and Development that was adopted at the United Nations Conference of the same name in 1992 in Rio de Janeiro has just celebrated 25 years in June 2017. Examining its influence in this historic period with the benefit of hindsight brings back memories of those years after the end of the Cold War and the fall of the Berlin Wall that were full of great expectations but which have never been met.[1] Back then, the Rio Declaration on Environment and Development and its principles served these expectations establishing a wider normative horizon for States and international organizations that reformulated the principle of state sovereignty as set out in Article 2 of the United Nations Charter, with a functional approach redefining both rights and obligations derived from the territorial power of the State.[2] 25 years later, on 24 June 2017, on the very dates when the Rio Conference on Environment and Development took place, with all the nostalgia but with new political ambitions, a French think tank, le Club de Juristes[3] has presented a proposal to

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1 This study has its origin in the editorial 'Sobre los 25 Años de la Declaración de Río sobre el Medio ambiente y el Desarrollo' in the 8 *Revista Catalana de Derecho Ambiental*, (2017) 1-5.

2 See W. Lang, 'UN-Principles and International Environmental Law', 3 *Max Planck* UNYB (1999), P. H. Sand, 'Global Environmental Change and the Nation State: the Sovereignty Bounded,' in G. Winter (Ed.), *Multilevel Governance of Global Environmental Change* (Cambridge University Press, Cambridge, 2006).

3 This covenant is the draft of a future treaty with a preamble and 26 articles that turn into obligations the Rio principles. See La Commission Environnement du Club de Juristes, 'Vers un Pacte mondial pour l'environnement: Agir pour la planète, agir par le droit', 24 June 2017.

 DOI: 10.17103/sybil.21.6

set a global covenant that will turn most of the principles of this soft law instrument into the rules of an international treaty.[4] President Macron has already endorsed this proposal for a Global Pact for the Environment as one of the goals of French Foreign Policy. If it is adopted, whatever form it takes, soft or hard international law, it will consolidate Rio's most successful principles. Furthermore, it will introduce state-of-the-art principles such as that of non-regression[5] as foreseen in the French and Spanish domestic laws and courts,[6] that will inspire the evolution of international environmental law in an ambitious exercise of progressive development of international law, responding to the need to preserve the status of conservation of the environment against the catastrophic risks of the twenty-first century.

Beyond its legal impact, the Rio Declaration and its principles have an essential influence in environmental politics and the way they have been designed at the national level by state and sub-national authorities. It is this political dimension that has been less addressed by international law academics, but has been embraced by the international relations experts that have seen the Rio Declaration as the final result of a political discourse to convince the non-believers, the reluctant leaders of developed and developing countries to start acting to protect the environment.[7] This political discourse has also informed global governance and has triggered the required changes to empower a more caring and committed international civil society,[8] willing to show the states the path to follow.[9] The Rio Declaration and its principles have also become part of the self-empowerment and diplomacy of sub-state actors and non-state actors[10] as new unacknowledged co-law-makers of the world and executors of their obligations. Thus, in the case of the sub-state entities, as seen recently in the United States of America, after President Trump's desertion of the Paris Agreement on Climate Change, federal states and cities all over the country have decided to go on complying with the

4 Available here.

5 See M. Prieur, 'Non-regression in environmental law', 5.2 *S.A.P.I.E.N.S* (2012).

6 See Conseil Constitutionnel of France, Referral of 21 July 2016, Case 2016-737 DC and the Spanish Constitutional Court 233/2015, of 5 November 2015, BOE Num. 296 11 Nov. 2016.

7 They consider the Rio Declaration as a soft law instrument. As Abbot and Snidal, two referential American authors put it with an interdisciplinary scope transcending divisions between international relations and international law, have argued, 'it initiates a process and a discourse that may involve learning and other changes over time' allowing actors to evaluate their soft law commitments in the perspective of legalization, K. Abbott y D. Snidal, 'Hard and Soft Law in International Governance,' 54 *International Organization* (2000) at 423.

8 Kiss pointed that 'Grâce aux préparatifs de la Conférence de Rio et à son déroulement une «société civile» internationale a pu emerger. (...) Au plan du droit l'aboutissement du processus devrait être la reconnaissance d'une place aux représentants de cette société civile internationale dans les procédures menant à l'élaboration de textes internationaux, mais surtout dans celles qui permettent de contrôler et de mieux assurer la mise en oeuvre effective des règles internationales', A. Kiss, 'Le droit international à Rio de Janeiro et à côté de Rio', 1 *Revue Juridique de l'Environnement* (1993) at 45.

9 As Colás considers, 'international civil society should be associated not only with the agents that operate outside the immediate control of the state, but also with those social forces that have shaped the international society of states', A. Colás, *International Civil Society, Social Movements in World Politics* (Polity Press, Cambridge, 2002) at 170.

10 As in previous works, Cornago explores the political and legal aspects of the diplomacy of sub-state entities, identifying as possible manifestations 'the extension of international agreements through diverse soft-law mechanisms, limited participation in international treaty-making processes (...), intensive participation in multilateral negotiation schemes on a geographical or functional basis'; see N. Cornago Prieto, 'On the Normalization of Sub-State Diplomacy', 5 *The Hague Journal of Diplomacy* (2010) 11-36, at 17.

 DOI: 10.17103/sybil.21.6

acquired commitments becoming the new counterparts on the on-going development of the legal framework to fight against climate change.

As the final statement adopted in the Rio Conference, the Declaration was based on a laboriously achieved consensus assembling the developed and developing countries' views, so often diverging but then reconciling into a common understanding of future challenges and principles to inspire decision-making and action at international and national levels.[11] So it had a complex conceptual structure with a short preamble and 27 principles, some of a political nature and others with different normative intensity. These principles respond to three goals: first to define concepts and links relating development and environment as well as proposing political and environmental rights for the citizen, second, to propose the basic guidelines for public environmental policies, and finally, to consolidate the normative principles of the Stockholm Declaration of 1972, as well as to formulate new ones, meant to be part of both the international legal order and domestic law.

Despite its contested legal nature as a soft law instrument,[12] the great contributions that the Rio Declaration and its principles brought about reside in the functions they have played ever since their adoption. They have informed norm-creation and policy-making at international and domestic levels, as well as norm-implementation, interpretation and adjudication of international law.[13] They are also referential in dispute settlements between States and in conflicts between legal regimes.[14] They have offered guidance and channelled expectations for the future legal development of international agreements, with special relevance in the case of the Conventions also adopted in the Rio Conference, the Convention on Biological Diversity[15] and the Convention on Climate Change that incorporated provisions with the specific principles that should govern their legal development.[16] And as in these

[11] Linking this consensus and the sustainable development principle, Viñuales said 'Born in the 1980s as a conservation concept, 'sustainable development' was brought to light by the report of the Brundtland Commission, 'Our Common Future', in 1987, and crowned at the Earth Summit, in 1992, as the leading concept guiding global efforts to protect the environment. Other concepts had been developed over time, including those of 'eco-development' or 'green economy', but they were unsuccessful in gathering consensus among different stakeholders. 'Sustainable development' proved to be superior in accommodating the developmental concerns expressed by countries such as Algeria, Brazil and India since the late 1960s. Yet, it did not crack the environment–development equation. Rather, it drew a veil over it to enable consensus', J. Viñuales, 'The Rise and Fall of Sustainable Development', 22 *RECIEL*, (2013) at 4.

[12] In this case, the Rio Declaration responds to the definition of soft law adopted by D. Shelton who described it as 'normative provisions contained in non-binding texts', D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, (Oxford University Press, Oxford, 2000, 2007 reprint). See also, M. Pallemaerts that says, 'It is obvious from their drafting history, form and content, that the Stockholm Declaration, World Chapter for Nature and Rio Declaration each belong to the realm of soft law', M. Pallemaerts, 'International Environmental Law from Stockholm to Rio: Back to the Future?' 1 *RECIEL* (1992), at 254.

[13] States have invoked Rio principles in the context of legal claims against other States adjudicated before international tribunals as it will be analysed below. See T. Fajardo, 'Environmental law principles and General principles of international law', in L. Kramer and E. Orlando (Eds.), *Principles of Environmental Law*, (Elgar Encyclopaedia of Environmental Law, Vol. VIII, 2018), forthcoming.

[14] See B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (Cambridge University Press, Cambridge, 2006).

[15] See Secretariat of the Convention on Biological Diversity, *The Ecosystem Approach*, (CBD Guidelines) Secretariat of the Convention on Biological Diversity 2004).

[16] Art. 3 of the UN Framework Convention on Climate Change sets out a number of international environmental principles applicable to the regime, to be used to guide the implementation of the instrument and assist in meeting the ultimate objectives of this convention. As Maguire examined, the international environmental principles referred to within

 DOI: 10.17103/sybil.21.6

conventions, Rio Principles also inspired all the institutional and normative frameworks that afterwards were adopted and developed in the field of the environment and guided their interpretation.[17]

The Rio Declaration and its principles also served to interpret other international commitments of the fragmented international system, acting as limits for other regimes such as international economic law and investments or humanitarian law, even though, the opposite conclusion was also sustained since this influence could also be interpreted as the acceptance of subordinating environmental protection to all international sectors through its diluting principles.[18] In any case, the Rio Principles have played an important role in the cases of cross-fertilization among different legal regimes, serving to diffuse the conflicts among different rules and making them mutually supportive, at least on paper, so, for instance, trade and the environment have been linked thanks to the Principle of sustainable development.[19]

At the national level, the Rio Declaration and its principles have had a seminal effect in domestic law and policies that led to the adoption of a wide array of measures both related with decision-making and green governance at state, regional and local levels. Its principles related with public participation and empowering non-state actors have deeply influenced the role that NGOs and citizens play in the protection of the environment nowadays. This study will also assess their influence in the Spanish legal order and case law.

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the UNFCCC are sourced from earlier international instruments, binding acts of international institutions and customary international law and may have not reached the status of customary international law. See R. Maguire, 'Foundations of International Climate Law: Objectives, Principles and Methods', in E. Hollo, K. Kulovesi and M. Mehling (Eds.), *Climate Change and The Law*, Ius Gentium: Comparative Perspectives on Law and Justice, (Springer, 2013), 83-110.

[17] See G. Loibl, 'Reporting and Information Systems in International Environmental Agreements as a Means for Dispute Prevention – The Role of 'International Institutions'', 5 *Non-State Actors and International Law*, (2005), 1-20.

[18] Thus, Pallemaerts was very critical about the relationship between environment and trade pointing out, 'Another provision of the Rio Declaration implicitly subordinating international environmental law to international economic law can be found in Principle 12, which addresses the issue of 'trade policy measures for environmental purposes'. Paraphrasing Article XX of GATT, it emphasises that such measures: 'should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade'. In an apparent attempt to generalise the holding of the GATT panel in the recent dispute between the US and Mexico on tuna import restrictions, it recommends that 'unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided', M. Pallemaerts, *supra* n. 12, at 263.

[19] For instance, the Title IX on Trade and Environment of the Trade Agreement between the European Union and its Member States and Colombia and Peru. Its Article 267.1 on Context and Objectives says: 1. Recalling the Rio Declaration on Environment and Development and the Agenda 21 adopted by the United Nations Conference on Environment and Development on 14 June 1992 (...), the Parties reaffirm their commitment to sustainable development, for the welfare of present and future generations. In this regard, the Parties agree to promote international trade in such a way as to contribute to the objective of sustainable development and to work to integrate and reflect this objective in their trade relationship. In particular, the Parties underline the benefit of considering trade-related labour and environmental issues as part of a global approach to trade and sustainable development'. See the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, *OJ L 276*, 21.12.2012, at 79.

 DOI: 10.17103/sybil.21.6

(B) THE RIO DECLARATION IN ITS TIME: BACK TO THE FUTURE

The Rio Declaration was seen in its time as a half empty glass[20] because it failed to address all the problems or to formulate all the principles of international environmental law,[21] as previously the Stockholm Declaration on Human Environment of 1972 also failed to address then. It was also seen as a half empty glass due to the fact that it subordinated environmental protection to economic development in some of its principles[22] (Principles 2, 3, 4, 5, 8). This subordination had been a requirement of the developing countries, which had led to adulteration of the formulation of the original version of the Stockholm Declaration Principles, and in particular its Principle 21,[23] to which Principle 2 had added the concept of development[24]:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, *the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies*, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[25]

This approach diverged from the Stockholm Declaration that was considered more balanced on this issue,[26] even though, developing countries saw it as a positive adjustment to the environmental focus of Stockholm.

The origin of this vision that linked the environment to development is to be found in the Brundtland Report, "Our Common Future", that was drafted by the World Commission on Environment and Development at the request of the General Assembly of the United Nations, on

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[20] See A. Kiss, 'The Rio Declaration on Environment and Development', in L. Campiglio et al. (Eds.), *The Environment after Rio: International Law and Economics*, (Graham & Trotman / M. Nijhoff, 1994) at 63; David H. Getchest, 'Foreword: The Challenge of Rio', 4 *Colorado Journal of International Environmental Law and Policy*, (1993) 1-19, at 14, Peter H. Sand, 'International Environmental Law' 4 *EJIL* (1993) 377-389.

[21] See J. Viñuales, 'The Rio Declaration: A Preliminary Study', in J. Viñuales, (Ed.), *The Rio Declaration on Environment and Development. A Commentary*, (Oxford University Press, 2015), at 2.

[22] See M. Pallemaerts, *supra* n. 12, at 256.

[23] The Principle 21 of the Stockholm Declaration on the Human Environment says 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.' The Stockholm Declaration was adopted in 1972 in the first United Nations conference addressing the protection of the environment, however its title shows the lack of consensus to name the environment. Text available here.

[24] A. Kiss and D. Shelton, *Guide to International Environmental Law*, (Martinus Nijhoff Publishers, Boston and Leiden, 2007) at 12.

[25] The text of the Rio Declaration is available here.

[26] Pallemaerts was very critical on this point, arguing, 'The fact that a clause virtually identical to Stockholm Principle 21 can be found in Principle 2 of the Rio Declaration, appearing at the beginning of the Declaration and not in the 21st place, gives cause for optimism, but a closer reading of Principle 2 reveals a skilfully masked step backwards. The Rio text is not identical to the one adopted in Stockholm: the Rio version of the principle of responsibility stipulates (...) an addition of two words, which is anything but innocent. The stronger emphasis on development in this new version upsets the delicate balance struck in Stockholm between the sovereign use of natural resources and the duty of care for the environment. In the Stockholm Declaration, the sovereign right of states to exploit their natural resources was affirmed in the context of their national environmental policies, giving 'a more ecological colour' to the principle of sovereignty over natural resources (...)', see M. Pallemaerts, *supra* n. 12, at 256.

 DOI: 10.17103/sybil.21.6

which the Rio Declaration is based.[27] This report undertook a diagnosis of the evils of the planet from two main causes: poverty and the model of production and consumption of the developed countries (Principles 3, 5, 6, 8). Far from being disconnected, these causes fed a vicious circle in which poor countries overexploited their resources with a narrow profit margin to meet the demands of developed countries that wanted to consume everything, all the time and at low prices. I consider this diagnosis fully valid today, and moreover the situation has worsened. At the Rio Conference in 1992, in order to solve the well-known problems arising from the excesses of the consumption and production model, science and new technologies were expected to bring about energy efficiency as a remedy for overexploitation and its devastating effects: more goods could be produced with fewer resources and at a lower energy cost. This hope, however, was betrayed by the unrelenting demand for more products and services. The poverty to be eradicated (Principle 5[28]) was mostly due to a colonial past and a global market governed by a law of perpetual dependence of developing countries' production on developed countries' demand. A few decades later, this paradigm has been altered by new and unforeseen circumstances: the scarcity of resources –real or just the idea of future scarcity- has turned developing countries into emerging powers of a new world order. In it, States are now classified according not just to their economic or military power but also according to their bio-capacity and their contribution to global pollution and climate change.[29] The consolidation of this new world system and the late economic crisis has led States, however, to re-examine the meaning and role to be played by some of the pillars of the Rio Declaration, those of the Principles of Sustainable Development (Principles 1, 4, 5, 12, 20 and 27) and the Common but Differentiated Responsibilities (Principle 7[30]) both closely related to Equity[31] (Principle 3[32]). The Principle of Common but Differentiated Responsibilities redefines obligations and reciprocity in international law, altering the obligational structure of most environmental agreements making the asymmetric distribution[33] of

[27] The Brundtland Report took its better known name from Gro Harlem Brundtland who presided over the World Commission. The real title of this report was *Our Common Future*. Its Annex 1 is a Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development Adopted by the WCED Experts Group on Environmental Law. See its text here.

[28] Principle 5 says 'All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world'.

[29] See T. Fajardo, 'Los bienes públicos del medio ambiente: el reto de la gestión sostenible de los recursos naturales en la Unión Europea', 16 *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, (2012), at 219-246.

[30] Principle 7 says 'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command'.

[31] See D. French, 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities', 49 *International and Comparative Law Quarterly* (2000), at 35.

[32] Principle 3 says 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.

[33] Juste Ruiz describes 'conventional asymmetry' as a 'technique consisting of the diversification of the obligations and rights of the parties, which must respond to their different responsibilities according to the respective degree of economic and scientific development. Incentives for certain States, particular derogations, differentiated obligations, grace periods, regionalization, etc., has also had its preferred application in the protection of the atmospheric environment.' See J. Juste

rights and duties a characteristic of these legal regimes, "in view of the different contributions to global environmental degradation". However, the affirmation and later questioning of this principle is clearly reflected in the Framework Convention on Climate Change and its normative development through the Kyoto Protocol and the Paris Agreement which still states in its Article 2.2 that "*This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*".[34] However, during the Paris Agreement negotiations, any claim for compensation for historical responsibility[35] for the effects of development, was finally rejected. The proposal of a Global Pact for the Environment incorporates the Principle of Common but Differentiated Responsibilities in its preamble and in its Article 20 that is called *Diversity of national situations* previous to Article 21 on *Monitoring of the implementation of the Pact*, showing with this position on the pact that there has been a change of course towards the idea of capacity to comply, eluding the responsibility for repairing environmental damage and abandoning the asymmetrical approach that attributed to developed countries the duty to fund cooperation to protect the environment.[36] Now, states are expected to comply with their duties depending on their national capabilities, which is a requirement derived from the fact that their obligations demand domestic legal and policy measures.

In 1987, the Brundtland Report identified many of the risks derived from our modern system of production[37] and foretold catastrophic consequences that now we have to face:

Ruiz, *Derecho Internacional del Medio ambiente*, (Madrid, McGraw Hill, 1998).

[34] See the Paris Agreement on Climate Change.

[35] On the concept of historical responsibility see J. Jaria Manzano, 'El Derecho, el Antropoceno y la Justicia', 7 *RCDA* (2016), 1-13. He says 'debe hacerse frente a la responsabilidad histórica—que se hace visible en expresiones como 'deuda ecológica' o 'deuda climática'—, la inequidad presente—que se materializad en el intercambio ecológicamente desigual en el contexto de la diferenciación centro-periferia en la economía-mundo capitalista—, y la sostenibilidad futura en relación con la transformación antrópica del Sistema Tierra', at 12.

[36] The second paragraph of this Article 21 says 'This mechanism consists of a Committee of independent experts and focuses on facilitation. It operates in a transparent, non-adversarial and non-punitive manner. The committee shall pay particular attention to the respective national circumstances and capabilities of the Parties', see *supra* n. 4.

[37] See the Brundlant Report, *supra* n. 28, at 35.

 DOI: 10.17103/sybil.21.6

> "31. Many of the risks stemming from our productive activity and the technologies we use cross-national boundaries; many are global. Though the activities that give rise to these dangers tend to be concentrated in a few countries, the risks are shared by all, rich and poor, those who benefit from them and those who do not. Most who share in the risks have little influence on the decision processes that regulate these activities.
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> "32. Little time is available for corrective action. In some cases we may already be close to transgressing critical thresholds. While scientists continue to research and debate causes and effects, in many cases we already know enough to warrant action. This is true locally and regionally in the cases of such threats as desertification, deforestation, toxic wastes, and acidification; it is true globally for such threats as climate change, ozone depletion, and species loss. The risks increase faster than do our abilities to manage them.
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> "33. Perhaps the greatest threat to the Earth's environment, to sustainable human progress, and indeed to survival is the possibility of nuclear war, increased daily by the continuing arms race and its spread to outer space. The search for a more viable future can only be meaningful in the context of a more vigorous effort to renounce and eliminate the development of means of annihilation."

As expressed in this last paragraph, the Brundtland Report was most concerned at the possibility of a nuclear war, a risk that seemed to be in the past after the end of the Cold war and that now has been unexpectedly brought back by the recent threats of North Korea, which is using nuclear weapons once again to redefine power relations in the global society.[38]

(C) ON THE LEGAL NATURE OF THE RIO DECLARATION AND PRINCIPLES

Discussing the legal nature of the Rio Declaration and its principles requires approaching them, first, as a soft law instrument with a set of legal principles[39] that was adopted as the "one 'product' of the United Nations Conference on Environment and Development designed precisely to embody rules and principles of a general and universal nature to govern the future conduct and cooperation of States (...)".[40] In contrast to this general Declaration, two framework Conventions on Climate Change and Biodiversity were adopted as well as another soft law instrument that was expressly called "Non-legally binding authoritative statement of principles for a global consensus on the management,

[38] See the UN Security Resolution 2371(2017) on North Korea establishing sanctions under Chapter VII of the Charter and its Article 41 after 'Expressing its gravest concern that the DPRK's ongoing nuclear- and ballistic missile-related activities have further generated increased tension in the region and beyond, and determining that there continues to exist a clear threat to international peace and security', *S/RES/2371 (2017)*, 5 August 2017, at 2.

[39] I consider that "as far as universal international law is concerned, a principle of law is only general when it can be found expressed in all the main legal systems of the world. When a judge has found that a given principle is recognized by the civilized nations, he must still ascertain whether it is transposable to the international sphere. There are nonetheless general principles taken from national law that are short-lived. Once recognized by a judgment they tend to crystallize into or become customary international law or be endorsed by treaty law. This does not exclude, however, that 'general principles' may also be used at merely a regional level as shown by the case of the European Union"; see T. Fajardo, 'Environmental law principles...', supra n.13. Also see G. Winter, 'The legal nature of environmental principles in international, EU, and exemplary national law' in G. Winter (Ed.), *Multilevel Governance of Global Environmental Change. Perspectives from Science, Sociology and the Law*, (Cambridge University Press, 2010).

[40] Shelton points out 'in the environmental field, statements of principles coming from global conferences have stimulated the conclusion of both legally binding and non-binding instruments, with peaks of regulation following the Stockholm and the Rio Conferences...', D. Shelton, *supra* n.12, at 555.

 DOI: 10.17103/sybil.21.6

conservation and sustainable development of all types of forests".[41]

As such, both a soft law instrument and a set of principles share some common features: they "may lack the supposedly harder edge of a 'rule' or an 'obligation' but they are certainly not legally irrelevant."[42] In both cases, as an instrument of soft law and as principles, they defy the consensual basis of international law because they have not been agreed in treaty-making processes and have not received endorsement by national assemblies. They have been inferred from domestic law and international agreements and customary law and had been proclaimed in a world conference final statement.[43] Moreover, some of them, as in the case of the precautionary principle (Principle 15[44]), were and still are frequently objected to by States such as in the case of the United States of America that prefer to consider them just as approaches and criteria fulfilling political functions rather than normative ones.[45] Moreover, there are principles that are not universally accepted but have an existence at regional and domestic levels. Others can have a double nature: as a political or non-binding nature for some states and at the same time as binding rules that have become part of the legal systems of others or have been incorporated in international treaties. Thus, the precautionary principle is part of the principles of the environmental policy of the European Union and its Member States[46] and informs both their internal and external policies. So in some of the international agreements celebrated by them, the contracting parties have reserved the potential effects of the precautionary principle when negotiating international obligations with the EU and its Member States that accept it as binding.[47]

For all of it, the Rio Declaration as soft law plays an important role as a "trendsetter for the expanding content of international law"[48] and is in the inception of hard law, despite the difficulties

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41 See Annex III of the Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), A/CONF.151/26 (Vol. III), 14 August 1992.

42 See A.E. Boyle 'Some Reflections on the Relationship of Treaties and Soft Law', *48 International and Comparative Law Quarterly* (1999) 901-913, at 907.

43 See A. Kiss and D. Shelton, supra n. 24.

44 Principle 15 says 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'

45 See G. Lynham 'The *Sic Utere* Principle as Customary International Law: A Case of Wishful Thinking?', 2 *James Cook U. L. Rev.* (1995), at 172.

46 It is among the EU environmental principles formulated in Article 191.2 of the Treaty on the funcioning of the EU that says: 'Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.'

47 So, for example, Peru made a declaration affirming that it will interpret the Trade Agreement with the EU and its Member States against the background of Principle 15 of the Rio Declaration on Environment and Development on the precautionary principle. See the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, *OJ L 276*, 21.12.2012, at 79.

48 Drumbl characterizes soft law as 'trendsetter for the expanding content of international law' (p.3) even though it defines it as a 'law-like behavior that falls outside the principal sources of law identified in Article 38(1)'. It highlights the role of United Nations as a locus of soft law-making activity (p. 19); M. A. Drumbl, 'Actors and Law-Making in International Environmental Law.' in Malgosia Fitzmaurice, David M. Ong, Panos Mercuris (Eds.) *Research Handbook of International Environmental Law*, (Edward Elgar Publishing, 2010) at 14.

arising when moving from soft law to the binding principles of international law via customary international law or via treaty making processes.[49] Thus the Rio Declaration, as Professors Boyle and Freestone said, "overtly intended to initiate new law for the international community of States and for this reason many of its provisions are formulated in normative and obligatory terms, although the declaration is formally non-binding. It marks the emergence of developing countries as a real and substantial influence on the making of international environmental law...".[50]

On the other hand, confronting the Rio Principles as international principles, with the theory of sources of law leads to opposing solutions. Thus, according to those that consider that Article 38 1(c) of the International Court of Justice Statute lists the general principles as another source of international law, many Rio Principles would be among the sources of international environmental law.[51] However there is no unanimity about this characterization of the principles or even on the theory of sources. As a result, many academic authors in legal traditions such as those of Spain, Latin America or China[52] prefer to refer to forms of creation of international law and discard the principles because they merely reflect treaties and customs rationale.[53] When not considered as a source of law, principles are characterized as non-binding by-products from these forms of creation and manifestation of international law. However, many Rio Principles as examined in the following sections show attributes of hard legalization: obligation, precision and adjudication. In this regard, the wording of the Rio Declaration and principles differs from that of the Stockholm Declaration, as shown by the prevailing use of the word *shall*. The drafting of the Rio obligations had a clear intention to go further; however on too many occasions the lack of precision is the bargaining chip of consensus. Regarding adjudication, the case law of international and domestic tribunals shows a growing list of judgments in which judges have explicitly referred to the Rio Principles while in other cases they have not done so but they have applied them.[54]

Whether or not considered as sources of international law, the Rio Principles are the proof that principles are not redundant since they play different functions from those ascribed to custom or international agreements from which they stem. However, their most relevant function has been to guide interpretation and implementation of international and domestic environmental laws. They inspire policy making and fill gaps in court decision-making avoiding *non liquet*. They helped to

[49] As studied by P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment*, (New York: Oxford University Press, 3rd Edition, 2009), and P.-M. Dupuy, 'Soft Law and the International Law of the Environment' 12 *Michigan Journal of International Law* (1991) 420-435, at 435.

[50] A.E. Boyle and D. Freestone (Eds), *International Law and Sustainable Development. Past Achievements and Future Challenges*, (New York: Oxford University Press, 1999) at 69.

[51] See T. Fajardo, 'Environmental law principles ...', *supra* n. 13.

[52] See Chiu Hungdah, 'Chinese View on the Sources of International Law' 28 *Harvard International Law Journal* (1987) at 289.

[53] See Drnas de Clément, Z., 'Fuentes del Derecho Internacional del Medio Ambiente', in F. Sindico, R. Fernández Egea & S. Borrás Pentinat (Eds.), *Derecho Internacional del Medio Ambiente. Una Visión desde Iberoamérica*, (Cameron May, London, 2011), Julio A. Barberis, 'Los Principios Generales de Derecho como Fuente del Derecho Internacional,' 14 *Revista del Instituto Interamericano de Derechos Humanos* (1991), at 11.

[54] For instance, this is the case of the Southern Bluefin Tuna Cases, New Zeland, Australia v. Japan (1999), International Tribunal for the Law of the Sea, *38 ILM* (1999), at 1624-1656. See S. Marr, *The Precautionary Principle in the Law of the Sea. Modern Decision Making in International Law* (Martinus Nijhoff Publishers, 2003), at. 1.

 DOI: 10.17103/sybil.21.6

crystallize or to trigger the customary process such as in the case of the principle of the Environmental Impact Assessment (Principle 17[55]) that is now accepted worldwide as a customary norm establishing a tool that States must use at both national and international level. In the Pulp Mills Case,[56] the ICJ referred to transboundary environmental impact assessment as part of customary international law. So, in suitable conditions, use of a general principle has been considered a justifiable act of judicial legislation. What is conspicuously absent are general principles on the law of reparation.[57]

The International Court of Justice has used soft law instruments[58] and principles of environmental law without attributing a legal nature —either customary law or treaty law— but uses it for the interpretation and adaptation, even for the progressive development of international law. Thus, in the *Case Concerning the Gabčikovo-Nagymaros Dam*, regarding the sustainable development principle, the ICJ considered that "new norms and standards have been developed, set forth in a great number of instruments ...[and] have to be taken into consideration, ..., not only when States contemplate new activities but also when continuing with activities begun in the past".[59]

(D) THE PRINCIPLE OF SUSTAINABLE DEVELOPMENT AND THE OTHER RIO PRINCIPLES INSPIRING ENVIRONMENTAL POLICIES AND GOVERNANCE

The influence of the principles and political guidelines of the Rio Declaration that have inspired international environmental law and green governance and the making of public policies over the last 25 years is undeniable. However, it has suffered erosion due to its incessant invocation, in particular, of the principle of sustainable development. Thus, Professor Rodrigo affirms in his work "The Challenge of Sustainable Development", that the abuse of this principle has put it on the verge of irrelevance.[60] Moreover, in recent years, the Rio principles have been relegated to the margins of the political agenda because of the economic crisis.

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[55] Principle 13 says 'Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority'.

[56] See A. Cançado Trindade, Separate Opinion, Pulp Mills Case. *ICJ Reports* (2010) 135–215.

[57] See T. Fajardo, 'Environmental law principles ...', *supra* n. 13.

[58] So I considered that 'In the case law of the International Court of Justice, an evolution can be observed from an absolute disregard for the new notions of soft law in the form of United Nations resolutions and declarations, to a certain sensitivity to those soft law instruments that cannot be denied legal effect, as stated by Judge Hersch Lauterpacht in his separate opinion appended to the Court's 1955 Advisory Opinion on South-West Africa: 'It is one thing to affirm the somewhat obvious principle that the recommendations of the General Assembly ... addressed to the Members of the United Nations are not legally binding upon them in the sense that full effect must be given to them. It is another thing to give currency to the view that they have no force at all whether legal or other. (p. 118).', See T. Fajardo, 'Soft Law', *Oxford Bibliographies*, (Oxford University Press, 2014) at 41.

[59] *Case Concerning the Gabčikovo-Nagymaros Dam, ICJ Reports, 1997*, para. 140.

[60] See A.J. Rodrigo, *El Desafío del Desarrollo Sostenible. Los principios de Derecho internacional relativos al desarrollo sostenible*, (Centro de Estudios Internacionales, Marcial Pons, Madrid, 2015).

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(1) The Principle of Sustainable Development

The Brundtland Report defined the Principle of Sustainable Development as:

> "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs."[61]

The Rio Declaration recast it in its Principles 1, 4, 5, 12, 20 and 27, by adding different aspects, some of them controversial and open to diverging interpretations. Thus, sustainable development was tainted with an anthropocentric approach because Principle 1 said that "Human beings are at the centre of concerns for sustainable development'" and was subjected and subordinated to economic development because Principle 4 determined that "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it". Principle 5 charged it with expectations of justice and redistribution and Principle 12 as analysed below made it not a compass of environmental cooperation but just a moderate factor of correction of the ravaging modes of economic cooperation.

This way, the Rio Declaration established the poly-faceted formula for the Principle of Sustainable Development that would later be the object of multiple adaptations due to its fragmentation in three dimensions: the environmental, the economic and the social, as well as its implementation by an infinite variety of political entities embracing it: non-state actors and the whole range of subnational entities, from federal states to local entities. The concept of sustainable development also encompasses the concepts of sustainable use, intergenerational equity, intra-generational equity and integration.

Despite all this, the Rio Declaration and the Principle of sustainable development have been invoked— not for their nature or normative intensity but for the halo of legitimacy that they confer on any normative or executive act that refer to them in their preambles and provisions.[62] So preambles of all types of legal and executive instruments adopted by international and domestic institutions at all levels of responsibility have invoked the Rio Declaration, the Principle of sustainable development[63] or its Agenda 21 to convince the parties of international conferences and the members of the parliaments and assemblies that they were the necessary and the right measures to adopt to protect the environment –or to pretend they were doing so. However, beyond the good intentions and

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[61] See the Brundlant Report supra n. 28 at 41.

[62] Mercado says that the principle evokes a new imagery of justice: 'el desarrollo sostenible evoca un nuevo imaginario de la justicia que sustituiría al imaginario de la justicia subyacente al hoy tambaleante contrato o compromiso que sostenía al Estado social. Un nuevo imaginario apto para declinar la justicia en todos los niveles espaciales (locales, estatales, regionales y globales) y temporales (intra e intergeneracional) que la globalización exigiría, superando la visión sincrónica y confinada territorialmente en el Estado de los anteriores imaginarios de la justicia. Además, evoca un imaginario desde el que es posible plantear soluciones tanto a la incesante polarización social y a la brecha en términos de desarrollo entre ricos y pobres, entre el Norte y el Sur, como para servir como principio normativo desde el que afrontar los desafíos de la crisis ecológica', P. Pacheco Mercado, 'Desarrollo sostenible y gobernanza: retóricas del derecho global y de la justicia ambiental', E. Pérez Alonso et al. (Ed.), *Derecho, Globalización, Riesgo y Medio ambiente*, (Tirant Lo Blanch, Valencia, 2012) at 95.

[63] After the Johannesburg Conference on Sustainable Development in 2002, it also serves to underpin social and economic policies.

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the political messages, this principle and the Rio Declaration itself have been undermined by poor implementation. The vagueness of their wording that was the price to be paid for achieving consensus led to a lack of compliance to their commitments that was not sanctioned either by political or legal responsibilities. This is why Professor Viñuales talks about fall and rise of sustainable development and "the need to use another 'weapon' to spearhead efforts to meet the challenge of implementation".[64] However, the green economy goal that was adopted in the Rio+20 Conference of 2012 was meant to be the substitute for the Principle of Sustainable Development but has so far failed. It was one of the main hopes at this revival of Rio Conference, but never reached the level of popularity and acceptance as the Principle of Sustainable Development.

Full implementation of the Rio Declaration and its principles would have required greater institutionalization of the sub-system of international environmental law. However, States continue to refuse to create an international environmental organization. The case of the United Nations Environment Program, the UNEP, is still far from meeting the challenges of the planet, because despite its up-grading in the 2012 Rio Conference, the potential of its wide mandate was never exploited; on the contrary, its inadequate funding was intended to impede its ability to promote environmental protection through political and legal approches. The United Nations Environment Assembly, the UNEA that was created at this conference as a necessary universal forum and test for future progress, is still waiting for adequate back up and resources to allow greater ambition in its resolutions.[65]

(2) The Rio Principles and Guidelines on Political and Environmental Rights

As the Global Pact for the Environment does now, the Rio Declaration made of non-state actors a weapon charged with hope for the protection of the environment. The hopeful and ambitious approach of the Rio Declaration made possible an upgrading of the role of the concerned members of the global civil society. Thus, the principles of the Rio Declaration that promoted the opening of decision-making processes to non-state actors[66] (Principle 10[67]) acquired a crucial value and made empowering citizens and NGOs, women,[68] young people,[69] indigenous peoples and other local

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64 See J. Viñuales, 'The Rise and Fall...', *supra* n.11, at 3.

65 There has been a negative dependency on the institutions of sustainable development despite the efforts to describe them as mutually supportive or complementary. Due to this, it has been more an alibi not to go further65 than the real reasons behind the lack of commitment of States with the idea of a new international organisation capable of growing competences on promotion and control if not sanction.

66 See J. Ebbesson, 'Principle 10: public participation', in Jorge E. Viñuales (Ed.), *The Rio Declaration on Environment and Development. A Commentary*, (Oxford University Press, 2014).

67 Principle 10 says 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.'

68 Principle 20 says 'Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development'.

69 Principle 21 says 'The creativity, ideals and courage of the youth of the world should be mobilized to forge a global

communities[70] possible.[71]

The challenge of implementation of the Rio Declaration was endorsed not by States but by non-state actors: local entities that first became familiar with their political and legal duties regarding the environment thanks to Agenda 21 and NGOs and citizens that have turned adjudication into the most effective tool to influence the decision-making processes and legislation.[72]

Without the Rio Principles, we cannot understand the latest developments in environmental justice,[73] which demand greater protection of the environment *per se* by public authorities as well as protection of future generations from disasters to which climate change can condemn the planet. It is now in Article 11 of the proposal of the Global Pact for the Environment on Access to environmental justice that says

> "Parties shall ensure the right of effective and affordable access to administrative and judicial procedures, including redress and remedies, to challenge acts or omissions of public authorities or private persons which contravene environmental law, taking into consideration the provisions of the present Pact."

This proposal also has a constitutional vocation since it incorporates environmental and political rights for every person as in Article 1 on the Right to an ecologically sound environment that says "Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment" and Article 10 on Public Participation: "Every person has the right to participate, at an appropriate stage and while options are still open, to the preparation of decisions, measures, plans, programmes, activities, policies and normative instruments of public authorities that may have a significant effect on the environment".

Non-state actors now seek to transcend the figure of the nation-state when their national borders

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partnership in order to achieve sustainable development and ensure a better future for all. The creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all.'

[70] Principle 22 says 'Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development'.

[71] The Preamble of the Voluntary Agreement between the EU and Liberia says: 'Having regard to the importance of Principles set out in the 1992 Rio Declaration in the context of securing sustainable forest management and, in particular, of Principle 10 concerning the importance of public awareness and participation in environmental issues and of Principle 22 concerning the vital role of indigenous people and other local communities in environmental management and development.' See Voluntary Partnership Agreement between the European Union and the Republic of Liberia on forest law enforcement, governance and trade in timber products to the European Union, *OJ L 191*, 19.07.2012, at 3.

[72] See D. Estrin, 'Limiting Dangerous Climate Change. The Critical Role of Citizen Suits and Domestic Courts - Despite the Paris Agreement', 101*CIGI Papers*, (2016), at 13; Randall S., Abate, 'Public nuisance suits for the Climate Justice Movement: The right thing and the right time', 85 *Washington Law Review*, (2010), at 197, L. Bergkamp, 'A Dutch Court's 'Revolutionary' Climate Policy Judgment: The Perversion of Judicial Power, the State's Duties of Care, and Science», 12 *Journal of Environmental & Planning Law*, (2015) 239-261 and L. Bergkamp & J.C. Hanekamp, 'Climate Change Litigation Against States: The Perils of Court-Made Climate Policies', 24 *European Energy and Environmental Law Review* (2015), 102-114.

[73] See S. Borrás Pentinat, 'Movimientos para la justicia climática global: replanteando el escenario internacional del cambio climático', 33 *Relaciones Internacionales*, (2016) Grupo de Estudios de Relaciones Internacionales (GERI) – UAM, 97-119.

 DOI: 10.17103/sybil.21.6

become a barricade to avoid confronting global problems, as is now the case in the USA. This is why States and cities such as California or Washington and NGOs and US companies have initiated a process of negotiation with the Secretary-General of the United Nations to formalize their commitment to the Paris Agreement, regardless of the decision to abandon it taken by President Trump.[74] A Coalition of states, cities and NGOs led by Michael Bloomberg will catalyze the efforts of the American paradiplomacy[75] that has committed itself to fulfill the objectives of the Paris Agreement as reported to the Secretary-General of the United Nations. This Coalition has also assumed the task of submitting the report of compliance with the contribution determined at the national level, if the Department of State fails to do so. The NGO Bloomberg Philanthropies will also compensate the cuts to the financing of the institutional framework to combat climate change and will pay for the 25% quota that the United States should pay to maintain the Secretariat of the UNFCCC, 15 million dollars.[76] The UN Secretary-General also named the Governor of California as special adviser for states and regions to the upcoming U.N. talks in Bonn.[77]

However, both in the Rio Declaration and in the Global Pact for the Environment, there was no reference that could indict past or future behaviour of multinational companies or just question their capacity to interfere in international decision-making processes or to undermine state sovereign right to exploit natural resources.

(3) The Effect of the Rio Principles on International Cooperation

The principle of cooperation conceived as an expression of good neighbourliness is defined in Principle 27 of the Rio Declaration as requiring that "[s]tates and people shall co-operate in good faith and in a spirit of partnership in the fulfilment of the principle embodied in this Declaration and in the further development of international law in the field of sustainable development". This general principle of cooperation has evolved to include more procedural guarantees such as information sharing and participation in decision-making processes.

Afterwards, these principles have had an important impact in international cooperation instruments in which they appeared in preambles and provisions expressing a common understanding of the idea of sustainable development and legitimating political and economic cooperation.[78] These principles have clearly inspired the European Union action as a global actor[79] in its relationships with

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[74] See President Trump's Statement on the Paris Climate Change Agreement of 1 June 2017.

[75] See N. Cornago Prieto, 'Paradiplomacy-Protodiplomacy', in Martel (Ed), *The Blackwell-Wiley Encyclopedia of Diplomacy*, (Blackwell-Wiley, London, 2017).

[76] Mike Bloomberg has been named by the UN Secretary-General Special Envoy for Cities and Climate Change; see V. Volcoci, 'Bloomberg delivers U.S. pledge to continue Paris climate goals to U.N.', Reuters, 5 June 2017, and Bloomberg Foundation, 'Mike Bloomberg doubles down to ensure America will fulfill the Paris Agreement'.

[77] D. Kahn, 'Jerry Brown is in Russia to talk about the climate', *E&E News*, September 7, 2017.

[78] See for instance, the preamble of the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part that says 'Mindful of the importance that both Parties attach to the proper implementation of the principle of sustainable development, as agreed and set out in Agenda 21 of the 1992 Rio Declaration on Environment and Development', *OJ L 276*, 28.10.2000, p. 45–80.

[79] For instance, the ACP-EU Official Joint Parliamentary Assembly adopted a Resolution in its 24th Session, in

its neighbours as well as the blocks of its counterparts such as the ACP countries[80] or Central America. For example, the agreement of the European Union with Central America refers to the Rio Declaration and its principles with different purposes, thus its Article 20.1 on the environment, says:

> "The Parties shall promote a dialogue in the areas of environment and sustainable development by exchanging information and encouraging initiatives on local and global environmental issues, recognising the principle of shared but differentiated responsibilities, as set forth in the 1992 Rio Declaration on Environment and Development." [81]

Of crucial importance are also those Rio principles that target peace [82] and security as complementary goals to environmental protection.[83] In recent years, rule-makers have also had to fight the worst impacts of war and conflict on the environment. Thus, Principles 24[84] and 25[85] continue to await more vigorous action as the International Law Commission finalizes its Draft Articles on Environmental Protection in Relation to the armed conflict.[86] Moreover, Principle 23 which states

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Brussels, in March 1997, *OJ C* 308, 9/10/1997.

[80] See Article 50 on Cooperation on Environment saying: "1. The Parties agree to cooperate in order to protect and improve the quality of the environment at local, regional and global levels with a view to achieving sustainable development, as set forth in the 1992 Rio Declaration on Environment and Development. 2. Taking into account the principle of common but differentiated responsibilities, the priorities and national development strategies, the Parties shall pay due attention to the relationship between poverty and the environment and the impact of economic activity on the environment including the potential impact of this Agreement. 3. Cooperation shall in particular address: (a) the protection and sustainable management of natural resources and ecosystems, including forests and fisheries; (b) the fight against pollution of fresh and marine waters, air and soil, including through the sound management of waste, sewage waters, chemicals and other dangerous substances and materials; (c) global issues such as climate change, depletion of the ozone layer, desertification, deforestation, conservation of biodiversity and biosafety; (d) in this context, cooperation shall seek to facilitate joint initiatives in the area of climate change mitigation and adaptation to its adverse effects, including the strengthening of carbon market mechanisms. 4. Cooperation may involve measures such as: (a) promoting policy dialogue and exchange of best environmental practices, experiences, and capacity building, including institutional strengthening; (b) transfer and use of sustainable technology and know-how, including creation of incentives and mechanisms for innovation and environmental protection; (c) integrating environmental considerations into other policy areas, including land-use management; (d) promoting sustainable production and consumption patterns, including through the sustainable use of ecosystems, services and goods; (e) promoting environmental awareness and education as well as enhanced participation by civil society, in particular local communities, in environmental protection and sustainable development efforts; (f) encouraging and promoting regional cooperation in the field of environmental protection; (g) assisting in the implementation and enforcement of those multilateral environmental agreements that the Parties are part of; (h) strengthening environmental management, as well as monitoring and control systems."

[81] Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, *OJ L 346*, 12 December 2012.

[82] A. Kiss, 'International humanitarian law and the environment', 31 *Environmental Policy and Law*, (2001) at 223; B.K. Schafer, 'The Relationship Between the International Laws of Armed Conflict and Environmental Protection. The Need to Revaluate what Types of Conduct are Permissible During Hostilities', 19 *California Western International Law Journal*, (1989), at 287.

[83] R. A. Malviya, 'Laws of armed conflict and environmental protection: an analysis of their inter-relationship', *ISIL Year Book of International Humanitarian and Refugee Law*, Vol. 1, 2001.

[84] Principle 24 says 'Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary'.

[85] Principle 25 says 'Peace, development and environmental protection are interdependent and indivisible'.

[86] The International Law Commission's Draft Articles on the protection of the environment during armed conflicts analyses the applicability of relevant rules and principles of international environmental law in this context, to reiterate that "the law of armed conflict is *lex specialis*, but at the same time this area of international law continuously develops and this

"the environment and natural resources of peoples subjected to oppression, domination and occupation must be protected" faces a reality such as that of Western Sahara or Palestine in which occupants who should be the "trustees" of their natural heritage, exploit mining, agricultural, fishery and water resources for their domestic benefit against international humanitarian law that prohibits it.[87]

The general formulation of these principles has made it possible to open a path for research that have considered natural resources as a curse for developing countries and have assessed the stressed that was anticipated by the Brundlant Report that said:

> "1. Among the dangers facing the environment, the possibility of nuclear war, or military conflict of a lesser scale involving weapons of mass destruction, is undoubtedly the gravest. Certain aspects of the issues of peace and security bear directly upon the concept of sustainable development. Indeed, they are central to it.
> 2. Environmental stress is both a cause and an effect of political tension and military conflict. Nations have often fought to assert or resist control over raw materials, energy supplies, land, river basins, sea passages, and other key environmental resources. Such conflicts are likely to increase as these resources become scarcer and competition for them increases."[88]

(E) THE RIO PRINCIPLES AS THE PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

The Rio Principles are part and parcel of international environmental law and function as its own set of principles. Some serve as systemic principles and others as material principles and procedural guarantees that have been adapted on a sector-by-sector basis, and so have found their way into international agreements, domestic legal systems and, of course, more soft law instruments, such as those adopted in the following United Nations Conferences that tried to continue Rio's mission but could not maintain the momentum or renew the commitment up to its initial ambitions.[89]

As systemic principles, the Rio principles characterize international environmental law as a sub-system of international law. Among them the principle of no harm (Principles 2 and 13) and the principle of common but differentiated responsibilities (Principle 7[90]) are its most characteristic features.

The obligation reflected in Principle 21 of the Stockholm Declaration and later incorporated in

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development is informed by the development of other areas of international law", International Law Commission, Sixty-eighth session, Geneva, 2 May-10 June and 4 July-12 August 2016, Protection of the environment in relation to armed conflict, A/CN.4/L.870/Rev.1 and A/CN.4/685 .

[87] On 4 August 2017, the International Law Commission appointed a new Special Rapporteur, Marja Lehto, to finish the draft principles and to further address areas such as protection of the environment in situations of occupation, issues of responsibility and liability, the responsibility of non-State actors, and overall application of the draft principles to armed conflicts of a non- international character. See the Report of the International Law Commission in its sixty-ninth session, Chapter 10 on Protection of the environment in relation to armed conflicts, A/72/10 .

[88] Our Common Future Report, *supra* n. 27, at 239.

[89] See M. Fiztmaurice, S. Maljean-Dubois, Stefania Negri (Eds.), *Environmental Protection and Sustainable Development from Rio to Rio+20*, (Queen Mary Studies in International Law, London, 2014); Gabriela A. Oanta, 'Protection and Preservation of the Marine Environment as a Goal for Achieving Sustainable Development on the Rio+20 Agenda', *16 International Community Law Review*, (2014) 14–35.

[90] As presented in the above sections.

Principle 2 of the Rio Declaration, is a Rosetta stone of the international environmental law and exposes its frailties since this principle of no harm or prevention is the most challenging in terms of implementation and compliance.[91] Namely it says that states have the responsibility not to cause transboundary environmental damage with the activities that take place under their jurisdiction or their control. The International Court of Justice recognized it in its advisory opinions where it said that "[t]he existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment." [92]

Principle 13 adds the internal dimension of responsibility turning it into a liability principle that States should adopt in their national legal systems. Conceiving responsibility with such a wide spectrum was consensual and unreservedly accepted but due to the countless violations it has experienced, compliance never seems to be borne in mind by states.[93] States are guided by the non-written principle that whoever the victim may be today can become an offender tomorrow, leading States not to react in the case of transboundary accidents as they did in the cases of Chernobyl or Sandoz accidents.[94]

Furthermore, the way this principle of no harm has been incorporated into treaties is far from satisfactory. Thus, as Professor Lynham criticised shortly after the Rio Conference, "there is such inconsistency in the nature and extent of the obligations imposed on States' parties by the numerous treaties prohibiting transboundary harm, that there is no clear indication that States recognise this prohibition as obligatory. Several treaties which contain the *sic utere tuo ut alienum non laedas* obligation are mandatory in this prohibition against causing transboundary harm. But there are many more treaties that are merely recommendatory in nature, and their prohibitions against causing transboundary harm impose no legal obligations. [...] They are hortatory or 'soft law' in character, and for this reason, do not evince any *opinio juris* on the part of the States who are signatories to them. If a treaty does not command, but merely recommends that a State act in a particular manner, then any failure by a State to act in the way prescribed will be of little consequence". [95]

Therefore, the draft Global Pact for the Environment shows the state of the art global consensus on this vital issue in its Article 7 on Environmental Damage, which does not say who should confront the task of repairing, and proclaims that "The necessary measures shall be taken to ensure an adequate remediation of environmental damages" but, at least, it recognises the procedural guarantee:

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[91] Okowa work identifies a number of difficulties associated with implementing the principle of responsibility including: issues of retroactivity, apportioning responsibility among states; apportioning responsibility for future damage; and managing the scientific uncertainty associated with such claims. Ph. Okowa, 'Responsibility for Environmental Damage', in M. Fitzmaurice, D. Ong and P. Merkouris (Eds.), *Research Handbook on International Environmental Law*, (Edward Elgar Publishers, London, 2010)

[92] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ 241–42, para. 29; also see *Case Concerning the Gabçikovo Nagymaros Project (Hung. v. Slovakia)*, 1997 ICJ 7, para. 53.

[93] And then, as Durkheim says the violation of the norm proves its validity.

[94] See J. Juste Ruiz and T. Scovazzi (Coords.), *La práctica internacional en materia de responsabilidad por accidentes industriales catastróficos*, (Tirant Lo Blanch, Valencia, 2005).

[95] See Lynham, G. 'The *Sic Utere* Principle as Customary International Law: A Case of Wishful Thinking? (1995) 2 *James Cook U. L. Rev.* 172-189, at 181.

> "Parties shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Parties shall promptly cooperate to help concerned States."

As one of the most recent referential agreements, the Paris Agreement on Climate Change offered a poor alternative introducing a loss and damage mechanism to redress harm arising from climate change. Such a mechanism does not impose responsibility on a particular state; it just avoids disputes by remedying the harm suffered as a result of climate change.[96]

(F) THE RIO PRINCIPLES AS PRINCIPLES OF DOMESTIC ENVIRONMENTAL LAW

The Rio Principles have an important influence in domestic law, due to the special nature of International Environmental Law, meant to be transposed and enforced at domestic level and to inform internal legal systems and institutions. This vocation was acknowledged and enhanced by Principle 11, which explicitly formulates an obligation: "States shall enact effective environmental legislation"[97]. The Rio Principles were meant to be incorporated by States into their domestic legal systems by adopting effective environmental laws "without forgetting the cost that this might entail for developing countries" (Principle 11). Thus principles such as precaution (Principle 15) or internalisation of environmental costs (Principle 16) or environmental impact assessment (Principle 17) are formally recognized in almost all countries, although their effectiveness and degree of compliance depends on the strength of their institutions and the way in which they guarantee the rule of law in environmental terms. This is why the practice of States shows the inconsistency between their adherence to the principles and their inadequate application both internationally and internally, and thus their poor commitment to the last principle, the 27th which stated that "States and Persons shall cooperate in good faith and in a spirit of solidarity in the application of the principles enshrined in this Declaration and in the further development of international law in the field of sustainable development."

Thus, the Rio Principles became the most basic tools to inspire and promote the adoption of environmental legislation in those countries in which it was not part of their legal systems before the Rio Conference. Ever since then, and with the help of the United Nations Environment Programme (UNEP), the Rio Principles have been incorporated in most legal systems as the guiding principles of their environmental chapters. This is despite the fact that in many countries environmental legislation has only a symbolic or formal presence in their national legal systems because of the lack of human and financial resources to implement them efficiently as a new branch of law that was perceived at first as a novelty or as an imposition in order to get international support and funds.

Some of these principles stem from the most developed national legal systems and have acquired a

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[96] See M. Campins i Eritja, 'De Kioto a París: ¿Evolución o Involución de las Negociaciones Internacionales sobre el Cambio Climático?', 61 *Instituto Español de Estudios Estratégicos*, (15 June 2015).

[97] Principle 11 goes on saying "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries."

special status as generally recognized environmental law and policy principles. They have been introduced in constitutions, administrative and civil codes and have inspired the adoption of policies on sustainable development as in the case of the European Union and its Member States, including Spain. Among them, the principle of integration soon acquired a relevant place. The case of the European Union is particularly relevant since it incorporated the principle in the forefront of its political action guidelines, through a formulation that while experiencing some changes have stayed true to the principle in Article 11 of the Treaty on the Functioning of the European Union that says:[98]

> "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development".

The principle of integration can also be found in the executive orders of the Obama era. Thus, he adopted Guidelines to integrate climate change concerns in all US policies to facilitate the transition to an economy not dependant on coal and fossil fuels. One of the first things, that President Trump did was to annul them and to erase them from the websites of the EPA. These guidelines were a valuable expression of Principle 4 of the Rio Declaration.

Special mention must be made of the European Union and its Member States' legal systems as receptors and promoters of the Rio Principles where some of them have become general principles of European environmental law. The Rio principles have had an enormous success in the European Union legislation were they have acquired the hard nature of law and a constitutional value after being incorporated in its constitutional treaties. First, the principles of the Stockholm Declaration of 1972 inspired the first environmental actions of the then European Economic Community and were later introduced into the treaties when for the first time the Single Act incorporated an environmental chapter. Later, the principles of sustainable development and precaution were incorporated under the influence of the Brundlant Report and the Rio Declaration in the EU Law. They are also recognized in the Charter of Fundamental Rights of the EU attached to the Treaties that has a full and legally binding value.[99]

(G) THE RIO DECLARATION AND ITS PRINCIPLES IN SPAIN

The Rio Declaration and its principles as previously those of the Stockholm Declaration have had a seminal effect in the Spanish legislation and environmental governance, taking their roots in the national level but also growing robustly through the Autonomous Communities and Local Authorities' legal regimes that form the complex and rich federal structure of Spain. Their political and legal importance can be found at different levels: permeating Spanish administrative law and institutions by them-self or through European Law, and what I consider the most relevant aspect for this study: their role as interpretative tools and 'source of inspiration' of the Spanish legal system. At first, they filled the gap of a non-existing background on protecting the environment *per se* and, then,

[98] The Treaty of Amsterdam made of the principle of integrating environmental requirements into the rest of Community policies a principle informing from the front Articles of the Treaty.

[99] See M. Lee, 'The Environmental Implications of the Lisbon Treaty', 10 *Environmental Law Review*, (2008) 131-138.

they served as a legal compass for the legislator, the judges, the Administration –national, regional and local- and finally they empowered the citizens to participate in the processes concerning them. Thus, the Constitutional Court and the Supreme Court have used the principles of the Stockholm and the Rio Declarations as interpretative tools[100] of the right to the environment as foreseen in the Spanish Constitution that the former clearly inspired.[101]For instance, the Supreme Court used the Stockholm Declaration on the Human Environment as a reference and an interpretative tool[102] of the Spanish Constitution as well as the international agreements ratified by Spain, in one of its judgments affirming:

> "An interpretation to apply the Washington Convention and the Community law which are part of the Spanish legal system and which develops Article 45 of the Spanish Constitution in respect of the protection of protected species must be carried out in an extensive sense, in accordance with the fundamental principles of environmental protection set out in the Declaration of the United Nations Conference on the Human Environment in Stockholm of 16 June 1972, which is the source of inspiration."[103]

The Constitutional Court has also examined the value of Stockholm and Rio principles that have been invoked by citizens and NGOs as part of their constitutional rights as well as limits to the State's powers. It has considered that some of them are not yet part of the international law or of the European Union system as in the case of the principle of non regression, but it has acknowledged its

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[100] An analogy can be established with Article 10.2 of the Spanish Constitution that says 'Provisions relating to the fundamental rights and liberties recognised by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain'. This Article turns a non-binding instrument such as the Universal Declaration of Human Rights into an interpretative reference of the Spanish Constitution in the context of the political transition where it was most needed.

[101] Article 45 of the Spanish Constitution says "1. Everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it. 2. The public authorities shall watch over a rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on an indispensable collective solidarity. 3. For those who break the provisions contained in the foregoing paragraph, criminal or, where applicable, administrative sanctions shall be imposed, under the terms established by the law, and they shall be obliged to repair the damage caused."

In its Judgement 102/1995 of 26 June, the Constitutional Court said: 'The environment, as it has been described, is a concept born to return to the unit the various components of a reality in danger. If this had not been presented, its appearance would be unimaginable for mere theoretical, scientific or philosophical reasons, and therefore not legal. The triggering factors have been soil erosion, deforestation and desertification; the pollution of marine, river and uplift waters as and the atmosphere by pernicious effect of smoke, fumes, effluents and waste, the whole species extinction or the degeneration other and degradation of agricultural wealth, forestry, livestock or fisheries, noise pollution and many other manifestations ranging from simply incidental to lethal, with a negative impact on the health of population in an essential unit of individuals. In other words, but with a substantially identical content, these dysfunctions are those included in the catalogue included in Work document num. 4 that on August 25, 1970, the Secretariat of the E.C.E. presented to the Meeting of Government Advisers on the environment of the Economic Commission for Europe. Diagnosed as serious, in addition, the threat that supposes such attacks constitute a challenge that has caused an immediate symmetrical response, in defence that at all legal dimensions constitutional, European and universal is identified with the word "protection", substratum of a function whose primary purpose is to be the "conservation" of the existing one, with a dynamic aspect tending to the "improvement", both contemplated in the constitutional text (Art. 45.2 Spanish Constitution), as well as in the Single Act (art 130 R) and in the Declarations of Stockholm and Rio, BOE No. 181, 31 July 1995, fj.7, p. 26

[102] See T. Fajardo, 'Principios del Derecho Comunitario y Aplicación Judicial en España en los años 2003 y 2004', 26 *Revista de Derecho Comunitario Europeo*, (2006) 135-179, at 160.

[103] See STS 13 December 2004, RAJ, RJ 2004\8178, at 5.

 DOI: 10.17103/sybil.21.6

legal value as a constitutional canon of interpretation. In its judgment 233/2015[104], it denied that the non-regression principle might be accepted as limiting the powers of the legislator, even though it recognized it as interpretative criterion because:

> "The exegesis of the constitutional obligation to defend and restore the environment or, in other words, the task of ensuring the fulfillment of obligations arising from this constitutional precept is always complex when, as in this case, process, regression or involution of the environmental protection standards previously established in the sphere of ordinary legislation is alleged [...]
>
> "In this context, the principle of non-regression of environmental law (also known as the stand-still clause) is linked to the original foundation of this sector of the legal system, and enunciates a strategy that is undoubtedly plausible in terms of the conservation and rational use of natural resources, which with different techniques and denominations have already been received in some sectoral regulations of international, European or national law (STC 45/2015, of 5 March, FJ 4) or in international jurisprudence or of the neighboring countries, whose detail is not relevant because it is sectoral references that do not specifically affect the maritime-terrestrial public domain. In the vocation of universal application with which this principle is stated, it is today at most a lex non scripta in international environmental law and, undoubtedly, constitutes an advanced doctrinal formulation that has already enlightened a political aspiration of which, to cite a significant document, echoed the Resolution of the European Parliament of 29 September 2011 on the elaboration of a common position of the EU before the United Nations Conference on Sustainable Development, «Rio + 20 »(Section 97).
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> "Thus, the question that we must clarify is whether it is possible to directly extract such a principle from the postulates collected in Article 45 of the Spanish Constitution. Certainly, as already noted in the aforementioned SSTC 149/1991 and 102/1995, the notions of conservation, defense and restoration of the environment, explicit in sections 1 and 2 of this constitutional precept, involve both the preservation of the existing and a dynamic aspect tending to its improvement that, in what pertains particularly to the protection of the maritime-terrestrial demand, oblige the legislator to ensure the maintenance of its physical and legal integrity, its public use and its landscape values. In particular, the conservation duty of the public powers has a dimension, that of not promoting the destruction or degradation of the environment, which would not consent to the adoption of measures, lacking objective justification, of such caliber that they would be a patent step back in the degree of protection that has been achieved after decades of tuition. This dimension inevitably evokes the idea of "no regression", although the concepts that we are here contrasting do not admit a mechanical identification, since it is also noteworthy that the constitutional duty is projected onto the physical environment, while the principle of non-regression is predicated of the legal system. In constitutional terms, this significant difference means that the standard is not intangible, and therefore the appreciation of the potential negative impact of its modification on the conservation of the environment requires careful consideration, in which, as one among other factors, the pre-existing regulation will have to be taken into consideration."[105]

Certainly petrifying the legislative power is not the core meaning of the principle of non-regression

[104] Sentence 233/2015, of November 5, 2015. Appeal for unconstitutionality 5012-2013. Interposed by more than fifty deputies of the Socialist Parliamentary Group of the Congress in relation to diverse precepts of the Law 2/2013, of May 29, of protection and sustainable use of the littoral and of modification of the Law 22/1988, of July 28, of coasts. Principles of non-retroactivity, legal security, interdiction of arbitrariness and environmental protection; regime of public goods: nullity of the legal precepts that exclude from the maritime-terrestrial public domain artificially and controlledly flooded lands, establish a specific demarcation regime for the island of Formentera and introduce a guarantee of the functioning of certain purification facilities; interpretation in accordance with the Constitution of the provision that excludes certain population centers of the maritime-terrestrial public domain (STC 149/1991), *BOE* No. 296, 11 December 2015.

[105] Sentence 233/2015, at FJ 2, p. 117174.

but the obligation of protecting the environment.[106] Nonetheless, the non-regression principle when applied to the status of conservation of the environment implies a development of the principle of sustainable development as shown by López Ramón who argues that "The principle of non-environmental regression is an adaptation to the contemporary circumstances of the idea of human progress that is behind the revolutionary declaration. It is a derivation of the principle of sustainable development, which imposes solidarity progress with future generations, solidarity that implies never retreat in the measures of environmental protection."[107]

In a different perspective, the principle of sustainable development has emerged in disputes between the central government and the Autonomous Communities regarding the competent authority to exercise the power of decision. In most cases, the Constitutional Court has decided in favour of the central government. However as analysed below, the debate is still on-going as part of the political exercise of competences on times of economic crisis when the central government but also the Autonomous Communities are inclined to adopt regressive measures.[108]

However, the legal influence of the Rio Declaration was mainly channelled through the European legislation, and through it, it found its ways into state, regional and even local legislative and administrative acts that incorporated references in their preambles and provisions, referring both to the European legislation as well as to the Rio Declaration.[109] Of particular relevance on disseminating the knowledge of the Rio Conference are the local plans implementing Agenda 21 that gave great visibility to the Rio Declaration and raised awareness of its principles among the decentralized entities of the state and, particularly, to the local powers.

Via European legislation, comprised of both hard and soft law instruments, the Rio Principles acquired a stronger normative intensity in the Spanish legal system. In the same way, the Principle on Sustainable Development became referential for the Spanish Environmental Policy as a national adaptation of the European strategies. Thus, the Spanish Sustainable Development Strategy adopted in 2007 was "framed under the EU Sustainable Development Strategy (SDS)"[110] and thus:

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[106] On this judgment, see L. J. Parejo Alfonso, "La sentencia del Tribunal Constitucional 233/2015, de 5 de noviembre, y el demanio marítimo-terrestre. La debilitación de la eficacia protectora del orden constitucional y, por tanto, de la adecuada ordenación del espacio marítimo", and all the other articles on the monographic volume of 140 *Práctica urbanística: Revista mensual de urbanismo,* (2016), B. Lozano Cutanda 'Derecho Ambiental. Algunas reflexiones desde el Derecho Administrativo', 200 *Revista de Administración Pública* (2016) 409-438, at 17.

[107] See F. López Ramón, 'Introducción general: regresiones del derecho ambiental', *Observatorio de políticas abientales*, 2011, 19-24, at 21. From the same author also see 'El principio de no regresión en la desclasificación de los espacios naturales protegidos en derecho español', 20 *Revista Aranzadi de Derecho Ambiental* (2011) 13-27 and 'La aceptación legislativa del principio de no regresión ambiental en Francia', 201 *Revista de administración pública* (2016), 269-277.

[108] See F. López Ramón, supra note 107, and in the case of Galicia: A. Nogueira López, "Galicia: recuperación del primer nivel organizativo sin una apuesta ambiental relevante" and in the case of Cataluña, M.T. Vadrí Fortuny, "Cataluña: presencia marginal del medio ambiente en una coyuntura política todavía inestable" at *Observatorio de políticas ambientales,* 2016.

[109] The accession of Spain to the European Community in 1986 triggered the adoption of environmental law, and in particular of administrative law as part of the process of transposition into the Spanish legal system of the *acquis communautaire* and its implementation.

[110] The EU Sustainable Development Strategy was reviewed in several occasions to 'sharpen its objectives and to set new milestones', its text is here. See the European Commission Communication from the Commission to the Council and the European Parliament - Draft Declaration on Guiding Principles for Sustainable Development, *COM/2005/0218 final*, 25

> "In line with the European Sustainable Development Strategy, the governing principles of the SSDS include the promotion and protection of the fundamental rights and intra and inter-generational solidarity, as well as precautionary principles and to make the polluter pay for any action affecting public health and the environment. In addition, the participation of citizens, companies and social interlocutors will be promoted in the processes of decision making, for which some of the action lines proposed are: to increase the education and public awareness in matters of sustainable development, to improve the social dialogue, to increase the social responsibility of companies and to foster associations between the public and the private sector to obtain a more sustainable consumption and production".[111]

The adoption by the United Nations Assembly of the 2030 Agenda for Sustainable Development and the Sustainable Development Goals also had an echo in the European Union and in Spain's strategies.[112] However, now the prophecy about the Sustainable Development principle being superseded by its economic dimension has been fulfilled. The Act on Sustainable Economy adopted in 2011[113] clearly says that its measures:

> "All of them are intended to serve new growth, balanced, sustainable growth. Sustainable in three senses: economically, that is, increasingly solid, based on the improvement of competitiveness, innovation and training; environmentally, to make the rational management of natural resources an essential opportunity to promote new activities and new jobs; and socially sustainable, as promoter and guarantor of equal opportunities and social cohesion".

However, this Act has been brought before the Constitutional Court by the Autonomous Communities that considered that their competences were invaded by the national legislator. To this effect, the Constitutional Court has ofter indicated that the national government is the competent authority to exercise these powers as part of the general scheme of the distribution of powers in relation to the environment, stating that in this matter the State is assigned "the basic legislation on environmental protection, without prejudice to the powers of the Autonomous Communities to establish additional protection standards"(Article 149.1.23 Spanish Constitution).[114] The breach of the principles of collaboration and federal loyalty justify that Autonomous Communities often challenge national regulation, since that does not attribute to the State a plus in the regulation. However, the Autonomous Communities have also tried to have their own interpretation of principles, as in the case of sustainable development in its different dimensions. Friction over this iussue have led them to go against the Act on Sustainable Economy, in the case of fulfilling the meaning of grean economy.

April 2005.

[111] See Spanish Sustainable Development Strategy, 1-134, at 8. It also covers the three dimensions of the Principle of Sustainable Development when it says 'This strategy is framed under the EU Sustainable Development Strategy (SDS), which was renewed in the Council of Brussels of 2006 with the general principle of "determining and elaborating measures that allow the continuous improvement of the quality of life for the present and future generations by means of the creation of sustainable communities having full capacity to efficiently manage and use resources, to take advantage of the potential for ecological and social innovation offered by the economy, and at the same time, ensuring prosperity, environment protection and social cohesion"', at 5.

[112] Angel Rodrigo considers that after the adoption of this Agenda, that sustainable development 'has become one of the three basic purposes of the United Nations, together with the maintenance of international peace and security and the promotion and protection of human rights', *supra* n.60, at 37.

[113] See Act 2/2011 on Sustainable Economy, Ley 2/2011 de Economía Sostenible, 4 March, BOE No. 55, 5 March 2011, 1-176.

[114] See the Judgment 194/2004 of the Constitutional Court of 4 November, BOE No. 290, of 2 December 2004.

This has taken place in the broader scenario of the European debate to fix this goal of promoting new activities, a Green economy at the service of creating new jobs as part of the European Union strategies and Spain will benefit from European funds to achieve it. As put by the European Commission:

> "It aims to ensure that economic growth goes hand-in-hand with sustainable development in Spain, through targeted investments in the areas of green transport, improved water quality, integrated urban development and other measures to support the country's transition to a low-carbon economy."[115]

Regarding environmental governance, Spanish institutions were also influenced by the Rio Declaration's call for greening institutions. The first Ministry of the environment was born in 1996 under the star of Rio and has made a most atypical evolution since its creation.[116] The Ministry first developed itself as a requirement of the implementation and enforcement of the European Union legislation and then it became itself an example of the development of a green governance institution growing at a variable speed and slowing down when the economic crisis imposed its priorities. Thus, in this time of economic crisis, the Spanish Ministry is now contained in a macro structure that ensemble agriculture, fisheries and food competences. Not all the Autonomous Communities have attained the same degree of autonomy or the same extent of competences in the field of the environmental protection and their institutions vary, creating different institutional systems, difficult to map and far from the limits of this study.[117]

Furthermore, the Spanish Ministry of Agriculture, Food and Environment has developed an external dimension that involves the adoption of an external political logic and strategy in accordance with the competences shared and concurrent with the European Union.[118] In the realm of its bilateral relations, Spain has used soft law instruments such as memoranda of understanding[119] and bilateral agreements to acknowledge the importance of the Rio Principles to inspire its environmental cooperation. Thus, the Spanish cooperation agreement with Morocco on environmental protection

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[115] In 2015, the European Commission adopted Spain's largest "Operational Programme" for the 2014-2020 funding period, which will cover the entire Spanish territory, with a total budget of €7.7 billion, of which the EU will contribute €5.5 billion from the European Regional Development Fund. '5.5. Billion for Sustainable Growth in Spain', 23 July 2015,

[116] After the Spanish accession to the EU, the *Dirección general del medio ambiente* was created and received a relevant budget, powers and duties which actually made it independent to follow its objectives. The Ministry of Environment has existed since 1996 even though it has suffered many reforms; the last of them has been its merger in a Ministry of environment, agriculture and food. Nevertheless, when discussing environmental policy and legislation, special mention must be made of the Spanish quasi-federal organization, which has important consequences for this matter. The Spanish Constitution designs a territorial quasi-federal organization. On the one hand there is the central Spanish Parliament and on the other there are 17 Autonomous Communities, which are sub-national entities with their own parliament, government and public administration. Every Autonomous Community has within its own Statute (territorial Constitution), a detailed list of competences in which it has law-making powers, and therefore every *Autonomous Community* has different law-making powers.

[117] This herculean task is for the administrative law academia.

[118] See the International Projection of the Ministry of Agriculture, Food and Environment, 'Proyección Internacional del Ministerio de Agricultura, Alimentación y Medio Ambiente'.

[119] See the Memorandum de Entendimiento del Ministerio de Medio ambiente del Reino de España y el Ministerio de Medio ambiente y Recursos Naturales de El Salvador, 22 June 2006 and the Memorandum de Entendimiento del Ministerio de Agricultura, Alimentación y Medio ambiente del Reino de España y el Ministerio de Medio ambiente y Recursos Naturales de El Salvador sobre iniciativas relativas al Cambio Climático, 21 November 2013.

 DOI: 10.17103/sybil.21.6

says:

> "Respecting and supporting the Rio Declaration and the provisions adopted at the Special Session of the United Nations General Assembly in June 1997 on financial assistance and the transfer of clean technologies,
>
> Have agreed as follows:
>
> Article 1.
>
> The Parties shall develop their bilateral cooperation on the environment on the basis of equity, equality of rights and mutual benefits within the framework of their competences and their respective legislation. Such cooperation, of a scientific, technical and technological nature, shall in particular promote the development of environmentally friendly technological exchanges."[120]

The Spanish Ministry is represented in the United Nations institutions and, of particular importance, in the Programme of the United Nations for the Environment, whose temporary presidency Spain exercised in 2011-2012. Thus, acting on behalf of the European Union, Spain gave its voice to the EU goals during the pre-Conferences that led to Rio +20 Conference arguing:

> "The position of Spain before this summit, in line with the postulates of the European Union, focuses on achieving progress towards a low carbon, resource efficient economy that generates growth, competitiveness and employment for the sake of sustainable development and the eradication of poverty." [121]

During the conference, Spain tried to confront the weak institutionalisation of the environmental global governance and had to accept the inexistence of consensus on green economy.

(F) FINAL REMARKS AND CONCLUSIONS

The Rio Declaration and its principles —as previously the Stockholm Declaration— had a ground-breaking impact in international law as well as in domestic legal systems.[122] They transcended the soft-law nature that had been attributed to them, becoming a normative horizon made of legal expectations, some of which have turned to customary law or found their way into international agreements. Furthermore, they have guided the evolution of international environmental law as well as the institutional systems born out of the international environmental agreements.

The Rio Declaration gave visibility to the environmental problems and a voice to the non-state actors, NGOs, indigenous people and citizens of the world that have assumed important tasks in protecting the environment in a new global scenario in which the planet is threatened by growing risks and problems that have their origin in human activities and our model of development that

[120] See Acuerdo de cooperación entre el Reino de España y el Reino de Marruecos en materia de medio ambiente, 20 Nov. 2000, BOE No. 172, 17 July 2008.

[121] See Press Note of the Ministry of Food, Agriculture and the Environment, (Nota de Prensa del MAGRAMA), 'El Secretario de Estado, Federico Ramos traslada a los agentes económicos y sociales el compromiso de España para que "Rio+20" concluya con avances', 18 June 2012. During this period, former president Rodriguez Zapatero also made a statement on behalf of Spain and the EU on our commitment to fight climate change, 'Our Planet'.

[122] See Lluís Paradell-Trius, 'Principles of International Environmental Law: An Overview' *Review of European Community & International Environmental Law* Vol. 9, 2000, p. 93.

could lead in the terms of Ulrich Beck to a metamorphosis of the world.[123] In this global picture, emerging powers are dismantling economic paradigms that previously condemned them to poverty and dependence on external aid and cooperation, while other developing countries are not. Now as before, most developing countries cannot break the chains of poverty and have to endure environmental problems such as climate change, in the form of floods, drought, desertification or elevation of the sea level that condemn them to migration, war and even physical disappearance under layers of water and oblivion. However, the bio-capacity of emerging powers counted on oil and minerals and other natural resources has led to revise some of the key Rio Principles, in particular, the principle of common but differentiated responsibilities to undermine its rationale of cooperation and support to developing countries. In legal terms, these adjustments of the Rio spirit are shown in the international negotiations and decision-making processes in the form of an affirmation of the principle of sovereignty that even though it is still limited by the function of protecting the environment, this must be done "taking into account national circumstances". This cannot mean a return to the selfishness of the nation state to avoid both liability and responsibility for environmental protection at the cost of the future of the planet.

Thus, the analysis that I have made of the Rio Declaration and its principles could be seen as that of an observer who sees the half empty glass. This is because the challenges of implementation and compliance faced by any rule of international law are especially cruel to the Rio Declaration and its principles,[124]due to the enormous incongruity between the normative expectations and the political action that has been taken by States and international organisations to achieve them.

However, a description of the glass as half full is possible if we consider that the Rio Declaration and its principles made possible a new way of perceiving the world, making visible the major environmental problems and the links between poverty and the environment, modernity and pollution and resource depletion, the industrial revolution model of progress and climate change.[125]

Should we ask ourselves if the Rio Principles have the capacity to project themselves 25 years more into the future, then the answer is clearly yes, because even if the future is uncertain, most normative tools we have now are an important development of the Rio Declaration.[126] Now they are informing the United Nations Sustainable Development Goals adopted in 2015 to inspire its action beyond, until 2030. As Okowa says, "After all, principles of international law are not episodic or transitory; they are in general formulated to apply beyond the specific historical or political context that gave rise

[123] Ulrich Beck, in his last and unfinished book, argued that we are facing a situation of metamorphosis of the world that surpasses the notion of change in society because 'Change brings a characteristic feature of modernity into focus, namely permanent transformation, while basic concepts and the certainties that support them remain constant. Metamorphosis, by contrast, destabilizes these certainties of modern society. It shifts the focus to 'being in the world' and 'seeing the world', to events and processes which are unintended, which generally go unnoticed, which prevail beyond the domains of politics and democracy as side effects of radical technical and economic modernization,' see Ulrich Beck, *The Metamorphosis of the World*, (Polity Press, Cambridge, 2016) at xi.

[124] See N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, (Oxford University Press, 2002).

[125] See A. Pigrau, 'Laudato Si', VI *Revista Catalana de Dret Ambiental*, (2015) 1 – 10.

[126] Foo Kim Boon wrote in 1992 'Fifty years hence, it is likely to be seen as one of the most important documents to have been negotiated and adopted by the states concerned', 'The Rio Declaration and its Influence on International Environmental Law', *Singapore Journal of Legal Studies* (1994) 347-364, at. 364.

to them",[127] the Rio Declaration Principles certainly have a projection into the future. Particularly, now, when France is willing to lead the negotiations for the adoption of a Global Pact for the Environment that would assume the highest of challenges, the one that the Stockholm and the Rio Conferences failed to do and States have always avoided adopting a sector-by-sector approach to the protection of the environment: the adoption of an international treaty that will set out explicitly and unambiguously the limits of the state sovereignty and the obligations for the protection of the environment.

In the case of Spain, our national circumstances in the European Union made us the richest country in terms of nature and thus the biggest redoubt of the shrinking European environment. Spain was committed to the Rio Declaration from the beginning as it was with the Stockholm Declaration so that both had a seminal effect in our legal and institutional system. However our commitment as a country has depended more on our obligations towards the European Union than on an individual pledge towards the planet. Spain could do more.[128] Despite our poor performance in terms of implementation and compliance with the Rio Declaration and Principles, we are accepting that sustainability has evolved to demands of non regression on the protection of nature and that regressive measures have to be submitted to the strongest motivation that allows accountability even in times of economic crisis. Thus, in Spain, the Principle of Sustainable Development is still a vital reference —as well as an alibi— guiding environmental policies and decisions at all levels of responsibility in the federal structure of Spain and Europe.

[127] See Ph. Okowa, 'Responsibility for Environmental Damage', in M. Fitzmaurice, D. Ong and P. Merkouris (Eds.), *Research Handbook on International Environmental Law*, Edward Elgar Publishers 2010, supra n. 91.

[128] For example, a OECD report said 'Spain could do more to reduce GHG emissions and improve energy security by reforming energy prices'. See *OECD*, Perspectives: Spain, Policies for a Sustainable Recovery, (OECD Publishing, Paris, 2011) at 18, http://dx.doi.org/10.1787/9789264201736-en

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Council of Europe 40 years later: Democracy and the Rule of Law

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Abstract: In 1977 Spain joined the Council of Europe after the end of the dictatorship. This paper will try to give a vision of those forty years through an analysis which falls into three parts: the first will highlight the main features of Spain's accession to the Council; the second part will focus on how the standards of the Council of Europe have become an integral part of the Spanish legal order; and, finally, it will analyse the challenges and increasingly complex situations in recent years, particularly the recent opinion issued by the Venice Commission on the reform of the constitutional law in Spain. It will focus on democracy and the rule of law rather than on the protection on human rights.

Keywords: Council of Europe – Spain – Democracy – Rule of Law – Venice Commission

(A) INTRODUCTION

This year, 2017, marks forty years since the entry of Spain into the Council of Europe, which was formalized on 24 November 1977, shortly after the first democratic elections since the end of the dictatorship. 1977 was a year that marked not only a period of intense change in Spain, but also witnessed, together with the first elections, the acceptance of Spain in the select club of democratic States of the Council of Europe, a further boost to the newly installed democracy. Spain, together with Portugal, symbolized the end of dictatorships in the countries of Western Europe as well as the strong will and hunger for political change.

The very process of Spain's entry into the Council of Europe was different from that of all the other States that joined the organization. Indeed, Spain was the only country that joined without having a Constitution in force, a fundamental text that could clearly reflect Spain's adherence to the Council's key values: democracy, rule of law and respect for human rights, enounced in Article 3 of its Statute. The Spanish authorities promised that the future Constitution would adequately include the *acquis* of the Council of Europe, but in reality there was still no Constitution, and it not only had to be adopted, but it also had to be approved by referendum. In an unprecedented decision, the commitment shown by the Spanish authorities was considered as sufficient to accept the entry of Spain in the Council, resulting in a very quick membership.

From that moment on, the forty years of Spain in the Council of Europe, as well as the role of the Council, accompanying the Spanish transition, have gone through various important events. These include the failed coup attempt of 1981, the ratification of numerous treaties, the election of prominent Spaniards in important posts within the Council and significant interactions on the issue of the follow-up of the international obligations accepted by Spain.

* Senior lawyer at the Council of Europe. The views expressed in this article are solely the author's views and do not represent the official position of the Council of Europe. All webpages last accessed on 21 December 2017.

 DOI: 10.17103/sybil.21.7

This paper will try to give a vision of those forty years through an analysis which falls into three parts: the first will highlight the main features of Spain's accession to the Council, including the procedure, implications and terms of its participation in the Council of Europe. The second part will focus on how the standards of the Council of Europe have become an integral part of the Spanish legal order and on the interactions throughout the forty years of activity in the field of the Council's main values: democracy, rule of law and human rights. The participation of Spain within the Council and its impact will be highlighted. Finally, the challenges and increasingly complex situations in recent years will lead to an analysis of the reports and opinions regarding Spain issued by the Council of Europe bodies, particularly the recent opinion of the Venice Commission on the constitutional law reform in Spain. It is necessary to underline here that the particular relations between the European Court of Human Rights and Spain will not be dealt with in this paper.

(B) THE ACCESSION OF SPAIN TO THE COUNCIL OF EUROPE

As has already been advanced in the introduction, the procedure by which the entry of Spain into the Council took place is an unprecedented and very *sui generis* process, which demonstrates that the Council of Europe's own bodies seemed to participate in the euphoria shown by the Spanish Government under the Presidency of Suárez and its firm democratic commitment.

On 24 November 1977, Spain joined the Council of Europe by a ceremony held at the Palace of Europe, the main headquarters of the organization. It was the then Foreign Minister, Marcelino Oreja, who delivered the instruments of ratification. The accession of Spain was a unique and peculiar process due to the speed with which it was made and above all was carried out "upon word of honour", as the first Spanish ambassador to the Council of Europe, José Luis Messía, would later write.[1]

Indeed, since the creation of the Council of Europe, one of its main organs, the Parliamentary Assembly (PACE), closely followed the Spanish process and referred to the legal obligation set forth in the Council's Statute, requiring the "democratization" prior to accession. In 1974, worried about the Spanish situation, the Council and its Assembly adopted a report indicating that the country was still far from fulfilling the necessary conditions which would enable it to join the Council of Europe as a member with full rights. After a visit to Spain prior to the report, MP Giuseppe Reale, rapporteur, underlined the absence of guarantees, individual liberties and of democratic elections, as well as the presence of censorship and brutal repression of political opponents as factors that prevented the entry of Spain in the Council. Despite this, he pointed out in his report that most Spaniards wanted a change of institutional structures without revolution. He noted that Spain's future accession to the European institutions could reassure those watching with apprehension the end of the dictatorship by providing a transition from the authoritarian regime without a violent

[1] Consul in Strasbourg between 1962 and 1970, Special Ambassador observer in Strasbourg since 1976. In his book, *Por palabra de honor*, he tells the story of Spain accession to the Council of Europe (Historia-Maihdisa, 1995, 211p.).

 DOI: 10.17103/sybil.21.7

change of the established regime.[2]

There was also distrust towards Arias Navarro's Government.[3] At the end of the first debates, the Assembly approved Resolution 614, which took note of the "will expressed by the Spanish Government to carry out the reform of the country's institutions", but also drew the Assembly's attention to the lack of concrete measures regarding freedom of association, assembly and expression. It recalled that respect for human rights, the restoration of freedom for all political views and the election of democratic institutions by universal and secret suffrage were indispensable conditions for the admission of Spain to the Council.

After the death of Francisco Franco, the situation in Spain changed very quickly. Already under the presidency of Adolfo Suárez, Giuseppe Reale returned to Spain together with the Socialist Parliamentarian Claude Delorme and Roger Massie, Secretary of the Political Committee of the Parliamentary Assembly, and they clearly perceived the political change after meetings with the Government, the opposition and some media. In his new report, Reale opened the Assembly debate by pointing out the clear "democratizing will" of the new Government, whilst highlighting the difficulties of legalization of political parties, particularly the Communist Party. The parliamentarians were generally inclined to support Spain in its democratization process. Nevertheless, Resolution 640 of the PACE pointed out that although Spain was in an already irreversible phase of political transition, qualified as pre-democratic, it regretted that political parties and unions still could not express themselves and organize normally.

It seems that one of the key points capable of tipping the balance was precisely the legalization of the political parties. The first communist parliamentary group in PACE was formed in April 1977, and was followed shortly afterwards by the legalization of the Spanish Communist Party (*Partido Comunista Español*, PCE). In addition, on 15 June 1977, the first democratic legislative elections were held, leading to direct negotiations prior to accession. In Resolution 656 of 6 July 1977, the Assembly approved a new report[4] in which it highlighted two key details: on the one hand, it indicated the "political maturity demonstrated by the Spanish people"; on the other, it asked that a delegation of Spanish observers be invited to participate in the October plenary session of the Assembly.

The big question was whether Spain would be invited to participate despite the lack of a Constitution. To show its commitment to the Council and to obtain such an invitation, representatives of the parliamentary groups of the Spanish low Chamber in Parliament, the Congress of Deputies,[5] issued a formal statement on 8 October 1977. They indicated before the Council of Europe "their firm decision to guarantee constitutionally the pre-eminence of the Law, the respect of the ideals enshrined in the Statute of the Council of Europe and especially the human rights and

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[2] PACE, First report prepared by Giuseppe Reale on Spain, 25 September 1974, doc. No. 3486. See the detailed chronicle prepared on tghe accession in A. Viñal Casas, "Historia de las negociaciones para el ingreso de España en el Consejo de Europa", 5 *Revista de instituciones europeas* (January-April 1978), pp. 93-113.

[3] Speech of King Juan Carlos I in 1979, available here.

[4] The rapporteurs of this new study were Hofer, Delorme and Paul Channon, who replaced Giuseppe Reale.

[5] Leopoldo Calvo-Sotelo (*Unión de Centro Derecha*, UCD), Felipe González (Partido Socialista Obrero Español, PSOE), Manuel Fraga (*Alianza Popular*, AP), Francisco Ramos Molins (Catalan Socialists), Miquel Roca (Basque-Catalan minority), Santiago Carrillo (PCE) and Raúl Morodo (Mixte Group).

 DOI: 10.17103/sybil.21.7

fundamental freedoms contained in the European Convention signed in Rome on 4 November 1950". They hoped that this statement could bring Spain closer to "the earliest possible accession to the Statute of the Council of Europe."

The Assembly debated the new report on "The situation in Spain" on 12 October 1977. With Resolution No. 820, PACE urged the Committee of Ministers to formally invite Spain to become a member. The following day, the Spanish Government presented its formal application for membership through the Consul José Luis Messía. On 18 October, the Committee of Ministers approved Resolution 77 (32) unanimously. By a show of hands and taking note of Spain's firm intention to ratify the European Convention on Human Rights, as well as the favorable opinion of the Parliamentary Assembly, it invited Spain to join. Among the speakers, the President of the Assembly, the Austrian Socialist Karl Czernetz, said that the Spanish accession was a "great event, perhaps one of the most important one in the history of the Council". The Portuguese Socialist Nuno Godinho de Matos honored the work of Juan Carlos I. Once Spain had become the 20th member of the organization, the King himself spoke before the Assembly, on his first visit in October 1979, and praised PACE for having "gone beyond formal and temporary obstacles to make faith and hope prevail in the Spanish transition process".[6]

Marcelino Oreja presented the instruments of accession after the unanimous approval of the Congress and the Senate of the respective bills. His first act was to ratify the European Convention on Human Rights and immediately after he participated for the first time in the session of the Committee of Ministers. The Spanish Constitution would still take thirteen months to enter into force, after being approved by the *Cortes* and in a referendum.

The enthusiasm and unprecedented features which emerged from the process are unique. It is necessary to remember that the Council of Europe was born in the specific context of the Second World War and that, in that immediate post-war period, the States decided to express the firm conviction that it was dictatorships that had led to such extremes, and that, therefore, should be avoided. There was a strong consensus about the benefits of democracy, and that political context left an important imprint on the creation of the Organization and the adoption of the text that serves as its basis, the Statute.[7] The Statute contains numerous references to the democratic principle as a common value shared by the European States, both in its Preamble and in its articles, and especially in Article 3. To become a member of the Organization, there are three main requirements: to be a European State, to respect the democratic principle, established for the first time as a condition to access an international Organization —a complex requirement, bearing in mind that it is a complex and non-univocal concept— and respect for human rights as an essential complement to democracy. The rights would be those enounced almost immediately afterwards in the European Convention on Human Rights, but in the 50s and 60s, ratifying the Convention was not a key element to consider the entry into the Council of new countries. At that time, the acquisition of membership was very gradual and there were no major formalities when admitting a new member State.

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6 Speech of King Juan Carlos I in 1979, *supra* n. 3.

7 Signed 5 May 1949, entered into force for Spain 24 November 1977 (BOE No. 51, 1 March 1978).

 DOI: 10.17103/sybil.21.7

Portugal had acceded to the Council a year before Spain, but its entry had occurred after the approval of its new Constitution. Never again has the accession of a State to the Council been so quick or based on the formal word of honour given by the political leaders of the States in question. Indeed, this procedure was to be tested in 1993, after the fall of the Berlin Wall and with the on mass access of the new States of the former communist bloc. At that moment there was a clear hardening of the entry conditions, one of the prerequisites being the accession to the European Convention as a formal obligation, together with the introduction of the main *acquis* of the Council in domestic law. In order to establish the ratification of the ECHR as an "official" requirement for accession, the Council had to face two issues. The first, referred to the acceptance of the contentious jurisdiction of the European Court of Human Rights, which at that time was still optional, leaving the choice to the States to commit to it or not. Since all States that were already members of the Council of Europe had accepted the optional clause, the solution adopted was that it became *de facto* mandatory, with all candidate States having to accept the jurisdiction of the European Court. The second question raised was in relation to the place of the additional Protocols, since they are optional and constitute in a certain way an acquis "a la carte" (with the exception of Protocol 1 and 11 and in more recent times, Protocol 14) . With regard to the procedure established to formalize the accession to the ECHR, the imposed "obligation" translated into a formal promise made by the candidate State to ratify the Convention within a short period of time immediately after the ratification of the Statute of the Council of Europe. The issue of the deadline was addressed by the Parliamentary Assembly, in Resolution 1031 (1994), which established that ratification should take place within one year.[8]

The increased requirements to accede to the Council of Europe, established by the Parliamentary Assembly and the Committee of Ministers, were not confined solely to the ratification of treaties. Domestic law was also the object of thorough analysis, and the opinions and reports issued by the Council of Europe bodies sometimes recommended changes with a view to accession, further highlighting the Spanish exceptionality. Spanish accession to the Council was, without a doubt, a unique moment.

(C) 40 YEARS WITHIN THE COUNCIL: THE CONSTRUCTION OF A COMMON LEGAL ACQUIS

Interactions between the Council of Europe and Spain throughout the forty years since the accession have been very diverse. Perhaps the most important and most visible changes are those of legal nature. In the months that preceded the accession, two Spanish magistrates, Fernando Martínez Ruiz and José María Morenilla, were sent to Strasbourg to study the legal implications of accession and first steps were taken following their reports, so that Spain could ratify the European Convention of Human Rights. Its ratification preceded even the existence of the Constitution.

It is evident that the changes brought about by this ratification and by the integration of the case-law of the Court of Strasbourg are some of the factors which had the greatest impact in the Spanish

[8] E. Pérez Vera, "El Consejo de Europa y los derechos humanos", *Cursos euromediterráneos Bancaja de Derecho Internacional/Bancaja Euromediterranean courses of international law/Cours Euro-Mediterranéens Bancaja de droit international* (2001), p. 495.

 DOI: 10.17103/sybil.21.7

legal system. The judicial reforms later embodied in the Constitution led to profound institutional changes. The *amparo* appeal at the Spanish Constitutional Court has also become an important filter of claims on fundamental rights, and one of the factors that surely explain the low number of complaints lodged before the European Court against Spain, compared to other countries with a similar number of inhabitants. The judgments of the Court are also translated and accessible to national judges and Strasbourg cases have opened up debates and have been key to bringing about necessary changes, such as on the rules and judicial interpretations in the fight against terrorism. Indeed, *Barberá, Messegué and Jabardo* case[9] and more recently *Del Río Prada*[10] judgment were probably the start of legislative reforms introduced in 2014 and 2015 aimed at improving the execution of the ECHR judgments in Spain.[11] However the case-law of Strasbourg, already studied in another contribution, has not been the only element of change and influence in the Spanish legal system.

Spain has ratified 132 Council of Europe treaties so far and has signed another 11, still pending ratification. On some occasions, the road has been slow. One of the former judges of the Court of Strasbourg, José María Morenilla, set out in a publication the complexities and the State's reticence concerning the ratification of treaties in criminal matters. Indeed, he highlighted the complexities to restrict the sacred principle of criminal territoriality, recommending the quick ratification to those treaties whose applicability in domestic law was simple, since their content was already along the same lines as the Constitution and Spanish legislation, and approach the ratification of other treaties, that implied a significant change in the structures necessary for an adequate compliance more gradually.[12]

In some aspects, Spain made an extraordinary quick and effective integration of the Council of Europe's acquis. The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention No. 108) has been a source of important inspiration for the development of the Spanish data protection system. The Council of Europe Convention on Access to Official Documents (Convention No. 205) also inspired recent legislative reforms on the issue, although Spain has not yet ratified this treaty, proving the interactions that occur in the field of *lege ferenda*. Something similar happened with the Convention against Trafficking in Human Organs, signed in Santiago de Compostela, a topic in which Spain has been recognized as leader, with the

9 *Barberá, Messegué and Jabardo v. Spain*, ECHR (13 June 1994).

10 *Del Río Prada v. Spain*, ECHR, Grand Chamber (21 October 2013).

11 Law 25/2014, 27 November 2014, on Treaties and Other International Agreements (BOE No. 288, 28 November 2014), which attributes a rank above ordinary law to obligations derived from international treaties ratified by Spain; and procedural legislation ensuring the re-opening of proceedings following a judgment of the European Court of Human Rights (Organic Law 7/2015 of 21 July 2015 and Law 41/2015 of 5 October 2015 amending various other laws).

12 Morenilla explores the possibilities concerning the ratification of eleven treaties in the criminal field: the European Convention on Extradition, the European Convention on Mutual Assistance in Criminal Matters, the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, the European Convention on the Punishment of Road Traffic Offences, the European Convention on the International Validity of Criminal Judgments, the European Convention on the Transfer of Proceedings in Criminal Matters, the European Convention on the Repatriation of Minors, the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, the European Convention on the International Effects of Deprivation of the Right to Drive a Motor Vehicle, the European Convention on the Suppression of Terrorism and the European Convention on the Control of the Acquisition and Possession of Firearms by Individuals. J.M. Morenilla Rodríguez, "La ratificación por España de los convenios del Consejo de Europa en material criminal", available here.

 DOI: 10.17103/sybil.21.7

most advanced legislation in the fight against these practices.[13] Indeed, Spain was a pioneer in criminalizing the trafficking of organs and transplant tourism in 2010, with criminal sanctions of up to 12 years. Spain has also been one of the first to promote the adoption of the Oviedo Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, the Convention on Human Rights and Biomedicine, whose ratification took place in 1999, or Convention No. 201 on the Protection of Children against Sexual Exploitation and Sexual Abuse, adopted in Lanzarote on October 25, 2007.

The role Spaniards have played in the creation and integration of the Council's *acquis* is evident. Although it is not possible to give a detailed chronicle of all Spaniards who have played a relevant role in the Council in this contribution, it is important to note that, seven years after accession, Marcelino Oreja became the first and only Secretary General of the Council of Europe of Spanish nationality. There have been four Spanish presidents of the Parliamentary Assembly: José María de Areilza (1981-1983) Miguel Ángel Martínez (1992-1996), Lluis María de Puig (2008-2009) and Pedro Agramunt (2016-2017). In addition, Spain has a delegation of 12 parliamentarians who participate in the meetings of PACE, and who have promoted resolutions, reports, agreements and ratifications. It is also necessary to mention the work of Álvaro Gil Robles, who became the first Commissioner of the Council in the field of human rights, a position created in 1999 and first developed under his mandate, being a pioneer in establishing the importance of visits and the breadth of the Commissioner's reports, especially in crisis situations. Indeed, although it was created as a body to reinforce or support the work of the European Court, helping with a complementary action aimed at preventing greater violations of human rights, it was not endowed with the ability to receive individual communications. It was rather established as a mediator and to provide advice. However, it made the Commissioner an authentic body with the capacity to carry out a general follow-up on compliance with international human rights obligations of the Member States, being able to act *ex officio*, which he used with respect to Spain and the situation in the Basque Country. All of this work was carried on despite the lack of a proper Secretariat and sufficient financial and human resources, something which became critical and very evident especially in the first part of his mandate.

Even so, there are evidently pending challenges. Perhaps one of the most recurrent and most present issues in the current debate on human rights has to do with the ratification of the revised European Social Charter, the other key treaty on human rights of the Council of Europe, together with the Convention. Although Spain ratified the original Turin Charter, it has never ratified the revised Charter,[14] in spite of the work carried out by Luis Jimena Quesada, who became one of the most active and most committed President of the Committee on Social Rights, the only one of Spanish nationality.

It would not be possible to conclude this analysis without making a reference to the weight Spain carries in the budget of the Council of Europe. It is the sixth main contributor, paying 7% of the

[13] PACE, *Défendre l'acquis du Conseil de l'Europe: préserver le succès de 65 ans de coopération intergouvernementale*, 17 Septembre 2017, doc. 14406.

[14] There is at present a bill, introduced in October 2017 by the parliamentary group of *Podemos*, to propose Spanish ratification of the revised Social Charter and the Protocol concerning Collective Complaints of 1995.

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overall budget (almost 19,000.000 Euros on a total budget of the Council in 2017 of 454,586,500). Part of this budget is intended to cover officials of Spanish nationality in the Secretariat of the Council of Europe, even though Spain is one of the few countries that is currently under quota.

(D) SPAIN AND THE COUNCIL OF EUROPE TODAY: PENDING CHALLENGES

Any discussion about the relations between Spain and the Council of Europe in the light of current affairs cannot fail to take into account the challenges that exist, both from the point of view of the organization and more recently in the national context.

From the standpoint of the organization, the current situation is very delicate. The economic crisis of recent years has gradually been paired with an even more important political crisis. Strong voices are conducting a powerful discourse against human rights, and this happens not only in countries that are the most condemned by the European Court, led by Russia, but in many others where the situation until recently was not so critical. Major conflicts between powers, especially between the judiciary and the executive powers, have brought about very problematic situations with regard to the evolution of the rule of law, especially in member States of the European Union such as Romania, Hungary and, more recently, Poland.[15] In addition, since 2014 and prior to the referendum after which the United Kingdom ended up deciding to exit the European Union, there has been an ongoing debate about the possible denunciation of the European Convention on Human Rights as a result of the judgments against this country the United Kingdom on the general ban on the right of the prisoners' vote. Being in open conflict since the first judgment of the European Court in 2005 (*Hirst No. 2 v. United Kingdom*),[16] it seems that this could soon be over following a recent amendment proposed by the British Government to the Department on the execution of judgments.[17] However, while the long-standing opposition on this topic may come to an end concerning the United Kingdom, it is still not the case with other countries. Russia modified its legislation in 2015 precisely to highlight the manifest impossibility of executing certain judgments of the European Court of Human Rights that were contrary to their constitutional principles.[18]

Today, there are other major financial challenges in addition the ones described. For the first time in the history of the Council, a member State has stopped paying its contribution to the regular

[15] The European Commission has launched before the Council of the European Union the procedure versus Poland, under Article 7.1 of the Treaty, for the first time in its history in December 2017.

[16] *Hirst No. 2 v. United Kingdom*, ECHR, Grand Chamber (6 October 2005).

[17] In November 2017, the British Government has announced a change in the prisons rule which would allow prisoners convicted of minor offences during temporary release, a situation which is yet to be discussed in order to assess whether the execution of *Hirst* No.2 can be considered officially closed.

[18] This happened in the case *Anchugov and Gladkov* (ECHR, 4 July 2013), concerning also the right to vote of Russian prisoners, although there a specific provision in the Russian Constitution which bans generally their voting rights, which makes difficult implementation without a constitutional change. It can also be consulted in this respect the Venice Commission opinion on this change of legislation, in which it is criticized that the Constitutional Court is given this power to decide on the possible execution or not of a ECHR judgment, a role which is a competence and an obligation for all national authorities, and not only by courts and the Constitutional Court in particular (CDL-AD(2016)016, Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court (Venice, 10-11 June 2016).

 DOI: 10.17103/sybil.21.7

annual budget. Indeed, Russia decided to suspend its legal obligation in 2017, as a result of the suspension of the right to vote of the Russian Delegation in the Parliamentary Assembly, decided after the annexation of Crimea in 2014. The annual contribution of Russia, one of the major contributors to the Council of Europe, is 33,000.000 Euros. Also, in November 2017, Turkey announced that it will stop contributing the additional contribution to the regular budget, to which it had previously committed, after the "discomfort" expressed by the Prime Minister for awarding the Human Rights Prize Václav Havel of the Council to Murat Arslan in 2017.[19]

Within this difficult context, Spain has also been confronted in recent times with significant internal challenges, which have led to interactions with different Council bodies. It is necessary to highlight in this contribution the recent opinion and the exchanges that took place with the Venice Commission as a result of the reform of the law of the Constitutional Court in 2015 and the possibility of organizing a referendum on independence in Catalonia. The Commission, whose full name is the Commission for Democracy through Law, is a consultative and independent body, which was promoted after the fall of the Berlin Wall by Italian diplomacy and to which all the member states currently belong, although it is also open to non-European States. It has at present 61 members, 14 more than the Council of Europe.[20] Among those States is Kosovo, which, as established in the Statute of the Commission, needed the favorable vote of two thirds of the States of the Committee of Ministers and not the unanimity required to become a member of the Council of Europe.

The opinion about the reform of the law of the Constitutional Court in Spain was the first, and only one so far adopted regarding Spain. The Venice Commission does not have the right to act spontaneously in a case concerning a specific country. There are two ways for the process of preparing a report or an opinion can be initiated: that the authorities of the country in question request it or that the procedure be initiated by one of the bodies authorized to do so by the Council of Europe, in which case the cooperation is not "voluntary", but is one of the consequences of acceptance of the Statute of the Commission. In the case at hand, the opinion was requested by the Follow-up Commission of the Parliamentary Assembly of the Council of Europe on the modification of organic law 2/1979 of the Constitutional Court that took place on 16 October 2015.

It is important to note that from a procedural point of view, the opinion followed a characteristic path. Indeed, the Venice Commission is known for its flexibility, which allows it to adopt opinions in a very short time when it is necessary for the report to be useful for the debate of a major legislative or constitutional reform or even postpone adoption to avoid interfering in an electoral campaign. That was the Spanish case. Although the request for opinion came in October 2015, there were several requests to delay it. The first came from the President of the PACE Monitoring Committee, who, in

[19] He was previously the President of the prosecutors and judges union, and who is detained for his alleged ties with association FETÖ, a gülenist organization considered responsible for the failed coup of 2016.

[20] On the Venice Commission, see the works of the author, among others, "La régionalisation par la coordination interétatique: le rôle catalyseur de la Commission de Venise", in S. Doumbé-Billé, Stéphane, ed., *La régionalisation du droit international, Cahiers de droit international* (Bruylant, Brussels, 2012), pp. 149-168 ; "Between Soft and Hard Law standards: the contribution of the Venice Commission in the electoral field", in H. Hardman and B. Dickson, *Electoral Rights in Europe* (Routledge, London, 2017), pp. 30-49 ; "La Comisión de Venecia y el Tribunal Europeo de Derechos Humanos", in VVAA, *Liber Amicorum Luis López Guerra* (2018, in print).

 DOI: 10.17103/sybil.21.7

view of the holding of general elections on 20 December 2015, requested that the opinion be adopted at the March 2016 plenary session. This is a frequent practice, to avoid that the opinions of the Commission becoming politicized or part of the electoral campaign debate. In view of the difficulties forming a new government in Spain, the visit of the delegation of Commission rapporteurs was delayed until April 2016. In addition, with the new call for elections in June 2016, there was a further delay of the Adoption of the opinion to the next plenary, on October 2016. The peculiarity occurs because in September 2016, the President of the Constitutional Court asked the Commission to delay the adoption of the opinion again, since it was about to resolve appeals filed against the unconstitutionality of the reform by the Basque and Catalan governments. This request, coming from the President of the Constitutional Court and taking into account that the opinion was about the Court's own law, was accepted, and after the adoption of the two judgments,[21] the opinion was finally adopted in March 2017.[22]

The opinion, on the merits, highlights a series of key elements. It begins, first, by recalling the importance of respecting and executing the judgments of the domestic courts, and even more of the importance of executing the decisions of the Constitutional Court, which has a definitive and obligatory character and which follows from the principle of the primacy of the Constitution. The government had indicated in its comments to the draft opinion, as well as all the interlocutors during the visit to Spain, that the reform had obeyed the need to face the problem of possible and frontal disobedience of the Parliament of Catalonia to abide by the judgments of the Constitutional Court, although the Commission expressed from the beginning that, since they were general modifications to the law, they were going to be analyzed and not only in reference to the Catalan situation.[23] The objective was not so much an analysis of the need for reform, since the objective of ensuring the execution of the judgments of the highest Court was, as such, perfectly legitimate, but on whether the amendments made to the legislation were the most appropriate to obtain the achievement of said objective.

Next, the Commission followed its usual *modus operandi*: it uses comparative law and looks for other examples that can be compared to then analyse all the elements established by law, from the possibility of the Court to annul any act that it considers contrary to its own decisions, going through the procedure established in case of failure to comply with the judgment or order of the Court, until the imposition of coercive fines, and the suspension of public offices or officials responsible for the non-execution of judgments.

The conclusions of the Venice Commission should be analysed, then, in the light of its usual practice, in which it makes a distinction between the violation of a European standard, the establishment of a recommendation or the adoption of considerations to the attention and State. Thus, in its opinion, the Commission emphasizes that, in the light of comparative law, the possibility that

[21] Constitutional Court judgments 185/2016, 3 November 2016 and 215/2016, 15 December 2016.

[22] Venice Commission, Opinion on the law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017), CDL-AD(2017)003.

[23] *Ibid.*, para. 14.

the Constitutional Court itself be entrusted with ensuring compliance with its own judgments is not prohibited by European standards. They say nothing about it. As such, the State may grant such powers to the body of its choice. But this analysis of comparative law highlights the exceptional nature of such a legislative decision, since it is usual for other competent authorities to execute the judgments of the Court. The Commission stresses that even though there is no such obligation as such, and there is therefore no incompatibility between these "new powers" of the Constitutional Court and the European standards that do not exist in the matter, it would be "desirable" that the final responsibility of the execution of their sentences was not left to the Court, whose role as an impartial arbitrator could be affected and which could also suffer from institutional attrition in the case of repeated non-compliance.[24]

Regarding the specific enforcement measures, the Commission issued doubts about the coercive fines and the possibility of suspending the holder of public functions in case of refusal to execute the judgment, especially recommending that the personal scope of the application of these measures was specified, as well as the scope of the different measures depending on their application to a public authority, an official or an individual.

After developments of events in 2017 concerning the Catalan situation, there was a series of exchanges following the opinion, this time informal, between the Venice Commission and the Catalan government around the referendum convened in 2017. It is necessary to refer to the fact that the Commission adopted in 2007 the Code of Good Practices on Referenda, which establishes a series of minimum standards that must be respected in the organization of any referendum.[25] This Code has been used by the Commission in numerous opinions, such as the one adopted on the referendum held in Crimea in 2014,[26] which was declared contrary to international standards, and also to evaluate the Italian law on the regulation of public participation and referendums premises of the Trento region in Italy.[27] Thus, the President of the Catalan government sent a letter on 29 May 2017 to the President of the Commission, Gianni Buquicchio, informing him of the decision taken by the Catalan Parliament to negotiate a referendum on the future of Catalonia, for which the collaboration of the Venice Commission would be necessary.

In the same letter, Puigdemont noted that the Government of Mariano Rajoy has not accepted his request to agree a negotiated referendum on the matter. In President Buquicchio's response, which takes place on 2 June 2017, three elements were reiterated: firstly, the Catalan government's interest in following the guidelines established by the Code of Good Practice regarding referendums was praised. This clearly highlighted a second key element appearing in the letter, that the first essential requirement for a referendum to be in accordance with international standards is to be carried out in

[24] Ibid., paras. 69 to 78.

[25] Venice Commission, *Code on good practice on referendum*, Venice, Mars 2017, CDL-AD(2017)008rev.

[26] Venice Commission, Opinion on "whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 19 92 constitution is compatible with constitutional principles", Venice, Mars 2014, CDL-AD(2014)002.

[27] Venice Commission, Opinion on the Citizens' bill on the regulation of public participation, citizens' bills, referendums and popular initiatives and amendments to the Provincial Electoral Law of the Autonomous Province of Trento (Italy), Venice, June 2015, CDL-AD(2015)009.

accordance with the Constitution and the legal system of the State. Finally, the President of the Commission pointed out another of the key conditions for entering into cooperation with the Venice Commission and that concerns the bodies authorized to initiate the procedure: these bodies are the state authorities in a broad sense, which encompasses the President of the Parliament, the President of the State, the Prime Minister or the Minister of Justice or Foreign Affairs, but does not allow a regional or local government to raise a request for an opinion without the agreement of the central government.[28] In numerous interviews given prior to the referendum, both the titular member for Spain before the Venice Commission, Josep María Castellà, and the Secretary of the Commission, Thomas Markert, stated that the referendum did not meet the requirements established in the *Code of Good Practice* as it was not foreseen in the Constitution.

(E) FINAL THOUGHTS

Spain has achieved 42 years of democracy and 40 of those years has done so within the Council of Europe. During all those years, Spain has been present at the great events and debates around democracy, human rights and the rule of law, and has had, as it corresponds to every member state on a rotating basis, the presidency of the Committee of Ministers in its hands. It has witnessed the fall of the Berlin Wall, the mass accession of new states and the negotiations to end the Balkan war, and has actively participated in numerous Council bodies, promoting intergovernmental cooperation. For its part, the legal and constitutional transformation of the Spanish state over these years has also been very important, with the Constitution and the Spanish transition being one of the examples that have been used to advise other countries on their constitutional changes.

However, from the initial enthusiasm to the present moment, there are numerous challenges that have arisen both in Spain and in Europe. If Spain was the 20th member of the Council, it has now 47 States, which is a success in itself, but also poses numerous obstacles and the Council institutions are put to the test. This is why it is even more important to continue developing cooperation, since democracy, like the rule of law and human rights, is not an objective to be achieved, but rather requires a daily and continuous effort to face the constant challenges of the present context.

[28] The two letters are available at the Website of the Venice Commission: the one of 29 May 2017 by Puigdemont here, and the one of 2 June 2017 by Dr. Buquicchio here.

 DOI: 10.17103/sybil.21.7

the SPANISH YEARBOOK of INTERNATIONAL LAW

Why this?

Mariano J. AZNAR*

Perhaps the question titling this introduction to this section on *Spain and the Law of the Sea* may be answered by its sub-title: "20 years under the Law of the Sea Convention". It is actually the origin of this scientific endeavor: to review —20 years after Spain's ratification of LOSC[1]— how Spanish practice on the law of the sea has been influenced by LOSC and, on the reverse, whether and how Spanish practice has influenced the law of the sea. But there is another compelling reason behind this array of contributions: to offer foreign governments, international organizations, the academia and those interested on the law of the sea an almost complete view of Spain at sea from a legal perspective, including a selection of the most representative literature written by Spanish authors on the subject. Unfortunately, there is no *manual* or *treatise* published by Spanish authors specifically on the law of the sea, as it exists, for example, in English, French, German or Italian.[2]

Being said this, of course —and as a clear disclaimer— none of the following pages can be understood as expressing the official legal position of the Kingdom of Spain in any of the questions addressed or discussed below.

*

Spain is a maritime country. If geography positioned Spain between two continents separated by a narrow strait and surrounded by an ocean and two seas, historically we sailed, occupied, fished, investigated but also polluted the waters around our territory as well as long-distance seas with a non-interrupted presence of Spanish navigators during the last centuries. Politically, Spain has had a continued interest on maritime issues, legally discussed during the three international conferences sponsored by the UN —and reminded in this volume by Ambassador Yturriaga—, permanently considered before LOSC treaty-bodies —as addressed in the paper by García García-Revillo—, participated in the related agreements —addressed by Borrás— and of course revisited in the different

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[1] Spain signed LOSC on 4 December 1984 and ratified it by instrument of 20 December 1996 (BOE No. 39, 14 February 1997). LOSC entered into force for Spain on 14 February 1997.

[2] As an example, it might be cited here the well-known work by Churchill and Lowe for Manchester University Press or the IMLI Manuel for IMO in English, the recent one in French under the direction of Thouvenin and Forteau for Éditions Pedone, the one written in Italian by Scovazzi some years ago for Giuffrè or the one in German by Graf Vitzthum and later Proelß for Beck. There are some treatises written in Spanish on the law of the sea, but elaborated by Latin-American authors. The last one edited is J.R. Martínez Vargas and G. Vega Barbosa, *Tratado de Derecho del mar* (Valencia: Tirant 2016).

 DOI: 10.17103/sybil.21.8

maritime strategies adopted by Spain —and traced here in the contribution by Blázquez.

The ratification of LOSC by Spain in 1997 had an impact on previous domestic legislation —Jiménez Piernas makes an appraisal on this in his contribution— and, since then, has influenced subsequent practice related, particularly, to the establishment and delimitation of Spanish maritime zones and the competences herein exerted: these are discussed in the different contributions addressing these zones —the territorial sea by Díez-Hochleitner, the contiguous zone by Andrés Sáenz de Santamaría, the islands by González, the continental shelf and its extension by Faramiñan, and the exclusive economic zone by Pastor—. On delimitations, the volume addresses both the already agreed —by Gutiérrez— and those still pending —by Orihuela—. Finally, Del Valle and López address the always conflicting particular questions around Gibraltar and the navigation through its strait, respectively.

Spain's presence in the high seas is not addressed as such in this volume, although the chapter on Fisheries by Casado Raigón discusses the case between Spain and Canada on fisheries jurisdiction in the high seas before the ICJ,[3] which was fully discussed by Spanish doctrine once the ICJ rendered its decision in 1998.[4] But the rest of Spanish main maritime interest are adequately addressed in this volume: non-living resources by Abad, marine scientific research by Conde, underwater cultural heritage by Carrera, security by Espaliú, piracy by Sobrino, migrants by García, illicit fisheries by Pons and questions of police at sea by Lirola and Jorge.

Last but not least (and, in this case, this common-place is absolutely true), the collection of essays is closed by an exceptional review of Spanish literature on the law of the sea made by three fantastic young scholars: Marta Abegón, Ana María Maestro y Beatriz Vázquez. Their very complete job traces the main publications written by Spanish scholars along the last 20 years (and even before) on different aspects of the law on the sea. Given that the collection gathers contributions which basically address the Spanish practice and avoid doctrinal or theoretical discussions about general institutions of the law of the sea, the *SYbIL* considered necessary to complete that more descriptive vision with a document collecting a selected and commented bibliography on the law of the sea from a Spanish perspective.

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This Agora has been made possible thanks to different persons and efforts: my colleagues Esperanza Orihuela and José Manuel Sobrino designed with me the main lines and structure of the section. Of course, my companions at the Editorial Board of the *Yearbook* and the Board of the AEPDIRI were always enthusiasts with this scientific endeavor. Irene Castañón and Sunna Sánchez —Law Degree students at the Universitat Jaume I— have also help us with some editorial job, reviewing some of the manuscripts sent by different authors. Finally, part of the editorial effort made by the *Spanish*

[3] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment of 4 December 1998, ICJ Reports* 1998, p. 432.

[4] See *Revista Española de Derecho Internacional* (1999), with papers written by A. Fernández Tomás, F. J. Quel López, F. Jiménez García, R. Casado Raigón, J. Juste Ruiz y C. Fernández de Casadevante.

 DOI: 10.17103/sybil.21.8

Yearbook of International Law has been funded by the R+D Project "Intereses de España y la UE en el ámbito maritime" (UJI-B2017-71). This is why its logo is proudly included in this introduction and in the *Yearbook*'s website.

 DOI: 10.17103/sybil.21.8

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

Spain at UNCLOS

José A. DE YTURRIAGA BARBERÁN*

(A) PREPARATION OF UNCLOS

Spain is a country conditioned by the sea and, accordingly, is extremely interested in anything related to this space. She is a peninsula with a broad coastline which borders an open sea —the Atlantic Ocean— and a semi-enclosed sea —the Mediterranean—. She has islands, two archipelagos and straits, especially the Gibraltar Strait, an important route of international navigation. She occupies the tenth position in the world ranking of ship tonnage —the eleventh in tankers— and the third in shipbuilding, and is included among the most important countries in maritime trade. She is the fifth power in fishing and the second in mariculture, and 200.000 Spaniards work at sea. She is placed at the cross-road of three important maritime routes: that of Finisterre —by which the traffic between Europe and Africa and America flows—, that of the Canary Islands —which receives the traffic between Europe and Northern Africa and South America— and that of Gibraltar —of special importance for the traffic of the tankers coming from the Middle East—. Consequently, Spain has been qualified as a country "especially exposed to the risks of marine pollution", which constitutes a serious problem for its incidence in fisheries, mariculture and tourism[1]. The UN General Assembly convened the III UNCLOS to deal with

> "the establishment of a an equitable international regime [...] for the area and the resources of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, a precise definition of the area and a broad range of related issues, including those concerning the regime of the high seas, the continental shelf, the territorial sea —including the question of its breadth and of international straits— and the contiguous zone, fishing and conservation of the living resources —including the question of the preferential rights of coastal States—, the preservation of the environment —including, 'inter alia', the prevention of pollution— and scientific research."[2]

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[1] Intervention of José Antonio de Yturriaga at the 15th session of the Afro-Asian Legal Consultative Committee (Tokyo, 11 January 1974), in J.A. de Yturriaga, *La actual revisión del Derecho del Mar: Una perspectiva española. Textos y Documentos* (Instituto de Estudios Políticos, Madrid, 1975), vol, II (2), at 380.

[2] Paragraphs 2 and 3 of A/Res/2750 C (XXV), 17 December 1970, reprinted in M.H. Nordquist, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht, 1975), at 179.

 DOI: 10.17103/sybil.21.9

The Spanish Government was aware of the importance of UNCLOS and of its repercusions for Spain and prepared carefully her participation in the Conference. She was faced at the time with advantages and disadvantages.

(1) Advantages

The Spanish Government had a clear idea of where the interests of Spain lay and gave political support to its delegation in UNCLOS, appointed a multi sectorial delegation composed of competent diplomats and experts in the various fields of 6he sea, and established a platform at the rear-guard to study the subjects and give relevant instructions to the Spanish delegation.

(a) Clarity of ideas

In 1971-1972, the United States sounded various states —including Spain— on the possibility of convening an international conference on the Law of the Sea, to deal with the issues that it considered necessary to modify: the extension to twelve miles of the breadth of the territorial sea, a regime of free transit through international straits and the recognition of special fishing rights to coastal states, beyond their territorial sea. Most of the countries consulted considered that the Conference should deal with all the issues related to the Law of the Sea and the General Assembly upheld this opinion in its resolutions.

The Spanish Ministry of Foreign Affairs was aware that the "winds of history" had changed and that the traditional regulations of the Law of the Sea had to be modified, especially to allow the expansion of coastal Sates' jurisdiction. As Foreign Minister Gregorio López Bravo stated,

> "we are facing a moment of historical implications in the change of the norms that rule maritime spaces. The UNGA adopted in December 1970 the resolution 2750 C (XXV) which convened the Third UNCLOS in 1973. This Conference will adopt agreements on various issues of the Law of the Sea, which are not regulated or which are regulated by norms such as the 1958 Geneva Conventions, that need to be renewed in view of the new data afforded by scientific and technological developments."[3]

The Minister felt that the extension of coastal states' jurisdiction up to 200 miles was unavoidable and, unlike the states member of the European Economic Community and other countries like Japan, accepted this fact —although it was against their fishing interests— and fought for the recognition of the right of fishing states to continue to fish in these areas with the consent of the coastal states concerned.

(b) Political support of the Governmentt

The Government duly instructed the Spanish delegation and supported its performance in UNCLOS, especially in the delicate issue of straits, where it had to face the combined efforts of the United States, the Soviet Union and their respective allies to impose absolute freedom of navigation and overflight through and over them. As López Bravo remarked, freedom of navigation and overflight

[3] Gregorio López Bravo's lecture at the "Centro Superior de Estudios de la Defensa Nacional" (3 February 1971), reprinted in Yturriaga, *supra*, n. 1, at 398.

 DOI: 10.17103/sybil.21.9

through the Strait of Gibraltar was "an essential and priority objective both for the Unites States and for the Soviet Union", since they did not accept the regime of innocent passage. He observed that

> "the qualification of the passage as innocent or non innocent and the prohibition of overflight over the territorial sea constituted for the coastal State a safeguard, which had the value and the scope of a legal norm in the troubled times in which w eare living. It is, in any way, a minimum and unrenounceable safeguard, and constitutes the international legal basis for our defense in a point of the greatest strategic importance for Spain and for the protection of her territory in an area with such intense traffic and so close to our territory."[4]

Thanks to the political support from its Government, the Spanish delegation was able to stand the tremendous pressure exerted by the two superpowers and challenge them with solid legal arguments. It did not succeed in maintaining the innocent passage regime, but managed to partially dilute their demands for unrestricted passage.

(c) Creation of a competent team for the negotiations

López Bravo entrusted the International Legal Office of his Ministry with the task of preparing the Conference. It was necessary to start from scratch and begin by acceding to the 1958 Geneva Conventions on the Law of the Sea, in order to fill the gaps existing in the Spanish legislation on the subject. A preparatory Committee —composed by diplomats, professors, navy officers, oceanographers and experts in fisheries, maritime safety and industry— was set up and I was appointed its Secretary. This Group was institutionalized at a later stage by the creation of a the Inter-ministerial Committee on International Maritime Policy (ICIMP), which created a Subcommittee in charge of issuing the relevant instruction to the Spanish delegation and following the development of UNCLOS. An ad hoc Ambassador was appointed to lead the delegation, which also include an administrative secretary[5].

(d) Multisectorial approach and coordination

The Ministry adopted a multisectorial approach for the renewal of the Law of the Sea, studying its various aspects —legal, political, strategical and economic— and focusing on the overall interests of Spain, without indulging in the interests of any particular sector. The interests of the various sectors were sometimes in contradiction and the Government had to balance these interests and give priority to the general interest of the State.

In addition, through the follow-up of UNCLOS by the ICIMP, the Government coordinated the actions of the Spanish delegations in various International Organizations and Conferences in order to adopt a unified and coherent position. Thus, Spain maintained her position in the International Maritime Consultative Organization —especially in the 1972 London Conference on Dumping and in the 1973 London Conference on Pollution by Ships— or in the in the 1972 Paris Conference on the

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4 Lopez Bravo's lecture, *supra*, n. 3, at 400.

5 J.A. de Yturriaga, "La Convención de las Naciones Unidas sobre el Derecho del Mar: Balance de 15 años de aplicación", in *España y la práctica del Derecho Internacional* (Colección Escuela Diplomática, Madrid, 2014), at 96.

 DOI: 10.17103/sybil.21.9

Legal Regime of "Oceanographic Data Acquisition Systems" sponsored by theIntergovernmental Oceanographic Organization.

(2) Disadvantages

The main disadvantages were the disparity of interests among the various sectors involved and the scarce involvement of some of them, and the negotiating weakness of Spain for political reasons.

(a) Disparity of interests

The interests of the various sectors involved in the Law of the Sea were not always coincidental and, at times, were in contradiction. The strategic interests did not necessarily coincide with those of the fishing sector, or the industrial interests with those of the environmental or tourist sectors. Special frictions arose between the military and the fishing departments on the issue of the expansion of coastal states' jurisdiction. The "Subsecretaría de la Marina Mercante" resented the position held by the Ministries of Foreign Affairs, of the Navy and of the Air Forces, and unduly accused them of sacrificing fishing interests to the defence of the regime of innocent passage through straits. It could not understand that they were two different issues and that the latter were not sacrificed for the former. Irrespective of the UNCLOS' decision on straits, the expansion of coastal states' jurisdiction up to 200 miles could not be stopped, and Spain did her best to preserve somehow her legitimate rights and interests as a long-distance fishing country. The fishing experts finally accepted this evidence and the cooperation within the Spanish delegation improved considerably.

There were two sectors of the Spanish Administration which were hardly involved in UNCLOS: the industrial sector —which, athough it participated in the delegation, was represented at a low level— and the economic and financial sectors, which did not participate at all. Therefore, the Spanish delegates at the First Committee dealing with seabed issues kept a low profile, lacking due instructions and sufficient knowledge about the interests of Spain in that area. It is true that Spain was not particularly interested in the exploration and exploitation of mineral resources beyond her national jurisdiction, because she lacked technological capacity to participate in such activities and was not an underdeveloped state which may get economic benefits out of them.

(b) Negotiating weakness

At the time of UNCLOS, Spain was, to some extent, an outcast of the international community due to the lack of acceptance of the Franco's regime and was somewhat isolated. She was neither a member of the Socialist Group, nor of the Group of 77 (G-77). She belonged to the "Western States and Others' Group", but was not integrated in western institutions, such as NATO or of the EEC. She was therefore isolated and whenever a post was to be attributed to the Group, it either went to a member of the Community or to the "Others" —Australia, Canada and New Zealand—. Spain joined the "Coastal States Group" —although she did not share some of its goals— and, in this way, managed to get support from some of the states of the Group in the issues which were not essential for them, such as straits or the rights of landlocked and geographically disadvantaged States.

 DOI: 10.17103/sybil.21.9

Apart from the ideological cleavage between East and West, and the equidistant role assumed by the G-77, the interests of the various states were not always coincidental enen within the same group. Thus, Spain clashed with Great Britain in the issue of straits and cooperated with her in that of delimitation or was allied with Morocco in the issue of straits, but fought with her on delimitation issues. Spain formed "interest groups" with other delegations concerned with straits or with delimitation. She prompted the formation of the "Straits Group" and led it discretely, and promoted the "Equidistance Group" —coordinated by Ambassador José Manuel Lacleta—, which played an essential role in reaching an agreement on delimitation. Although the Spanish delegation had poor cards, it plaid them very reasonably well.

(B) PERFORMANCE OF THE SPANISH DELEGATION

(1) General attitude of the Delegation

Spain was one of the states that least benefited from UNCLOS. However, had it not been for the performance of the Spanish delegation, the situation could have been much worse. It carefully studied the situation, duly elaborated the legal basis of its position and properly exposed its arguments. In 1970, the Spanish Government answered the questionnaire submitted by the UN Secretary General in order to collect the opinion of all the member states regarding the convening of UNCLOS[6] and, in 1972, it circulated a Memorandum on the *Spanish position on the Law of the Sea*[7] and, later on, three other memorandums about straits and delimitation. At the end of the meetings of the Sea-Bed Committee, the Head of the Spanish delegation, Ambassador Antonio Poch, edited a very comprehensive book on *The Present Review of the Law of the Sea: A Spanish Perspective*, written by various members and collaborators of the delegation.[8] This study was complemented with the publication of two additional books with documents, which included international treaties, national legislation, declarations and interventions of Spanish representatives in international fora concerning Law of the Sea issues.[9]

Once in the Sea-Bed Committee, Spain joined the Latino-American Group in co-sponsoring a proposal on a comprehensive "List of Subjects and Issues Relating to the Law of the Sea". Its presence among the co-sponsors contributed to soften its formulation. Thus, the issue of "Straits" appeared in the section covering "Zones within national jurisdiction" and was formulated as follows: "Navigation through straits used for international navigation: Innocent passage". Under the chapter dealing with these Zones, there was a reference to the "rights of coastal States with regard to the conservation, preservation and exclusive or preferential exploitation of the resources, economic and/or fisheries closing lines, resources, administration, protection of the marine environment and scientific

6 Reply of the Spanish Government to the UN Secretary General about the convening of a Conference on the Law of the Sea (10 June 1970), reprinted in Yturriaga, *supra* n. 1, at 357-358.

7 Yturriaga, *supra n.* 1, at 376-380.

8 A. Poch (ed.), *La actual revisión del Derecho del Mar: Una perspectiva española* (Instituto de Estudios Políticos. Madrid, 1974).

9 See Yturriaga, *supra* n. 1.

 DOI: 10.17103/sybil.21.9

research."[10] The proposal offered the peculiarity of adopting a zonal approach by referring to "economic and/or fishing zones" and showing the global and comprehensive nature of the zone by including the issues of preservation of the marine environment and marine scientific research.[11]

This proposal was merged with another one co-sponsored by several Afro-Asian states[12] and the new text —which was sponsored by 56 delegations— served as the basis for the final adoption of the "List of Subjects and Issues". Paragraph 4, devoted to "Straits used for international navigation" included two sub-paragraphs on "Innocent passage" and "Other connected subjects, including the issue of transit rights". Concerning the Economic Zone, the List included two optional paragraphs: "Exclusive Economic Zone beyond the territorial sea" and "Preferential rights or any non exclusive jurisdiction of the coastal State over the resources beyond the territorial sea".[13]

Spain joined the Coastal States Group and the Spanish delegation participated actively in the informal meetings of the Group of Experts led by the Norwegian Minister Jens Evensen —known as the "Evensen Group"—, which played an essential role in the elaboration of compromise texts, many of which were eventually embodied into the LOSC. Spanish delegates participated in international meetings preparatory of UNCLOS and in conferences dealing with Law of the Sea issues, such as the Meeting of the Intergovernmental Group on Marine Pollution (Ottawa, 1971), the Conference on the Human Environment (Stockholm, 1972), the Conference on Dumping (London, 1972), the Conference for a Draft Convention on Oceanic Data Acquisition Systems (Paris, 1972), the Conference on Pollution by Ships (London, 1973), the Afro-Asian Legal Consultative Committee (Tokyo, 1974) or the Meeting of the G-77 on the Law of the Sea (Nairobi, 1974). The members of the Spanish delegation also followed an determined policy in approaching the delegation of the other participating states in order to explain its position. They even made contacts and exchanged opinions with states with which Spain had no diplomatic relations, namely the Popular Republic of China. The delegation also resorted to the "gastronomic diplomacy" and made efficient use of the *Don Quijote* restaurant in Geneva or the *Spanish House* in New York. A good *paella* was sometimes more convincing than a solid legal argument!

As a matter of policy, Spain normally tried to get a post in the Drafting Committees of the International Conferences in which she participated. At UNCLOS, the Spanish delegation was appointed member of the Drafting Committee in spite of its political isolation in the Conference. The Spanish Government did a detailed study of the Spanish text of the Draft Convention and shared the results of its work with other Spanish-speaking delegations. The Spanish delegation formed a "Spanish Linguistic Group", open to all the Spanish-speaking delegations, which examined the text and made the relevant comments in order that they may be taken into account by the Spanish-

[10] Paragraphs 4 and 2 (3) of the proposal by 14 Latino-American States and Spain. UN Doc. A/AC.138/56, 19 July 1971. General Assembly Official Records, 27th session (New York, 1972), Supplement No. 21, at 199.

[11] J.A. de Yturriaga, *The International Regime of Fisheries: From UNCLOS 1982 to the Presential Sea* (Martinus Nijhoff Publishers. The Hague/Boston/London, 1997), at 29.

[12] Proposal by thirty Afro-Asian States and Yugoslavia. UN Doc. A/AC.138/58, 20 July 1971, *supra* n. 10, at 202.

[13] Paragraphs 4, 6 and 7 of the "List of Subjects and Issues Relating to the Law of the Sea" (16 August 1972), para. 23 of the "Report on the Work of the Committee", UN Doc. A/AC/138/66. General Assembly Official Records, 27th session (New York, 1972), Supplement No. 21, at 5.

speaking members of the Committee, and I was appointed coordinator of the Group. This example was followed by other delegations and Linguistic Groups in Arabic, Chinese, English, French and Russian were set up and coordinators appointed. At times, the discrepancies which arose in the Committee were examined during the meetings of the coordinators before being decided upon by the plenary of the Committee

(2) Straits Used for International Navigation

The agreement reached before the beginning of UNCLOS between the United States and the Soviet Union about a regime of free passage through and over straits used for international navigation left Spain little margin for manoeuvring. She formed a "Strait Group "with Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines and Yemen, and the Group submitted a proposal on 'Navigation through the territorial sea, including straits used for international navigation' in 1973."[14] One year later, the Spanish delegation elaborated a revised version of the proposal which was submitted to the Conference by Oman for tactical reasons.[15] In 1972, Spain circulated a Memorandum on "International Straits"[16] and, in 1978, another on "Overflight over international straits used for international navigation".[17] In spite of the considerable pressure exercised by the big powers, the Group succeeded in opposing the establishment of a regime of freedom of navigation and overflight as in the high seas, and succeeded in softening their requirement by the adoption of a regulated new regime of "transit passage".

The LOSC established unimpeded freedom of maritime navigation, although "solely for the purpose of continuous and expeditious transit", and offered certain safeguards to coastal states. The regime of transit should not in other respects affect the legal status of the waters forming the strait or the rights of the coastal state of its sovereignty or jurisdiction over such waters and their air space, soil and subsoil.[18] Transit passage should be exercised only for the purpose of continuous and expeditious transit of the strait and any activity which was not an exercise of such right would remain subject to the applicable provisions of the Convention. Ships in transit had to comply with a series of obligations, including that of refraining from any activities other than those incidental to their normal mode of transit, unless rendered necessary by *force majeure* or by distress. Finally, ships in transit were obliged to comply with the laws and regulations adopted by the coastal state relating to transit passage, as well as with generally accepted rules, procedures and practices for safety at sea, and for the prevention, reduction and control of pollution from ships. They should also respect applicable sea-

[14] UN Doc. A/AC.138/SC.II/L.18 (27 March 1973). General Assembly Official Records 28th session (New York, 1973), vol. III, at 3-4.

[15] UN Doc. A/CONF.62/C.2/L.16, 17 July 1974. UNCLOS III (New York, 1974), vol. IV, at 194.

[16] "Memorándum sobre la cuestión de los estrechos internacionales" (New York, 1972), reprinted in Yturroaga, *supra.* n 1, at 420-428.

[17] "Memorándum sobre la cuestión del sobrevuelo en los estrechos utilizados para la navegación internacional" (17 April 1978). See J.A. de Yturriaga, *Ámbitos de soberanía en la Convención de las Naciones Unidas sobre el Derecho del Mar: Una perspectiva española* (Ministerio de Asuntos Exteriores. Madrid, 1993), at 241-242.

[18] LOSC, Section 2 of Part III on "Transit Passage".

 DOI: 10.17103/sybil.21.9

lanes and traffic separation schemes established by the coastal states in accordance with the Convention.[19]

With respect to air navigation, the LOSC abrogated the conventional and customary rules of International Law by establishing the unrestricted freedom of overflight, Nevertheless, the Convention offered some limited safeguards to coastal States: Thus, the regime of transit should not, in other respect, affect the sovereignty or jurisdiction of this state over the air space above the strait. Transit passage must be exercised "solely for the purpose of continuous and expeditious transit on the straits" and "any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions on this Convention". Aircraft in transit had to comply with a series of duties, including those of proceeding without delay over the strait and of refraining "from any activity other than those incidental to their normal modes of continuous and expeditious transit, unless rendered necessary by *force majeur* or by distress"[20].

(3) Delimitation

UNCLOS was split on the issue of the delimitation of the exclusive economic zone (EEZ) and of the continental shelf between the delegations which gave priority to the criterion of equidistance and those which commended the "equitable principles". The Informal Single Negotiating Text (ISNT) stated that the delimitation should be effected by agreement in conformity with equitable principles and using, whenever appropriate, the median or equidistance line, and taking the relevant circumstances into account. If there was no agreement, no state might extend the limit of its EEZ or its continental shelf beyond the equidistance line[21]. The Chairman of the Second Committee, Ambassador Andrés Aguilar (Venezuela), changed this formula in the Revised Single Negotiating Text (RSNT) and established that, pending agreement, the states concerned should enter into provisional arrangements[22]. In 1977, Spain, together with other sixteen delegations which formed the "Equidistance Group", submitted a proposal in favour of equidistance, which was counteracted by the proposal of other eleven delegations from the "Equitable Group", which opposed the equidistance criterion and defended the application of "equitable principles" in the delimitation[23].

Spain circulated a *Memorandum on Delimitation*, which reflected the views of the "Equidistance Group". There were endless informal negotiations between the two groups —respectively coordinated by the Spanish Ambassador José Manuel Lacleta and by the Irish Ambassador Mahon Hayes— under the supervision of Judge Manner —Chairman of the Negotiating Group on Delimitation—, until a compromise was reached at the eleventh hour under the pressure of UNCLOS President, Ambassador Tommy Koh, on the following terms: The delimitation of the EEZ/continental shelf between states

[19] J.A. de Yturriaga, *Straits Used for International Navigation: A Spanish Perspective* (Martinus Nijhoff Publishers. Dordrecht/London/Boston, 1991), at 296.

[20] Arts. 34 (1), 38 and 39 (1) LOSC.

[21] Art. 70 of the ISNT/Part II, reprinted in R. Platzöder, *Third UN Conference on the Law of the Sea. Documents* (Dobs Ferry, 1983), vol. XI, at 171.

[22] Art. 62 (3) of the RSNT/Part II, reprinted in Platzïder, *supra* n. 21, vol. IV, at 176.

[23] Proposals by the "Equidistance Group" and by the "Equitable Group", reprinted in Plqatzöder, *supra* n. 21, at 467 and 468.

 DOI: 10.17103/sybil.21.9

with opposite or adjacent coasts "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution". Pending agreement, the states concerned "shall make every effort to enter into provisional arrangements of a practical nature [...], without prejudice of the final delimitation"[24].

(4) Exclusive Economic Zone

With pragmagtism, Spain accepted the zonal approach from the very beginning, but tried to obtain some recognition for fishing nations so that they may have access to the living resources in the EEZ of another state which were not fully exploited by such state. The LOSC established that when the coastal state did not have the capacity to harvest the entire allowable catch, it should give other states access to the surplus. At Spain's proposal, the Convention provided that, in giving access to its EEZ, the coastal state should take into account all relevant factors, including "the need to minimize economic dislocation in states whose nationals have habitually fished in the zone"[25].

Since most of the proposals submitted granted a preferential status to the so called "geographically disadvantaged states" —which included various European fishing nations—, the Spanish delegation tried to reduce the privileged status recognized to this new category of states and got the support of the Coastal States Group, which submitted a document on the issue[26]. The LOSC established that developed geographically disadvantaged states are entitled to fish only in the EEZ of developed coastal states of the same region, having regard to the extent to which the coastal state had taken into account the need to minimize "economic dislocation in states whose nationals have habitually fished in the zone". In addition, the Convention gives a rather restrictive definition of the term; that is, coastal states "whose geographical situation makes them dependent upon the exploitation of the living resources of the EEZ of other states in the subregion or region for adequate supplies of states which can claim no EEZ of their own"[27]. The Second Committee used the term "states with special goegraphic characteristics", whereas the Third Committee employed that of "geographically disadvantaged states". The Spanish delegation proposed to unify the terminology by using the first expression, but there was no agreement in the Drafting Committee and the Plenary opted for the second alternative[28].

Several states with broad continental shelves —the "Margineer States"— tried to consecrate the *special interests* of coastal states in those parts of the high seas adjacent to their EEZ. Thus, Argentina proposed that coastal and fishing states should be "obliged to agree", rather than "seek to agree", on the adoption of conservation measures with regard to straddling stocks. Argentina and Canada also asked for the introduction of provisions on disputes settlement in case of disagreement, in order that

[24] Arts. 74(3) and 83(3) LOSC. See J.A. de Yturriaga, *Ámbitos de jurisdicción en la Convención de las Naciones Unidas sobre el Derecho del Mar: Una perspectiva española* (Ministerio de Asuntos Exteriores. Madrid, 1993), at 224, 228-229 and 238-245.

[25] Art. 62(2) and (3) LOSC.

[26] Document of the Coastal States Group on Art. 56 to 60 of the RSNT/Part. II (13 June 1977), reprinted in Platzöder, *supra* n. 21, vol. IV, at 542.

[27] Art. 70 (2) LOSC.

[28] Yturriaga, *supra* n. 17 at 583.

the "appropriate tribunal" determined conservation measures compatible with those applied to the same stocks by the coastal state within its EEZ. Fifteen margineer states proposed that coastal and fishing States cooperated in the adoption of such measures in areas adjacent to their EEZ. These suggestions -strongly criticised by Spain and the EC- were not included in the draft Convention. Eight of these states submitted a proposal that recognized coastal states the rights to take conservation measures in the high seas concerning straddling and highly migratory fish stocks[29], but due to the opposition of the fishing States and after the request made by President Koh, the amendment was withdrawn[30]. Some margineer states raised again the issue at the 1992 Rio UN Conference on Environment and Development and finally an Agreement was adopted in 1995 on Implementation of the Provisions of the LOSC Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks[31].

(5) Islands and Archipelagos

Spain maintained that all the islands, except the rocks, had equal rights to maritime spaces. The LOSC accepted this principle and established that the territorial sea, the contiguous zone, the EEZ and the continental shelf of an island were "determined in accordance with the provisions of this Convention applicable to other land territory", with the exception of "rocks which cannot sustain human habitation or economic life of their own", which were not entitled to EEZ or continental shelves[32].

Spain supported the thesis that the archipelagic states had a particular status, according to which their geographical, historical and political features should be taken into account, and maintained that the especial regime granted to them should be applied *mutatis mutandi* to the archipelagos of states which were not independent. The ISNT stated that the provisions concerning archipelagic states did not prejudiced the legal condition of the oceanic archipelagos which formed an integral part of the territory of a continental state[33]. This vague formulation was interpreted as meaning that the provisions concerning archipelagic state were applicable by analogy to the archipelagos of states[34]. The Spanish delegation suggested a clearer formulation of the text, but the President of the Second Committee, Ambassador Aguilar, deleted that provision from the RSNT without any explanation and it was not included in the Convention[35].

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[29] Amendment co-sponsored by Australia, Canada, Cape Verde, Iceland, Philippines, Santo Tomé and Principe, Senegal and Sierra Leone. UN Doc. A/CONF.62/L.114 (12 April 1982), UNCLOS-III. (New York, 1984), vol. XVII, at 224.

[30] J.A. de Yturriaga, 'Perspectives on Hifh Seas Fisheries after UNCLOS', in J.M. de Faramiñán (Ed.), *Coopération, securité et dévelopement durable dans les mers et les océans: Une referenc spéciale à la Mediterranée* (Jaen University), 2013, at 233.

[31] Yturriaga, *supra* n. 11, at 201-220.

[32] Art. 121 LOSC.

[33] Art. 131 of the ISNT/Part II (7 May 1975), *supra* n. 21, at 179.

[34] J.M. Lacleta, J.A. Pastor & J.A. de Yturriaga, *III Conferencia de las Naciones Unidas sobre el Derecho del Mar* (Ministerio de Asuntos Exteriores. Madrid, 1978), at 37.

[35] Yturriaga, *supra* n. 17, at 358-359.

(6) Preservation of the Marine Environment and Marine Scientific Research

In the Third Committee, the Spanish delegation adopted a middle-of-the-road position in matters concerning marine pollution and oceanographic research. It was coherent with its acceptance of the expansion of coastal states' jurisdiction beyond their territorial sea and supported broader powers of these states in their EEZ in such issues, adopting a moderate zonal approach. At the Sea-bed Committee, she had submitted, with other seventeen delegations, a working document on the application by coastal states of measures to prevent pollution by ships[36]. At the Conference, Spain and other nine countries sponsored a proposal on *Zonal Approach for the Preservation of the Marine Environment*[37], which was the basis of the provision included in the Convention[38].

The Spanish delegation —together with Australia, Canada and New Zealand— also adopted an intermediate position on marine scientific research. They submitted various informal proposals aimed at establishing a regime of absolute consent in the territorial sea, freedom of research in the high sea and a limited consent regime in the EEZ and in the continental shelf. The LOSC established that marine scientific research within the EEZ or the continental shelf of a State should be conducted with the consent of that State, and introduced the formula of "implied consent", according to which the authorization to conduct scientific research should not be withheld when the researching States complied with certain requirements[39].

(C) SPAIN'S ATTITUDE TOWARDS THE LOSC

(1) Adoption of the LOSC

The main political problem that the Spanish Government had with the Draft Convention was the regime of transit passage through straits used for international navigation. The Heads of the Spanish and of the United States delegations, Ambassadors José Manuel Lacleta and James Malone, maintained bilateral negotiations to find formulae to make the straits provisions more palatable for Spain. In 1980, they reached a gentlemen's agreement to introduce some changes in the Draft: In Article 42 (1) (b) —which regulated "transit passage" through straits—, to replace "applicable" by "generally accepted" international regulations and delete "oily" before "wastes"; in Article 221(1) —concerning "maritime casualties"— to delete the words "beyond the territorial sea"; in article 233 —on "safeguards with respect to straits"—, to replace "the legal regime of straits" by "the regime of passage through straits"; and to add an article with the following text: "The provisions of this Convention regarding responsibility for damages are without prejudice to the application of other rules and principle of international law concerning responsibility for damages". Both the American

[36] UN Doc. A/AC.138/SC.III/L.56 (22 August 1973). Official Records of the UN General Assembly, 28th session (New York, 1973).

[37] Proposal by Canada, Fiji, Ghana Guyana, Iceland, India, Iran, New Zealand, Philippines and Spain. UN Doc. A/CONF.62/C.3/L.6 (31 July 1974). Official Records of the Third UNCLOS (New York, 1975), vol. III, at 284-285.

[38] Part XII LOSC.

[39] Arts. 246 (2) and 252 LOSC.

and the Spanish delegations held consultations with the Conference, but the only amendment accepted was the introduction of the new clause about responsibility. The Drafting Committee examined the changes proposed to article 42 as a matter of "text concordance" and accepted them, but when they were examined by the Second Committee, Argentina objected the proposal for procedural reasons. The amendments to article 221 and 233 were not accepted by the Chairman of the Third Committee, Alexander Yankov and the only change included in the Draft was the addition of the clause on responsibility. After this fiasco, Lacleta informed Malone that Spain was relieved from her commitment witn the USA and recovered her freedom of action[40].

The Spanish delegation formally submitted the amendments agreed with the American delegation to articles 42, 221 and 233, and another one not agreed about the deletion in paragraph 3 (a) of article 39 —devoted to the duties of aircraft in transit passage— of the word "normally", in order to make no exception to the obligation of aircraft to comply with safety measures[41]. President Koh urged the delegations to withdraw their amendments, but Spain only withdrew her amendments to articles 221 and 233, and maintained those referring to articles 39 and 42. Put to the vote, the amendment to article 39 was rejected by 55 votes to 21, with 60 abstentions and the amendment to article 42 carried by 60 votes to 29, with 51 abstentions, although it could not be embodied into the Convention because it had not received the two thirds majority required. The Convention was approved by 130 votes to 4 —Israel, Turkey, United States and Venezuela—, and 17 abstentions, including that of Spain. Ambassador Lacleta explained that, since the amendments proposed by Spain had not been accepted., "it would have been surprising if his delegation had voted against the Draft", but "his Government, aware of the political and historical importance of the final moments of the Conference, had simply abstained, because it considered that its position on a question of great importance, which affected it very directly, had not been properly reflected in the text of Part III of the Draft Convention and, more particularly, in articles 38, 39, 41 and 42". His Government considered that these provisions "did not constitute a codification or expression of customary law".[42]

Prior to the signature of the Final Act of the Conference there was a general debate during which Ambassador Lacleta said that very few of the participating States felt fully satisfied with the LOSC. Many of its provisions were satisfactory, some of them —especially articles 39 and 42— were unsatisfactory and other were barely acceptable. The Convention contained provisions —as those concerning delimitation or access by third States to the resources of the EEZ of other States— which were the result of lengthy and difficult negotiations, in which the balanced texts agreed constituted a compromise. The Spanish Government supported these provisions which would protect the interests of Spain, "though they may not be the precise regulations that we desired". He said that his Government would undertake "a detailed study and an overall assessment, taking into account all the positive and negative factors", and assured that, in making this final analysis, his Government would bear in mind "the meaning of the Convention and its aspiration to be a universal code, which may be

[40] Yturriaga, *supra* n. 19, at 143.

[41] UN Doc. A/CONF.62/L.109 (13 April 1982).

[42] Statement by Ambassador José Manuel Lacleta (30 April 1982), reprinted in *UNCLOS III*. (New York, 1983), vol. XV, at 93.

 DOI: 10.17103/sybil.21.9

the basis for the peaceful and orderly use of the sea and its resources, regardless of the objections which may be raised to the text adopted on April 30th; it will also bear in mind its significance for the implementation of the principle of the common heritage of mankind which has been, beyond any doubt, accepted by my Government"[43]

(2) Signature of the LOSC

The Spanish Government examined the pros and the cons of the LOSC and, just a few days before the end of the deadline provided by the Convention, signed it because -in spite of its shortcomings- the Government considered that it was better to be a party rather than to keep outside its regulations, accepted by the majority of the international community. Spain accepted the Convention as a whole despite its reservation towards the regime of "transit passage". She was the ideal *persistent objector*, because —as accepted by the International Court of Justice— she had "sufficiently, consistently and openly" [44] opposed that regime before, during and after UNCLOS. She submitted formal and informal proposals, as well as amendments, in favour of innocent passage and against the regime of transit passage, elaborated and circulated a couple of well-founded legal memorandums on the subject, maintained its position until the end of the Conference and abstained when the Convention was adopted. Ambassador Lacleta, explained that his abstention was due to the fact that his Government considered that "its position on a question of great importance, which affected it very directly, had not been properly reflected in the text of Part III", and stated that "the text approved by the Conference did not constitute a codification or expression of customary law"[45]. In professor Pastor's opinion, in order that a regulation may be considered as custom, "a very broad and representative participation in a Convention is not sufficient; it requires for the states more particularly concerned to be among the participating states, and there is no doubt that states bordering straits enter within this category". Even if the new regime was accepted as general customary law, "such norm would not be binding on those states which opposed it during the period of its formation[46] Spain, however, spoilt her position as a *persistent objector* by signing the LOSC on 4 December 1984.

(3) Declaratory statements formulated by Spain

When Spain signed the Convention, she formulated interpretative declarations with respect to nine of its provisions. Most of them were voluntarist and ineffective, and were made mainly with a purpose of self-justification *vis-à-vis* the Spanish public opinion. These declarations were restated when Spain ratified the Convention on February 7th 1997.

The first statement reproduced the declaration made by Spain about Gibraltar in 1971 when she acceded to the 1958 Geneva Conventions on the Law of the Sea. It said that the signing of the LOSC

[43] Statement by Ambassador José Manuel Lacleta (8 December 1982), reprinted in *UNCLOS III* (New York, 1983), at 90-91. See Yturriaga, *supra* n. 19, at 149-150.

[44] See *Fisheries* case, in *Pleadings, Oral Arguments, Documents, International, ICJ Reports 1971*, vol. I, at 382.

[45] Yturriaga, *supra* n. 19, at 329

[46] J.A. Pastor, 'La Convención de 1982 sobre el Derecho del Mar: los intereses de España', in *Cursos de Derecho Internacional* (Vitoria-Gasteiz, 1983), at 81.

 DOI: 10.17103/sybil.21.9

could not be interpreted as "recognition of any rights or situations relating to the maritime spaces of Gibraltar which are not included in article X of the Treaty of Utrecht, of 13 July 1713, between the Spanish and British Crowns". It added that Resolution III of UNCLOS —about the extension of the rights of the Convention to the population of dependent territories— was not applicable "in the case of the colony of Gibraltar, which is undergoing a decolonization process in which only the relevant resolutions adopted by the United Nations General Assembly apply"[47].

The majority of the paragraphs of the Declaration refers to the provisions concerning strait, as the assertion that "the regime established in Part III of the Convention is compatible with the right of a coastal State to issue and apply its own regulations in the air space of the straits used for international navigation, so long as it does not impede the transit passage of aircraft". With regard to article 39 (3), the Spanish Government took the word "normally" as meaning "except in cases of 'force majeure' or distress". The Government considered that article 42 (1) did not "prevent it from issuing, in accordance with international law, laws and regulations giving effect to generally accepted international regulations". It interpreted article 221 "as not depriving the coastal States of straits used for international navigation of its powers recognized by international law to intervene in the case of casualties referred to in this article", and considered that article 233 "must be interpreted, in any case, in conjunction with the provisions of article 34"[48].

Concerning fishing, the Spanish Government interpreted articles 69 and 70 of the Convention —dealing with the rights of land-locked and geographically disadvantaged states— as meaning that the access to fishing in the EEZ of third states by the fleets of these states was "dependent upon the prior granting of access by the coastal states in question to the nationals of other states who had habitually fished in the economic zone concerned". It declared that, without prejudice to the provisions of article 297 regarding the settlement of disputes, articles 56, 61 and 62 of the Convention precluded "considering as discretionary the powers of the coastal state to determine the allowable catch, its harvesting capacity and the allocation of surpluses to other states"[49]. These declarations cannot be more voluntarist, since it is evident that the coastal state have full latitude to fix the allowable catch and its fishing capacity, and distribute the surplus as it considers it convenient for its interests.

(D) CONCLUSIONS

(1) Straits used for international navigation

The Spanish delegation and its allied prevented the establishment of a regime of free transit similar to the one existing in the high seas and modulated the transit passage regime adopted"[50]. Navigation and overflight in straits used for international navigation are regulated by the Spanish Law on Maritime

[47] Paragraph 1 of Spain's Declaration of 4 December 1984, available at DOALOS website here.

[48] Paragraphs 2, 3, 4, 6 and 7 of Spain's Declaration.

[49] Paragraphs 5 and 8 of Spain's Declaration.

[50] J.A. de Yturriaga, 'Contribución de España a la elaboración del concepto de Zona Económica Exclusiva', in *Obra Homenaje al Profesor Luis Ignacio Sánchez Rodríguez* (Universidad Complutense. Madrid, 2013), at 308.

Navigation (*Ley de Navegacion Marítima*) of 2014[51] in a very unsatisfactory way. The Law does not mention the regime of "transit passage" through these straits, but establishes that "the navigation through the strait of Gibraltar will be regulated in accordance with the provisions of Part III of the 1982 UN Convention on the Law of the Sea"[52], and includes a final clause stating that nothing in the Law could be interpreted as "recognition of any rights or situations relating to the maritime spaces of Gibraltar which are not included in article 10 of the Treaty of Utrecht of 13 July 1713 between the Spanish and British Crowns"[53]. The Law states that navigation through the Spanish maritime spaces should follow the provisions of the LOSC, and contains an article regarding "overflight of foreign aircraft", which establishes that the "innocent passage of foreign aircraft over the air space above the maritime internal waters or the territorial sea may be authorised by a special permit"[54]. This is an improper formulation because the International Law of the Air does not contemplate the notion of innocent passage of aircraft and provides that the overflight of state aircraft over the territory of a state —including its internal waters and territorial sea— requires the prior authorization of that state. The LOSC has changed air regulations with the implicit establishment of a new regime of "transit passage" over straits used for international navigation by state aircraft. It may be interpreted that the reference to the Convention in article 19 of the Law also covers overflight, although the provision only mentions "maritime navigation".

(2) Delimitation

The "equidistant group" led by Spain prevented the victory of the criterion of "equitable principles" for the delimitation of the EEZ and the continental shelf, and succeeded in including in the Convention the criterion of "agreement on the basis of international law". The only concession granted to the "equitable group" was the assertion that the agreement should aim "to achieve an equitable solution"[55]. The LOSC did not solve the problem of delimitation since it forwarded its solution to the eventual agreement to be reached by the states concerned "on the basis of international law" and did not precise which was the solution offered by international law. As in the episode of the fight between Don Quixote and el Vizcaino, the Convention has left "las espadas en alto".

Reynaldo Galindo-Pohl —who was the author of the ISNT – Part II— stated that the delimitation of the EEZ and the continental shelf was complex and that many questions remained unanswered or were in a process of change. The legal unity between the economic zone and the infrajacent seabed within 200 miles loomed over such questions. The aftermath of these question and the methods of dealing with them "are still in process of elaboration, but the basis have been identified by, and defined in, the judgements of the International Court of Justice and the awards of the Arbitration

[51] Law 14/2014, 24 May 2014, on Maritime Navigation (BOE No. 180, of 25 July 2014), en English version available here.
[52] Art. 37 Law 14/2014.
[53] Final clause No. 7 Law 14/2014.
[54] Art. 47 Law 14/2014.
[55] Art. 74 (1) and 83 (1) LOSC.

Tribunals"[56]. The ICJ has passed various judgements in matters of delimitation, in which the criterion of "equidistance" has been eroded and that of "equitable principles" further developed[57].

Spain has concluded the 1974 Conventions of delimitation of the continental shelf with Italy in the Mediterranean Sea and with France in the Atlantic Ocean, and the 1976 Convention of delimitation of the continental shelf with Portugal in the Atlantic Ocean, although it has not been ratified yet. The delimitation of the EEZ of Spain with France, with Portugal between the Canary Islands and Madeira, and with Morocco is still pending. The delimitation between Spain and Gibraltar is another question, since the Spanish Government maintains that Gibraltar has no territorial waters and, accordingly, there is no need for delimitation[58].

(3) Exclusive Economic Zone

Spain accepted as a *fait accompli* the eventual acceptance by UNCLOS of a 200-mile EEZ and tried to minimize its aftermaths by getting some kind of recognition of the rights and interests of the states whose nationals had habitually fished in the areas which would fall under the jurisdiction of coastal states, and by reducing the preferential rights of land-locked and geographically disadvantaged states. In 1978, the Government of Spain established an Economic Zone in its Atlantic coasts and left open the possibility of its extension to the Mediterranean shore. Although the Law reserved the exercise of fishing in the area to Spaniards, it allowed the access to the living resources of the EEZ to "the nationals of those countries whose fishing vessels had fished in a habitual manner"[59]. The Spanish delegation succeeded in including in the LOSC a reference to "the need to minimize economic dislocation in states whose nationals have habitually fished in the zone",[60] in limiting the access of developed land-locked and geographically disadvantaged states to the EEZ of developed coastal states[61], in prohibiting these states to transfer their rights to third states, and in adopting a very restrictive definition of "geographically disadvantaged states"[62]. In 2013, the Spanish Government established an EEZ in the Mediterranean Sea[63].

(4) Islands and archipelagos

Contrary to the delegations which defended the "plurality of regimes" for the islands in accordance with a series of circumstances —geographical location, size or colonial status— and in conformity with phantasmagorical "equitable principles", Spain and her allies were successful in keeping the

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56 R. Galindo-Pohl, 'Desarrollo de la delimitación de espacios oceánicos', *Anuario Hispano-Luso-Americano de Derecho Internacional* (1993), at 227.

57 Yturriaga, *supra* n. 11, at 144.

58 P.A. Fernández, 'The Dry-Shore Doctrine' and A. Mangas, "Gibraltar: Adjacent Waters to the Territory Yielded by Spain", in P.A., Fernández (Ed.), *New Approaches to the Law of the Sea: In Honour of Ambassador José Antonio de Yturriaga* (Nova Science Publishers. New York, 2017), at 19-30 and 31-46, respectively.

59 Art. 3(1) of the Law 15/1978, 20 February 1978, on the Economic Zone (BOE No. 46, 23 February 1978).

60 Art. 62(3), 69(4) and 70(5) LOSC.

61 Art. 72 LOSC.

62 Art. 70(2) LOSC.

63 Royal Decree 236/2013, 5 April 2013, establishing the Spanish Exclusive Economic Zone in the North-West Mediterranean (BOE No. 92, 17 April 2013).

"unity of regime" for the islands, and the LOSC provided that any island —with the exception of rocks which could not sustain human habitation or economic life on their own— was entitled to have territorial sea, contiguous zone, EEZ and continental shelf. They rejected the arguments of some States which considered the islands as "special circumstances" for the purpose of delimitation between States[64] . The Spanish-Portuguese negotiations for the delimitation between the Canary Islands and Madeira failed because Portugal claimed an EEZ for the rock of Salvages. Spain has also had problems with the delimitation between the Canary Islands and Morocco, because the Moroccan Government has argued that islands did not have the same rights to maritime spaces as the continental mass.

The LOSC has consecrated the concept of archipelagic state, but —against any logic— refused to apply it to the archipelagos of states, despite the well-founded argument of Spain that they were integral parts of those states. During the adoption of the Spanish Law about the Economic Zone, the Parliament accepted an amendment proposed by a Canary Islands deputy, against the opinion of the Government. Accordingly, the Law prescribes that, in the case of archipelagos, the outer limit of the EEZ will be measured from the straight baselines joining the outer points of the islands and islets which conform the archipelago, in such way that the resulting perimeter followed the general configuration of the archipelago. In the case of its delimitation, the median or equidistant line will be calculated from the archipelagic perimeter[65]. The Spanish Government has not adopted regulations to develop these provisions despite the pressure exercised by the Government of the Canary Islands.

(5) Preservation of the Marine Environment and Marine Scientific Research

The Spanish delegation was coherent with its acceptance of the EEZ concept and tried to apply it, not only to the exploitation of resources, but also in the fields of preservation of the marine environment and of marine scientific research. It became a "friend of the chair" held by José Luis Vallarta (Mexico) —who presided over the Working Group on Marine Pollution— and backed him in his differences of views with the President of the Third Committee, Alexander Yankov. In the middle of the road between the delegations that backed the predominance of the flag State and those that defended a radical zonal approach, Spain joined the members of the white Commonwealth and some Latino-American and European countries to support a moderate zonal approach, position which was eventually embodied in the LOSC. Spain has not adopted an "*ad hoc*" law on the preservation of the marine environment and its regulation is dispersed in various norms, especially the 1988 Law of Coasts[66] and the 1992 Law concerning State Ports and the Merchant Marine[67].

With regard to marine scientific research, the Spanish delegation placed itself in between those which supported a radical zonal approach and those in favour of absolute freedom of research, and adopted a moderate zonal approach, which was eventually included in the LOSC. In 1981, even before the adoption of the Convention, the Spanish Government enacted a Decree about the applicable

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64 J.A. de Yturriaga, 'Orígenes, desarrollo y resultados de la Conferencia de las Naciones Unidas sobre el Derecho del Mar', *Cuadernos de la Escuela Diplomática* (Madrid, 2007), at 29.

65 Art. 1(1) and 2(2) of the Law 15/1978, *supra* n. 59.

66 Law 22/1988, 22 July 1988, on Coasts (BOE No. 181, 29 July 1988).

67 Law 27/1992, of 24 November, on State Ports and Merchant Marine (BOE No. 283, 25 November 1992).

 DOI: 10.17103/sybil.21.9

norms to the conduct of scientific research in the maritime areas under Spanish jurisdiction, which reproduced the provisions contained in the draft-Convention[68].

I honestly think that Spain can be proud of the role played by her delegation at UNCLOS. The Spanish Government carefully prepared the Conference and its instructions were duly implemented by its delegation, despite the serious disadvantages that it faced. Had not been for its active, intense and effective performance, the LOSC would have probably consecrated the unfettered freedom of navigation and overflight in straits used for international navigation, the delimitation of the EEZ and the continental shelves between States in accordance with "equitable principles", and the preferential right of access to the resources in the EEZ of coastal states by geographically disadvantaged states —a broad and vague concept embracing developed fishing states—, to the detriment of long distant fishing states whose nationals had habitually fished in the areas formerly considered as high seas and nowadays under the jurisdiction of coastal states.

[68] Royal Decree 799/1981, of 27 February, concerning the Rules Applicable to Marine Scientific Research Activities in Areas under Spanish Jurisdiction (BOE No. 110, 8 May 1981).

 DOI: 10.17103/sybil.21.9

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

The ratification by Spain

Carlos JIMÉNEZ PIERNAS*

(A) GENERAL CONSIDERATIONS

The preparatory work for the Third UN Conference on the Law of the Sea (hereinafter, UNCLOS) began in 1969. The first session was held in New York, in 1973, and the work was concluded in 1982, after 11 sessions, 14 years after the Conference's inception, making it the longest UN-sponsored codification conference to date. On 30 April 1982, the Conference adopted the UN Convention on the Law of the Sea (hereinafter, LOSC) by a majority of 130 votes in favour, 4 against (the United States, Israel, Turkey and Venezuela) and 17 abstentions (primarily European states, including Spain). The LOSC was signed by 117 delegations on 10 December 1982 at Montego Bay (Jamaica) and opened to signature until 9 December 1984. It entered into force on 16 November 1994, 12 months after the date on which the government of Guyana deposited the sixtieth ratification instrument.[1]

The LOSC was adopted by vote rather than consensus due to the fundamental disagreement between the maritime powers and the Group of 77 over Part XI of the Convention, concerning the institutions and regime for the exploitation of the resources of the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (hereinafter, the Area), as a result of which the United States, the United Kingdom and Germany declined to sign it. A new Agreement relating to the implementation of Part XI of the LOSC, adopted in New York in 1994 and in force since 28 July 1996 (hereinafter, Agreement relating to Part XI or the 1994 Agreement),[2] settled the discrepancies in this regard, making it easier for the maritime powers to join the LOSC and thus enabling both the Convention's universality and the operation of the system for the exploration and exploitation of the Area.

Enforcement of the LOSC was entrusted, amongst other bodies, to a new permanent and

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1 Art. 308(1), UN Convention on the Law of the Sea, 1833 *UNTS* 3 (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter). Today, 165 states and the European Union are parties to the LOSC. The most important official documentation on the law of the sea can be easily consulted at www.un.org/Depts/los/index.htm (Oceans & Law of the Sea – United Nations).

2 A/RES/48/263, 28 July 1994; in force for Spain since 14 February 1997 (BOE No. 38, 13 February 1997). Today, 147 states and the European Union are parties to this Agreement. See Art. 6(1), in relation to Arts. 4 and 5, of the Agreement relating to Part XI, which established its entry into force 30 days after the date on which 40 states had ratified it, albeit subject to certain conditions that are not material here.

 DOI: 10.17103/sybil.21.10

specialized court, the International Tribunal for the Law of the Sea (hereinafter, ITLOS),[3] which was officially inaugurated on 18 October 1996 in the German city of Hamburg, where it has its seat. The court has jurisdiction over all the disputes and applications submitted to it regarding the interpretation or application of the LOSC.[4]

Spain signed the LOSC on 4 December 1984, but it made certain interpretative declarations, endeavouring not to violate the general prohibition on making reservations and exceptions other than those expressly permitted laid down in Article 309 of the Convention. These declarations sought to safeguard, *inter alia*, its position against the regime for transit passage through straits used for international navigation established in Part III LOSC, as well as to prevent the discretionary use, to the detriment of third parties, of the powers attributed to coastal states in the Economic Exclusive Zone (hereinafter, EEZ).[5] Indeed, the new legal regime for straits used for international navigation (hereinafter, international straits) provided for under the LOSC seemed to be the main obstacle to its ratification by Spain.[6] However, the adoption of the aforementioned Agreement relating to Part XI apparently encouraged many states, including Spain, to ultimately ratify the LOSC. Spain, moreover, took advantage of the ratification to reduce the number of and simplify the interpretative declarations it had made upon signing.[7] Once both the LOSC and the 1994 Agreement came into force for Spain,[8] on 14 February 1997, Article 311(1) LOSC provided that the Convention would prevail, in relations between states parties, over the four Geneva Conventions on the Law of the Sea of 1958, thereby limiting the application of those Conventions to Spain's relations with states that are not parties to the LOSC but are to the Geneva Conventions.[9]

(B) AN UNSTABLE AND CHANGING CODIFICATION PROCESS

Therefore, the codification process begun in 1969 produced not one, but two treaties, which, as we

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3 See its Statute in Annex VI LOSC, in relation to Arts. 287 *et seq.* of the Convention.

4 See the Agreement on the privileges and immunities of the International Tribunal for the Law of the Sea, adopted 23 March 1997 (2167 *UNTS* 271), entered into force 30 December 2001 in general and for Spain in accordance with the provisions of Art. 30 thereof (*BOE* No. 15, 17 January 2002; corrigenda in BOE No. 29, 2 February 2002). See also the Protocol on the privileges and immunities of the International Seabed Authority, adopted 27 March 1998 (2214 *UNTS* 133), entered into force 31 May 2003 in general and for Spain (*BOE* No. 138, 10 June 2003). Both treaties were submitted for parliamentary approval at the time. For the 1997 Agreement, see *DSS-C*, VII Leg., No. 59 (favourable opinion, without debate or observations, by the Foreign Affairs Committee of the Senate at its session of 7 November 2000); and *BOCG-Senado.IV*, VII Leg., No. 6(b) (approval by the full Senate at its session of 16 November 2000).

5 See *infra* section (C).

6 R. Riquelme Cortado, *España ante la Convención sobre el Derecho del Mar. Las declaraciones formuladas* (Universidad de Murcia, Murcia, 1990), at 85-90.

7 *Multilateral Treaties Deposited with the Secretary-General*, *supra* n. 5, at 228-229.

8 Instrument of Ratification of the United Nations Convention on the Law of the Sea, done in Montego Bay on December 10, 1982 (BOE No. 39, 14 February 1997, corrigenda in BOE No. 136, 7 June 1997). UN, *Multilateral Treaties Deposited with the Secretary-General. Status as at 31 December 2000*, vol. II (New York, 2001), at 228.

9 Spain acceded to all four Conventions (the 1958 Convention on the Territorial Sea and the Contiguous Zone, CTS; the 1958 Convention on the High Seas, CHS; the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, CFCLR; and the 1958 Convention on the Continental Shelf, CCS) on 25 February 1971, and they entered into force for it on 27 March 1971: see *BOE* No. 307, 24 December 1971, for the first; No. 309, 27 December 1971, for the second and third; and No. 308, 25 December 1971, for the fourth).

will see below, were shortly joined by a third. It furthermore spanned more than three decades. Its aim of fully regulating maritime zones made it a formally complex process, primarily resulting in three conventional instruments, one of which is quite long and has a format more typical of a standard domestic code. This is not to say that it has solved all the problems posed by the contemporary regulation of maritime zones, as in the case of the vague, programmatic nature of the rules on conserving the marine environment.[10] It also left other matters open, pending subsequent agreements, such as that of the cooperation between states on the conservation and management of straddling and highly migratory species in the high seas contiguous to the EEZ;[11] hence, the third conventional instrument came into being. Indeed, a United Nations Conference, convened for that purpose, adopted by consensus on 4 August 1995, in New York, the UN Agreement for the implementation of the provisions of the LOSC relating to the conservation and management of straddling fish stocks and highly migratory fish stocks (hereinafter, the Fish Stocks Agreement or 1995 Agreement). Opened for signature on 4 December 1995, it entered into force on 11 December 2001 and today has 84 states parties, including Spain,[12] in addition to the European Union (hereinafter, EU).[13]

Thus, the entry into force of the LOSC in 1994 and the Agreement relating to Part XI in 1996 was supplemented by the entry into force in 2001 of the Fish Stocks Agreement, giving rise to a changing and unstable regulatory panorama from the adoption of the LOSC in 1982 until the turn of the 21st century. Consequently, if we go back to its inception, in 1969, the entire codification process in question, to which considerable efforts, resources and time have been devoted, has been delayed in achieving the usual objectives, i.e. encouraging the establishment and implementation of the codified norms and endowing practice in this area with the desirable legal certainty.

As a result of this conventional imbroglio, the states parties, including Spain, have had no choice but to look to the process of interaction between the rules of the LOSC and customary practice to determine the actual normative value of its provisions. In fact, the LOSC has been being used as a legal framework for domestic law on the matter, and its content is reflected in state practice. This is true to such an extent that institutions such as the EEZ have been part of general international law for many years now, since even before the LOSC came into force, although not necessarily in

[10] LOSC, Part XII, Arts. 192 et seq.

[11] LOSC, Arts. 63-64 and 116-119. Straddling fish stocks are found within the EEZ of two or more coastal states or both within the EEZ and in an area beyond and adjacent to it (Art. 63). Highly migratory fish stocks can be fished both within and beyond the EEZ (Art. 64).

[12] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001), 2167 UNTS 3. In force for Spain since 18 January 2004: see Instrument of Ratification of the Agreement on the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 concerning the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, done in New York on 4 August 1995 (BOE No. 175, of 21 July 2004). In its ratification instrument, Spain made a total of nine interpretative declarations. On this question, see the contribution in this volume by Borrás Pentinat on "Related agreements and Spain: Fish stocks and marine biological diversity" for additional information on both the circumstances and the content of the Agreement and on Spain's position on it.

[13] The European Union signed the 1995 Agreement on 27 June 1996 and Spain reluctantly followed suit some months later, on 3 December 1996. They ratified the Agreement on the same date, 19 December 2003, two years after its entry into force: see Council Decision 98/414 of 8 June 1998, OJ 1998 L 189/14.

 DOI: 10.17103/sybil.21.10

accordance with the terms of the treaty, as domestic law tends to better reflect the rights granted to coastal states than their obligations towards other states.[14]

In short, the LOSC contains provisions that are merely declarative of customary law, such as virtually all those concerning the regime for internal waters, the territorial sea, the contiguous zone and the high seas,[15] which respect and follow significant portions of the law codified in 1958. Other provisions might be better described as crystallizing an earlier customary practice, as in the case of archipelagic states.[16] Finally, still other provisions encourage or may encourage the formation of customary law, provided they promote a practice consistent with their content concerning conduct beyond the scope of the convention. This has been the case of its rules on the delimitation of maritime zones, imbued with very weak normative content, which have been the subject of extensive attention and jurisprudential development.[17] All of this has greatly affected Spanish practice on the matter as a coastal state that moreover borders a major strait (Gibraltar), is a mixed state (continental with state archipelagos) and has a large fleet and fishing industry.

However, the current status of the law of the sea has changed considerably since the 1960s. Then, there was a lack of solutions for important issues such as the disagreement over the extension of the territorial sea, the newfound independence of a large number of developing countries, scientific and technological advances, and the logical and growing demands of socioeconomic development within the system. The need to address these issues immediately triggered the start of a broad process of review of the conventional law agreed in the four Geneva Conventions of 1958, only recently concluded. This was carried out through unilateral or multilateral state practice within the framework of various regional subsystems, especially the inter-American one. This process resulted in a genuine confrontation of conflicting interests and opposing practices, whose solution was not to be found in international jurisdiction, i.e. judicial enforcement of the law in force,[18] but rather required a return to the path of cooperation and agreement through the opening of a new codification process, as indeed occurred in 1969.

Strictly speaking, the turbulence surrounding the LOSC began with the sudden last-minute disagreement of the United States, immediately seconded by other maritime powers and by the then European Community.[19] The disagreement regarded the regime of the Area, even though they had

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[14] R. Wolfrum, "The Emerging Customary Law of Marine Zones: State Practice and the Convention on the Law of the Sea", 18 *NYIL* (1987), 121-144, at 143-144.

[15] LOSC, Part II, Arts. 2-33, and Part VII, Arts. 86-115.

[16] LOSC, Part IV, Arts. 46-54.

[17] LOSC, Arts. 74 (EEZ) and 83 (CS). In this regard, see C. Jiménez Piernas, "La jurisprudencia sobre delimitación de los espacios marinos: una prueba de la unidad del ordenamiento internacional", in E.M. Vázquez Gómez, M.D. Adam Muñoz and N. Cornago Prieto (eds.), *El arreglo pacífico de controversias internacionales* (Tirant, Valencia, 2013), 241-273, at 243.

[18] Proof of this can be found in the judgments of the International Court of Justice of 25 July 1974 in the *Fisheries Jurisdiction* cases, in which the Court was dangerously divided almost in half, with each side representing conflicting state practices: *ICJ Reports 1974*, 23 et seq., 46 et seq.

[19] This was expressly stated by the European Community upon signing (*Multilateral Treaties Deposited with the Secretary-General*, *supra* n. 5, at 216): "The Community, however, considers that significant provisions of Part XI of the Convention are not conducive to the development of the activities to which that Part refers in view of the fact that several Member States of the Community have already expressed their position that this Part contains considerable deficiencies and

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participated in the consensus that made it possible. The United States subsequently voted against the LOSC and did not sign it. The very significant legal and political concessions made by developing states in the negotiation and adoption of the Agreement relating to Part XI derived from the need to include the most developed states, i.e. those that possessed the necessary technology and resources to actually make the system work, coupled with the aim of encouraging universal participation in the LOSC.[20]

However, it is not merely a question of these concessions, but also of the licences the Agreement took with the law of treaties. Indeed, to name only the most important irregularities, the LOSC was amended before its entry into force and without following the procedure provided for to this end. The Agreement was negotiated by the Preparatory Commission for the International Seabed Authority, which was enlarged for this purpose to include Germany, the United States and the United Kingdom, which could not be members of it as they had not signed the LOSC. Moreover, despite being presented as interpretative, the Agreement in fact substantially modified Part XI and Annexes III and IV of the LOSC. In short, the 1994 Agreement was opened to the participation of the same subjects as the LOSC (Article 8); the consent to be bound by either was inseparable from the consent to be bound by the other (Article 4(2)); and the consent to be bound by the LOSC was assumed also to apply to the Agreement (Article 4(1)), to the extent that those states parties to the LOSC that signed the Agreement were bound by it without further ado, unless otherwise expressly stated within one year of the date of its adoption (Article 5). This explains the climate of instability generated around the LOSC and the problems posed by the Fish Stocks Agreement, undertaken with the same objective, i.e. the immediate review of the consensus reached at the UNCLOS on important aspects of the law of the sea, although in that case by more orthodox formal means than those employed with the 1994 Agreement.

In the context of this analysis of both the ratification by Spain of these treaties and subsequent Spanish practice, let us now consider the consequences for Spain of the climate of regulatory instability created around the LOSC.

(C) SPAIN'S SIGNATURE, RATIFICATION AND INTERPRETATIVE DECLARATIONS

The present contribution will not examine Spanish practice prior to the country's ratification of the LOSC, as it has been sufficiently studied elsewhere.[21] Suffice it to say that this practice, especially at

flaws which require rectification. The Community recognises the importance of the work which remains to be done and hopes that conditions for the implementation of a sea bed mining regime, which are generally acceptable and which are therefore likely to promote activities in the international sea bed area, can be agreed. The Community, within the limits of its competence, will play a full part in contributing to the task of finding satisfactory solutions."

[20] J.A de Yturriaga Barberán, *Ámbitos de jurisdicción en la Convención de las Naciones Unidas sobre el Derecho del Mar. Una perspectiva española* (Ministerio de Asuntos Exteriores, Madrid, 1996), at 524-526. Of particular interest is the control regime imposed by the industrialized states on the operation of the International Seabed Authority, deemed excessive and discriminatory for the developing states.

[21] To cite but a few, and at the risk of unfairly neglecting a relevant contribution from prior to 1997, attention should be drawn to the monographs and articles on specific areas of Spanish practice by P. Andrés Sáenz de Santa María, J. Juste Ruiz, E. Orihuela Calatayud, J.A. Pastor Ridruejo, R. Riquelme Cortado, L.I. Sánchez Rodríguez and J.A. de Yturriaga

the legislative and jurisprudential levels, was largely consistent with the law of the sea then in force, albeit with certain technical legislative shortcomings that could lead to confusion and errors in Spanish case law, which made an admirable effort to adapt to the requirements of international law on this matter, coinciding with the establishment and consolidation of a democratic regime in Spain.[22] This was the state of affairs in the mid-1990s, just prior to Spain's ratification of the LOSC in 1997, which was a landmark in Spanish practice. This led to a renewed attention to the country's interests and position on the matter in the Spanish scholarly literature, especially with regard to fisheries, environmental conservation and the delimitation of maritime zones.[23]

Spain had good reason to abstain, as it indeed did, in the vote to adopt the LOSC. In light of subsequent events, the package deal seriously harmed Spanish interests and did not truly close the negotiation within the UNCLOS. Spanish strategic priorities were threatened by various aspects of the new legal regime ultimately agreed, including: the right of transit passage through international straits, which had not previously been recognized in international law; the regime envisaged for the new EEZ, which augured a drastic reduction in the fishing grounds available to the country's fishing fleet, at the time one of the world's largest; the exclusion of state archipelagos from the regime established for archipelagic states; the weak regulation of the delimitation of maritime zones, which reflected the rise of the principle of equity and left all pending delimitations with neighbouring states wide open; and the legal regime of the Area, contrary to the interests of average industrialized states.[24] Over the course of the negotiations, the mechanism of consensus and the package deal arbitrated within the UNCLOS terminally sandwiched Spain's interests between those of the maritime powers, rich states and developing states.

Even so, at the last minute, Spain signed the LOSC. There are no objective reasons for that signature, other than the usual commonplaces, *inter alia*: as a gesture towards developing countries; to align itself with the member states of the then European Community, which Spain hoped to join; to align itself with the strategy of the North Atlantic Treaty Organization (NATO), of which it was already a member;[25] or as the lesser evil of the certainty of a universally agreed legal regime. The

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Barberán, the majority published in Spanish journals (*REDI*, the former *RIE*, *Anuario IHLADI*, *Anuario de Derecho Internacional* and *Cursos de Derecho Internacional de Vitoria-Gasteiz*). See the Spanish bibliography in this volume on the Law of the sea selected by Abegón, Maestro and Vázquez.

[22] See the summary of Spanish legislative practice and domestic case law up to that date, at least with regard to the legal regime for the territorial sea and the EEZ (right of innocent passage, right of hot pursuit, right to visit, jurisdiction of the coastal state over the protection and preservation of the marine environment in the EEZ, prohibition on the use of force by the coastal state to exercise its rights in the EEZ) in C. Jiménez Piernas, "Competencia territorial del Estado y problemas de aplicación de Derecho del Mar: práctica española", 12 *Anuario IHLADI* (1995), 233-278, at 257-278.

[23] Again to cite only a few, attention should be drawn to the line of work opened by the contributions of the teams of Professors R. Casado Raigón (at the University of Cordoba) and J.M. Sobrino Heredia (at the University of La Coruña), especially, but not exclusively, regarding the legal regime for fishing, as well as the contributions of the team of professors from the University of Alicante, led by the author of the present contribution, on the protection and delimitation of maritime areas. Mention should likewise be made of the continuity of the lines of research of the professors cited *supra* n. 21.

[24] Amongst others, see J.A. Pastor Ridruejo, "La Convención de 1982 sobre el Derecho del Mar y los intereses de España", *Cursos de Derecho Internacional de Vitoria-Gasteiz* (1983), 69-103, at 103; J.A. de Yturriaga Barberán, *Ámbitos de soberanía en la Convención de las Naciones Unidas sobre el Derecho del Mar. Una perspectiva española* (Ministerio de Asuntos Exteriores, Madrid, 1993), at 317 *in fine*-321 and 413-414; and, again, Yturriaga Barberán, *supra* n. 20, at 184-186.

[25] The North Atlantic Treaty, signed in Washington on 4 April 1949, which entered into force on 24 August 1949 in

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considerable challenges the Spanish delegation faced in its highly professional and rigorous defence of Spain's position are thus clear;[26] hence, the nine interpretative declarations submitted along with Spain's signature, which sought to mildly mitigate the damage caused by the conventional regulation. To this end, five of the declarations referred to international straits (the 2nd, 3rd, 4th, 6th and 7th), two to the EEZ (the 5th and 8th), and one (the 9th) to the Area, whilst an additional initial declaration recalled Spain's position on the status of the waters of the Rock of Gibraltar.[27] Nevertheless, signing the LOSC seriously crippled Spain's legal position as a persistent objector to the new regime proposed for international straits, archipelagic states and the Area, as, according to the governing principles of the law of treaties, including that of good faith, from the moment of its signature, it should "refrain from acts which would defeat the object and purpose" of the LOSC, pending its foreseeable future ratification.[28]

Nor are there decisive objective reasons, exclusively within the context of the law of the sea, to explain why Spain ultimately expressed its consent to be bound by the LOSC and the Agreement relating to Part XI. This is especially true given that the new regime for international straits established under the LOSC was not customary and, therefore, Spain's ratification was not trivial. This was unlike, for example, the case of the EEZ, whose main principles (if not the nature and exact content of the powers of the coastal state) were already customary law long before Spain's ratification. Furthermore, whilst the Agreement relating to Part XI reduced Spain's economic obligations, it did not improve its position in the institutional system of the Area, although this issue was not as important as the new regime for international straits.

With regard to the revision of the interpretative declarations presented upon signature at the time of Spain's ratification, suffice it to say that those related to the regime for international straits continued to be the most important and the ones most subject to appreciable changes. Indeed, Spain withdrew two of the five declarations made upon signing with regard to the regime for these straits, to wit, the 4th and 7th, concerning the protection of the marine environment in international straits. It moreover reformulated the original 2nd declaration, eliminating the references to the regulation of air navigation in such straits and endowing it with such a broad meaning as to allow it to accommodate the content of the two withdrawn declarations.[29] In contrast, it left the other two declarations

accordance with Art. 11 thereof, entered into force for Spain on 30 May 1982 (BOE No. 129, 31 May 1982).

[26] On this question, see the contribution in this volume by de Yturriaga Barberán on "Spain at UNCLOS".

[27] Spain has formally maintained its position on the Rock on significant occasions, for instance, upon ratifying two of the 1958 Geneva Conventions on the Law of the Sea, in particular, the CTS (see *supra*, n. 9). Twenty years later, upon signing the LOSC, it made a similar interpretative declaration on the Rock. It is a recurrent safeguarding formula that Spain repeated and expanded upon ratifying the LOSC on 20 December 1996, which provides as follows: "In ratifying the Convention, Spain wishes to make it known that this act cannot be construed as recognition of any rights or status regarding the maritime space of Gibraltar that are not included in article 10 of the Treaty of Utrecht of 13 July 1713 concluded between the Crowns of Spain and Great Britain. Furthermore, Spain does not consider that Resolution III of the Third United Nations Conference on the Law of the Sea is applicable to the colony of Gibraltar, which is subject to a process of decolonization in which only relevant resolutions adopted by the United Nations General Assembly are applicable." On this question, see the contribution in this volume by del Valle Gálvez on "Maritime zones around Gibraltar".

[28] See the Preamble and Art. 18(a) of the Vienna Convention of 23 May 1969 on the Law of Treaties, entered into force in general and for Spain 27 January 1980 (BOE No. 142, 13 June 1980).

[29] The new declaration 3(a) was worded as follows: "3. Spain understands that: a) The provisions laid down in Part III

(formerly, the 3rd and 6th, now 3(b) and 3(c)) unchanged. These declarations also referred to the regime for international straits and were quite opportune to head off interpretations by parties from the user states of such straits that were clearly contrary to the legitimate interests of their coastal states, so as to prevent abuse of the right of transit passage by aircraft and safeguard the coastal state's right to intervene in case of accidents.[30] However, there was a softening of the opposition maintained against the new regime during the UNCLOS and at the signing of the LOSC, which will be examined below. The rest of Spain's interpretative declarations are, undoubtedly, minor and some (the 4th in particular) are little more than an empty gesture. These are the declarations relating to Gibraltar (the 2nd), the regime for fishing in the EEZ (the 4th) and the regime for exploiting the Area (the 5th), which were kept almost word for word. These declarations, in that order, aim to maintain the status of Gibraltar, as established under the Treaty of Utrecht, unaltered, to establish that the rights of states that have habitually fished in the EEZ shall prevail over those of developed landlocked or geographically disadvantaged states, and to preclude consideration of the exercise of the coastal state's powers to determine the allowable catch, its own harvesting capacity and the allocation of surpluses to other states to be discretionary. They are further intended to enable Spain to participate in the joint ventures referred to in Article 9(2) of Annex III for the exploitation of the resources of the Area.

Two new declarations (the 1st and 6th) were also added, which are self-explanatory. In the latter (the 6th), in accordance with Article 287 LOSC, which offers a choice of dispute settlement procedures, Spain initially chose the International Court of Justice as the means for the settlement of disputes concerning the interpretation or application of the LOSC. It subsequently presented another declaration, dated 19 July 2002 and deposited with the Secretary-General of the United Nations, in which it also accepted the jurisdiction of the ITLOS.[31] The former declaration (the 1st) merits a discussion of its own.

(D) THE POSITION OF THE EUROPEAN UNION

In its first interpretive declaration, Spain recalled that, as a member of the then European Community, "it has transferred competence over certain matters governed by the Convention to the European Community. A detailed declaration will be made in due course as to the nature and extent of the competence transferred to the European Community, in accordance with the provisions of Annex IX of the Convention". Annex IX of the LOSC, regulating participation by international organizations in the Convention, which was tailor-made to facilitate participation in the LOSC by the then

of the Convention are compatible with the right of a coastal State to dictate and apply its own regulations in straits used for international navigation, provided that this does not impede the right of transit passage." However, in reality, Spain has a very limited capacity to intervene in the prevention of pollution in the Strait of Gibraltar.

[30] The new declarations are worded as follows: "(b) In article 39, paragraph 3 (a), the word 'normally' means 'unless by *force majeure* or by distress'. (c) The provisions of article 221 shall not deprive a State bordering a strait used for international navigation of its competence under international law regarding intervention in the event of the casualties referred to in that article."

[31] BOE No. 170, 17 July 2003. The declaration provides: "Pursuant to article 287, paragraph 1, the Government of Spain declares that it chooses the International Tribunal for the Law of the Sea and the International Court of Justice as means for the settlement of disputes concerning the interpretation or application of the Convention."

European Community, provides that, upon signing and agreeing to be bound by the LOSC, both an international organization and its member states shall make a declaration specifying the matters governed by it in respect of which competence has been transferred to the organization by those member states, which the European Community and those of its member states that are parties to the LOSC did.[32] Thus, the other contracting states or parties to the LOSC were informed that none of the member states of that organization that ratified the LOSC could be bound by certain provisions thereof due to the transfer of sovereign powers to it. Moreover, the scope of this lack of competence was explained in detail as soon as the EU acceded to the LOSC.[33]

Needless to say, the broad competences, both exclusive and shared with the member states, that the then European Community had in the areas of fisheries, trade and environmental policy,[34] as well as the exercise of those competences, whether exclusively or in coordination with the member states, made it essential for this organization to effectively participate in the LOSC and in the functioning of its bodies. In particular, the deposit of the instrument of formal confirmation gave the EU's participation in the International Seabed Authority a final nature. On the other hand, as reflected in the EU's declaration in consenting to be bound, due to their very functional nature, the scope and exercise of Community competences may undergo continuous modifications, prompting the organization to amend or supplement that declaration, in accordance with the provisions of Article 5.4 of Annex IX of the LOSC.

Consequently, the European Parliament (hereinafter, EP) took the assent procedure related to the request submitted by the Council, pursuant to Article 300(2) and (3) TEC, concerning the conclusion of the LOSC and the Agreement relating to Part XI, very seriously. The President of the EP referred the proposal to the Committee on Legal Affairs and Citizens' Rights, as the committee responsible, and to four other Committees, including the Committee on Fisheries, for their opinions. The Committee on Legal Affairs examined the proposal and unanimously recommended the draft favourable decision, submitting the opinions issued by the other Committees with its report, and the proposal was ultimately approved by the EP.[35] A review of the procedure, especially the explanatory statement and also the opinion issued by the Committee on Fisheries, reveals the interest of the

[32] See *Multilateral Treaties Deposited with the Secretary-General*, *supra* n. 5, at 208 and 216-218; the European Community signed the Convention on 7 December 1984 and formally confirmed its participation in it on 1 April 1998. The documentary sources from the process followed within the EU can be found in *Bulletin of the EU*, 3/1998, point 1.3.18, and in OJ 1998 L 179/1, which contains the Council Decision of 23 March 1998 on the conclusion by the European Community of the LOSC and of the Agreement relating to Part XI thereof. See also the Declaration concerning the competence of the European Community with regard to matters governed by the LOSC in BOE No. 136, 7 June 1997.

[33] Upon depositing the instrument of formal confirmation (this is the formula used in Art. 306 LOSC and Art. 3 of Annex IX thereof), the European Community clarified the matters for which it had exclusive competence (e.g. the Common Fisheries Policy and, in particular, the conservation and management of fisheries resources both in Community waters and on the high seas) and those for which it shared competence with its member states (e.g. in matters of maritime transport, navigation safety and marine pollution), listing in an Appendix the relevant Community acts on these matters.

[34] Arts. 37, 133 and 175 of the Treaty establishing the European Community (TEC) then in force. These competences have increased (Arts. 43, 153 and 192 of the current TEU).

[35] See OJ 1997 C 325/14. The rest of the documentation cited in this paragraph can be found in European Parliament, Committee on Legal Affairs and Citizens' Rights, Recommendation on the proposal for a Council Decision concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement relating to Part XI thereof, Rapporteur Jean-Pierre Cot (Ref. PE DOC A4-0283/97).

 DOI: 10.17103/sybil.21.10

MEPs in these matters, their capacity for information and advice, their concern to ensure that the powers of the EP were respected, and, of course, their interest in protecting Community interests by taking advantage of the occasion to recommend the submission of an interpretative declaration recalling the Community position opposing the creeping jurisdiction of certain coastal states. To this end, it recalled the 1995 fishing dispute with Canada involving the seizure by Canadian patrol boats of a Community trawler (the Spanish vessel *Estai*) when it was fishing in the high seas, and, indeed, the Community's declaration takes a firm position on the matter:[36]

> "The Community also wishes to declare, in accordance with Article 310 of the Convention, its objection to any declaration or position excluding or amending the legal scope of the provisions of the [said Convention], and in particular those relating to fishing activities. The Community does not consider the Convention to recognize the rights or jurisdiction of coastal States regarding the exploitation, conservation and management of fishery resources other than sedentary species outside their exclusive economic zone."

Furthermore, as a supplement to this declaration and on the occasion of the signature by the European Community, on 27 June 1996,[37] of the Fish Stocks Agreement, it also included in the well-known declaration on its exclusive and shared competences in matters regulated by the Agreement a set of very precise interpretative declarations aimed at preserving the following principles: the prohibition of the threat or use of force, the freedom of the high seas, the jurisdiction of the flag state, and the primacy of the jurisdiction of the flag state over any other jurisdiction to ensure compliance and enforcement of conservation and management measures for these fish stocks.[38]

However, Canada's declaration seems to be a clear response to the European Community's concerns,[39] insofar as it recalls that Article 42 of the 1995 Agreement prohibits reservations and exceptions and that Article 43 likewise prohibits declarations or statements that purport to exclude or modify the legal effect of the provisions of the 1995 Agreement in terms of their application to the state or entity making them. It further states that Canada reserves the right to decide at any time when a declaration does purport to exclude or modify the legal effect of the 1995 Agreement for the purposes of not being bound by it. This underscores the degree of regulatory uncertainty that prevailed on the matter upon the entry into force, in 2001, of the Fish Stocks Agreement, the parties to which are mostly developing countries, together with Australia, Canada, Norway, the Russian Federation and the United States, in addition to the European Union and Spain.[40]

Of course, the presence of the United States amongst the states parties to the 1995 Agreement is striking. It is indicative of the hegemonic power's behavioural patterns that its government had no problem unabashedly leading the rebellion of the richest states against the LOSC, in defence of the market economy and freedom of enterprise, even as it participated in the 1995 Agreement, legally

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[36] *Multilateral Treaties Deposited with the Secretary-Genera*, *supra* n. 5, at 217.

[37] In other words, one and a half years after the signature by the Community (on 7 December 1984) of the LOSC and almost two years before the formal confirmation of that signature (1 April 1998). In any case, on dates very close to those of the dispute with Canada over the seizure of the *Estai*.

[38] *Multilateral Treaties Deposited with the Secretary-Genera*, *supra* n. 5, at 244 and 246 (Declarations 2, 3, 5, 6 and 7). Cf. Part VI (Compliance and Enforcement), Arts. 19-23, of the Fish Stocks Agreement.

[39] See again *Multilateral Treaties Deposited with the Secretary-General*, *supra* n. 5, at 245.

[40] *Ibid.*, at 244.

endorsing the attacks of states with long coastlines on the principles of freedom of the high seas and the jurisdiction of the flag state, traditionally defended by the maritime powers. On the contrary, actively or passively, the United States has participated on all fronts (that of the rich states and that of the states with long coastlines) in the process of revising the consensus reached in 1982 in the context of the UNCLOS, clearly to the detriment of the interests of Spain.

(E) SPANISH PARLIAMENTARY APPROVAL OF THE TREATIES

In light of all the above, the parliamentary approval of these international treaties in Spain, which was done by means of the emergency procedure and in the absence of any sort of parliamentary debate, is surprising. It was a Socialist administration that sent the two treaties to Parliament in November 1995. However, the process was temporarily suspended as a result of snap elections and was not resumed until 17 June 1996, by which time a new administration was in office. Because the agreements required the prior authorization of Parliament before consent to be bound by them could be granted,[41] they were referred to the Foreign Affairs Committees for an opinion and to the full Congress and Senate for approval without any particular incident. The full Senate ultimately authorized their ratification on 5 November 1996.[42]

Very few statements, generally commonplaces of little interest, were made at the Congressional Foreign Affairs Committee sessions or at the full Senate session. It was accepted at face value, and despite not being entirely true, that "Spain was not in favour of ratifying the Convention unless the regime provided for in Part XI was modified".[43] The lack of legal recognition of the status of state archipelagos was lamented in good form,[44] and the interpretative declarations by the Executive to be submitted with the ratification were accepted, naturally acknowledging that certain problems, such as the delimitation between the Canary Island archipelago and Morocco, would remain unsolved and

[41] See Art. 94(1) of the Spanish Constitution (CE) and the opinions of the Council of State No. 2.411/94, of 16 December 1994, for the Agreement relating to Part XI, and No. 2.376/95, of 26 October 1995, for the LOSC, both in this regard. Whilst the content of these opinions does not offer any technical novelties, it is worth reading at least the opinion on the LOSC, as it provides information of interest on the reports of the interested ministries used in these proceedings. We already know, as recorded in Opinion No. 2.376/95, at 20, that the "competence of the Council of State in matters of international treaties or conventions is limited, according to Article 22(1) of its Organic Law, to giving its opinion on the need for parliamentary approval prior to the granting of the state's consent, without entering into additional considerations regarding their content. However, as the bodies that have previously reported [in these proceedings] have done, in this specific case it is necessary to stress the transcendence and significance of the Convention submitted for review."

[42] For the entire legislative process, see *BOCG-Congreso*. C, VI Leg., No. 7-1 and 9-1, 17 June 1996; No. 7-2 and 9-2, 26 June 1996; and No. 7-3 and 9-3, 10 September 1996 (recommendation of an opinion by the emergency procedure and extension of the deadlines for the submission of proposals by the Congressional Executive Committee). *DSC*-C, VI Leg., No. 61 (unanimous approval of the opinion by the Congressional Foreign Affairs Committee at its session of 26 September 1996). *BOCG-Congreso*. C, VI Leg., No. 7-5 and 9-5, 14 October 1996 (approval by the full Congress of both conventions at its session of 10 October 1996). *DSS*-C, VI Leg., No. 51 (approval without discussion or observations by the Senate Foreign Affairs Committee at its session of 24 October 1996). *BOCG-Senado*. IV, VI Leg., No. 5(d) and 6(d), 12 November 1996 (approval by the full Senate of both conventions at its session of 5 November 1996).

[43] Remarks by Mr Soriano Benítez de Lugo in the Congressional Foreign Affairs Committee (session of 26 September 1996). The statement is taken verbatim from Opinion No. 2,376 of the Council of State, at 15; strictly speaking, the MPs paraphrased parts of this opinion in their remarks.

[44] Remarks by Mr Martinón Cejas in the same Committee and session.

advocating that an agreement be concluded to settle them.[45] The Spanish MPs did not seem particularly concerned with the other issues raised in the present contribution, such as the legal regime governing fishing or international straits, and thus simply endorsed the previous work of the Executive, especially with regard to the interpretative declarations, with which they expressed their agreement. As can be seen, there was very little knowledge of the matter, and it is necessary to refer to opinion No. 2.376/95 of the Council of State to get a vague idea of what that preliminary work conducted by the central government on the advisability of the ratification by Spain of the two treaties consisted of.

That opinion does evidence at least a certain degree of consideration of some of the problems this ratification posed for Spain. It proposed possible interpretative declarations on the regime for transit passage through straits,[46] raised doubts regarding the possible economic obligations that Spain might acquire in relation to joint ventures,[47] cited potential difficulties that certain provisions of the LOSC might pose to Spain's position as a coastal state of the Strait of Gibraltar and for the delimitation of its EEZ with Morocco in the Alborán Sea,[48] and recorded verbatim the declarations approved by the Inter-ministerial Committee on International Maritime Policy at its meeting of 27 September 1995.[49]

It was obvious that both the LOSC and the Agreement relating to Part XI would require parliamentary approval before Spain could grant its consent to be bound by them, because they were subject to various sections of Article 94(1) of the Spanish Constitution (CE). In addition to affecting matters reserved to the law in the Spanish legal system (Article 94(1)(e) CE) or entailing financial liabilities for the Public Treasury (Article 94(1)(d) CE), the most important factor without a doubt was the fact that the Council of State considered the LOSC to be a treaty of a political nature (Article 94(1)(a) CE).[50] It would thus have been logical and desirable for Spanish lawmakers to have taken more time and trouble in the parliamentary approval of these treaties, at least to the same extent as their counterparts in the EP, who took the legal dispute with Canada into account. Instead, Spanish lawmakers sidestepped the issue, despite the fact that Spain was the member state most affected by it.

Since this ratification process, and strictly with regard to the key concerns expressed in the country's interpretative declarations, Spanish practice has continued to develop in accordance with the same basic parameters. Without going into too much detail, as this practice is examined elsewhere in this volume, it should be noted that Spain is still beset by the same problems of pending delimitations with its neighbours, especially Portugal and Morocco.[51] These problems are related to

45 Remarks by Mr Mardones Sevilla in the same Committee and session.

46 Opinion No. 2.376/95 of the Council of State, at 11.

47 *Ibid.*, at 12.

48 *Ibid.*, at 12-13.

49 *Ibid.*, at 16-19.

50 In the words of the opinion itself, "it is appropriate to classify as such the 1982 United Nations Convention on the Law of the Sea, given its importance in the relations between the subjects of international society and the international political order, the stable and serious commitment that it implies for Spanish foreign policy in the maritime area, and its institutionalization of a new system of cooperation in the exploration and exploitation of certain marine areas" (*Ibid.*, at 23 *in fine*-24).

51 On this question, see the contribution in this volume by Gutiérrez del Castillo on "Delimited maritime zones". See further E. Orihuela Calatayud, *España y la delimitación de sus espacios marinos* (Murcia, 1989), at 172-173 and 197-204; and

the lack of recognition of the archipelagic legal status of the Canary Islands, which constrains Spain's negotiating position vis-à-vis Morocco by preventing it from drawing baselines that surround all the islands of the archipelago. The Royal Decree of 21 December 2001, granting oil prospecting permits for the marine subsoil off the coasts of the islands of Fuerteventura and Lanzarote to the company Repsol,[52] sparked an immediate note of protest from Morocco, which does not accept the equidistant line between the Canary Island and Moroccan coasts advocated by Spain as a boundary until the two states can reach a delimitation agreement, maintaining instead that the Canary Islands lie within the Moroccan continental shelf.[53] This is aside from the uncertainty regarding the future legal status of the territory of Western Sahara, under Moroccan administration, which makes any calm and measured process of delimitation of these maritime areas unviable for the time being. The LOSC is of little use in this endeavour, as it advocates agreement between the interested states as the first and main component of the delimiting rule, followed, as the second component, by the rule of equitable delimitation, which is imbued with only slight regulatory content and contains a very abstract and general obligation, always subject to subsequent detailed specification. A feasible delimitation solution for the Canary Islands thus seems unlikely at present.[54]

With regard to the new regime for international straits and its application to Gibraltar, Spain's full incorporation into NATO coupled with Spanish practice in relation to overflights of the strait by the military aircraft of other states in certain crisis situations, points to a clear change of position in this regard. The US bombing of targets in Libya in April 1984 is a distant and relevant precedent; the Spanish government neither opposed nor protested the ensuing overflights, foreshadowing an evolution in the Spanish position[55] towards acceptance of the right of transit passage provided for under the LOSC. This would explain the declarations it ultimately made upon ratification, which do not question the new right of transit passage and seem perfectly compatible with the LOSC.

With regard to the new regime for the EEZ, a tough restructuring of the fishing fleet, coupled with a determined investment and bilateral and multilateral conventional cooperation effort in the field of fisheries by the EU, saved the sector, which emerged quite lean from the crisis entailed by the establishment of the EEZ.[56] Additionally, Spanish law has respected the conduct-related content provided for under the LOSC and EU law on the matter, which has entailed the full integration of

D.H. Anderson, "Portugal-Spain", in J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (Martinus Nijhoff, Dordrecht, 1993), vol. 2, at 1791-1800. Seven volumes have been published so far.

[52] Royal Decree 1462/2001, 21 December 2001 (BOE No. 20, 23 January 2002). See M. Requena Casanova, "España concede a la empresa REPSOL YPF permisos de investigación de hidrocarburos en aguas situadas, en aplicación del método de la equidistancia, más allá del mar territorial de las Islas Canarias frente al litoral marroquí", 54 *REDI* (2002), 501-505. A map of the prospecting areas authorized by the Council of Ministers was published in the newspaper *El País*, on 30 December 2001, at 26. Repsol subsequently renounced the prospecting.

[53] *Ibid.*, at 502-503. In its note of 31 January 2002, Morocco described the Spanish initiative as a unilateral, debatable and unfriendly act.

[54] On this question, see the contribution in this volume by Orihuela Calatayud on "Pending delimitations".

[55] Which was very strict during the Third Conference: see V. Bou and R. Bermejo, "Espagne et le droit de la mer", in T. Treves (ed.), *The Law of the Sea: The European Union and its Member States* (The Hague, 1997), 449-493, at 458-461.

[56] See the works published in Vol. 1 (2000) of *Cuadernos de Derecho pesquero* for an idea of the state of the Spanish fishing sector following the entry into force of the LOSC. On this question, see the contribution in this volume by Casado Ragión on "Fisheries".

the institution of the EEZ into the Spanish legal system. To cite just a few precedents from around that time as proof of this integration, attention might be called to Royal Decree 1315/1997, 1 August 1997, establishing a Fisheries Protection Zone in the Mediterranean,[57] amended by Royal Decree 431/2000, 31 March 2000, or the sanctions regime established for both the EEZ and the aforementioned Fisheries Protection Zone under Law 3/2001, of 20 March, on State Marine Fisheries,[58] and under Royal Decree 1797/1999, 26 November 1999, on the Monitoring of Fishing Operations by Vessels of Third Countries in Waters under Spanish Sovereignty or Jurisdiction.[59] All this legislation adheres to the Community regulations and has been implemented without detriment to the specific provisions established in the fisheries agreements between the EU and third countries.[60]

Finally, mention should be made of the claims of states with long coastlines, endorsed in parallel by both the 1995 Agreement and the policy of facts on the ground pursued by Canada when it seized the Spanish trawler *Estai* on 9 March 1995.[61] Article 63(2) LOSC establishes an obligation of conduct (negotiation between the interested parties), rather than one of result, to ensure the conservation and development of straddling and highly migratory species. This prevents the coastal state from unilaterally imposing conservation measures on these species outside its EEZ by virtue of a presumed special interest in those areas of the high seas adjacent to its EEZ.

The 1995 Agreement establishes a special treatment for straddling and highly migratory species, regulates the control of fishing vessels on the high seas as an exception to the exclusive jurisdiction of the flag state, replacing it with a sort of shared jurisdiction with other states over the activity of these vessels in the high seas, and even exceptionally authorizes the use of force against them by the inspecting state (see Art. 22(1)(f) of the 1995 Agreement). This latter provision is undoubtedly the most serious violation of the LOSC, Article 301 of which safeguards the principles of international law included in the UN Charter in its application. In light of the risks of the extension of this creeping jurisdiction to the high seas adjacent to the EEZs of certain coastal states, doubts arose

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57 Royal Decree 1315/1997, 1 August 1997, establishing a Fisheries Protection Zone in the Mediterranean (BOE No. 204, 26 August 1997), amended by Royal Decree 431/2000, 31 March 2000 (BOE No. 79, 1 April 2000). Establishing a fisheries protection zone in the Mediterranean, between Cabo de Gata and the French border, to prevent the uncontrolled exploitation of fisheries resources therein by third-country factory vessels and to preserve the activity of the traditional Spanish fleet that has habitually fished in these waters. France protested the creation of this zone, but due to its disagreement with the application of the equidistance principle advocated by the Royal Decree to delimit it with those neighbouring states with which there was no delimitation agreement. Cf. D. Blázquez Peinado, "El Real Decreto 1315/1997, de 1 de agosto, por el que se establece una zona de protección pesquera en el Mar Mediterráneo", XLIX *REDI* (1997), 334-339; V.L. Gutiérrez Castillo and E.M. Vázquez Gómez, "La zone de protection de la pêche établie par l'Espagne en Méditerranée», 13 *Espaces et Ressources Marines*, (1999-2000), 207-231.

58 Law 3/2001, of 20 March, on State Marine Fisheries (BOE No. 75, 28 March 2001).

59 Royal Decree 1797/1999, 26 November 1999, on the Monitoring of Fishing Operations by Vessels of Third Countries in Waters under Spanish Sovereignty or Jurisdiction (BOE No. 301, 17 December 1999).

60 See, in summary, Arts. 2, 4 and 38-40 and Title V of Law 3/2001, in relation to Arts. 2 and 10 of Royal Decree 1797/1999. On this question, see the contribution in this volume by Pastor Palomar on the "Exclusive Economic Zone and fisheries zones".

61 As a result of this seizure, Spain filed an application against Canada before the International Court of Justice, which declared itself incompetent: *ICJ Reports 1998*, paras. 44-60, 66, 71 and 76. Cf. the various contributions devoted to this case in 51 *REDI* (1999).

regarding the advisability for the EU and its member states of signing and ratifying the 1995 Agreement. The dust from the establishment of the EEZ was only just beginning to settle when this phenomenon ushered in a new set of dangers for the stability of the LOSC and, of course, Spain's maritime interests.[62]

(F) DYSFUNCTIONS AND RISKS OF THE CODIFICATION PROCESS

The codification process culminating in the LOSC was never truly closed and has thus become a small trap for many states, including Spain, which had placed their faith in the consensus mechanism as a reasonable formula for reaching global agreements on the regime for maritime zones. The hegemonic unilateralism of the United States, seconded by the maritime powers and the most developed states, and the ambitions of states with long coastlines have altered and hurt the codification process, giving rise to a climate of political instability and legal uncertainty ill-suited and contrary to the nature of the codification of international law. Its paradigm would be the illegal seizure on the high seas of the Spanish trawler *Estai* by Canadian patrol boats in March of 1995, as the culmination of various unilateral acts of conservation and management of the exploitation of fisheries resources in the high seas adjacent to its EEZ by Canada and other states with long coastlines.

In short, first the rich states forced an in-depth revision of the institutions and regime for the exploitation of the Area agreed in 1982; immediately thereafter, states with long coastlines, likewise dissatisfied with the LOSC and encouraged by the success of the 1994 Agreement, secured an overhaul of the cooperation regime for the conservation and management of straddling and highly migratory fish stocks in the high seas contiguous to the EEZ that violated both the letter and the spirit of the consensus reached in this regard in the LOSC. The first claim, of course, was not intended for the benefit of Spain but rather of the industrialized powers, which have managed to reduce to virtually nothing the institutionalization of the principle of solidarity provided for in the regime for exploitation of the mineral resources of the Area based on the international management thereof. However, the second claim was clearly detrimental to Spain's interests. This, coupled with the damage already done by the transactions agreed in 1982, gave Spain, together with other states similarly harmed, the dubious honour of becoming, to use a culinary metaphor, the ham in the international sandwich prepared by the richest states and states with long coastlines on the one hand and developing states on the other.

However, it is also worth highlighting the evidence of dysfunction and uncertainty surrounding the codification of international law, when, until recently, this codification seemed blessed by the belief that it encouraged the consolidation of norms and granted a greater degree of legal certainty not

[62] J.A. Pastor Ridruejo, "La jurisdicción rampante de los Estados ribereños sobre la pesca en alta mar", in *Hacia un nuevo orden internacional y europeo. Estudios en homenaje al profesor Don Manuel Díez de Velasco* (Tecnos, Madrid, 1993), 521-527; J.A. de Yturriaga Barberán, "Acuerdo de 1995 sobre conservación y ordenación de las poblaciones de peces transzonales y altamente migratorios", 7 *Anuario Argentino de Derecho Internacional* (1996-1997), 15-61; and L.I. Sánchez Rodríguez, "Jurisdicciones rampantes y libertad de pesca en alta mar", in *Liber Amicorum in memoriam of Judge José María Ruda* (Dordrecht, 2000), 139-155.

only to the content of practice but also to the interpretations thereof. That legal certainty once offered by conventional law today seems naïve. Thus, a measured return to customary law might be advisable, as already noted and advocated by Roberto Ago a long time ago. Codes, conventional law, are not the salvation of international law and involve risks for the weakest states, that is, for most states, which in the present case might perhaps have better defended their legitimate interests and rights under the customary legal order.

It is obviously formalistic to state that the process of codifying in multilateral forums makes it possible to take the objectors' opinions into consideration, integrating them into the agreed texts to endow the codified laws with even greater authority. This may have been more or less the case until the regulatory havoc created around the LOSC, both by the maritime powers (against Part XI of the treaty, in defence of the market economy and free enterprise) and by the states with long coastlines (against the principles of freedom of the high seas and the exclusive jurisdiction of the flag state well established in the treaty). Both groups immediately set out to tear down the agreements reached on these matters in 1982 following a fourteen-year codification process, achieving their goals in the Agreements of 1994 and 1995.

The technique employed was quite simple: these states radically challenged the parts of the LOSC that did not suit their interests until they managed to amend it, keeping the codification process open indefinitely from a substantive perspective. To accomplish this, they took a great deal of licence with the law of treaties, in particular by replacing the institution of reservations, prohibited under the LOSC, with the surreptitious and *de facto* introduction in the conventional context of an institution with customary roots, the so-called persistent objection, which consists in expressly, unambiguously and persistently objecting to certain emerging norms before they become formally established so that they cannot be enforced against the objector. That sort of customary metamorphosis of conventional international law, also on display in the informality of the renegotiation process of the LOSC, in the great importance given to the willingness of the parties to reach an *arrangement* in this regard, and in the weakening of the properties of stability and certainty of conventional law that all of this entails, signified the triumph of a certain voluntarist and consensualist understanding of international custom and of the legal order itself. Beyond the theoretical debate, which is not germane here, this has important substantive consequences, such as the certainty that, under the current circumstances, international custom can afford better protection to the weakest states than a conventional international law that has been consistently reworked to the benefit of the most powerful states.

The same can be seen in the Community context. The risks of the power asymmetry that likewise dominates the process of European integration, as palpably demonstrated in the case of the LOSC, so warrant. Nor is the principle of supranational integration immune to these dangers, amongst other things because it coexists with the principle of intergovernmental cooperation in a delicate balance of tensions and compromises that has permeated the entire history of European integration. Spain has known what it is like to be on the receiving end of this asymmetry. How else to explain the signature and ratification by the EU and Spain of the Fish Stocks Agreement, so undeniably harmful to its fishing interests? It can only be attributed to a vicarious conduct within the EU, in which Spain

 DOI: 10.17103/sybil.21.10

failed to convince its partners that the Agreement should never have been negotiated or signed by the EU and its member states, because it recognizes the special interest and preferential rights of coastal states over those of states that engage in deep-sea fishing, extending the jurisdiction of the former over both the living resources beyond the 200 miles of their EEZs and any vessels that might fish on the high seas under the flag of another state.

(G) CONCLUSIONS

The main outcome of this whole process has been very negative for the interests of Spain. Spain is one of the coastal states most affected by the various issues recounted here. However, the verification of this fact failed to prompt Spanish lawmakers at the time to take an interest in these matters in relation to the country's ratification of the treaties in question. Instead, their unremarkable passage through Parliament, executed with little fanfare, bears witness to a lack of interest and the absence of a true state policy on the matter, despite the political and economic importance of these treaties and the consequences for Spain of their ratification and entry into force.

 DOI: 10.17103/sybil.21.10

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

Related agreements and Spain: Fish stocks and marine biological diversity

Susana BORRÁS PENTINAT*

(A) INTRODUCTION

Prior to the 1982 United Nations Convention on the Law of the Sea (LOSC),[1] there was no legal framework for a better management of marine resources. Since the adoption of LOSC, a new legal regime for the oceans has been established, giving State parties obligations for the management and use of marine and fishery resources within their areas of national jurisdiction, around 12 miles from the coast, where concentrates about 90% of the world's marine fishing concentrates.

In recent years the trend within fishing industry has grown in importance, with world fishery being one of the most dynamic and productive sectors of the food industry, bringing new opportunities to coastal states, which have tried to make the most of the growing international demand for fish and fish products by investing in fishing fleets and modern fishing facilities. However, despite existing international regulation in this area, the state of fish stocks is becoming more and more precarious, revealing the existence of a difficult balance between economic exploitation and preservation of marine resources: on the one hand, increasing competitiveness in the access to these resources, and, on the other hand, the need to establish a limitation to the uncontrolled increase in fishing exploitation.[2]

This present study analyzes the Spanish position with regard LOSC in order to establish the legal regime in an area of crucial importance to Spanish interests, namely fishing and access and management of marine biological resources.

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1 UN Convention on the Law of the Sea, 1833 UNTS 3 (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter).

2 FAO 2007 Information Summary on each country's fishery profile – The Spanish Kingdom.

 DOI: 10.17103/sybil.21.11

(B) THE IMPORTANCE OF THE FISHING POLICY IN SPAIN: FROM EXPLOITATION TO CONSERVATION?

Spain has been, and is, one of the world's great fishing powers, being among the top five, and the second most important in fish farming. This is indicated by the size of the fleet (tonnage and power), the volume of catch and the value of the fish landed. Currently there are about 18,000 fishing boats catching 13,000,000 tons of fish every year and employing 74,798 crew members and more than 200,000 Spanish people working at sea, especially as fishermen. In its economic scale, fishery accounts for 0,5% of the Spanish GDP. It also has an exploitable national area for fisheries of 862.459 km^2, comprising both, the exclusive economic zone (EEZ) and the Fisheries Protection Zone in the Mediterranean[3].

In 1952, Peru, Chile and Ecuador declared within the country's jurisdiction the waters between the coast and 200 miles out and, in 1976, the United States followed this practice in order to lead the negotiations of the United Nations Convention on the Law of the Sea. In this context, the Americans managed to get the waters resulting from this extension to be considered exclusive economic zones (EEZ). On the basis of these declarations of extended zones and the later general practice among other States this meant that 90% of the world fishery resources were within the limits of the exclusive exploitation zones.

Following the example of its surrounding countries and the work of the UN Conference on the Law of the Sea having not yet been finished, Spain passed a law in 1978 about the EEZ for up to 200 miles from the coasts of the Atlantic Ocean and the Bay of Biscay, although it included a provision authorizing the Government to "agree to extend it to other Spanish coasts"[4].

Spain was the last of the fishing powers to establish the EEZ and it was clearly needed so since the waters of the States where Spanish fishing boats used to fish were getting closed while the boats from those countries could continue fishing beyond the 12 miles of the Spanish territorial sea.

An important transformation of the international sea-fishing regime took place within the negotiations of the third United Nations Conference on the Law of the Sea[5] in the mid-70's. In fact, the establishment of the exclusive economic zone up to 200 miles appeared, in which the coastal State has sovereign rights over the exploration and exploitation of the living and non-living resources of the sea, its bed and subsoil. With the establishment of the EEZ, the coastal States had sovereign rights over the living and non-living resources of the sea, its bed and subsoil between the 12 and 200 nautical miles but in turn, it limited the growth of fishing quantities[6]. These rights were confirmed both by the state practice in this regard[7], and by the international[8]. The coastal State also has jurisdiction

3 Royal Decree 1315/1997, 1 August 1997, establishing a Fisheries Protection Zone in the Mediterranean (BOE No. 204, 26 August 1997), amended by Royal Decree 431/2000, 31 March 2000 (BOE No. 79, 1 April 2000).

4 Art. 1(1) and first final disposition Law 15/1978, 20 February 1978, on the Economic Zone (BOE No. 46, 23 February 1978).

5 Resolution 2750C (XXV), of 17 December 1970.

6 See Art. 56(1)(a) LOSC.

7 For instance, Art. 64 of the Lomé IV Convention, signed on 15 December 1989, signed by the European Community, its 12 State members, and 68 African Countries and Caribbean and Asia, states that: "The Community and the ACP States recognize that coastal States exercise sovereign rights for the purpose of exploring, exploiting, conserving and managing the

 DOI: 10.17103/sybil.21.11

regarding the protection and preservation of the marine environment, which also has an effect on the legal status of fishery[9].

These rights are limited by correlative duties. Among others, the coastal State must determine the allowable amount of catch in its EEZ and must take preservation and management measures to make sure the fishing reserves within it EEZ are not threatened by an excess of exploitation. It also has the duty to preserve or re-establish such fish stocks at levels that can produce the maximum sustainable yield, in accordance with the appropriate environmental and economic factors, including the economic needs of the coastal fishing communities and the special needs of the developing States. This should take into account the sub-regional, regional and worldwide international minimum standards suggested. In addition, they must also take into account the effects on specific species associated with the catch.[10].

In this regard, the coastal State shall promote the objective of optimum use of the living resources in the EEZ[11], a principal that was established to ensure that there was no waste or wasted resources, especially since many developing States have major food problems. To achieve this objective, each coastal State must determine its own capacity to catch living resources in their area and, in the case that they do not have enough capacity to exploit the total catch allowed, give access to other States to catch the surplus through agreements or other arrangements.

This new regulation had immediate and very damaging consequences for Spain: it meant the closure of access to traditional fishing grounds located in third countries and in waters which until then had had the status of international and free fishing ones and, consequently, the loss of fishing rights limiting the expansionist processes of long-distance industrial fleets that had operated for many years with little control and restriction[12].

Faced with these limiting prospects, the adoption of bilateral fishery agreements allowed Spain to receive significant relief for its fishing fleet. Although initially the bilateral agreements were signed between Spain and different coastal countries, when it entered the EEC in 1986 their competence to sign fishery agreements was assumed by the Community. Since then, and due to the progressive exhaustion of fishing grounds, the EEC has been forced to carry out reforms in its fishery policy, incorporating the need that future fishery agreements signed with third countries were based on the

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fishery resources of their respective exclusive economic zones in conformity with current international law" (Boletín Oficial del Estado, of 10 December 1991).

8 For instance, the Arbitral Award in the *Case concerning filleting within the Gulf of St. Lawrence between Canada and France*, 17 July 1986, 19 UNRIAA 225-296.

9 Art. 56(1)(b)(iii) LOSC. It should be noted, however, that the powers granted to the coastal State in the EEZ zone do not affect freedom of navigation and overflight and of the laying submarine cables and pipelines, and other internationally lawful uses of the sea related with these freedoms the States have rights on, according with LOSC (art. 58.-1 of LOSC). That is to say that all the high sea freedoms prevail in favour of the third States except for the freedom of fishing. At the same time, the third States must comply with the laws and regulations adopted by the coastal State in accordance with the provisions of LOSC and other rules of international law. (art. 58.-3 of LOSC).

10 Art. 61(1)-(3) LOSC.

11 Art. 62(1) LOSC.

12 The most affected countries by the implementation of the 200 miles of exclusive economic zones were those which had more presence in the international fishing grounds, such as Japan, the Soviet Union and Spain.

promotion of sustainable fishing[13]. Thus, access to the waters of third countries would be limited to surplus stocks, as stated in article 62 of the United Nations Convention on the Law of the Sea.

As already stated, in 1997 the Spanish Government established a "Fisheries Protection Zone in the Mediterranean Sea" defined by an imaginary line for the conservation of fishery resources,[14] which recognized the "sovereign rights for purposes of conservation of living marine resources, as well as for the management and control of fishery activity"[15], but not for the purposes of exploitation of such resources. Three years later the co-ordinates established had to be partially changed when they realized that by mistake they had measured the extent of the area out from the coastline, instead of in from the outer limit of the territorial sea.[16] Whichever way, this provision left a regulatory void in the western part of the Mediterranean between Spain and Morocco.

Subsequently, in 2013, the Government resorted to the first final provision of the 1978 Law on Economic Zones to establish on EEZ in the Northwestern Mediterranean[17]. However, the Decree maintains the shortcomings of the previous one (that established the fishing protection zone in the Mediterranean), leaving a legal void, without sufficient reasons to justify it, in the area between Spain and Morocco located between the eastern limit of the EEZ in the Atlantic and the western limit of the EEZ in the Mediterranean.

(C) FISHERIES AND MARINE RESOURCES IN LOSC NEGOTIATION AND THE SPANISH POSITION

During the negotiations of LOSC, the subject of fishing led to strong discussions on fisheries between two groups or categories within States. On the one hand, coastal States, especially developing coastal States, were interested in exercising control over fishing catch where the distribution areas went beyond the 200 miles. On the other hand, States with large deep-sea fishing fleets, were resistant to any restriction of the traditional freedom of fishing on the high seas, as it would seriously affect their fishing interests. The consensus finally reached reflects the delicate balance between the two positions, establishing vague and imprecise obligations, a fact that in practice causes divergent interpretations of the regime of straddling and highly migratory fish stocks.

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[13] See the Communication from the Commission on the Reform of the Common Fisheries Policy ("Roadmap"). COM (2002) 181 final of 28 May 2002.

[14] This imaginary line started from Punta Negra-Cabo de Gata, "in 36°43'35" N 002°09'95" W. At this point, the straight baseline passes, delimiting the inner end of the Spanish territorial sea in that area. From said interior point, the fishing protection zone extends 49 nautical miles in direction 181° (S 001 W) to another point located at 35°54'05" N and 002°12'00" W and continuing eastward to the equidistant line with neighbouring countries, drawn in conformity with international law, up to the marine boundary with France.

[15] Arts. 1 and 2 of the Royal Decree 1315/1997.

[16] Art. 1 Royal Decree 431/2000, of 31 March, amending Royal Decree 1315/1997, of 1 August, establishing a fisheries protection zone in the Mediterranean (BOE No. 79, 1 April 2000).

[17] This extends from the outer limit of the territorial sea to a point of coordinates 35° 57,46' N / 2° 5,31' W, located in course 173° of Cabo Gata and distant 46 miles from the same, continuing eastward to the equidistant line with the neighbouring countries, drawn in conformity with international law, up to the maritime boundary with France.

The interests of coastal States and high seas fishing were based on the 1958 Geneva Convention on the high seas; on fishing and conservation of the living resources; on the recognition of the freedom to fish in high seas with the obligation to adopt conservation measures or cooperate with other States in the adoption of such measures; and the obligation to cooperate with other States in the management and conservation over living resources in the high seas. In addition, the negotiating text also established some obligations regarding populations of species found on both sides of the limit between the exclusive economic zone and the high seas, highly migratory and catadromous species[18].

In this sense, Article 87 LOSC establishes the traditional principle of freedom of the high seas. This freedom applies to nationals of all the States, either coastal or landlocked. However, although section e) of paragraph 1 from this article solemnly proclaims the freedom to fish on the high seas, such affirmation is not absolute, since the same provision refers to the conditions set out in Section 2 of Part VII, entitled "Conservation and Management of the Living Resources of the High Seas" (Articles 116 to 120 LOSC); provisions which subject such freedom to the conventional obligations of the Sates and certain specific rules which, in general, concern the protection of species. On the other hand, the same article 87 LOSC states that the freedoms referred to in this article shall be exercised "with due regard" to the interests of other States in exercising their freedom of the high seas. It is the concept of solidarity which imposes that obligation implying that the right of each State to be limited proportionally by the rights of other States.

The general obligation of conservation is established in Article 117 LOSC. According with this article, all the members of the international community have the duty to take the measures with respect to each country's nationals necessary for the conservation of the living resources on the high seas and to co-operate with other States in the adoption of such measures. On the other hand, article 194(5) LOSC binds the States to take all the individual and joint measures to protect and preserve the rare and vulnerable ecosystems as well as the habitat of the species and other forms of decimated, threatened or endangered marine life.

In this context, the basic position of Spain before the General Assembly in 1971[19], focused on searching for the balance between the economic interests of the States in the use and exploitation of the sea and the political ones in matters of security. But the matters derived from economic and social development required a satisfactory answer regarding the exploration and exclusive exploitation of the resources from the continental shelf, and the enjoyment by the coastal States of preferential rights in the conservation and use of fishing resources in a wide-enough area of the sea adjacent to their coasts.

The Spanish position particularly on fisheries and fishing resources was based on the need to acknowledge within the text of the convention the historical right of certain fishing fleets to fish in areas where they had traditionally been fishing.

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[18] Official Records of the Third United Nations Conference on the Law of the Sea, vol. IV (United Nations publications, bulletin no. S.75.V.10), text A/CONF.62/WP.8, Part II.

[19] Intervention of Gregorio López Bravo, of 1 October 1971, reprinted in J.A. de Yturriaga, *La actual revisión del Derecho del Mar: Una perspectiva española. Textos y Documentos* (Instituto de Estudios Políticos, Madrid, 1975), vol, II (2), at 374-375.

Despite the diplomatic pressure exerted in this sense, finally the letter of the convention did not reflect the aspect of the historical rights, but it did ask the countries to reduce the damages for the nations which had "usually fished" in the area. Thus, thanks to the Spanish position, it was possible to protect the habitual fishing States' interest and weakened the fishing rights of States in disadvantaged geographic situations within the EEZ. Even so, Spain abstained in this vote on LOSC, particularly because of the regulations over the straits and the restrictions on the activity of its fishing fleet, as well as considering that the texts adopted by the conference did not constitute a codification or expression of customary Law. Thus, Spain did not sign the Convention until the last moment, on the 4th of December 1984, and ratified it 13 years later, on the 15th of January 1997.

At the time of signing and ratification[20], the Spanish Government made an interpretative declaration on Articles 69 and 70 of the Convention[21], regarding the access to fishing in economic zones of third States. In particular, it states that:

> "a) Articles 69 and 70 of the Convention, states that the access to fishing in the Exclusive Economic Zone of third party States by fleets of developed land-locked States or which are in a disadvantageous geographical location, is conditional on the coastal States in question having previously provided access to fleets of the States that have been fishing regularly in the Exclusive Economic Zone in question.
>
> b) With respect to Article 297, and notwithstanding the provisions of that Article in relation to the settlement of disputes, Articles 56, 61 and 62 of the Convention do not allow the faculties of the coastal State to be considered discretionary regarding the determination of allowable catch, their exploitation capacity and the allocation of surpluses to other States."

The strong pressure which the traditional freedom of high seas fishing has been subject to, due to the problem of straddling and highly migratory fish stocks, has not only occurred at a theoretical level. In fact, there have been several coastal States which have sought to extend unilaterally their competence in fishing matters beyond the two hundred miles, based on the presence of ichthyologic species on the high seas that move into maritime areas under their national jurisdiction or that come from these areas. In addition, several fisheries treaties, both bilateral and multilateral, have recognized these powers in favour of coastal States. In order to manage the different interests involved, the 1995 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter UNFSA) was adopted, which seeks to give effect to LOSC in terms of assuring long-term conservation and the sustainable use of these fish stocks.

(D) 1995 AGREEMENT ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS (UNFSA)

The references to fishing resources and marine biodiversity arise above all in the need to conserve and manage this biodiversity on the high seas, including the management of bottom fishing (methods of fishing in the sea floor), in a manner consistent with LOSC, the 1993 FAO Compliance Agreement, the Convention on Biological Biodiversity (CBD) and the FAO Code of Conduct for Responsible

[20] Instrument of Ratification of the United Nations Convention on the Law of the Sea, done in Montego Bay on December 10, 1982 (BOE No. 39, 14 February 1997).

[21] Declarations Nos. 2 and 3 made by the Spanish Government on 4 December 1984.

 DOI: 10.17103/sybil.21.11

Fisheries[22]. For the purpose of this study, the 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA), linked to LOSC is also of interest.

Already in the Third United Nations Conference on the Law of the Sea, attempts were made to grant greater rights to coastal States with regard to straddling fish stocks.[23] In this sense, the negotiating Conference did not seek to determine the regime that was to govern fishing on the high seas, but rather what surface area would remain on the high seas after the jurisdiction of coastal States was extended. During informal negotiations, proposals were made for the inclusion of a specific reference to the "special interest" of coastal States in relation to fish populations overlapping in their exclusive economic zones and on the high seas, in particular, in the regulation and exploitation of straddling and highly migratory fish species on the high seas. In relation to the former, the Convention provides where the same populations of associated species are found in both the EEZ and area beyond and adjacent to it, the coastal State and the States fishing these stocks shall try to agree on the necessary measures for the conservation of the population in the adjacent area. With respect to the latter, LOSC only provides that coastal States and other States whose nationals fish on them cooperate in order to ensure conservation and promote the optimum use of those resources throughout the region, both within and outside the EEZ.

Despite the pressure of States with a broad platform, no provisions were included in the text, although the Group of 77 submitted a similar proposal to the Conference on the recognition of a "special interest" of the coastal State beyond the limit of 200 miles. Finally, the amendment was not included and the negotiating text remained unchanged[24].

The lack of determination of LOSC in this matter and the conflicting interests made it necessary to adopt a new agreement: the Agreement for the implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA), was adopted in New York on 4 August 1995[25]. Under this Agreement, State Parties undertake to cooperate, both within and outside the areas under their jurisdiction, either directly or through regional or subregional fishing organizations and arrangements. The concept of "responsible fishing" already included in the Declaration of Cancun of 1992 and which was based on LOSC lies in: a) ensuring the long-term survival of these stocks by promoting their sustainable use, b) guaranteeing that the measures taken are based on sound scientific data, and c) promoting follow-up of the precautionary principle under Article 6 of the Agreement. The long-term conservation, management and sustainable use of the living marine resources of the world's oceans and seas and the obligations of States to cooperate to that end, in accordance with international law, are reflected in the relevant provisions of

[22] Available at FAO website here.

[23] On this question, see the contribution in this volume by de Yturriaga Barberán on "Spain at UNCLOS".

[24] See José Luis Meseguer, "Le régime juridique de l'exploitation de stocks communs de poissons au-delà des 200 milles", *Annuaire français de droit international* (1982), at 28.

[25] United Nations Conference on Fish Stocks whose territories are within and outside the exclusive economic zones and on highly migratory fish stocks. New York, 12 to 30 July 1993. Background Paper, A/CONF.164/INF/5, 8 July 1993.

the Convention, in particular the provisions on cooperation set out in Part V and Section 2 of Part VII of the Convention, and developed in the UNFSA.

With this aim, State parties may adopt and implement: the appropriate conservation and management measures; establishing maximum allowable catch and level of fishing effort; agreement on participation rights; and undertaking monitoring, control, surveillance and enforcement. Only States which are members of the organization or participate in the corresponding arrangement, or commit to apply the measures adopted by one or the other, shall have access to fishing resources on the high seas to which such measures are applicable[26].

In this context, and in order to ensure the effectiveness of the Spanish fishing sector, Spain became a party to several agreements on fishing cooperation in limited geographic areas, as well as to agreements on protected or highly migratory species. Bilateral fishing agreements that Spain took part in with European, African and American countries should be highlighted, which regulated the conditions for obtaining a temporary fishing permit for Spanish vessels operating in jurisdictional waters of other States or on the high seas. This practice was complemented by the creation of a large number of joint fishing companies. These are understood to be formed in a foreign country and in accordance with its legislation, which Spanish fishing companies constitute in association with natural or legal persons from that country in order to jointly exploit sea fishing resources. This situation was completely altered by Spain's accession to the European Communities. The then European Community (EEC) did not establish a common policy on this matter until 1983 and it did not apply it to the Mediterranean Sea. A long transitional period was established for the full integration of Spain into the Community fisheries policy. During this period, the access of Spanish fishing vessels to the Community waters and resources depended on the number of vessels allowed in Spain and the quota allocated to Spain on the total allowable catches (TACs) of the species subject to TACs and to quotas.

The EEC, in its process of extending the common fisheries policies to the high seas, has recognized the interest in fish stocks both within the area of 200 miles of jurisdiction and in an area beyond and adjacent to it. Thus, the ruling of the Court of Justice of the European Communities of 25 July 1991, raised by the Commission against Spain, meant bringing forward the international legal treatment over straddling fish stocks.[27].

The negotiations under this Agreement were focused on analysing how the problems of straddling and highly migratory fish stocks affect the interests of both coastal States, regarding the conservation and management of the resources within their 200-mile zones, and of States fishing on the high seas, with respect to the conservation and management of living resources on the high seas. Obviously, these issues can only be resolved through cooperation and collaboration, and this was provided for in

[26] See Articles 2, 7(1), 8(1), 10 and 8(4) of the Agreement on the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 December 1995, entered into force 11 December 2001), 2167 UNTS 3.

[27] *Commission of the European Communities v. Kingdom of Spain* (Case C-258/89) European Court Reports, 1991/5, at 1.

the 1982 Convention[28]. However, these provisions did not solve the basic conflict on rights that constituted the core of the problem and which affected the interests of the Spanish fleet.

The Agreement, as an international treaty linked to LOSC, contains provisions that develop it, but also introduces new provisions not considered in LOSC. Some of them, although not provided in the Convention, do not contradict it, but others are particularly striking because they are incompatible with the Convention's provisions. Among them, should be mentioned the extension of the Agreement to States that are not party to it, requiring the implementation of enforcement measures on the high seas against ships of States other than the recognized flags, and the legitimate use of force by the inspecting State, when, and to the extent necessary, to ensure the safety of inspectors or when they are prevented from carrying out their duties[29].

These Articles, not only contradict LOSC, but also the Agreement itself, which provides that none of its provisions should be construed to prejudice the rights and jurisdiction of States in accordance with the Convention[30].

Despite its shortcomings, both Spain and the EC chose to become parties to the Agreement. Spain signed it in 1996 and the EC decided to join it in 1997, making seven interpretative declarations together with the Member States. It was agreed that the States and the Community would simultaneously present their respective instruments of ratification and acceptance, as well as the corresponding declarations. During the parliamentary process, the Spanish Government —at the request of the Ministry of Agriculture and Fisheries— asked 'las Cortes' (General Courts) to authorize the ratification of the Agreement together with six declarations —similar, but not fully in line with those agreed in the EC— and two more. In the face of this discrepancy, the Parliament through an amendment made it possible to recover the text of the Community declarations, while maintaining the supplementary Spanish declarations.

The most relevant interpretative declarations refer to the fact that Spain understands that no provision of the Agreement can be interpreted as contrary to the freedom of the high seas, recognized by international law; therefore it considers that the expression "States whose nationals fish on the high seas", should not provide new grounds for jurisdiction based on the nationality of persons fishing on the high seas different from the principle of jurisdiction of the flag State; and that in the application of Article 21, Spain is to understand that, when the flag State declares that it intends to exercise its authority over a fishing vessel sailing under its flag, the authorities of the State carrying out the inspection shall not endeavour to exercise any authority over such ship. The main justification for such statements was based on a double argument: on the one side, it was considered

[28] In accordance with Article 63(2) LOSC, the coastal State and the States fishing those fish stocks in the adjacent area shall seek "either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area". In accordance with Article 64, paragraph 1, coastal States and other States whose nationals fish the highly migratory species in the region "shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum use of such species throughout the region, both within and beyond the exclusive economic zone".

[29] Articles 17(2), 18, 21(8) and 22(1) of the New York Agreement of 1995.

[30] J.A. de Yturriaga, 'Acuerdo de 1995 sobre conservación y ordenación de las poblaciones de peces transzonales y altamente migratorios', 7 *Anuario Argentino de Derecho Internacional* (1996-1997), at 60.

 DOI: 10.17103/sybil.21.11

that the normative provisions could constitute dangerous precedents, which contravene international standards, enshrined in the Convention on the Law of the Sea, in consolidating the interests of coastal States compared to those of countries that carry out long-distance activities, such as Spain and whose situation would be seriously affected. And, on the other hand, to grant a guarantee and greater legal certainty to the application of the above-mentioned international Agreement, so that it is subject to the rules contained in the Convention on the Law of the Sea.

Subsequently, in 2001, Spain proposed in the EC Group on the Law of the Sea that it and the other member States should include the two added declarations, but there was widespread rejection and Great Britain and the Council itself, objected to the position that Spain made the aforementioned declarations alone. After intensive discussions —in which Spain argued that if its alternative proposal was not accepted, the entire legislative process would have to be restarted for the ratification of the Agreement, due to the mandate received from 'las Cortes'— a commitment was reached that all member States would submit the seven declarations agreed, and Spain the two additional ones as a private application. As a consequence, on 9 December 2003, the EC and its member States incorporated the Agreement on the agreed terms[31].

Undoubtedly, this new agreement represented a new challenge for remote-fishing States that, like Spain, habitually fish on the high seas. However, Spain had already experienced fishing restrictions resulting from the Act of Accession of the European Communities[32] and accepted with certain passivity the limitations that the Agreement entailed for Spanish interests, especially, in relation to freedom of fishing on the high seas, freedom of navigation and the principle of exclusive State jurisdiction over their ships in that space[33].

Despite the adoption of this agreement, the delicate question of the competence of States on the high seas beyond their EEZ was raised by Spain before the International Court of Justice (ICJ) in 1997, following the assault, arrest and detention of the Spanish fishing boat "Estai" by Canada while fishing on the high seas. The importance of the controversy, known as the "halibut war", is the confrontation of important interests at stake: the freedom to fish on the high seas, and the conservation of fishing resources. In its judgement of 4 December 1998[34], the ICJ stated that it had no jurisdiction to rule on the substance of the claim. Accepting that the Canadian reservation in exempting itself from the mandatory jurisdiction of the Tribunal was given that the disputes arose from administrative and conservation measures adopted by Canada with respect to vessels fishing in the area and was subject to the regulation of the Northwest Atlantic Fisheries Organization and related to those measures, as well as their application.

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[31] J.A. de Yturriaga, 'The European Community and Some Problems of the Law of the Sea Concerning Fisheries', in *Mélanges de droit de la mer offerts à Daniel Vignes* (Brussels, 2009), 292-296.

[32] Instrument of Ratification of the Treaty done in Lisbon and Madrid on 12 June 1985, concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and the European Atomic Energy Community (BOE No. 1, of 1 January 1986).

[33] See Instrument of Ratification of the Agreement on the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 concerning the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, done in New York on 4 August 1995 (BOE No. 175, of 21 July 2004).

[34] *Fisheries Jurisdiction* (*Spain* v. *Canada*), *Jurisdiction of the Court, Judgment, ICJ Reports 1998*, p. 432.

Through this analysis, it is seen that, although Spain has not always given the marine environment the importance it deserves in terms of conservation of fishing resources, it is worth noting that it has been one of the pioneer States to oppose fishing with gill and drift nets. A Ministerial Order of 1981 regulated the use of both drift and minor fixed gear. This Order was dictated exclusively for the Mediterranean Sea since in it, the use of these fishing nets was most noteworthy. Almost a decade later, the Spanish State saw the appearance of drift fishing nets of great length and mesh size, used for catches of large migratory pelagic species. The high catch capacity of these nets has a very negative impact on the marine ecosystem as a whole. Thus, the Ministry of Agriculture, Fisheries and Food adopted an Order of 1990 prohibiting the use of drift gear, although it still allows them to be used as minor gear in the Mediterranean area. Despite these good practices in achieving "sustainable fishing", this is subject to the guarantee of freedom of fishing on the high seas, the right of navigation of fishing vessels beyond 200 miles and the principle of exclusive jurisdiction of the flag State over their ships, which remain, to date, the general rule and not the exception.

 DOI: 10.17103/sybil.21.11

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

LOSC bodies and Spain

Miguel GARCÍA GARCÍA-REVILLO*

(A) INTRODUCTION

The adoption and subsequent entry into force of the United Nations Convention on the Law of the Sea[1] not only meant the application of a number of provisions containing substantial and procedural rights and obligations but also the establishment and entry into function of three brand-new international institutions created *ex novo* for serving their respective and well-differentiated goals. Those institutions are the Commission on the Limits of the Continental Shelf (Article 76 and Annex II), the International Seabed Authority (Part XI, Annexes III and IV and the 1994 Implementing Agreement[2]) and the International Tribunal for the Law of the Sea (Annex VI).

According to the Law of the Sea Convention (LOSC), the Commission on the Limits of the Continental Shelf (CLCS) shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf when such continental shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured (Article 76(8) LOSC). In particular, pursuant to its Annex II, the functions of the Commission shall be: "(a) to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with Article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea; and (b) to provide scientific and technical advice, if requested by the coastal State concerned during the preparation of the data referred to in subparagraph (a)" (Article 3(1) of Annex II). For this goal, the CLCS is composed of 21 members who shall be experts in the field of geology, geophysics or hydrography, elected by States Parties to this Convention from among their nationals, having due regard to the

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[1] UN Convention on the Law of the Sea, 1833 UNTS 3 (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter).

[2] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1826 UNTS 3 (adopted 28 July 1994, entered into force, provisionally 16 November 1996 and definitively 28 July 1996).

 DOI: 10.17103/sybil.21.12

need to ensure equitable geographical representation, and who shall serve in their personal capacities (Article 2(1) of Annex II).

For its part, the International Seabed Authority (ISBA), as established by Article 156 LOSC, is an international intergovernmental organization through which the States Parties to the Convention shall, in accordance with its Part XI (and the 1994 Implementing Agreement), organize and control activities in the Area, that is, the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction[3], particularly with a view to administering the resources of that maritime space (Article 157). To fulfill its functions, the ISBA is composed of three principal organs (the Assembly, the Council and the Secretariat), such subsidiary organs as may be found necessary to accomplish its mission, and an Enterprise, "the organ through which the Authority shall carry out the functions referred to in article 170, paragraph 1" (Article 158).[4]

Finally, the International Tribunal for the Law of the Sea, whose Statute is contained in Annex VI of the LOSC, is an autonomous specialized international judicial institution composed of twenty-one independent judges elected by the Meeting of States Parties to the Convention, among specialists in the law of the sea, according to a method that intends to assure an equitable geographical representation. ITLOS has both contentious and advisory jurisdiction. As to the contentious jurisdiction, ITLOS has broad voluntary competence to deal with disputes submitted to it by the agreement of the parties. It also has compulsory jurisdiction for some specific types of disputes, such as those concerning the seabed area (assigned to its Seabed Disputes Chamber), those relating to the prompt release of arrested vessels and their crews according to the special procedure regulated by Article 292 LOSC, and, in general, those disputes concerning the interpretation or application of the Convention (neither listed in the automatic exceptions of Article 297 nor opted out by the parties through a declaration made pursuant Article 298), in respect to which the confronting parties have made a declaration electing ITLOS in conformity with its Article 287. Other significant international treaties, such as the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks[5], also give some room for the compulsory jurisdiction of ITLOS. Regarding its advisory jurisdiction, it was expressly conferred by the Tribunal's Statute (Annex VI of the Convention) only to its Seabed Disputes Chamber and only for questions

3 Art. 1(1)(1) LOSC.

4 According to Art. 170(1) LOSC: "The Enterprise shall be the organ of the Authority which shall carry out activities in the Area directly, pursuant to Art. 153, paragraph 2(a), as well as the transporting, processing and marketing of minerals recovered from the Area." For its part, pursuant to Art. 153(2) "Activities in the Area shall be carried out (...) (a) by the Enterprise, and (b) in association with the Authority by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements provided in this Part and in Annex III." Nevertheless, Section 2, paras. 1 and 2, of the 1994 Agreement sets up that the Secretariat of the Authority "shall perform the functions of the Enterprise until it begins to operate independently of the Secretariat" and that the Enterprise "shall conduct its initial deep seabed mining operations through joint ventures." To date, the ISBA Secretariat is still performing the functions of the Enterprise.

5 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001), 2167 UNTS 3.

 DOI: 10.17103/sybil.21.12

concerning the seabed area. However, by means of its Rules, ITLOS included an express mention to its general advisory jurisdiction, thereby not only constrained to seabed matters, to be exercised under certain conditions.

This paper intends to summarize the practice of Spain in the three afore-mentioned international institutions.

(B) THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF (CLCS)

According to the LOSC, the coastal State shall establish the outer edge of the continental margin, wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by following the criteria established in Article 76, paragraphs 4 to 7. For this purpose, information on the limits of the continental shelf beyond 200 nautical miles shall be submitted by the coastal State to the CLCS, which shall make recommendations on the matters related to those limits (Article 76(8)). Hence, the CLCS does not have a direct mandate to establish the outer limits. The right and the power to establish the outer limits of the continental shelf belong to the coastal State. The recommendatory nature of this task is therefore an acknowledgement of the coastal State's sovereign right over this maritime space.[6] Nevertheless, pursuant to the same provision, only those limits "established by the coastal State on the basis of [the CLCS] recommendations shall be final and binding" (Article 76(8), *in fine*) whereas limits established in contravention of such recommendations would have not the same final and compulsory nature.

Either way, even when the limits are established by coastal States on the basis of CLCS' recommendations, such delineation does not prejudice the delimitation of the continental shelves of States with opposite or adjacent coasts (Articles 76(10) LOSC and 9 of its Annex II). As the International Tribunal for the Law of the Sea affirmed in its Judgment of 14 March 2012, in the case on the *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh / Myanmar)*, "[t]here is a clear distinction between the delimitation of the continental shelf under article 83 and the delineation of its outer limits under article 76. Under the latter article, the Commission is assigned the function of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so without prejudice to delimitation of maritime boundaries."[7]

States intending to establish the outer limits of their continental shelves should submit to the CLCS particulars of such limits, along with supporting scientific and technical data, as soon as possible but in any case within ten years of the entry into force of the LOSC for those States (Article 4 Annex II LOSC). Nevertheless, after noting, *inter alia*, that it was only since the adoption by the

[6] Suzette V. Suarez, "Commission on the Limits of the Continental Shelf", 14 *Max Planck Yearbook of United Nations Law* (2010), 131-168.

[7] Para. 376. As ITLOS recalls: "Just as the functions of the Commission are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts, so the exercise by international courts and tribunals of their jurisdiction regarding the delimitation of maritime boundaries, including that of the continental shelf, is without prejudice to the exercise by the Commission of its functions on matters related to the delineation of the outer limits of the continental shelf" (para. 379).

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Commission of its Scientific and Technical Guidelines, on 13 May 1999, that States had before them the basic documents concerning submissions in accordance with Article 76, paragraph 8, of the Convention, and considering the problems encountered by States Parties, in particular developing countries, including small island developing States, in complying with the afore-mentioned time limit, the Meeting of States Parties to the LOSC decided that, in the cases of States Parties for which the Convention entered into force before 13 May 1999, it would be understood that the ten-year time period should be taken to have commenced on the said date of 13 May 1999.[8]

Additionally, subsequent practice of the Meeting of States Parties to the LOSC, has allowed to extend this deadline even further, insofar as it has been understood that the ten-year time period may be satisfied by submitting to the Secretary-General preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles and a description of the status of preparation and intended date of making a submission in accordance with the requirements of Article 76 of the Convention and with the Rules of Procedure and the Scientific and Technical Guidelines of the Commission[9]. Moreover, in view of the possibility for coastal States to have disputes on the delimitation of their respective continental shelves, it has also been permitted to submit partial submissions instead of a unique and global submission. Particularly, pursuant to the Rules of Procedure of the CLCS: "A submission may be made by a coastal State for a portion of its continental shelf in order not to prejudice questions relating to the delimitation of boundaries between States in any other portion or portions of the continental shelf for which a submission may be made later, notwithstanding the provisions regarding the ten-year period established by article 4 of Annex II to the Convention" (Annex I, para. 3).

Pursuant to this set of provisions and rules, and within the ten-year time limit applicable to it, expiring on 13 May 2009, Spain has made three partial submissions regarding its continental shelf in the areas of the Celtic Sea and the Bay of Biscay (Submission 6) of Galicia (Submission 47) and in the area west of the Canary Islands (Submission 77).[10]

(1) Submission nº. 6. Bay of Biscay and Celtic Sea

Pursuant to Article 76(4) LOSC, and Article 4 of its Annex II, on 19 May 2006, France, Ireland, Spain and the United Kingdom, all of them States Parties to the LOSC,[11] submitted to the CLCS, through the Secretary-General of the United Nations, a partial Joint Submission made by these States

8 Doc. SPLOS/72, 29 May 2001, para. (a).

9 Doc. SPLOS/183, 20 June 2008, para. 1.a. Rules of Procedure of the CLCS are contained in Doc. CLCS/40/Rev.1, of 17 April 2008. Scientific and Technical Guidelines of the Commission are contained in Doc. CLCS/11, of 13 May 1999, as corrected by CLCS/11/Corr.1 (24 February 2000), CLCS/11/Corr.2 (17 May 2000), plus CLCS/11/Add.1, of 3 September 1999, as corrected by Doc. CLCS/11/Add.1/Corr.1 (19 November 1999). All these documents are available here.

10 On the Spanish Submissions and, in particular, that regarding the Canary Islands, see: J. Martín y Pérez de Nanclares, "Plataforma continental ampliada al oeste de las Islas Canarias: Presentación española ante la Comisión de Límites de las Plataforma Continental", 68 *Revista Española de Derecho Internacional* (2016), 219-226 [doi: http://dx.doi.org/10.17103/redi.68.1.2016.4a.01].

11 The Convention entered into force for France on 11 May 1996, for Ireland on 21 July 1996, for Spain on 14 February 1997 and for the United Kingdom on 24 August 1997. As regards Spain, see Instrument of Ratification of the United Nations Convention on the Law of the Sea, done in Montego Bay on December 10, 1982 (BOE No. 39, 14 February 1997).

in respect of the Celtic Sea and the Bay of Biscay.[12]

The Joint Submission was presented by the four States through *notes verbales* in which they stated that "[t]he enclosed submission is of a joint nature, comprising a single project prepared collectively and collaboratively by the four coastal States. For each of these four coastal States the enclosed joint submission represents a partial submission in respect of a portion only of the outer limits of the continental shelf appurtenant to all four coastal States that lie beyond 200 nautical miles from their baselines from which the breadth of their respective territorial seas are measured." In addition, after affirming that "[t]his portion of shelf is not the subject of any dispute", the notes verbales also stated that in order not to prejudice unresolved questions relating to the delimitation of boundaries between France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland and some of their neighbours in other portions of the continental shelf appurtenant to [those four States], submissions for those portions shall be made at a later date".[13]

According to the Rules of Procedure of the CLCS, the UN Secretary-General circulated the information concerning the Joint Submission to all Member States of the United Nations as well as the States Parties to the LOSC[14] and the Submission was included in the CLCS Agenda. In particular, it was included in its eighteen session[15], where the four interested States made their formal and oral presentations and responded to the questions asked by the CLCS members.[16] Further, pursuant to Article 5 of Annex II of the Convention and to the Rules of Procedure[17], the Joint Submission was addressed to a Sub-commission, established for this purpose, which initially met three times with the delegations of the four coastal States to raise questions and receive further clarifications.[18] In addition, meetings were also held between the Sub-commission and the four coastal States during the twenty-first[19] and the twenty-second[20] plenary sessions of the CLCS to deal with the considerations made by the Sub-commission on the original outer limit as submitted. As a consequence of these previous exchange of views, and subsequently, before proceeding with its recommendations to the Commission, the Sub-commission offered the four coastal States the option of either revising the outer limit, taking into consideration the Sub-commission's view, or maintaining their original view. In this respect, after giving due consideration to the views of the Sub-commission, and in the interest of the timely

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[12] *Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Joint Submission made by France, Ireland, Spain, and The United Kingdom of Great Britain and Northern Ireland in Respect of the Area of the Celtic Sea and the Bay of Biscay on 19 May 2006*, para. 1.

[13] *Id.*, para. 2. See also the *Joint Submission to the Commission on the Limits of the Continental Shelf pursuant to Art. 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect of the area of the Celtic Sea and the Bay of Biscay, Part I (Executive Summary)*, in which a map and the coordinates of the area are included.

[14] See United Nations Secretary-General, doc. CLCS.06.2006.LOS (Continental Shelf Notification) nº. 06/150, of 19 May 2006 (Receipt of the Joint Submission made by France, Ireland, Spain, and The United Kingdom of Great Britain and Northern Ireland to the Commission on the Limits of the Continental Shelf).

[15] UN Headquarters, New York, 21 August to 15 September 2006 (Doc. CLCS/52, 6 October 2006, para.1).

[16] The presentations and questions were made on 22 August 2006 (Doc. CLCS/52, cit., paras. 26 and 28).

[17] Rule 42.

[18] Doc. CLCS/52, cit., para. 33. According to this document (para.34), an additional resumed-session was needed for considering the Submission (22 January-2 February 2007).

[19] UN Headquarters, New York, 17 March to 18 April 2008 (Doc. CLCS/58, 25 April 2008, paras. 19 to 23).

[20] UN Headquarters, New York, 11 August to 12 September 2008 (Doc. CLCS/60, 26 September 2008, paras. 12 to 14).

completion of the examination of the joint submission, the four coastal States decided to accept the first option, without prejudice to this or any other future submission. Thereafter, they presented a revised outer limit to the Sub-commission, which accepted it.[21]

Finally, during the twenty-third session of the CLCS[22], the Joint Submission entered into its decisive stage. After the Sub-commission prepared a draft of its recommendations[23] and submitted it to the plenary of the Commission,[24] the Commission held a meeting with the delegations of the four coastal States, at their request, on 24 March 2009.[25] Then, following their presentations, the Commission adopted the "Recommendations of the Commission on the Limits of the Continental Shelf in regard to the joint submission made by France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland in respect of the area of the Celtic Sea and the Bay of Biscay on 19 May 2006" by consensus.[26] Nevertheless, as the internal delimitation between the four coastal States of their respective continental shelves in this area is still pending and subject to negotiations, they have not yet proceeded to the establishment of the outer limits of their corresponding continental shelves on the basis of the said Recommendations.

(2) Submission nº 47. Galicia

Again, pursuant to Article 76 and Annex II of the LOSC, on 11 May 2009 Spain submitted to the CLCS, through the Secretary-General of the United Nations, a second partial Submission concerning the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breath of the territorial sea is measured in respect of the area of Galicia.[27]

In this second partial Submission, Spain notes that it deals only with the outer limits of the continental shelf in the Galicia area, which is bounded to the north by a Fixed Point, defined in the joint partial Submission made by Spain, France, Ireland and the United Kingdom (FISU), in the Bay of Biscay and the Celtic Sea, and to the south by a Fixed Point situated on the southern edge of the Area of Common Interest (ACI) defined by Spain and Portugal by common agreement.[28] In this respect, after stating that the area of the continental shelf to which its partial Submission refers is not the subject of any dispute with any other coastal State or States, nor does it prejudice matters relating to the delimitation of boundaries between States[29], Spain informs the CLCS that its partial Submission does not prejudice the delimitation of the outer limits of the continental shelf resulting

[21] Doc. CLCS/62, 20 April 2009, para. 13.

[22] UN Headquarters, New York, 2 March to 9 April 2009 (Doc. CLCS/62, 20 April 2009, paras. 8 to 14).

[23] Doc. CLCS/62, cit., para. 8.

[24] Doc. CLCS/62, cit., paras 9 and 10.

[25] Doc. CLCS/62, cit., para. 11.

[26] Doc. CLCS/62, cit., para. 14.

[27] United Nations Secretary-General, doc. CLCS.47.2009.LOS (Continental Shelf Notification) of 14 May 2009 (Receipt of the Submission made by the Kingdom of Spain to the Commission on the Limits of the Continental Shelf). See also *The Continental Shelf of Spain. Partial Submission on the limits of the Spanish Continental Shelf pursuant to Art. 76 and Annex II of the United Nations Convention on the Law of the Sea in respect of the area of Galicia*, para 1.1.

[28] *The Continental Shelf of Spain. Partial Submission*, cit. para. 2.1.

[29] *The Continental Shelf of Spain. Partial Submission*, cit. para. 5.1.

from the joint partial Submission by Spain, France, Ireland and the United Kingdom[30] and that, for the exclusive purpose of defining the outer limits of the continental shelf beyond 200 nautical miles in the area of the Galicia Bank, Spain and Portugal have agreed to identify an Area of Common Interest (ACI) for both coastal States.[31] Particularly, as Spain affirmed in its Submission, even though each of these coastal States presented a separate Submission to the Commission, within the ACI, the outer limits of the extended continental shelf have been established by Spain and Portugal acting in coordination and in accordance with common information, scientific and technical data, and criteria.[32] In addition, Spanish Submission also informs that Spain and Portugal have agreed that the aforesaid delimitation does not prejudice the lateral delimitation of the continental shelf between both coastal States, which shall be resolved in the future and by common agreement between both Parties, in accordance with the applicable rules and principles of international law.[33]

As it occurred with Submission nº 6, the UN Secretary-General circulated the information concerning this Submission nº 47 to all Member States of the United Nations as well as the States Parties to the LOSC and the Submission was included in the agenda of the CLCS for its twenty-fifth session.[34] Namely, the presentation of the Submission to the Commission by the Spanish delegation was made on 7 April 2010. In addition to the explanation of the substantive points, it was reiterated the absence of disputes related to the Submission, the agreement between Spain and Portugal regarding the establishment of a common interest area and that the delimitation of the extended continental shelf in the common interest area was without prejudice to issues related to the establishment of boundaries between the two States.[35]

Pursuant to Article 5 of Annex II of the Convention and to the Rules of Procedure, the CLCS decided to address the Submission to a Sub-commission to be formed for this purpose. In this case, the Commission decided to revert to the consideration of the Submission at the plenary level when the Submission was next in line for consideration as queued in the order in which it was received.[36] The Submission is still under consideration by the Sub-commission.

Supposedly, as both Spain and Portugal had introduced Submissions on their respective extended continental shelves including the afore-mentioned Area of Common Interest, and as the Portuguese submission was prior to the Spanish one,[37] the treatment of this area by the corresponding sub-

30 *The Continental Shelf of Spain. Partial Submission,* cit. para. 5.2. According to its Submission, the ACI is defined to the north by parallel 41º 52' N, to the south by parallel 40º 34' 13" N, to the east by the baseline from which the breadth of the territorial sea of Spain and Portugal is measured, and to the west by a line 350 nautical miles from the aforesaid baseline.

31 *The Continental Shelf of Spain. Partial Submission,* cit. para. 5.3.

32 *The Continental Shelf of Spain. Partial Submission,* cit. para. 5.4. In fact, both States presented their Submissions in the same date (11 May 2009).

33 *The Continental Shelf of Spain. Partial Submission,* cit. para. 5.6.

34 United Nations Secretary-General, doc. CLCS.47.2009.LOS (Continental Shelf Notification) of 14 May 2009 (Receipt of the Submission made by the Kingdom of Spain to the Commission on the Limits of the Continental Shelf). Twenty-fifth session of the CLCS was held in the UN Headquarters in New York, from 15 March to 23 April 2010 (Doc. CLCS/66, 30 April 2010, para.1).

35 Doc. CLCS/66, cit., para. 69.

36 Doc. CLCS/66, cit., para. 70.

37 Despite they presented their Submissions on the same date, Portuguese one was marked as nº 44 and the Spanish with nº 47.

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commission and, subsequently, the own CLCS, in respect to the Submission of Portugal, might be ready even when the Spanish Submission would be under consideration. However, the recent Submission by Portugal, on the last 22 August 2017, of an Amended Executive Summary to its original Submission, which, according to that State, replaces the entire Submission made by the Portuguese Republic on 11 May 2009[38], may postpone the treatment of such Submission to a date latter than that corresponding to the Spanish one. In this respect, even when the amended Submission introduces significant changes in the so-called Western Region (comprising the legal continental margin of the Azores Archipelago), which mean a remarkable enlargement of the Portuguese outer limits in that region, it apparently does not overlap with the Spanish Submission concerning Galicia. On the other hand, as regards the ACI, the Amended Submission expressly states that "[f]or the Galicia Bank Region, Portugal did neither collect any new data nor perform any new computations; accordingly, the OECM segment common and agreed by Portugal and Spain and the OLCS contour in the Area of Common Interest (ACI) remains as in the 2009 Submission."[39]

(3) Submission nº 77. Canary Islands

Finally, once more in accordance with Article 76 and Annex II of the LOSC, on 17 September 2014, Spain submitted to the CLCS, through the Secretary-General of the United Nations, its third partial Submission, this time in respect to the area west of the Canary Islands.[40] In order to fulfil with the afore-mentioned ten-year time limit, expiring for Spain on 13 May 2009, this Submission had been preceded by another one, presented by this country to the CLCS on 11 May 2009, containing preliminary information on the outer limits beyond 200 miles of the continental shelf in the described area, a description of the state of preparation of the future partial Submission and an indication on the planned date for such submission.[41]

As it occurred with its Submission concerning the area of Galicia, Spain affirmed in this third and again partial Submission that it refers solely to the outer limits of the continental shelf in the area to the West of the Canary Islands[42] and informed the CLCS that the concerned area is not the subject of any dispute with any other coastal State or States, nor does it prejudice matters relating to the

[38] See United Nations Secretary-General, doc. CLCS.44.2009.LOS.Add 1 (Continental Shelf Notification), of 1 September 2017 (Receipt of Amended Executive Summary and Addendum to the Submission made by the Portuguese Republic to the Commission on the Limits of the Continental Shelf).

[39] *Continental Shelf Submission of Portugal. Pursuant to Art. 76, paragraph 8 of the United Nations Convention on the Law of the Sea (2017 update)*, p. 4.

[40] UN Secretary-General, doc. CLCS.77.2014.LOS (Continental Shelf Notification) of 17 December 2014 (Receipt of the Submission made by the Kingdom of Spain to the Commission on the Limits of the Continental Shelf).

[41] Doc. CLCS.77.2014.LOS, cit. See also *Partial Submission of Data and Information on the Limits of the Continental Shelf of Spain to the West of the Canary Islands, pursuant to Part VI and Annex II of United Nations Convention on the Law of the Sea (Part I. Executive Summary)*, paras. 1-2 and 1-3. The preliminary information and description presented by Spain on 11 May 2009 (*Información Preliminar y Descripción del Estado de Preparación, de conformidad con la decisión SPLOS/183, de la Presentación parcial relativa a los límites exteriores de la Plataforma Continental de España en el área al Oeste de las Islas Canarias*) is available here.

[42] *Partial Submission of Data and Information on the Limits of the Continental Shelf of Spain to the West of the Canary Islands*, cit. para. 2-1.

 DOI: 10.17103/sybil.21.12

delimitation of boundaries between States[43]. Further, the submitting State also informed the Commission that its partial submission neither prejudges nor prejudices the fixing of the outer limits of the continental shelf resulting from Portugal's Submission, nor the rights of third parties which may be claimed in the future.[44]

Similar to previous Submissions, once received the UN Secretary-General circulated the information concerning this Submission to the United Nations Member States and to the States Parties to the LOSC.[45] The Submission was included in the agenda of the CLCS for its thirty-eight session.[46] This time, the presentation before the CLCS was carried out by the Spanish delegation on 26 August 2016. In addition to its elaboration on substantive points, Spanish representatives stated that the area of continental shelf covered by the Submission was not subject to any dispute, notwithstanding the fact that some of its parts were the subject of overlapping claims. In particular, further clarification was offered by Spain on its position in respect to the communications presented by Portugal and Morocco regarding the Spanish Submission in the afore-said area.[47]

Eventually, as it occurred with the Submission concerning the area west of Galicia, the CLCS decided to address this Submission to a Sub-commission to be formed for this purpose and to revert to its consideration, along with the consideration of communications from Portugal and Morocco, as well as of any future relevant developments, at the plenary level, when such Submission is next in line for consideration, as queued in the order in which it was received.[48]

(c) INTERNATIONAL SEABED AUTHORITY.

In contrast to its activity regarding the Commission on the Limits of the Continental Shelf, described above, and to that concerning the International Tribunal for the Law of the Sea, to be explained in the next section, the Spanish activity in respect to the International Seabed Authority (ISBA) is slim.

Spain is one of the 44 States Parties to the Protocol on the Privileges and Immunities of the International Seabed Authority, adopted by consensus at the fifty-fourth meeting of the Assembly of this international organization on 26 March 1998[49], and has some participation in its organs. For example, it has presided the Assembly in 2010 and is currently one of the States Members of the ISBA Council.[50]

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43 *Ibid*, para. 5-1.

44 *Ibid*, para. 5-2.

45 Doc. CLCS.77.2014.LOS, cit.

46 Thirty-eight sessions of the CLCS was held in UN Headquarters, in New York, from 20 July to 4 September 2015 (doc. CLCS/90, 1 October 2015).

47 Doc. CLCS/90, cit., para. 76. On the potential conflicts between Spain and both Portugal and Morocco in this area, see the contribution in this volume by de Faramiñán on the "Continental shelf and its extension".

48 Doc. CLCS/90, cit., para. 77. Apparently, there are no significant changes in this Amended Submission as regards the points originally determined by Portugal in the area closest to that of the outer limits of the extended continental shelf of Spain in the Canary Islands.

49 2214 *UNTS* 133. Spain deposited its Instrument of Ratification on 9 January 2001 (BOE nº 138, 10 June 2003).

50 The Presidency of the Assembly was assumed by the then Spanish Representative before the ISBA, Mr. Jesús Silva-Fernández. As regards the Council, Spain was elected on 21 July 2016 for a four year period beginning in 1 January 2017, subject to the understanding that it will relinquish its seat to Norway for the year 2018 and recover it for the remaining 2019

However, Spain is not among the States either sponsoring or directly developing any kind of mining activity in the marine zone under the organization and control of the ISBA.[51] In this respect, despite some members of the Spanish administration expressed in 2010 the intention of being more active on the matters regarding the Area,[52] for the moment, Spain has concentrated its efforts only in regard to deep seabed mining within the areas under its sovereignty or sovereign rights and, in particular, once established, in relation to its future extended continental shelf described above.[53]

(D) INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

In contrast to its lack of practice before the International Seabed Authority, Spain has been more active in what concerns the International Tribunal for the Law of the Sea.

Apart from being one of the 41 States Parties to the Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea, adopted by the seventh Meeting of States Parties on 23 May 1997,[54] Spain has evidenced its trust on this international judicial institution by choosing it in its Declaration of 19 July 2002, still in force, in which it states that:

> "Pursuant to article 287, paragraph 1, the Government of Spain declares that it chooses the International Tribunal for the Law of the Sea and the International Court of Justice as means for the settlement of disputes concerning the interpretation or application of the Convention."

In addition, and regarding the judicial practice of ITLOS, Spain has been a State party in one dispute before the Hamburg Tribunal and has participated in an advisory proceeding before this court. In addition, the Spanish interests were also implicitly present in another contentious case, as we will see below.

(1) Contentious cases

The one and only case in which Spain has been party in a dispute before ITLOS so far is the M/V *Louisa* (*Saint Vincent and the Grenadines v. Spain*), marked in the Tribunal's docket as its case nº 18.

This case concerned the arrest in 2006 of the M/V *Louisa*, a vessel flying the flag of Saint Vincent and the Grenadines, on the allegation by the Spanish authorities that it was involved in activities

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and 2020. (Information available at the ISBA website on 15 September 2017).

[51] According to the information provided with the ISBA website, this intergovernmental organization has entered into 15-year contracts for exploration for polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts in the deep seabed with twenty seven contractors. Seventeen of these contracts are for exploration for polymetallic nodules in the Clarion-Clipperton Fracture Zone (16) and Central Indian Ocean Basin (1). There are six contracts for exploration for polymetallic sulphides in the South West Indian Ridge, Central Indian Ridge and the Mid-Atlantic Ridge and four contracts for exploration for cobalt-rich crusts in the Western Pacific Ocean.

[52] See, in this respect, the international Seminar *Los Fondos Marinos: La Nueva frontera*, held at the Fundación Ramón Areces in Madrid, on 26 February 2010, with the participation of the then Secretary-General of the ISBA, Mr. Nii Allotey Odunton. See, in particular, the speech by Ambassador Silva-Fernández, the then Representative of Spain before the ISBA and latter appointed the President of the Assembly of the said international organization.

[53] See, *inter alia*, the article in Spanish newspaper ABC by José L. Jiménez, "España se suma a la fiebre de la minería submarina", of 22 April 2017.

[54] 2167 UNTS 271. Spain deposited its Instrument of Accession on 9 January 2001 (BOE nº. 15, 17 January 2002).

against the underwater cultural heritage of Spain. The vessel was immobilized by order of the Spanish judicial authorities. The case was brought before the Tribunal by means of an application filed by Saint Vincent and the Grenadines against Spain upon the basis of the mutual election of ITLOS, by the two states concerned, in their respective declarations made pursuant to Article 287 of UNCLOS.[55]

The Saint Vincent's Application, filed on 23 November 2010, also included a Request for provisional measures in which the applicant asked ITLOS for the release of the vessel. In its Order of 23 December 2010, while deciding not to take any measure for the moment, the Tribunal found that it was *prima facie* competent to entertain the case. However, four of its most prominent judges, namely Wolfrum, Treves, Cot, and Golitsyn, voted against this finding and held that ITLOS did not have jurisdiction for this dispute. It was not surprising, then, that ITLOS finally found in its Judgment of 28 May 2013 that it lacked jurisdiction to deal with the merits of this case, even after declaring its *prima facie* jurisdiction in the provisional measures proceedings and despite the declarations made by both parties in the dispute. In regard to the former, the Tribunal recalled that the question of the jurisdiction to deal with the merits of the case 'can be decided only after consideration of the written and oral proceedings'[56] and not only on the *prima facie* analysis that is made in the provisional measures phase. As to the effect of the declarations made by the parties pursuant to Article 287 of UNCLOS, it is also necessary that the provisions invoked as the basis for the competence of the Tribunal fall under its compulsory jurisdiction. In this respect, after analysing in detail the numerous provisions invoked by the applicant as a possible basis for its jurisdiction,[57] and the objections raised by the respondent (Spain), ITLOS reached the conclusion that "no dispute concerning the interpretation or application of the Convention existed between the Parties at the time of the filing of the Application and that, therefore, it [had] no jurisdiction *ratione materiae* to entertain the present case".[58]

(2) Advisory cases

Apart from the said contentious case, Spain has also been present in the *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission* (SRFC), which was submitted to its Plenary and marked as case nº 21.

According to Article 33 of the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (SRFC), the Conference of Ministers of the SRFC authorized its Permanent Secretary to bring before ITLOS several questions on the

[55] The Spanish Declaration is reproduced in this page. As to the Declaration by Saint Vincent and the Grenadines, it states the following: "In accordance with Art. 287, of the 1982 United Nations Convention on the Law of the Sea of 10 December 1982, ... the Government of Saint Vincent and the Grenadines declares that it chooses the International Tribunal for the Law of the Sea established in accordance with Annex VI, as the means of settlement of disputes concerning the arrest or detention of its vessels."

[56] Judgment, para. 92.

[57] Arts. 73, 87, 226, 227 and 303, alleged in time, plus Art. 303, alleged untimely after the closure of the written proceedings (Judgment of 28 May 2013, paras. 96 ss.).

[58] Judgment, para. 151 and operative para. (n. 160).

 DOI: 10.17103/sybil.21.12

obligations and liability of flag States in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zones of third party States[59].

By its Order of 24 May 2013, and pursuant to Article 133(3) of its Rules, the Tribunal invited the States Parties to the Convention, the SRFC and other organizations referred in the Order[60] to present written statements on the questions submitted to the Tribunal for its advisory opinion. In this respect, and besides the discussion on the merits, a lengthy discussion was also held on the jurisdiction of ITLOS to deal with them. Spain participated actively in this second discussion on the Tribunal's competence.[61]

As it is well known, this case meant the first time in which an advisory opinion was requested to the plenary of ITLOS. Regarding advisory jurisdiction, express mention is only made by the LOSC in respect to its Seabed Disputes Chamber (SDC),[62] not to the ITLOS full court, and to deal solely with requests for advisory opinions concerning the seabed area, not on general issues. However, going beyond that limited scope, in a somehow "audacious" movement, ITLOS on its own added, to the original draft of its Rules, its current Article 138, according to which the Tribunal itself (not only its SDC) "may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion." ITLOS approved its Rules (Article 16 Annex VI LOSC) on 28 October 1997. When this text was presented to the Eight Meeting of the States Parties of the LOSC, on May 1998, no objection was raised nor has it been posed in its nearly twenty years since its adoption.[63]

During the proceedings, several States, including Spain, expressed their opinions against the jurisdiction of ITLOS for entertaining the request. In this respect, it was put into question both the general empowerment conferred upon ITLOS' full court to give advisory opinions and the jurisdiction of ITLOS to give its advisory opinion on the specific issues posed by the Request. In particular, as to the Spanish view, the main arguments against the Tribunal's advisory jurisdiction could be summarized as follows:

Concerning the general jurisdiction of ITLOS' full court to deal with requests for advisory opinions, as envisaged in Article 138 of its Rules, Spain held that, according to the principle of conferral of competences, international organizations and institutions have no general competence but the special or functional powers that States have invested in them. In this respect, according to Spain,

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59 In particular, the questions were the following: "1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zones of third party States? 2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag? 3. Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question? 4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?"

60 See Annex to the Order.

61 As regards the merits, Spain stated that it "[did] not submit any considerations to the Tribunal regarding the substance of the questions asked to it in the request for its advisory opinion" (Written Statement by the Kingdom of Spain, 29 November 2013, para. 32)

62 In line with such express empowerment, on 1 February 2011, the SDC delivered its Advisory Opinion on the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.*

63 See docs. SPLOS/27, of 23 April 1998 (paras. 42-48), and SPLOS/31, of 4 June 1998 (paras. 9-14).

"neither the Convention nor the Statute [of ITLOS] confers on the Tribunal an advisory jurisdiction of a general character".[64] In lack of such express conferral, Spain considered that the doctrine of implicit powers could not be applied, as "the advisory jurisdiction is not inherent to the function of a judicial body and thus it has to be transferred expressly to a court or tribunal, as confirmed by the institutional practice".[65] In addition, neither Article 288(2) of the LOSC nor 21 of its Annex VI (Statute of ITLOS) serve as a basis for a general advisory jurisdiction of the Tribunal under the LOSC.[66] Finally, according to the Spanish delegation, in the absence of an express conferral by the LOSC, Article 138 of ITLOS' Rules cannot fulfil this function. In summarizing the Spanish view, Article 138 of the Rules cannot be an autonomous basis for conferring general advisory jurisdiction to the Tribunal because it is not an international agreement nor can it serve as the basis for other international agreements related to the purposes of the Convention to confer by themselves (without the LOSC) special advisory jurisdiction to ITLOS, as it might be the case with the request by the SRFC.[67]

On the other hand, Spain also held that, in case that ITLOS found that it had general advisory jurisdiction as objected, it would nevertheless be inappropriate to exercise the power to give an advisory opinion in the present case. Particularly, the Spanish position was that "any legal question which is or can become the object of a dispute between States (and thus would require the consent of the States to be substantiated before the Tribunal) would compromise the Tribunal's judicial functions and extend beyond the special advisory jurisdiction expressly conferred on it by an international agreement related to the purposes of the Convention (and which, by virtue of that international agreement, is limited to its substance and can only affect rights and duties of States parties to the agreement)."[68] In this regard, according to the Spanish view "[I]n the request for an advisory opinion made by the SRFC, the nature of the questions posed is of a wide enough nature as to give rise to controversies between the States, or between a State and an international organisation", thus making them "inadequate to be answered by the Tribunal".[69]

Both types of arguments, raised by Spain and other States, were refused by the Plenary of ITLOS, which considered that its advisory jurisdiction relies not on its Rules but on its own Statute, Article 21, when it confers jurisdiction to this institution not only for dealing with "disputes" but also for entertaining "all matters" specifically provided for in any other agreement [different from UNCLOS]

64 Written Statement by the Kingdom of Spain, cit., para. 8.

65 Written Statement by the Kingdom of Spain, cit., paras. 5-6. In support of its statement, Spain quotes the examples of other international tribunals having advisory jurisdiction, whose power has been always conferred upon them expressly, such as the Permanent Court of International Justice (Art. 14 of the Covenant of the League of Nations), the International Court of Justice (Art. 96 of the UN Charter), the European Court of Human Rights (Arts. 47 and 48 of the European Convention on Human Rights and Protocol 16 to the Convention) the Inter-American Court of Human Rights (Art. 64 of the San José Convention) the African Court of the Human and Peoples' Rights (Art. 4 of the Protocol to the African Charter of Human and Peoples' Rights on the Establishment of the African Court of Human and Peoples' Rights), the Court of Justice of the European Union (Art. 218 of the TFEU) and the Court of Justice of the Economic Community of West African States (Art. 10 of the Protocol of the Community Court of Justice).

66 Written Statement by the Kingdom of Spain, cit., paras. 9 - 11.

67 Written Statement by the Kingdom of Spain, cit., paras. 13 - 23.

68 Written Statement by the Kingdom of Spain, cit., para. 30.

69 Written Statement by the Kingdom of Spain, cit., para. 31.

 DOI: 10.17103/sybil.21.12

conferring jurisdiction upon it.[70] ITLOS also found appropriate to exercise its jurisdiction to give an advisory opinion in the present case.[71]

(3) Other activity before ITLOS

Setting aside the afore-mentioned cases, Spain has had no direct participation in other cases before ITLOS. Nevertheless, it worth's mentioning that the Spanish State's interests were also implicitly present in the case nº 7, concerning the *Conservation and Sustainable Exploitation of Swordfish Stocks in the South-East Pacific Ocean (Chile/European Union)*, in which the fishing vessels and companies affected by the restrictive measures approved by Chile were mostly of Spanish nationality. In this case, as Spain was not a party to the dispute, the concerns of Spain were expressed and treated within the European Union institutions. A different situation is that of prompt release cases nº 5 (*Camouco (Panama v. France)*),[72] 6 (*Monte Confurco (Seychelles v. France)*),[73] 8 (*Grand Prince (Belice v. France)*)[74] and 11 (*Volga (Russian Federation v. Australia)*)[75], in which Spanish nationals were involved, insofar as the Spanish State adopted, in regard to such nationals, a remarkable detachment in coherence with the official position of Spain as regards IUU fishing.[76]

(E) CONCLUDING REMARKS

As seen in pages above, the practice of Spain before the three institutions created by the LOSC, namely, the CLCS, the ISBA and ITLOS, has been remarkable as regards the first and the third, and slim in what concerns the second.

Spain has submitted to the CLCS three partial Submissions concerning the outer limits of its continental shelf in the areas of the Celtic Sea and the Bay of Biscay (Submission 6, jointly submitted with France, Ireland and the United Kingdom) of Galicia (Submission 47) and of the area west of the Canary Islands (Submission 77). Submission 6 was subject to Recommendations by the CLCS and the two remaining ones are still under consideration by this international institution.

For its part, Spain, which is a State Party to the Agreement on the Privileges and Immunities of ITLOS, adopted on 23 May 1997, and which has evidenced its trust on this international judicial institution by choosing it, along with the International Court of Justice, in its Declaration of 19 July 2002, made pursuant to Article 287 of the LOSC, has also been a party in a dispute submitted to ITLOS, the M/V *Louisa* case, (case nº 18) and has participated actively in the discussion on the jurisdiction of ITLOS' full court to give an advisory opinion in the context of the *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission* (SRFC) (case nº 21).

In contrast to this activity before the CLCS and ITLOS, the practice of Spain regarding the ISBA

[70] See Advisory Opinion, 2 April 2015, paras. 37 - 69.

[71] See Advisory Opinion, cit., paras. 70 - 79. As to the substantive aspects of the request, see the Advisory Opinion, para. 219, points 3 to 6.

[72] See Judgment of 7 February 2000, para. 27.

[73] See Judgment of 18 December 2000, para. 28.

[74] See Judgment of 20 April 2001, paras. 32 - 34.

[75] See Judgment of 22 December 2002, para. 38.

[76] On this question, see the contribution in this volume by Pons Rafols on "IIU fishing".

is remarkably shorter. In this respect, Spain is a Party to the Protocol on the Privileges and Immunities of the International Seabed Authority, adopted on 26 March 1998, and has some participation in its organs, but is not among the States either sponsoring or directly developing any kind of mining activity in the marine zone under the organization and control of the ISBA.

 DOI: 10.17103/sybil.21.12

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

A Comprehensive New Approach: The National Maritime Security Strategy

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(A) INTRODUCTION

Maritime security is an increasingly high priority on the agendas of states, international organizations and the private sector. In Spain, it is an area of utmost political and strategic importance and interest for national security. This was recognized in two documents endorsed by the Prime Minister in 2013: the 2013 National Security Strategy,[1] recently reviewed and replaced by the 2017 Strategy,[2] and the National Maritime Security Strategy,[3] which implements its provisions concerning the maritime domain.

The National Security Act subsequently confirmed this special treatment,[4] including maritime security as an area requiring specific attention due to its fundamental role in preserving rights and freedoms, ensuring the supply of essential services and resources, and guaranteeing the welfare of the population.

The Spanish National Maritime Security Strategy was a milestone. Spain was the first country in the European Union to define its national maritime interests in a sectoral document. It was followed by the United Kingdom,[5] the EU itself,[6] France and Portugal.[7] The Strategy reaffirmed the basic

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I am most grateful for the valuable comments by Antonio Notario-Ezquerra of the National Security Department. The usual disclaimer applies; all views herein expressed are strictly personal.

1 Council of Ministers Agreement of 31 May 2013 (*Official State Gazette* (BOE) No. 131, 1 June 2013).

2 2017 National Security Strategy, which received a favourable report from the National Security Council on 1 December 2017 and was subsequently approved by the Council of Ministers by Royal Decree (BOE, pending). On the procedure for the Strategy's preparation, see the National Security Council Agreement of 20 January 2017 (BOE No. 38, 14 February 2017).

3 National Security Council meeting of 5 December 2013. The document is available here. The document will be reviewed to align it where necessary with the new 2017 National Security Strategy.

4 Article 10, Law 36/2015, 28 September 2015, on National Security (BOE No. 233, 29 September 2015)(hereinafter, "National Security Act"). The National Security Policy is organized around national defence, homeland security and external action, the essential components of national security supported by the state intelligence services. It also includes "areas of special interest", such as cybersecurity, maritime security, energy security or environmental conservation.

5 *The UK National Strategy for Maritime Security* was published on 13 May 2014.

6 The *European Union Maritime Security Strategy* was adopted by the European Council on 24 June 2014. The Strategy

 DOI: 10.17103/sybil.21.13

principles to guide the action of the state as a whole in a cohesive and synchronized manner. It also defined a series of objectives and set out lines of action. The ultimate aim was to raise the standards of maritime security, understood as a responsibility shared with the international community.

Like the equivalent documents of the most advanced states and organizations in this field, the Spanish Strategy is based on a comprehensive approach to maritime security. At the same time, it reflects Spain's country profile as a nation open to the sea, bordering the Mediterranean and the Atlantic, with a maritime tradition, vocation and aspirations.[8] Spain also has a high degree of decentralization in the exercise of public power between the central government authorities and other public authorities, a fact that is reflected in the Spanish model of maritime administration.

In this monographic issue of the *Spanish Yearbook of International Law*, commemorating the twentieth anniversary of Spain's ratification of the United Nations Convention on the Law of the Sea (LOSC), an introductory space has been reserved for maritime security. This is because, as with other international instruments on the matter, many of the Convention's provisions are the result of the accommodation of the various security interests of states, which have evolved from classical power and control of the sea to encompass new areas as well, such as the economic, human or environmental dimensions.

Maritime security is therefore present in law, policy, strategy and, to a lesser extent, academia. I will organize the ideas presented in the remainder of this paper in four sections.

First, I will address the principles of Spanish strategic security culture that permeate the country's approach to national maritime security. Second, I will discuss the main contributions of Spain's National Maritime Security Strategy. Third, I will explain how the Strategy has been implemented. Fourth and finally, I will offer an overview of the current state of the direction and coordination of crisis management in the context of the National Security System, an area in which Spain saw significant legislative development in 2015.

(B) THE FOUNDATIONS OF STRATEGIC MARITIME SECURITY CULTURE IN SPAIN

A security strategy is an instrument for political action[9] that lays out the shared principles, defines the interests to be protected, establishes lines of action, and allocates resources and capabilities in pursuit of a feasible and sustainable goal. It does this based on a credible assessment of the priority risks and

Action Plan was adopted on 16 December 2014. Both documents available here.

7 The French strategy, *Stratégie nationale de sûreté des espaces maritimes*, was adopted on 22 October 2015. The Portuguese strategy, *Estratégia nacional para o mar 2013-2020*, was adopted by that country's Council of Ministers and published on 12 February 2014. It focuses on economic, environmental and social challenges in order to promote sustainable development and economic competitiveness.

8 In the words of A. de Senillosa, Director of the National Security Department of the Prime Minister's Office, "Whenever Spain resolutely turns its gaze to the sea, it behaves like the great country it is." ("*The Sea: Strategic Scenario for National Security*", Spanish Maritime Cluster seminar, 26 November 2015.)

9 G. Mulgan, *The Art of Public Strategy: Mobilizing Power and Knowledge for the Common Good* (Oxford University Press, Oxford, 2009). On national security strategies, see: M.A. Ballesteros, *En busca de una Estrategia de Seguridad Nacional* (Ministry of Defence, Madrid, 2016); and A.G. Stolberg, *How Nation-States Craft National Security Strategy Documents* (Strategic Studies Institute, U.S. Army War College, October 2012).

 DOI: 10.17103/sybil.21.13

threats with a view to anticipating, preventing and responding to them, whilst all the while increasing the resilience and capacity to recover of the state and society at large.

In short, it is a model for understanding the major trends and drivers of change in security[10] that makes it possible to prepare the state and society to face long-term challenges. As such, a strategy must be acceptable, credible, legitimate, feasible and sustainable.[11] It can also be an important instrument of influence and diplomacy.

Whatever else it may be, a security strategy is an advanced mechanism for updating a state's vision and planning, to align its tools with the actual magnitude of the challenges looming over society and serve as a basis for whatever policy the government might implement in the matter.

Since 2012, when the process to prepare the National Security Strategy that would ultimately be approved in 2013 began, Spain has witnessed an unprecedented degree of development with regard to its security doctrine and strategic culture. One of its hallmark traits can be summed up in the maxim "from strategic thinking to action", in the sense that documents must be "actionable", capable of delivering results. This goal has been met in two ways: the establishment of an institutional system and organization designed to provide integrated modular responses and the design of a programmed, sustained and evolving work method set out in action plans.

In this regard, as a parallel institutional development simultaneous to the approval of the National Security Strategy, the National Security Council[12] was created, to serve as the cornerstone of the National Security System.[13]

Other fundamental and characteristic aspects of the new way of thinking and doing things when it comes to national security are today codified in law.[14]

I am referring to the effort to narrow the gap between national security policy and Parliament by means of a Joint Congress-Senate Committee and the related search for maximum parliamentary support.[15] I am also referring to the sharing of Spain's security project with the various public authorities, based on the conviction that national security requires a state policy.

Equally relevant is the gradual cultivation of a national security culture able to explain the importance of security for the full exercise of rights and public freedoms, as well as the involvement

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[10] See: *Munich Security Report 2017*: *Post-Truth, Post-West, Post-Order?*, and *The Global Risks Report 2017* (World Economic Forum, 2017). On the maritime domain, see: *Global Marine Trends 2030* (QinetiQ, Lloyd's Register and Strathclyde University, Glasgow, 2013).

[11] *Thinking Strategically* (Royal College of Defence Studies, Defence Academy of the United Kingdom, October 2010). On the embodiment of these principles in the 2013 Spanish National Security Strategy and, thus, the consensus-based, participatory and feasible nature of the document's adoption, in accordance with Spain's country profile, see: J. Moragas, "La Estrategia de Seguridad Nacional", *Política Exterior* (2013), 174.

[12] Royal Decree 385/2013, 31 May 2013, amending Royal Decree 1886/2011, 30 December 2011, establishing the Government's Delegated Commissions (BOE No. 131, 1 June 2013), and Arts. 17, 21 and 26 National Security Act.

[13] Arts. 18-21 National Security Act.

[14] Arts. 4-8 National Security Act.

[15] The National Security Strategy and the resulting National Maritime Security Strategy and National Cybersecurity Strategy of 2013, available at http://www.dsn.gob.es, were adopted with the support of the then-main opposition party. In 2015, the National Security Council adopted the National Energy Security Strategy, which is also available at the aforementioned website.

 DOI: 10.17103/sybil.21.13

of agents from the public and private sectors in fulfilling this objective.[16]

The aforementioned pattern of coordinating reflection and action based on a permanent organizational foundation has been replicated in the field of maritime security. Following the approval of the Strategy, in February 2014, the National Maritime Security Council, tasked with providing support to the National Security Council in this matter, was set up to implement it.[17]

As for the principles of citizen and parliamentary involvement, the state of maritime security, the challenges entailed and the achievements made are an integral part of the Annual Report on National Security. This report has been submitted to Parliament following its approval by the National Security Council since 2013, when it was first submitted to the Constitutional Committee,[18] in an unprecedented effort to inform the public and Parliament of the measures taken in matters of maritime security. Since 2015, the reports have been submitted, by legislative mandate, to the Joint Committee on National Security.[19]

(C) A COMPREHENSIVE STRATEGY ADAPTED TO SPAIN'S DISTINCT MARITIME CHARACTER AND THE INHERENTLY INTERNATIONAL NATURE OF MARITIME SECURITY

The 2013 National Maritime Security Strategy is a document of the highest political order, a fact that reflects the sea's status as a theatre of interest, with economic-commercial, human, environmental, communicational, and geopolitical dimensions.[20] It is thus necessary to ensure high standards of maritime security in Spain and its surroundings.

With regard to this latter dimension of the sea as a space to project power, the strategic impetus given to maritime security in Spain was timely. Although this aspect of security seemed to have been relegated to the back burner following the stepped-up efforts to control the sea in the wake of 9/11, events have continuously reaffirmed the close link between maritime security and geopolitics and the

[16] Since 2013, the basic principles of national security have been unity of action, anticipation and prevention, efficient and sustainable use of resources, and resilience. Others arising from practice have since been added, such as ongoing assessment, which translates into the need to update the national security strategic policy framework at least once every five years. See Art. 4, National Security Act.

[17] See section D of this contribution.

[18] Appearances by the Chief of Staff of the Prime Minister's Office, J. Moragas, to present the Annual Report on National Security 2013 (Session Minutes of the Congress of Deputies [lower chamber of the Spanish Parliament], 15 July 2014, *Official Gazette of the Spanish Parliament* (BOCG) No. 615) and 2014 (Session Minutes of the Congress of Deputies, 28 April 2015, BOCG No. 797).

[19] Article 13 National Security Act. Appearance by the Chief of Staff of the Prime Minister's Office, J. Moragas, to present the Annual Reports on National Security for 2015 and 2016 (Session Minutes of the Joint Committees, 14 February 2017, BOCG No. 14).

[20] C. Bueger and T. Edmunds identify four core dimensions of maritime security: national security, the marine environment, economic development (meaning the "blue economy") and human security ("Beyond seablindness: a new agenda for maritime security studies", 93 *International Affairs* (2017) 1293, at 1299-1300). In this regard, maritime security sector reform is a key issue today. For an overview of the origins and meaning of this concept, see: J. Castellón, "Qué entendemos por reforma del sector de seguridad", in Instituto Español de Estudios Estratégicos, *La reforma del sector de la seguridad: el nexo entre la seguridad, el desarrollo y el buen gobierno*, Cuadernos de Estrategia 138 (Ministerio de Defensa, Madrid, 2008).

 DOI: 10.17103/sybil.21.13

major changes in international politics and tensions.[21]

Security has served to shape international law of the sea and, especially, the LOSC,[22] which in some cases codified state practice or set forth the existing general consensus. For example, security interests drove the discussion and guided the agreement on issues such as the definition (and breadth) of areas such as the territorial sea —defined by Bynkershoek in the 18th century as extending as far as a cannon ball fired from the shore—[23] over which coastal states project their sovereignty and jurisdiction and in which they may thus exclusively exercise certain powers. They were likewise behind the right of innocent passage through the territorial sea,[24] so long as such passage is not prejudicial to the peace, good order or security of the coastal state, and the right of innocent or transit passage applicable to international straits of great strategic importance.[25]

In fact, the sea's contribution to the security of nations is what led to the development of international law of the sea,[26] the cornerstone for cooperation initiatives intended to facilitate optimal use of the opportunities the sea affords.

In this regard, the Spanish Strategy naturally underscores the role of the 1982 LOSC as the main international legal framework for marine areas and the starting point for any effort to address the challenges posed by maritime security, understood in the evolving sense described above.

Another key to understanding the Strategy is the close link between maritime security and other interests in the context of regional organizations of which Spain is a member, such as NATO, with its 2011 Maritime Strategy,[27] or the EU, which, in 2010, began to work on its current strategy, which was ultimately adopted in 2014.[28] Other forums and organizations have likewise positioned themselves and advanced in their understanding of maritime security.[29]

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[21] Working document (07/2017) "Mares violentos", Instituto Español de Estudios Estratégicos, available here; M.T. Klare, "Mahan Revisited: Globalization, Resource Dependency, and Maritime Security in the Twenty-First Century", in D. Moran and J.A. Russell (eds.), *Maritime Strategy and Global Order* (Georgetown University Press, Washington, 2016), 261.

[22] N. Klein, "Maritime Security" and D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens, "Charting the Future for the Law of the Sea", both in D.R. Rothwell, A.G. Oude Elferink, K.N. Scott, and T. Stephens, *The Law of the Sea* (Oxford University Press, Oxford, 2015) 582 and 888, respectively.

[23] As P. Andrés Saénz de Santa María points out in *Sistema de Derecho internacional público* (Civitas-Thomson Reuters, Madrid, 2011), at 335, this links the sovereignty of the coastal state to the use of force. See also, N. Klein, "Maritime Security", *supra* n. 22, at 582, who refers to the "cannon-shot".

[24] Art. 19.2 LOSC.

[25] Arts. 34-45 LOSC.

[26] Preamble LOSC.

[27] NATO Alliance Maritime Strategy 2011.

[28] It was in 2010 under the Spanish Presidency of the Council that the initiative to draft a Maritime Security Strategy for the European Union was launched. The issue was discussed by the Political and Security Committee on 17 June 2014, and the text was adopted by the General Affairs Council at its meeting of 24 June and subsequently endorsed by the European Council. See, T. Molina Schmid, "Los asuntos marítimos en el marco de la Unión Europea. Una estrategia de seguridad marítima de la UE", in Various Authors, *Enfoque integral de la seguridad en el espacio marítimo español* (Escuela de Altos Estudios de la Defensa, Ministerio de Defensa, 2013) 61; R. Roy, "The European Union's approach to maritime security", in J. Krause and S. Bruns, *Routledge Handbook of Naval Strategy and Security* (Routledge, London, New York, 2016), 381.

[29] Africa's Integrated Maritime Strategy (2050 AIM Strategy), 31 January 2014, and the African Charter on Maritime Security and Safety and Development, or "Lomé Charter", adopted on 15 October 2016. On the seeming lack of adherence to inclusive and collective maritime security interests, see B.N. Patel, "Eight Dimensions of Maritime Security Law and Practice Among Member States of the Indian Ocean Rim Association", in C. Espósito, J. Kraska, H.N. Scheiber and M-S

The Spanish Strategy takes a convergent approach. It analyses security comprehensively and, after identifying the challenges, creates an institutional system to enable equally comprehensive action in terms of anticipation, prevention and response.

(1) A Comprehensive Approach to Maritime Security

Spain's National Maritime Security Strategy established a pattern that can be seen in the strategies subsequently adopted by its neighbours in the EU or that had been put forward by traditional maritime powers.[30] It is a pattern marked by a broad, holistic ambition, encompassing the various risks and threats to be addressed and interests to be protected, a comprehensive vision with consequences for the governance of the maritime domain.

This "360° vision" of maritime security in Spain stems from its concept of national security,[31] which comprises, in concentric circles, the protection of its citizens, the defence of Spain and its constitutional principles and values, and the country's contribution to international security. Today it is impossible to differentiate between internal and external security. In a world in constant flux, a world that is globalized and interconnected but also fragmented,[32] where threats are cross-cutting, transnational and intertwined, the blurring of this boundary is clear: security begins beyond our borders. To be effective, any response must be comprehensive and include both domestic and international cooperation.

This is especially true with regard to the sea, whose inherent characteristics make it quite particular. It is a four-dimensional ambivalent environment,[33] open and difficult to control, in which risks and threats are easily projected and easily transcend; a space without visible borders, which facilitates interconnection and interdependence; a space with very different yet intimately related zones,[34] as well as areas —some quite remote— that lie beyond the sovereignty and jurisdiction of states, which cannot be appropriated but rather are governed by the principle of freedom.

The changing and evolving nature of maritime security has been theorized in relation to the discipline of international relations. Recently, the need to advance in this field "beyond seablindness"

Kwon (eds.), *Ocean Law and Policy: 20 Years under UNCLOS* (Brill-Nijhoff, Leiden, Boston, 2016), 249-265.

[30] In addition to the aforementioned strategies adopted by EU Member States, see the US National Strategy for Maritime Security (2005).

[31] 2013 and 2017 Spanish National Security Strategies and Art. 6 of the National Security Act. On the concept of national security, see: Opinion of the Spanish Council of State, 13 May 2015, on the National Security Bill (Document CE-D-2015-405). See also: D. A. Baldwin, "The Concept of Security", 23 *Review of International Studies* (1997), 5-26; B. Finel, "What is Security? Why the Debate Matters", 4 *National Security Studies Quarterly* (Fall 1998), 1-18; L. Lazarus, "The Right to Security", in R. Cruft, S. Matthew Liao and M. Renzo (eds.), *Philosophical Foundations of Human Rights* (Oxford University Press, Oxford, 2015), 423; I. Loader and N. Walker, *Civilizing Security* (Cambridge University Press, Cambridge, 2007), on security as a global public good.

[32] On "decentralized globalism" see: B. Buzan and G. Lawson, *The Global Transformation. History, Modernity and the Making of International Relations* (Cambridge University Press, Cambridge, 2015).

[33] Insofar as it not only encompasses the area occupied by water, but the coast, littoral, continental shelf, international seabed area, airspace and cyberspace. See: C. Schofield, "Ever More Lines in the Sea: Advances in the Spatial Governance of Marine Space" in C. Espósito, J. Kraska, H.N. Scheiber and M-S Kwon (eds.), *supra* No. 29, at 387-418.

[34] Preamble LOSC.

has become clear; it is a matter deserving its own differentiated space.[35] In any case, the all-encompassing approach to maritime security is the most widely shared.[36]

In Spain, national maritime security is understood as the action of the state aimed at protecting national interests related to:[37] 1) compliance with national legislation and international law in maritime areas under Spanish sovereignty and jurisdiction and respect for international rules on the high seas, in adherence to Spain's international commitments; 2) protection of human life at sea; 3) freedom and security of navigation; 4) maritime trade and transport; 5) the shipping industry and other maritime industries; 6) the security of ships flying the Spanish flag (merchant, fishing and recreational fleets); 7) ports and maritime infrastructure, including off-shore facilities, oil pipelines, underwater pipelines and submarine cables, as well as critical infrastructure located along the coastline; 8) marine resources (living and non-living); 9) the marine environment; and 10) underwater archaeological heritage.

These interests reflect Spain's unique maritime condition, in which geographical and political aspects that underlie the Strategy are decisive.

With a coastline spanning almost 8,000 kilometres and a marine area of around 1.1 million square kilometres,[38] Spain is the fourth-largest country in Europe. In the current panorama of interdependent, liquid[39] security —an especially appropriate term in this context— the sea is an essential element for the country.

Spain's distinctive geostrategic profile moreover requires it to have peripheral vision. Lying at the crossroads between Europe and North Africa, the Mediterranean and the Atlantic, comprising a peninsular mainland, archipelagos, islands and sovereign territories in North Africa, bordering the Strait of Gibraltar, one of the world's busiest bottlenecks, with an average transit of more than 100,000 ships a year,[40] Spain is a bridge between countries and cultures, unavoidably exposed but also exceptionally positioned with regard to the sea.

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35 C. Bueger and T. Edmunds (*supra* No. 20, at 1293-1311) offer an account of the realist interpretation of security at sea found in G. Till, *Seapower: A Guide for the Twenty-First Centrury* (Routledge, New York, 2013), although in my view, certain qualifications can be found. They also identify the liberal approach, represented by J. Kraska and R. Pedrozo, *International Maritime Security Law* (Brill, Leiden, 2013), associated with the rise of international governance regimes, since the sea is a space in which a collective public order is manifested. Finally, they cite B. Buzan, O. Waever and J. de Wilde (*Security: a new framework for analysis* (Lynne Riener, London, 1998)) as theorists who consider maritime security a distinct subset of security thinking, including but not limited to the previous two dimensions referring to power and law at sea.

36 C. Bueger, "What is maritime security?", 53 *Marine Policy* (2015), 159-164; L. Feldt, P. Roell, R.D. Thiele, "Maritime Security – Perspectives for a Comprehensive Approach", 222 *Institute for Strategic, Political, Security and Economic Consultancy* (2013); J. Kraska and R. Pedrozo, *supra* No. 35; J. Klein, "Maritime security" in S. Jasper (ed.), *Securing freedom in the global commons* (Stanford University Press, Stanford, 2010), 69; N. Klein, *supra* No. 22, at 582. For C. Bueger and T. Edmunds (*supra* No. 20, at 1293, 1300-1302), this vast object explains the interconnected nature of the risks and threats to maritime security, their transnational and inter-jurisdictional nature, and their "liminality", meaning, their extension to the coast.

37 National Maritime Security Strategy and "La organización de la Seguridad Marítima en España: oportunidades y desafíos", restricted report, presented to the National Maritime Security Council on 9 December 2014.

38 Data available here.

39 See M. Leonard, "The Era of Mutual Assured Disruption", in reference to the work of Z. Bauman, *Liquid Modernity* (Polity Press, Cambridge, 2012) and *Liquid Times: Living in an Age of Uncertainty* (Polity Press, Cambridge, 2007).

40 Data from the Maritime Security Agency.

 DOI: 10.17103/sybil.21.13

Additionally, although virtually all aspects of maritime security fall under the exclusive jurisdiction of the state, given that the country's autonomous regions and municipalities lack jurisdictional waters, the responsibility for maintaining this security does not lie solely with the Spanish government and central government authorities; it also falls to the other public authorities, autonomous regions and local councils, especially in matters related to fisheries, underwater cultural heritage and environmental protection.

National maritime security is integrated into the Spanish "state of autonomous regions". In Spain, competence in the field of maritime security is shared both vertically and horizontally.[41] Thus, the general principles of organization and operation of relations between public authorities apply, including institutional loyalty, collaboration, cooperation, coordination and efficient management of public resources.[42]

(2) National Maritime Interests *versus* Risks and Threats: Comprehensive Modular Responses to Multiform Global Challenges

As noted, the Spanish Strategy identifies highly diverse maritime interests to be protected from challenges due to a variety of causes. Indeed, very different factors can jeopardize maritime security, depending on whether the cause is social, technological, geopolitical, economic, environmental or a natural disaster. The source or reason is rarely monocausal.

The Strategy chooses to classify risks and threats by whether they originate in deliberate acts of a criminal nature or are the result of accidents or chance.[43] It thus distinguishes between, on the one hand, illicit acts —trafficking, piracy, terrorism, weapons proliferation, irregular immigration and human trafficking, illegal exploitation of marine resources, destruction and degradation of the marine environment, acts against underwater cultural heritage and cyber threats— and, on the other, maritime accidents and natural disasters.

In addition to these risks and threats, it takes into account the existence of multipliers[44] that can be conducive to their emergence or accelerate or aggravate them. Poverty, inequality, demographic imbalances and climate change would fall into this category. In this regard, the Spanish National Maritime Security Strategy notes that unsettled maritime boundaries with neighbouring countries are also likely to generate friction and affect national maritime security interests.

On this basis and with the understanding that the ultimate aim of maritime security is to help facilitate the maximum use of the opportunities afforded by the lawful uses of the sea for the benefit of Spain's wellbeing and prosperity, always in consonance with its commitments to and common projects with its partners and allies and bearing in mind the aspirations of the international

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41 G. Guerra, "Administración y protección marítima", in Various Authors, *Enfoque integral de la seguridad en el espacio marítimo español* (Escuela de Altos Estudios de la Defensa, Ministerio de Defensa, 2013), 183.

42 Law 40/2015, 1 October 2015, on the legal framework applicable to the public sector (BOE No. 236, 2 October 2015); "La organización de la Seguridad Marítima en España: oportunidades y desafíos", *supra* No. 37.

43 R. Calduch, "Riesgos, amenazas y escenarios en el enfoque integral de la Seguridad marítima española", in *Enfoque integral de la seguridad en el espacio marítimo español* (Escuela de Altos Estudios de la Defensa, Ministerio de Defensa, 2013).

44 Instituto Español de Estudios Estratégicos, *Los potenciadores del riesgo*, Cuadernos de Estrategia 159 (Ministerio de Defensa, Madrid, 2013).

community as a whole, the Strategy establishes a general objective, identifies four basic principles, and lays down five lines of action to guide the state's actions in pursuit of that objective.

The objective is to promote a wide-ranging maritime security policy informed by the principles contained in the National Security Strategy through strategic lines of action that pursue a comprehensive approach, efficiency, international cooperation, partnership with the private sector, and enhanced cybersecurity in the marine environment.[45]

Finally, the Strategy describes the mechanism of the institutional maritime security architecture within the National Security System, the ultimate purpose of which is to strengthen decision-making at the strategic policy level.

(D) THE IMPLEMENTATION OF SPAIN'S NATIONAL MARITIME SECURITY STRATEGY

The division of public power in Spain, a highly decentralized state in matters of maritime security, explains why one of the guiding principles of the 2013 National Maritime Security Strategy is unity of action, coupled with recourse to the system technique to coordinate and align actions and instruments.

To this end, the National Security System, promoted and led by the Prime Minister, was established in 2013. The system is based on the National Security Council, which, in its capacity as the Government's Delegated Commission for National Security, assists the Prime Minister in directing the National Security Policy and actions related to crisis management.

The National Maritime Security Council and the Situation Committee were created as support bodies for the National Security Council for the management of crises, including maritime ones, situations in which unity of action is essential to ensuring efficiency and a coordinated response.

(1) The National Maritime Security Council

On the initiative of the National Security Council, the National Maritime Security Council was created as a support body in the maritime domain the same day the National Maritime Security Strategy was approved. It held its constituent meeting on 28 December 2014. The president of the Council is the Chief of the Defence Staff; the vice-president is the Director of the National Security Department. A seat on the council is also reserved for the Operations Director of the National Security Department, so that the department can ensure the continuity of the work promoted by each Council presidency, which was initially conceived of as rotating.

The Council is a coordinating body whose actions have made the National Maritime Security Strategy a useful, actionable, living document that has remained current since its approval. In addition to the competent ministerial departments, the other public authorities, private sector, and society at large may also participate. With regard to the central government authorities, not only are the "canonical" ministries competent and represented, i.e. the Ministries of Defence,[46] Finance and Civil

[45] The latter two lines of action were coordinated in Spain in collaboration with the Spanish Maritime Cluster.

[46] Organic Law 5/2005, 17 November 2005, on National Defence (BOE No. 276, 18 November 2005) and Ministerial Order 86/2012, 4 December 2012, creating the Maritime Security and Surveillance Command and the Defence and Air

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Service,[47] Home Affairs[48] and Public Works,[49] all of which have broad missions and centres and resources at sea; in the preservation of maritime security, understood in a broad sense including all potential risks or threats, nearly all the central ministries participate. The National Maritime Security Council's composition reflects this division of competences.[50]

As for its legal nature and functions, the National Maritime Security Council is a collegial body that supports the National Security Council and, therefore, the Prime Minister within the framework of the Government Act.[51] Consequently, the National Maritime Security Council is not attached to any ministerial department. Its functions are to reinforce coordination, collaboration and cooperation amongst the various competent authorities.

Additionally, the Council pursues the necessary initiatives to ensure the harmonious evolution of the National Maritime Security Strategy with regard to the Integrated Maritime Policy, the European Union Maritime Security Strategy and other international strategies. It also performs risk and threat assessments.

At its meeting on 9 December 2014, it approved the National Maritime Security Strategy Action Plan, which was endorsed by the National Security Council at its meeting on 23 January 2015.

(2) The Spanish Maritime Strategy Action Plan

The Council presidency was extremely proactive in fulfilling its mandate.[52] It submitted for consideration an Annual Plan based on five long-term projects, as well as a draft Action Plan that proposed, amongst other things, the establishment of a National Maritime Surveillance Centre, the creation of a permanent maritime security body, the coordination and suppression of conflicts amongst the various maritime services, and the establishment of a virtual coast guard service.

Indeed, the best way to promote coordinated action through a joint maritime security operations

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Operations Command (*Official Defence Gazette* No. 242, 13 December 2012).

47 Law 31/1990, of 27 December 1990, on the State Budget for 1991, creating the State Tax Administration Agency (AEAT from the Spanish) (BOE No. 311, 28 December 1990), and Order PRE/3581/2007, 10 December 2007, establishing the departments of the State Tax Administration Agency and attributing to them functions and powers implemented in Organic Law 12/1995, 12 December 1995, on the deterrence of smuggling, amended by Organic Law 6/2011, 30 June 2011 (BOE No. 296, 11 December 2007).

48 Organic Law 2/1986, 13 March 1986, on Security Forces and Corps (BOE No. 63, 14 March 1986), and Order PRE/2523/2008, 4 September 2008, creating the Civil Guard centres for the maritime surveillance of coasts and borders (BOE No. 215, 5 September 2008).

49 Royal Legislative Decree 2/2011, 5 September 2011, approving the consolidated text of the State Ports and Merchant Marine Act (BOE No. 253, 20 October 2011).

50 In addition to the Ministries of Defence, Finance and Civil Service, Home Affairs and Public Works, the following ministries and bodies are represented: Ministry of Foreign Affairs and Cooperation; Ministry of Education, Culture and Sport; Ministry of Energy, Tourism and Digital Agenda; Ministry of Agriculture, Fisheries and Food and Environmental Affairs; Ministry of the Presidency and Regional Administrations; Ministry of Economy, Industry and Competitiveness; the National Intelligence Centre; and the National Security Department (Prime Minister's Office). Other competent ministerial departments, central, regional or local government authorities or experts able to make a valid contribution may also be invited depending on the matter to be discussed.

51 Law 50/1997, 27 November 1997, on the Government (BOE No. 285, 28 November 1997).

52 The presidency of the Council was held by General Admiral F. García Sánchez, Chief of the Defence Staff, until June 2017.

centre or body was one of the most debated aspects in the deliberative and analytical process leading up to the Strategy's implementation.[53]

By initiative of the presidency and decision of the Council, the Maritime Security Research Group was created in the National Security Department of the Prime Minister's Office. It was tasked with identifying the strengths, weaknesses, opportunities, and threats of the Spanish maritime administration model and analysing other cooperative and centralized models, including the one proposed by the presidency, with a view to assessing their potential transfer to the Spanish system and, therefore, their suitability, viability and acceptability, i.e. their functionality and regulatory and economic impact.[54]

The report's conclusions are reflected in the Action Plan.[55] Despite their intrinsic value, the proposals to create new bodies included in the document submitted by the presidency were deemed premature and likely to have a strong regulatory impact. Nevertheless, they were largely included in the line of action to enhance the comprehensive approach as part of the dimension concerning the strengthening or creation of new bodies.

The Action Plan reifies and develops the Strategy's five lines of action – comprehensive approach, effectiveness and efficiency, international cooperation, public-private partnership and cybersecurity – in the form of fourteen specific actions. These specific actions are divided amongst the five lines of action according to a 5+5+1+2+1 scheme that places clear emphasis on the comprehensive approach and effectiveness and efficiency lines.[56] Management of these actions is assigned to a member of the National Maritime Security Council according to a schedule. In the following paragraphs, I will highlight just a few of the actions undertaken under the first line of action, concerning the comprehensive approach.

The first line of action is broken down into five specific actions. Three involve the strengthening or creation of new bodies, one is technical, and the fifth is functional. Specifically, the first three concern the creation of a maritime security office, the strengthening of the National Security Department's Situation Centre, and the creation of a Cell for Information and Analysis of Risks and Threats to Maritime Security (CIARA from the Spanish).

Attention should be called to the importance of this latter body, chaired by the Deputy Director General of the Armed Forces Intelligence Centre (CIFAS) and with representatives from all the ministerial departments and bodies with seats on the National Maritime Security Council itself. Constituted on 11 June 2015, the CIARA performs a twice-yearly assessment and monitoring of risks and threats, paying particular attention to their likelihood, and prepares extraordinary reports

53 F. del Pozo, "La seguridad marítima hoy: la mar nunca está en calma", *Real Instituto Elcano* (Documento de Trabajo 3/2014, 12 March 2014).

54 "La organización de la Seguridad Marítima en España: oportunidades y desafíos", *supra* n. 37.

55 On 23 January 2015, the National Security Council endorsed the National Maritime Security Strategy Action Plan, previously approved by the National Maritime Security Council on 9 December 2014.

56 The action line concerning effectiveness and efficiency is implemented through five actions. Two are related to material resources and capabilities with a view to listing and cataloguing these resources and capabilities, respectively, in light of the recommendations contained in the Report on the Reform of Public Administrations (CORA). The other three concerns: cooperation in the field of training and capacity-building; the development of an Underwater Archaeological Heritage Catalogue; and biodiversity protection and marine spatial planning.

 DOI: 10.17103/sybil.21.13

whenever the circumstances so require.

Within the comprehensive approach line, and in relation to the above, the technical action has consisted of the development of systems to enable the exchange and sharing of maritime security information at the national level. This has resulted in the development of the SEGMAR tool, designed to support maritime security bodies in decision-making by providing them with aggregate data,[57] and the *Colabora* portal, a single document repository for the entire maritime administration represented on the National Maritime Security Council.

The fifth and final action undertaken under the umbrella of strengthening the comprehensive approach is functional and consists in improving operational cooperation and collaboration. In this regard, attention should be called[58] to the approval of the Maritime Security Operations Coordination and Cooperation Agreement and the Comprehensive Plan for Maritime Security in the Strait of Gibraltar or MARES Plan.[59]

(E) CRISIS MANAGEMENT IN THE SPANISH NATIONAL SECURITY SYSTEM

The National Security Act developed and advanced the regulatory framework for crisis management in Spain, which was designed to accommodate the decentralized territorial organization of the state enshrined in Title VIII of the Constitution. This framework was thus conceived of as a space for inter-administration action according to the competences attributed to each administration by the Constitution and the respective Statutes of Autonomy, to be governed by the general principles of mutual trust and cooperation set out in the regulations governing the public sector regime.

The National Security Act aims to improve coordination amongst the competent authorities, the private sector and civil society through permanent, modular prevention and response frameworks that do not need to be assembled *ad hoc* for each crisis. It thus seeks to move beyond compartmentalized action in this area in order to address the cross-cutting nature of most crises, which generally require the involvement of multiple actors to be resolved.

In the maritime sphere, prior to the Act's passage, crises such as the sinking of the Prestige in 2002 or the massive arrival of irregular immigrants to the Canary Islands in 2006 were managed by crisis cells set up *ad casum*.

The National Security Act signalled an advance in the integration of actions for a comprehensive response. To this end, within the government, the National Security Council was created at the

[57] SEGMAR is a modular IT system with three main features: a video-conference system for the coordination of operations centres, a chat feature to facilitate 24/7 monitoring, and a geographic viewer with different layers of information.

[58] Also of relevance is the maritime dimension of the report on terrorist threat levels and their alignment with the International Ship and Port Facility Security Code (ISPS) levels (Report of the Secretary of Homeland Security, Ministry for Home Affairs, 22 September 2015). The ISPS was adopted into the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention) in a new Chapter following the 9/11 attacks in the United States of America.

[59] The first one offers a framework for interministerial cooperation initiatives in the field of maritime operations. The MARES Plan officially outlines the coordination procedure for addressing potential risks and threats arising in the maritime area running from Cape Gata, Almeria, to the province of Huelva. The area is subject to heavy global maritime traffic and significant east-west and north-south trade flows through ports such as Algeciras, which have registered increasing volumes of container traffic and are the focus of multiple international geostrategic interests.

strategic policy level and tasked with assisting the Prime Minister in directing and coordinating actions to manage crisis situations and, in particular, situations of interest for national security. This it would do with the support of the Specialized Situation Committee, which is the same for all crisis situations regardless of their nature or the area they affect.[60] If activated, this committee may supplement its actions with other specialized bodies, such as the National Maritime Security Council.

A situation of interest for national security[61] refers to a state prior to one of constitutional anomaly.[62] This includes contingencies in which the severity of the effects of the situation and the dimension, urgency and cross-cutting nature of the measures required for its resolution call for enhanced coordination of the competent authorities in the performance of their ordinary duties and powers, without this coordination ever entailing the suspension of the fundamental rights and public freedoms of citizens. This would have been the case in the aforementioned maritime crises in 2002 and 2006.[63]

With regard to the role of specialized bodies such as the National Maritime Security Council of supporting the Situation Committee, in November 2014, the Council held two extraordinary sessions in relation to the incident involving the Greenpeace vessel Arctic Sunrise and its actions protesting the exploratory work being carried out by the Repsol drillship Rowan Renaissance in Canary Island waters east of Fuerteventura and Lanzarote. The meetings enhanced interministerial coordination at the strategic policy level.

As for the migrant and refugee crises, one of the response measures adopted was the joint activation, on 27 April 2015, of the National Maritime Security Council with the Immigration Committee. The purpose of the meeting, which was co-chaired by the Chief of the Defence Staff and the Secretary of State for Security, was to prepare the measures to comply with the resolutions of the extraordinary meeting of the European Council in April 2015.

(F) CONCLUSION

In a globalized world, good governance of the sea is vital. Cooperation between states is essential both to ensure better use of the opportunities afforded by this domain and to tackle the security challenges arising in it. The maritime space is inherently international. In particular, international law of the sea and, more specifically, its flagship, the LOSC, are often underpinned by the maritime security interests of states. These interests evolve and are currently quite diverse.

Maritime security occupies an important place on the agendas of states and international organizations. In their strategic documents, the prevailing approach to maritime security is a comprehensive one. This approach has expanded beyond the canonical power and control of the sea to

[60] The Situation Committee will be chaired by the National Security Council member or the acting authority appointed by the Prime Minister, as appropriate.

[61] Art. 23 *ff.* National Security Act.

[62] Organic Law 4/1981, 1 June 1981, on States of Alert, Emergency and Siege (BOE No. 134, 5 June 1981).

[63] The Prime Minister can determine the necessary human and material resources to be provided by the competent authorities. The contribution of resources according to the principles of gradual and proportional contribution in accordance with the situation and compensation is regulated under Title IV of the National Security Act.

today encompass economic, human or environmental factors as well.

Spain has been a trailblazer in the EU. Through its National Maritime Security Strategy it showed, first, that in the 21st century any understanding of maritime security must be all-encompassing and relational and, second, that the present and future uses of the sea are of utmost importance for a seafaring country, open to the Mediterranean and the Atlantic, with a maritime past, legacy, prestige and ambition.

One of the challenges of the maritime security governance model is to reflect and unite the vast diversity it encompasses and to defend common interests and values. Furthermore, it must do all this in an unstable world that is changing at an unprecedented speed, with known and unknown systemic and global risks and threats requiring global responses. To pursue this unifying goal, Spain created the National Maritime Security Strategy and the National Maritime Security Council, based on the conviction that no challenge can outweigh the will to overcome it.

 DOI: 10.17103/sybil.21.13

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

Maritime zones under sovereignty and navigation

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(A) SPAIN'S TERRITORIAL SEA CLAIM. SPANISH INTERNAL WATERS

It has been argued that Spain already had a 6-mile territorial sea since the mid-17th century, (more specifically, since the Royal Charter of 17 December 1760 against tobacco and salt smuggling in the waters adjacent to the Spanish coast up to 2 leagues offshore).[1] However, until 1977 the Spanish legislation and conventional practice only allowed us to speak (strictly) of Spain's exercise of jurisdiction in different fields (defence, customs and fisheries) in the waters adjacent to its coast.[2] On the other hand, the so-called "Spanish Territorial Waters" did not exceed 6 miles until the 1967 Fisheries Act, enacted upon the ratification of the 1964 European Fisheries Convention, which extended them to 12 miles for fishing purposes.[3]

It was in 1977 —almost six years after acceding to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone—[4] when Spain formally claimed its territorial sea through the 1977 Territorial Sea Act.[5] Its breadth is set at 12 miles from the baseline, following other countries' practice and the *opinio juris* of the majority of states participating in the Third United Nations Conference on the Law of the Sea —and in the preparatory committee before that.

For the purpose of measurement, the 1977 Territorial Sea Act provides that the inner limit shall be determined by the "low-water line and by such straight baselines as may be established by the Government" (Art. 2). However, Royal Decree 627/1976, adopted by the Spanish Government as an implementing regulation of the 1967 Fisheries Act, had previously established straight baselines both

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1 Statement made by the Spanish representative to the United Nations Seabed Committee, 16 March 1971; taken from S. Martínez Caro, "Mar territorial: naturaleza, anchura y delimitación", in A. Poch (ed.), *La actual revisión del Derecho del mar. Una perspectiva Española* (Instituto de Estudios Políticos, Madrid, 1975) vol. I (1), 233-284, at 265.

2 J.A. Pastor Ridruejo, *Curso de Derecho internacional público y organizaciones internacionales* (21th ed., Tecnos, 2017), at 360.

3 Law 20/1967, 8 April 1967, Extending the Jurisdictional Waters to Twelve Miles for Fishing Purposes (BOE No. 86, 11 April 2967). Decree 3281/1968 extended jurisdictional waters to twelve miles for tax purposes (BOE No. 17, 20 January 1969).

4 Instrument of accession deposited on 25 February 1971 (BOE No. 307, 24 December 1971).

5 Law 10/1977, 4 January, on the Territorial Sea (BOE No. 7, 8 January 1977). Law 28/1969, of 26 April, on Coasts (BOE No. 101, 28 April 1969), already referred to the territorial sea, without setting its breadth and declaring it under public domain by means of its Art. 1. Before that, Art. 1 of Law 48/1960, of 21 July, on Air Navigation, claimed that Spanish sovereignty extended to the airspace over the territorial sea (BOE No. 176, 23 July 1960).

 DOI: 10.17103/sybil.21.14

in the mainland coast and in the Balearic and Canary Islands.[6] The wording of this regulation was similar to that of the 1977 Territorial Sea Act, providing also that the low-water lines of natural harbours or bays should be considered as baselines whenever they exceeded 24 nautical miles. The aforesaid 1976 Royal Decree was later replaced by Royal Decree 2510/1997 in view of the errors identified in the drawing of straight baselines.[7]

Royal Decree 2510/1997, currently in force, draws 123 straight baselines, most of which do not exceed 24 nautical miles.[8] These lines, however, do not cover all Spanish coast, either because there are no geographical features allowing for it (for instance, in certain parts of the coast of the Balearic Islands), or for political reasons (in Algeciras Bay, bathing the territory of Gibraltar, and in Ceuta, Melilla and the Mediterranean islands, islets and island rocks close to the African coast). It is worth noting the drawing of straight baselines in river mouths without using the low-water points of riverbanks as reference, but also without deviating significantly from the rules later laid down in the 1982 UN Convention on the Law of the Sea (LOSC).[9]

The adoption of the 2010 Canary Islands Waters Act does not change the application of the referred baselines regime to the Canary Islands. This Act establishes the so-called "Canary waters" as a maritime zone of the Autonomous Region of the Canary Islands, based on a perimeter outline of the outermost points of the islands and rocks.[10]

According to former 1967 Fisheries Act As, the internal waters were those waters included within the baselines used to measure such area (Art. 2). Later, the 1977 Territorial Sea Act (currently in force) declared that the Spanish sovereignty extends over these waters (Art. 1: "The sovereignty of the Spanish state shall extend, beyond its land territory and its internal waters, to the territorial sea [...]"), without further specifications.

Currently, the 2011 State Ports and Merchant Marine Act[11] provides that "Spanish internal maritime waters are, for the purposes of this Act, those on the landward side of the baselines of the territorial sea", adding that these waters "include ports and any other permanently connected to the sea where it becomes sensitive to the effect of tidal and navigable stretches of rivers to where there are ports of general interest" (Art. 8(1)).[12] It defines seaports as "all territorial spaces, maritime waters and

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6 Royal Decree 627/1976, 5 March 1976, of April 8, on the extension of Spanish jurisdictional waters to 12 miles, for fishing purposes (BOE No. 77, 30 March 1976).

7 Royal Decree 2510/1977, 5 August 1977, on the drawing of straight baselines in development of Law 20/1967, of April 8, on the extension of Spanish jurisdictional waters to 12 miles, for fishing purposes (BOE No. 234, 30 September 1977).

8 See V.L. Gutiérrez Castillo, "Análisis del sistema de líneas de base español a la luz de la Convención de Naciones Unidas sobre el Derecho del Mar de 1982", in J.M. Sobrino Heredia (ed.), *Mares y océanos en un mundo en cambio* (Tirant lo Blanc, Valencia, 2007), 171-197, at 175.

9 *Ibid.*, at 186.

10 Law 44/2010, 30 December 2010, on the Canary Island Waters (BOE No. 318, 31 December 2010). Sole additional provision provides that: "[T]he drawing of the perimeter outline shall not affect the delimitation of the maritime zones of the Canary Islands as established by the Spanish legal order under applicable international law". See, in this regard, E. Orihuela Calatayud, "La delimitación de los espacios marinos en los archipiélagos de Estado. Reflexiones a la luz de la Ley 44/2010, de 30 de diciembre de aguas canarias", 21 *REEI* (2011), 1-26, at 18.

11 Royal Legislative Decree 2/2011 of September 5, approving the consolidated text of the State Ports and Merchant Marine Act (BOE No. 253, 20 October 2011).

12 Former Law 27/1992, of 24 November, on State Ports and Merchant Marine (BOE No. 283, 25 November 1992)

facilities located on the shore of the sea or estuaries, with physical, natural or artificial and organizational conditions that enable the performance of port traffic operations [...]" (Art. 2).

(B) SPAIN'S TERRITORIAL SEA AND INTERNAL WATERS LEGAL REGIME

The 1977 Territorial Sea Act declares Spain's sovereignty over its territorial sea and internal waters, and provides that such sovereignty "shall be exercised, in accordance with international law, over the water column, seabed, subsoil and resources of the territorial sea, and over the superdjacent airspace" (Art. 1). Also, the Spanish Constitution of 1978 (Art. 132(2)) and the 1988 Coastal Act[13] (Art. 3(2)) establish that the territorial sea and the internal waters (including the seabed and subsoil) are "property of the state public domain". Hence, they are inalienable (they cannot be sold), not subject to any statute of limitations (ownership cannot be obtained through acquisitive prescription) and exempt from seizure.[14] Until 2014, the Spanish legislation said no more on the territorial sea regime, except for certain regulatory provisions referred to below.

The approval of the 2014 Maritime Navigation Act[15] provided Spain with a rule governing navigation through the territorial sea. Incidentally, it also regulated other activities in this area. In particular, it enshrines the prohibition for foreign vessels to fish in the territorial sea —as well as in the internal waters— (Art. 24, which also establishes that foreign vessels shall not have their fishing nets ready for operation in any Spanish maritime zone). Moreover, research activities by foreign vessels (or foreign entities in Spanish vessels), either in the territorial sea or other maritime zones under Spanish sovereignty or jurisdiction, are subject to administrative authorization (Art. 25). Furthermore, the 2014 Maritime Navigation Act sets forth the following obligations for foreign vessels:

(1) The obligation to comply with the applicable laws and regulations on navigation, border controls and immigration, customs, health and others of public security, as well as those related to the protection of the marine environment and the underwater cultural heritage (Art. 38); and

(2) The prohibition, except where otherwise authorized, to carry out marine scientific research, underwater activities or any others that may damage cables, pipes or facilities and equipment serving navigation, research, measurement of the environment, or exploitation of marine resources. It also lays down the prohibition to use ancillary vessels (except in the event of failure or of search and rescue operations), to send out sound or light signals other than those provided by the rules on maritime safety and prevention of collisions at sea (Art. 39(1) and (3), see also Art. 25(3) in relation to research).[16]

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wrongly included rivers, lakes and continental waters in the definition of internal waters (Art. 7). The 2011 State Ports and Merchant Marine Act also provides a broad definition of internal waters, since it includes non-maritime waters ("navigable stretches of rivers to where there are ports of general interest").

[13] Law 22/1988, 22 July 1988, on Coasts (BOE No. 181, 29 July 1988).

[14] According to Law 33/2003, on Assets of Government Bodies (BOE No. 264, 4 November 2003).

[15] Law 14/2014, 24 May 2014, on Maritime Navigation (BOE No. 180, of 25 July 2014), an English version available here.

[16] With regard to marine research, Royal Decree 799/1981, of 27 February, concerning the Rules Applicable to Marine Scientific Research Activities in Areas under Spanish Jurisdiction (BOE No. 110, 8 May 1981), requires prior authorization

 DOI: 10.17103/sybil.21.14

With regard to internal waters, Spain does not have a specific rule defining their legal regime in a complete and detailed manner. Nevertheless, they are subject to the rest of the Spanish legislation and the decisions of the courts and other authorities. However, two sector-specific rules lay down the regime applicable to navigation through these waters, as well as to access and stay in ports. I am referring, on the one hand, to the abovementioned 2011 State Ports and Merchant Marine Act, which replaced the 1992 Act[17] and, on the other, to the Maritime Navigation Act itself. To them should be added several regulatory provisions, the most relevant of which will be mentioned below.

Moreover, the 2014 Maritime Navigation Act prevents foreign vessels (except when authorized by the marine authorities) from carrying out the activities mentioned above in internal waters (Art. 39(4)). Foreign vessels are also prohibited from fishing, unless authorized by the competent authority, and subject to international treaties (Art. 24(2)).

(c) General regime applicable to navigation through the territorial sea

Until the 2014 Maritime Navigation Act, Spain did not have a detailed regulation of navigation through its territorial sea, except, as we shall see, for warships. The 1977 Territorial Sea Act merely stated that the sovereignty in such area was to be exercised in accordance with international law. However, the Spanish practice reflects the long-standing acceptance of international standards on innocent passage.[18]

In line with LOSC provisions, the 2014 Maritime Navigation Act provides the application of the innocent passage regime in the territorial sea (without it being subject to charges, except for the services provided during the passage; see Art. 41). It also specifies that such passage must be expeditious and uninterrupted, without threatening the peace, the good order or the safety of Spain (Art. 37(1) and (2)). Submarines and other underwater vessels are required to navigate on the surface and to show their flag (Art. 22(3)). With respect to overflying aircrafts, passage may be allowed through a special permit or pursuant to the treaties to which Spain is a party (Art. 47). Besides, reference is made to LOSC[19] for navigation through the Strait of Gibraltar (covered by the territorial sea of both Spain and Morocco). Furthermore, this Act requires all vessels navigating through Spanish zones to be registered in only one state, to show their name and registration number, and, pursuant to maritime uses, to fly the Spanish flag along with theirs.

As regards stopping and anchoring, reference is made to LOSC (Art. 37(3), which refers to Art. 18 LOSC). Ships that are forced to stop or anchor in any Spanish maritime zone due to *force majeure* or distress shall immediately notify the nearest maritime authorities (Art. 21(2)).

Furthermore, under the 2014 Maritime Navigation Act, the Government is entitled to temporarily

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to carry out research activities in these areas (Art. 1).

[17] Law 22/992, cited above.

[18] See J.D. González Campos, "Navegación por el mar territorial, incluidos los estrechos", in Poch *supra* n. 1, vol. I (1), 285-398, at 386.

[19] On this question, see the contribution in this volume by López Martín on "Navigation through the Strait of Gibraltar".

suspend innocent passage in certain zones without discrimination between flags. But, unlike LOSC, which restricts the exercise of such power by the coastal state to cases when it "is essential for the protection of its security, including weapons exercises" (Art. 25(3)), the Spanish Act states that the suspension must be "in order to defend the general interest and, in particular, to safeguard safety of navigation" (Art. 42). On the other hand, it provides for the establishment of 500-meter safety-of-navigation zones around artefacts and platforms located in any Spanish maritime zone, which can be larger when so permitted by the applicable international standards (Art. 31).

A previous chapter of the Act (Chapter III, of rather vague content), referred to the "general regime" of maritime navigation through the "Spanish Maritime Zones" (sic), sets forth other possible limitations to navigation in such zones (including the territorial sea). In particular, navigation can be restricted, conditioned or prohibited in certain places for reasons of maritime safety or protection, especially in cases of naval exercises and operations of the Armed Forces, or whenever the passage of foreign vessels through the territorial sea is not innocent (Art. 20(1)). Such measures can also be adopted in order to protect the marine biodiversity or the underwater cultural heritage, subject to any applicable international agreements. Furthermore, it is stated that such measures can be taken by the competent authorities, without discriminating between flags and with respect to certain categories of ships, whenever it may be necessary to prevent certain unlawful activities or any prohibited trade (Art. 20(2)). Undoubtedly, the wording of this provision, formulated in very broad terms, is hardly consistent with LOSC provisions. Nevertheless, it should be borne in mind that Article 2 of the 2014 Maritime Navigation Act provides that it shall be applied "as long as it does not oppose the terms set forth in the international treaties in force in Spain". In any case, the provisions of the act must be interpreted in accordance with such treaties.

Regarding environmental protection, the 2014 Maritime Navigation Act includes certain limitations to navigation that seem compatible with LOSC and subsequent practice:[20]

(1) Passage of foreign ships shall not be considered innocent when they perform any act of intentional and severe pollution, nor when their state of failure or seaworthiness are a serious threat to the environment (Art. 39(2));

(2) Ships carrying radioactive or other hazardous or noxious substances shall have the relevant documents on board and comply with the precautionary measures provided in the applicable treaties, and they shall pass through the lanes and systems established for that purpose, following the instructions of the maritime authorities (Art. 40);[21] and

(3) The masters of ships must immediately notify any pollution incidents caused by oil or other noxious or potentially hazardous substances of which they are aware (Art. 33).

To these provisions should be added those contained in the 1964 Nuclear Energy Act, to which the

[20] On the practice subsequent to LOSC, see, in the Spanish literature: J. Juste Ruiz, "Libertad de navegación e intereses de los Estados ribereños", in Sobrino Heredia, *supra* n. 8, 259-295, at 268.

[21] Also worth considering are the provisions of the International Convention for the Prevention of Pollution from Ships, 1973 and the Protocol of 1978 related thereto (MARPOL 73/78), to which Spain is a party, as well as Royal Decree 394/2007, 31 March 2007, on Measures Dealing with Ships in Transit that Perform Polluting Discharges in Spanish Waters, transposing EP and Council Directive 2005/35/EC (OJ 2005 L 255/11) (BOE No. 81, 4 April 2007).

 DOI: 10.17103/sybil.21.14

2014 Maritime Navigation Act itself refers. The Nuclear Energy Act considers the passage of nuclear ships through territorial waters as an exception to the "right of innocent passage". Therefore, the government of the flag state certifying the safety of the nuclear devices and facilities of the ships is required to verify and ensure protection against ionizing radiations, as well as to guarantee the coverage for civil liability that may arise from any accident (Arts. 70 to 73).[22] Hence, the Act deviates from Article 23 LOSC, which has drawn severe criticism from Spanish experts.[23]

Also worth mentioning are the provisions of the Act concerning maritime security, which require the vessels to comply with:

(1) The rules on lights, signals, course and steering contained in the applicable regulations, in particular the international regulations for preventing collisions at sea (Art. 27).

(2) The maritime traffic organization systems, once they have obtained the required international approval and publication (Art. 30). The Act also specifies that ships carrying radioactive or other hazardous or noxious substances must pass through the appropriate lanes, devices and systems, and they shall follow the special navigation instructions that may be issued by the maritime authorities.

The 1974 International Convention for the Safety of Life at Sea (SOLAS), to which Spain is a party, provides that the adoption of maritime traffic organization systems should be subject to the International Maritime Organization (IMO). However, they can also be implemented without IMO's approval, in which case they are required to comply, to the extent possible, with its guidelines and criteria (Rule 10 of Chapter V).[24] Royal Decree 210/2004, establishing a Maritime Traffic Monitoring and Information System,[25] envisages these systems (adopted and not adopted by the IMO). Spain currently has traffic separation schemes in Finisterre, Tarifa (for traffic in the Strait of Gibraltar), Cabo de Gata, East Canary Islands and West Canary Islands.

The aforementioned Royal Decree 210/2014, adopted after the "Prestige" crisis, also puts in place detailed rules on ship reporting and monitoring, notification of dangerous or polluting goods on board ships, and monitoring of hazardous ships.[26] These rules aim at increasing maritime safety, imposing certain requirements on merchant ships over 300 GRT to ensure their monitoring (reporting, use of identification systems, etc.). Moreover, the Royal Decree establishes that the maritime authorities shall adopt the relevant measures to ensure that ships entering the territorial sea

[22] Law 25/1964, 29 April 1964, on Nuclear Energy (BOE No. 107, 4 May 1964).

[23] See J.A. de Yturriaga Barberán, "La Convención de Naciones Unidas sobre el Derecho del Mar. Balance de 15 años de aplicación", in J. Martín y Pérez de Nanclares (ed.), *España y la práctica del Derecho Internacional* (Colección Escuela Diplomática, MAEC, Madrid, 2014), 95-113, at 100. See also V.L. Gutiérrez Castillo, "Legal Regime on Navigation through the Strait of Gibraltar: The Role of its Coastal States", 2 *Il Diritto Marittimo* (2017), 349-365, at 361. For an opposite approach, see my work "Régimen de navegación de los buques de guerra extranjeros por el mar territorial español y de sus escalas en puertos españoles", 2 *REDI* (1986), 543-569, at 552.

[24] See IMO Assembly Resolution A.572(14), of 20 November 1985, "General Provisions on Ships' Routeing".

[25] Royal Decree 210/2004, 6 February 2004, establishing a monitoring and information system on maritime traffic, transposing EP and Council Directive 2002/59/EC (OJ 2002 L 208/10) (BOE No. 39, 14 February 2004), amended by Royal Decree 1593/2010, 26 November 2010, transposing EP and Council Directive 2009/17/EC (OJ 2009 L 131/101) (BOE No. 289, 30 November 2010), and Royal Decree 201/2012, 23 January 2012, transposing Commission Directive 2011/15/EU (OJ 2011 L 49/33) (BOE No. 30, 4 February 2012).

[26] See J. Juste and V. Bou, "After the Prestige Oil Spill: Measures Taken by Spain in an Evolving Legal Framework", 10 *SYIL* (2004), 1-37, at 20-22.

comply with the specific rules in areas of applicability of Vessel Traffic Systems (VTS) based on the guidelines developed by the IMO (Art. 8).

(D) NAVIGATION REGIME APPLICABLE TO GOVERNMENT SHIPS IN THE TERRITORIAL SEA

With regard to navigation of Government ships (warships and other ships used exclusively on government non-commercial service), the 2014 Maritime Navigation Act lays down the following special provisions:

(1) They are not required to fly the Spanish flag (Art. 22(2)), but only to fly their own flag;
(2) Passage shall not be considered innocent when it involves performance of manoeuvres or other exercises with weapons, acts aimed at collecting information by electromagnetic means or the launching, landing or taking on board of any aircraft or military device (Art. 52);
(3) Government submarines shall also navigate on the surface and show their flag, unless otherwise authorized to take part in military exercises or manoeuvres (Art. 53); and
(4) The Government may regulate their navigation in accordance with the provisions of that Act and international law (Art. 55).

In this regard, mention should be made of Order 25/1985 of the Ministry of Defence, providing that no special authorization is required for the passage of foreign warships through the territorial sea, and prohibiting them from stopping, towing vessels, flying aircrafts, performing manoeuvres or exercises of any kind, and from carrying out hydrographic or oceanographic works.[27] The Order also requires a diplomatic authorization to perform any exercise or operation beyond simple passage.

(E) GENERAL REGIME APPLICABLE TO NAVIGATION THROUGH INTERNAL WATERS AND ACCESS TO PORTS

The 2014 Maritime Navigation Act contains some scattered provisions on navigation of foreign vessels through internal waters and detailed regulations on their access and stay in ports.

The point of departure is the principle of free access to ports open to navigation, subject only to the authorization of the port authority and to the provisions of the Act and other laws and regulations on ports, safety, customs, borders and immigration, police, health, the environment and fishing, as well as the operating conditions established (Arts. 7(1) and (3)).

Nevertheless, it should be borne in mind that the 2011 State Ports and Merchant Marine Act provides that internal navigation and coastal navigation (*cabotage*) with commercial purposes are reserved to Spanish commercial ships,[28] except as provided in this regard by EU law (Art. 256(1)),

[27] Order 25/1985, 23 April 1985, of the Ministry of Defence, approving the Rules on Warships' Port Calls to Spanish Ports or Anchorages and their Passage through the Spanish Territorial sea in Times of Peace (BOE No. 115, 14 May 1985).

[28] Internal navigation means navigation which takes place wholly within the area of a given port or other Spanish internal waters, and coastal navigation ("cabotage") means navigation other than internal navigation which is carried out between ports or points in areas under Spanish sovereignty, sovereign rights or jurisdiction (Art. 8(2) of the 2011 State Ports and Merchant Marine Act).

including the Regulations on the freedom to provide services to maritime transport between Member States and between Member States and third countries, as well as cabotage services.[29]

However, the right to navigate through internal waters, in the above terms, does not include stopping or anchoring outside the service areas of ports, except in the event of force majeure (in which case notification to the nearest maritime authority is required), when expressly authorized, or when it concerns recreational craft (Art. 21). On the other hand, just like in the territorial sea, foreign ships must fly the flag of only one state, and they must show their name and registration number, flying their flag along with the Spanish one. They are also required to navigate on the surface (Art. 22).

Spanish legislation does not make any reference whatsoever to internal waters enclosed as a result of the drawing of straight baselines under Royal Decree 2510/1977. Pursuant to LOSC, these waters are subject to innocent passage (Art. 8(2)).

As for the access and stay in ports, the following provisions of the 2014 Maritime Navigation Act should be highlighted:

(1) Entry to ports may be prohibited or conditioned for emergency reasons or risks to public health, safety of navigation, protection of traffic and port facilities, fight against illegal fishing or environmental sustainability, in accordance with the applicable legislation (Art. 7(2)).

(2) Port authorities may order temporary closure pursuant to the regulations in force. Furthermore, maritime authorities may provisionally propose prohibition of navigation in ports and their access channels, as well as entry or exit of ships, when so advised by the weather or water conditions, when there are obstacles to navigation, or on grounds of protection, emergency, public security, and environmental or public security reasons. Such prohibition or the establishment of conditions may also be proposed with regard to ships that may be a hazard to the safety of persons, property or the environment (Art. 8).

(3) In the event of forced docking, the vessel owner, master or agent must inform the maritime authority of the causes to, which shall verify them and state the formalities and requirements to be fulfilled. The maritime authority may impose requirements and conditions for entry to ports or places of shelter of potentially polluting ships (Art. 9).

(4) Navigation and entry and stay in ports of nuclear-powered ships are governed by the aforementioned 1964 Nuclear Energy Act and the applicable treaties (Art. 13). This Act provides for refusing stay in port if the vessel does not comply with the relevant conditions.

(5) Entry to internal waters and ports of ships carrying radioactive substances is subject to technical and operational specifications established by the Government. Entry and stay in ports is in any case subject to any verification required for the protection of the environment, which may result in an order to leave the internal waters (Art. 14).

[29] Council Regulation 4055/86/EEC applying the Principle of Freedom to Provide Services to Maritime Transport between Member States and between Member States and Third Countries (OJ 1986 L 378/1) and Council Regulation 3577/92/EEC applying the Principle of Freedom to Provide Services to Maritime Transport within Member States (Maritime Cabotage)(OJ 1992 L 364/7).

 DOI: 10.17103/sybil.21.14

(6) Special conditions may be established for the entry and stay in ports of ships carrying hazardous goods. In any event, these conditions must comply with the applicable international treaties (Art. 15).

Royal Decree-Law 9/2002, adopted after the "Prestige" disaster, is also worth mentioning. It bans all single-hull oil tankers (regardless of the flag) carrying bunker fuel, asphaltic bitumen or heavy crude oil from entering Spanish ports, terminals and anchorage areas.[30]

As regards fishing vessels, the 2001 Fisheries Act governs landing in ports by vessels under flags of EU Member States.[31] Landing of third country ships is governed by Royal Decree 1797/1999, which requires a previous authorization,[32] and by Council Regulation 1005/2008/CE, which sets forth a scheme of inspections in port for third country fishing vessels to prevent, deter and eliminate illegal fishing.[33] Pursuant to this Regulation, access to ports is prohibited for third country fishing vessels unless they meet the relevant requirements, except in cases of force majeure or distress (Art. 4).

Also relevant is the maritime traffic monitoring and information system established by the aforementioned Royal Decree 210/2004, which lays down certain reporting and information obligations for merchant ships over 300 GRT bound for Spanish ports, including the obligation to use automatic identification systems. Following IMO's guidelines, the Royal Decree also regulates access to places of shelter of ships in need of assistance (Arts. 22-24).[34] Royal Decree 1334/2012 governs the formalities for merchant ships arriving in or departing from ports of Member States, and generalizes the electronic transmission of the information required.[35]

(F) REGIME APPLICABLE TO GOVERNMENT SHIPS IN TERRITORIAL WATERS AND REGARDING THEIR ACCESS TO PORTS

Concerning Government ships, the 2014 Maritime Navigation Act provides the following (Art 51):

(1) Warships may enter internal waters and visit open ports with the prior authorization of the Ministry of Defence, which shall be processed through diplomatic channels.

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[30] Royal Law Decree 9/2002, 13 December 2002, adopting Measures for Tankers Carrying Hazardous or Polluting Cargoes (BOE No. 299, 14 December 2002).

[31] Law 3/2001, of 20 March, on State Marine Fisheries (BOE No. 75, 28 March 2001).

[32] Royal Decree 1797/1999, 26 November 1999, on the Monitoring of Fishing Operations by Vessels of Third Countries in Waters under Spanish Sovereignty or Jurisdiction (BOE No. 301, 17 December 1999).

[33] Council Regulation 1005/2008/EC establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, OJ 2008 L 286/1, based on the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, the conclusion of which by the EU was approved by Council Decision 2011/443, OJ 2011 L 191/1. See also Order ARM/2007/2010 for the Access of Vessels from Third Countries, Transit Operations, Transhipment, Import and Export of Fishing Products to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (BOE No. 185, 31 July 2010).

[34] With Regard to the relevant provisions of Royal Decree 210/2004 before the amendment introduced by the aforementioned Royal Decree 1593/2010, see B. Sánchez Ramos, "Nuevos avances en el acceso a lugares de refugio: las directrices sobre lugares de refugio para buques en peligro adoptadas por la Organización Marítima Internacional", 8 *REEI* (2004), 1-15, at 12-14.

[35] Royal Decree 1334/2012, 21 September 2012 (transposing EP and Council Directive 2010/65/EU on Reporting Formalities for Ships Arriving in and/or Departing from Ports of the Member States, OJ 2010 L 283/1) (BOE No. 229, 22 September 2012).

 DOI: 10.17103/sybil.21.14

(2) For other Government ships (used exclusively on government non-commercial service), the authorization of the maritime authorities shall suffice.
(3) By way of exception, such authorization is not required in the event of failure, bad weather, or for any other urgent reason. In such cases, the master or commander of the ship shall immediately inform the nearest maritime authority or the Navy, if it is a warship, and it shall follow the instructions until the relevant authorization is issued through diplomatic channels.
(4) Nuclear-powered ships or ships carrying hazardous substances are subject to the same provisions of the 1964 Nuclear Energy Act applicable to merchant ships.

It is worth recalling the aforementioned Order 25/1985 of the Ministry of Defence, applicable to warships. Regarding their access to Spanish ports, a distinction is made between accidental calls (forced docking and force majeure), non-official calls, and official calls. The Order details, among other things, the authorization procedure for each type of call, as well as the obligations and prohibitions for such ships in the port of call.

Finally, calls made by US warships to Spanish ports are governed by Annex 3 of the 1988 Agreement of Defence Cooperation between the U.S.A. and the Kingdom of Spain,[36] as well as by the rules contained in the NATO STANAG 1100, also applicable to the ships from other NATO Member States.

(G) JURISDICTION OVER FOREIGN VESSELS IN THE TERRITORIAL SEA AND INTERNAL WATERS

Article 50 of the 2014 Maritime Navigation Act asserts, in general, immunity from jurisdiction of warships and Government ships (used exclusively on government non-commercial service), with the exceptions provided under international law. Those ships shall only be subject to the jurisdiction of their flag state. In this regard, the recent 2015 Foreign Immunities Act[37] –which fails to mention the 2014 Maritime Navigation Act– establishes that: "Unless otherwise agreed by the states concerned, warships and foreign Government ships shall enjoy immunity from jurisdiction and enforcement before Spanish courts, even when they are in Spanish internal waters or the Spanish territorial sea".[38] However, just like the LOSC, the 2014 Maritime Navigation Act expressly preserves:

(1) The power to require them to abandon their attitude and, as the case may be, to leave the internal waters or the territorial sea if they fail to comply with the law (Art. 54(1)).

[36] Agreement of Defence Cooperation between the United States of America and the Kingdom of Spain of 1 December 1988, 1539 UNTS 91 (BOE No. 108, 6 May 1989).

[37] Organic Law 16/2015, 27 October 2015, on Privileges and Immunities of Foreign States, International Organizations with Headquarters or Office in Spain, and Conferences and International Meetings Held in Spain (BOE No. 258, 28 October 2015).

[38] See C. Espósito, "Inmunidades respecto de los buques de guerra y aeronaves de Estado extranjeros", in J. Martín y Pérez de Nanclares (ed.), *La Ley Orgánica 16/2015 sobre privilegios e inmunidades: gestación y contenido* (Cuadernos de la Escuela Diplomática, No. 55, MAEC, Madrid, 2016), 339-353.

(2) The responsibility of the flag state for any loss or damages arising from breaches of the Spanish legislation, especially with regard to the passage through the territorial sea and the stay in ports and other internal waters (Art. 54(2)).

The question remains, however, as to whether the immunity of foreign Government ships covers also acts (in particular, crimes) committed on board in Spanish internal waters or in Spanish ports. In this regard, it should not be forgotten that the Spanish Criminal Procedural Act[39] provides for the entry to and search of foreign warships (without any reference to other Government ships) with the prior authorization of the Commander or the "Ambassador or Minister of the relevant country". Also, criminal jurisdiction extends to such spaces (Art. 21(1) of the Organic Law on Judicial Power[40]). Nevertheless, the practice seems to rule out this possibility, at least with regard to warships. Spanish scholars generally agree that the authorization required to access port entails Spain's waiver to an effective exercise of jurisdiction.[41]

A different issue is the possibility of exercising jurisdiction over the crew of warships for acts committed on land, which is in any case limited by certain treaties concluded by Spain (Agreement of Defence Cooperation between the U.S.A. and the Kingdom of Spain and the NATO Status of Forces Agreement).

In this respect, the 2015 Foreign Immunities Act provides that the visiting Armed Forces of a NATO Member State or NATO's Partnership for Peace (its civilian and military personnel and assets), when in Spanish territory, at the invitation or with the consent of Spain, shall be subject to the 1951 Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (Art. 33(1)). These provisions shall also apply to the Armed Forces of any other foreign state under the principle of reciprocity and an agreement concluded for that purpose by the Spanish Ministry of Defence and the counterpart of the foreign state.

With regard to the rest of foreign vessels (other than Government ships), the 2014 Maritime Navigation Act restricts the exercise of civil and criminal jurisdiction to the territorial sea, in the same vein as LOSC. Therefore, along the lines of LOSC (Art. 28), the Spanish Maritime Navigation Act establishes:

(1) The prohibition to stop or divert foreign ships for the purpose of exercising civil jurisdiction in relation to persons on board (Art. 43(1));

(2) The possibility of adopting precautionary or enforcement measures with regard to such ships when they stop or anchor voluntarily while lying in the territorial sea or passing through it after leaving internal waters (Art. 43(2)), as well as with regard to ships on lateral passage, but only in respect of obligations or liabilities assumed or incurred during such passage (Art. 43(3)).

As for the exercise of criminal jurisdiction, the Act contains the following provisions:

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[39] Criminal Procedural Act, approved by Royal Decree of 14 September 1882 (*Gaceta de Madrid*, 17 September 1882), which remains un-amended in that regard.

[40] Organic Law 6/1985, 1 July 1985, on the Judicial Power (BOE No. 157, 2 July 1985).

[41] See, for all, A Remiro Brotóns et al., *Derecho Internacional* (McGraw-Hill, Madrid, 1997), at 598.

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(1) Reference is made to the Organic Act on the Judicial Power and to Article 27 LOSC (Art. 44). It is worth recalling that under Article 23(4)(d) of this Organic Act, Spanish courts are competent to hear cases relating to:

> "Crimes of piracy, terrorism, illegal trafficking of toxic drugs, narcotic drugs and psychotropic substances, human trafficking, crimes against the rights of foreign citizens and crimes against shipping safety perpetrated at sea, in the cases provided for in the treaties ratified by Spain or in the regulatory acts of an International Organization to which Spain is a party".[42]

(2) Spanish courts are expressly entitled to issue arrests warrants or conduct investigations committed on board of a foreign ship passing through the territorial sea after leaving internal waters (Art. 44, reproducing the content of Art. 27(2) LOSC).

(3) Such measures may be adopted at the request of the master of the ship or a diplomatic or consular representative of the flag state, in which case the measures shall not be limited to ships coming from internal waters (Art. 45).

(4) Before taking any steps, the competent court shall notify a diplomatic or consular agent of the flag state (Art. 46 of the Act and 27(3) LOSC).

Consideration should also be given to the Regulation governing inspections of foreign ships docked at Spanish ports (not applicable to warships).[43] Its purpose is to ensure compliance with international and EU law on maritime safety, maritime security, protection of the environment, and on-board living and working conditions of ships of all flags. It governs the inspections performed in the waters under Spanish sovereignty or jurisdiction (Arts. 1 and 3(1)).

Other sector-specific instruments should also be mentioned, including:

(1) Royal Decree 394/2007, on Measures Applicable to Ships in Transit which Unload Pollutants in Spanish Maritime Waters,[44] which provides that, where there is decisive evidence of a polluting unload posing actual or potential material damages, maritime authorities shall adopt any necessary police measures. Such measures include detention of the vessel and initiation of disciplinary proceedings, or the transfer of proceedings to the Public Prosecutor's Office, informing in any case the flag state.

(2) The aforementioned 1964 Nuclear Energy Act, under which maritime authorities are entitled to perform inspections on nuclear ships within "territorial waters", and to verify their safety and operating conditions before authorizing their passage through such waters (Art. 74).[45]

As regards jurisdiction over foreign merchant ships in internal waters, the 2014 Maritime Navigation Act provides that both civil and criminal jurisdiction extend over them while they stay in national ports or in other internal waters. Such jurisdiction can also be exercised after the ships have left the

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[42] Art. 23(4) of Organic Law 6/1985 on the Judicial Power, cited above, according to the wording given by Organic Law 1/2014, 13 March 2014, on Universal Jurisdiction (BOE No. 63, 14 March 2014).

[43] Royal Decree 1737/2010, 23 December 2010, transposing EP and Council Directive 2009/16/EC on Port State Control, and repealing Directive 95/21/EC (OJ 2009 L 131/57) (BOE No. 317, 30 December 2010), amended by Royal Decree 1004/2014, 5 December 2014, transposing EP and Council Directive 2013/28/EU, amending Directive 2009/16/CE (OJ 2013 L 218/1) (BOE No. 295, 6 December 2014).

[44] Royal Decree 394/2007, of 31 March, referred to above.

[45] The aforementioned Nuclear Energy Act leaves aside Government ships.

internal waters and are passing through the territorial sea, or if they are detained outside the territorial sea under the right of hot pursuit (Art. 12(1) and (3)). The Spanish legislation thus deviates from the practice of other states that restrict their jurisdiction over crimes committed on board of ships not affecting their security or public order.[46]

On the other hand, the 2014 Maritime Navigation Act clarifies that the exercise of jurisdiction includes the power of judicial authorities to order measures of inquiry on board, as well as the entry to and search of the vessel, after notifying the consul of the flag state (Art. 12(2)). This provision is intended to replace a former article of the Code of Criminal Procedure (now repealed), which required prior authorization by the master or, failing that, by the Consul of the flag state.[47]

It is worth recalling that, in its judgment of 2013 in the *M/V Louisa* case (Saint Vincent and the Grenadines v. Spain), the International Tribunal for the Law of the Sea held that the possibility of searching a vessel docked at a port, as provided in the Spanish legislation, is in line with international law. In this regard, referring to LOSC, it pointed out that "there is no provision in the Convention which requires a port state to notify the flag state or to obtain the authorization of the flag state or of the master of a foreign vessel operated for commercial purposes such as the M/V "Louisa" before boarding and searching such a vessel docked at its port."[48]

Also worth considering is the aforementioned Regulation governing inspections of foreign ships docked at Spanish ports. It derives from several Directives on port state control of ships adopted by the European Union from 1995 onwards.[49] The origins of these Directives lie, in turn, in the 1982 Paris Memorandum of Understanding, aimed at ensuring compliance with international conventions on maritime safety and prevention of pollution, adopted after the sinking of the "Amoco Cádiz".

Finally, we would like to highlight that the Maritime Navigation Act requires maritime authorities to do everything possible to prevent ships from suffering unnecessary detention or delay in all Spanish maritime zones. Otherwise, the Spanish authorities shall compensate any damage caused (Art. 36).

(H) CONCLUDING REMARKS

Until 2014, Spain had a dispersed and incomplete regulation concerning its territorial sea and its internal waters, except for the regime applicable to its ports. The 2014 Maritime Navigation Act has changed this situation, governing in detail the navigation of foreign vessels through these maritime areas (as well as through the rest of the maritime areas under Spanish jurisdiction). Its provisions are based on LOSC. However, they enable the Spanish authorities to adopt measures restricting navigation in order to protect certain essential interests, such as the environment, which go beyond LOSC. The Spanish legislature has taken into consideration the post-LOSC practice and, in

[46] See P. Andrés Sáenz de Santa María, *Sistema de Derecho Internacional Público* (4th ed., Civitas-Thomson Reuters, Madrid, 2016), at 340.

[47] First paragraph of Art. 561 of the Criminal Procedural Act, cited above, repealed by Sole repeal provision of the 2014 Maritime Navigation Act.

[48] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013*, para. 125.

[49] Royal Decree 1737/2010, referred to above.

 DOI: 10.17103/sybil.21.14

particular the experience of the catastrophes occurred near the coasts of Spain in recent years. The conformity of these provisions of the 2014 Maritime Navigation Act with LOSC should nevertheless be assessed in the light of the practice subsequent to the adoption of the Convention. In any event, the Act itself establishes the primacy over its own provisions of the treaties to which Spain is a party. This, in turn, is in line with the 2014 International Treaties Act, which provides such primacy on a general basis with respect to all Spanish laws and regulations (Art. 31).[50]

[50] Law 25/2014, 27 November 2014, on Treaties and Other International Agreements (BOE No. 288, 28 November 2014).

 DOI: 10.17103/sybil.21.14

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

The Spanish Contiguous Zone

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(A) THE REGULATION OF THE CONTIGUOUS ZONE IN THE LAW ON MARITIME NAVIGATION

Before the entry into force of LOSC in Spain, the 1992 Law on State Ports and Merchant Marine consecrated for the first time the general regulation of the contiguous zone in Spanish law.[1] In effect, this Law (Revised Text of 2011) establishes in its Article 8(1) the width of the Spanish contiguous zone in 24 nm counted from the baselines from which the territorial sea is measured; and in the second Additional Provision gives the Government competence to adopt the necessary control measures in order to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea, as well as to sanction said infractions.[2]

More recently, the 2014 Law on Maritime Navigation (LMN)[3] has revisited the contiguous zone, proclaiming in its Article 23(1) the control competence of the State as follows:

> "In the contiguous zone, the Spanish State shall exercise control over foreign ships to prevent breaches of the customs, tax, health and border control and immigration laws that may be committed in Spanish territory and in the territorial waters, as well as the Spanish criminal and administrative jurisdiction, to penalise those who commit offences against such laws."

If in the 1992 Law the reference to smuggling was a redundancy, in the LMN it is the reference to immigration, not expressly mentioned in Article 33 LOSC. On the other hand, in this Article 23(1) State competence to exercise criminal and administrative jurisdiction is explicit, which is the logical corollary to the powers of control. By contrast, it is not easily understandable why the requirements are restricted to "foreign ships", given that the laws and regulations on these matters do apply to all ships, whether Spanish or foreign.

It should be noted that the wording of the 2012 Draft of the LMN referred to the powers of the State to prevent and suppress violations in specified material areas "that may be committed within its borders, including the territorial sea," which led the State Council (*Consejo de Estado*) to note that the

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1 Law 27/1992, of 24 November, on State Ports and Merchant Marine (BOE No. 283, 25 November 1992), Art. 7.1 and First Additional Provision.

2 Royal Legislative Decree 2/2011 of September 5, approving the consolidated text of the State Ports and Merchant Marine Act (BOE No. 253, 20 October 2011).

3 Law 14/2014, 24 May 2014, on Maritime Navigation (BOE No. 180, of 25 July 2014), an English version available here.

 DOI: 10.17103/sybil.21.15

article "transcribe[d] incorrectly article 33(1) of the Convention on the Law of the Sea by including, within the space delimited by the borders of the State, the territorial sea. This inclusion is contrary not only to the aforementioned Convention but also to the treaties signed by the Kingdom of Spain with its neighbours. In effect, according to the former and these treaties, the territory of the State is defined by the notion of border and, outside of this, is the territorial sea. For this reason, it is appropriate to replace 'within its borders, including the territorial sea' with the expression conforming with that used by the 1982 Convention: 'within its territory or territorial sea'."[4] The LMN finally took this observation into account.[5]

In any case, the prescriptions of Article 23(1) LMN on the control competencies and the exercise of jurisdiction are developed in Article 35 LMN, on the special measures to be adopted in the contiguous zone, which says:

> "1. Whenever a competent Public Administration has knowledge that a foreign ship located in the contiguous zone has breached, is breaching or intends to breach the laws and regulations referred to in Article 23, it shall be entitled to intercept it, to request information or perform the appropriate inspection.
>
> "2. Where necessary, other necessary and proportional measures may be adopted to prevent or penalise the offence, including arrest and escorting it to port."

Actually, we are facing a specific manifestation of the right of persecution and visit regulated in Chapter V of the same Law (Articles 48-49), with the peculiarity that it attributes to the Administration the right of interception not only when it has knowledge that a vessel has infringed or is violating the laws and regulations on the contiguous zone but also when it considers that the vessel in question "intends to infringe", which goes beyond the provisions of the LOSC, which rightfully does not contain this psychological element. On the other hand, due to its location, it is incomprehensibly disconnected from the special navigation regime in the contiguous zone established in Article 23 of the Law, which supposes a defect of legislative systematics.

(B) THE REFERENCE TO THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE IN THE CONTIGUOUS ZONE'S REGIME

The main novelty of the regime is in Article 23(2), where it is said that:

> "Unauthorised extraction of archaeological and historic objects found on the seabed or subsoil of water in the contiguous zone shall be considered a breach of the laws and regulations referred to in the preceding Section, as well as of the provisions on underwater cultural heritage."

This provision of the LMN is in line with recent international practice; and this is so despite the fact that some expert criticized such a provision at the time, because it was understood that "[t]he jurisdiction of the coastal States in the contiguous zone are limited; they only refer to the infractions that in these concrete matters 'may be committed within their borders, including the territorial sea'. The unauthorized extraction of archaeological and historical objects in the contiguous zone of a State

4 Advisory Opinion No. 449/2013, 24 July 2013. The Draft Text may be seen in this Opinion.

5 BOCG, Congreso, X Legislatura, Serie A, No. 73-1, 29 November 2013.

 DOI: 10.17103/sybil.21.15

is only prosecutable if it is carried out within the first twelve miles that overlap with the territorial sea, because it is precisely territorial sea."[6]

To some extent, this follows the ambiguity of Article 303(2) LOSC, dealing with the archaeological and historical objects found at sea, which establishing that "[i]n order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the [contiguous zone] without its approval" drives to the legal fiction that this removal would result in an infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.[7]

However, with the adoption of the UNESCO Convention on the Protection of the Underwater Cultural Heritage in 2001,[8] its Article 8 has reinforced the competence of the coastal State on this matter in the contiguous zone, as has been reflected in legislative practice of States. Consequently, is has been underlined that "State practice offers a general, quite uniform and constant evidence of the acceptance of a coastal State's right to legislate on and to enforce the protection of underwater cultural heritage located in its contiguous zone"[9], and therefore, it can be confirmed the crystallization of a new customary rule[10] that Spain contributes to strengthen through its recognition in domestic legislation of that new competence in its contiguous zone, as many other States have already done.

6 J.L. Meseguer Sánchez, "El proyecto de Ley General de Navegación Marítima y el régimen internacional de los espacios marítimos", 7145 *Diario La Ley* (2009), at 3. The author referred to the then Art. 35(2) of the 2008 Bill, which was identical to 23") of the LMN except in the final reference to the rules on underwater cultural heritage.

7 D. de Pietri, "La redefinición de la zona contigua por la legislación interna de los Estados", 62 *REDI* (2010), 125.

8 Convention on the Protection of the Underwater Cultural Heritage, adopted 2 November 2001, entered into force 2 January 2009 (2562 UNTS 3) (BOE No. 55, 5 March 2009).

9 M. J. Aznar, "The Contiguous Zone as an Archaeological Maritime Zone", 29 *The International Journal of Marine and Coastal Law* (2014), p. 50.

10 *Ibid.*, p. 51.

 DOI: 10.17103/sybil.21.15

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

Exclusive Economic Zone and Fisheries Zones

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(A) THE INTERPLAY OF INTERNATIONAL, EUROPEAN AND NATIONAL LEGAL FRAMEWORKS. THE ESTABLISHMENT OF THE ZONES

Spain's practice is laid down in a threefold legal structure. Firstly, the 1982 Convention on the Law of the Sea (LOSC) provides the international legal framework within which all activities in the seas must be carried out, including the use of the exclusive economic zone (EEZ), the fishery protection zone (FZ) and any other *sui generis* zone, like the ecological protection zone (EPZ), or the marine reserves (MR). The EEZ is defined in Part V (Articles 55 to 75) of the LOSC as a zone extended no further than 200 miles from the baselines of the territorial sea (TS), where states exercise a number of sovereign rights and jurisdiction.[1] The EEZ is optional, so its existence depends upon an actual claim. It coexists with the regime of the Continental Shelf (CS), an *ipso iure* maritime zone which governs rights with respect to the seabed and the subsoil, and it may also concur with the contiguous zone (CZ). As it is well known, the customary law status of the EEZ and the FZ has been recognized by the International Court of Justice (ICJ).[2]

Secondly, Spain established in the Atlantic Ocean coasts a 200 nautical miles EEZ as defined in the LOSC, by way of the Law 15/1978, 20 February 1978.[3] This national legislation stipulates that the Government has the right to extend the zone to other coasts of Spain. Following France's enactment of Decree 2012/1148, 12 October 2012, on a EEZ in the North-West Mediterranean shore,[4] Spain

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1 UN Convention on the Law of the Sea, 1833 UNTS 3 (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter), entered into force for Spain on 14 February 1997 (BOE no. 39, 14 February 1997). On this particular question, see J. Juste Ruiz, "La entrada en vigor del Convenio de Naciones Unidas sobre Derecho del Mar y los intereses españoles", *Anuario Argentino de Derecho Internacional* (1996-1997), 167-184; J.A. De Yturriaga Barberán, *Ámbitos de Jurisdicción en la Convención de Naciones Unidas sobre el Derecho del Mar. Una perspectiva española* (Ministerio de Asuntos Exteriores, Madrid, 1995); R. Riquelme Cortado, *España ante la Convención sobre el Derecho del Mar. Las declaraciones formuladas* (Editum, Murcia, 1990). On this question, see the contribution in this volume by Díez-Hochleitner on "Maritime zones under sovereignty and navigation".

2 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ Reports (1982) 18, at 38; *Jan Mayen (Denmark v. Norway)*, ICJ Reports (1993) 38, at 59. See also, C. Hudson, "Fishery and Economic Zones as Customary International Law" 17 *San Diego Law Review* (1980), at 661-689.

3 Law 15/1978, 20 February 1978, on the Economic Zone (BOE No. 46, 23 February 1978).

4 Décret no. 2012-1148, 12 octobre 2012, portant creation d'une zone économique exclusive au large des côtes du territoire de la République en Méditerranée (JORF no. 0240, 14 October 2012). A study of the French EEZ claim in V.L.

 DOI: 10.17103/sybil.21.16

replied to the French unilateral act with the establishment of a EEZ along its Mediterranean coast by the Royal Decree 236/2013, 3 April 2013.[5] In 2003 France had proclaimed a EPZ in the Mediterranean, a zone replaced by the 2012 EEZ, which partially overlapped with the Spanish FZ. In 1997 Spain had established a 37 miles FZ measured from the outer limit of the TS[6] in a Mediterranean area between Cabo de Gata and the French border. In the FZ the state has sovereign rights for purposes of conservation of living marine resources and for the management and control of fishery activity. The FZ was enacted by Royal Decree 1315/1997, 1 August 1997.[7] Furthermore, Spain exercised its international sovereign rights and jurisdiction by developing a network of ten MR as protected areas in the TS or the EEZ, which are focused on maintaining artisanal fisheries. Seven MR are placed in the Mediterranean Sea and three in the Canary Islands waters. The state government and the autonomous communities are the competent authorities for the management of MR.[8]

Thirdly, Spain is bound as a member of the European Union (EU) to abide by the rules of the *Common Fisheries Policy* (CFP) based on the management of European fishing fleets and the conservation of fish stocks.[9] Therefore, the EU rules on the establishment of a system for fisheries control[10] were implemented by the Law 3/2001, 26 March 2001, on State Marine Fisheries,[11] and by the Royal Decree 176/2003, 14 February 2003, regulating control and inspection functions of the fishing activities.[12] Also, the access of the Spanish fishing fleet to waters in third countries is set out in the

Gutiérrez Castillo, "La Zona Económica Exclusiva Francesa en el Mediterráneo: Causas y Consecuencias de su Creación", in *The contribution of the United Nations Convention on the Law of the Sea to Good Governance of the Oceans and Seas*, Papers of the International Association of the Law of the Sea, vol. II (Editoriale Scientifica, Napoli, 2014), at 811-830.

5 Royal Decree 236/2013, 5 April 2013, establishing the Spanish Exclusive Economic Zone in the North-West Mediterranean (BOE No. 92, 17 April 2013).

6 The breadth of Spain's territorial sea up to a limit not exceeding 12 miles was determined by Law 10/1977, 4 January 1977, on the TS (BOE no. 374, 8 January 1977).

7 Royal Decree 1315/1997, 1 August 1997, establishing a Fisheries Protection Zone in the Mediterranean (BOE No. 204, 26 August 1997), amended by Royal Decree 431/2000, 31 March 2000 (BOE No. 79, 1 April 2000). See notably, D. Blázquez Peinado, "El Real Decreto 1315/1997, de 1 de agosto, por el que se establece una zona de protección pesquera en el Mar Mediterráneo", 49 *Revista Española de Derecho Internacional* (1997), at 334-338; and, A. Pastor Palomar, "La Nueva Zona de Protección Pesquera de España en el Mar Mediterráneo", 1 *Studia Carande* (1997), at 87-98; also, V. Gutiérrez Castillo & E.M. Vázquez Gómez, "La zone de protection établie par l'Espagne", 13 *Collection Espaces et Ressources Maritimes* (1999-2000), at 207-232.

8 The MR of Spain are the following: Masía Blanca (Tarragona), Levante de Mallorca-Cala Ratjada (Mallorca), Islas Columbretes (Castellón), Isla de Tabarca (Alicante), Cabo de Palos-Islas Hormigas (Murcia), Cabo de Gata-Níjar (Almería), Isla de Alborán, Isla Graciosa-Islotes del Norte de Lanzarote (Canarias), Isla de la Palma (Canarias), Punta de la Restinga-El Hierro (Canarias). For details, see Minsterio de Agricultura, Alimentación y Medio Ambiente, *Spain's Network of Marine Reserves. More than 30 years protecting our seas* (Publicaciones Oficiales, BOE, 2015).

9 On these questions, see the contributions in this volume by Casado Ragión on "Fisheries" and by Pons Rafols on "IUU fishing".

10 Council Regulation 3760/92, establishing a Community system for fisheries and aquaculture OJ 1992 L 389/1; Council Regulation 2847/93, establishing a control system applicable to the common fisheries policy OJ 1993 L 261/1

11 Law 3/2001, of 20 March, on State Marine Fisheries (BOE No. 75, 28 March 2001), amended by Law 33/2014, of 26 December (BOE No.313, 27 December 2014). It must be taken into account the exclusive competence of the State in sea fisheries, according to Art. 149(1)(19) of Spain's Constitution (CE).

12 Royal Decree 176/2003, 14 February 2003, regulating control and inspection functions of the fishing activities (BOE no. 50, 27 February 2003).

 DOI: 10.17103/sybil.21.16

Royal Decree 1549/2004, 25 June 2004.[13] EU law lays down general provisions concerning the authorisation of fishing in the waters of a third country under a fisheries bilateral and multilateral agreements, like the procedure and responsibilities of the Commission and Member states for the authorisation of fishing activities of EU fishing vessels.[14] In effect, Member states have been empowered within the framework of the CFP to adopt conservation and management measures.[15] Finally, Spain must comply with the EU *environmental legislation* and with environmental international treaties concerning maritime areas, and so the state has the capacity to establish in the sea environmental or ecological zones[16].

(B) THE CONCEPT OF THE MARITIME ZONES AND THE NATURE OF THEIR RESOURCES

(1) Notion of the zones

Spain's EEZ is defined in Article 1 of the Law 15/1978 on the Economic Zone as "a belt of sea to be called the EEZ, which shall extend from the outer limit of the Spanish territorial sea for a distance of 200 nautical miles from the base lines used to measure the breadth of the territorial sea, the Spanish state shall have sovereign rights for the purposes of exploring and exploiting the natural resources of the seabed, subsoil thereof and its superjacent waters". Clearly, this definition stresses the measurement of the area and the special authority of the coastal state for certain economic purposes, as it is the case in Article 55 of the LOSC. Consistently, Article 8(1) of the Law 27/1992, 24 November 1992, on state ports and the merchant marine, as amended, provides that Spain exercises sovereignty, sovereign rights or jurisdiction in the internal waters, the TS, the CZ and the EEZ.[17]

The EEZ of Spain is established in the Atlantic coasts and the Cantabrian sea, including mainland and islands, as well as in the North-West Mediterranean "from the outer limit of the TS to a point of geographical coordinates and heading towards the East using the equidistant line with the coastal states, drew in accordance with international law, up to the maritime border with France".[18] It is important to underline the commitment of Spain with general international law as it is shown in Article 2 of the Royal Decree 236/2013, providing that "these limits of the EEZ could be modified in

[13] Royal Decree 1549/2004, 25 June 2004, regulating access of the Spanish fleet to waters in third countries, in accordance the EU agreements (BOE no. 163, 7 July 2004).

[14] Council Regulation 1006/2008, concerning authorizations for fishing activities of Community fishing vessels outside Community waters and the access of third country vessels to Community waters, amending Regulation 2847/93 and Regulation 1627/94, and repealing Regulation 3317/94, OJ 2008 L 286/33.

[15] Regulation of the European Parliament and of the Council 1380/2013, on the Common Fisheries Policy, OJ 2013 L354/22. See, R. Casado Raigón, "Nuevas tendencias en materia de conservación y gestión de los recursos marinos vivos", in J. M. Sobrino Heredia, *Mares y océanos en un mundo en cambio: Tendencias jurídicas, actores y factores* (Tirant lo Blanch, Valencia, 2007), 73-98, at 79-87.

[16] See, R. Casado Raigón (ed), *Europe and the Sea. Fisheries, Navigation and Marine Environment* (Bruylant, Brussels, 2005).

[17] Law 27/1992, 24 November 1992, on State ports and the Merchant Marine, as amended by the Royal Legislative Decree 2/2011, 5 September 2011, which approves the revised text of the Law 27/1992 (BOE no. 253, 20 October 2011).

[18] Art. 1 of the Royal Decree 236/2013, 5 April 2013, establishing the Spanish Exclusive Economic Zone in the North-West Mediterranean (BOE No. 92, 17 April 2013).

 DOI: 10.17103/sybil.21.16

case of conclusion of boundary agreements with the neighbouring coastal states, based on Article 74 of the LOSC". In fact, in a *Note Verbale* of 23 October 2012, sent through diplomatic channels after the 2012 enactment of the French EEZ, Spain reacted to the establishment of the French EEZ by stating that the state's right to set a EEZ cannot be exercised in a unilateral manner but in accordance with Article 74 of the LOSC, "in order to achieve an equitable solution". For Spain "a line that is equidistant from the baselines form which the breadth of the territorial sea is measured would be the most just and equitable solution, and would be subject to modification only in the case of special or particular circumstances", therefore the French EEZ, which has boundaries that extent far beyond the equidistant line, "contravene Article 74 of the LOSC".[19] Evidently, Spain reacted in such a way to avoid the international acquiescence.

Besides, there is international practice on the regime of islands and rocks, namely the entitlement to maritime zones as it is governed in Article 121 of the LOSC. Spain's opposition with respect to the entitlement of rocks to generate a EEZ is clearly expressed in relation to the Portuguese Wild Islands (Islas Salvajes).[20] For instance, Spain addressed the Note 186 FP/ot, 5 July 2013, to the UN Secretary General, protesting against the Portuguese submission to the Commission on the Limits of the Continental Shelf of information on the limits of the CS beyond 200 nautical miles from the baselines of the TS.[21] Further insular formations present this kind of entitlement problems in various pending delimitations between Spain and Morocco in the Mediterranean Sea (Isla de Perejil, Isla de Alborán, Islas Alhucemas, Islas Chafarinas), and in the Atlantic Ocean (Islas Canarias).[22]

The concept of EEZ is not necessarily the same as that of FZ. Certainly, the establishment of 200 miles zones has important implications for fisheries because most of the Part V LOSC provisions relate to living marine resources and to fishing.[23] The coastal state enjoys wide discretionary powers regarding the conservation and exploitation of living resources in the EEZ, although the LOSC takes into account several species whose biological characteristics and migration patterns require special considerations: highly migratory species (Article 64), marine mammals (Article 65), anadromous stocks (Article 66), and catadromous species (Article 67). The establishment in 1997 of Spain's FZ in the Mediterranean was due to the non-existence of a EEZ at that time. It can be stated that resources belonged to anyone who could catch them. Spain's resource conservation policy was restricted to the

[19] Note Verbale no. 31661, 23 October 2012, from the Ministry of Foreign Affairs and Cooperation of Spain addressed to the Embassy of the Republic of France in Madrid.

[20] For details, see A. Pastor Palomar, *Delimitación Marítima entre Estados. Formaciones Insulares y Bajíos* (Tirant Lo Blanch, Valencia, 2017), at 84. Also, E. Orihuela Calatayud, *España y la Delimitación de sus Espacios Marítimos* (Universidad de Murcia, 1989), at 202; and J.M. Lacleta Muñoz, "Las Fronteras de España en el Mar", 34 *Real Instituto Elcano*, DT, (2004), at 16.

[21] On these questions, see the contribution in this volume by de Faramiñán on the "Continental shelf and its extension".

[22] On 14 December 2014 Spain submitted to the UN Commission on the limits of the Continental Shelf the Western limits of the Islas Canarias's CS beyond 200 nautical miles, which caused the replies from Morocco (Notes of 10 March 2015 and 31 July 2015) and Portugal (Note of 1 April 2015). See the documentation here. See also the contribution in this volume by Orihuela Calatayud on "Pending delimitations".

[23] See J. Carroz, "Fishery Zones and Limits", in II *Encyclopaedia of Public International Law* (Max Planck Institute, 1995), at 397-400; J.P. Quéneudec, "Les Rapports entre Zone de Pêche et Zone Économique Exclusive", 38 *German Yearbook of Interantional Law* (1989), at 138-155; J.A. De Yturriaga Barberán, *The International Regime of Fisheries. From UNCLOS 1982 to the Presential Sea* (Martinus Nijhoff Publishers, The Hague, 1997) at 1-344.

 DOI: 10.17103/sybil.21.16

12 miles of the TS, without prejudice to the applicable European Union law. So, the FZ was meant to ensure a sustainable utilization of the fisheries resources and to hinder an uncontrolled exploitation of fish species like the red tuna. An improvement in stocks of red tuna was expected with this measure. The declaration of a FZ does not affect other rights conferred upon the coastal state in the EEZ.

France protested against the limits of Spain's FZ in the Mediterranean Sea facing the French coasts. It considered that "the delimitation resulting from the line joining the points specified in the Spanish communication (to the UN Secretariat) cannot be invoked against it. The French government recalls on this occasion that under international public law, the delimitation of a boundary must take place by agreement. Moreover, in this specific case of a maritime boundary, such delimitation must result in an equitable solution, thus ruling out in this instance use of the equidistance line employed by the Spanish side".[24] Evidently, the same statement as regards the need of a bilateral agreement in such a situation could apply for the French unilateral establishment of the EEZ in the Mediterranean.[25]

(2) EEZ and FZ resources as public property and natural heritage

Art. 132(2) of the Spanish Constitution [CE] understands the EEZ and the CS resources as goods or assets of the state's public property.[26] Moreover, art 3 of Law 22/1988 on Coasts specifies that these resources are under the state's public terrestrial-maritime property,[27] and Article 5 of Law 33/2003 on Assets of Government Bodies provides that this type of assets must be aimed at a public service or at a general use, they are inalienable and cannot be subject to any statute of limitations, like seizure.[28] The Law 42/2007, 13 December 2007, on natural heritage and biodiversity includes in the category of natural heritage and natural protected zones (Article 28) the waters under Spain sovereignty and jurisdiction.[29] Obviously, all this is in conformity with Articles 55 and 56 of LOSC as well as with customary international law.

(C) SPAIN'S AUTHORITY AS THE COASTAL STATE

In the general international law, the coastal state sovereignty does not extend to the EEZ/FZ, unlike for the territorial sea. In the EEZ the coastal state exercises specific rights over the activities set out in the Article 56 of the LOSC, whether they are carried out by nationals or by foreigners. *Exclusivity* means that only Spain authorities may exercise rights with an economic purpose in the EEZ and, consequently, that other states need Spain's authorization to act in the zone. The coastal state

[24] The French protest can be found in 38 *LoS Bull.* (1998), at 54.

[25] Before the establishment of the EEZ, France had already set up the EPZ in the Mediterranean with the Law 2002-346, 15 April 2003, and Decree 2004-33, 8 January 2004 (JORF no.1 16 April 2004 and no. 10 January 2004).

[26] Art. 132(2) CE reads as follows: "Assets under the state's public property shall be those established by law and shall, in any case, include the foreshore beaches, territorial waters and the natural resources of the exclusive economic zone and the continental shelf" (official translation into English by the Cortes Generales).

[27] Law 22/1988, 22 July 1988, on Coasts (BOE No. 181, 29 July 1988), as amended by the Law2/2013, 29 May 2013, on the Protection and Sustainable Use of the Seashore (BOE no. 129, 30 May 2013.

[28] Law 33/2003, on Assets of Government Bodies (BOE No. 264, 4 November 2003).

[29] Law 42/2007, 13 December 2007, on Natural Heritage and Biodiversity (BOE no. 299, 14 December 2007.

authority can be exercised over the development of marine resources as well as over other economic exploitation and exploration of the zones (energy, artificial islands, installations and structures for economic purposes, scientific research), and over the preservation of the marine environment, including the adoption of sanctions. Obviously, the LOSC regime assigns rights and responsibilities to the coastal state. The regime of innocent passage is inapplicable in the EEZ, but there exist the freedoms of navigation, overflight, cable-lying and pipeline-laying.[30]

The Law 14/2014, of 24 May 2014 on Maritime Navigation complies with the LOSC —including the subsequent practice— and governs the legal situations and relations arising from navigation in offshore sea waters.[31] Art. 24(3) states that "the Government shall ensure that when foreign ships exercise their rights and fulfil their duties in the exclusive economic zone they duly take into account the rights of the Spanish State and fulfil the provisions of this Law and those of the fishing legislation, that comply with EU and international Law". The scientific research activities from foreign ships within the EEZ, or any other Spanish maritime area, is subject to authorisation further to Article 25. Spain has the international right to regulate, authorize and conduct marine research in the EEZ. The state consent is granted for peaceful purposes and to increase scientific knowledge. This is also regulated in the Royal Decree 799/1981, 27 February 1981, on the rules applicable to marine scientific research in areas under Spanish jurisdiction.[32] The national legislation, though previous to the entry into force of the LOSC, is considered to be consistent with the regime set out in its Part XIII, Articles 238 to 265, and with the international customary law.[33] As for maritime traffic systems, Article 30.3 stipulates that they shall be mandatory when located in internal waters or in the territorial sea and "in the event of approval by the International Maritime Organisation, within the exclusive economic zone". It is worth mentioning the Royal Decree 210/2004, of 6 February 2004, establishing a monitoring and information system on maritime traffic because it provides the ship reporting of accidents concerning safety at sea.[34] The right to pursue and inspect (Articles 48-49) shall be exercised

[30] For details, see L.I. Sánchez Rodríguez, *La Zona Exclusiva de Pesca en el Nuevo Derecho del Mar* (Universidad de Oviedo, 1977); B. Conforti (ed.), *La Zona Económica Exclusiva* (Giuffré, Milano, 1983); S. Oda, "Exclusive Economic Zone", in *Encyclopaedia of Public International Law* (Max Planck Institute, 1989), at 305-312; R.J. Dupuy & D. Vignes, *A Handbook on the New Law of the Sea*, (Martinus Nijhoff Publishers, Dordrecht, 1991), at 278; F. Orrego Vicuña, *La Zona Económica Exclusiva: Régimen y Naturaleza Jurídica en el Derecho Internacional* (Editorial Jurídica de Chile, Santiago de Chile, 1991); R. Carnerero Castilla, *El Régimen Jurídico de la Navegación por la Zona Económica Exclusiva* (Universidad Complutense, Madrid, 1999); E. Franckx & P. Gautier (eds.), *La Zone Économique Exclusive et la Convention des Nations Unies sur le Droit de la Mer 1982-2000: Un Premier Bilan de la Pratique des États* (Bruylant, Bruxelles, 2003); G. Andreone, "The Exclusive Economic Zone", in D.R. Rothwell, A.G. Oude et al. (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015), at 159-180.

[31] Law 14/2014, 24 May 2014, on Maritime Navigation (BOE No. 180, of 25 July 2014), en English version available here.

[32] Royal Decree 799/1981, of 27 February, concerning the Rules Applicable to Marine Scientific Research Activities in Areas under Spanish Jurisdiction (BOE No. 110, 8 May 1981). For details, see, E. Conde Pérez, *La investigación científica marina. Régimen jurídico* (Marcial Pons, Madrid, 1998). M. Pérez González, "La investigación científica marina y el nuevo Derecho del mar desde la perspectiva española", *Anuario de Derecho Marítimo* 5 (1986), at 45-96.

[33] On the national legislation, see the contribution in this volume by Conde Pérez on "Marine scientific research".

[34] Royal Decree 210/2004, 6 February 2004, establishing a monitoring and information system on maritime traffic, transposing EP and Council Directive 2002/59/EC (OJ 2002 L 208/10) (BOE No. 39, 14 February 2004), amended by Royal Decree 1593/2010, 26 November 2010, transposing EP and Council Directive 2009/17/EC (OJ 2009 L 131/101) (BOE No. 289, 30 November 2010), and Royal Decree 201/2012, 23 January 2012, transposing Commission Directive 2011/15/EU (OJ 2011 L 49/33) (BOE No. 30, 4 February 2012)

in conformity with the Articles 110 and 111 of the LOSC, as well as with other applicable treaties. Additionally, further to Article 374(2) of the Law 14/2014, the State shall acquire the ownership of ships or goods that, once three years have elapsed since the shipwreck or sinking, "are located in the EEZ or in the high seas and are owned by Spaniards". The LOSC does not have any specific provision in Articles 149 and 303 on underwater cultural heritage in the EEZ and the CS, but Article 383(1) sets out that "the authorisation of activities related to underwater cultural heritage in the EEZ and on the CS shall be governed by the terms set forth in the Convention on Protection of the Underwater Cultural Heritage of 2 November 2001 and other treaties to which Spain is a party".[35]

The EEZ regime stipulated in the LOSC is considered to have negative impact on powerful fishing fleets like Spain's. Consequently, upon signature and ratification of the LOSC Spain made a declaration on fishing with the following wording: "Articles 69 and 70 of the Convention mean that access to fisheries in the EEZ of third states by the fleets of developed landlocked or geographically disadvantaged states shall depend on whether the relevant coastal states have previously granted access to the fleets of states which habitually fish in the relevant EEZ". At Spain's proposal, paragraph 3 of Article 62 of the LOSC, provides that the coastal State should take into account, in giving access to the EEZ, the need to minimize economic dislocation in States whose nationals have habitually fished in the zone. In the same vein, the Spanish declaration adds that "Articles 56, 61 and 62 of the Convention do not allow of an interpretation whereby the rights of the coastal state to determine permissible catches, its capacity for exploitation and the allocation of surpluses to other States may be considered discretionary".[36] These declarations have been characterized as "voluntarist" by De Yturriaga, because "it is evident that the coastal State has full latitude to fix the allowable catch and its fishing capacity, and distribute the surplus as it considers convenient for its interests".[37]

As for the fisheries national regulation, it is necessary to take account of the Royal Decree 1797/1999, 26 November 1999, on the monitoring of fishing operations by vessels of third countries in waters under Spanish sovereignty or jurisdiction, which shall operate in conformity with the agreements of the EU with third states concluded within the CFP.[38] The system is based on the granting of licences and fishing permits, their control and inspection, as well as on rules regarding landing transhipments and marketing. Spain is empowered to verify compliance of vessels with the recommendations and other measures of protection of the fishing resources adopted by the regional fisheries organisations. In addition, the above-mentioned Law 3/2001, 26 March 2001, on State Marine Fisheries lays down the norms concerning offences and penalties.[39]

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[35] On Spain's practice relating to the protection of underwater cultural heritage, see the contribution in this volume by Carrera Hernández on "Protecting Underwater Cultural Heritage".

[36] Division for Ocean Affairs and the Law of the Sea (DOALOS), *Declarations made upon signature, ratification, accession or succession or anytime thereafter*, as of 29 October 2013, Spain.

[37] On these questions, see the contributions de Yturriaga Barberán on "Spain at UNCLOS" and by Casado Ragión on "Fisheries".

[38] Royal Decree 1797/1999, 26 November 1999, on the Monitoring of Fishing Operations by Vessels of Third Countries in Waters under Spanish Sovereignty or Jurisdiction (BOE No. 301, 17 December 1999).

[39] Title V, Arts. 89-114, Law 3/2001, of 20 March, on State Marine Fisheries (BOE No. 75, 28 March 2001).

The Law 42/2007 on Natural Heritage and Biodiversity means the transposition of the EU directives on conservation of habitats and certain species. Art 5 lays down the duty of all public powers to secure the conservation and rational management of natural heritage. And the General Administration of the State is the competent authority for the EEZ's natural heritage (Article 6). Spain implemented within this context the national legislation to carry out the EU Natura 2000. This is a network of protected areas in the waters of the EU member states, aiming at ensuring the long-term survival of Europe's rare and most threatened species and habitats, listed under both the Birds Directive and the Habitats Directive.[40] According to Article 42 of the Law 42/2007, Natura 2000 is made up of Sites of Community Importance (SCI-LIC), which can be transformed into Special Areas of Conservation (SAC-ZEC), as well as of Special Protection Areas for Birds (SPAB-ZEPA). The LIC can be proposed by Spain and later be approved by the EU Commission in a TS, a EEZ or a CS (Article 43(2)). As a consequence, Spain's Administration shall declare a SAC-ZED in the area constituting a SCI-LIC (Article 43(3)). Similarly, the General Administration and the Autonomous Communities can declare the SPAB-ZEPA in the maritime zones of Spain (Article 44), without the need of a previous authorization of the EU Commission, which shall be informed after the declaration of an area (Article 45). As of September 2017, Spain has declared and brought into Natura 2000 a total of 40 areas.

There are also nine Specially Protected Areas of Mediterranean Importance (SPAMI-ZEPIM)[41] as a result of Spain's consent to be bound by the Barcelona Convention for the protection of the Mediterranean Sea against pollution, 10 June 1995,[42] by the Convention on the biological diversity, 5 June 1992,[43] and the Protocol concerning specially protected areas and biological diversity in the Mediterranean, 10 June 1995.[44] These areas envisage to promote cooperation in the management and conservation of natural areas and to ensure the safeguard of biological diversity. They can be established in the marine zones subject to sovereignty or jurisdiction of the Parties to the Protocol and in areas situated partly or wholly on the high sea (France, Italy and Monaco set the Pelagos Sanctuary for marine mammals on the high sea).[45]

Finally, the Royal Decree 394/2007, of 31 March 2007, on measures (including the detention of the vessel and the adoption of disciplinary proceedings) dealing with ships in transit that perform polluting discharges in Spanish waters, is applicable to the EEZ.[46]

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[40] European Parliament and Council Directive 2009/147, on the Conservation of Wild Birds, OJ 2010 L 20/7,; and Council Directive 92/43, on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206/7.

[41] Isla de Alborán, Fondos Marinos del Levante Almeriense, Cabo de Gata-Níjar, Acantilados de Maro-Cerro Gordo, Islas Medes, Cabo de Creus, Islas Columbretes, Mar Menor, y Archipiélago de Cabrera.

[42] Barcelona Convention of 16 February 1976 (BOE no. 44, 21 February 1978) as amended on 10 June 1995 (BOE no. 173, 19 July 2004.)

[43] Convention on the Biological Diversity, 5 June 1992 (BOE no. 27, 1 February 1994).

[44] Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, 10 June 1995 (BOE no. 302, 18 December 1999).

[45] See, the Regional Activity Center for Specially Protected Areas information on SPAMIs, available at http://www.rac-spa.org/spami

[46] Royal Decree 394/2007, 31 March 2007, on Measures Dealing with Ships in Transit that Perform Polluting Discharges in Spanish Waters, transposing EP and Council Directive 2005/35/EC (OJ 2005 L 255/11) (BOE No. 81, 4 April 2007).

(D) DELIMITATION

Notwithstanding, it can be pointed out now that the stability of maritime boundaries is important for economic activity.[47] Thus, the future settlement of the pending maritime boundaries, such as the one between Spain and France in the Gulf of Lion (North-West Mediterranean), can have a significant impact on the economic decisions of States and commercial actors. In effect, energy, fishing and other businesses would like to know which state exercises sovereignty or jurisdiction in the relevant area. In conclusion, being aware of the technical and political difficulties underlying Spain's pending delimitations, it can be maintained that their settlement would seem in principle desirable on economic grounds.

(E) SETTLEMENT OF DISPUTES

Upon signature and ratification of the LOSC Spain declared that, "without prejudice to the provisions of Article 297 regarding the settlement of disputes, Articles 56, 61, and 62 of the Convention preclude considering as discretionary the powers of the coastal state to determine the allowable catch, its harvesting capacity and the allocation of surpluses to other states".[48]

In addition, Spain made declarations after the expression of consent to be bound by the LOSC (deposited on 19 July 2002), on the means for the settlement of disputes concerning the interpretation or application of the Convention. Therefore, pursuant to Article 287(1), Spain chose the International Tribunal for the Law of the Sea and the International Court of Justice. And pursuant to the provisions of Article 298(1)(a), which allows for the exclusion of some disputes from these procedures, Spain "does not accept the procedures provided for in part XV, section 2, with respect to the settlement of disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles".[49] As a consequence, the LOSC cannot be the legal basis for submitting Spain's delimitation disputes to arbitral or judicial procedures.

The EU has not yet chosen the means for the settlement of disputes, pursuant to Article 287 of the LOSC, and in accordance with Council Decision 98/392.[50]

(F) CONCLUSIONS

Spain's social and economic structures are highly dependent on the sea. Therefore, she needs an equitable and precise international regime. As a powerful fishing nation, she accepted the zonal

[47] On these questions, see the contributions in this volume by Gutiérrez on "Delimited maritime zones" and by Orihuela Calatayud on "Pending delimitations".

[48] The Spanish declarations made upon signature and ratification of the LOSC are available at here.

[49] *Ibid.*

[50] Council Decision 98/392 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof OJ 1998 L 179/1.

 DOI: 10.17103/sybil.21.16

approach with respect to the EEZ. But it can be stated that Spain is one of the States that least benefited from the new legal regime set out in the LOSC.

With the establishment of a EEZ, a FZ, and other related zones, Spain acquired control and authority over maritime economic resources, living or mineral. National priorities could be put forward in accordance with Spain's international and European obligations. However, some practices and precedents of bilateral negotiations for the purposes of delimitation with the neighbouring states are still required in order to complete the body of rules governing these maritime zones.

 DOI: 10.17103/sybil.21.16

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

The continental shelf and its extension

Juan Manuel DE FARAMIÑÁN GILBERT*

(A) THE LEGAL FRAMEWORK OF THE CONTINENTAL SHELF AND THE EXTENDED SHELF

One of the major steps taken in international law in recent times has been the negotiation and entry into force of the Convention on the Law of the Sea, done at Montego Bay (Jamaica) in 1982, to which the Kingdom of Spain has been a signatory since 14 February 1997. Within this legal framework, which establishes the definition of the different marine spaces, the continental shelf implies an extension of the sovereignty of the coastal state beyond its coasts below the marine surface. This extension *ipso facto et ab initio* is determined in Article 76 of the United Nations Convention on the Law of the Sea (LOSC), which states:

> "The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

Nevertheless, it is appropriate to point out that the legal regime of the continental shelf which is set forth in the Convention does not coincide with the scientific concept[1]. This is due to the fact that its drafters had to satisfy the interests of different states, some with broad shelves and others with narrow shelves. We need to bear in mind that terms such as "continental mass" and "continental margin" are scientific concepts, whereas "land territory" and "continental shelf" are legal concepts. By combining these criteria, the determination of the "continental margin" is effective for determining the "continental shelf" for legal purposes.

In addition, the Convention grants to interested states the possibility of extending their continental shelf beyond 200 nautical miles. This means that, based on the different geomorphological modifications, the continental shelf can, from a legal perspective, be narrower or wider than the

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1 J. M. de Faramiñán Gilbert, 'Consideraciones jurídicas sobre la extensión de la plataforma continental (PC) más allá de las 200 (M) millas marinas (algunas referencias a la plataforma continental española)', in J. Juste Ruiz, V. Bou Franch and J. M. Sánchez Patrón (eds), *Derecho del Mar y Sostenibilidad Ambiental en el Mediterráneo* (Tirant, Valencia, 2013) 59-87; J. M. de Faramiñan Gilbert and V.L Gutiérrez Castillo, *El Mediterráneo y la delimitación de su Plataforma Continental* (Tirant, Valencia, 2007).

 DOI: 10.17103/sybil.21.17

continental margin, giving rise to an "extended continental shelf". Thus, for the purposes of the Convention, as Article 76(4) states:

> "(a) the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
>
> (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
>
> (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.
>
> "(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base."

Accordingly, the extension of the continental shelf beyond 200 nautical miles is established on a geophysical basis, based on a series of formulas which are calculated from the foot of the continental slope, although one must bear in mind the limitation specified in Article 76(5), which specifies that,

> "The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a) (i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres."

Therefore, up to a distance of 200 nautical miles, the coastal state does not need to make any announcement in relation to the extension of its sovereignty over its continental shelf, provided that it does not affect the continental shelves of other adjacent or opposite states. On the other hand, if it wishes to claim its extended continental shelf beyond 200 nautical miles, it must submit its claim to the Commission on the Limits of the Continental Shelf. As laid down in Article 76(8) UNCLOS,

> "Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding."

If a state is interested in extending its continental shelf beyond 200 nautical miles it must follow an exhaustive four-stage process[2]: (1) Delineate the outer edge of its continental margin by applying the "formulae lines" as set out in Article 76(4) LOSC; (2) Generate the so-called "test of appurtenance", proving that its continental shelf extends throughout the natural prolongation of its territory beyond 200 nautical miles; (3) Once the "test of appurtenance" has been satisfactorily determined, it must verify that the "formulae lines" do not exceed the limits established by the "constraint lines"[3]; and (4)

[2] *Rules of Procedure of the Commission on the Limits of the Continental Shelf.* CLCS/40*, 2 September 2004. Training Manual for Delineation of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles and for Preparation of Submissions to the Commission on the Limits of the Continental Shelf. DOALOS. Office of Legal Affairs. United Nations, New York, 2006.

[3] Paragraphs 5 and 6 of Article 76: "5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a) (i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500-metre

finally, delineate the "outer limits of the extended shelf", taking into account the "formulae lines" and the "constraint lines"[4].

(B) SETTING UP THE TEAMS OF EXPERTS

As a state party to the Montego Bay Convention, Spain has the right to extend its continental shelf beyond 200 nautical miles. Accordingly, it has submitted the following claims to the Commission on the Limits of the Continental Shelf: (a) in 2006, it made a joint submission with France, Ireland and the United Kingdom of Great Britain and Northern Ireland (FISU) in respect of the area of the Celtic Sea and the Bay of Biscay; (b) in 2009 it made a partial submission (coordinated with Portugal) in respect of the area of Galicia and (c) in 2014 it made a partial submission in respect of the continental shelf to the west of the Canary Islands.

To address these claims, the Spanish Ministry of Foreign Affairs and Cooperation (MAEC), through its International Legal Department (*Asesoría Jurídica Internacional*), and through the Commissions on the Limits with France and Portugal, set up a working group that would be concerned with negotiating with the states involved to reach agreements and avoid overlapping of the respective continental shelves. For the preparation of these submissions of the FISU area and the area of Galicia, a scientific-technical team was formed that brought together experts in geology, oceanography, hydrology, diplomacy and law.[5]

As already stated, these submissions have to follow a strict protocol from a geological,

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isobath, which is a line connecting the depth of 2,500 metres. 6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs."

4 Art. 76(7) LOSC: "The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude."

5 The team was comprised of scientists from the Geological and Mining Institute of Spain (IGME), the Spanish Institute of Oceanography (IEO) of the Ministry of Science and Innovation and the Hydrographic Institute of the Navy (IHM) of the Ministry of Defence, and an expert in the Law of the Sea from the University of Jaén. During the course of the negotiations, the Ministry of Foreign Affairs and Cooperation created several delegations. The first of these was composed of Ambassador Pablo de Jevenois Acillona as chairman, the Commissions on the Limits with France and Portugal (MAEC), Dr. Concepción Escobar Hernández, Head of the International Legal Department (MAEC), Luis Somoza Losada, Technical Coordinator (IGME) and the scientific-technical team composed of Teresa Medialdea Cela (IGME), Ricardo León Buendía (IGME), Juan Tomás Vázquez Garrido (IEO), Luis Miguel Fernández Salas (IEO) and Juan Antonio Rengel Ortega (IHM), together with Juan Manuel de Faramiñán Gilbert from the University of Jaén, as jurist. Subsequently, as a replacement for the previous chairman, the Ministry appointed Ambassador Álvaro Alabart Fernández-Cavada, who is also the chairman of the Commissions on the Limits with France and Portugal, while the diplomat José Lorenzo Outón became a member of the International Legal Department which otherwise remained unchanged. The submission in respect of the Canary Islands was made by a team appointed by the Ministry of Foreign Affairs and Cooperation, with Dr. José Martín y Pérez de Nanclares as the new Head of the International Legal Department, the diplomat Ana María Salomón Pérez as chairperson of the Commissions on the Limits with France and Portugal and a number of new members with scientific-technical backgrounds such as Francisco Javier González Sanz (IGME), Desirée Palomino Canterio (IEO), Daniel González-Aller Lacalle (IHM), Juan Ramón Conforto Sesto (IHM), Salvador Espínola González Llanos (IHM), Paloma Sevillano Sánchez (IHM) and Constantino Cid Álvarez (IHM), who are currently on the point of finalizing submissions to the Commission on the Limits of the Continental Shelf.

 DOI: 10.17103/sybil.21.17

oceanographic and hydrographic point of view. Consequently, the presence of highly qualified experts in these matters is fundamental when setting up the working groups, as is the legal and diplomatic perspective, which is central to the negotiations with neighbouring states. Hence the importance of the work carried out on board the oceanographic vessels *Hespérides*, *Sarmiento de Gamboa* and *Miguel Oliver*, which was designed to determine, in the irregular topography of the seabed, the changes in the gradient at the base of the continental slope. Thus, whether by using the "sediment thickness" formula or the "distance" formula, the "formulae lines" can be delineated, as stated in Article 76(4) UNCLOS. Two types of formulas can be used to achieve this: the Gardiner formula and the Hedberg formula. Once the foot of the continental slope has been determined, these formulas can be used to establish the "formulae lines" which delineate the outer edge of the extended continental shelf. The Gardiner formula, also known as the "Irish formula", enables the "sediment thickness" to be determined, by measuring the thickness of the sedimentary rocks on their continental rise and generating a "fixed point" at which the thickness of the sediment is at least 1% of the shortest distance from that point to the foot of the continental slope. This is the most suitable method to use where there are significant volumes of sediment deposited on the continental rise. The Hedberg formula, on the other hand, also known as the "distance formula", is used when the thickness of the sediment is not sufficient to establish the edge of the continental margin beyond 60 nautical miles from the foot of the continental slope. It enables arcs to be delineated at a distance of not more than 60 nautical miles from the foot of the continental slope. In this way, by using these two formulas, either jointly or separately, it is possible to establish the outer enveloping line of the extended continental shelf.

The three submissions made by Spain will allow it to extend its continental shelf beyond 200 nautical miles, with the resulting impact on its sovereignty[6], as laid down in Article 77 of the Convention on the Law of the Sea, and on the exploration and exploitation of any natural resources[7] located on it. In that sense, in the submission for the FISU zone between Spain, France, Ireland and Great Britain, based on the information obtained from the Breogham oceanographic survey, it was calculated that the four member countries would be able to obtain an extension of the continental shelf, on which they would have to reach a delimitation agreement. The joint submission contains a partial claim by each of the four states involved, in respect of the area of 83,000 km² in which they converge beyond 200 nautical miles. With regard to the submission for the area of Galicia, the agreement reached between Spain and Portugal in respect of the outer limits of the extended continental shelf could obtain 56,000 km² for Spain. The submission for the Canary Islands (limited to the western area of the islands of La Palma and El Hierro) would imply an extension of about

[6] Paragraphs 1 and 3 of Article 77 LOSC: "1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources [...] 3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."

[7] Paragraphs 2 and 4 of Article 77 LOSC: "2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State [...] 4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."

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296,500 km², on which Spain will have to reach a consensual agreement with Portugal and Morocco. This will not be without difficulties, because the southern zone of the extension area coincides with the marine projection of the non-autonomous territory of Western Sahara and the particular case of the Savage Islands in respect of Portugal.

However, as has been correctly pointed out, "[i]t is remarkable that, in spite of its advanced position towards the sea, Spain has not claimed a new limit for its continental shelf in all the areas that would be capable of extension. We are referring here to the western area of the Strait of Gibraltar and the Gulf of Cadiz, which projects a small continental shelf in the area between the Portuguese and Moroccan shelves. The proximity of the neighbouring continental shelves would hinder the Spanish extension in the area."[8]

(C) THE SUBMISSION OF SPAIN, FRANCE, IRELAND AND THE UNITED KINGDOM (FISU)

On 19 May 2006, Spain, France, Ireland and the United Kingdom made a joint submission to the Commission on the Limits of the Continental Shelf in respect of the outer limits of their respective continental shelves in the Bay of Biscay and the Celtic Sea. It needs to be borne in mind that a series of agreements and maritime boundary delimitations had already existed between these four states in the form of the delimitation of the continental shelf between France and the United Kingdom resulting from the arbitration award of 30 June 1977[9], and the delimitation of the continental shelf between the United Kingdom and Ireland defined by the Agreement of 7 November 1988[10]. Regarding the delimitation agreement concerning the continental shelf between France and Spain[11] it should be remembered how unfortunate this was for Spain, as the delimitation of the continental shelf between France and Spain agreed in 1974 was detrimental to Spain's interests. It is therefore to be expected that both states will have to renegotiate the extension of the continental shelf by seeking a review of the previous positions.

The agreement reached in the FISU submission is clearly an exemplary model of good interstate collaboration on a matter of such importance for these four states, involving the extension of their continental shelf beyond 200 nautical miles. At first, the parties considered the possibility of making

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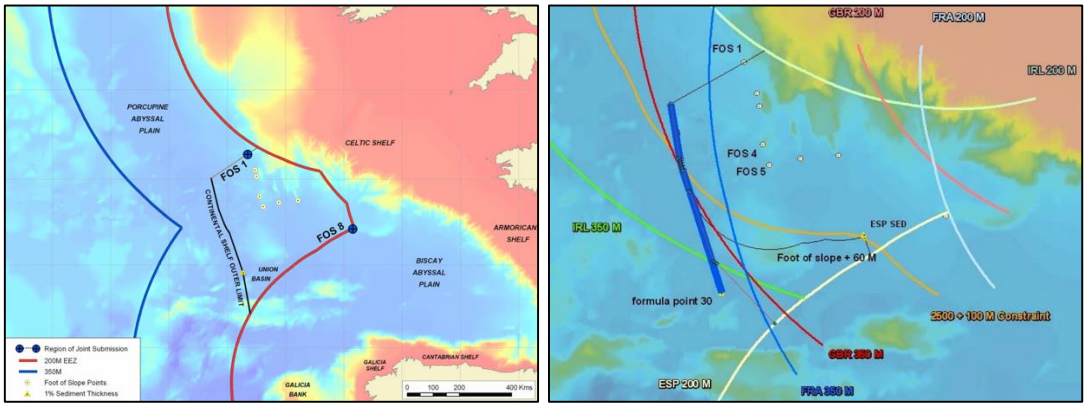
8 A. Jiménez García-Carriazo, *La ampliación de la plataforma continental más allá de las doscientas millas marinas en el marco de la Convención de las Naciones Unidas sobre el Derecho del Mar - especial referencia a España*, PhD Thesis, University of Jaén, 2017.

9 *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Decision of 30 June 1977, 18 RIAA 3.

10 Agreement between the Government of the United Kingdom and the Republic of Ireland concerning the Delimitation of Areas of the Continental Shelf between the Two Countries (signed on 7 November 1988, entered into force 11 January 1990), 1564 *UNTS* 218. It is worth noting that United Kingdom and Ireland have already drawn a maritime boundary that delimits their exclusive economic zones and parts of the continental shelves up to 200 nautical miles. Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland establishing a Single Maritime Boundary between the Exclusive Economic Zones of the two countries and parts of their Continental Shelves, signed on 28 March 2013.

11 Agreement between Spain and France concerning the Delimitation of the Continental Shelf in the Bay of Biscay (Golfe de Gascogne/Golfo de Vizcaya) (adopted 29 January 1974, entered into force 5 April 1975), 996 UNTS 351 (BOE No. 163, 9 July 1975).

the four submissions separately, but at the suggestion of Doug Wilson, the coordinator of the four delegations, they opted for the solution of making a joint submission. On the one hand, this simplified the work of the Commission on the Limits and, on the other hand, the outstanding issue of the delimitations of maritime borders was put off until a later stage. The submission was jointly prepared by the Marine Geology Division of the Geological and Mining Institute of Spain, the Hydrographic Institute of the Navy and the Spanish Institute of Oceanography; EXTRAPLAC of France[12]; the Petroleum Affairs Division of the Department of Communications, Marine and Natural Resources of Ireland; and the National Oceanography Centre and the United Kingdom Hydrographic Office of the United Kingdom.



Source: Executive summary of the FISU submission and summary of recommendations adopted by the CLCS on 24 March 2009.

The decision to make a joint submission resulted in a synergy between the teams of the four states, which divided up the work between themselves. Four working groups were set up, according to the technical needs of the submission, to produce a consensus that would enable them to obtain the maximum extension of the extended continental shelf. The "Natural Prolongation Group" dealt with the geological and morphological analysis, the "Bathymetry and Foot of the Continental Slope Group" studied the bathymetric data, the "Sediment Thickness and Seismic Group" undertook to determine the point of 1% of the thickness of the sedimentary rocks on the basis of the seismic data, and the "Geographic Information System Group" prepared the digital program for the submission. Once the technical data of the submission had been collected, the diplomats and jurists worked on completing the final agreement. The first submission was made on 22 August 2006. According to the Rules of Procedure of the Commission on the Limits, its members can offer assistance to the delegations. In this case, for the preparation of the documentation that was to be submitted, advice was given by Peter F. Croker, an Irish member of the Commission, on simplifying the procedure. In this regard, as the rules allow the Commission on the Limits to carry out certain activities via sub-commissions, it was agreed to create a sub-commission that would submit the conclusions in a later session. This enabled the four states to carry out the "tests of appurtenance" on their respective natural prolongations, thereby establishing that their respective continental margins extended beyond 200 nautical miles. They managed to identify the base of the continental slope by determining eight points

[12] A consortium composed of Ifremer, Service Hydrographique et Océanographique de la Marine, Institut Français du Pétrole and Institut Polaire Français Paul-Émile-Victor under the auspices of the Secretariat-General for the Sea.

 DOI: 10.17103/sybil.21.17

at the foot of the slope, which enabled them to delineate the outer limits of the continental shelf[13]. The final lines were determined by a combination of the Hedberg and Gardiner formulas, using either the distance formula based on the eight points at the foot of the slope, or using the sediment thickness formula, as the seismic data presented established that the sediment thickness was sufficient to enable the sediment thickness formula to be applied from one of the points to the foot of the slope. Finally, the Commission on the Limits approved the methodology used to locate the points at the foot of the continental slope and it was confirmed that the delineation of the lines was not more than 60 nautical miles, as required by Article 76(7) of the Convention. Consequently, the Commission finally approved the recommendations by consensus on 24 March 2009. It should be noted that, in the recommendations received by the Commission on the Limits of the Continental Shelf, the limits delineated by the parties are recognised without prejudice to the pending delimitations that will need to be made in the future.

(D) THE SUBMISSION IN RESPECT OF THE AREA OF GALICIA

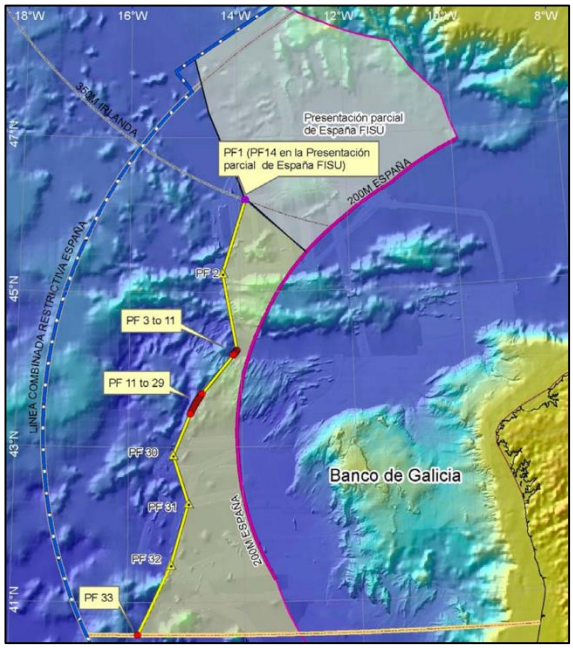
On 11 May 2009 Spain delivered a partial submission to the Commission on the Limits with a proposal to extend the continental shelf in the area of Galicia. This proposal to extend the Galician continental shelf has been determined at its northern limit by following the area already extended in the Bay of Biscay by the delimitations made by FISU; at its southern limit, on the other hand, a negotiation will need to be conducted with Portugal, since there is an overlapping of shelves in the region of the Galicia Bank. It must also be borne in mind that the orography of the seabed in the area is extremely complex, since the Galician continental margin presents a wide variety of segments with great depths and many submarine craters. In 2005 the Breogham survey was carried out by the oceanographic vessel Hespérides between the area of Galicia and the Irish margin. This was completed by another survey, the Espor, in 2008 which involved a coordination between Spain and Portugal, with their respective vessels Hespérides and Joao Coutihho, in order to determine the limits of the natural prolongation of the continental mass of the Galicia Bank. The outer limit has been delineated by applying the Hedberg and Gardiner formulas, which has made it possible to establish 33 fixed points, 28 of which are the result of applying the method of 60 nautical miles from the 12 points established at the foot of the continental slope from the spur of Cape Ortegal (Hedberg formula) and a further 4 fixed points which comply with the condition of sediment thickness of at least 1% of the shortest distance to the foot of the continental slope (Gardiner formula). These are completed by fixed point 1, which corresponds to fixed point 14 (of the FISU joint submission) to the north and fixed point 33, which was established by mutual agreement between Spain and Portugal when determining the Area of Common Interest to the south.

Under the Rules of the Commission on the Limits, it was possible to take advice from Fernando

[13] L. Somoza, T. Medialdea, T. Rengel, R. León, T. Vázquez, F. Bohoyo, F.J. González, *Extensión de la Plataforma Continental española en el Golfo de Vizcaya y Mar Céltico con arreglo al artículo 76 de la Convención de las Naciones Unidas sobre el Derecho del Mar (1982)*, 6th Symposium on the Iberian Atlantic Margin, Oviedo, 1-5 December 2009.

 DOI: 10.17103/sybil.21.17

Pimentel, a Portuguese member of the Commission. This led the two countries to consider the possibility of making separating proposals for their extensions in the area of the above-mentioned Galicia Bank, but in a co-ordinated and parallel way, so that the Commission on the Limits could appreciate the consensus between the two states. As a result of this consensus it has been possible to define the Area of Common Interest in which the extensions to the continental shelves of the two countries overlap. From this it is clear that there is agreement between them and a joint effort has been made to define this area on the basis of scientific-technical criteria. These criteria were determined by the above-mentioned Breogham and Espor surveys, and by the bathymetric and geophysical data obtained by the *Estructura de Missao para a Extensao da Plataforma Continental do Portugal* (EMEPC).



Source: Executive summary of the Spanish submission in respect of the area of Galicia.

As a result, it has been possible to establish this Area of Common Interest as a "superimposed zone" between parallel 41° 52' N to the north and parallel 40° 34' 13" N to the south along the baseline from which the width of the territorial sea of Spain and Portugal is measured to the east and along the constraint line of 350 nautical miles to the west. In this way, as has been pointed out, the area to which the Spanish submission relates is delineated to the north by the fixed point defined by the submission of the FISU area and to the south by the fixed point located at the southern limit of the Area of Common Interest.

Following the criteria established in its Rules of Procedure, the Commission on the Limits has set up a sub-commission to study the submission of Portugal which is scheduled for August 2017 and which, for the moment, is in a higher position than the Spanish submission on the list of receipt and analysis of proposals. It will therefore be necessary for Spain and Portugal to wait for the Commission on the Limits to issue its respective recommendations before they can define the delimitation of the Area of Common Interest in the framework of bilateral negotiations between the two governments. Finally, the extended outer limit of the continental shelves of the two countries

must follow the criteria of Article 76(5) of the Convention on the Law of the Sea, according to which this line must not exceed the distance of 350 nautical miles or 100 nautical miles from the 2,500-metre isobath.

(E) SUBMISSION IN RESPECT OF THE AREA TO THE WEST OF THE CANARY ISLANDS

The third (and final) submission to the Commission on the Limits of the Continental Shelf was made by Spain on 17 December 2014 in respect of the area corresponding to the west of the Canary Islands. It must be borne in mind that, as stated in Annex II of the Convention (UNCLOS) with regard to the functioning of the Commission on the Limits,

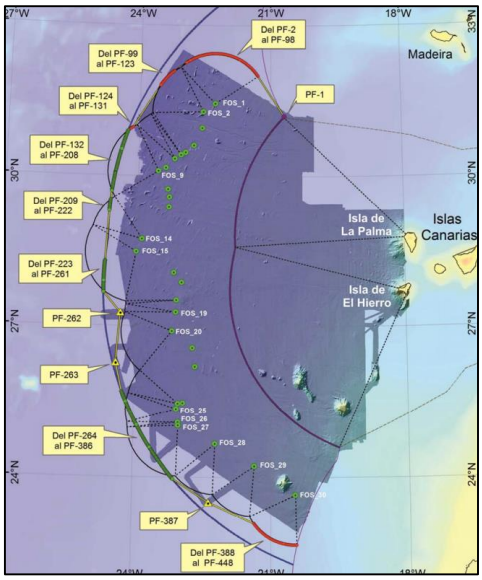
> "Where a coastal State intends to establish, in accordance with article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State. The coastal State shall at the same time give the names of any Commission members who have provided it with scientific and technical advice."

In May 2009, Spain announced its claim for extension through a preliminary notice. In this way, it prevented the time-limit of ten years from lapsing and undertook to make the final submission within a period of five years. Accordingly, it conducted a series of prospecting surveys with the oceanographic vessels *Hespérides*, *Sarmiento de Gamboa* and *Miguel Oliver*, which took place between 2010 and 2014. These surveys revealed the uneven topography of the area, highlighting an important orography of seamounts of volcanic origin lying to the south-west of the Canary Islands Archipelago, which demonstrate the geological and geomorphological continuity with the Canary Islands. This provides an argument for the continuity of its natural prolongation beneath the sea, a fact which was confirmed by the Drago survey[14]. Based on the results obtained, the outer limit of the extended continental shelf has been calculated using 30 fixed points at the foot of the continental slope, as points of maximum change in the gradient at the base of that slope. It should be borne in mind that, as the proposal concerns an extension to an area characterised by submarine ridges of mountain ranges formed by volcanic activity, related to the movement of the crust on hotspots, its measurements must be very strictly regulated on the basis of the criterion of distance and in compliance with Article 76(6) UNCLOS. As in the previous submissions, both the Gardiner and Hedberg formulas have been used to determine 448 fixed points, either by taking into account the 1% sediment thickness according to the Gardiner formula or by applying the distance formula according to the Hedberg formula, to ensure that the outer limit of the extended continental shelf, resulting from the combined application of the two formulas, will not exceed 350 nautical miles, as specified by Article 76(5) UNCLOS. Fixed point 1 is located at an equidistance of 200 nautical miles between Spain and Portugal (between el Roque de Santo Domingo on the island of La Palma and la Ponta do Pargo in Madeira), while fixed point 448 is determined at the intersection of 60 nautical miles from

[14] J.T. Vázquez *et al.*, *Informe científico Campaña Drago 0511*, Proyecto para la Ampliación de la Plataforma Continental de España al Oeste de las Islas Canarias (2011).

point 30 at the foot of the continental slope and the 200-nautical mile line of third party states.

However, in view of the order in which the submissions to the Commission on the Limits are to be studied and the number of submissions currently being processed, it is highly unlikely that the recommendations in respect of the Spanish proposal will be made in the near future.



Source: Executive summary of the Spanish submission in respect of the area to the west of the Canary Islands.

In any case, by the time these future recommendations are produced, Spain will still have to resolve some outstanding delimitations with Portugal and Morocco. Nevertheless, Spain has informed the Commission on the Limits that there are no disputes in the area of extension of the continental shelf towards the north of the island of La Palma, to which this submission relates and, in addition, that this partial submission does not prejudge or prejudice the determination of the outer limit of the Portuguese submission. In accordance with Article 121 of the Convention, the matter as to whether the Savage Islands are to be considered as islands or rocks is yet to be resolved, since in the first case, as an island, its continental shelf must be recognised and extended, and in the second case, as a rock, it would only be entitled to the delimitation of its territorial sea. Indeed, the delimitation of the continental shelf between Madeira and the Canary Islands may be affected by the consideration of the Savage Islands as "islands", which is the view held by Portugal on the grounds that they meet the requirements for being considered as "habitable". Portugal argues that the Savage Islands are "inhabited" by a unit of the Portuguese Nature Protection Force responsible for safeguarding it and that, in consequence, it does not match the criteria set out in Article 121(3) of the Convention, which states: "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." This is no trivial matter, since the subsoil surrounding the islands is rich in deposits of sulphur, tin, hydrocarbons, phosphates and manganese nodules, although, strictly speaking, this issue does not affect the projection of the extended continental shelf to the west of the Canary Islands.

Reference is also made in the submission to the fact that the Spanish delimitation to the south of the island of El Hierro does not prejudice "the rights of third parties" that may give rise to claims, which is an implicit reference to the situation of the Western Sahara. This is a complex issue, since

there are still unresolved matters concerning the decolonization of the territory of the Western Sahara, a non-self-governing territory in which Morocco maintains an interest. Furthermore, the Alawite kingdom has submitted reservations with regard to the Spanish submission, recalling that the delimitation of the marine spaces with Spain is still pending.

(F) FINAL CONSIDERATIONS

The extension of the continental shelf beyond 200 nautical miles has become a high impact model for territorial sovereignty claims by coastal states, as evidenced by the number of submissions being presented to the Commission on the Limits of the Continental Shelf. The procedure for interested states entails a particularly complex technical exercise in which they must prove the legitimacy of their claims.

It is important to bear in mind that in order to extend the continental shelf beyond 200 nautical miles, the interested state must base its submission on the configuration of the seabed and on the location of the foot of the continental slope, rather than on the configuration of its coasts, as is the case with the demarcation of the continental shelf up to 200 nautical miles. For this reason, Article 76 of the Convention lays down clear and detailed criteria for establishing the outer limits of the extended continental shelf.

Spain possesses an extensive coastline and the projection of its continental shelf beyond 200 nautical miles is not only a challenge but, above all, a priority in view of the natural resources contained on its seabed.

 DOI: 10.17103/sybil.21.17

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

Archipelagos and islands

Inmaculada GONZÁLEZ GARCÍA*

(A) INTRODUCTION

Spain is a mixed state, comprising the peninsular mainland, two state archipelagos (the Canary Islands and the Balearic Islands), and the Spanish territories located in North Africa (Ceuta and Melilla) and off the coast of Morocco. These latter territories include Spanish islands and rocks, such as Alborán Island, the Chafarinas Islands (an archipelago made up of the islets Isla de Isabel II, Isla del Rey and Isla del Congreso), the Alhucemas Islands (consisting of Peñón de Alhucemas, or "Lavender Rock", and the islets Isla de Tierra and Isla de Mar) and the rock Peñón de Vélez de la Gomera.[1]

Following a brief review of the general issues involved in the delimitation of the maritime areas and, thus, in the determination of the legal regime applicable to each one, this chapter will give special consideration to the particularities of the legal regime governing the Canarian waters and to the protection of the marine environment surrounding Spain's islands and archipelagos, before concluding with a final assessment. The issues related to the delimitation of the exclusive economic zone (EEZ) and fisheries zones in the Balearic Islands, the EEZ and continental shelf (CS) in the Canary Islands, and the lack of a maritime delimitation of the Spanish territories in North Africa (including the aforementioned Spanish islands and rocks off the coast of Morocco) will be addressed by other authors in this volume.[2]

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[1] The Island or Islet of Perejil [Parsley] will not be examined here, since, as a result of the Spanish-Moroccan incident of 2002 and following the mediation or good offices of then US Secretary of State Colin Powell, Spain and Morocco agreed to respect the previous status quo. In other words, they agreed to guarantee the non-occupation or exercise of sovereign or jurisdictional acts affecting the islet by either state. Pheasant Island (an uninhabited islet) is likewise excluded from this study, as it is subject to a condominium arrangement between Spain and France under the 1856 Treaty of Bayonne.

[2] On these questions, see the contribution in this volume by Pastor Palomar on the "Exclusive Economic Zone and fisheries zones", the contribution in this volume by de Faramiñán on the "Continental shelf and its extension" and the contribution in this volume by Orihuela Calatayud on "Pending delimitations".

 DOI: 10.17103/sybil.21.18

(B) DELIMITATION AND LEGAL REGIME GOVERNING THE SPANISH ISLANDS AND ARCHIPELAGOS

With regard, first, to the Canary and Balearic archipelagos, Art. 2 of the statutes of autonomy of both autonomous communities delimits their territories. The Canary archipelago is "composed of the seven islands of El Hierro, Fuerteventura, Gran Canaria, La Gomera, Lanzarote, La Palma and Tenerife, as well as the islands of Alegranza, La Graciosa, Lobos, Montaña Clara, Roque del Este and Roque del Oeste". The territory of the autonomous community of the Balearic Islands "consists of that of the islands of Majorca, Minorca, Ibiza, Formentera and Cabrera and that of the other adjacent minor islands".

This configuration of Spanish territory led the Spanish government to call for the application of the archipelagic principle and, therefore, of the archipelagic straight baseline system to state archipelagos at the Third United Nations Conference on the Law of the Sea (UNCLOS).

However, the United Nations Convention on the Law of the Sea (LOSC) ultimately approved in 1982 recognized the application of the archipelagic principle only to archipelagic states. Aware of the positions staked out during the negotiations, in 1977, Spain had adopted Royal Decree 2510/1977,[3] which delimits virtually the entire Spanish coast based on straight baselines, thereby making it possible to group the closest islands in the Canary and Balearic archipelagos, in application of Art. 7 LOSC. That provision provides for the drawing of straight baselines in localities in which the coast is deeply indented or cut into or where there is a fringe of islands along the coast in its immediate vicinity. The most notable exceptions to the establishment of these straight baselines were the Bay of Algeciras, due to the presence of Gibraltar, a British colony, on one of its shores,[4] and Spain's North African territories — which include, in addition to the cities of Ceuta and Melilla, the islands and rocks under study here — due to the Moroccan claim to these territories.[5]

Thus, Royal Decree 2510/1977 made it possible to group the islands of Lanzarote, Fuerteventura, Alegranza, Graciosa, Montaña Clara and Lobos within the Canary archipelago through the use of straight baselines, turning the waters located on the landward side of the baselines into internal waters.

The same system was applied to the Balearic archipelago, where straight baselines were used to group the islands of Majorca and Cabrera and the islands of Ibiza and Formentera, creating internal

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3 Royal Decree 2510/1977, 5 August 1977, on the drawing of straight baselines in development of Law 20/1967, of April 8, on the extension of Spanish jurisdictional waters to 12 miles, for fishing purposes (*Official State Gazette*, BOE No. 234, 30 September 1977).

4 On this question, see the contribution in this volume by del Valle Gálvez on "Maritime zones around Gibraltar".

5 Morocco explicitly stated this claim in the interpretive declaration it made on 11 June 2007, upon ratifying the LOSC, in which it also reiterated its non-recognition of Spain's "occupation" of these territories. See E. M. Vázquez Gómez, "Crónica de Derecho del Mar (Enero–Junio 2007)", 14 *Revista Electrónica de Estudios Internacionales* (REEI) (2007), at 2-3. Specifically, it stated: "... The Government of the Kingdom of Morocco affirms once again that Sebta, Melilia, the islet of Al-Hoceima, the rock of Badis and the Chafarinas Islands are Moroccan territories.

Morocco has never ceased to demand the recovery of these territories, which are under Spanish occupation, in order to achieve its territorial unity.

On ratifying the Convention, the Government of the Kingdom of Morocco declares that ratification may in no way be interpreted as recognition of that occupation..."

waters on the landward side. In both cases, the navigation regime governing the internal waters is that established under the 2011 State Ports and Merchant Marine Act[6] and Law 14/2014 on Maritime Navigation[7], and the right of innocent passage recognized in Art. 8(2) LOSC does not apply.

The straight baselines are used to delimit the various maritime areas around the islands that make up these archipelagos, in accordance with the LOSC, which provides that the regime governing the waters of island territory shall be the same as that governing the waters of continental territory, i.e. with regard to the territorial sea (TS), contiguous zone (CZ), EEZ and CS. That regime is determined in accordance with Art. 14 LOSC, which allows for a combination of normal baselines, i.e. the low-water line along the coast, and straight baselines. Additionally, because of the configuration of the Spanish coast, which includes the presence of neighbouring states with opposite or adjacent coasts, in the absence of an agreement to the contrary between the states involved, Spain may also delimit its TS by drawing an equidistant median line.

As for the Spanish islands and rocks in North Africa, Morocco's claim to these territories is very likely the reason why Spain, unlike Morocco, did not draw straight baselines for them. In this regard, on 5 February 1976, Spain protested the *Dahir* published by Moroccan Decree 2-75-311, 21 July 1975, establishing straight baselines for the Spanish territories in North Africa.[8] Such a delimitation would be contrary to the provisions of Art. 7(6) LOSC, as Peñón de Vélez de la Gomera and Peñón de Alhucemas fall on the landward side of those lines and Spain's TS is thus cut off from the high seas or an EEZ. In short, the fact that Spain did not draw straight baselines for its territories in North Africa does not mean that its islands and rocks there lack maritime areas. Rather, in these cases the delimitation would be calculated from the normal baseline and, for the delimitation of the TS, using the equidistant median line method as well.[9]

In accordance with the provisions of Art. 121 LOSC, which distinguishes between islands (paragraph 1) and rocks (paragraph 3), depending on whether or not they can sustain human habitation or economic life of their own, rocks have neither an EEZ nor a CS.[10] Although Alborán Island, Isla de Isabel II in the Chafarinas Islands, Peñón de Alhucemas and Peñón Vélez de la Gomera are inhabited by military garrisons, Spain has not claimed an EEZ or CS around them to date. This is probably due to Morocco's claim to these territories, which does not affect Alborán Island, which, as we will see in the last section, is located in the Mediterranean, halfway between the Iberian peninsular and North African coasts.

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6 Royal Legislative Decree 2/2011 of September 5, approving the consolidated text of the State Ports and Merchant Marine Act (BOE No. 253, 20 October 2011)

7 Law 14/2014, 24 May 2014, on Maritime Navigation (BOE No. 180, of 25 July 2014), an English version available here. On this question, see the contribution in this volume by Díez-Hochleitner on "Maritime zones under sovereignty and navigation".

8 On 10 September 2008, the Spanish government published a communication on the declaration made by Morocco upon its ratification of the LOSC, BOE No. 274, 13 November 2009.

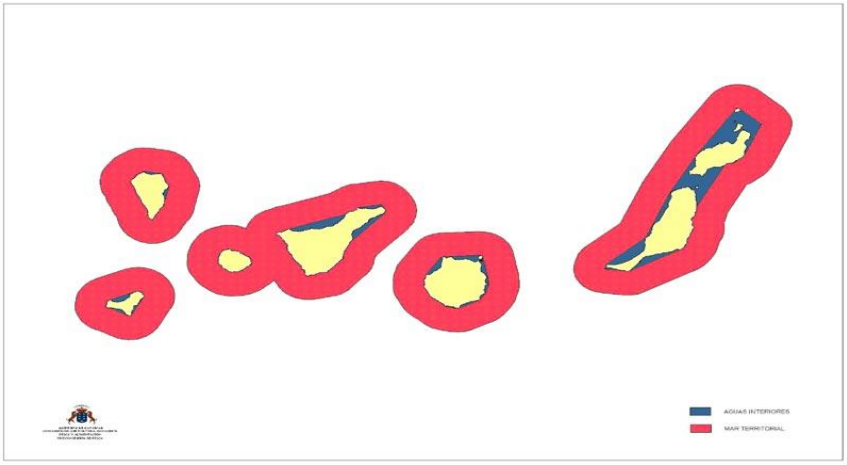
9 See Arts. 2 and 4 of Law 10/1977, 4 January, on the Territorial Sea (BOE No. 7, 8 January 1977).

10 See A. Pastor Palomar, *La Delimitación Marítima entre Estados. Formaciones Insulares y Bajíos* (Tirant Lo Blanch, Valencia, 2017), Chapter III (Islands) and Chapter V (Rocks).

 DOI: 10.17103/sybil.21.18

(C) THE LAW ON THE CANARY ISLAND WATERS: AN APPLICATION OF THE ARCHIPELAGIC PRINCIPLE TO THE CANARY ISLANDS?

Many authors have argued that the adoption of Law 44/2010, 30 December 2010, on the Canary Island Waters,[11] could be considered an application of the archipelagic principle to state archipelagos, intended to establish a practice that would afford states a new regulation.[12] This argument is based on the Law's preamble, the sense of the previous draft bills, and the practice initiated by other states.[13] This latter point has been refuted by Lacleta,[14] who considers these cases to have involved the application of straight baselines, just as the Royal Decree of 1977 did in the case of Spain's archipelagos.



Indeed, the delimitation of the maritime areas around the Canary Islands (see the figure on the left by the regional Government of the Canary Islands) is determined by the straight baselines drawn in 1977, which, as noted above, grouped the islands of Lanzarote, Fuerte-ventura, Alegranza, Graciosa, Montaña Clara and Lobos, giving rise to internal waters on the landward side. Therefore, the maritime areas regulated under the LOSC are measured from those lines or, in the absence thereof, the normal baseline.

However, one year later, Spain included in Law 15/1978, 20 February 1978, on the Economic Zone,[15] the recognition of the application of the archipelagic principle to state archipelagos that it had called for during the negotiation of the LOSC.[16] Specifically, Art. 1(1) of the aforementioned law provides: "In the case of archipelagos, the outer limit of the economic zone shall be measured from straight baselines joining the outermost points of the islands or islets forming the respective archipelago, so that the resulting perimeter conforms to the general configuration of each archipelago."

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[11] BOE No. 318, 31 December 2010. It entered into force on 31 March 2011.

[12] E. Orihuela Calatayud, "La delimitación de los espacios marinos en los archipiélagos de Estado. Reflexiones a la luz de la Ley 44/2010, de 30 de diciembre de aguas canarias", 21 *REEI* (2011) 1-26.

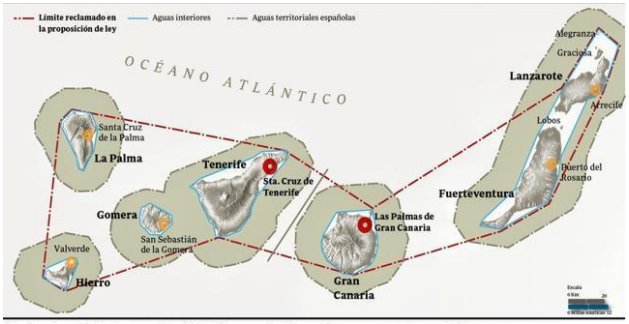
[13] The following states have delimited inter-island waters for their archipelagos: Portugal, for the Azores and Madeira islands; Denmark, for the Faroe Islands; Norway, for the Spitsbergen Islands; and Ecuador for the Galapagos Islands.

[14] J. M. Lacleta, "Las aguas del archipiélago canario en el derecho internacional del mar actualmente vigente", Working Paper, *Real Instituto Elcano de Estudios Internacionales y Estratégicos*, 13 June 2005, 1-23, at 8-9.

[15] BOE No. 46, 23 February 1978. It entered into force on 15 March 1978.

[16] As Lacleta has pointed out, the said law was enacted when the possibility of obtaining the archipelagic status for the waters of mixed states was still under discussion. Spanish lawmakers were thus seeking to provide evidence of their interest in supporting such a position, *loc. cit.*, at 4. On "Islands and Archipelagos" at UNCLOS, see the contribution in this volume by de Yturriaga Barberán on "Spain at UNCLOS".

Ultimately, the adoption of the Law on the Canary Island Waters failed to shed light on the matter. Although the sense of the Law is the recognition of "inter-island" waters for the Canary Islands (in the sense of a maritime area pertaining to the Canary Islands),[17] its sole Additional Provision, entitled "Respect for International Law", expressly states: "The drawing of this perimetric outline will not change the delimitation of the maritime areas of the Canary Islands as established by Spanish law under the international law in force" (see the figure in this page by *ABC*). Therefore, in accordance with international law, the delimitation of the Canarian maritime areas is as established in the Royal Decree of 1977.[18] That is because, under Art. 16 LOSC, states are obligated to give due publicity to the charts or lists of geographical coordinates and must deposit a copy of each one with the Secretary-General of the United Nations. In the case of Spain, the lists of geographical coordinates deposited with the Office of Ocean Affairs are those established under the Royal Decree of 1977, not under the Law of 1978. Furthermore, had Spain applied the archipelagic perimeter to state archipelagos, it would follow that it would have adopted a similar law for the Balearic archipelago. To date, this has not occurred.



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Therefore, as provided under the sole article, paragraph 1, of the aforementioned Law, the Canary Island waters —delimited in accordance with the geographical coordinates established in Annex I of the Law, which were used to establish the straight baselines used for their delimitation (see Annex II of the Law)— are the special maritime area of the Autonomous Community of the Canary Islands. Thus, it is necessary to examine the distribution of powers established by the Spanish Constitution and the Canarian Statute of Autonomy, as well as the nature of the other maritime areas surrounding the Canary Islands. In this regard, paragraph 2 provides: "The exercise of state or regional powers in the Canary Islands and, where appropriate, over the other maritime areas surrounding the Canary Islands over which the Spanish state exercises sovereignty or jurisdiction will take into account the material distribution of powers established by the Constitution or the Statute of Autonomy, for both these and terrestrial areas."[19]

[17] The Spanish Supreme Court has pronounced itself on this contradiction in the system of delimitation of the EEZ of the Canary archipelago (since the Law of 1978 excludes the Mediterranean Sea from its scope of application). See the judgement of 18 June 1992 (Contentious-Administrative Chamber, Appeal No. 540/1990) and the judgement of 16 June 2008 (Contentious-Administrative Chamber, Appeal No. 1341/2004).

[18] In this regard: "... The Government of Spain would like to note that the baselines used to measure the breadth of the continental shelf in the partial submission on the limits of the continental shelf of Spain west of the Canary Islands are set out in Royal Decree No. 2510/1977 of 5 August, as is stated in section 7.9 of the submission. Law No. 44/2010 does not define baselines and was not used in any way in the preparation of the submission on the limits of the continental shelf west of the Canary Islands....". Permanent Mission of Spain to the United Nations, No. 076 MP/bcm, New York, 22 April 2015, United Nations Secretariat, Office of Legal Affairs (Division for Ocean Affairs and the Law of the Sea).

[19] The Spanish Supreme Court expressed this view in its judgement of 7 October 2011 (Roj: STS 6513/2011 – ECLI: ES:TS:2011:6513).

 DOI: 10.17103/sybil.21.18

According to the provisions of Art. 148 of the Spanish Constitution [hereinafter, "CE" from the Spanish] and Art. 30 of the Canarian Statute of Autonomy, the autonomous community has exclusive jurisdiction over, amongst other matters: fishing in inland waters, shell fishing and aquaculture; protected natural areas; maritime transport conducted exclusively between ports or points of the autonomous community; and environmental protection management (Art. 32 in this last case).

In accordance with Art. 149 CE, maritime fishing falls under the exclusive jurisdiction of the state. Specifically, the scope of Law 3/2001, 26 March 2001, on State Maritime Fisheries, amended by Law 33/2014, 26 December 2014, which, in turn, repealed Law 71/1978, 26 December 1978, on Fisheries Development in the Canary Islands,[20] distinguishes between external waters (including the TS, the EEZ and the Fisheries Protection Zone in the Mediterranean) and internal ones, over which the autonomous communities have jurisdiction.[21] In accordance with the provisions of Art. 13 of the aforementioned Law 3/2001, the declaration, by Ministerial Order, of fisheries protection zones (including, amongst others, marine reserves) to encourage the protection and regeneration of marine living resources also falls under the jurisdiction of what is today the Spanish Ministry of Agriculture and Fisheries, Food and the Environment. Three such marine reserves have been declared in the Canary Islands (La Restinga-Mar de las Calmas, La Graciosa-Islets and La Palma). Additionally, Art. 15 bis grants the same Ministry the power to authorize the installation of artificial reefs in external waters (paragraph 1), although in those cases in which the reefs span both external and internal waters, the authorization must be jointly granted by the Ministry and the autonomous community to which the internal waters belong (paragraph 2).

Recreational maritime fishing in the external waters of the Canary archipelago is regulated by Royal Decree 347/2011. These waters are one of the four zones constituting distinct management units. This group also includes the Mediterranean zone, which comprises the waters over which Spain exercises sovereignty or jurisdiction around the Balearic Islands, Alborán Island, the cities of Ceuta and Melilla, and the Fisheries Protection Zone in the Mediterranean (Art. 2).

Finally, the navigation regime governing the internal waters of the Canary Islands is that established in general in the aforementioned Law 14/2014, on Maritime Navigation, which distinguishes between navigation in each maritime area, taking into account the characteristics of the vessels, albeit subject to the agreement reached in the context of the International Maritime Organization (IMO), which will be examined below.

(D) THE PROTECTION OF THE MARINE ENVIRONMENT IN THE SPANISH ISLANDS AND ARCHIPELAGOS

In light of the obligation undertaken by states to protect and preserve the environment,[22] the LOSC envisages the need for both global and regional cooperation, whether directly or through the

[20] BOE No. 313, 27 December 2014.

[21] See Title I "On maritime fisheries in external waters", and, specifically, Art. 4 on the "Delimitation of the scope" of the aforementioned Law 3/2001.

[22] Art. 192 LOSC.

competent international organizations.[23] To this end, this chapter will now briefly review the main actions the Spanish government has taken in the context of the IMO and the European Union (EU) in relation to the protection and preservation of the marine environment of the Spanish islands and archipelagos.

First, with regard to Spain's actions before the IMO, on 24 October 2003, it submitted a proposal to designate the waters of the Canary Islands as a Particularly Sensitive Sea Area (PSSA). The proposal was considered by the IMO's Marine Environment Protection Committee (MEPC) and approved at its 51st session, held in London, from 29 March to 2 April 2004.[24] According to the provisions of Art. 211(6)(a) LOSC, and in accordance with the MARPOL Convention to which Spain is a party,[25] the Spanish government cited, amongst other reasons, the intense maritime traffic to which the waters are subject and the high risk of pollution from oil and hazardous noxious substances. The proposal included various associated protective measures aimed at preserving the area's ecosystem and biodiversity. The PSSA would comprise a maritime area bounded by a polygonal line connecting points along the outer limit of the TS surrounding the Canary archipelago, including areas of the EEZ on the landward side. The protective measures would include: the establishment of "areas to be avoided" for in-transit shipping, usable only for small-scale inshore fishing, inter-island navigation and journeys from and to ports located inside the areas; the establishment of mandatory shipping routes for in-transit ships whose port of origin or destination was not in the Canary Islands; and the adoption of a "mandatory ship reporting system" for all vessels carrying heavy-grade oils in transit through the PSSA or leaving or heading for ports in the Canary Islands. The reporting was to be done through the Las Palmas and Tenerife Rescue Coordination Centres attached to the Ministry of Public Works.[26] The establishment of the PSSA in the Canary Islands entered into force on 1 December 2006.

Second, in the context of the EU, attention should be called to Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive),[27] which aims to achieve good environmental status in the marine environment by 2020, to protect and preserve the marine environment, and to prevent and reduce inputs in the marine environment. In accordance with the provisions of Law 41/2010, 29 December 2010, on the Protection of the Marine Environment,[28] which transposes the aforementioned directive into Spanish law,[29] the strategies will be

[23] Art. 197 LOSC.

[24] See the description of the Canary Islands as a PSSA (Annex 1) and the establishment of associated protective measures defined in Annex 2 of Resolution MEPC.134(53), adopted on 22 July 2005. Designation of the Canary Islands as a Particularly Sensitive Sea Area, available here.

[25] The International Convention for the Prevention of Pollution from Ships, together with its amendments and additional Protocols, commonly referred to as MARPOL (from the English "Marine Pollution"), was signed by Spain in 1979 and ratified by instrument of ratification on 22 June 1984 (BOE Nos. 249 and 250, 17 and 18 October 1984).

[26] A. Ortega and E. Díaz, "Proposal for a New Traffic Separation Scheme in the Canary Islands", XII(II) *Journal of Maritime Research* (2015), 19-26. See also another analysis here.

[27] OJ L 164, 25 June 2008.

[28] BOE No. 317, 30 December 2010.

[29] See I. González García and M. A. Acosta Sánchez, "La difícil aplicación de la Estrategia Marina europea y la

adopted by Royal Decree at the initiative of the Ministry of Agriculture and Fisheries, Food and the Environment, and they will be updated every six years. The said Law covers two large regions in which marine strategies must be established (Art. 6), in accordance with the provisions of Art. 4 of the Framework Directive:[30] (1) The North-east Atlantic Ocean, which has two sub-regions: a) the Bay of Biscay and the Iberian coast; and b) the Macaronesian region of the Atlantic Ocean surrounding the Canary Islands. (2) The Mediterranean Sea.

Law 41/2010 moreover created the concept of *marine demarcation*. Each of the five marine demarcations so established has its corresponding marine strategy. The following are of interest here:

- The marine demarcation of the *Strait and Alborán*,[31] which includes two zones, one of which is the marine environment in which Spain exercises sovereignty or jurisdiction around the Chafarinas Islands, the Islet of Perejil, Peñón de Vélez de la Gomera, Peñón de Alhucemas and Alborán Island. This reference to the islands and rocks over which Spain exercises sovereignty or jurisdiction in North Africa is an exceptional instance of legal support for Spain's ownership of these possessions. Moreover, it is the first time Spanish law has made reference to the islet of Perejil. In light of the Spanish and European law,[32] this demarcation will necessarily require cooperation with Morocco on the development of the marine strategies, which is unlikely to occur, given the lack of an agreement delimiting the maritime boundaries between the two countries as a result of the aforementioned territorial claim.
- The *Levantine-Balearic* marine demarcation and the *Canary Islands* marine demarcation, which will require cooperation with France and with Portugal, respectively. In the latter case, there is currently no delimitation agreement for the CS and EEZ in the waters between the Canary Islands and Madeira due to the dispute over the Savage Islands.[33]

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protección del medio marino en la Bahía de Algeciras/Gibraltar" 25 *REEI* (2013) 1-35, in particular, at 8-20.

[30] Art. 4 specifies the regions and sub-regions for which marine strategies must be established. One of the subregions, in the North-east Atlantic Ocean, is the Macaronesian biogeographic region, comprising the waters surrounding the Azores, Madeira and the Canary Islands. Another, in the Mediterranean Sea, is the Western Mediterranean. States may establish other subdivisions, provided they inform the Commission.

[31] The Strait-Alborán marine demarcation comprises four Andalusian provinces (Cádiz, Malaga, Granada and Almeria) and the Autonomous Cities of Ceuta and Melilla. The demarcation spans from Cape Spartel (North Africa) through the Strait of Gibraltar to the Alborán Sea, including the Chafarinas Islands, the Islet of Perejil, Peñón de Vélez de la Gomera, Peñón de Alhucemas, and Alborán Island, located in the westernmost part of the Mediterranean Sea. See Ministerio de Agricultura, Alimentación y Medio Ambiente, *Estrategia Marina, Demarcación Marina del Estrecho y Alborán. Parte I. Marco General, Evaluación Inicial y Buen Estado Ambiental*, Secretaría General Técnica, Centro de Publicaciones, Madrid, 2012, at 1.

[32] Arts. 5(3) and 6 of the Framework Directive and Art. 23 of Law 41/2010, which provides for the need for cooperation with other states when a single marine region or subregion is shared.

[33] See the reference to Spain's "objection to Portugal's submission to the Commission on the Limits of the Continental Shelf in note verbale No. 381 AV/ot of 10 June 2009 [...]. In that regard, it should be noted that while the Portuguese Government wishes the United Nations to recognize its exclusive economic zone and continental shelf in 2015 and to include the Ilhas Selvagens in both of them, Spain does not agree that the Ilhas Selvagens in any way give rise to an exclusive economic zone. It does, however, agree that they give rise to a territorial sea as it considers them to be rocks, which have the right only to a territorial sea. Spain also reiterates its previous objection, whereby it refused its consent to any delimitation of exclusive economic zones between Madeira and the Canary Islands." Permanent Mission of Spain to the United Nations, ESPAÑA 2015-2016, Note verbale No. 186 FP/ot, New York, 5 July 2013, United Nations Secretariat, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea. On the Savage Islands, see F. Baeza Betancort, *Las Islas Canarias ante el Nuevo Derecho Internacional del Mar* (Museo Canario, Las Palmas, 1987), at 93-94; and A. Sereno, "El nuevo mapa marítimo

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Finally, the aforementioned Law 41/2010, on the Protection of the Marine Environment, formally created the Network of Marine Protected Areas, originated by Law 42/2007, on Natural Heritage and Biodiversity,[34] in compliance with the Habitats Directive.[35]

The Natura 2000 network in Spain consists of Sites of Community Importance (SCIs), Special Areas of Conservation (SACs) and Special Protection Areas for birds (SPAs). With regard to the SPAs, anticipating the difficult and, initially, fruitless cooperation with its neighbouring states in the Strait, the Spanish government omitted the originally planned SPAs (Strait of Gibraltar, Chafarinas Islands, and Banco de la Concepción, which lies north-west of the Canary Islands) from the final list of areas to be classified as SPAs in the first network of marine protected areas. The reason given for this omission was none other than "to avoid diplomatic conflicts", since the areas in question include maritime areas claimed by the United Kingdom and Morocco.[36] Ultimately, the Ministry of Agriculture and Fisheries, Food and the Environment approved Order AAA/1260/2014, 9 July 2014, declaring, amongst others, the marine areas of the Balearic Islands and the Canary Islands (including the Banco de la Concepción SPA), as well as the marine area of Alborán Island, to be SPAs.

The fact that Alborán Island has been left out of the Moroccan claim to the Spanish territories in North Africa was conducive to the declaration, in 1997, of the island (administratively linked to Almeria) and its surroundings as a marine and fishing reserve, to be managed by the Secretariat-General of Fisheries of the Ministry of Agriculture and Fisheries, Food and the Environment.[37] Likewise, the Andalusian parliament passed Law 3/2003, 25 June 2003, declaring the Alborán Natural Area, in accordance with the 2001 designation of Alborán Island and its seabed as a Specially Protected Area of Mediterranean Importance (SPAMI).[38] These spaces coincide with the marine SPA ES0000505 Marine area of Alborán Island and the SCI ES6110015 Alborán.[39]

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de Portugal y el caso de las Islas Salvajes", 28 *REEI* (2014) (DOI: 10.17103/reei.28.01).

[34] *BOE* No. 299, 14 December 2007. See Royal Decree 1599/2011, 4 November 2011, establishing the criteria for the integration of protected marine areas into Spain's Network of Marine Protected Areas (BOE No. 294, 7 December 2011).

[35] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. *OJ* L 206, 22 July 1992.

[36] See *Elpais.com* (19 October 2011): "España descarta tres parques para evitar conflictos diplomáticos: El Estrecho, Chafarinas y el Banco de la Concepción, en aguas que reclaman Marruecos y Gibraltar, se caen de la primera red de áreas marinas protegidas". In declarations to the newspaper, Director General for Forestry Policy José Jiménez explained: "Where a dispute exists, we will study the matter with the Ministry of Foreign Affairs." He defined these areas as "those places subject to some conflict in which the boundaries are not clear" (*ibid.*).

[37] See the Ministerial Order of 31 July 1997 (*BOE* No. 204, 26 August and *BOE* No. 233, 24 September 1998).

[38] *Official Gazette of the Government of Andalusia* (*BOJA*) No. 133, 14 July 2003, and *BOE* No. 187, 6 August 2003. As stated in the law's preamble, in compliance with one of the protocols adopted in the context of the Barcelona Convention, the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean, which was ratified by Spain through the instrument of 23 December 1998, Alborán Island and its seabed were designated a Specially Protected Area of Mediterranean Importance at the 12th Ordinary Meeting of the Contracting Parties to the said convention, held in Monaco in November 2001.

[39] See more information here.

(E) CONCLUSIONS

The foregoing analysis of the delimitation of the waters of Spain's islands and archipelagos has revealed the existence of internal waters created by the straight baselines drawn around the closest islands of the Canary and Balearic archipelagos, thereby refuting the existence of archipelagic waters. In this regard, in accordance with the provisions of the sole Additional Provision of the Law on the Canary Island Waters, the recognition of inter-island waters belonging to the Canary Islands cannot be considered to constitute a precedent in state practice for the application of the archipelagic principle to state archipelagos.

With regard to the distinction the LOSC makes between islands and rocks, the lack of delimitation of the EEZ and the CS around certain islands and rocks off the coast of Morocco is due less to the provisions of Art. 121 LOSC than to Morocco's claim to these territories, as such a delimitation would require an agreement between the states. Morocco supported this claim in practice with the drawing of straight baselines that enclose Spanish territory, with the ensuing protest by the Spanish government.

Special mention must be made of the analysis of the regulations adopted by the EU in matters of protection of the marine environment, in accordance with the obligation for states with adjacent or opposite coasts to cooperate in this regard established under the LOSC. In implementing the European regulations, Spanish law managed to include an explicit reference to the Spanish islands and rocks located off the coast of Morocco. Specifically, in application of the Marine Strategy Framework Directive, Spanish law has provided for the establishment of the marine demarcation of the Strait and Alborán, which will necessarily require cooperation with Morocco on matters of marine environmental protection. This same cooperation is also required with other countries, in this case European, for the Levantine-Balearic marine demarcation (with France) and the marine demarcation of the Canary Islands (with Portugal).

 DOI: 10.17103/sybil.21.18

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

Delimited maritime zones

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With a nearly 8,000-kilometer-long coastline, Spain borders on an open sea (the Atlantic Ocean) and a semi-enclosed sea (the Mediterranean). Regarding its geographical situation, it is surrounded by States with adjacent or opposite coasts which can extend their sovereignty and jurisdiction over the sea to the limits established by International Law. Thus, both Spain's ocean space and that of its neighboring countries are in a frontal, lateral, perpendicular or omnidirectional position, depending on the coastal features and their geographical location. Inevitably, as a result, these ocean spaces overlap and the need arises to define their boundaries through delimitation agreements.

Like its neighboring States,[1] Spain is a signatory of the 1982 United Nations Convention on the Law of the Sea[2] and, as such, it has claimed all internationally recognized ocean spaces. At the present time, it has internal waters (hereinafter IW), a territorial sea (hereinafter TS) of 12 nautical miles, and a zone contiguous to it that extends to 24 nautical miles[3]. Furthermore, it has unilaterally declared an Exclusive Economic Zone[4] (hereinafter EEZ) in the Atlantic without specifying its delimitation (1978) and the Mediterranean (2013), establishing in this case the relevant geographical coordinates. Prior to that, Spain had declared a Fishery Protection Zone in the Mediterranean (1997) of almost the same extension as the abovementioned EEZ. In this respect, it also has a Continental Shelf (hereinafter CS) around its whole coastline of a breadth in keeping with the provisions laid down in LOSC, considering that a nation's rights over this space are not contingent on any express declaration, according to Article 77 LOSC. These circumstances have led our country to claim an extended CS in the Atlantic Ocean.

There is no doubt that any geographical feature of the Earth's surface can be taken into account to delimit and demarcate boundaries: a mountain range, a large lake or, even, a desert... They all can be

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1 Ratifications of The United Nations Convention on the Law of the Sea of 10 December 1982: Algeria (11 June 1996), France (11 April 1996), Italy (13 January 1995), Morocco (31 May 2007), Portugal (3 November 1997) and Spain (15 January 1997). See National legislation - DOALOS/OLA - United Nations.

2 UN Convention on the Law of the Sea, 1833 UNTS 3 (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter).

3 Royal Legislative Decree 2/2011 of September 5, approving the consolidated text of the State Ports and Merchant Marine Act (BOE No. 253, 20 October 2011).

4 Law 15/1978, 20 February 1978, on the Economic Zone (BOE No. 46, 23 February 1978).

 DOI: 10.17103/sybil.21.19

used as legal boundaries for the purpose of separating territories or reinforcing a State's national security. However, it is not like that when it comes to the sea, where the unity of the physical medium, made of a continuous, uniform and homogeneous mass, makes the delimitation of boundaries all the more difficult. From a technical viewpoint, the layout of boundaries is carried out through an operation comprising two main stages: (*a*) delimitation, a process to define spatial extensions in accordance with legal and political views, and (*b*) demarcation, a technical operation by virtue of which the prior delimitation of the land is materially executed. Consequently, it is safe to say that "to define a territory is to define its boundaries".

In light of the extension of its spaces and its geographical location, Spain has applied itself, together with its neighboring States, to the task of delimiting many spaces: with France, the territorial sea, the EEZ and the CS in the Bay of Biscay and in the Mediterranean Sea; with Portugal, the territorial sea, the EEZ and the CS in the mouth of the rivers Minho and Guadiana (continental zone), as well as the EEZ and the CS between Madeira and the Canary Islands; with Italy, the EEZ and the CS; and with Morocco, the territorial sea in the Strait of Gibraltar, the territorial sea and the CS in the Alboran Sea, and the EEZ and the CS along the Atlantic coast, both in the Gulf of Cádiz and in front of the Canary Islands[5]. This considerable potential for conflict contrasts with the few delimitation agreements reached until today, which still remain in force.

(A) SPAIN'S INTERNAL WATERS: THE LAYOUT OF THEIR OUTER LIMITS, THE CLOSING OF BAYS AND THE MOUTHS OF RIVERS.

LOSC defines the internal waters of a State as those on the landward side of the baseline that can be used to measure the breadth of the TS. They include not only the waters along the coastline, such as coastal lagoons, estuaries, gulfs, small bays, etc., but also those within certain man-made constructions, especially the ports. In the case of Spain, where the legislation is consistent with the provisions of the international standard, they are defined as those "located on the landward side of the baselines of the territorial sea", including the waters of "ports and any other waters permanently connected to the sea up to where the effect of tides becomes noticeable, as well as the navigable stretches of rivers up to where there are ports of general interest"[6].

The outer limit of the Spanish internal waters is determined by the baselines from where the rest of the ocean spaces are measured[7]. They are mostly determined by straight baselines unilaterally drawn by the Government along the whole coastline by virtue of Royal Decree 2510/1977[8]. The baselines established along the peninsular coastline show a discontinuous pattern in the zone of

5 On this question, see the contribution in this volume by Orihuela Calatayud on "Pending delimitations".

6 Royal Legislative Decree 2/2011 of September 5, approving the consolidated text of the State Ports and Merchant Marine Act (BOE No. 253, 20 October 2011).

7 Art. 3 Law 10/1977, 4 January, on the Territorial Sea (BOE No. 7, 8 January 1977).

8 Royal Decree 2510/1977, 5 August 1977, on the drawing of straight baselines in development of Law 20/1967, of April 8, on the extension of Spanish jurisdictional waters to 12 miles, for fishing purposes (BOE No. 234, 30 September 1977); Law 20/1967, 8 April 1967, Extending the Jurisdictional Waters to Twelve Miles for Fishing Purposes (BOE No. 86, 11 April 2967).

Gibraltar between Point of Acebuche and Point Carbonera, where the spaces are measured on the basis of the low-tide line. A critical approach would lead us to say that not all the straight baselines drawn by Spain are in accordance with the provisions of International Law[9]. Nevertheless, no neighboring State has ever lodged a protest and no modification has been made, which could be due to the fact that the said drawn baselines neither divert from the overall direction of the coastline nor are they excessively long.

As to the closing of bays, we must bear in mind that Spain has two bays in coasts partially submitted to the sovereignty of other States: the bay of Hondarribia and the bay of Algeciras (bay of Gibraltar). The French-Spanish land border in the Cantabrian Sea coincides with the low course of the Bidasoa River's mouth, forming an indentation that may be qualified as a "bay" according to Article 10 LOSC and it is known as Bay of Hondarribia. Spain and France have closed this bay by common consent and established a water management regime. As a result, one part of the bay is now under Spanish jurisdiction, another part is under French jurisdiction, and a third part is under both countries' common jurisdiction. The straight baseline that closes its mouth joins the Cape Higuer on the Spanish coast and Tombeau Point (or *Pointe des Jumelles*) on the French coast. The closing baseline is 3,055 meters long and made up of three 1,018-meter-long segments that mark the outer limit of the aforesaid three parts of the bay. This water delimitation and management regime have stemmed from several delimitation agreements reached through official exchanges (on December 2, 1858[10], and January 31 and February 7, 1985[11]), as well as from the Joint Declaration of March 30, 1879[12]. It is important to point out in this connection that in the last few years both Governments have held regular meetings to adjust the closing of the Bidasoa River's mouth, near the Hondarribia airport, to the regulations of the European Union[13].

The situation is altogether different in the case of the Bay of Gibraltar, within which the British Overseas Territory of Gibraltar is located. The legal regime and lines of delimitation governing the waters of this bay and the strait of the same name are closely linked to the Spanish-British dispute regarding the territory of Gibraltar, as well as the interpretation of Article X of the Treaty of Utrecht of 1713[14]. The problem lies, among other issues, in the text of this Article. The United Kingdom

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9 Leanza, U., 'Le régime des baies et des golfes dans la Mer Méditerranée', in *Contemporary developments in international law: essays in honour of Budislav Vukas*, (Leiden, Boston, Brill Nijhoff, 2016), at 206-229.

10 *Exchange of letters constituting an agreement between France and Spain amending Annex V of the Convention of 28 December 1858 supplementary to the Treaty on delimitation of 2 December 1856 delimiting the frontier from the mouth of the Bidassoa to the point where the department of Basses-Pyrénées adjoins Aragon and Navarre*, Paris, 22 September 1987 and Madrid, 10 June 1988 (entry into force: 10 June 1988; registration date: 1 May 1989). See National legislation - DOALOS/OLA - United Nations.

11 *Exchange of letters constituting an agreement amending Annex V of the Convention of 28 December 1858 supplementary to the Treaty on delimitation of 2 December 1856 delimiting the frontier from the mouth of the Bidassoa to the point where the department of Basses-Pyrénées adjoins Aragon and Navarre*, Madrid, 31 January and 7 February 1985 (entry into force: 7 February 1985). See National legislation - DOALOS/OLA - United Nations.

12 *Gaceta de Madrid* of 22 April 1879.

13 Written reply issued by the Parliament of the Government of Spain on 19/6/2017 (entry number in the Register of the Congress of Deputies: 39472). Said reply was issued to the question asked by Doña Micaela Navarro Garzón and Don Felipe Sicilia Álvarez (GS) to the Parliamentary Committee of the Congress on 26/4/2017.

14 "The Catholic King does hereby, for himself, his heirs and successors, yield to the Crown of Great Britain the full

understands it in its broadest sense, extending its sovereignty to the waters of the Bay of Gibraltar right in front of the British colony (2 nautical miles) and the waters surrounding the Rock of Gibraltar up to a length of 3 nautical miles. Spain, in turn, makes a literal interpretation of Article X and only recognizes Britain's sovereignty over the town and castle of Gibraltar, together with its port, denying any British offshore jurisdiction[15]. Moreover, to Spain, any negotiation about Gibraltar's sovereignty must be discussed on the basis of United Nations Resolutions, including the General Assembly Resolution 2353 (XI) of 19 December 1967. Taking into account all of the above, the Spanish government has preferred not to draw any straight baseline in the Bay of Gibraltar. This is not to be understood as recognition of British sovereignty over the waters beyond the port of Gibraltar, but as a legitimate choice to measure ocean spaces from low-tide marks[16].

Meanwhile, with regards to the closing of mouths of rivers, in the last two centuries Spain has reached several delimitation agreements with Portugal in the case of the rivers Minho and Guadiana[17]. On September 27, 1893, both countries exchanged notes to reach a delimitation agreement to close the mouth of the Guadiana. Said agreement was in accordance with paragraph A of Article 4 of the Regulations of Coastal and Fisheries Law Enforcement of 1893 and Declaration VI of the Final Protocol of the Treaty of Trade and Navigation, signed by both countries in March 1893[18]. This Agreement expired on September 5, 1913, and was not replaced by any other. Later on, in early February 1969, the International Commission on Boundaries between Spain and Portugal would reach an agreement to fix the limits of the lower Guadiana and its sea boundary, a solution set to become the basis of the Guarda Agreements of February 12, 1976 on TS, CZ and CS[19], which never came into force for lack of ratification by Portugal.

In addition to all these facts, it is important to remark that as far as the Spanish Government is concerned, the delimitations agreed upon with the neighboring country are no longer valid. So it has been stated in writing by the Congress of Deputies in response to the parliamentary question asked in April 2017 about the current status of Spain's ocean spaces. Likewise, in its official reply, the Government reported that on May 30, 2017 Spain and Portugal signed a new agreement to close the mouths of the rivers Minho and Guadiana and delimit their international stretches. Although ocean

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and entire propriety of the town and castle of Gibraltar, together with the port, fortifications, and forts thereunto belonging; and he gives up the said propriety to be held and enjoyed absolutely with all manner of right for ever, without any exception or impediment whatsoever. But that abuses and frauds may be avoided by importing any kind of goods, the Catholic King wills, and takes it to be understood, that the above-named propriety be yielded to Great Britain without any territorial jurisdiction and without any open communication by land with the country round about. [...] And in case it shall hereafter seem meet to the Crown of Great Britain to grant, sell or by any means to alienate therefrom the propriety of the said town of Gibraltar, it is hereby agreed and concluded that the preference of having the sale shall always be given to the Crown of Spain before any others".

15 See. V.L. Gutiérrez Castillo, 'Le systeme de lignes de base établit par l'Espagne conformement à la norme internationale', *Annuaire du Droit de la Mer* (Pedone, Paris) 2008 at 123-143.

16 On this question, see the contribution in this volume by del Valle Gálvez on "Maritime zones around Gibraltar".

17 *Gaceta de Madrid* of 29 September 1893.

18 *Boletín Jurídico Administrativo. Anuario de Legislación y Jurisprudencia* 1893, at 606.

19 *Agreement between Portugal and Spain on the Delimitation of the Territorial Sea and Contiguous Zone, 12 February 1976 and Agreement between Portugal and Spain on the Continental Shelf*, 12 February 1976. See National legislation. See J.I. Charney and L.M. Alexander (ed.), *International Maritime Boundaries*, vol. II (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993), at 1791.

spaces are not delimited in the said treaty, the closing lines of the mouths separate the internal waters of the TS, which lays the foundations for a future delimitation of the TS and the EEZ and the expansion of the CS beyond 200 NM.

(B) DELIMITATION OF THE SPANISH TERRITORIAL SEA: AGREEMENTS WITH FRANCE AND PORTUGAL

Just like all its neighboring States with opposite or adjacent coasts (France[20], Morocco[21], Italy[22] and Portugal[23]), Spain has fixed itself a TS with an extension of up to 12 nautical miles. The same goes to the CZ: Article 8(1) of the Revised Text of the Spanish Law of State and Merchant Navy Harbors defines the CZ under Spanish jurisdiction, extending it to 24 nautical miles measured from the baselines. Moreover, in accordance with the UNESCO Convention on the Protection of the Underwater Cultural Heritage, Member States (including Spain) will be able to regulate and authorize in the said zone all activities directed to underwater cultural heritage.

As to the neighboring States, only France[24] and Morocco[25] have formally claimed CZs so far. Despite a number of official statements declaring its intention to do so, Portugal is yet to claim such space[26]. Indeed, the Portuguese Government has implicitly stated its intention of establishing a CZ both in Decree No.67-A/97 to ratify LOSC and the 1994 Agreement, and a similar statement appeared in *Resoluçao da Assembleia da República* No. 60-B/97 of April 3[27]. However, despite such political declarations, the Portuguese law on ocean space planning avoids any reference to this topic[28]. So is the case of Italy, which has never claimed a CZ in its adjacent territorial sea.

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[20] *Law No. 71-1060 of 14 December 1971 regarding the delimitation of French territorial waters* (Art. 1): "*The territorial waters of France extend up to a limit of 12 nautical miles from the baselines.* The baselines are the low-water mark as well as straight baselines and closing lines of bays as determined by decree. The sovereignty of the French State extends to the airspace as well as to the seabed and subsoil thereof within the limits of its territorial waters". See National legislation - DOALOS/OLA - United Nations.

[21] *Dahir concerning Law No. 1-73-211 of 26 Muharram 1393 (2 March 1973) establishing the limits of the territorial waters* (Art. 1): "The territorial waters of Morocco shall extend to a limit established at 12 nautical miles from the baselines. The baselines shall be the low-water line together with the straight baselines and the closing lines of bays which shall be determined by decree. The sovereignty of the Moroccan State shall extend to the airspace over the territorial waters as well as to their bed and subsoil". See National legislation - DOALOS/OLA - United Nations.

[22] *Navigation Code of 30 March 1942, as amended by Law No. 359 of 14 August 1974.* See National legislation - DOALOS/OLA - United Nations.

[23] *Law No. 33/77 of 28 May 1977 regarding the juridical status of the Portuguese Territorial Sea and the Exclusive Economic Zone and Bases of Spatial Planning and Management of the National Maritime Space Law No. 17/2014, 14 February 2014.* Published in *Diário da Republica* (DR, Official Gazette of Portugal) of 10 April 2014.

[24] Art 44 of the *Customs Code amended by the Ordinance No. 2016-1687, 8 December 2016. Journal Officiel de la République Française* (JORF, *Official Gazette of the French Republic*) of 9 December 2016.

[25] *Law No. 1-81 of 18 December 1980, Promulgated by Dahir No. 1-81-179 of 8 April 1981, establishing a 200-nautical-mile Exclusive Economic Zone off the Moroccan coasts.* See National legislation - DOALOS/OLA - United Nations.

[26] *Law No. 33/77 of 28 May 1977 regarding the juridical status of the Portuguese Territorial Sea and the Exclusive Economic Zone and Decree-Law No. 495/85 of 29 November 1985.* See National legislation - DOALOS/OLA - United Nations.

[27] DR No. 238/1997, 14 October 1997.

[28] *Bases of Spatial Planning and Management of the National Maritime Space Law No.17/2014, 14 February 2014.* DR of 10 April 2014. See National legislation - DOALOS/OLA - United Nations.

The extension and outer limit of the Spanish TS is determined by Articles 3 and 4 of Law 10/77 of January 4 on the territorial sea. In this connection, Article 3 establishes that "The outer limit of the territorial sea shall be determined by a line drawn in such a way that the points constituting it are at a distance of 12 nautical miles from the nearest points of the baseline referred to in the preceding article". Since this space is measured from the baselines, today the Spanish TS can be said to form a belt of sea of 12 nautical miles that surrounds all Spanish coasts (peninsular, insular and archipelagic) interrupted by the territorial waters under jurisdiction of its neighboring States. For these cases, Article 4 of the foregoing Law 10/77 establishes that "Failing agreement to the contrary, the territorial sea shall not, in relation to neighboring countries and countries whose coasts are opposite to those of Spain, extend beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two countries is measured, such baselines being drawn in accordance with international law".

The solution proposed in the Spanish regulations for the delimitation of the territorial sea (that is, the use of the equidistance method) is also found in the codes of the neighboring countries, with the exception of Portugal. Theoretically speaking, this fact should facilitate the delimitation of the said space. However, because of geographical and economic reasons, together with the claims of sovereignty, make any agreement all the more difficult, which explains why TS boundaries have been agreed upon only for a part of the Atlantic coasts: with France on the Cantabrian Sea and with Portugal on the mouth of the river Miño. Nonetheless, the situation regarding the Mediterranean has been traditionally different on account of the claims lodged by Morocco over the Spanish territories along the African coasts and the French Government's refusal to accept the solutions about the Gulf of Lion put forward by Spain.

As far as the agreements on the Atlantic Ocean are concerned, it is worth pointing out that on 29 January 1974 Spain and France signed a Treaty for the delimitation of their respective territorial seas in the Bay of Biscay.[29] At the time of its signature, the extension of that space was different in both countries. France's TS stretched across 12 nautical miles[30], whereas Spain's did not exceed 6 nautical miles. Beyond that limit and up to 12 nautical miles, the Spanish State only had jurisdictional rights over fishing, customs, health and immigration related matters in an area called "contiguous zone"[31]. Consequently, the boundaries agreed upon by virtue of the aforesaid Treaty separated the French TS from the Spanish TS and CZ. This state of affairs has been overcome with the extension of the Spanish TS to 12 nautical miles and the subsequent ratification of LOSC by both countries. Therefore, nowadays the Spanish-French territorial sea is delimited by a boundary formed by two geodetic lines defined in Article 2 of the Treaty as follows: "(...) (a) The first geodetic line follows the meridian, passing through point M at the mid-point of a line AD joining Cape Higuer (Erdico point)

[29] Agreement between Spain and France concerning the Delimitation of the Continental Shelf in the Bay of Biscay (Golfe de Gascogne/Golfo de Vizcaya) (adopted 29 January 1974, entered into force 5 April 1975), 996 UNTS 351 (BOE No. 163, 9 July 1975).

[30] *Law No. 71-1060 of 14 December 1971 regarding the delimitation of French territorial waters*. See National legislation - DOALOS/OLA - United Nations.

[31] Decree of the Ministry of Finance No. 3281/1968 of 26 December 1968. BOE No. 17, *20 January 1969*. See National legislation - DOALOS/OLA - United Nations.

 DOI: 10.17103/sybil.21.19

in Spain to Sainte Anne or Tombeau point in France. This line extends from point M northwards to point P situated at a distance of six miles from point M. (b) The second geodetic line follows the arc of a great circle joining point P and point Q equidistant from the French and Spanish baselines and at a distance of 12 miles therefrom (...)"

A delimitation agreement was also reached with Portugal by virtue of the Treaty of Trade and Navigation of March 27, 1893 to separate the territorial waters in maritime zones adjacent to the river Minho[32]. This separation would be determined later on by the Spanish and Portuguese commissions in charge of the demarcation. The resulting boundary was fixed by a parallel line at 41° 51' 57" North[33]. As stated above, this agreement is not currently in force, according to a declaration made by the Spanish Government in the Parliament on June 19, 2017.

(C) OUTER LIMITS OF THE SPANISH EEZ AND CS: DELIMITATION AGREEMENTS WITH FRANCE AND ITALY

Spain regulated its EEZ through Act. No. 15/78 on the Economic Zone of February 20, 1978[34], recognizing an extension of 200 nautical miles measured from baselines. While at first the Spanish Government limited its extension to the Atlantic coasts, it claimed later on an EEZ in its Mediterranean coasts. The reason that Spain decided to establish this maritime space in the Mediterranean northwest, without including the Alboran Sea, was the growing importance of the exploitation of the Mediterranean Sea's resources. This proclamation was issued through Royal Decree 236/2013[35]. Before that date, France had unilaterally claimed another EEZ[36], which led Spain to make a formal protest[37]. It is worth mentioning in this regard that both countries have followed a similar process to establish their EEZ. In the 1970s, the French Government, just like Spain did, claimed this space in its Atlantic waters[38] and, forty years later, in its Mediterranean coasts[39]. Finally, with regard to the Canary archipelago, Article 1 of Act 15/1978 stipulates in its second paragraph that the outer limit of the Spanish EEZ shall be measured from the straight baselines that join the extreme points of the islands and islets constituting it, in such a way that the resulting perimeter will match the overall configuration of the archipelago.

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32 *Gaceta de Madrid* No. 272, 29 September 1893.

33 See E. Orihuela Calatayud, *España y la delimitación de sus espacios marinos* (Univ. de Murcia, Murcia), 1989, at. 172 and Ministerio de Defensa. Armada (ed.), *Manual de Derecho del Mar* vol. I (Ministerio de Defensa, Madrid, 2016) at. 33.

34 BOE No. 46, 23 February 1978.

35 Royal Decree 236/2013, 5 April 2013, establishing the Spanish Exclusive Economic Zone in the North-West Mediterranean (BOE No. 92, 17 April 2013).

36 *Decree No. 2012- 1148 of 12 October 2012, which establishes a French Exclusive Economic Zone in the Mediterranean* (JORF of 14 October 2012).

37 Ministry of Foreign Affairs and Cooperation No. 31661, note verbal. See National legislation - DOALOS/OLA - United Nations.

38 *Law* No. *71-1060 of 14 December 1971 regarding the delimitation of French territorial waters* (JORF of 30 December 1971).

Decree No. 2012-1148 of 12 October Establishing an Economic Zone off the Coast of the Territory of the Republic in the Mediterranean Sea (JORF of 14 October 2012).

Except for Italy, which has established an ecological protection zone[40], all the neighboring States have also claimed either an EEZ or a fishing zone. Thus Morocco, Portugal and France have claimed an EEZ up to 200 nautical miles, whereas Algeria opted for a *reserved fishing zone*[41] with a limited extension: from 32 nautical miles (between the western sea boundary and *Ras Ténès*) up to 52 nautical miles (from *Ras Ténès* to the eastern sea boundary). Portugal and Morocco[42] also established their own EEZs along their coasts, including the islands in the case of the former[43], which paved the way for a formal protest of the Spanish government on grounds that the Savage Islands (under Portuguese sovereignty) should not be entitled to such ocean space[44].

As to the CS, Spain abides by the surface area criterion, much like most of its neighboring States. Likewise, it is now taking steps to extend its CS beyond 200 nautical miles in three areas: The Bay of Biscay (upon agreement with France, UK and Ireland); in front of Galicia's western coastline (by common consent with Portugal); and to the west of the Canary Islands. As to the basis used for their definition, it must be pointed out that most States have ruled out the criteria on depth and/or exploitation possibilities of the Geneva Convention of 1958 in favor of surface area considerations. So it can be inferred following the inclusion of the EEZs in the legislations of neighboring countries, in which the rights of exploration and exploitation of the seabed and subsoil are recognized. This has been the case, for instance, of Morocco[45], Portugal[46] and France[47]. On the other hand, Italy and Algeria have chosen different solutions. Italy's legislation establishes that the limits of its CS are determined by either the depth criterion (200 meters of depth) or the exploitation criterion, its outer limit being fixed by delimitation agreements (already implemented)[48]. Algeria, in turn, has no specific legislation on this matter yet. However, despite the above facts, it is safe to say that these two countries could have also adopted the surface area criterion: they have both ratified and incorporated LOSC into their

[40] *Law No. 61 on the Establishment of an ecological protection zone beyond the outer limit of the territorial sea 8 February 2006* (*Gazzetta Ufficiale* No. 52, 3 Mars 2006) *and Presidential Decree No. 209 of 27 October 2011* (*Gazzetta Ufficiale* No. 293, 17 *December* 2011).

[41] *Legislative Decree No. 94-13 of 17 Dhu'lhijjah 1414, corresponding to 28 May 1994, establishing the general rules relating to fisheries, 22 June 1994*. See National legislation - DOALOS/OLA - United Nations.

[42] *Law No. 1-81 of 18 December 1980, Promulgated by Dahir No. 1-81-179 of 8 April 1981, establishing a 200-nautical-mile Exclusive Economic Zone off the Moroccan coasts.* Article 1 "Act no. 1-81 of 18 December 1980, Promulgated by Dahir no. 1-81-179 of 8 April 1981, establishing a 200-nautical-mile Exclusive Economic Zone off the Moroccan coasts". See National legislation - DOALOS/OLA - United Nations.

[43] *Law No. 33/77 of 28 May 1977 regarding the juridical status of the Portuguese Territorial Sean and the Exclusive Economic Zone* and Declaration LOSC "Portugal enjoys sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles from the baselines from which the breath of the territorial sea is measured". See National legislation - DOALOS/OLA - United Nations.

[44] Communication from Spain dated 5 July 2013. See National legislation - DOALOS/OLA - United Nations.

[45] *Law No. 1-81 of 18 December 1980, Promulgated by Dahir No. 1-81-179 of 8 April 1981, establishing a 200-nautical-mile Exclusive Economic Zone off the Moroccan coasts*. See National legislation - DOALOS/OLA - United Nations.

[46] *Decree-Law No. 49-369 of 11 November 1969, Law No. 33/77 of 28 May 1977 regarding the juridical status of the Portuguese Territorial Sea and the Exclusive Economic Zone* and *Decree Law No. 119/78 of 1st June 1978*. See National legislation - DOALOS/OLA - United Nations.

[47] *Law No. 68-1181 of 30 December 1968 relating to the exploration of the Continental Shelf and to the exploitation of its natural resources* (JORF of 31 December 1968) and *Law No. 76-655 of 16 July 1976 relating to the Economic Zone off the coasts of the territory of the Republic* (JORF of 12 May 1977). See. R. Meese/ J.S. Ponroy, "L'ultime frontière de la France: le plateau continental au-delà de 200 milles", 7 *Annuaire du Droit de la Mer* (2002), at 93 *ff.*

[48] With Albania, Croatia, France, Greece, Slovenia, Spain, Tunisia and with Serbia and Montenegro.

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domestic legislations.

(1) Delimitation with France: delimitation of the CS in the Bay of Biscay

Pursuant to an Agreement signed on January 29, 1974[49], Spain and France have delimited their CS in the Bay of Biscay. In those days, the internal legislations of the two countries defined their respective continental shelf on the basis of depth rather than surface area. Understandably so, since the Geneva Convention on the Continental Shelf of April 29, 1958, which both States were party to, was in force at the time. Despite their statements and reservations about the said Convention, neither Spain nor France failed to implement its Article 6 (application of equidistance).

The boundary that resulted from this agreement, still in effect, is determined by two segments defined by means of different methods for delimitation. The first segment, pointed towards the northwest, is an extension of the Spanish-French TS boundary, whereas the second one, 160 nautical miles long, leans to the Spanish coast, which favors France's interests. The reason that this layout was preferred has to do with a number of special circumstances defended by the French delegation. Some of them were accepted by Spain, such as, for instance, that France's CS had a greater geological area and a longer coastline.

One of the most interesting details of the aforesaid agreement is the establishment of a zone of around 50 square kilometers for joint exploration and exploitation that was closer to the Spanish coast than to the French. Located on the so-called *Gascony dome*, this zone is made up of several geodetic lines that join four points in coordinates defined by mutual consent. Its creation was a way to compensate Spain for the resulting boundary. The provisions governing the said zone of joint exploitation are stated in Annex II of the agreement, where it says that the contracting parties will engage in the exploitation of their resources with a view to their equitable distribution. In keeping with this intention, both States committed themselves, as per their Mining Regulations, to promoting agreements between companies willing to explore the zone[50]. Another noteworthy aspect is the willingness to solve by peaceful means any possible future conflict between the parties. Furthermore, Article 4 makes reference to potential problems in case new mineral deposits should be found beneath the boundary line, in which case the possibility of entering into new agreements should be considered. Finally, Article 8 of the said Spanish-French agreement stipulates: "In the event of the entry into force between the Contracting Parties of any multilateral treaty which modifies the Convention on the Continental Shelf done at Geneva on 29 April 1958 and which might affect the provisions of the present Convention, the Contracting Parties shall immediately hold consultations for the purpose of agreeing on such amendments to the present Convention as may prove necessary". Despite the provisions of this Article and the fact that Spain requested a revision in light of the delimitation of

[49] Agreement between Spain and France concerning the Delimitation of the Continental Shelf in the Bay of Biscay (Golfe de Gascogne/Golfo de Vizcaya) (adopted 29 January 1974, entered into force 5 April 1975), 996 UNTS 351 (BOE No. 163, 9 July 1975).

[50] See Annex II to the *Convention between the Government of the French Republic and the Government of the Spanish State on the delimitation of the continental shelves of the two States in the Bay of Biscay* (Golfe de Gascogne/Golfo de Vizcaya), 29 January 1974 (entry into force: 5 April 1975) (BOE No. 163, 9 July 1975).

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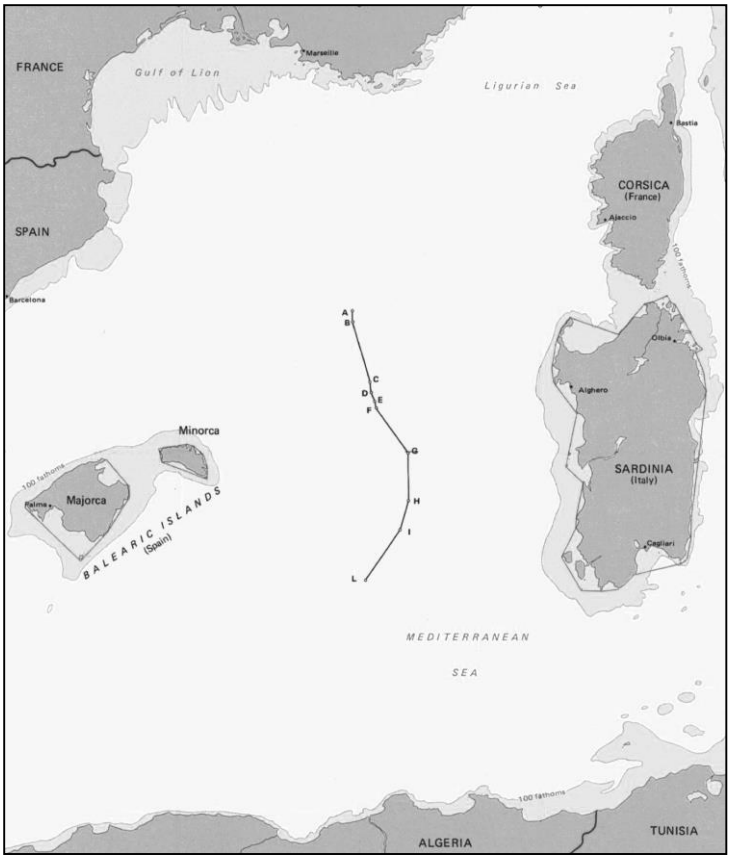
the FISU (France-Ireland-Spain-UK) Zone in connection with the Cantabrian Sea/Bay of Biscay/Gulf of Gascony/Celtic Sea), the Spanish-French agreement has never been modified.

(2) Delimitation with Italy: delimitation of the CS in the Mediterranean

Italy is the only State with which Spain has signed an agreement on delimitation in the Mediterranean Sea relating to the Spanish and Italian CS[51]. This agreement delimitated the continental shelves between the islands of Menorca and Sardinia. At the time of its signature, Italy, unlike Spain, was not a party to the Geneva Convention of the Continental Shelf of April 1958. Nevertheless, both the Spanish and the Italian legislation based the definition of their respective shelves on the depth factor. The absence of an international normative of a common conventional character stipulating the rights applicable to this case made it necessary to find a solution under Common Law[52].



The resulting agreement, with the establishment of an equidistant line between the Spanish Balearic archipelago and the Italian island of Sardinia (see figure on the left). As to the zone subject to delimitation, both nations agreed that it would not include any area likely to be claimed by either France or Algeria. For this reason, Article 1 defines de coordinates of the points constituting the boundary between the two countries as extending not beyond 5 nautical miles from the triple Italy-Spain-France equidistance point in the north, nor beyond 8 nautical miles from the one connecting Algeria, Italy and Spain in the south. In such circumstances, the resulting boundary, still in force, is a 9-segment equidistant line of 137 nautical miles[53].

Now, despite the parties' will to prevent any damage to their neighboring States, the French

[51] Agreement on the delimitation of the continental shelf (with chart) (adopted 19 February 1974, entered into force 16 November 1978), 1120 UNTS 356 (BOE No. 290, 5 December 1978). For an Italian perspective, see G. Francalanci, "Problems of Management of Continental Shelf: Italian perspective", in D. Pharand and U. Leanza (ed.), *Le plateau continental et la zone économique exclusive. Délimitation et régime juridique*, (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993), at 252.

[52] Orihuela Calatayud, *España y la delimitación...*, *supra* n. 33, at. 169.

[53] Charney and Alexander, *supra* n. 19, vol. II, at 1601 *ff*. T. Scovazzi, 'Delimation Agreement with Italy', in Pharand and Leanza, *Le plateau...*, *supra* n. 52, at 91; and J.L. Azacárraga Bustamante, "España suscribe, con Francia e Italia, dos convenios sobre delimitación de sus plataformas continentales", 1-3 *Revista Española de Derecho Internacional* (1975), at. 133.

Government issued a diplomatic note in May 1979 in protest against the Spanish-Italian boundary, stating that it was detrimental to French interests[54]. This protest stemmed from France's disagreement with the application of equidistance in the Mediterranean, the same position that the country has kept in the last few years concerning unilateral claims of jurisdictional zones in the region. It was the case, for instance, of the protest against the EEZ claimed by Spain and the ecological protection zone established by Italy.

If we form a critical opinion on the aforesaid agreement, we realize that Spain has benefited from the negotiated settlement, since the difference in extension between Menorca (754 km²) and Sardinia (23.813 km²) was not taken into account. The reason, according to the doctrine, is that the island of Menorca was not considered in itself for the delimitation, but regarded instead as part of the Balearic archipelago, which has an overall extension of 5.014 km².[55]

(D) CONCLUSION

Just like most of its neighboring States, Spain has claimed all ocean spaces recognized by the international normative. Therefore, that country can be said to be seeking delimitation agreements with three European nations (France, Italy and Portugal) and two African nations (Algeria and Morocco). Officially speaking, the Spanish Government considers that there is no conflict whatsoever with the United Kingdom about the said ocean spaces, since Spain does not recognize British sovereignty over the waters adjacent to the Rock of Gibraltar or the bay of Algeciras (Bay of Gibraltar), but only over the waters within the harbor of the British Overseas Territory. Despite the existing potential of delimitation-related conflicts, Spain has not reached any consensus with its neighbors about most of its maritime borders, so very few agreements on this respect have been signed so far.

Several agreements have been reached with France about the Cantabrian Sea. Both countries have closed the Bidasoa River's mouth and signed a specific Agreement (exchange of letters on December 2, 1858, and January 31 and February 7, 1985) establishing a zone of common or joint use, which is still in force. Other significant treaties on this matter are the Convention on the Delimitation of the Territorial Sea and Contiguous Zone in the Bay of Biscay (Gulf of Gascony) signed in Paris on January 29, 1974 and the agreement reached on the same date about the delimitation of the CS. All of them remain in effect.

Agreements have also been reached with Portugal concerning the Atlantic waters, although with more complicated results in this case because, according to the Spanish Government, the delimitation agreements signed by both countries in the past which could have settled this matter are no longer in force; for instance, the exchange of notes in 1893, expired in 1913, and the Guarda Agreements of 1976 that Portugal never ratified. In this connection, according to data provided by the Spanish Government in a parliament session, both countries signed a Treaty on May 30, 2017 establishing the

[54] A. Reynaud, *Le plateau continental de la France* (LGDJ, Paris, 1984), at 233.
[55] Charney and Alexander, *supra* n. 19, vol. II, at 1603.

 DOI: 10.17103/sybil.21.19

closing line of the mouths of rivers Mihno and Guadiana and defining its international reach. Even if the ocean space between the two States is not specified in the said Treaty, the closing lines of their river mouths divide the internal waters of the TS and, therefore –as stated in its preamble– they can be a starting point for future negotiations concerning the delimitation of the TS and EEZ as well as the extension of the CS beyond 200 nautical miles.

Finally, Italy has been the only State so far with which Spain has reached a delimitation agreement on the Mediterranean by virtue of the Convention on the Delimitation of the Continental Shelf, signed in Madrid on February 19, 1974. This Convention is not without controversy: it has been challenged by France on grounds that the resulting boundaries were detrimental to French interests in the region.

 DOI: 10.17103/sybil.21.19

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

Pending delimitations

Esperanza ORIHUELA CALATAYUD*

(A) INTRODUCTION

The conclusion and entry into force of the United Nations Convention on the Law of the Sea (LOSC) impacted the establishment and breadth of Spain's maritime zones[1] and, thus, the gradual increase in the number of cases in which it was necessary to draw sea borders with the country's neighbours. The situation resulting from the maritime zones claimed by Spain and its neighbours[2] shows that delimitation issues exist on all the country's coasts, that they affect all types of maritime

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1 At the third United Nations Conference on the Law of the Sea (UNCLOS), breadths of 12 and 188 nautical miles were established for the territorial sea (TS) and the exclusive economic zone (EEZ), respectively, prompting Spain to expand its maritime areas (see Articles 1 and 3 of Law 10/1977, 4 January, on the Territorial Sea (BOE No. 7, 8 January 1977) and Article 1 of Law 15/1978, 20 February 1978, on the Economic Zone (BOE No. 46, 23 February 1978)). Following the entry into force of the LOSC for Spain, the country established an EEZ with limited jurisdiction in the Mediterranean (Royal Decree 1315/1997, 1 August 1997, establishing a Fisheries Protection Zone in the Mediterranean (BOE No. 204, 26 August 1997), amended by Royal Decree 431/2000, 31 March 2000 (BOE No. 79, 1 April 2000)), which, in response to French actions, it subsequently transformed into an EEZ with full recognition of the rights provided for under the Convention (Royal Decree 236/2013, 5 April 2013, establishing the Spanish Exclusive Economic Zone in the North-West Mediterranean (BOE No. 92, 17 April 2013)); it requested extensions of the CS beyond 200 nm wherever the geography so allowed (Bay of Biscay, area of Galicia, and to the west of the Canary Islands); and it joined the group of states in favour of recognizing the archipelago principle for state archipelagos by means of Law 44/2010, 30 December 2010, on the Canary Island Waters (BOE No. 318, 31 December 2010). These actions have impacted the delimitation of Spain's maritime zones, as they have increased the number of cases and zones pending an agreement on the drawing of the boundaries and introduced additional factors impeding the reaching of such agreements.

2 For a more detailed analysis of the issue, see the E. Orihuela Calatayud, "La delimitación de los espacios marinos en España: perspectivas futuras", in *España y la práctica del Derecho Internacional. LXXV Aniversario de la Asesoría Jurídica Internacional del MAEC* (Ministerio de Asuntos Exteriores y de Cooperación, 2014) 121-141, at 123-127. The only new development with regard to the analysis presented there has been in relation to France, which, by means of Order no. 2016-1687, 8 December 2016, on maritime zones under the sovereignty or jurisdiction of the French Republic (JORF, 9 December), has equipped itself with a contiguous zone (CZ) adjacent to the TS and up to 24 nautical miles from the baselines (Art. 10) that it had previously lacked. The following table shows Spain's maritime zones and those claimed by its neighbours.

STATE	TS	CZ	EEZ	CS	CS beyond 200 nm
Algeria	X	X	EFZ (limited extension)	X	
France	X	X	X	X	X
Italy	X		EPZ	X	
Morocco	X	X	X	X	
Portugal	X	X	X	X	X
Spain	X	X	X	X	X

 DOI: 10.17103/sybil.21.20

areas, and that they have only increased since the Convention's entry into force.

In the case of France, in addition to the need to define the boundary of the territorial sea (TS) and continental shelf (CS) in the Mediterranean, there is the issue of the delimitation of the exclusive economic zone (EEZ) in the Mediterranean and in the Cantabrian Sea (southern Bay of Biscay),[3] as well as those related to the establishment of an extended CS (ECS) —CS beyond 200 nautical miles (nm)— in the Bay of Biscay.[4] In the case of Portugal, in addition to the delimitation of the EEZ and CS at the mouth of the River Miño and between the Canary Islands and Madeira, as well as the definition of the boundaries of the TS, EEZ, and CS at the mouth of the River Guadiana, it is now also necessary to consider the delimitation of the ECS in the Atlantic Ocean.[5] The establishment of a Spanish EEZ in the Mediterranean further requires the drawing of boundaries with Italy's ecological protection zone (EPZ) and Algeria's exclusive fishing zone (EFZ), although in these two cases, the limits established in each case minimize the need for delimitation. As for Morocco, the space to be delimited in the Canary Islands area could be expanded beyond 200 nm[6].

The established rules for the drawing of maritime boundaries[7] call for an agreement between the parties and/or the achievement of an equitable solution. The parties have an obligation of conduct to negotiate in good faith the conclusion of an agreement resulting in an equitable solution. Should these negotiations fail, the parties are to have recourse to the procedures provided for in Part XV of the Convention. In the case of judicial procedures, an equitable solution is the goal to be achieved by the

3 Including those related to the delimitation of the respective contiguous zones.

4 On 19 May 2006, France, Ireland, the United Kingdom and Spain submitted to the Commission on the Limits of the Continental Shelf, in accordance with Article 76, paragraph 8, of the LOSC, information on the limits of the CS appurtenant to the four coastal states that lie beyond 200 nm from the baselines from which their respective TSs are measured corresponding to the area of the Celtic Sea and the Bay of Biscay. On 24 March 2009, the Commission on Limits adopted its recommendations and the four states must now reach an agreement on the delimitation of their respective CSs beyond 200 nm. Both the request and the Commission's recommendations are available in the United Nations Oceans and Law of the Sea Database. On this question, see the contribution in this volume by de Faramiñán on the "Continental shelf and its extension".

5 On 11 May 2009, Portugal submitted to the Commission on Limits information on the limits of its ECS in three areas: the eastern region (mainland Portugal and the Madeira Archipelago), the western region (the Azores Islands), and the Galicia Bank. This information was subject to observations by Spain. The same day, Spain submitted to the Commission on Limits information regarding the area of Galicia. As for the delimitation at the mouths of the rivers Miño and Guadiana, on 30 May 2017, Spain and Portugal signed an agreement drawing closing lines across the mouths of the rivers and delimiting their international sections, which constitutes a basis for negotiating the delimitation of their respective maritime areas. Information about this treaty is available here.

6 On 11 May 2009, Spain submitted to the Commission on the Limits a preliminary information on the limits of the Spain's ECS to the west of the Canary Islands, which was completed on 17 December 2014. On 3 August 2015, Morocco submitted a preliminary information with the intention of completing it by 31 May 2017, which it ultimately failed to do. On 20 June 2017, the North African kingdom sent a notification to the United Nations Secretary General that it reserves the right to make a definitive submission later. On this question, see again the contribution in this volume by de Faramiñán on the "Continental shelf and its extension".

7 Both conventional and customary rules apply to the delimitation of these maritime areas. With regard to the former, in particular to Arts. 15, 74, and 83 LOSC, it should be noted that both Spain and its neighbours are parties to the Convention. The first to express its consent to be bound by the Convention was Italy, which deposited its instrument of ratification on 13 January 1995. In 11 April and 11 June 1996, respectively, France and Algeria became Contracting Parties. Spain and Portugal ratified the LOSC in 1997, on 15 January and 3 November respectively. Undoubtedly, the most reluctant to accept the text resulting from the third UNCLOS was Morocco, which did not ratify it until 31 May 2007.

 DOI: 10.17103/sybil.21.20

arbitral tribunal or court.[8]

Despite the commitment assumed, the delimitation of most of Spain's maritime boundaries is still pending. Since 19 February 1974, when the country signed an agreement with Italy delimiting the CS,[9] the contacts made have not resulted in the opening of a negotiation process with prospects for success,[10] nor is there much enthusiasm for the possibility of recourse to a third party.

This paper aims to determine the causes of this paralysis. To this end, it will examine the challenges preventing the parties from reaching agreements and consider the possibilities, in the absence of such an agreement, of suing or being sued before an international court.

(B) THE CHALLENGES OF CONCLUDING DELIMITATION AGREEMENTS

A wide variety of circumstances have, to date, prevented Spain from making progress on the drawing of its maritime boundaries through the signing of agreements with its neighbours. Notwithstanding the political considerations, the analysis of which falls beyond the scope of this paper,[11] the main circumstances are geographical and/or legal in nature.

(1) Geographical Circumstances in the Pending Delimitations

The geographical circumstances hampering the definition of these boundaries include the existence of concave coasts, the concurrence of both lateral and frontal delimitations with a single state in a single area, the existence of cases in which the establishment of the definitive boundary requires the participation of more than two states, and islands.

Coastal concavity is often cited as a circumstance leading to the rejection or modification of an equidistant boundary. The Spanish coast curves inward near the mouth of the River Guadiana, as does the French coast in the Gulf of Lion; likewise, Morocco considers the concavity of its coast between Cape Ghir and Cape Juby relevant to the drawing of its boundary with the Canary Islands.[12] Although Spain does not seem to have taken a particularly belligerent stance on this point with regard to the delimitation of the boundary with Portugal at the mouth of the Guadiana, France and Morocco

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[8] On the content of the international rules on the delimitation of maritime areas, see E. Orihuela Calatayud, "La delimitación de espacios marinos entre Estados y la jurisprudencia internacional" in *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria/Gasteiz 2016* (UPV, Bilbao, 2017) 487-568, at 499-510.

[9] BOE No. 290, 5 December 1978. On this question, see the contribution in this volume by Gutiérrez del Castillo on "Delimited maritime zones".

[10] The drawing of Spain's maritime boundaries thus remains stalled, and the borders drawn are the same as those that existed prior to the adoption of the LOSC. In this regard, see: V. Gutiérrez del Castillo, "Delimited Maritime Zones" in this same section.

[11] Specifically, those arising from the presence of Spanish cities and islands in Moroccan territory or off the Moroccan coast and Morocco's claims to them, as well as to the territory of the Sahara, all of which circumstances are unrelated to the Convention's conclusion and entry into force.

[12] In this regard, see: A. Lahlou, *Le Maroc et le droit des pêches maritimes* (LGDJ, Paris, 1983) 310-311; E. Orihuela Calatayud, *España y la delimitación de sus espacios marinos* (Universidad de Murcia, Murcia, 1989) 224; and V.L. Gutiérrez del Castillo, *El Magreb y sus fronteras en el mar. Conflictos de delimitación y propuestas de solución* (Huygens, Barcelona, 2009) 217-218.

have cited the concavity of their coasts to oppose the establishment of an equidistant boundary.[13] Solving these discrepancies is not simple and involves determining whether their existence necessarily renders an equidistant boundary unfair, whether that is only true in certain cases and which ones, or whether they should be deemed to have no impact on how the boundary is drawn at all. International jurisprudence is of little assistance in these matters, as the only thing that seems clear to the international courts is that this assessment depends on the position of the coasts of the states involved in the delimitation and that concavity should only be a factor when the coasts are adjacent.[14] But should coastal concavity lead to a rejection or modification of the equidistance line in all cases of lateral delimitation? Apparently not, as according to international case law, to have such a consequence, the concavity of a coast must produce a cut-off effect on the parties' maritime rights. Nevertheless, beyond qualifying the concavity as particular or well-marked, and requiring the concurrence of the requirements of disadvantage and seriousness, the international courts have not specified when this effect occurs.[15]

Other geographical circumstances hampering the delimitation of Spain's maritime areas and on which the decisions of the international courts shed little light are related to the concurrence in a single zone and with a single state of a lateral and a frontal delimitation and the existence of border points involving three or more states. The first of these circumstances affects the delimitation between Spain and France in the Mediterranean, as the change in direction of the French coast at Cap d'Agde and the presence of the Balearic Islands, thereafter opposite the French coast, turn the lateral border into a frontal one.

Delimitation points of interest to more than two states[16] can be found in the Mediterranean and the Atlantic. In the Mediterranean, such tri-border areas affect three groups of states: France, Italy,

[13] With regard to France, this rejection is clear when one considers that the limits established by the French for their EEZ. The article 1 of the Decree no. 2012-1148, 12 October 2012, on the Creation of an Exclusive Economic Zone off the Coast of the Republic's Territory in the Mediterranean (JORF, 14 October 2012) defines a space that overlaps with the EEZ established by Spain in accordance with the equidistance line (Royal Decree 236/2013, 5 April 2013, establishing the Spanish Exclusive Economic Zone in the North-West Mediterranean (BOE No. 92, 17 April 2013)).

[14] The difference between adjacent and opposite states in relation to the effects of a concave coast on the drawing of the equidistance line was highlighted by the arbitral tribunal tasked with delimiting the French-British CS, which endorsed the ICJ's statements in the *North Sea Continental Shelf* case on the effects that the presence of concavity has on the delimitation of maritime zones far from the coast by means of the drawing of a line of equidistance (*ICJ, Reports*, 1969, pars. 57-59). In the arbitral tribunal's opinion, "clearly, this characteristic of the equidistance method marks a material difference between a geographical situation of opposite States and one of adjacent States in the delimitation of the continental shelf boundaries" (par. 86 of the decision of 30 June 1977). This distinction had been assumed by the parties, as the court showed, stating that "in the present proceeding, both the Parties have recognised the significance of the distinction drawn by the International Court of Justice between 'opposite States' and 'adjacent States' situations in relation to the use of the equidistance method, whether under Article 6 or under customary law. They are agreed that throughout the English Channel where the coasts of the French Republic and the United Kingdom are opposite each other the boundary should, in principle, be the median line" (par. 87 of the decision).

[15] In this regard, see the analysis of the decisions of the international courts in E. Orihuela Calatayud, "La delimitación...." *op. cit* n. 8, pp. 547-551.

[16] Until claims to ECSs off the Atlantic Ocean coasts led to the emergence of cases concerning four states —Ireland, the United Kingdom, France and Spain— in the Spanish delimitation, these were tripoints. On this point, see, for example, L. Pérez-Prat Durbán, *La frontera triangular* (Dykinson Madrid, 1999) or C.G. Lathrop, "Tripoint Issues in Maritime Boundary Delimitation", in D.A. Colson and R.W. Smith (eds.), *International Maritime Boundaries* (The American Society of International Law, The Hague, 2005) 3305-3375, also available in C.G. Lathrop, *International Maritime Boundaries Online*.

and Spain; Italy, Algeria, and Spain; and Algeria, Morocco, and Spain. In the Atlantic, the triangle is formed by the maritime boundaries of Morocco, Portugal, and Spain. The clear and effective identification of these multiple points requires the agreement of all parties involved, which conditions and impedes the definitive delimitation. The bilateral delimitation agreements reached between some of the parties identifying the end of their boundary as the terminal point for the pending delimitation between them and a third state may serve as a proposal for the future delimitation with that third state, but in no way, may they be invoked against it. The recent delimitation agreement signed by France and Italy delimits the boundary up to a point presented as a tripoint between France, Italy, and Spain, but the point's location does not coincide with the end of the boundary drawn between Italy and Spain in 1974.[17]

Spain's pending delimitations also include cases involving islands. On the one hand, there are islands whose location requires a boundary to be drawn; on the other, there are islands located in the area to be delimited, making it difficult for the parties to reach an agreement. Both situations can concur in a single case.

The Canary Islands require delimitation with Morocco and Portugal (Madeira Archipelago), and the Balearic Islands with Italy and Algeria. The challenges these cases pose for the drawing of maritime boundaries are not, in principle —with one exception— related to the islands themselves, but rather to other factors.[18] The exception is the delimitation between Portugal and Spain of the CS and EEZ between Madeira and the Canary Islands.

The main obstacles to the drawing of the EEZ and CS boundaries between Madeira and the Canary Islands are the existence and location of the Savage Islands and the Portuguese and Spanish positions regarding the effect they should have on the delimitation. Although they belong to the Community of Madeira, the Savage Islands are geographically separate from the archipelago, and their impact on the drawing of the boundary is controversial. Whilst Portugal considers that the equidistance line should be drawn from these uninhabited islands in the zone opposite the Canary Islands, Spain maintains that the boundary should be drawn between Madeira and the Canary Islands, and that the Savage Islands are a circumstance to be assessed in the drawing of the dividing line between the Portuguese and Spanish archipelagos.[19] This difference of opinion is related to the other aspect to be examined in the analysis of the pending delimitation of Spain's maritime zones, i.e. islands as a circumstance to be considered in the drawing of maritime boundaries.

Determining what role islands should play in how a boundary is drawn is unavoidable not in those cases in which the islands and their seaward projection are what originate the delimitation problem,

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17 See the report on this agreement contained in C.G. Lathrop, *International Maritime*, *supra* n. 16.

18 The drawing of the boundaries between Spain and Italy and between Spain and Algeria need not be complicated given the boundaries drawn by these states for their economic zones. However, it must be recalled that the limits of the Italian EPZ include some points that do not match those established in the delimitation of the CS and that, at the UNCLOS Algeria argued in favour of minimizing the maritime zones of dependent islands and archipelagos. The case of Morocco is always more controversial, due to the concurrence of a variety of factors that permanently muddy the relations.

19 On the matter of the Savage Islands, Portugal's ownership of them, and the challenges they pose to the delimitation of the EEZ and CS between Madeira and the Canary Islands, see: F. Baeza Betancourt, *Las Islas Canarias ante el nuevo Derecho Internacional del Mar* (Las Palmas, 1987) 81 and 93-94, and, more recently, A. Sereno, "El nuevo mapa marítimo de Portugal y el caso de las Islas Salvajes", 28 *REEI* (2014) (doi: 10.17103/reei.28.01).

but rather when these elevations are located in the zone to be delimited. The presence of islands and rocks in the zone to be delimited is often one of the factors impeding the plotting of a maritime boundary, as the party harmed by their presence tends to minimize their effects on the delimitation and seeks to impose a reduction of their spaces.

The determination and weighting of the impact islands will have on the final boundary affects the drawing of the maritime boundary between the Canary Islands and Madeira; is one of the obstacles hampering the agreement between France and Spain in the Gulf of Lion; is a circumstance that may hinder an agreement with Algeria; and is certainly one of the main challenges in drawing the boundary between Spain and Morocco in both the Strait and the Alboran Sea.

Despite the difficulties that islands and rocks pose to delimitation, no international legal provisions set out the effects such land elevations should have on the delineation of maritime boundaries, nor do the arbitral and court decisions offer an objective assessment criterion.[20] The only thing that is clear is the zones that can be established from their coasts (Article 121 LOSC); in this regard, rocks are irrelevant to the configuration of the maritime boundaries related to the EEZ and CS, except where they were used to draw the baselines.[21]

(2) Legal Difficulties in the Pending Delimitation

The issues of a markedly legal nature affecting the pending delimitation of Spain's maritime zones include those related to the drawing of baselines by the states involved in the delimitation and the extension of the application of a delimitation agreement signed with regard to a given maritime zone to another zone that did not exist at the time of its conclusion.

With regard to the baselines, the discrepancies have to do with the drawing itself, as some of those established, especially by Morocco, are contrary to the rules provided for under the law of the sea.[22] Furthermore, the establishment of baselines closing the perimeter of the Canary archipelago could also be an obstacle to reaching a delimitation agreement with Morocco.[23]

In the context of Spain's pending delimitations, consideration has been given to the appropriateness of drawing a boundary agreed for a given maritime zone toward another that, at the time of its conclusion, did not exist or was *in statu nascendi*, i.e. to extending a CS delimitation agreement to all or part of the EEZ. A possibility that can be entertained in terms of the equity of the solution, but that in no case can be considered automatic. This extension could affect the delimitation

[20] On this issue, see: E. Orihuela Calatayud, "La delimitación...." *supra* n. 8, pp. 541-547.

[21] What it says with regard to islands, to which one can add low-tide elevations (Art. 13 LOSC), close to the coast of the state to which they belong.

[22] Although in recent months the media have reported the possibility of changes to the Moroccan law governing its TS, EEZ and CS, and to the drawing of the baselines from which those areas are measured, the situation is unlikely to change substantially from the present, as the fact that these proposals state that waters located on the land side of the baselines are all interior waters suggests that Morocco will continue to deny maritime zones to the Spanish territories located on or opposite its coast whose sovereignty it claims. In this regard, see the declaration with which Morocco accompanied its declaration of consent to be bound by the LOSC, available in the database of treaties deposited with the Secretary-General of the United Nations. On the irregularity of the straight baselines drawn by Morocco, see: E. Orihuela Calatayud, *España...*, *op. cit* n. 12, pp. 213-219, and V.L. Gutiérrez del Castillo, *El Magreb...*, *supra* n. 12, pp. 80-95.

[23] On this issue, see E. Orihuela Calatayud, "La delimitación...", *supra* n. 2, pp. 137-139.

 DOI: 10.17103/sybil.21.20

of the EEZ between Spain and France in the Bay of Biscay and the configuration of the boundary between Spain (Balearic Islands) and Italy (Sardinia) with regard to the Spanish EEZ and the Italian EPZ.

As concerns the Bay of Biscay, the main discrepancy regarding the delimitation of the Spanish-French EEZ is due to both states' desire to draw a single dividing line for the CS and the EEZ, and to France's interest in using the dividing line established by agreement on 29 January 1974 for the CS for this purpose[24] versus Spain's interest in revising that treaty.

As for the delimitation of an EEZ and EPZ boundary between the Balearic Islands and Sardinia, the extension of the agreement signed in 1974 for the CS should not pose any particular problem. However, it must be remembered that the boundary drawn under that agreement differs slightly from that established in the Italian law establishing the new EPZ and that the final point thereof is not the same as that established by France and Italy in their 2015 agreement.

(C) RECOURSE TO A JUDICIAL PROCEDURE: A REAL POSSIBILITY?

In light of the current state of paralysis of the configuration of Spain's maritime boundaries and the commitment assumed by the parties to the LOSC regarding recourse to the settlement procedures provided for in Part XV of the Convention should the negotiations fail, the possibility of submitting the delimitation to a judicial procedure should be examined.

So far, the parties have evinced little consensus regarding the option of recourse to arbitration or judicial settlement. This reluctance may be due to the unpredictability of the outcome, as each case of delimitation is unique, a situation that encourages the parties to seek to retain control of the solution to their delimitation problems. However, it is necessary to ask whether it would be possible for any of the states involved in the delimitations, including Spain, to use a judicial procedure, asking the court to draw the boundary or, at least, to indicate the principles to guide the agreement between the parties and how they should be applied when it comes time to establish it. In the context of this hypothesis, it is necessary to examine the consent that these states may have given to the jurisdiction of an arbitral tribunal, ITLOS or the ICJ itself.

Given that, except for the arbitration regulated in Annex VII LOSC, the treaty does not contain an arbitration clause whereby the parties agree *a priori* to submit disputes concerning the interpretation and application of the Convention to a judicial procedure, but rather that this possibility is made subject to an *ad hoc* declaration, the commitments assumed by the states involved in the delineation of Spain's maritime boundaries are unequal. Whilst some states have not made the written declaration provided for in Article 287 LOSC and, thus, could only be sued before an arbitral tribunal, others have.

Spain, Italy, and Portugal have all made a declaration in accordance with Article 287, choosing as the means for the settlement of disputes either judicial settlement —ICJ and ITLOS[25]— or all means

[24] BOE No. 163, 9 July 1975.

[25] Case of Spain and Italy.

 DOI: 10.17103/sybil.21.20

mentioned in the said provision.[26] The rest of the states with which Spain still has to define a boundary have not made a choice. However, the LOSC offers the parties the possibility of excluding disputes relating to sea boundary delimitations from this commitment (Article 298(1)(a)(i)). This has been done by all the states that have made a declaration based on Article 287, as well as France, which, despite not having made such a declaration and, therefore, having consented only to the arbitration provided for in Annex VII, has excluded delimitation disputes from judicial procedures.

Given this state of affairs, on the basis of the LOSC there are no grounds for submitting a dispute over the drawing of Spain's maritime boundaries to the arbitral or judicial (ITLOS and ICJ) procedures provided for therein.

However, insofar as the potential submission of a delimitation dispute to the ICJ is concerned, it is necessary to ask whether any of the country's neighbours could find a different basis for the Court's jurisdiction. Needless to say, to answer that question it is necessary to look at the declarations made under the optional clause of the Statute of the ICJ and the possible existence of arbitration clauses that might offer a basis for the Court's action.

The analysis of the declarations made under the optional clause included in Article 36(2) of the Statute must focus on the relations with Portugal and Italy, as, along with Spain, they are the only states to have subscribed to the optional clause. In the case of the former, the amendment made by Portugal to its declaration in 2005 prevents it from serving as a basis for the Court's jurisdiction, as Portugal excluded from the Court's jurisdiction disputes with one or more parties to a treaty regarding which the ICJ's jurisdiction has, under the applicable rules, been explicitly excluded, irrespective of whether the scope of the dispute refers to the interpretation and application of the treaty provisions or to any other source of international law.[27] With regard to Italy, which recently subscribed to the optional clause,[28] none of the limitations established in the Italian or Spanish declarations refers to delimitation disputes; however, given that both states excluded these disputes in the declarations they made under the LOSC, recourse to the Court seems unlikely.

As for the arbitration clauses, the result is the same, since the arbitration clause included in Article 3 of the Convention, of 19 February 1974, on the delimitation of the CS between Italy and Spain, would not apply in the event of a dispute concerning the extension of the Convention to the delimitation of the EEZ, as Article 4 of the Convention provides that none of its provisions shall affect the status of the waters.

We are thus dealing with a situation in which the submission of delimitation disputes affecting Spain will require the signing of a commitment or arbitration agreement and in which Spain, for the time being, controls the recourse to judicial procedures.

(D) CONCLUSION

The conclusion and entry into force of the LOSC have not facilitated the signing of delimitation

[26] Case of Portugal.

[27] See para. 1(iv) of the Declaration of 18 February 2005.

[28] Italy made its Declaration on 25 November 2014.

 DOI: 10.17103/sybil.21.20

agreements that might have put an end to the situations of juxtaposition to which the establishment of the maritime zones recognized under the Convention has given rise. The reason for this lies in the lack of agreement between the parties involved, whether to draw a boundary once the circumstances present in each case have been identified and assessed, or to use a settlement procedure to definitively settle the matter. This situation should not be considered detrimental to the interests of Spain, as long as the country is able to build bridges of cooperation that enable the use and enjoyment of the sea and its resources.

 DOI: 10.17103/sybil.21.20

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

Maritimes zones around Gibraltar

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(A) GIBRALTAR: HISTORICAL DISPUTE AND LAW OF THE SEA

One of the specific legal and political facets of the dispute between Spain and Britain over Gibraltar is that of the maritime zones around it. The dispute extends to the waters around the Rock, its maritime zones and the jurisdiction over them, as Spain rejects the existence of British jurisdictional waters around the Rock, whilst the United Kingdom (UK) has always claimed them and exercised *de facto* jurisdiction over them.

(1) The Dispute and the Waters around Gibraltar

The territory of Gibraltar has a special status under international law. For various reasons, both Spain, on the one hand, and the UK and Gibraltar, on the other, consider Gibraltar to be a different, legally distinct territory from the UK as a state, whose domestic law classifies it as a British Overseas Territory. The territory was ceded by Spain in 1713, and the UK has a valid claim to sovereignty over it. Therefore, Gibraltar is not Spanish, because it is under British sovereignty. Nevertheless, three important qualifications must be made:

First, there is no agreement on exactly which areas were ceded under the Treaty of Utrecht, the 1713 treaty that both Spain and the UK consider to be in force —at least with regard to the first section, concerning territorial cession, and the final section, on restitution to Spain.[1] It seems clear that the town, castle and port, as well as the complementary buildings from 1704, were ceded in perpetuity to the UK and, therefore, are British. However, the territory of Gibraltar comprises other zones (isthmus, Gibraltar Mountain, expansions, reclaimed land, and waters) also under British jurisdiction that Article 10 of the Treaty of Utrecht does not mention. Indeed, the Treaty contains no boundary delimitation, nor has there been any subsequent boundary delimitation or demarcation agreement.

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1 "The Catholic King does hereby, for himself, his heirs and successors, yield to the Crown of Great Britain the full and entire propriety of the town and castle of Gibraltar, together with the port, fortifications, and forts thereunto belonging; and he gives up the said propriety to be held and enjoyed absolutely with all manner of right forever, without any exception or impediment whatsoever [...] And in case it shall hereafter seem meet to the Crown of Great Britain to grant, sell or by any means to alienate therefrom the propriety of the said town of Gibraltar, it is hereby agreed and concluded that the preference of having the same shall always be given to the Crown of Spain before any others."

The official English text of the six paragraphs of Art. 10 of the Peace and Friendship Treaty of Utrecht between Spain and Great Britain, concluded at Utrecht on 13 July 1713, can be found in *The Question of Gibraltar* (Ministerio de Asuntos Exteriores y de Cooperación, Madrid, 2008), 97-98.

 DOI: 10.17103/sybil.21.21

Second, the UK claims to have two sovereignty titles to territory over Gibraltar: that arising under the conventional cession at Utrecht over the town, port and rock, and, since 1966, that of acquisitive prescription over the isthmus, which was subsequently occupied by the UK in the 19th century. The two separate disputes over the land territory also extend into the adjacent maritime zones. Thus, the problem of the waters can be posed as a third dispute, separate from those over the Rock and isthmus.

Third, the status of Gibraltar was in any case internationalized in 1946 by the United Nations (UN): all of Gibraltar's areas, including those under clear British sovereignty, are now politically and legally conditioned by the UN's decolonization doctrine. The British sovereignty is thus denaturalized, due to Gibraltar's classification as a "non-self-governing territory". Therefore, for today's international society, this international legal status of Gibraltar as a "non-self-governing territory" conditions the British right of sovereignty over the ceded part of the Gibraltarian territory. In this same vein, the UK has the international status of "administering power of the territory".

The current situation is thus that of a lack of an agreed delimitation of the waters surrounding the Rock of Gibraltar and of the waters adjacent to the territory of the isthmus, which, in practice, logically entails a high degree of indeterminacy with regard to the applicable legal regime.[2]

(2) The Dispute and the Law of the Sea

The adoption of the 1958 Geneva Conventions and, especially, the 1982 UN Convention on the Law of the Sea at Montego Bay,[3] conditioned these zones and provided the applicable international legal framework. In each case, Spain made reservations or declarations regarding Gibraltar.

Upon signing and ratifying the Geneva Conventions on the Territorial Sea and the Contiguous Zone and on the Continental Shelf, Spain included the following declaration in its instruments of accession: "Spain's accession is not to be interpreted as recognition of any rights or situations in connexion with the waters of Gibraltar other than those referred to in Article 10 of the Treaty of Utrecht, of 13 July 1713, between the Crowns of Spain and Great Britain."[4]

Especially with regard to the decisive LOSC, Spain made clear by means of a declaration that it does not consider the Convention to apply to Gibraltar: "2. In ratifying the Convention, Spain wishes to make it known that this act cannot be construed as recognition of any rights or status regarding the maritime space of Gibraltar that are not included in article 10 of the Treaty of Utrecht of 13 July 1713 concluded between the Crowns of Spain and Great Britain. Furthermore, Spain does not consider that Resolution III of the United Nations Conference on the Law of the Sea (UNCLOS) is applicable to the colony of Gibraltar, which is subject to a process of decolonization in which only

[2] I. González García, "The Anglo-Spanish Dispute over the Waters of Gibraltar and the Tripartite Forum of Dialogue", 26 *The International Journal of Marine and Coastal Law* (2011) 91-117.

[3] UN Convention on the Law of the Sea, 1833 UNTS 3 (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter).

[4] Convention on the Continental Shelf, made in Geneva on 29 April 1958 (BOE No. 308, 25 December 1971); Convention on the Territorial Sea and the Contiguous Zone, made in Geneva on 29 April 1958 (BOE No. 307, 24 December 1971).

relevant resolutions adopted by the United Nations General Assembly are applicable."[5]

The UK expressly opposed Spain's declaration on Gibraltar upon acceding to the LOSC, stating that it did consider the Montego Bay Convention to apply to Gibraltar.[6]

Subsequently, upon choosing the International Tribunal for the Law of the Sea (ITLOS) and the International Court of Justice (ICJ) as means for the settlement of disputes concerning the interpretation or application of the LOSC, Spain declared that it excluded disputes concerning sea boundary delimitation or involving historical bays or titles, in reference to Gibraltar.[7]

This lack of agreement makes the legal status of the various maritime zones recognized by the UK and Spain in relation to the waters around Gibraltar quite problematic: the UK claims a territorial sea around the Rock and the isthmus, which Spain denies. The Bay of Algeciras/Gibraltar is not closed or regulated by Spain. Nor have a continental shelf, exclusive economic zone or other marine zones been established or regulated unilaterally or by mutual agreement by the two states. The two states only recognize the existence of internal waters in the current Port of Gibraltar, the only maritime zone recognized by Spain and the only place in which it recognizes British sovereignty or jurisdiction.

(3) The Waters around the Rock and Isthmus: Spanish Position and Practice

Spain interprets the Treaty of Utrecht —which does not contain any express boundary delimitation of the land territory— as ceding the physical mass of the Rock, but has always formally denied the cession

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[5] According to Resolution III: "The Third United Nations Conference on the Law of the Sea, Having regard to the Convention on the Law of the Sea, Bearing in mind the Charter of the United Nations, in particular Article 73,

"1. Declares that: (a) In the case of a territory whose people have not attained full independence or other selfgoverning status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development. (b) Where a dispute exists between States over the sovereignty of a territory to which this resolution applies, in respect of which the United Nations has recommended specific means of settlement, there shall be consultations between the parties to that dispute regarding the exercise of the rights referred to in subparagraph (a). In such consultations the interests of the people of the territory concerned shall be a fundamental consideration. Any exercise of those rights shall take into account the relevant resolutions of the United Nations and shall be without prejudice to the position of any party to the dispute. The States concerned shall make every effort to enter into provisional arrangements of a practical nature and shall not jeopardize or hamper the reaching of a final settlement of the dispute.

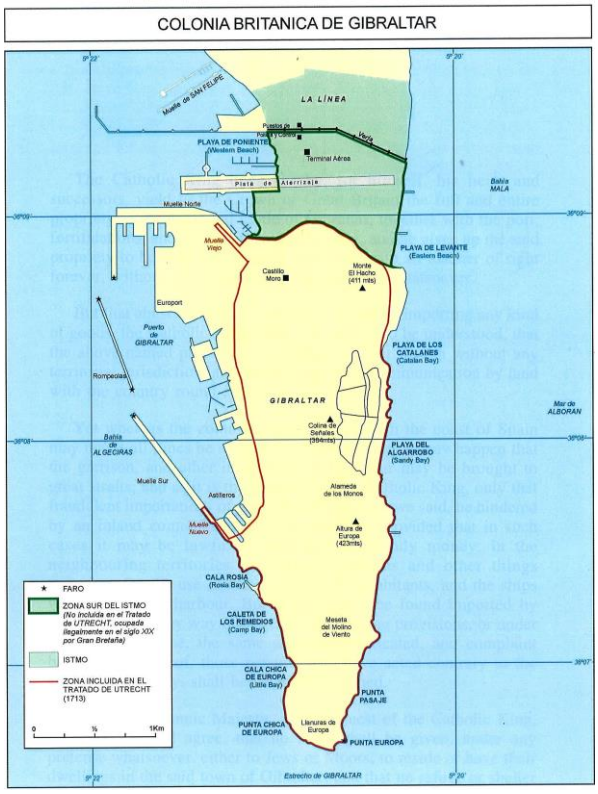
"2. Requests the Secretary-General of the United Nations to bring this resolution to the attention of all Members of the United Nations and the other participants in the Conference, as well as the principal organs of the United Nations, and to request their compliance with it." *Cf.* Final Act of Third United Nations Conference on the Law of the Sea.

[6] Declarations made upon accession: " (...) (d) Gibraltar: With regard to point 2 of the declaration made upon ratification of the convention by the Government of Spain, the Government of the United Kingdom has no doubt about the sovereignty of the United Kingdom over Gibraltar, including its territorial waters. The Government of the United Kingdom, as the administering authority of Gibraltar, has extended the United Kingdom's accession to the Convention and ratification of the Agreement to Gibraltar. The Government of the United Kingdom, therefore, rejects as unfounded point 2 of the Spanish declaration."

[7] Declarations under Arts. 287 and 298 (19 July 2002): "Pursuant to article 287, paragraph 1, the Government of Spain declares that it chooses the International Tribunal for the Law of the Sea and the International Court of Justice as means for the settlement of disputes concerning the interpretation or application of the Convention.

"The Government of Spain declares, pursuant to the provisions of article 298, para. 1(a) of the Convention, that it does not accept the procedures provided for in part XV, section 2, with respect to the settlement of disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitation, or those involving historic bays or titles." (Spain's declarations are available here)

of sovereignty over the waters around it (as may be seen in the Figure on this page[8]). Therefore, it does not recognize any Gibraltarian maritime zone other than that explicitly ceded under Art. 10 of the Treaty of Utrecht ("town and castle of Gibraltar, together with the port, fortifications, and forts thereunto belonging"), i.e. the internal waters of the Port of Gibraltar as it existed in 1704 or 1713. This interpretation is known as the "dry coast" or "dry shore" doctrine.[9] In keeping with this doctrine, Spain does not recognize any British territorial waters around Gibraltar; consequently, for Spain, these waters are not even "waters in dispute".



Perhaps due to its own position, Spain has not closed the Bay of Algeciras by means of straight baselines (SBs). The existence of a dispute seems to have been decisive in Spain's decision to end the SB both west of the bay and east of it, before reaching the coast of the isthmus that connects the Spanish town of La Línea to Gibraltar, a move that has been interpreted as Spanish recognition of British jurisdiction in these waters. Whatever the case, the fact of the matter is that, when it delimited its maritime zones by means of Royal Decree 2510/1977,[10] Spain did not close the Bay of Algeciras, nor has it drawn a straight baseline from Carnero Point to Europa Point. This was probably a wise decision, since a line closing the inlet of the Bay of Algeciras would have made the entire bay, including the waters of the Port of Gibraltar, Spanish internal waters[11].

The 'dry coast' theory advocated by Spain with regard to the waters around the Rock poses problems of consistency, and some authors have argued against its viability and application. The thrust of the theory is that this territory was ceded in 1713 without any projection into the adjacent maritime zones, even though there is no record of any express reference to this reservation during the negotiations or in the Treaty itself. On the contrary, in accordance with the evolution of the law of

8 Source: Spanish Ministry of Foreign Affairs and Cooperation, *The Question of Gibraltar* (Ministerio de Asuntos Exteriores y de Cooperación, Madrid, 2008), 95.

9 For a recent manifestation of the Spanish position, see the Spanish Ministry of Foreign Affairs and Cooperation, *Intervención sobre la cuestión de Gibraltar ante el Comité Especial de Descolonización (Comité de los 24)*, New York, 12 June 2017, at 1: "Furthermore, the UK illegally seized other territories that were not ceded under the Treaty. That Treaty clearly defines the zones ceded to the UK: only the town and castle of Gibraltar, together with the port (with its internal waters only), fortifications and forts thereunto belonging. The waters surrounding Gibraltar were never ceded and thus remained and continue to remain under Spanish sovereignty." (Translated from the original Spanish and available here).

10 Royal Decree 2510/1977, 5 August 1977, on the drawing of straight baselines in development of Law 20/1967, of April 8, on the extension of Spanish jurisdictional waters to 12 miles, for fishing purposes (BOE No. 234, 30 September 1977).

11 I. González García, "La Bahía de Algeciras y las aguas españolas" *Gibraltar 300 años*, (Cádiz, 2004), 211-236, at 222-223.

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the sea since the 18th century, territories are presumed to project into their adjacent waters.[12]

Furthermore, Spanish practice does not seem consistent with the 'dry coast' position it has historically defended. The theory contradicts the country's traditional practice of allowing the UK to act as if it were the sovereign holder of the waters adjacent to the isthmus and Rock of Gibraltar. In fact, the Spanish maritime authorities have not and do not exercise control over the vessels anchored there. This attitude of the Spanish state, coupled with the continued exercise of British jurisdiction in the waters around the Rock, with continuous and consistent public acts of authority[13], is favourable to the British thesis, notwithstanding the numerous conflicts and presence of Spanish state vessels in the waters in recent years. These aspects of Spanish practice have been cited to bolster the thesis of implicit recognition by Spain of Britain's claim to the waters.

As for the isthmus, the Spanish claim has not traditionally differentiated between the waters of the isthmus and the waters of the Rock, which, logically, should be treated differently: the waters surrounding the isthmus are entirely Spanish and were not ceded, whilst those surrounding the Rock border a territory ceded under a treaty. With regard to the waters of the isthmus in particular, i.e. the territory spanning from the outer walls of the Landport Gate (Puerta de Tierra) to the Border/Fence of Gibraltar,[14] since 1966 the UK has claimed to have a right of sovereignty over the isthmus by prescription, which it argues further extends to the surrounding waters, a right that Spain has never recognized. However, the line of argument that Spain has maintained through its non-recognition of this sovereignty does not distinguish between the status of the waters around the isthmus and the status of the waters around the Rock.[15] Likewise, there is no delimitation of the territory of the isthmus or its waters. Of course, the applicable provisions of international law of the sea offer means of delimiting the waters. Article 15 LOSC provides that, failing agreement between the parties, the territorial sea between states with opposite or adjacent coasts shall be delimited by means of an equidistant median line. However, this delimitation has not been carried out, due to the parties' conflicting interpretations of the boundaries of the territories ceded under the Treaty of Utrecht, on the one hand, and the territorial dispute over the isthmus, on the other.

The drawing of SBs by Spain could also be understood as implicit recognition with regard to the waters adjacent to the isthmus and east of the Rock, as the last segment of the SBs defined by the Spanish government on the Atlantic shore of the country's southwest coast runs from the island of

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[12] According to A. Remiro Brotóns, "As to the waters, the general norm by which sovereignty over the coast is projected onto adjacent sea plays in Britain's favour. It certainly is not an imperative principle and therefore, it is possible to limit a territorial cession merely to land, conceived as a dry coast, but this is an exception that requires proof that this has been the will of the parties involved. In fact, Spain did not dare convert the waters of the Bay into internal waters by closing the entrance with a straight line between Algeciras and Europa Point." Cf.: "Gibraltar", 1 *Cuadernos de Gibraltar – Gibraltar Reports* (2015), 13-24, at 20.

[13] G. Naldi, "The Status of the Disputed Waters Surrounding Gibraltar" 28 *The International Journal of Marine and Coastal Law* (2013) 701-718 at 717.

[14] On the Isthmus and the Fence, see A. del Valle Gálvez, "La '*Verja*' de Gibraltar", in *Gibraltar: 300 años...*, *supra* n. 11 155-176, as well as the maps in the same book, at 455-456.

[15] References can, however, be found to the fact that Spain considers infractions committed near the waters of the isthmus more serious. See the Spanish government's response to the question by the MP S. de la Encina regarding incidents between Spanish fishermen and Gibraltar patrol vessels in *Official Gazette of the Spanish Parliament* (BOCG) No. 261, 2 April 1998.

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Tarifa to Acebuche Point. The next segment begins on the southern coast in the Mediterranean and runs from Carbonera Point to Baños Point.[16] Spain has thus refrained from drawing any SB that encompasses the isthmus or the Rock of Gibraltar.

Perhaps with a view to making the theory and practice of the Spanish position more consistent, since the turn of the 21st century, the number of Spanish state vessels and acts conducted in these waters has increased, sparking protests and leading to sometimes serious diplomatic crises.

Another important dimension is the implementation of specific or applicable regulations in the waters of Gibraltar. This is the case of the declaration of a Special Area of Conservation (SAC) in the Site of Community Importance (SCI) known as the "Estrecho Oriental" [Eastern Strait]. In this context, certain actions fall within the scope of the new regulations, such as those of oceanographic vessels conducting environmental research missions.[17]

At present, there is no prospect of a different or more nuanced approach than the traditional Spanish position, which according to Spain has been applied continuously since the Treaty of Utrecht and which now seems to be giving rise to its full consequences. Thus, Spain does not recognize any rights or situations other than those expressly established at Utrecht, and it does not consider the activities of its vessels incursions, but rather routine activities in Spanish waters.[18]

As recently as 2014, the Spanish Ministry of Foreign Affairs expressly declared that activities related to the control of vessels anchored in the waters east of the Rock are conducted in accordance with international law and the LOSC. Particular attention should be called to the following assertions:

- that the 12-mile stretch of waters to the east of the Rock is Spanish territorial waters; and
- that foreign-flagged vessels anchored, stopped or exhibiting unconventional movements violate the right of innocent passage and, for reasons of maritime surveillance and security, will be invited to leave the territorial waters.[19]

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[16] See the aforementioned Royal Decree 2510/77, 5 August 1977.

[17] Spanish Ministry of Foreign Affairs, Press Release 229, 6 October 2014, "Spanish Secretary of State for Foreign Affairs holds conversations with British Minister for Europe on Gibraltar": "The ocean research vessel was performing its assigned duties. More specifically, it was carrying out an environmental research mission within a Special Area of Conservation (SCI-SAC "Eastern Strait") recognised by the European Union (...) Spain has no doubts whatsoever about the limits of its territory and therefore, as in the case under discussion, Spanish vessels will continue to perform their duties in Spanish waters by completing the tasks assigned to them, as they have done since time immemorial." (Available here).

[18] "Spain does not accept any other rights or situations claimed by the United Kingdom as regards the maritime zones around Gibraltar that are not established in Article 10 of the Treaty of Utrecht. Therefore, the adjacent waters are Spanish. That which the United Kingdom describes as 'illegal incursions' into what it refers to as 'British territorial waters' are simply routine activities by Spanish vessels in Spanish waters." Ministry of Foreign Affairs, *Press Release* 229, 6 October 2014, *supra n.* 15.

[19] Official Statement 211, 18 July 2014 "Gibraltar": "The Spanish Ministry of Foreign Affairs and Cooperation called the British Ambassador to a meeting this morning in order to express Spain's utmost objection and discontent regarding the way in which the United Kingdom managed the supposed 'incident' involving the Spanish Navy vessel Tagomago on 16 July. (...) What the United Kingdom describes as an incident (and regarding which the Foreign Office summoned the Spanish Ambassador in London to a meeting yesterday) was nothing but the routine activity of a Spanish Navy vessel in Spanish waters while fully respecting both domestic Spanish law and international law, in particular the United Nations Convention on the Law of the Sea. According to international law, a 12-mile stretch of waters located to the east of Gibraltar Rock are Spanish territorial waters.

"Within the framework of the Permanent Maritime Surveillance and Security Plan, the Directorate-General of the

(4) The Waters around the Rock and Isthmus: British Position and Practice

The UK holds that Spain could not have ceded sovereignty over the Rock without that sovereignty also projecting into the corresponding maritime zones, in accordance with the "land dominates sea" principle.[20] For the UK, its sovereignty over the territorial sea adjacent to the Rock of Gibraltar arises precisely from the sovereignty it exercises over Gibraltar. Its 1966 proposal to settle all aspects of the dispute, including the waters, before the ICJ was not favourably received by Spain.[21]

The UK does not distinguish between the town, Rock and isthmus and considers Gibraltar a single territory (over which it has two different sovereignty titles), such that its sovereignty over the territory as a whole extends to the adjacent waters. Therefore, it does not differentiate between the waters of the isthmus and the waters of the ceded town and port, in which it also includes the mountain. Likewise, the UK does not treat the waters any differently due to their appurtenance to a territory in the process of decolonization, as required under Resolution III of UNCLOS.[22]

In any case, the UK has unilaterally delimited the waters of the Rock: on the one hand, it claims they extend 1.5 miles to the west, into the Bay of Algeciras; on the other, it claims a 3-mile territorial sea extending east and south into the Strait.[23] These are the so-called British Gibraltar Territorial Waters (BGTW), or Gibraltar Territorial Waters, terms particularly rejected by Spain. Although earlier references to British Waters or Territorial Waters can be found on British maps dating back to the 19th century, the waters were not delimited until the 1980s and 90s, following the signing of the United Nations Convention on the Territorial Sea [24]. A clear presentation of these waters can be

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Merchant Navy requests the Spanish Navy to invite those foreign-flagged vessels anchored, stopped or whose movements do not adapt to conventional sailing standards —and therefore violating the right of innocent passage— to leave Spanish territorial waters.

"Hence, at 06:00 hours on 16 July, the Spanish patrol boat Tagomago requested the following vessels to leave Spanish territorial waters as they were stationary and therefore violating the right of innocent passage in the space between 7 and 9 miles off the eastern face of the Rock of Gibraltar and to the south of the border parallel (...).

"In light of the above, this Ministry of Foreign Affairs and Cooperation wishes to state the following:

"- The Government of Spain will always stand firm in the defence of Spanish positions regarding the controversy over Gibraltar.

"- The position adopted by Spain as regards the spaces assigned and not assigned to Great Britain by the Treaty of Utrecht remains unchanged since said document was signed. Spain does not accept any other rights or situations claimed by the United Kingdom as regards the maritime spaces surrounding Gibraltar that are not established in Article 10 of the Treaty of Utrecht.

"- This latest incident represents unacceptable interference by the United Kingdom in the routine activity by the Spanish Navy in Spanish waters, and is made all the more serious by the fact that none of the vessels was a British-flagged vessel." (Available here).

[20] See Document No. 33 in *Un nuevo Libro Rojo sobre Gibraltar* (Ministerio de Asuntos Exteriores, Madrid, 1967), 501.

[21] The October 1966 proposal was a compromise to bring the following questions before the ICJ: "Article I (1): Has Spain or the United Kingdom sovereignty over the territory of Gibraltar comprising: i) The fortress, town, fortifications and port of Gibraltar, including the Rock; ii) The southern part of the isthmus connecting the Rock with the mainland of Spain, that is, the area commonly known as the 'British neutral ground'; iii) The waters adjacent to (i) and (ii)?. (...). Article I (3): What is the boundary (if any) between the adjacent waters mentioned in Question 1 above, and Spanish waters? (...)". The British proposal can be found in *Un Nuevo Libro Rojo.*., *supra* n. 20, at 519-520.

[22] See Resolution III, *supra* n. 4.

[23] On this matter, see G. O'Reilly, "Gibraltar: Sovereignty Disputes and Territorial Waters", 7 *International Boundaries Research Unit Boundary and Security Bulletin* (Spring, 1999) 67-81.

[24] See the references in J. Verdú Baeza, *Gibraltar. Controversia y medio ambiente*, (Dykinson, Madrid, 2008), at 203 and

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found in Admiralty Chart No. 1448 (reproduced in this page)[25], which draws the international maritime boundary in the bay with a median line based on the principle of equidistance.

However, the BGTW was not legally defined until 2011, in the context of progressive Gibraltarian regulation of the activities conducted in the waters adjacent to the Rock. In fact, today the entire BGTW is included in a protected nature area in accordance with the 1991 Nature Protection Ordinance. The amended 2011 version of these regulations describe the waters of Gibraltar thusly: "'BGTW' means British Gibraltar Territorial Waters which is the area of sea, the sea bed and subsoil within the seaward limits of the territorial sea adjacent to Gibraltar under British sovereignty and which, in accordance with the United Nations Convention on the Law of the Sea 1982, currently extends to three nautical miles and to the median line in the Bay of Gibraltar."[26] The introduction of this definition into Gibraltarian domestic law triggered a cascade of amendments to other laws to incorporate the BGTW concept.[27]

In this context of progressive regulation of the waters, attention should be drawn to the expansion, in 2009, of the concept of "Port of Gibraltar", carried out in the waters east of the Rock.[28]

Finally, since 1972, special regulations have governed the so-called Admiralty Waters, the strip of water parallel to the moles at the entrance to the Port of Gibraltar and a naval

note 456.

[25] Admiralty Chart 1448 – Gibraltar Bay. The line depicted within the Admiralty Chart 1448 illustrates the UK's International Maritime Boundary surrounding Gibraltar. 'Reproduced from Admiralty Chart 1448 by permission of the Controller of Her Majesty's Stationery Office and the hydrographic offices of Spain and the United Kingdom (www.ukho.gov.uk)' 'Not to be used for navigation'. Taken from A. del Valle-Gálvez – I. González García Eds. *Gibraltar, 300 años* (Universidad de Cádiz, 2004), 459.

[26] Part I, 2.(1) of Nature Protection Act, 1991 (Act No. 1991-11), *Gibraltar Gazette*, 10 February 2011, *Legal Notice* No. 12 of 2011. The Act establishes certain limitations on navigation and fishing, the protection of which has been entrusted, since 1985, to the Gibraltar Squadron of the Royal Navy. The delimitation of the Gibraltarian waters was specified on 10 February 2011 in an amendment entitled 'Interpretation and General Clauses Act', known as the Nature Protection Act, 1991 (Amendment) Regulations 2011 (available here).

[27] Marine Strategy Regulations 2011, Legal Notice 13 of 2011, 10 February 2011, transposing Directive 2007/56/EC; Gibraltar Merchant Shipping Act 1995, which also replaces the term "Gibraltar Waters" with "BGTW", Community Vessel Traffic Monitoring and Information System (Amendment) Regulations 2011, Legal Notice 51 of 2011, Second Supplement to the *Gibraltar Gazette* No. 3844, 12 April 2011; Gibraltar Merchant Shipping Act 1995, which replaces the term "territorial Waters" with "BGTW", Prevention of Pollution from Ships (Amendment) Regulations 2011, Legal Notice 24 of 2011, Second Supplement to the *Gibraltar Gazette* No. 3840, 17 March 2011.

[28] Indeed, it now includes "the area within Gibraltar territorial waters commonly known as the Eastern Anchorage", 2, Port, (c) of the Gibraltar Port Authority Act 2005-14, amended on 29 October 2009 by Act 2009-39. This differs from the description of the Port of Gibraltar included in the Schedule of the Port Act 1960-16.

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base under British military control.[29]

In short, Gibraltarian law regards as British the waters adjacent to Gibraltar (Rock and isthmus), for a breadth of three nautical miles to the south and east and to the median line, or about one and a half miles, in the Bay of Algeciras to the west. The LOSC is expressly cited as the legal basis for this delimitation. Because these waters are understood to be under British sovereignty, any passage of Spanish state vessels through them is viewed as an incursion, a fact that is subject to monthly protests. Likewise, any acts involving the exercise of Spanish authority (inspections, marine research) are subject to immediate individual protests. In any case, the official British position is that these occurrences are violations of, rather than threats to, its sovereignty.[30]

(B) CERTAIN QUESTIONS CONCERNING THE WATERS AROUND GIBRALTAR

With regard to the waters around the Rock, attention should be called to certain legal situations and particularities.

(1) The Waters of the Port

The concept of the port ceded in 1713 is one of the most complex legal problems. Needless to say, the cession included anchoring in the waters outside the moles, in the roadstead or bay, which, in the 19th century, included the waters north of the isthmus, from Punta Mala to the Old Mole. In fact, anchoring outside the port (called Port Canning, 1826, sketched on the right)[31] was most likely carried out uninterruptedly under British jurisdiction and that of the Gibraltar Port Authority for the long period stretching from 1826 to 1968.

Under the 'dry coast' theory regularly asserted by the Spanish Ministry of Foreign Affairs since the 1960s, "port waters", in reference to the present-day enlarged port, is generally understood to refer to the strip of water enclosed between the access and protective moles, i.e. it is a very restricted interpretation of these waters. This Spanish interpretation of the concept of "port" is questionable, as outside the moles are port areas affecting certain waters that are usually regulated by the port authority. This is the case with the Port of Gibraltar, whose waters and jurisdiction were extended to include the waters on the east face of the Rock by means of the extension, in 2009, of the waters under the port authority and, probably, of the concept of "Port of Gibraltar" itself. To the author's knowledge, Spain did not oppose this extension.

One instance of express recognition of British jurisdiction over the waters of the port occurred in a doubtful case of hot pursuit by Spanish Guardia Civil officers, who entered the Port of Gibraltar

[29] Admiralty Waters (Gibraltar) Order, SI 1972/2207, of 5 April 1972, which contains a map of these waters.

[30] J. Trinidad, "The Disputed Waters around Gibraltar", 86 *British Yearbook of International Law* (2016), VI, 101-154, at 147.

[31] Source: G. O'Reilly, "Gibraltar: Sovereignty Disputes and Territorial Waters", 7 *International Boundaries Research Unit Boundary and Security Bulletin* (Spring, 1999), 78.

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itself, for which Spain later apologized.[32]

(2) The Waters around Military Facilities

Certain strips or zones of the waters around the Rock have a special status for security reasons. These are the waters adjacent to the important military and intelligence bases on the Rock. In particular, as noted above, the Admiralty Waters have been subject to specific regulation since 1972.[33] Located in a 200 metre strip that runs from outside the port (Rosia Bay) along the outside of the moles, these waters are, for security reasons (security waters) subject to specific military regulation.

The Spanish Foreign Minister recognized the existence and special statute governing these waters in the (verbal) agreement of 1998 on fishing in the waters of the Rock. Spain expressly recorded that the agreement did not imply Spanish recognition of British jurisdiction or sovereignty over this zone of the waters outside the Port of Gibraltar.[34]

Additionally, the waters west of the landing strip at Gibraltar Airport, a military airport belonging to the RAF (a small part of which is used for civilian purposes), are subject to special regulation for reasons of military security and air safety. Specifically, navigation is prohibited under certain conditions[35] and anchoring in the widest area of the waters around the landing strip, which extends into the bay, is prohibited in general.

Finally, according to Admiralty Chart 1448, there is also an "explosives dumping ground" southeast of the Rock and a "firing practice area" east of it.

(3) Nuclear Submarines

A particular problem is that posed by the nuclear-powered warships and submarines —of various nationalities but primarily British— that make stopovers and repairs in the Gibraltar port facilities, whose activities could potentially affect the entire Bay and Campo de Gibraltar, the neighbour county in the Spanish province of Cádiz. This question concerns the *transit* of these nuclear-powered vessels through the waters and ports, as it is understood that they are not carrying nuclear cargo or weapons when they call at the Port of Gibraltar, nor is British nuclear ammunition currently stored on the Rock.

The use of the Port of Gibraltar to repair components linked to nuclear propulsion and reactor systems is nevertheless quite problematic, as evidenced by the long stopover of the submarine *Tireless* from 2000 to 2001 for the repair of its nuclear reactor cooling circuit. Although Britain has agreed not to turn the port into a permanent base for the repair of submarines,[36] the port facilities have

[32] Press release by the Spanish Minister of Home Affairs, 8 December 2009. M. Acosta Sánchez "Incidentes de la Guardia Civil con la Royal Gibraltar Police en aguas de la bahía de Algeciras: persecución en caliente y posibles soluciones" 64 *REDI* No. 2 (2012) 292-296.

[33] Admiralty Waters (Gibraltar) Order, SI 1972/2207, 5 April 1972, containing a map of these waters.

[34] Agreement, *infra* No 39, Observation 4, paragraph 2: "on the Spanish part, this does not imply the recognition of the British Jurisdiction over this zone".

[35] Entry Restricted: "Navigation is prohibited within the area indicated during aircraft movements".

[36] Specifically, in a letter from the Secretary of State for Foreign and Commonwealth Affairs to the Spanish Foreign Minister dated 27 February 2017, the UK undertook as follows: "The United Kingdom does not maintain permanent

occasionally been adapted for this purpose for the British Navy. Furthermore, accidents involving these nuclear vessels are always possible, a matter of special concern to the neighbouring Spanish population —which the British contingency plans do not take into account— and the Spanish government, which, following the disbandment of the Forum of Dialogue, now lacks an institutional cooperation channel to address these types of problems.[37]

(4)Navigation and Illicit Trafficking

The existence of a *de facto* division of the Bay of Algeciras into two zones controlled by two different authorities, without any coordination channels between them, has given rise to specific problems related to navigation and the routine activities carried out in these waters.

For instance, certain activities that are prohibited in the Spanish zone due to their high risk are engaged in freely in the part under British jurisdiction. In this regard, special mention should be made of bunkering, or the supply of fuel oil to ships from large tankers at anchor. This activity, conducted in the Gibraltarian part of the bay, has caused numerous oil spills.

With regard to navigation, the lack of centralized control over the dense traffic in the bay and of coordination between the Spanish and Gibraltarian areas poses additional problems related to maritime traffic safety, which, in turn, generates serious risks of potentially polluting accidents. Likewise, with regard to ship control, complaints of looser control by the Gibraltar Port Authority are common, and environmental organizations have frequently warned of the presence of monohulls and substandard vessels in waters under Gibraltarian control, a practice that poses significant risks to the entire bay.

As for the control and pursuit of vessels allegedly engaging in illicit trafficking by vessels of various Spanish (Guardia Civil, Customs, Navy), Gibraltarian (Royal Gibraltar Police) and British (Royal Navy) institutions, risk situations sometimes arise. These aspects of the presence, control and pursuit of vessels by Spanish state vessels in waters under British jurisdiction in particular have often triggered protests and diplomatic incidents, sometimes leading to crises in Spanish-British relations.

Finally, both Spain and the UK have anchored buoy lines at different times for air signalling, anchorage, and demarcation purposes. However, they have done so independently, without any prior agreement on these boundaries.[38]

(5) Fishing

Traditionally, Spanish fishing vessels had engaged in certain fishing activities in these waters. Following the enactment of the 1991 Gibraltarian Nature Protection Act, fishing continued to be

facilities in Gibraltar for major nuclear repairs to submarines". This letter, and the letter sent by the Spanish Minister in response, can be found in *Gibraltar y el Foro tripartito de Diálogo* (Dykinson, Madrid, 2009), Document 25 of the Document Appendix, at 514-517.

[37] On the accident involving the submarine HMS *Ambush* in 2016 in waters near Gibraltar, see *Notas de Prensa del MAEC* 169, dated 21 July 2016, and 175, dated 28 July 2016, Documents 17 and 19, *Cuadernos de Gibraltar – Gibraltar Reports* No. 2 (2016-2017), 495 and 498.

[38] See I. Gonzalez García, "La Bahía de Algeciras y las aguas españolas", in *Gibraltar: 300 años...*, *supra* n. 11, at 211-ss *loc. cit.*, and 221-22.

tolerated by the British and Gibraltarian authorities. However, an incident in the waters of Gibraltar (the so-called "Piraña" case) caused a bitter crisis between Spain and the UK, leading to two different fishing agreements.

First, in 1998, the UK and Spain reached an "official" agreement for the exercise of fishing activities (British/Spanish Agreement to Fish in Waters Surrounding Gibraltar, 3 November 1998 - Compromiso Hispano-Británico para la Pesca en las Aguas Próximas al Peñón), between the British Embassy, on the one hand, and the Secretary General for Fisheries, the Spanish Ministry of Foreign Affairs, and the affected fishing industry on the other. The agreement took the traditional form of a "gentlemen's agreement" ("commitment, understanding or verbal agreement", according to point I.1 thereof [39]). This 1998 Spanish-British agreement enabled fishing and moreover reflected the parties' respective positions on the waters. Thus, the English version of the agreement refers to "fishing in these waters [...] surrounding the Rock" whilst the Spanish version refers to "las aguas en litigio", literally, "the waters in dispute".[40] The commitment even refers to the prohibition on fishing in the "military zones" of the naval base, or "Admiralty Waters", the aforementioned 200 metre strip parallel to the entrance to the Port of Gibraltar.[41]

Subsequently, in 1999, a different, atypical agreement between the Campo de Gibraltar Fishing Committee [*Mesa de Pesca del Campo de Gibraltar*] and the Chief Minister of Gibraltar enabled a real and practical solution for fishing in the Bay of Algeciras.[42]

Both agreements[43] evidence the complexity —and real possibility— of reaching agreements between the states, the government of Gibraltar and the civil society stakeholders from Campo de Gibraltar, capable of agreeing to regulate this activity in Gibraltarian waters. Even for the two states, the need led to an agreement on certain bilateral formulas, leaving aside the issues of sovereignty over the waters, as the parties stated that with the 1998 commitment they did "not have in mind to better our

[39] "I. Observations 1. The commitment, understanding and agreement, ratified by the Ministers of Foreign Affairs of both Spain and the United Kingdom in Luxembourg on 5 October..."(...) "3. This is a commitment, understanding and verbal agreement. This is due to the fact that both Spain and the United Kingdom do not have in mind to better our position regarding sovereignty over the waters in this dispute, which is what would have been the case if the agreement would have been a written agreement, as one of the positions would have prevailed over the other."

[40] Specifically, the Spanish version refers to "la pesca en las aguas en litigio (milla y media en poniente y tres millas en levante) próximas al Peñón", literally, "fishing in the waters under dispute (one and a half miles to the west and three miles to the east)".

[41] The issue of the waters in the Bay of Algeciras was addressed in the negotiated bilateral plan solely for the purposes of "recovering the traditional fishing practice prior to 1997". To this end, on 5 October 1998, following a long negotiating process, the Spanish and British governments ultimately adopted what they called a "commitment, understanding or verbal agreement". Under the terms of the agreement, Spanish fishermen are allowed to work in the waters under dispute near the Rock, subject to the aforementioned restrictions.

[42] The continuous fishing-related incidents that occurred following the adoption of the Spanish-British agreement of 1998 led the Spanish fishermen of Campo de Gibraltar to sign a fishing agreement with the Chief Minister of Gibraltar, Mr Caruana. See also the *communiques* issued by the Diplomatic Information Office of the Spanish Ministry of Foreign Affairs, on 28 and 29 January 199, Nos. 8,421 and 8,422. On the agreement adopted in Gibraltar on 3 February 1999 between the representatives of the Campo de Gibraltar Fishing Committee and the Chief Minister of Gibraltar, and a comparative analysis of that agreement with the Spanish-British agreement of 1998, see: I. Gonzalez García., *supra n.* 34, at 228-231. See also: G. O'Reilly, *supra n.* 21, at 76-77.

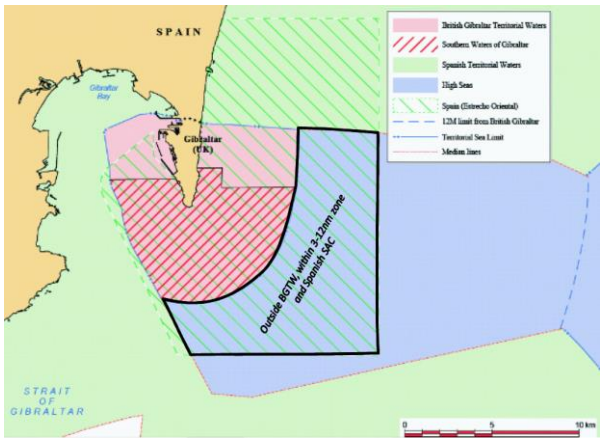
[43] They are collected in the Documentation Section of *Cuadernos de Gibraltar – Gibraltar Reports* No. 1, 2015, at 261-268. Available here.

position regarding sovereignty over the waters in this dispute". However, the matter's close connexion to the issues of jurisdiction and maritime sovereignty led to the suspension, in 2012, by Gibraltar of the fishing activities agreed in 1999, on the grounds of environmental protection.

The lack of dialogue has led to numerous incidents in the Bay of Algeciras, related to the Spanish fishing fleet and to the presence, in the waters around the Rock, of vessels from the Royal Navy, the Spanish Navy, the Guardia Civil and the Gibraltar Royal Police. The fishing conflict was aggravated by the artificial reef crisis of 2013, which has since prevented fishing activities in the zone where the concrete blocks were sunk, in the internal waters of the isthmus around the landing strip, in the bay. Furthermore, the specific and strategic site chosen for the creation of the artificial reef — in the waters of the isthmus that Spain holds were not ceded, outside the area covered by the Spanish and British SCIs, and a specific fishing site for the Spanish fishing fleet — was most likely responsible for the response of the Spanish government and the extraordinary acrimony of the crisis (2013-2015)[44]. Consequently, the situation regarding traditional Spanish fishing activities in the waters around Gibraltar has not been regulated since 2012.

(6) The Environment and the European Marine Strategy

In general, the marine environment is one of the aspects that has most suffered as a result of the dispute, and it has become an important aspect of it. Both the Bay of Algeciras and its surroundings are an area of high biological interest, requiring a suitable level of protection. Furthermore, both Spain and Gibraltar have included maritime zones in the Bay of Algeciras in protected nature areas within the scope of their respective domestic laws, needless to say, without any sort of connexion between them. In Spain, the waters of the Getares Inlet are included in the El Estrecho (The Strait) Natural Park,[45] whilst in Gibraltar all waters it considers under its jurisdiction are protected by the 1991 Nature Protection Ordinance.



Special attention should be given to several aspects related to environmental protection in the waters around the Rock. *First*, the aforementioned bunkering practices have repeatedly caused oil spills of medium importance, which contributes to the deep degradation of the ecosystems and beaches of the Bay of Algeciras. *Second*, a new dispute has arisen regarding the Sites of Community Importance (SCIs) in the waters around the Rock (see figure on the right)[46], in a clear sign of the lack of coordination between the parties regarding environmental

[44] A. del Valle Gálvez "The Gibraltar crisis and the measures, options and strategies open to Spain" *Análisis del Real Intsituto Elcano - ARI* 32/2013, 30.09.2013

[45] Decree 57/2003, 4 March 2003, of the Andalusian Department of the Environment, declaring the Strait a Natural Park (*Official Gazette of the Andalusian Government* (BOJA) no. 54/2003, 20 March 2003).

[46] Source: House of Commons Foreign Affairs Committee, *Gibraltar: Time to get off the fence* (Second Report of Session 2014–15) (2014), at 18.

 DOI: 10.17103/sybil.21.21

protection in the area. Briefly, in 2006, the European Commission recognized, at the initiative of the UK, an SCI in part of the waters surrounding the Rock. Subsequently, in 2008, it recognized, at the initiative of Spain, a different SCI in a larger part of the same waters. Consequently, there is an overlap with regard to the authorities responsible for monitoring compliance with European environmental regulations in these waters around Gibraltar. This dual designation of SCIs in the same waters adjacent to Gibraltar has emerged as a specific dispute, including a judicial component before the Luxembourg Court. Initially, the UK, based on a 2004 proposal by the government of Gibraltar, obtained a declaration of an SCI under the name "Southern Waters of Gibraltar", comprising most of the waters adjacent to the Rock. Spain reacted by proposing and achieving, in 2008, the inclusion in the list of EU SCIs of a marine area, under the name of "Estrecho Oriental" [Eastern Strait] of almost 34,000 hectares, including an overlap of more than 5,000 hectares with the waters of the Gibraltarian SCI, declared a couple of years earlier. Thus, these waters, also included in the British SCI, are under Spanish jurisdiction.[47]

Finally, third, in the context of this lack of coordination, the European Marine Strategy seems unlikely to be applied in the Bay of Algeciras. In the context of the European Integrated Maritime Policy, it is intended to lend an element of sustainability and coherence to the massive human intervention on Europe's coasts. The Strategy requires coordination between authorities from different countries, and one of the Spanish regions in which a Strategy should be established is the Gibraltar Strait/Alborán Sea demarcation. This region comprises the Bay of Algeciras, site of the dispute between Spain and the UK over the waters around Gibraltar, as well as the recent conflict over the SCIs. All of this poses a serious challenge for the implementation of marine strategies in the waters of Gibraltar.[48]

(7) Future Projection of Maritime Zones by Gibraltar

Experience shows that certain aspects of the Gibraltar dispute can emerge unexpectedly to endow the historical dispute with even greater complexity. In future, this could well be the case with certain claims by the UK and Gibraltar to jurisdiction over zones or functions in waters in the area of the Strait.

In fact, legally, it would be possible. The 2011 definition of the BGTW allows for the potential extension thereof, noting that the waters "...currently extends to three nautical miles and to the median line in the Bay of Gibraltar"[49]. Nothing would prevent an eventual extension of the territorial sea to twelve miles to the east and south (where it would overlap with the waters of Ceuta), as Gibraltarian and British politicians have been calling for for some time now. Such a decision to

[47] The British SCI was adopted by means of the Commission decision of 19 July 2006, in accordance with the provisions of Directive 92/42/EEC, known as the Habitats Directive. The area was legally defined by Gibraltar in 2011.

[48] Marine Strategy Framework Directive, Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (OJ L 164, 25 June 2008, pp. 19-40). Directive transposed in Spain through Law 41/2010, 29 December 2010 (BOE No. 317, 30 December 2010, pp. 108464-108488).

[49] Reproduced *supra* n. 26.

unilaterally extend the territorial waters to twelve miles would no doubt once again trigger enormous new political tensions between the parties.

Gibraltar and the UK could even consider creating other maritime zones in future, such as the continental shelf and exclusive economic zone. In fact, Gibraltarian law already provides for this possibility. Following its amendment in 2011, the aforementioned 1991 Nature Protection Act provides that it applies to "(a) BGTW; and (b) any area of sea, the sea bed and subsoil within the limits of the exclusive economic zone adjacent to Gibraltar, when and if that zone is established".

To date, the Spanish position is that none of the waters around the Rock were ceded. However, a British or Gibraltarian initiative concerning these other maritime zones could lead Spain to qualify, develop or adapt that position. Spain already officially communicated, in 2014, that it considers the 12-mile stretch of waters east of the Rock to be part of the Spanish territorial sea.[50]

Finally, a potential British claim to participate in the control of maritime traffic through the Strait[51], today carried out by Spain and the Kingdom of Morocco in accordance with the international legal framework of the International Maritime Organization, is not a minor matter.

(C) CONCLUSION

In summary, with the exception of the waters of the port, Spain denies the existence of waters appertaining to Gibraltar. However, in practice, it allows the exercise of British jurisdiction within an extension unilaterally established by the UK, without distinguishing between the waters of the Rock and those of the isthmus. Meanwhile, the UK asserts a *presumed* sovereignty over the waters around the Rock;[52] however, its initial position that the waters surrounding the isthmus are British is legally weak.

Two main factors explain the glaring lack of coordination with regard to the legal regime governing the waters around the Rock. The first is structural: it is inextricably linked to the core issues of the sovereignty dispute, as the waters are legally and judicially inseparable from the other disputes over the cession of the town, port, rock and isthmus, as well as from the UN doctrine on decolonization. The other factor is temporary: the lack of institutional channels or other channels of dialogue to encourage the parties to address practical issues of coexistence and jurisdiction in the waters since the elimination of the Forum of Dialogue on Gibraltar following the arrival in office of the Rajoy administration in 2011. This explains the utter impossibility of reaching understandings regarding the waters and even the unlikelihood of reaching a simple and provisional *modus vivendi* on the regime to govern navigation in them[53].

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[50] Official Statement 211, 18 July 2014, reproduced *supra* n. 17.

[51] On this question, see the contribution in this volume by López Martín on "Navigation through the Strait of Gibraltar".

[52] See the opinion of A. Remiro, *supra n.* 12.

[53] A. del Valle Gálvez, I. González García & J. Verdú Baeza, "Propuestas para un acuerdo práctico sobre las aguas de Gibraltar", *Estudios de derecho internacional y de derecho europeo en homenaje al profesor Manuel Pérez González,* M. J. Aznar Gómez, Coord. Vol I (Tirant, Valencia, 2012), 407-440; A. del Valle Gálvez "Brexit Negotiations and Gibraltar: Time for a Modus Vivendi?" 2 *Cuadernos de Gibraltar – Gibraltar Reports* (2016-2017), 19-26.

 DOI: 10.17103/sybil.21.21

The Spanish 'dry coast' position is not as legally sound with regard to the waters as to other aspects of the dispute, and it moreover weakens Spain's claim as a whole. This theory, advocated by Spain, is in some ways inconsistent with Spanish practice and, furthermore, seems to be fairly young, having been established in the 1960s during the dictatorship and subsequently continued in the Spanish democracy [54].

In this context, the UK unequivocally seems to have expanded its concept of port over the 19th and 20th centuries and brought under its jurisdiction anchoring in waters near but outside the port, up to the Spanish coast in La Línea, Punta Mala and San Felipe in the bay. For more than 140 years, the UK applied its own particular version of the 'dry coast' theory, in that case, against Spain. That period, which spanned from 1826 to 1968, is a bad precedent for the Spanish 'dry coast' position. Despite the existence of protests and Spanish notes rejecting any form of claim to British waters outside the port, the continuous exercise of vessel control in this zone could undermine the strength of the Spanish interpretation of the Treaty of Utrecht, in particular, with regard to the waters of this external anchorage near the isthmus and, in general, with regard to all the waters of the bay.

Ensuring greater coherence between Spanish theory and practice in relation to Spain's position on the waters of the bay would strengthen the consistency and credibility of its claim to the waters in the Gibraltar dispute, which seems to have arisen in the 1960s in response to the 'dry coast' theory applied by the UK to Spain at that time.[55] However, for achieving greater coherence on the Spanish position, it would be necessary to reformulate in some way the theory of the 'dry coast' in its application to the mountain and the isthmus of Gibraltar.

[54] J. Verdú Baeza "Las aguas de Gibraltar, el Tratado de Utrecht y el Derecho Internacional del Mar" 1 *Cuadernos de Gibraltar – Gibraltar Reports* (2015), 97-132.

[55] "The doctrine appears as a mirror image of Britain's own 'dry coast' doctrine in relation to the Punta Mala anchorage, which for many decades was a source of considerable consternation in Spain." J. Trinidad, *supra* n. 30, at 150–151.

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Spain and the Law of the Sea: 20 years under LOSC

Navigation through the Strait of Gibraltar

Ana Gemma LÓPEZ MARTÍN*

(A) INTRODUCTION

As already stated, the new navigation regime in international straits, as contained in the Part III of the United Nations Convention on the Law of the Sea of 1982[1], in particular Articles 38, 39, 41 and 42, which excludes the traditional innocent passage in favor of the new right of transit passage, was the main reason for Spain to abstain at the time of voting on the Draft Convention on the Law of the Sea in April 1982, and subsequently to resist the ratification of the LOSC, given that it poses a serious threat to both its sovereignty and its security; especially when it comes to the possibility of submarines sailing submerged and, above all, the recognition of the overflight right to all aircraft, including military aircraft.[2]

In effect, the first clear conclusion which can be deduced from Article 38 is that the transit passage is a right which is extensive to ships and aircraft that does not distinguish nationalities or ownership. All vessels, including warships, nuclear-driven vessels and those which transport harmful or hazardous substances have the right to transit passage. This is also a right which all aircraft have, an all-embracing expression sufficient to include not only the civil aircraft used in air navigation, but also the other civil aircraft, military aircraft and other State aircraft.

However, we cannot ignore that after 1982 there were drastic changes in Spain's position in this regard. After the consolidation and normalization of democracy, Spain chose to join its strategic future to that of the United States and NATO, which explains why it ceased to be a persistent objector to the new regime on international straits and embraced the advantages of the right to transit passage through the Strait of Gibraltar. In fact, Spain's allies were strongly in favor of this and it was considered that the effective control of the strait guaranteed by the regime of 1958 was more nominal and formal than real as Spain lacked a dissuasive military force to combat nuclear submarines with

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1 UN Convention on the Law of the Sea, 1833 UNTS 3 (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter).

2 In this line of rejection, when Spain finally decided to sign the Convention on 4 December 1984, as we know, five out of the nine interpretative declarations accompanying the signature were related to the regime of transit passage. We can even say that the essential core of the declarations made at the time of ratification of the LOSC refer to the prospective application of the right of transit passage through the Strait of Gibraltar, although without questioning it. For the Spanish position throughout this process, see the contribution in this volume by de Yturriaga Barberán on "Spain at UNCLOS".

 DOI: 10.17103/sybil.21.22

strategic nuclear weapons. In fact, in 1982 the effective control of Gibraltar was located in the British military base on the rock and the United States military base in Rota, which meant that Spain was superfluous and could only be invited to the banquet after joining NATO. Undoubtedly, these factors contributed to overcoming Spain's initial reluctance to this new regime and, consequently, to the final ratification of the LOSC in 1997, which we now commemorate.

The purpose of this paper is to point out the different aspects related to navigation through the Strait of Gibraltar that have taken place after the entry into force of the LOSC for Spain in line with the regulation envisaged by the latter[3].

(B) SPANISH LEGISLATION IN RELATION TO NAVIGATION THROUGH THE STRAIT OF GIBRALTAR

According to the provisions of the LOSC, Spain has regulatory competence to adopt laws and regulations related to transit passage through its straits (Article 42), but in four specific material areas:

(a) the safety of navigation and the regulation of maritime traffic;
(b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;
(c) with respect to fishing vessels and the prevention of fishing;
(d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations.

We must emphasize that such competences refer only to maritime navigation and not to air navigation. With respect to the latter, the LOSC does not expressly recognize any competence to the coastal States to adopt laws and regulations regarding overflight in transit passage through the straits.
In relation to the exercise of this regulatory competence,[4] we find that, although the Spanish ratification of the LOSC takes place in 1997, the fact is that the development in Spanish domestic law of the content of the aforementioned articles has certainly been late. Well, it was not until ten years later, in 2007, when the first legislative development took place in Spanish legislation.

This first reference is found in Article 2(2) of Royal Decree 394/2007, 31 March 2007, "on Measures Dealing with Ships in Transit that Perform Polluting Discharges in Spanish Waters",[5] which provides

[3] For the analysis of the situation in the waters of the Bay of Algeciras and the port and surrounding areas of Gibraltar see the contribution in this volume by del Valle Gálvez on "Maritime zones around Gibraltar".

[4] It is important to note that, in line with this regulatory competence, Spain does not have the corresponding executive powers under the LOSC. The only reference appears in Art. 42(5), but there is no reference to the adoption of measures concerning the infringement of transit passage or its legislation by the coastal State. However, it does refer to the possibility that the coastal State has to demand the international liability of the flag State in the cases of failure of State ships to comply with its laws and regulations.

There is a particular provision, although not within Part III: Art. 233. This article recognizes the executive competence of the coastal States of international straits, although this refers to a very specific material area, which is the "protection and preservation of the marine environment", regulated in Part XII of the LOSC.

[5] Royal Decree 394/2007, 31 March 2007, on Measures Dealing with Ships in Transit that Perform Polluting Discharges in Spanish Waters, transposing EP and Council Directive 2005/35/EC (OJ 2005 L 255/11) (BOE No. 81, 4 April 2007). This Royal Decree incorporates the provisions of Arts. 3 and 7 of this Directive on ship-source pollution and on the introduction of penalties for infringements which had not yet been transposed.

 DOI: 10.17103/sybil.21.22

that it shall apply to discharges of polluting substances carried out "in straits used for international navigation subject to the regime of transit passage over which Spain exercises jurisdiction." Under this general and plural reference to "straits used for international navigation", we must, obviously, include the Strait of Gibraltar.[6]

Among other measures, in the case of a polluting discharge carried out by a ship sailing through territorial sea, which is causing or is likely to cause considerable damage to the natural resources of said waters or to the coast or related assets to it, Article 3 of the Royal Decree legitimates the Spanish Maritime Administration to take the necessary police measures, including the detention of the ship, and, if necessary, the commencement of the appropriate sanctioning file or the referral of the proceedings to the Prosecutor. In any case, the Spanish Ministry of Development shall approve the necessary provisions for the development and application of this Royal Decree.

As indicated, this provision is framed within the competences that characterize Spain as a coastal State of the Strait of Gibraltar, according to the provisions of Article 42 LOSC. More specifically, the aforementioned Royal Decree constitutes the practical application of Spain's right to legislate in the terms set forth in section (b), insofar as it establishes various measures with the aim of preventing and avoiding pollution, which have been adopted in accordance with the International Convention for the Prevention of Pollution from Ships (1973) and its Protocol of 1978 (MARPOL 73/78).

Apart from that, we do not find any other specific Spanish legislation in relation to the regulation of the right of transit passage through the Strait of Gibraltar in the other three material areas in respect of which the LOSC grants jurisdiction. This is not to be understood as a deficiency or lack of diligence on the part of Spain insofar, according to the wording of Article 42, this is an absolutely optional possibility for coastal States.[7]

Beyond the regulatory powers on maritime navigation in the Strait of Gibraltar conferred by the LOSC, we do not find any other specific reference to such navigation until the adoption of Law 14/2014 on Maritime Navigation —in force since 25 September 2014—[8], aiming to regulate legal situations, acts and relationships arising out of maritime navigation, such as that which is carried out

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[6] We must bear in mind that this is not the only international strait under Spanish sovereignty. Within this category equally falls, and is applicable the right of transit passage —and, consequently, this Royal Decree— the Channel of Menorca or Freu de Menorca, separating the islands of Mallorca and Menorca.

[7] Apart from the specific legislation relating to the Strait, it is clear that there are other general rules which are equally relevant as they relate to different aspects of maritime navigation; in particular that relating to the territorial sea. This is the case, among others, of Royal Decree 210/2004, 6 February 2004, establishing a monitoring and information system on maritime traffic, transposing EP and Council Directive 2002/59/EC (OJ 2002 L 208/10) (BOE No. 39, 14 February 2004), amended by Royal Decree 1593/2010, 26 November 2010, transposing EP and Council Directive 2009/17/EC (OJ 2009 L 131/101) (BOE No. 289, 30 November 2010), and Royal Decree 201/2012, 23 January 2012, transposing Commission Directive 2011/15/EU (OJ 2011 L 49/33) (BOE No. 30, 4 February 2012). This constitutes an important initiative aimed at the implementation of a uniform European system for the control of maritime navigation, making compatible the freedom of navigation in Community waters with the protection of maritime safety and the prevention of pollution of the marine environment.

Similarly, as regards air navigation, we can refer to Law 21/2003, 7 July 2003, on Air Safety (BOE No. 162, 8 July 2003, consolidated text of 30 October 2015). Article 2 provides that, in establishing its scope of application, it "shall apply throughout the Spanish territory, within its jurisdictional waters, in the overlying air space and in the airspace over which the Spanish State exercises jurisdiction in accordance with the international treaties and conventions in force".

[8] Law 14/2014, 24 May 2014, on Maritime Navigation (BOE No. 180, of 25 July 2014), an English version available here.

 DOI: 10.17103/sybil.21.22

by the sea waters and, where appropriate, also by the continental waters accessible to the vessels from the sea, but only as far as the effect of the tides is felt or, in the navigable rivers, in the sections where there are ports of general interest. Within the framework of this Law, Article 37(1) provides that:

> "[...] Navigation through the Strait of Gibraltar shall be governed by the terms set forth in Part III of the United Nations Convention on the Law of the Sea of 1982."

In this respect, although we can affirm that this Law supposes the full consecration of Spain's acceptance of the regime of transit passage as the pertinent one for navigation by the Strait of Gibraltar, we also find that the Spanish law-makers —as usual practice— have abandoned the creation of a detailed regulation on this matter, opting for the referral technique to international standards in this field, that is, those that are consecrated by the LOSC.

(c) Maritime Traffic Regulation

In addition, Spain also has regulatory powers in this field for designating sea lanes and prescribing schemes for the separation of traffic in these lanes (Article 41), and also to modify or replace them when necessary to make the transit safe. While such competence is not unilateral, since it is a Strait with two coastal States, they will cooperate in order to present a joint proposal to the IMO. These sea lanes and traffic separation schemes are limited only to sea navigation and they are adjusted to generally accepted international regulations.[9]

In this respect, as with normative competences, the LOSC does not contemplate any further competence in favor of coastal States to establish the necessary air corridors in the regime of transit passage similar to the contemplated maritime routes.

However, unlike what happens with the innocent passage, the competence of the Strait's coastal States is not absolute when it comes to the transit passage. The latter is specified in a proposal power of mutual agreement to the IMO –competent international organization in this field–, who will be the one to determine the corresponding sea lanes and the schemes for the separation of traffic in these lanes.

(1) Traffic Separation Scheme of the Strait of Gibraltar

Prior to the Spanish ratification of the LOSC, the IMO had already established a Traffic Separation System (TSS) in the Strait of Gibraltar to channel traffic flows in the East and West directions, operating since 1970 (A.284 (VIII)). Since 1972 it was mandatory to respect the established channels to enter and leave the Mediterranean Sea. Being a device established by the IMO, the 1972 International

[9] We must understand these to be Regulation V/8 of SOLAS, Rules 1 d) and 10 of COLREG 1972 and the General Provisions on Ships' Routing of the IMO contained in Resolution A.572 (14), as amended by Resolution MSC.71 (69). In addition, we must take Resolution A.858 (20) regarding the Procedure for the adoption and amendment of traffic separation schemes into consideration. Also of interest are Resolution A.857 (20) which establishes the Guidelines for Vessel Traffic Services, Resolution A.851 (20) which includes the General Principles for Ship Reporting Systems and Ship Reporting Requirements, including Guidelines for Reporting incidents involving Dangerous Goods, Harmful Substances and/or Marine Pollutants.

Regulations for Preventing Collisions at Sea (COLREGs) apply.

The Regulations have been amended three times. The first, very mild, in 1994 (COLREG.2/Circ.40.40). More important is the one approved in 2006. The construction and entry into service of the new Tanger-Med port made it necessary for Spain and Morocco to jointly design a modification of the existing TSS to securely integrate the new traffic flows generated by that port and to encourage ships to navigate extremely cautious near the Eastern end area of the TSS. Submitted by both States to the IMO, it was adopted by the Maritime Safety Committee on 11 December 2006 and was implemented at 12:00 A.M. UTC on 1 July 2007 (COLREG.2/Circ.58).

The last amendments to the existing Traffic Separation Schemes —changing only some geographical positions— have been adopted by the Maritime Safety Committee on 21 November 2014 and were implemented at 12:00 A.M. UTC on 1 June 2015 (COLREG.2/Circ.66).

The TSS of the Strait of Gibraltar consists of: two separation zones of half a mile wide; two traffic lanes for West-bounded traffic; two traffic lanes for East-bounded traffic; two precautionary areas (one in front of Tangier-Med port and another between Algeciras and Ceuta). There is also a Northern-coastal navigation zone.

(2) Compulsory Notification System for Vessels

In certain TSSs there is a compulsory notification system whereby ships notify their position when passing through certain points. Notification systems are essential to respond to emergencies at sea, such as search and rescue operations or protection of the marine environment.

Since 3 June 1997 there is a "Notification System for Vessels" in the area of the TSS of the Strait of Gibraltar (GIBREP) adopted by the IMO Maritime Safety Committee (MSC.63(67)), which arose from a proposal made by Spain in cooperation with Morocco, on 12 August 1996 (NAV.42/23, p. 5.4).[10] On 17 May 2010, as a result of the start-up of the Vessel Traffic Service of Tanger in January 2010 (TANGIER TRAFFIC), the resolution MSC.300(87) was adopted by the IMO, modifying the system of mandatory notification for ships in the Strait of Gibraltar, which entered into force at 12:00 A.M. UTC on 1 December 2010.

The following categories of vessels are required to participate in the reporting system: all vessels 300 gross tons and over; all vessels, regardless of gross tonnage, carrying hazardous and/or potentially polluting cargo; vessels engaged in towing or pushing another vessel regardless of gross tonnage; any category of vessel less than 300 gross tons which is using the appropriate traffic lane or separation zone in order to engage in fishing; any category of vessel less than 300 gross tons which is using the appropriate traffic lane or separation zone in an emergency in order to avoid immediate danger.

[10] This system affects all the vessels with a length of more than 50 meters, all the vessels which transport hazardous substances as per the definition given by resolution MSC.43 (64), the vessels are over 50 meters long are hooked to or pushed by another vessel, any category of vessel shorter than 50 meters but which uses the traffic lane or the separation zone in order to work, and any type of vessel shorter than 50 meters which is using the traffic lane or the separation zone in an emergency in order to avoid an imminent danger.

(3) Maritime Traffic Control of the Strait of Gibraltar by Spain

TSS and other traffic management systems may be combined with a Vessel Traffic Service (VTS), which aims to control their proper functioning. In Spain, the competent Spanish body in this regard is *Salvamento Marítimo*, operating through its Rescue Coordination Centers of the Maritime Rescue and Safety Society. The operational center in the Strait of Gibraltar is the Tarifa Rescue Coordination Center (TARIFA TRAFFIC), under the Ministry of Development.

By delegation from the IMO, TARIFA TRAFFIC is the Center that also serves the Compulsory Notification System of the Strait of Gibraltar. It is an authority of passage with the power to sanction and even immobilize in port the ships that do not respect its indications.[11] Since 1 December 2010, when the Tangier maritime traffic control tower initiates its official activity, both VTS centers — Tarifa and Tangier— act in a coordinated manner in the reception of notifications.

Furthermore, there are four other Spanish centers with various competences in the area, contributing to the smooth operation and maritime and air traffic safety in the Strait of Gibraltar:[12]

- The Comprehensive External Surveillance System (SIVE) of the Civil Guard of Algeciras, under the Ministry of the Interior. Its operation began in 2002, and its main objectives are the fight against drug trafficking and irregular immigration, although it can also act in the fight against illegal fishing, piracy, and terrorism, protection of resources, defense of ports, search and rescue tasks or environmental accidents.
- The Strait Control Station (CIFAS-EMAD) of Tarifa —under the Ministry of Defense— and the Spanish Army Electronic War Battalion I/32 (REW-32) of Algeciras. They are responsible for collecting maritime information from the electronic systems operating the platforms that cross the Strait, as well as interfering the possible hostile use of the emissions.
- The Coastal Artillery Operations Center (COACTA-COVAM) of El Bujeo, Spanish Army/Navy, in charge of the defense and close control of the coast.
- The Air Surveillance Squadron (EVA) no. 11 of Alcalá de los Gazules, Spanish Air Force, and the Army Radar AAA Hawk Group I/74 (Tarifa) are responsible for the surveillance and airspace safety of the Strait.

In this regard, we must point out that the security threats posed by both jihadist terrorism and increasingly illegal immigration, which have the Strait of Gibraltar as their entry point, make it an area of geostrategic interest which has led to the adoption of the 'Comprehensive Maritime Safety Plan for the Strait of Gibraltar' (MARES) in January 2015. The Plan's aim is to transfer the vision of the National Maritime Safety Strategy to this area, in order to achieve an adequate coordination and cooperation of all centers and agencies belonging to the various ministries with presence in the area, as a response strategy to resolve a serious incident in the maritime safety field in the Strait of Gibraltar and its accesses.

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[11] In this regard, entering the Strait area, ships are required to contact Tarifa traffic through VHF channel 16 and communicate their geographic position, speed, number of crew, port of origin and destination, as well as their estimated time of arrival.

[12] See, in this regard, L. Romero Bartumeus, "Los actores que intervienen en la estrategia del Estrecho de Gibraltar", 2 *Cuadernos de Gibraltar* (2016-2017), 147-223.

 DOI: 10.17103/sybil.21.22

Lastly, it is equally important to mention that, given that the Strait of Gibraltar is one of the world's busiest areas supporting a greater density of maritime traffic, since it is an obligatory passage point for all ships whose lines connect the ports of the Atlantic Ocean and the North Sea of Europe with those of the Mediterranean Sea and even with the most important ports in Asia and the Persian Gulf, the risks of *accidents* —navigation accidents, polluting spills, etc.— are a constant reality. It is just enough to mention some of the best known.

In November 1997, the vessel *J.P. Bobo* suffered an accident in front of the coast of Rota and poured into the sea 300,000 liters of kerosene intended for the maritime terminal of the Rota-Zaragoza military pipeline, located at the base. On 12 August 2007, after colliding with the oil tanker Torm Gertrud near Gibraltar, the New Flame ship loaded with 42,000 tons of scrap stranded in the bay of Algeciras causing contaminated spills for months. That same year there were four other serious accidents involving the Sierra Nava refrigerated vessel, the Samothraki and Torm Gertrud oil tankers, and the Egyptian-flagged merchant ship Al Zahraa getting stuck half a mile of the coast of Ceuta. The Milenium Dos high-speed catamaran ferry and bulk carrier New Glory collided on 13 January 2012 in the waters of the Strait, five miles north of Ceuta. On 3 September 2015, the Hermanos Otero vessel sank in the waters of the Strait and caused the disappearance of a sailor. On 22 July 2016, the nuclear submarine HMS Ambush causes an accident in the waters of the Strait near Gibraltar. On 21 December 2016, there was a spill of industrial oil in the Strait of Gibraltar due to the rupture of the Red Eléctrica Española submarine high-voltage cable between Tarifa (Cádiz) and Fardioua (Morocco).[13]

The body responsible for the investigation of accidents or incidents taking place in the Strait of Gibraltar is the *Permanent Commission for the Investigation of Maritime Accidents and Incidents*[14], which is a Collegiate Body attached to the Under-secretariat of the Ministry of Development. Its main objective is the determination of the technical causes of maritime accidents occurring in waters where Spain exercises sovereignty, sovereign rights or jurisdiction —and on Spanish flag vessels—, as well as the formulation of the recommendations necessary to avoid similar accidents in the future.

However, it exists a high level of dispersion of information regarding maritime emergencies occurred in the Strait of Gibraltar. Due to this dispersion and the lack of clearly defined relationships among the historical records, it become necessary a previous compilation of the information, and the unification of criteria for the classification and its subsequent analysis. This all led to the creation of a special database called GIBSAR, which is the basic tool for the development of this historical analysis

[13] To this we should add the reiterated and constant altercations between the Spanish Civil Guard and the Royal Navy taking place in the disputed waters near the Rock. Or, even, the controversy surrounding the crossing of the Russian Navy's flagship, the aircraft carrier *Admiral Kuznetsov*, since it sailed from its base at Severomorsk in the Barents Sea on 15 October 2016, until it reached the Syrian coasts, crossing for the Strait of Gibraltar. A controversy that began years ago, especially for the UK questioning the routine scales of supplies of ships and submarines of the Russian Navy in the Spanish port of Ceuta.

[14] Regulated by Art. 265 of the Consolidated Text of the Law on State Ports and Merchant Marine, approved by Royal Legislative Decree 2/2011 of September 5, approving the consolidated text of the State Ports and Merchant Marine Act (BOE No. 253, 20 October 2011). This Commission was created in 2008 to replace the previous Permanent Commission for the Investigation of Maritime Accidents, created by Order of the Ministry of Development of 14 April 1988 and regulated by Ministerial Order of 17 May 2001; it was attached to the General Directorate of the Merchant Marine.

 DOI: 10.17103/sybil.21.22

of maritime accidents in the Strait of Gibraltar.[15]

(D) FINAL ASSESSMENT

The Spanish legislative practice in relation to the transit passage is certainly scarce and late, since of the four possible areas in respect of which Article 42 LOSC recognizes regulatory powers, there has been only a minimal regulatory development in the field of pollution prevention with the adoption of a Royal Decree on Measures Dealing with Ships in Transit that Perform Polluting Discharges in Spanish Waters in 2007, which is applicable in the straits. It seems that the Spanish law-makers have opted for full referral to international regulations, as remains clear from the provisions of the 2014 Maritime Navigation Law.

There is a greater commitment in relation to the regulation and control of maritime traffic, both with regard to the establishment of the traffic separation scheme and other measures, as well as in the establishment of various competent bodies whose objective is to ensure the safety of such traffic.

[15] This database does not only compile information provided by the marine rescue coordination centers of Algeciras and Tarifa and the statistical series of data produce by the General Directorate of Merchant Marine, but it also establishes a scale for the assessment of effect, both for individuals and vessels, caused by the consequences of these events.

 DOI: 10.17103/sybil.21.22

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Fisheries

Rafael CASADO RAIGÓN*

(A) A FISHING MAJOR, BUT A FRAGILE GIANT

Spain, a world fishing major, ranks first among the EU Member States in total catch, aquaculture production, gross tonnage (for a modern and well-equipped fishing fleet), fishing industry employment, and fish and aquaculture product trade with third countries[1]. Spaniards, moreover, are among the world's most avid fish product consumers.

Spain is nonetheless a *géant fragile*[2], for, having no rich fishing grounds of its own, it has historically deployed and continues to deploy most of its effort in long-range fishing. For that reason, the establishment of national jurisdiction in areas of the sea has never been in its best interest[3]. In particular, Spain was very adversely affected by the consolidation of exclusive economic zone (EEZ) arrangements, which it (resignedly) accepted. In 1978, one year later than its European neighbours, Spain established an EEZ (although for its Atlantic coast only[4]) under the Act on Spanish Regulation of an Exclusive Economic Zone[5], undertaking what had become general practice and by then accepted as law. Prior to the country's 1986 accession to the European Communities, Spain had to conclude bilateral fishing agreements with third countries (such as Canada, United States, Norway, Portugal, Morocco, Mauritania or South Africa) and the European Economic Community itself to maintain its extractive capacity in other latitudes[6].

Spain's negotiating position on the EEZ during the Third United Nations Conference on the Law of the Sea was that any such zone should be contingent upon respect for the traditional fishing activities conducted by third countries in the fishing grounds affected[7]. Its position was reflected (as a

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1 European Commission, *Facts and figures on the Common Fisheries Policy. Basic statistical data* (2016 edition).

2 L. I. Sánchez Rodríguez, 'La pêche et les intérêts espagnols', in R. Casado Raigón (ed), *Europe and the Sea. Fisheries, Navigation and Marine Environment* (Bruylant, Brussels, 2005) 29, at 31.

3 Spain is a party to the four 1958 Geneva Conventions. Moreover, Spain was a negotiating State and party to the Fisheries Convention done at London on 9 March 1964 (581 *UNTS* 58), that contains a provision on the 6+6 proposal, which failed to pass at the Second United Nations Conference on the Law of the Sea by just one vote.

4 Royal Decree 1315/1997, 1 August 1997, establishing a Fisheries Protection Zone in the Mediterranean (BOE No. 204, 26 August 1997), amended by Royal Decree 431/2000, 31 March 2000 (BOE No. 79, 1 April 2000). Subsequently Royal Decree 236/2013, 5 April 2013, establishing the Spanish Exclusive Economic Zone in the North-West Mediterranean (BOE No. 92, 17 April 2013).

5 Law 15/1978, 20 February 1978, on the Economic Zone (BOE No. 46, 23 February 1978).

6 J. L. Meseguer Sánchez, *Acuerdos bilaterales de pesca suscritos por España* (Ministerio de Agricultura, Madrid, 1984).

7 J. D. González Campos, 'Las relaciones entre España y la CEE en materia de pesca', in F. Leita & T. Scovazzi, *Il regime della pesca nella Comunità Economica Europea* (Giuffrè, Milano, 1979), 131-169 at 139.

 DOI: 10.17103/sybil.21.23

last resort) in its declarations on the occasion of the LOSC signature, subsequently confirmed in its ratification instrument. Spain deemed that 'On the grounds of Articles 56, 61 and 62 of the Convention, the coastal State's powers to determine the allowable catch, the respective fishing effort and the allocation of surpluses to other States cannot be regarded as discretionary', and interpreted 'Articles 69 and 70 of the Convention to mean that access to fisheries in a third State's Exclusive Economic Zone by fleets of developed landlocked or geographically disadvantaged States is contingent upon the provision, by the coastal State at issue, of such access to the fleets of States that have traditionally fished in the Exclusive Economic Zone in question.' Its position, while understandable from the perspective of its interests, was not aligned with those of the other States or subsequent practice under the Convention[8].

(B) THE COMMON FISHERIES POLICY AND ITS REPERCUSSIONS FOR SPAIN

Spain's accession to the European Communities had a significant impact on the country's fishing industry, which, then as now, was much larger than any of the other member countries'. Spain adhered to the Common Fisheries Policy (CFP) upon accession in 1986, albeit under a transitory regime specified in the Act of Accession[9] whereby Spain was to receive differential and discriminatory treatment until its full integration in the CFP on 31 December 2002[10]. On the occasion of Austrian, Finnish and Swedish (and Norwegian) accession to the European Communities, however, Spain (and Portugal) negotiated full adherence to the CFP beginning in 1996, further to the terms of the aforementioned Act of Accession that empowered Council to adapt the transitory regime[11].

Today, the basic legislation on the subject is laid down in Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy[12], in effect since 1 January 2014. By virtue of its Article 1, the CFP shall cover: (a) the conservation of marine biological resources and the management of fisheries and fleets exploiting such resources; [and] (b) in relation to measures on markets and financial measures in support of the implementation of the CFP: fresh water biological resources, aquaculture, and the processing and marketing of fisheries and aquaculture products. The CFP shall cover these activities where they are carried out: (a) on the territory of Member States to which the Treaty [TEU] applies; (b) in Union waters, including by fishing vessels flying the flag of, and registered in, third countries; (c) by Union fishing vessels outside Union waters; or (d) by nationals of Member States, without prejudice to the primary responsibility of the flag State. The CFP's primary objective is to ensure that fishing and aquaculture

8 See, for instance, G. Cataldi, 'La pêche dans les eaux soumises à la souveraineté ou à la juridiction des États côtiers', in D. Vignes, G. Cataldi and R. Casado Raigón, *Le droit international de la pêche maritime* (Bruylant, Brussels, 2000) 47, at 83-84 and 98.

9 OJ 1985 L 302/9 and BOE No. 1, 1 January 1986.

10 See, among others, L. I. Sánchez Rodríguez, 'El derecho de pesca en la CEE y el Acta de Adhesión de España', 15 *Revista de Instituciones Europeas* (1988) 9-43; G. Apollis, 'La règlementation des activités halieutiques dans l'acte d'adhésion de l'Espagne et du Portugal au traité CEE', *Annuaire français de droit international* (1985), 837-867.

11 Council Regulation (EC) nº 1275/94 of 30 May 1994 on adjustments to the arrangements in the fisheries chapters of the Act of Accession of Spain and Portugal (OJ 1994 L 140/1).

12 OJ 2013 L 354/22.

 DOI: 10.17103/sybil.21.23

activities are environmentally sustainable in the long-term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies. With respect to fisheries management specifically, the CFP shall apply the precautionary approach and the ecosystem-based approach[13]. One of the essential principles of this policy is equal access to waters and resources in all Union waters[14].

The marine areas under the jurisdiction of EU Member States are open to the Spanish fleet, subject, however, to the provisions of the conditions established in EU regulations and in particular to the allocation of fishing opportunities. That, in turn, entails application of the principle of (so-called) *relative stability*, which takes the particulars of the Spanish fishing industry into consideration. The necessary conservation measures call for limiting fishing opportunities and reducing the fishing fleet, which must be economically viable without overexploiting marine biological resources, a requirement that often constitutes a serious problem for Spanish politicians. Nonetheless, the rational and sustainable exploitation of those resources, both in waters under national jurisdiction and on the high seas, is essential for Spain to maintain its fishing expectations into the not-so-distant future[15].

(C) COMPETENCES OF THE EU AND OF SPAIN AS A MEMBER STATE

Further to the Treaty on the Functioning of the European Union (TFEU)[16], 'the conservation of marine biological resources under the common fisheries policy' is an area in which the Union has exclusive competence. In addition, it shares competence with the Member States in the area of 'agriculture and fisheries, excluding the conservation of marine biological resources'[17].

In all these areas, the EU is competent to conclude agreements with third countries and other subjects of international law. According to Article 216 (2) of the TFEU 'the agreements concluded by the Union are binding upon the institutions of the Union and on its Members States'. Two types of agreements can be defined: those that lie within the Union's exclusive competence (such as bilateral fishing agreements, to be discussed later, the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas[18] or the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing[19]), and those in which it participates with all or some of its Member States. That is the case, for instance, of the LOSC, ratified by Spain in 1997 (along with its Community partners and the European Community itself) and the 1995 Agreement on straddling stocks and highly migratory fish stocks[20],

[13] Art. 2, Regulation 1380/2013. On these two approaches, see R. Casado Raigón, 'Nuevas tendencias en materia de conservación y gestión de los recursos marinos vivos', in J. M. Sobrino Heredia, *Mares y océanos en un mundo en cambio: Tendencias jurídicas, actores y factores* (Tirant lo Blanch, Valencia, 2007), 73-98, at 79-87.

[14] See the exceptions to this principle in Article 5, Regulation 1380/2013.

[15] See in this regard Sánchez Rodríguez, *supra* n. 2, at 37.

[16] OJ 2016 C 202/47.

[17] Articles 3 and 4.

[18] Adopted 24 November 1993, entered into force on 24 April 2003 (2221 *UNTS* 91).

[19] Entered into force on 5 June 2016. The Agreement was registered with the Secretariat of the United Nations on 26 January 2017 under No. I-54133, not yet officially published by *UNTS*.

[20] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10

ratified by Spain on 19 December 2003, the same day as the other EU countries[21] and the European Community itself. Such mixed agreements, which regulate matters whose competence is shared by the EU and its Member States or areas in which the EU has exclusive competence along with others for which the Member States are competent, consistently pose a practical problem that is not always readily solved. That problem affects not only the relationship between the Union and its Member States, but also their respective relationships with third countries and other international organisations[22].

The latter is an important issue, for it may affect a State's position on a proposal or emergent practice. In this regard, I sometimes feel that in the various (multilateral) fora in which both the EU and its Member States participate, Spain's voice (and that of other Member States with substantial fishing interests) in defence of its legitimate interest is barely audible or highly diluted in the European Commission's, a side effect of the ongoing debate on where competence lies. In such fora, the positions of Fiji and Cape Verde 'are reflected in the minutes'.

The declaration concerning competence included in the EC's (today the EU's) instrument of formal confirmation, provided for in Article 5 (1) of Annex IX of the LOSC, states that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. 'Hence in this field it is for the Community to adopt the relevant rules and regulations (which are enforced by the Member States) and, within its competence, to enter into external undertakings with third States or competent international organisations. This competence applies to waters under national fisheries jurisdiction and to the high seas'. The EU nonetheless acknowledges that 'in respect of measures relating to the exercise of jurisdiction over vessels, flagging and registration of vessels and the enforcement of penal and administrative sanctions, competence rests with the Member States while respecting Community law'[23]. The EC's declaration concerning competence for all the matters governed under the aforementioned 1995 Agreement[24] is set out in similar terms.

In particular, on the occasion of its ratification of that Agreement, the EC reiterated that its competence did not cover measures relating to the exercise of jurisdiction by the flag State over its vessels on the high seas. The problems referred to earlier are illustrated by an incident involving the vessel *Estai* (1995), intercepted and boarded on the high seas by Canadian Government vessels and subsequently brought to a port in Canada. Broadly speaking, the dispute over this detention revolved around two issues[25]. One, relating to fishing in the NAFO regulatory area[26] and hence under the EU's

December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Adopted 4 August 1995, entered into force 11 December 2001 (2167 UNTS 3).

[21] With the exception of the United Kingdom, which had ratified it on 10 December 2001.

[22] R. Casado Raigón, 'La dimension internationale de la compétence de l'Union européenne en matière de pêche', in J. Crawford et al. (eds), *The International Legal Order: Current Needs and Possible Responses. Essays in Honour of Djamchid Momtaz* (Brill/Nijhoff, Leiden/Boston, 2017) 288, at 289-293.

[23] See declaration in Council Decision 98/392/EC of 23 March 1998, OJ 1998 L 179/1.

[24] See declaration in Council Decision 98/414/EC of 8 June 1998, OJ 1998 L 189/14.

[25] See R. Casado Raigón, 'La pêche en haute mer', in D. Vignes, G. Cataldi and R. Casado Raigón, *Le droit international de la pêche maritime* (Bruylant, Brussels, 2000), 117-242, at 139-147.

[26] North-West Atlantic Fisheries Organisation.

exclusive competence, was settled by Canada and the EU[27]. The other involved the exercise of jurisdiction on the high seas. In this second respect, Spain filed an application to institute proceedings against Canada with the ICJ Registry. In its Judgment of 4 December 1998, the Court found that it had no jurisdiction to adjudicate in the case because the dispute between Spain and Canada was within the terms of one of the reservations in a Canadian declaration made under Article 36 (2) of the Statute of the ICJ. That judgement, in my view, is not flawless, although Spain unquestionably adopted a mistaken approach in its application[28].

(D) HIGH SEAS FISHERIES

Given the country's substantial (present and future) interest in high seas fisheries, Spain should, in conjunction with the EU, seek to ensure rational and sustainable management of such fisheries within the framework of regional fisheries management organisations (RFMOs). The LOSC attributes an important role to institutionalised cooperation in this area, and the Agreement on straddling stocks and highly migratory fish stocks and other more recent multilateral regulatory instruments rightly place cooperation channelled through RFMOs at the hub of the conservation and management of marine biological resources. In light of the EU's exclusive competence in the area of fisheries, neither Spain nor any of the other Member States participates simultaneously in most of these organisations. At this time, the EU, represented by the Commission, plays an active role in six tuna organisations and eleven other RFMOs[29] Nonetheless, Spain and some other Member States participate in a few organisations together with the EU. These include the Convention on Conservation of Antartic Marine Living Resources (CCAMLR), the General Fisheries Commission for the Mediterranean (GFCM), the Western Central Atlantic Fisheries Commission (WECAFC) and the Fisheries Committee for the Eastern Central Atlantic (CECAF). However, the latter two (instituted under the provisions of Article VI of the FAO Constitution) have a merely advisory mission. CCAMLR, in turn, forms an integral part of the Antarctic Treaty[30], of which the EU is not a contracting party, even though Article XXIX of the CCAMLR provides that it 'shall be open for accession by regional economic integration organisations constituted by sovereign States which include among their members one or more States members of the Commission and to which the States members of the organisation have transferred, in whole or in part, competences with regard to the matters covered by this Convention'. Lastly, Council Decision of 16 June 1998 on the accession of the EC to the GFCM (instituted under the provisions of Article XIV of the FAO Constitution) contains a single declaration on the exercise of competence and voting rights[31]. Conversely, Spain and a few other Member States participate in other organisations in which the EU does not. One, the International

[27] See text of the Agreement in OJ 1995 C 239/8-19.

[28] *Fisheries Jurisdiction (Spain v. Canada). Jurisdiction of the Court, Judgment of 4 December 1998, ICJ Reports* 1998, p. 432. See the papers on this case authored by professors A. Fernández Tomás, F. J. Quel López, F. Jiménez García, R. Casado Raigón, J. Juste Ruiz y C. Fernández de Casadevante published in *REDI*, 1999-1, pp. 89 ss.

[29] https://ec.europa.eu/fisheries/cfp/international/rfmo_en.

[30] Adopted 1 December 1959, entered into force 23 June 1961 (402 *UNTS* 72).

[31] Decision 98/416/EC, OJ 1998 L 190/34.

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Whaling Commission (IWC), which is neither regional nor engages in whaling, has a foundational charter[32] that envisages accession by States only. Another, the International Council for the Exploration of the Sea (ICES), focuses essentially on scientific research and likewise provides for State participation only.

(E) BILATERAL FISHERIES AGREEMENTS

One of the main objectives of the latest reform of the CFP is to defend the principles of sustainable and responsible fishing and their extension across the globe, in both high seas fishing channelled through RFMOs and activities conducted by Union fishing vessels (and by nationals of Member States) in waters under third country jurisdiction[33]. The latter are primarily the outcome of agreements between the EU and those countries. Two types of such agreements are in effect at this time: the so-called 'northern agreements' for the joint management of shared stocks in the North Sea and Northwest Atlantic Ocean, concluded with Norway, Iceland and the Faeroe Islands, and the 'sustainable fisheries partnership agreements', concluded with African countries, Greenland and the Cook Islands, whereby Community vessels can fish surplus resources in the respective country's EEZ. The new CFP, committed to the effective application of the LOSC, provides that by virtue of such agreements Community vessels 'shall only catch surplus of the allowable catch as referred to in article 62 (2 and 3) of the [LOSC], and identified on the basis of the relevant information exchanged between the Union and the third country about the total fishing effort on the affected stocks by all fleets'[34].

The EU's bilateral relations clearly favour the Spanish fleet in seas located south of Community waters. Outside the northern and Greenland agreements, Spain has benefited far more than any other Member State (followed by France) from all tuna or multi-species fisheries partnership agreements in force or that have been in force until recently. Agreements of this nature have been concluded with Cape Verde, Comoros, Cook Islands, Côte d'Ivoire, Gabon, Liberia, Madagascar, Mauritius, Sao Tomé and Principe, Senegal, Seychelles, Guinea-Bissau, Mauritania and Morocco.

All the partnership agreements presently in force include a so-called exclusivity clause. Further to the new CFP[35], when a partnership agreement is in force, Union fishing vessels shall not operate in the waters of the third country unless they are in possession of a fishing authorisation which has been issued in accordance with that agreement. With this clause, the Union aims to encourage sustainable and responsible fishing in third country waters and prevent Community vessels from eluding CFP rules via private arrangements which, in practice, may lead to overfishing in waters where the sustainability of fish stocks is not ensured[36].

[32] The International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) (161 *UNTS* 74).

[33] Article 28, Regulation 1380/2013.

[34] Regulation 1380/2013, Art. 28.

[35] Regulation 1380/2013, Article 31(5) and (6)(b).

[36] See Casado Raigón, *supra* n. 22, at 306-307.

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(F) JOINT ENTERPRISES

One key element in Spain's fishing industry continues to be *joint enterprises*[37], defined under Regulation 3944/90 as a 'company incorporated under private law comprising one or more Community ship-owners and one or more partners from a third country with which the Community maintains relations, associated under a joint enterprise agreement set up for a purpose of exploiting and, where appropriate, using the fishery resources of waters falling within the sovereignty and/or jurisdiction of such third country, primary consideration being given to the supply of the Community market'[38]. As the CFP evolved, such arrangements came to be defined exclusively as an alternative instrument of structural fisheries policy to scrapping or exporting vessels[39] and since 31 December 2004, joint enterprises have practically disappeared from the EU's fisheries structural policy[40]. Today, as attested to by Regulation 1380/2013, they lie in a legal void. They are regarded simply as foreign companies in which EU partners are involved, with an engagement to prioritise EU supply and to transmit information regularly; their only protection is that provided by bilateral treaties for the mutual protection of investments between the source Member State and the beneficiary third country[41]. Irrespective of the suitability or otherwise of maintaining a specific policy for joint fisheries enterprises in the context of the CFP, arrangements involving Spanish capital are being actively implemented in over 20 coastal countries, where they are (or could be) contributing to economic and social development and can (or could) encourage responsible and sustainable fishing[42].

(G) SPANISH FISHERIES LAW

Since 2001, Spain, in the framework of EU competence (and today in particular, of Regulation 1380/2013[43]), has a State Law on Marine Fisheries: Act 3/2001 of 26 March has undergone a number of amendments, the most recent in December 2014[44]. Until that time, Spanish fisheries legislation was

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37 See J. M. Sobrino Heredia, "Hacia una pesca responsable y sostenible: el papel de las empresas mixtas pesqueras", in J. M. Sobrino Heredia (dir.), *La toma de decisiones en el ámbito marítimo: su repercusión en la cooperación internacional y en la situación d las gentes del mar* (Bomarzo, Albacete, 2016), 479-495, and J. M. Sobrino Heredia & A. C. Bürgin, *La colaboración multi-actores en la cooperación al desarrollo en el sector pesquero* (Colección Derecho Europeo, no. 3, Instituto Universitario de Estudios Europeos "Salvador de Madariaga", A Coruña, 2016), at 144-153.

38 Council Regulation (EEC) 3944/90, of 20 December 1990, amending Regulation (EEC) 4028/86 on Community measures to improve and adapt structures in the fisheries and aquaculture sector. OJ 1990 L 380/1. Article 21 (a).

39 Regulations (EEC) 2080/93 (OJ 1993 L 193/1) and 3699/93 (OJ 1993 L 346/1).

40 Council Regulation (EC) 2369/2002 (OJ 2002 L 258/49).

41 Opinion of the European Economic and Social Committee on Joint enterprises in the fisheries sector: current state of play and future prospects (JO 2006 C 65/46).

42 Spain's State Law on Marine Fisheries, discussed below, stresses the importance of joint enterprises as a policy tool for regulating the fishing industry. Further to its Article 41, that policy is implemented, among others, through measures to encourage the creation of joint enterprises and others for accessing third countries' fisheries resources. Pursuant to Article 64 of the law, such measures are to be adopted by the Central Government, after deliberating with the autonomous regions, with a view to accessing the aforementioned resources and improving EU market supply. The Ministry of Agriculture, Fishing and Food keeps a public registry of these enterprises

43 Regulation (EU) 1380/2013, like all EU regulations, is binding in its entirety and directly applicable in Spain (Article 288 TFUE).

44 Law 33/2014, 26 December 2014, amending Law 3/2001, 26 March 2001, on Marine Fisheries (BOE No. 313, 27

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insufficient, disperse, heterogeneous and informed not by strategic but merely circumstantial considerations[45]. It is at least surprising that a country with such a long tradition and such a significant interest in the industry had no such law until the 'third millennium of the common era'[46].

After the Spanish Constitution (CE) of 1978, the State has exclusive competence in 'sea fisheries, without prejudice to the competences attributed to the autonomous regions for regulation of the industry'[47]. The autonomous regions may assume competence in inland waters, shellfish fisheries and aquaculture[48]. On those grounds, Spain's fisheries law establishes a general regulatory framework for: marine fisheries in 'exterior waters'[49], fishing industry regulation, fish product trade and processing[50], fisheries and oceanographic research[51] and infringements and penalties. Obviously, whether or not the matters involved are covered by Spanish domestic laws, the provisions of the LOSC, the agreements concluded by Spain and the agreements concluded by EU[52] remain applicable insofar as they are also part of the law of that country[53].

December 2014).

45 L. I. Sánchez Rodríguez, *España y el régimen internacional de la pesca marítima* (Tecnos, Madrid, 1986) at 29.

46 J. Juste Ruiz, 'La Ley 3/2001, de 26 de marzo, de pesca marítima del Estado: Análisis y evaluación', 54 *REDI* (2002) at 95.

47 Article 149(1)(19) CE

48 Article 148(1)(11) CE.

49 The Law (Article 4) defines this term to include waters subject to Spanish sovereignty or jurisdiction, with the exception of internal waters, other EU Member States' and third countries' sovereign waters or waters under their jurisdiction and the high seas. Scantly aligned with the LOSC, in which it is not envisaged, the term 'exterior waters' was coined by Spain's Constitutional Court in its interpretation of the constitutional division of competence in marine and internal fisheries between the central and regional governments. See Juste Ruiz, *supra* n. 46, at 101.

50 Further to the provisions of Article 149(1)(13) and (1)(10) CE.

51 Further to the provisions of Article 149(1)(15) CE.

52 Article 216 (2) TFEU.

53 Article 96 (1) CE.

 DOI: 10.17103/sybil.21.23

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

Non-living marine resources

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(A) INTRODUCTION

When we talk about non-living marine resources we generally think of hydrocarbons and minerals, and this perception lay behind the creation of new marine spaces outside territorial waters, starting with the 1945 Truman Proclamation, which above all owed its existence to the awareness of the importance of the oil deposits underlying the continental shelf. However, it should also be acknowledged that it is also possible to exploit other types of marine energy resources, which enjoy the advantage, among others, of not being finite. It is therefore fitting to begin by pointing out, coinciding with the 35th anniversary of the UN Convention on the Law of the Sea[1], that the latter provided an appropriate framework in this regard, which could turn out to be particularly promising for Spain.

The provision contained in Article 56(1)(a) LOSC, when it refers to the "sovereign rights" of coastal States concerning "other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds", is not intended to be exhaustive and thus encompasses the exploitation of other kinds of marine renewable energies that are not specifically mentioned and will be referred to below. No voices have been raised against this interpretation, which has never been questioned[2].

This study analyses Spanish practice regarding the exploitation and exploration of offshore

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[1] UN Convention on the Law of the Sea, 1833 UNTS 3 (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter).

[2] UN Doc. A/67/79, at p. 10.

 DOI: 10.17103/sybil.21.24

hydrocarbons, on the one hand, and of marine renewable energies, on the other, as well as certain significant aspects connected with both. It should be noted from the outset that Spain's situation is very different from that of other European countries such as those bordering the North Sea, i.e. Norway, the UK, Denmark or the Netherlands, all of which enjoy substantial hydrocarbon resources. Although the advent of fracking has greatly revolutionised the statistics, the trend seems to be that unexploited marine deposits are more equitably distributed throughout the world than conventional land-based hydrocarbons, and indeed appear to lie outside OPEC's sphere of influence[3]. However, going by the results of all the prospecting carried out to date, no hydrocarbon deposits of sufficient quantity or quality to make their exploitation commercially viable have been discovered on Spanish soil or in Spanish territorial waters.

Given the above, in the case of Spain the exploitation of marine renewable energies would appear to be particularly favourable, even in the face of the tremendous challenges and obstacles that need to be overcome. The reasons for supporting their development are as substantial as they are heterogeneous: not only do renewable energies help to mitigate climate change and guarantee sustainable development, but the absence of significant hydrocarbon deposits in Spain and/or waters under Spanish jurisdiction and the country's extensive coastline, over 7000 km long, also make a solid case for their exploitation.

(B) SPAIN AND OFFSHORE HYDROCARBONS

(1) International Law

(a) Guiding principles

These pages refer only to spaces under national jurisdiction and take as their starting point the familiar rights and obligations of all States regarding the various marine spaces, regulated by LOSC, and more specifically those concerning inshore waters, territorial seas, EEZs and the continental shelf. A number of premises, which will be set out below, must also be taken into consideration. Firstly, unlike renewal energy installations, those used for exploring and exploiting hydrocarbons are increasingly located further and further offshore. Secondly, limits pending ratification and/or some of the submissions put forward to extend Spain's continental shelf may be of future relevance for the issue in question, involving a change of legal regime of the spaces affected and the exploitation of their resources[4]. Finally, and with specific reference to hydrocarbon production activities, there are multiple questions of particular importance from an international legal perspective, of which we will consider only a few, restricted to obligations regarding the use of certain safety techniques or practices concerning the technology employed, the prevention of accidents and environmental protection, due to the potentially highly adverse effects of such activities. In this respect it is worth noting that hydrocarbon exploration and exploitation activities generate, in addition to any possible

[3] IEA: World Energy Outlook (2008), at pp. 257 y 258; IEA: World Energy Outlook (2013).

[4] On this question, see the contribution by J.M. De Faramiñán Gilbert, in this same Agora: "Spain: Continental Shelf and its Extension".

accidentalpollution caused by a major spill, a degree of operationalpollution as a consequence of their ongoing operations. These include, once the necessary scientific marine research activities have taken place, preparatory activities such as seismological surveys, seabed and subsoil prospection, sampling and exploratory drilling on the one hand, and on the other the exploitation activities themselves, involving the installation of a facility for extracting resources and related activities, drilling, the extraction, processing and storage of the resource, transporting the latter to shore by means of a pipeline and/or loading onto tankers, as well as maintenance, repair and other ancillary work[5]. Thus, even though no full-scale commercial exploitation activities actually take place, only exploratory operations, as in the case of Spain, pollution nevertheless occurs.

(b) Spain and international instruments

The prevention of and reaction to the environmental impact of oil and gas rigs and other kinds of facility located in the marine environment for the purpose of extracting offshore hydrocarbons is the subject of international regulation, over and above the general provisions of LOSC, which provide a basic regulatory framework[6]. This regulation, however, falls well short of that concerning pollution originating from vessels[7]. In addition to LOSC there is another maritime convention with universal scope, the International Convention on Oil Pollution Preparedness, Response and Cooperation (adopted within the framework of the IMO in London in 1990; entered into force in 1995 and ratified by Spain also in that year[8]). The general purpose of this Convention was, as stated in its preamble, is to "promote international cooperation and to enhance existing national, regional and global capabilities concerning oil pollution preparedness and response". However, although it contemplates pollution by what it refers to as "offshore units"[9], it does not refer exclusively to the pollution caused by them, but also to that caused by vessels, and thus does not focus on best practices for carrying out extractive activities.

It should also be noted that together with the treaties referred to above, other instruments of equally universal scope have been drafted by a variety of international institutions, within the sphere of soft law, amongst them those adopted by the IMO[10], the UNEP[11] or the World Bank[12].

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5 List taken from the definition of "activities concerning exploration and/or exploitation of the resources" contained in the Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, adopted on 14 October 1994 in Madrid (Art. 1); OJEU, L4/15-34, 9 January 2013.

6 See arts. 192 ff, especially arts. 194(3)(c) and (d), 198, 199, 208 and 214. This framework has been the subject of criticism due to the vagueness and programmatic nature of its rules in this regard, as well as for its shortcomings concerning spaces outside national jurisdiction.

7 Pollution of this kind has generated a more prolific regulatory response in the international sphere, with universal scope, for which the IMO has been the main driving force.

8 *BOE* No. 133, 5 June 1995.

9 Which it defines as "any fixed or floating offshore installation or structure engaged in gas or oil exploration, exploitation or production activities, or loading or unloading of oil" (art. 2(4)).

10 MODU Code, 2009 (A 26/Res. 1023), 2 December 2009.

11 *Legal aspects concerning the environment related to offshore mining and drilling within the limits of national jurisdiction*, produced by the Working Group of Experts on Environmental Law in 1982 (YBEO/GC.9/5/Add. 5, annex III and UNEP/GC.10/5, annex I).

12 See for example *Environmental, Health, and Safety General Guidelines* and *Environmental, Health and Safety*

(c)Spain and regional legislation

A number of regulations at regional level dealing with the issue under consideration have also come into existence. As far as Spain is concerned, the following are of particular relevance:

(i) *The North-East Atlantic*

Spain, together with the EU and other States, is Party to the Convention for the Protection of the Marine Environment of the North-East Atlantic (or OSPAR Convention, adopted in Paris in 1992 and in force since 1998). This instrument is endowed with an institutional mechanism, the OSPAR Commission, which is made up of representatives of all the Parties. Although the Convention itself contains no provisions concerning the technical requirements to which installations and rigs must conform, the Commission has adopted a number of decisions in this regard. Furthermore, in its Strategy for the Protection of the Marine Environment of the North-East Atlantic 2010-2020 it devotes a specific section to the Offshore Oil and Gas Industry, in which it proposes to"[improve] management mechanisms so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected". Its targets include a reduction of oil in produced water discharged into the sea and, to this end, the development of Best Available Techniques (BAT) and Best Environmental Practices (BEP)[13].

(ii) *The Mediterranean Sea*

As far as the Mediterranean Sea is concerned, the principal legislation comprises the Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (adopted in 1976 and amended in 1995) to enlarge its goals, together with some of its accompanying Protocols, especially that for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil (commonly referred to as the Offshore Protocol, adopted in Madrid in 1994 and entering into force in 2011). The Protocol contains two "general undertakings": to take, individually or through cooperation with other States, all appropriate measures to "prevent, abate, combat and control pollution" from activities in the area, ensuring, *inter alia*, "that the best available techniques, environmentally effective and economically appropriate, are sued for this purpose"; and to "ensure that all necessary measures are taken so that activities do not cause pollution"[14]. It envisages an authorization system based on compliance with a series of requirements[15]. It also contains a series of restrictions on harmful or

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Guidelines for Offshore Oil and Gas Development. These guidelines, first adopted in 1998 and subsequently revised in 2007 and 2015, respectively, contain "general and industry-specific examples of Good International Industry Practice", indicating the"performance levels and measures generally considered to be achievable in new facilities by existing technology" with regard to "air emissions", "wastewater discharges", "solid and liquid waste management"; "noise generation" and "spills".

[13] OSPAR Commission: The North-East Atlantic Environment Strategy. Strategy of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic 2010-2020.

[14] Art. 1.

[15] Arts. 4-7.

noxious substances and materials, sewage, oily mixtures, drilling fluids and garbage[16], together with various safeguards (safety measures, contingency planning, reporting measures and mutual assistance in cases of emergency)[17]. Further provisions include those concerning the removal of installations[18], specially protected areas[19] and cooperation[20].

The European Union acceded to the Offshore Protocol in December 2012, but paradoxically, despite being the place of its adoption (Madrid) and acting as its depository, Spain has yet to ratify it. The EU Council, in its Decision to accede to the Protocol, explained that the discovery of large fossil fuel reserves in the Mediterranean makes it likely that oil and gas exploration and exploitation activities will increase in the near future, referring to the existence of over 200 active offshore platforms in the Mediterranean at the end of 2012, with more in the planning stage. Consequently, as a result of "the semi-enclosed nature and special hydrodynamics of the Mediterranean Sea, an accident of the kind that occurred in the Gulf of Mexico in 2010 could have immediate adverse transboundary consequences on the Mediterranean economy and fragile marine and coastal ecosystems"[21].

(iii) *Spain and The Safety of Offshore Oil and Gas Operations Directive*

The 2010 *Deepwater Horizon* disaster led to the adoption of the Safety of Offshore Oil and Gas Operations Directive, adopted in 2013[22] and giving Member States until 19 July 2015 to bring into force the laws, regulations and administrative provisions necessary to comply with its provisions[23]. Its principle objective, outlined in Article 1, is to establish minimum requirements for preventing major accidents in offshore oil and gas operations and "limiting" their consequences. To this end, the directive establishes a series of essential elements, the first being that in order to grant or transfer licences to carry out offshore oil and gas operations States shall take into account the "capability of an applicant"[24]. Furthermore, States shall ensure that operators and owners establish "schemes for independent verification", and prepare a description of such schemes, without prejudice to the responsibility of the said operators or owners for the correct and safe functioning of the equipment and systems under verification[25]. In the case of situations of emergency, States are to ensure that internal emergency response plans prepared by operators or owners fulfil certain requirements including "an analysis of the oil spill response effectiveness", and are put into action without delay to respond to any major accident or a situation where there is an immediate risk of a major accident, as well as being consistent with the external emergency response plan prepared by States themselves[26]. Regarding liability, the licensee oil and gas companies shall be "financially liable for the prevention

[16] Arts. 8-12.
[17] Arts. 15-19.
[18] Art. 20.
[19] Art. 21.
[20] Arts. 22-27.
[21] Paras. 4 and 10 of the Council Decision on the accession of the EU to the Offshore Protocol.
[22] OJEU L178/66, 12 June 2013.
[23] Art. 41.
[24] See Arts. 3-9.
[25] Art. 17.
[26] Arts. 14 ff.

and remediation of environmental damage" caused by operations carried out by them or by other operators on their behalf[27]. Cooperation between Member States in various areas is also envisaged, including the exchange of knowledge, information and experience.

(2) Spanish practice and the law

Law 34/1998, 7 October, on the Hydrocarbons Sector, regulates, amongst other activities, "the exploration, prospecting and exploitation of hydrocarbon deposits and subterranean storage facilities"[28]. According to the law, the General State Administration is responsible for granting exploration authorisations, prospecting permits and exploitation licenses in marine subsoil areas. A prospecting permit gives the holder the exclusive right to prospect, in the area to which it refers, for hydrocarbons and subterranean storage facilities for them, in the conditions determined by the regulations and the previously approved prospecting plan[29]. The granting of a prospecting permit gives the holder the exclusive right to obtain exploitation licenses, which in turn enable their holders, as well as to carry out prospecting work in the specified area, to exploit the resources they discover, either by extracting hydrocarbons or by using underground structures as storage facilities for hydrocarbons of any kind.[30]

The Law 34/1998 also contemplates, with regard to operations carried out in the marine subsoil, that the activities performed "in the subsoil of territorial waters and other sea bottoms under Spanish sovereignty shall be regulated by this Act, by legislation in force covering the coastline, territorial waters, exclusive economic zone and continental shelf, and by the international agreements and conventions to which the Kingdom of Spain is party"[31]. Furthermore, "when activities take place in the said spheres, regardless of whether they affect land areas or not, a prior report by the Autonomous Region affected will be a mandatory requirement in the procedure for granting licences to exploit subterranean hydrocarbon deposits and subterranean storage facilities"[32].

In line with the provisions contemplated by LOSC for the protection and conservation of the marine environment in the different spaces under national jurisdiction and Directive 2008/56/CE, of 17 June 2008, establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive)[33], Law 41/2010, 29 December, on the Protection of the Marine Environment is designed to establish "the legal regime covering the adoption of the necessary measures to achieve or maintain the good environmental status of the marine environment by means of planning, conservation, protection and improvement"[34]. Similarly, Law 21/2013, 9 December, on Environmental Assessment (transposing the 2011 EU Directive on the assessment of the effects of

27 Art. 7.
28 *BOE* No. 241, 8 October 1998. Arts. 1(2)(a) and7.
29 Art. 9.
30 *Ibíd.*
31 Art. 32.
32 *Ibid.*
33 OJEU L164, 25 June 2008.
34 *BOE* No.317, 30 December 2010 (art. 1).

certain public and private projects on the environment[35]), includes activities relating to the "exploitation or use of natural resources or the soil and subsoil, as well as of marine waters"[36], subjecting them to a series of environmental assessment principles that include the following: "protection of the environment", "precaution", "preventive and precautionary action", "proportionality", "public participation" and "sustainable development"[37].

It is also worth noting that in late 2016 the European Commission requested Spain, together with other Member States (the UK, Bulgaria and Poland) to fully transpose the Directive on safety in offshore oil and gas operations, still pending at the time[38]. This was finally achieved with the promulgation of Royal Law-Decree 16/2017, 18 November, establishing safety requirements for the prospecting and exploitation of oil and gas in the marine environment[39].

Similarly, it should be noted that the Spanish National Security and Maritime Security Strategies, in line with the EU Maritime Security Strategy, introduce a goal of maritime security that takes as one of its starting points energy vulnerability as a threat to be faced. These documents are intended, amongst other related objectives, to promote a policy of security in maritime areas in order to maintain freedom of navigation and protect maritime traffic and critical maritime infrastructures; protect and preserve the coastline, marine resources and the marine environment; and prevent and respond to catastrophes or accidents occurring in the marine environment[40].

Although oil and gas prospecting on dry land in Spain dates back to the nineteen-forties, it is common knowledge that results in terms of the actual exploitation of such resources have been few and far between[41], and that the "small number of Spanish oilfields and the low level of production, which is practically testimonial", as acknowledged by the competent Ministry in its latest reports, means that Spain has to import almost 100% of the oil it consumes[42]. As far as offshore oil and gas exploration is concerned, the outlook is equally pessimistic, although there have been moments when expectations were raised by indications of the possible existence of submarine deposits, particularly off the Canary Islands. This led to a temporary change in the *status quo*, with divided opinions in at least part of the Spanish population regarding the beneficial nature of activities of this kind. The discovery of oil in 2014 by the Anglo-Turkish company Genel Energy in waters under Moroccan

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35 OJEU L26, 28 January 2012.

36 *BOE* No. 296, 11 December 2013. Art. 5(3)(b).

37 Art. 2.

38 See the Proposal for a Draft Bill establishing safety provisions in the exploration and exploitation of hydrocarbons in the marine environment (General Directorate for Energy Policy and Mines, in Spanish only) and the Report on the said Proposal (also in Spanish only).

39 *BOE* No. 280, 18 November 2017.

40 Presidency of the Spanish Government: The National Security Strategy: Sharing a Common Project (2013) and The National Security Strategy (2017); Presidency of the Spanish Government: National Maritime Security Strategy (2013).

41 Cf. Deloitte and Stevens & Bolton, *Civil liability, financial security and compensation claims for offshore oil and gas activities in the European Economic Area. Final Report*, 14 August 2014 (European Commission - DG Energy), at pp. 41-42.

42 Spanish Ministry of Industry, Energy and Tourism, *La EnergíaenEspaña2013*, Madrid, 2014,at p. 140 e *id.*, at p. 97. The report highlights the additional difficulties caused by the adverse crude oil price environment, the complexity of environmental regulations and growing social awareness.

For a study of Spain's position in thisregard, see G. Escribano, "La seguridad energética española en un escenario en transición", *166 Cuadernos de Estrategia* (Energía y Geoestrategia 2014, Ministerio de Defensa, Madrid, 2014),pp. 93-125.

 DOI: 10.17103/sybil.21.24

jurisdiction (at the *Sidi Ifni Musa-1* well, located off the coast of Agadir at a depth of 2825 m under the seabed) fuelled expectations of hydrocarbons also being found in nearby waters, this time under Spanish jurisdiction, at approximately 60 km from Lanzarote and Fuerteventura and at a depth of 8500 m[43], where the Spanish oil company Repsol was prospecting. These hopes were dashed, but prospecting continued at different stages in other locations (e.g. off the Mediterranean coast, between Malaga and Almeria, by CNWL Oil España and Repsol; near Tarragona, by Repsol; off the Costa Brava and Valencia by Capricon Spain Limited; between the Costa Brava and the Balearic Islands by Spectrum Geo Limited; off the Balearic Islands by Cairn Energy[44]; off the Costa del Sol by Repsol and the Canadian company Chinook[45]; or by Repsol, this time for gas, off the coast of Biscay).

The most controversial of all the above-mentioned projects was the one carried out in waters off the Canary Islands. The Spanish government, when justifying its decision to authorise Repsol to prospect for oil, cited three major reasons: firstly, the potential beneficial effect of the discovery and exploitation of hydrocarbon deposits on oil imports, and thus on Spain's energy dependency; secondly, increased earnings (in this regard, the Autonomous Region of the Canary Islands would receive extraction royalties to compensate for the risks involved); and finally, the positive impact on employment statistics. The situation, however, produced a lively reaction with the regional government of the Canary Islands changing its initially favourable posture to a negative one, joining the ranks of the *Cabildos* (a form of local administration peculiar to the Canaries), ONGs and other members of civil society. Their most serious objections concerned the high levels of risk generated by prospecting for the protection of the environment, biodiversity and the local population's income and way of life, which are fundamentally dependent on tourism. In 2014 the Spanish government approved an environmental impact assessment submitted by Repsol. In June of the same year the Supreme Court turned down the seven appeals lodged against the prospecting project by the Regional Government of the Canary Islands and environmental organisations such as Greenpeace, Oceana and the World Wildlife Fund, amongst other institutions, giving the go-ahead for prospecting to commence later in the year[46]. In early 2015, however, Repsol cancelled its exploration activities in the Canary Islands on the basis that the gas they had found was of insufficient quantity and quality to ensure the viability of its commercial exploitation.

In the case of gas Spain is a net importer, producing practically no gas of its own[47]. On the other

[43] See *El País*, 21 October 2014.

[44] This project for test drillings close to Ibiza, for which permission was sought by Cairn Energy, led to demonstrations in the Balearic Islands in late October 2014, and to the posterior extinction of permits; see *El Mundo*, 2 June 2015.

[45] The Spanish Ministry of Agriculture, Food and the Environment turned down the environmental impact assessment submitted by Chinook for its project off the coast of Granada and Malaga in late October 2014. According to the NGOOceana, in some cases companies provide insufficient information by giving "surface data even though the activities are to take place underwater", omitting to include certain species and habitats, etc.; seeMálaga y Granada se salvan de lossondeos de hidrocarburos (2014).

[46] Regarding this case, see J. Sanz Larruga, "Ante la conflictividad ambiental que viene del mar: el caso de los sondeos petrolíferos en Canarias", 99-100*Revista Vasca de Administración Pública* (Special Issue May-Dec. 2014), pp. 2703-2722.

[47] In 2015 the relevant Ministry described the national production of gas, standing at a mere 776 GWh, as practically zero. At 31 December of the same year only one license had been issued for the specific exploitation of gas in marine areas: the *Poseidón* field, off the coast of Huelva; Ministerio de Industria Energía y Turismo, *La Energía en España 2015* (Madrid, 2016), at pp. 99 and 106.

hand, the country boasts the largest LNG regasification capacity of all European nations and in this sense is a major player in guaranteeing the supply of gas on the continent. However, it has no floating regasification plants[48], whose existence would undoubtedly confer additional advantages[49]. Spain also imports natural gas through two one-way underwater pipelines, one between Morocco and Tarifa and the other between Algeria and Almeria[50], the latter through the underwater gas pipeline *Medgaz*, operative since 2011.

In this context, reference should also be made to the controversial *Proyecto Cástor*, a large-scale underground natural gas storage facility located in the marine subsoil approximately 21 kilometres off the coast of Castellón and authorised by means of a Royal Decree in 2008[51]. The approximately 500 tremors recorded in 2013 (reaching magnitudes of up to 4 degrees on the Richter Scale and thus being felt by the local population) generated a great deal of controversy, leading the licence-holder to cancel the project. The Spanish government cancelled the licence the following year, giving the company a sum in compensation and ordering the "mothballing" of the underground storage facility and prohibiting any further injection or extraction of natural gas[52]. A subsequent report produced in 2017 by scholars at MIT and Harvard University confirmed that the tremors were caused by gas being injected into the underground storage facility, whilst exonerating both the operator and the government from liability on the grounds that it was "unreasonable to expect that a study with industry-standard methodologies would have reached these conclusions ahead of the injection"[53]. The case gave rise to several court proceedings, all of which are still pending resolution, while further technical reports have been commissioned to determine the best way to move forward. The gas already injected has thus not been extracted and no moves to dismantle the facilities have as yet been made. The environmental problems generated by this project, combined with its high financial costs (estimated at over 4000 million Euros, of which a significant amount was publicly funded), have led to calls from a number of environmental organisations for protocols to be put in place to avoid the recurrence of absurd ventures of this kind, given the unacceptably high levels of financial and

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It should be noted that in the case of the *M/V "Louisa"*, which reached the ITLOS, the Applicant stated that the ship, sailing under the flag of Saint Vincent and the Granadines, had been sent to Spain in 20014 to carry out survey activities relating to the possible existence of gas in the Bay of Cadiz. The permit granted by the Spanish Directorate-General for Coasts, however, only referred to the 'mapping' of the seabed and possible sampling. The vessel was not authorised to carry out any subsequent prospecting relating to the existence of oil and gas: see Case No. 18, The *M/V "Louisa" Case* (Saint Vincent and the Granadines v. Kingdom of Spain).

48 The six facilities currently in operation are all shore-based.

49 The U.S. Energy Information Administration highlights their flexible deployment capabilities, their cost-effectiveness and the fact that countries beginning to import LNG (Egypt, Jordan and Pakistan in 2015) were opting for this technology; IEA: World Energy Outlook (2016)(DOE/EIA-0484, 2016), at p. 51.

50 Ministerio de Industria Energía y Turismo, *supra* n. 47, at p. 329.

51 Royal Decree 855/2008, 16 May, granting Escal UGS, S. L. an operating licence for the underground storage of natural gas going by the name of "Castor", *BOE* No. 136, 5 June 2008.

52 Royal Decree-Law 13/2014, 3 October, on the adoption urgent measures concerning the gas system and ownership of nuclear power stations, *BOE* No. 241, 4 October 2014. Nevertheless, the Spanish Constitutional Court considered afterwards (December 2017) that a law should have been used instead a Royal Decree-Law since there was no justification of an extraordinary and urgent necessity.

53 *Coupled Flow and GeomechanicalModeling,and Assessment of Induced Seismicity, at the Castor Underground Gas Storage Project. Final Report* (April 24, 2017), at p. 74.

environmental risk they involve.

A further point to note is the possible existence of methane hydrate, a fossil fuel with potentially negative consequences for the environment[54], under the seabed in Spanish waters. To date, however, the only indications available point to the existence of deposits in the Gulf of Cadiz and the Alboran Sea.

Finally, the Spanish government appears to be aware of the existence of a mineral-rich underwater mountain in waters to the south of the Canary Islands. More specifically, British scientists claim to have discovered what they calculate to be 2670 tonnes of tellurium, a scarce substance of great strategic importance in the energy sector due its use in the production of batteries, wind turbines and solar panels[55].

(C) SPAIN AND MARINE RENEWABLE ENERGIES

(1) Kinds of marine renewable energies and general overview

Marine renewable energies are a form of renewable energy deriving from the various natural processes that take place in the marine environment. There are four kinds of such energy, namely ocean energy; wind energy from turbines located in offshore areas, geothermal energy derived from submarine geothermal resources; and bioenergy derived from marine biomass, particularly ocean-derived algae. In turn, renewable ocean energy comes from six distinct sources, each with different origins and requiring different technologies for conversion, but having in common the fact that they are all obtained from the potential, kinetic, thermal and chemical energy of seawater. These six distinct sources are waves, tidal range, tidal currents, ocean currents, ocean thermal energy conversion and, finally, salinity gradients. More specifically, waves, which are generated by the action of wind on water, produce energy that can be harnessed. With regard to tides, their amplitude generates energy through the cyclical rise and fall in the height of the ocean. The same is true of tidal currents, which are generated by horizontal movements of water, their flows resulting from the rise and fall of the tide. Ocean currents, which exist in the open ocean, are another source of energy. Ocean thermal energy conversion, on the other hand, is a technology for taking advantage of the solar energy absorbed by the oceans, based on the temperature difference between the top layers of water and those at a greater depth, which are much colder. However, a minimum temperature difference of 20°C between layers is needed in order to harness this energy, which can therefore only be produced in certain parts of the world, such as equatorial and tropical regions. Finally, salinity gradients arise from the mixing of freshwater and seawater, which takes place at river mouths and releases energy as heat. This energy can be harnessed through a process of inverse electrodialysis, based on the difference in

[54] In terms of the atmospheric emissions produced by its burning and the deterioration of marine ecosystems as a result of its mining. See, for example, Greenpeace, Hidratos de gas (Briefing, 2008, in Spanish).

[55] See D. Shukman, Renewables' deep-sea mining conundrum, *Science & Environment* (11 April 2017).

chemical potential between freshwater and seawater, or through an osmotic power process based on the natural tendency of the two types of water to mix together[56].

The development status of these technologies differs widely, although most of them are still either embryonic or in their infancy, ranging as they do from the conceptual stage to the prototype stage, taking in the pure research and development stage on their way[57]. The IPCC highlights tidal range technology as being the most advanced, and in fact as the only form of ocean energy technology (excluding marine wind energy technology) that can currently be considered 'mature'.[58] Although marine energy technologies are still generally at an early stage of development, it has to be said that they could make much swifter progress if investment in them were higher. Prominent among the leaders in the development and commercialisation of marine renewable energy technologies are nations such as the United Kingdom, Ireland, the United States, Australia, New Zealand, Finland, Denmark, Belgium, France, Germany and Japan[59]. Nevertheless, the list of leading countries in this sector varies according to the source consulted. For example, the countries mentioned in the Report of the UN Secretary-General on marine renewable energies, published in 2012, do not exactly coincide with those that appear in other places, such as specialist websites[60]. Furthermore, the economic crisis which has been affecting a number of the world's developed countries has had necessarily a negative effect on the flow of investment towards technologies of this kind.

Although forecasts vary widely, depending on who is making the prediction, a prudent approach indicates that it any significant deployment of ocean energy technologies is unlikely to occur before 2030, whilst commercial deployments are expected to continue expanding beyond 2050.[61] It remains to be seen, therefore, when these technologies will be able to make a significant contribution to the global energy supply. At the moment, only marine wind energy can be considered to be relatively close to beginning to be competitive with fossil fuels or nuclear energy. However, it must be said that in spite of the incipient status of all marine renewable energies forecasts of their potential are on the whole clearly optimistic. According to the IPCC, the potential for technically exploitable marine renewable energies, marine wind power excluded, is estimated at some 7,400 exajules (EJ) per year.[62] This figure is considered to be more than enough to meet human energy needs not only at present, but also well into the future.[63]

If we take the parameters of sustainable development, and by extension its three constituent dimensions, namely its economic, social and environmental aspects, it is clear that marine renewable

56 IPCC, *Special Report on Renewable Energy Sources and Climate Change Mitigation* (2011), at pp. 503 ff.

57 *Ibid.*, Chap. 6(3)(1).

58 *Ibid.*

59 Nevertheless, the list of leading countries in this sector varies according to the source consulted. For example, the countries mentioned in the Report of the UN Secretary-General on marine renewable energies, published in 2012, do not exactly coincide with those that appear in other places, such as specialist websites. See, in any case, the above-mentioned report, UN Doc. A/67/79 (dated 4 April 2012), at p. 8.

60 See, in any case, *ibid.*

61 IPCC, *supra* n. 56, at p. 527.

62 *Ibid.*, at p. 501.

63 *Ibid.* and UN Doc. A/67/79, *supra* note n. 59, at pp. 6-7.

 DOI: 10.17103/sybil.21.24

energies score very highly in this regard, as the UN Secretary General's 2012 report demonstrates[64]. A similar conclusion was also reached in the UNICPOLOS meeting devoted to marine renewable energies[65]. It is also behind the Agenda 2030, in particular regarding SDGs 7 and 14. Finally, is also being supported by the EU. It is essential to bear in mind that blue growth is one of the main pillars of the EU's Integrated Maritime Policy (IMP) since 2012. In this sphere, the EU has carried out a strategic assessment of the potential for cooperation in the context of Blue Growth in the various sea basins concerned and has sponsored a series of studies, through DG MARE, to analyse its blue growth potential, examining in detail each of the different development models of its maritime industries, with the aim of drafting specific plans for the future. Another highlight is the Communication on *Blue Energy: Action needed to deliver on the potential of ocean energy in European seas and oceans by 2020 and beyond*, adopted in 2014[66]. It includes, in addition to an overview of the current situation and the main opportunities and threats remaining, an "Action Plan for Ocean Energy" that envisages a two-step approach: a first phase (2014-16) that includes the setting up of an Ocean Energy Forum to bring stakeholders together in order to develop a shared understanding of the main problems and devise workable solutions, as well as the development of an Ocean Energy Strategic Roadmap; and a second phase (2017-2020) that contemplates the possibility of developing a European Industrial Initiative based on the outcomes of the first stage[67].

Although it is true that certain problems or challenges can always be mentioned, particularly in the economic and environmental spheres[68], the overall balance is nevertheless clearly favourable, since the benefits of sustainable development from all angles are self-evident (job creation, stimulus to the economy, improved access to energy, energy security, reduction of emissions, climate change mitigation, zero risk of hydrocarbon spills and a reduction in the probability of hazardous accidents, to name but a few). Nonetheless, the existing regulatory framework has many gaps"[69].

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64 UN Doc. A/67/79, pp. 4 ff. See also M. Abad Castelos, "Marine Renewable Energies: Opportunities, Law, and Management", 45 *Ocean Development & International Law* (2014), pp. 221-237; at p. 232.

65 See, for example, 25 *Earth Negotiations Bulletin* (Number 88, 4 June 2012), at p. 5; and *Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its thirteenth meeting*, Doc. A/67/120, 2 July 2012.

66 COM (2014) 8 final, 20 January 2014.

67 Particularly at pp. 5-9. A few months later, in its Communication *Innovation in the Blue Economy: realising the potential of our seas and oceans for jobs and growth*, also dated 2014, the Commission highlights, amongst other aspects, the need to increase knowledge of our seas in order to promote growth in the blue economy; COM (2014) 254 final, 8 May 2014.

68 It must be acknowledged that issues can also rise in the social sphere, for example a rejection of the more visible kinds of technology in certain surroundings; see S. Kerr, J. Colton & G. Wright, "Rights and ownership in sea country: implications of marine renewable energy for indigenous and local communities", 52 *Marine Policy* (2015), at pp. 108-115. Above all, however, the main challenges are to be found in the economic sphere, due to the huge costs involved and the massive investments needed, and in the environmental sphere, resulting from other possible negative impacts; see G. Wright, "Strengthening the role of science in marine governance through environmental impact assessment: a case study of the marine renewable energy industry", 99 *Ocean & Coastal Management* (2014), pp. 23-30. Nevertheless, further research is needed to determine the scope of certain potential problems (e.g. the impact of certain devices on marine fauna and the possible adverse impact of tidal barrages).

69 E. J. Martínez Pérez, "The environmental Legal Framework of the Development of Blue Energy in Europe", *The Future of the Law of the Sea. Bridging gaps between National, Individual and Common Interests* (G. Andreone Editor, Springer, 2017), pp. 127-144, at p. 142.

(2) Spanish practice and the law

Without prejudice to the above, however, it should be realised that it will never be possible to obtain all of the various kinds of renewable energy in all possible surroundings. We have seen how some kinds of marine energy are dependent on certain particular physical characteristics such as temperature or the existence of currents, amongst other[70]. The marine renewable energies best suited to Spain's geography are those generated by wind, waves and currents. This notwithstanding, no offshore wind farms have been built in Spain to date[71]. In the case of energy generated by waves and currents, a number of R&D projects are currently under way along the north coast of Spain, especially in waters off the coast of Bilbao[72].

The starting point for Spanish legislation in this sphere is once again to be found in the Spanish Constitution, which in Article 149.1.22ª gives the State, rather than the Autonomous Regions, exclusive competence over "legislation, regulation and concession of hydraulic resources and development when the waters flow through more than one Autonomous Region, and authorisation for hydro-electrical installations when their development affects another Community or when energy transport goes beyond its territorial area". In consonance with the foregoing, Royal Decree 661/2007, 25 May, which regulates electricity production under the special regime, states that administrative authorisation for the construction, operation, substantial modification, transmission and closing down of facilities "located out to sea" is the competence of the Central State Government, after prior consultation with the relevant Autonomous Regions in each case, and without prejudice to the competences held by other ministerial departments[73]. The same year also saw the coming into force of Royal Decree 1028/2007, 20 July, establishing the administrative procedure for filing requests for authorisation of electricity generating facilities in territorial waters[74], subsequently partially modified by Royal Decree 1485/2012, 29 October[75] and Royal Decree 1074/2015, 27 November[76]. Wind technology lies at the heart of Royal Decree 1028/2007, whose principal procedure is devoted to this type of renewable energy. Nevertheless, the regulation contemplates a simplified procedure for constructing and enlarging renewable energy production facilities located in territorial waters constituted by "marine energy generation technologies (...) other than wind power"[77]. It should also be noted that although its wording would seem to indicate that this instrument is only applicable to

[70] See M. Abad Castelos, "The Black Sea and Blue Energy: Challenges, Opportunities and the Role of the EU", *The Future of the Law of the Sea. Bridging gaps between National, Individual and Common Interests* (G. Andreone Editor, Springer, 2017), pp. 145-161.

[71] See the government's Registry of Electrical Energy Production Facilities held by the Ministry of Energy, Tourism and the Digital Agenda, available here.

[72] See more information here. Figures for renewable energies in terms of both consumed output and generation infrastructure are still low in Spain. With regard to the former, at 31 December 2015 renewable energy accounted for 13.9% of total power consumption (with wind energy, mainly land-based, contributing 3.4%), whilst in the case of the latter it represents as much as 34.6% (of which wind energy is responsible for 17.6%); Ministerio de Industria Energía y Turismo, *supra* n. 47, at pp. 186 *ff.*

[73] Royal Decree, 25 May 2007; *BOE* No.126, 26 May 2007 (art. 4(2)(b)).

[74] Royal Decree, 20 July 2007; *BOE* No.183, 1 August 2007.

[75] *BOE* No. 269, 8 November 2012.

[76] *BOE* No. 290, 4 December 2015.

[77] Art. 32.

 DOI: 10.17103/sybil.21.24

facilities located in territorial waters, in reality it also contemplates the use of the procedure it regulates to "wind power generation facilities intended to be located in the adjacent area or in the exclusive economic zone"[78]. Nevertheless, the bulk of the general procedure can be divided into two main stages: firstly, the initial granting of a so-called "zone reservation", by means of the "marine wind power area definition procedure[79], and secondly, the processing of the application for authorisation of the facilities concerned[80]. Each of these two stages is accompanied by its own environmental impact assessment[81].

The regime contemplated by Royal Decree 1028/2007, although in general terms deserving of a positive appraisal, is not wholly free from reproach from the standpoint of international law. In this regard, criticism can be levelled at the fact that the scope of the application of environmental impact assessments it contemplates is restricted to the national sphere, since it is subject to Legislative Decree 1302/1986, of 28 June, on the assessment of environmental impact and its secondary legislation. This is in breach of a rule of international law that contemplates the requirement "to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource"[82]. In this respect the Law on Environmental Assessment 21/2013 makes no mention either of this matter amongst the principles of environmental assessment applicable to new projects[83].

Another target for criticism is that according to the current domestic legislation in force, Royal Decree 1028/2007, there has to be an initial competitive procedure in order to analyse and select the best project. As has quite rightly been put forward by scholars of administrative law doctrine, it would be necessary to "postulate the realization, the programmatic nature of sector development plans within the overall strategic plan for the management of the seas". This would enable the government to predetermine, "in the light of all available information, the location of wind farms, thereby avoiding the opportunism of the competitors and the unwarranted lamentable speculation over facilities occupying a location in the public domain or *res communis* and using a resource, the wind, which is also non-tradable"[84]. Indeed, this is the methodology favoured by other European countries (the United Kingdom, Germany or France, amongst others), which predetermine the areas considered

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78 By virtue of Supplementary Provision Number Five.

79 Art. 9 ff.

80 Art. 24 ff.

81 In addition to the text of the said Royal Decree (arts. 23 & 28), also see I. González Ríos, *Régimen jurídico administrativo de las energías renovables y de la eficiencia energética* (Thomson Reuters-Aranzadi, Navarra, 2011).

82 Recent international jurisprudence has firmly established this idea, in particular by the International Court of Justice in 2010 on settling the dispute between Argentina and Uruguay regarding the installation of pulp mills on the River Uruguay; *Case concerning Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay; 2010 ICJ, at par. 204- 205).

83 It only refers to "cooperation and coordination between Central State Government and Autonomous Regions" (art. 2(f)).

84 B. Soro Mateo, "La autorización de parques eólicos marinos en España", *Revista Catalana de Dret Ambiental* (2011,Issue 2), pp. 1-43; at p. 39. The author goes on to point out that "a competitive procedure is justifiable in the sphere of public procurement, as well as in relation to the promotion of policies or the convening of benefits, or in regard to the allocation of scarce goods, but not, as in the case of the current object of study, Royal Decree 1028/2007, to favour competition over a project whose initiative is perfectly defined and proceeds from the private sector. This (...) only discourages entrepreneurship in this field"; *ibid.*

appropriate for installing offshore wind farms. As the Spanish Maritime Cluster has highlighted, to do the opposite, might, "as has indeed happened", lead to various bidders applying for areas in which to install their wind farms "that overlap with each other"[85].

A further point to be taken into account is the adoption of the Law 2/2011, 4 March, on Sustainable Economy[86] within the framework of the *Strategy for a Sustainable Economy*, passed by the Cabinet in late 2009 and which contemplated a reform package based on a series of strategic options, one of these being the promotion of activities related to clean energy and energy saving. Part III of the Act contains provisions relating to various areas of environmental stability, a platform for introducing a number of overarching reforms in the sectors concerned, that of the "energy model" amongst them. The chapter devoted to the sustainability of the energy model includes the major principles applicable to the field, namely guaranteed security of supply, economic efficiency and environmental protection. It also covers domestic targets for 2020 regarding energy saving, energy efficiency and the use of renewable energies, in line with those laid down in the EU's 20-20-20 Directive[87], although it makes no specific mention of marine renewable energies[88].

The Law 21/2013 on Environmental Assessment, which transposes the 2011 EU Directive on the assessment of the effects of certain public and private projects on the environment[89], includes activities relating to the "exploitation or use of natural resources or of the soil and subsoil and of marine waters"[90] and subjects them to a series of environmental assessment principles including "environmental protection", "precaution", "preventive and precautionary action", "proportionality", "public participation" and "sustainable development"[91].

Similarly, and also in response to the challenge laid down by the EU's 20-20-20 Directive to ensure that at least 20% of Spain's gross final energy consumption is provided by renewable sources, the Spanish 2011-2020 *Renewable Energy Plan* for the first time devotes a specific section to marine energies[92], starting by acknowledging that "the seas and oceans contain the world's largest solar energy collector and storage system, making them an enormous potential source of energy"[93]. The Plan also points out that the initial consortia formed by SMEs and Universities have opened the way for greater involvement on the part of large private corporations[94]. It is also relevant to add, in this regard, that the Spanish Maritime Cluster (CME), which brings together "all Spain's domestic industries, services and economic activities connected with the sea"[95], has stressed the convenience of recognising the positive effect that the development of a new maritime industry linked to renewable energies

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85 Clúster Marítimo Español, *Oportunidades de negocio de la energía eólica marina en el sector marítimo español* (Madrid, 2011), at 63.

86 *BOE* No. 55, 5 March 2011.

87 OJEU L140/16, 05 June 2009.

88 See Arts. 77-80.

89 *Supra* n. 35.

90 Art. 5(3)(b).

91 Art. 2.

92 Section 4(4), at p. 191 ff.

93 IDAE, *Plan de Energías Renovables 2011-20*(Madrid, 2011), at p. 191.

94 *Ibid,* p. 193.

95 See more information here.

could have on certain disadvantaged areas of the country, citing Ferrol, the Bay of Cadiz or Campo de Gibraltar as examples, amongst others[96].

A raft of Spanish companies of all sizes and degrees of diversification of their activity are currently involved in marine energy projects. Some of these are 'traditional' energy companies that have started to embark on renewable energy projects (e.g. Iberdrola, Repsol or Cepsa), whilst others focus exclusively on producing clean energy or simply manufacturing products for the sector (e.g. Acciona, Renovalia, Tecnalia or Ingeteam). It must be said, however, that some of these companies have found themselves in serious financial difficulties (one being Gamesa, which was taken over by Siemens Wind Power, giving birth to a major player in the wind energy sector). At the same time, we also encounter the paradox of certain Spanish companies being involved in renewable energy projects abroad, but not at home.

To summarise, it is apparent that Spain faces a number of specific barriers of different kinds that not only relate to its physical geography[97], or are of an economic, social and environmental nature[98], but also derive from its administrative structure. These obstacles are the reason for the cancellation of many renewable energy projects, particularly those in the field of marine wind energy, after first being submitted. Above all, serious impediments have been identified in the granting of permits, arising from the lack of coordination between the different competent authorities concerned, leading to extremely long delays[99]. To all of these we must add a series of legal hurdles, amongst them recent decisions leading to the introduction of damaging regulatory measures with retroactive effect that reflect a lack of political will to come down firmly on the side of renewable energy and have done serious harm to the sector in Spain[100]. What needs to be done is precisely the opposite, namely to consider specific measures that will promote the use of marine renewable energies.

(D) CONCLUSIONS

Both the sea and its non-living resources can be considered strategic assets for Spain. Their legal regulation involves a number of important sectors of the international legal system, the most

[96] Clúster Marítimo Español, *supra* n. 86, at p. 20.

[97] Spain's continental shelf is very deep in many places, making it difficult to anchor fixed wind turbines to the seabed. In cases such as these floating turbines are a better alternative.

[98] See E. J., Martínez Pérez, *supra* n. 70, at pp. 138 ff; also *id.* "El marco jurídico internacional y comunitario con incidencia en la instalación de parqueseólicos", *49 Revista de EstudiosEuropeos*(July-December 2008), pp. 75-96 and V. L. Gutiérrez Castillo and J. J. García Blesa, "The environmental protection regimes governing marine renewable energies in the EU and their implementation in the marine and coastal areas of the South of Spain", *17 Spanish Yearbook of International Law* (2011-12).

[99] See A. Colmenar-Santos, J. Perera-Pérez and D. Borge-Díez, "Offshore wind energy: A review of the current status, challenges and future development in Spain", *64 Renewable and Sustainable Energy Reviews* (2016), pp. 1-18; at pp. 6ff.

[100] See Royal Decree-Law 1/2012, 27 January, which suspended, with retroactive effect, certain economic incentives for renewable energies in Spain (whereby the pre-allocation of remuneration procedures for new facilities producing electricity from cogeneration, renewable energy resources and waste is suspended; *BOE* No. 24, 28 January 2012). This was followed by Royal Decree-Laws 2/2013, on urgent measures in the electrical system and financial sector (*BOE* No. 29, 2 February 2013) and 9/2013 whereby urgent measures to ensure the financial stability of the electrical sector are adopted (*BOE* No. 167, 13 July 2013). See also Law 24/2013 on the Electrical Sector (*BOE* No. 310, 27 December 2013).

significant being those related to the law of the sea and energy law, as well as the regulations governing the transport and transmission of energy and the protection of the marine environment. Also to be taken into account within this sphere are the principles of sustainable development and precaution, given that in addition to enjoying a place in EU law, they undeniably extend not only to the international regulatory framework concerned with this issue but also to that of Spanish domestic law.

A further point to emphasise is the vital role played by companies in the exploitation of non-living marine energy resources, both fossil and renewable. More specific planning and safeguarding of their activity than is at present the case needs to be integrated into Spanish laws and regulations.

Improvements can also be made to the Spanish legislation concerning hydrocarbons. In this regard, despite having somewhat belatedly transposed the 2013 EU Safety of Offshore Oil and Gas Operations Directive, Spain still has other potential actions ahead of it, with the desirability of ratifying the Madrid Protocol deserving particular mention.

In the specific sphere of marine renewable energies, their commercial exploitation should cease to be merely an ideal and transform itself into a reality for Spain in the short to medium term. The main conclusion of this study is thus that a whole raft of possibilities within the field of renewable energies would open up for Spain if the competent political authorities decided for once and for all to follow the path of sustainability signposted by domestic and international instruments (of varying legal scope), with a commitment to making the most of the enormous potential offered by the country's geographical location. This challenge has to date not been faced in a consistent, determined and efficient manner, and it would appear that now is the moment to do so. However, for this to happen a series of necessary conditions must prevail, and in this regard the public authorities will have to plan ahead strategically. Action needs to be taken on a series of interconnected fronts, namely greater investment in RDI, a commitment to paving the way for companies as far as licences and incentives are concerned, and finally, the undertaking of initiatives that will guarantee the existence of a transparent, stable, appropriate and stimulating legal framework.

 DOI: 10.17103/sybil.21.24

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

Marine scientific research

Elena CONDE PÉREZ*

(A) SPANISH LEGAL REGULATION OF MARINE SCIENTIFIC RESEARCH

Spanish legal and administrative practice on marine scientific research (MSR) has been consistent with its positions maintained during the discussions at the Seabed Committee and later, the III United Nations Conference on the Law of the Sea (UNCLOS)[1]. This position was based on the following main premises:

(1) Spain does not distinguish between pure or fundamental MSR and applied MSR but our country considers it necessary to establish a distinction between MSR and "exploitation".

(2) The rule of consent is the general principle, with some nuances, such as possible implied consent under some circumstances and the coastal State's (Spain) obligation to grant consent when some requirements are fulfilled in maritime spaces under the Spanish maritime jurisdiction.

(3) Great interest in international cooperation through several channels: a) publication or dissemination of the results obtained, always bearing in mind the main interests of the coastal state; b) Spanish participation in the scientific expedition and c) cooperation through international organizations.

In accordance with these general principles, in 1970, Spain enacted an administrative act (*Circular*) on rules applying to marine scientific research activities in areas under Spanish maritime jurisdiction, whose general inspiration was maintained in subsequent and current regulation of these activities.

The subsequent regulation of MSR activities followed and is still contained in the current Royal Decree 799/1981, on rules concerning marine scientific research activities in maritime areas under

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[1] On this question, see the contribution in this volume by de Yturriaga Barberán on "Spain at UNCLOS".

 DOI: 10.17103/sybil.21.25

Spanish jurisdiction.[2] Consequently, Spanish regulation of MSR is previous to the entry into force of the LOSC for the country, which happened on 14 February 1997. Though there is a long lapse in time between the two dates under consideration —1981-1997—, the Royal Decree still in force in Spain is clearly influenced by the negotiation of the topic during UNCLOS and the customary regime on the subject. The Royal Decree is also consequent with some other Spanish regulations of new or renewed maritime spaces at the time: the territorial sea[3] and the Exclusive Economic Zone (EEZ)[4] as the Preamble of the Royal Decree reminds.

In its four parts —General provisions, territorial sea, continental shelf and EEZ, and stay in ports— the Royal Decree follows the main provisions of Part XIII LOSC:

(a) General provisions: the Royal Decree is applicable to research states[5] and international organizations[6] and it specifies that MSR cannot be the legal basis for any claim to the marine environment or its resources[7].

(b) Territorial sea: while LOSC[8] contains its most specific regulations concerning MSR in areas under sovereign rights or jurisdiction of coastal States, as is the case of continental shelf and EEZ, Spanish regulation deals in detail with MSR activities undertaken in territorial sea. Recalling that this space is under the total sovereignty of the coastal State, it is easy to understand the provision contained in Article 9.1 by which the results of the scientific expedition will be transmitted to the Spanish Foreign Affairs Department one year after the expedition has finished. However, given the implications of scientific research, this delay becomes unrealistic. Differently from the previous administrative regulation of 1971 that in part was more liberal than current one and provided for the previous contacts between Spanish and foreign scientists, the Royal Decree establishes the contact through diplomatic channels —Article 7 consequent with art 250 LOSC— Article 9(1) considers the possibility of non-sharable data: in that case, the data will be kept by the researching State for its use if needed by interested Spanish departments.

(c) Continental shelf and EEZ: as it has been previously mentioned, it is remarkable that in Spanish regulation the most specific provisions are those related to territorial sea. It could be understood that the legislator did not yet have knowledge of the possible implications of these two new oceanic spaces. In general terms, Spanish regulation follows Part XIII LOSC

2 Royal Decree 799/1981, of 27 February, concerning the Rules Applicable to Marine Scientific Research Activities in Areas under Spanish Jurisdiction (BOE No. 110, 8 May 1981).

3 Law 10/1977, 4 January, on the Territorial Sea (BOE No. 7, 8 January 1977).

4 Law 15/1978, 20 February 1978, on the Economic Zone (BOE No. 46, 23 February 1978).

5 Art. 1.

6 Art. 5.

7 LOSC regulates MSR activities in its Part XIII, providing that all States (not only parties to the LOSC) and competent international organizations have the right to conduct MSR subject to the rights and duties of other States under this Convention (Art. 24(5)). Art. 241 provides that MSR cannot be the legal basis for any claim to the marine environment or its resources.

8 Under Part XIII of LOSC, in internal waters, archipelagic waters and the territorial sea, the coastal state has complete control over MSR: these activities can only be performed with the express consent of the coastal state, which can impose its own conditions. In territorial sea, under the provision of Art. 19(2)(j) passage will be considered non-innocent if it involves research or survey activities.

 DOI: 10.17103/sybil.21.25

provisions[9] but there are some discrepancies with it; for instance, the Royal Decree contains an *ad hoc* procedure —Articles 14 and 15— to obtain Spanish consent to accede to Spanish ports by vessels that are not carrying out or do not try to develop MSR in Spanish maritime spaces, which have been interpreted as a major obstacle to the free development of MSR activities[10].

Considering the Royal Decree in its whole one can draw the following conclusions:

- The consent rule is reinforced, although compared to previous Spanish administrative acts —*Circular* 1970—, the Royal Decree introduces more control in favor of Spain and in detriment of scientific research (Articles 7-9).
- Compared to LOSC, the Royal Decree is more rigorous in some aspects: (1) There is no provision that resembles that of Article 246(3) and no granting of consent under "normal circumstances"; (2) There is no provision for implied consent as in Article 252 LOSC; and (3) Rights of non-coastal or disadvantageous States are not mentioned. As a conclusion, the consent rule is reinforced. However, Spanish legislation is in some aspects more liberal than LOSC: for example, the conditions required by Article 249 LOSC[11] are more lenient than those in Spanish Royal Decree.

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[9] Art. 246 LOSC addresses MSR in the EEZ and continental shelf in a combined set of provisions. Coastal states have general rights to regulate, authorize and conduct MSR in both zones; in consequence, the overriding rule is that MSR in EEZ and continental shelf can only be conducted with the consent of the coastal state. However, there are some provisions that make the process of obtaining this consent easier: Art. 246(3) LOSC: States shall "in normal circumstances" grant consent for research "carried out exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind", and it mandates that coastal states must establish rules and procedures ensuring that such consent will not be delayed or denied unreasonably. Notwithstanding, in Art. 246(5)(a) coastal states enjoy absolute discretion to withhold consent for MSR which is of direct significance to the exploration and exploitation of natural resources, whether living or non-living. This same right is given to coastal States in relation to research, whether pure or applied, if it involves drilling into the continental shelf, the use of explosives, the introduction of harmful substances into the marine environment, or involves the construction, operation, or use of artificial islands and structures. Art.246(6), in relation to continental shelf beyond 200 nm., is interesting as it provides that coastal states may not withhold consent unless the research project refers to specific areas publicly designated by coastal states as areas in which exploration or exploitation is occurring or about to occur. Art. 252 provides for implied consent when the coastal state fails to give its permission or withhold consent within six months of a valid request containing all the information. The information that the researchers must provide at least six months in advance of the expected starting date of the project includes the following data: a) nature and objectives; b) method and means; c) area; d) time period; e) body sponsoring the project and person in charge; f) extent to which the coastal state could potentially participate in the project. This obligation is particularly constringent as under art 246(5)(d) a coastal state may withhold or withdraw consent if the nature or objectives of a research project have been inaccurately documented.

[10] M. Pérez González, "La investigación científica marina y el nuevo Derecho del Mar desde la perspectiva española", 5 *Anuario de Derecho Marítimo* (1986), at 85.

[11] Researchers must respect the right of coastal states to participate or be represented in the project (Art. 249(1)(a) and must provide the coastal state with both preliminary and final reports and conclusions arising from the research (Art. 249(1)(b). Researching states are also under obligation to make the results internationally available as soon as practicable (Art. 249(1)(e) and to remove scientific research installations or equipment once the research project has been completed unless otherwise agreed with the host country (Art. 249(1)(g). When the research is of direct significance for the exploration or exploitation of the natural resources, coastal states may impose conditions (Art. 249(2)) and may insist that their agreement be obtained before the results of any resource-oriented research are made internationally available (Art. 249(2)).

 DOI: 10.17103/sybil.21.25

- Bearing in mind that in 1981 Spain had not yet ratified LOSC, the similitudes between the two regimes are many. The permanence of the same legislation since 1981 is evidence of its relevance to the present day and its customary character.

(B) SPANISH PRACTICAL APPLICATION OF MSR RULES: PROCEDURE AND INSTITUTIONS ENGAGED.

This part of the contribution will consider Spanish practice in MSR from two perspectives: as a coastal state and as a researcher state.

(1) As a coastal State.

As a coastal state, Spanish practice is consequent with the provisions of the Royal Decree 799/1981. In this vein, the administrative procedure starts with the submission of a request for permission to undertake MSR activities in maritime spaces under Spanish jurisdiction —internal waters, territorial sea, continental shelf and EEZ. This request must be submitted six months previous to the starting date of the proposed research project and be made through diplomatic channels, taking the form of *note verbale* that the permanent diplomatic mission of the flag researching vessel addresses to Spanish Department of Foreign Affairs[12]. Article 6(3) of the Royal Decree specifies the information that the foreign researchers must provide, and this Article in general terms follows Article 248 LOSC[13]. The participation of Spanish scientists is not a pre-requisite to giving consent (Article 6(3)(f)), although it is usual in practice, as a courtesy, that this invitation is extended to Spanish scientists. Once the Spanish Foreign Affairs Department has received the advice of the Spanish institutions engaged in MSR, decides to deny its consent (this happens only very occasionally); to ask for more information or some amendments to the researching institutions (Article 7) or to consent (this is the general rule). Once the research expedition is developing its project in areas under Spanish jurisdiction, Spain may ask for a suspension of these activities if it considers that the activities are not being performed in accordance with Spanish legislation or do not follow the program consented to by Spain (Article 12).

MSR files collected at the Spanish Foreign Ministry have been studied in order to write this contribution: in our investigation, we have found that only in very limited cases does Spain deny its consent to MSR activities. This happened, for instance, with the oceanographic campaign that Norwegian vessel *Princess* intended to perform in 2014 in maritime areas near to the island of

[12] Within the structure of the Foreign Affairs Ministry, it is the Under-Directorate-General of Multilateral Economic Relations and Aerial, Maritime and Terrestrial Cooperation which is the department that asks for advice to the following institutions: Defence Ministry; Development Ministry (Directorate-General of Energy Policy and Mines, Directorate-General of Navy and Spanish Division for the Protection of the Oceans); Ministry of Agriculture, Food and Environment (General Secretary of Fisheries, General Directorate of Fisheries Management); Oceanographic Spanish Institute (IEO); Spanish Council for Advanced Scientific Research (CSIC).

[13] The request for Spanish consent must contain the following data: Expected research programme; Name of the researching institution, main responsible person, number of researching staff; Aims of the researching expedition, Method and means to be used. Name of the vessel and main features. Description of the scientific gear; Geographical áreas; Expected dates; Number of vacancies, in case Spain wants to send Spanish scientists to the expedition.

Lanzarote. As some Spanish institutions stated in their advice, the information provided was insufficient. In any, with this scarce information submitted, the Spanish Oceanographic Institute (IEO) considered that the project was a seismic study whose main aim was to obtain a better understanding of the geological resources of the zone, probably related to the existence of fuel deposits in the area. IEO also considered that the methodology to be used was not suitable as it might interfere with areas under Moroccan jurisdiction. Finally, the advice stated that some conservative measures related to marine mammals were not being observed.

Some of the most common requests of consent by researching vessels are related to urgent repairs to submarine cables that pass through many areas under several States' jurisdiction. In these compelling cases in which the proper laying of submarine cables transporting many vital resources for societies are at stake[14], the requirements for six months and even the information programme, are considered leniently, especially if all the countries involved in giving their consent have been positive. In 2016, the MSR expedition of the vessel *Odyssey Explorer* under request of the Bahamas was denied by Spanish authorities: it was supposedly related to repairs to Orval cable[15] and Spanish authorities took into consideration the long and conflictive background of this vessel as regards underwater cultural heritage. In its report denying its consent, Spanish Council for Advanced Scientific Research (CSIC) recalls the *Mercedes* case that confronted "Odyssey Marine Exploration Inc." against Spain in 2011 before United States courts[16] and further incidents with some other countries.

There is no evidence of any relaxed application of these rules to any vessel coming from any country, for vessels coming from EU countries, for example. In fact, most of the research visitors come from EU countries. However, Article 13 of the Royal Decree provides for implied Spanish consent in EEZ and continental shelf in the case of the researching vessel being an international organization of which Spain is a member and Spanish delegates having previously approved the research project inside this organization[17]. In addition to this, the Spanish Foreign Ministry must not have expressed its opposition within four months since the submission of the request by the researching organization. Notwithstanding the demanding provision of six months, in practice —as confirmed with some Spanish institutions engaged in MSR, such as IEO or Spanish Department of Foreign Affairs— the period of six months is considered with flexibility by Spanish authorities and most research projects are authorized by our country.

Most researching vessels are open to the participation of Spanish scientists in the expedition. This is provided for in Article 6 of the Royal Decree and is considered both a courtesy and criteria for reciprocity.

The rule established in Article 9 by which the researching institution must submit the results of

[14] See the very interesting map of submarine cables in this web site; the reader can reach his own conclusions.

[15] See more information here.

[16] M.J., Aznar Gómez, M.J: "Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage", 25 *International Journal of Marine and Coastal Law* (2010), pp. 209-236. On this question, see the contribution in this volume by Carrera Hernández on "Protecting Underwater Cultural Heritage".

[17] Art. 247(5) LOSC relaxes the exigence of explicit consent, establishing the possibility of implied consent when the research is conducted by an international organization of which the coastal state is a member and when the coastal state has not expressed its objection within four months of the request.

 DOI: 10.17103/sybil.21.25

the research project to the Spanish Department of Foreign Affairs is not fulfilled as often as should be, as Spanish institutions concerned with MSR state. Anyway, it has already been mentioned in this contribution that this rule is unrealistic in its delay as many of these results are difficult to evaluate and assess in a one-year period. The same can be said in reference to the publications derived from the research project.

Considering the period of time 2011-2015, the foreign vessels that have undertaken marine scientific research campaigns in areas under Spanish jurisdiction are: Barbados: 1; Belgium: 5; Cyprus: 3; Denmark: 1; France: 72; Germany: 35; Greece: 1; Ireland: 1; Island: 1; Italy: 15; Malta: 1; Netherlands: 8; Norway: 4; Portugal: 7; Sweden: 1; Turkey: 1; United Kingdom: 13; United States: 11.

As a conclusion of the Spanish practice as a host state of MSR activities, the following remarks can be made:

- In general terms, Spanish procedure follows Part XIII of LOSC.
- Spanish practice puts stress on the participation of Spanish scientists.
- Although Spanish rules are quite demanding, the general evidence is that most scientific expeditions in areas under Spanish jurisdiction are undertaken with Spanish consent.
- In practice, some of the rules are applied with some flexibility, as is the case with those related to the six months advance request and one year to submit results.

(2) As a researching country

The practice of Spain as a country engaged in MSR can be studied from the two following perspectives: main legal framework; main institutional structure engaged in MSR and report of some incidents affecting Spanish vessels.

(a) Legal framework

The Spanish Strategy of Science, Technology and Innovation is the framework instrument that establishes the general objectives linked to fostering and developing research activities in Spain during the period from 2013 to 2020. Its objectives are aligned with those highlighted by the European Union under Horizon 2020. The basic legal framework is the Law 14/2011 on Science, Technology and Innovation[18].

(b) Main institutional structure

Main Spanish oceanographic research infrastructures concerned with MSR are composed by oceanographic vessels. This is consequent with Part XIII LOSC that only considers as MSR activities those conducted at sea, that are on its surface, water column, subsoil or seabed.

The Spanish oceanographic fleet depends on two main public departments: the Ministry of Economy, Industry and Competitiveness (hereinafter, MINECO) and the Ministry of Agriculture, Food and Environment (hereinafter, MAPAMA).

[18] BOE No. 131, 2 June 2011.

(1) MINECO oceanographic campaigns are planned by the Commission of Coordination and Monitoring of Oceanographic Vessels' Activities (hereinafter, COCSABO). There are currently 10 oceanographic vessels, all funded by MINECO. These vessels conform to what is called a Singular and Technical Infrastructure[19], particularly the ICTS FLOTA. These oceanographic vessels fundamentally provide services to campaigns being carried out within the framework of the Spanish State Plan for Scientific and Technical Research and Innovation and of the framework programme of the European Union, as well as the specific responsibilities assigned to different Public Research Organizations of the Secretary of State for Research, Development, and Innovation. The on-board technical support of the oceanographic vessels of the campaigns approved by the COCSABO is provided by the Marine Technology Unit of the CSIC. The ICTS FLOTA consists of two infrastructures, BIO Hespérides[20] and the FLOTPOL[21].

(2) For its part, the research campaigns carried out by the General Secretariat of Fisheries in MAPAMA are currently divided between fisheries assessment and mapping and are carried out on board the three fishing and oceanographic research vessels managed by the General Secretariat for Fisheries. In the case of fisheries research campaigns there are agreements with scientific institutions for scientific personnel on board and the scientific coordination of the campaign. The fisheries' assessment campaigns are included in the national program for the collection of basic data for the Spanish fisheries sector, which follows the recently updated European data collection framework guidelines.[22] Campaigns carried out in waters of third countries follow the protocol established for authorization, always through our Department of Foreign Affairs, which is in charge of the procedures. In particular, evaluation campaigns are carried out in the North Atlantic Fisheries' Organization (NAFO) zone, reaching Canadian waters and within the Porcupine bank (Irish waters) and certain inclusions in French waters,

[19] The so-called singular scientific and technical infrastructures (ICTS) are large installations, resources, facilities and services, unique in their kind, that are dedicated to cutting-edge and high-quality research and technological development, as well as to promoting exchange, transmission and preservation of knowledge, technology transfer and innovation.

[20] The BIO *Hespérides* is a vessel of the Navy integrated into the Maritime Task Force of the Spanish Navy, based in Cartagena (Murcia). Its scientific equipment is managed completely by the Marine Technology Unit of the CSIC. Its hull is reinforced for the navigation of the polar areas of the Antarctic and the Arctic. Its main activity focuses on austral summers, carrying out scientific research campaigns in the Antarctic and occasionally providing support to Spanish Antarctic Facilities and their research projects. It is a global research vessel with instrumentation and laboratories that allow for investigation of natural resources and risks, global change, marine resources, global ocean currents, and marine biodiversity. See more information here.

[21] The FLOTPOL infrastructure integrates the resources provided by the Marine Technology Unit of the CSIC and by the Ships and Campaigns Unit of the Oceanography Spanish Institute. The vessels included in this infrastructure are: B/O *Sarmiento de Gamboa,* B/O *García del Cid,* B/O *Ramón Margalef,* B/O *Ángeles Alvariño,* B/O *Mytilus,* B/O *Francisco de Paula Navarro,* B/O *José María Navaz,* B/O *Lura* y B/O *SOCIB.* The FLOTPOL deals with the MINECO Oceanographic fleet management, providing technical and logistical support to oceanographic and polar research and the Spanish bases in Antarctica, in accordance with the plans of activities established by the different administrative units of the General Administration of the State or other competent bodies for this purpose. It provides technical support to campaigns conducted aboard the ship *Hespérides* of the Spanish Navy. See more information here. Their current campaigns can be consulted here.

[22] See more information here.

 DOI: 10.17103/sybil.21.25

for which the corresponding authorizations are requested from the authorities of those countries. Cartography campaigns are not being carried out outside the limits of Spanish waters. On the other hand, certain campaigns have been carried out on board commercial vessels to evaluate certain resources or to carry out tests on the implementation of the landing obligation policy. When these have been necessary within the waters of other States, the same authorization procedure as explained above has been followed through the Department of Foreign Affairs.

Spanish activities undertaken in foreign maritime areas in general terms follow the principles already established in Part XIII LOSC, as most of the countries that have enacted any legislation about marine scientific research activities are part of the above mentioned convention and their practices in the matter, consistent[23]. Under these premises, most Spanish MSR activities are granted the consent of the host State. However, there have been some interesting incidents to be reported in this contribution:

- In disputed waters of Svalbard islands, where Spain doesn't recognize the jurisdiction exercised by Norway, some incidents took place in 2005 with Spanish fishing vessels accused of illegal fishing. One of these vessels —*Garayoa Segundo*— had gone to Svalbard waters in order to carry out a scientific assessment of halibut populations.
- In 2016, great expectation was caused by the incident of IEO research vessel *Ángeles Alvariño*, that was developing research activities in maritime areas face Gibraltar coast. Gibraltar authorities accused the Spanish vessel of having invaded their territorial sea, and threatened with the use of force against the researchers. As it is obvious, this is a long-standing dispute between Great Britain and Spain about the width of Gibraltar's territorial sea.[24]

(C) CONCLUDING REMARKS: EVALUATION AND CHALLENGES AHEAD

Part XIII of the LOSC intends to reconcile the interests of the scientific community with those of coastal states. As such, this regime makes it clear that the principle of consent of the coastal State is the general rule in spaces under its jurisdiction. Spanish regulation, in general terms, follows this rule. However, this rule is implemented with certain degree of flexibility considering the unexpected events that may surround a scientific expedition. In this vein, Spanish practice is not different from that of countries of the same socio-economic development as ours.

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[23] Vid. *Marine Scientific Research. A revised guide to the implementation of the relevant provisions of the UN LOSC*. United Nations Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, New York, 2010.

[24] Spain determines that the waters where this new incident has occurred are Spanish because the Treaty of Utrecht of 1713 ceded the city and the castle of Gibraltar (next to its port, defense and fortress) to the British Crown. The same is not true of the isthmus that links the Rock with the Peninsula and the surrounding waters. For this reason, Spain only recognizes United Kingdom sovereignty over the waters of the interior of the port. For years, London has been claiming up to three nautical miles under the LOSC (post-Utrecht) and which attributes adjacent waters to any territory. In the midst of this misunderstanding, ships of the security forces of both countries, fishing vessels or researchers have been involved in various conflicts. On this question, see the contribution in this volume by del Valle Gálvez on "Maritime zones around Gibraltar".

 DOI: 10.17103/sybil.21.25

International regulation of MSR as established in LOSC and national regulations of these activities —Spain among them— will have to face, in the years to come, some important challenges:

(1) First of them is the definition of MSR activities: there is no definition of MSR in Part XIII of LOSC and most national legislations, as Spanish one, have followed the same path. This has provoked disputes about the scope of activities normally considered as MSR or not, and some scientific powers, such as the United States of America or the United Kingdom, are keen advocates of a very narrow interpretation of Part XIII of LOSC.

(2) International and national regulations of MSR have got obsolete as they don't contemplate MSR undertaken from satellites or other methods that are increasingly displacing *in situ* ship based methods.

(3) The "direct significance" test of Article 246(5)(a) was valid to manage the resources at the time the LOSC as negotiated but is not so clear when considering bioprospecting in the marine environment, as this activity might not be considered as "pure" scientific research, due its commercial aim. Anyway, the great challenge that bioprospecting activities pose to LOSC relates to maritime areas beyond national jurisdictions.

(4) Finally, the paramount importance of MSR in enhancing the better understanding of the oceanic environment and its influence over many natural phenomena cannot be underestimated. Nowadays, MSR is related to a multitude of topics whose social relevance is beyond any doubt. For instance, bathymetry —or the drawing of nautical charts—, the geological or geomorphological study of the seabed —for locating resources, understanding seismic processes or shedding light on the understanding of the outer limits of the continental shelves—, the assessment of fisheries and marine ecosystems —both for improving fisheries management or for bioprospecting purposes—, the role of the oceans in the global climate system or in the sustainable development of the marine environment, or the very significant findings in the deep seabed —the discovery of chemosynthetic-based ecosystems at hydrothermal vents, with its implications for the production of energy or the discovery of new biological species—, to mention just a few, are all activities that come into the realm of MSR and whose social relevance is generally recognized.

 DOI: 10.17103/sybil.21.25

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

Protecting underwater cultural heritage

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The protection of underwater cultural heritage (hereinafter UCH) is one of the latest subjects that have entered into the areas of concern, and legal regulation, of Public International Law. The interest in establishing an international legal regime for this particular category of cultural heritage derives largely from the failure of the State action against the various risks that threaten him, taking into account, in addition, that the treasures and shipwrecks are immersed in all marine areas.

Spain is a State that has important interests in the sector due to the existence of multiple Spanish shipwrecks sunken in waters of third countries and, in general, in waters not subject to its sovereignty or jurisdiction. At the time, in Spanish waters remains rests from wrecks of vessels belonging to third countries. This situation highlights the need of Spain showing some sensitivity toward the legal regulation and protection of underwater cultural heritage.

In the next pages it will be carry out an analysis in order to clarify if the attitude shown by Spain corresponds with this last statement, reviewing the practice developed in relation to the protection of the underwater cultural heritage from three points of view: its position in relation to the existing international agreements; the legislative internal practice developed to protect these treasures; and, finally, the attitude of Spain before the findings in which there were Spanish interests.

(A) SPANISH POSITION BEFORE THE INTERNATIONAL CONVENTIONAL PRACTICE

The protection of the underwater cultural heritage has received attention, directly or indirectly, from two conventional regimes not always clearly separated: the rules concerning the international protection of cultural property, on one side, and the law of the sea, on the other hand. It should be noted, from the outset, the active attitude shown by Spain to be incorporated as State part in the existing relevant international agreements.

(1) International agreements about the protection of the cultural heritage.

In relation to the international protection of cultural property, it is a conventional scheme adopted with the primary purpose of raising awareness about the need for States to carry out the protection of

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 DOI: 10.17103/sybil.21.26

their own cultural heritage. They are rules that do not cater to the problems of specific categories of goods, with a very few exceptions. In the context of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), are of interest for our purposes the conventions adopted in relation to the protection of the cultural heritage, especially the Paris Convention on measures to be taken to prohibit and prevent the import, export and transfer of ownership illicit cultural property[1] and the Convention on the protection of world heritage cultural and natural;[2] and, in time of war, The Hague Convention relative to the protection of the cultural heritage in the event of armed conflict.[3] Conventions all them ratified by Spain.

In relation to the work from the Council of Europe, the Spanish practice has shown the delay experienced in the acceptance of the main instrument applicable to the archaeological activities. It's true that Spain had ratified without too many years of delay the Convention adopted in 1969 for the protection of the archaeological heritage,[4] agreement that Spain has already denounced. But it was an agreement that was aimed at the protection of the archaeological sites and the suppression of clandestine excavations, including the obstruction of trade from excavations of such works, without addressing the specific problems of the underwater cultural heritage; that heritage is not even mentioned in its articles. A legal regime adapted to the needs to be displayed at the time of drafting of the Convention by archaeology, which did not fit even the underwater cultural heritage.

Art. 1(3) of the revised European Convention of *La Valetta*, currently ratified by Spain, covers in part this omission,[5] even if it does not pursue to establish a legal regime applicable to all the UCH, regardless of the maritime space in which is located. Fundamentally, it is extending the regime of the Convention to the subaquatic archaeological heritage located in waters subject to the jurisdiction of the Member States, aside from high seas and the Area. It is an agreement that poses a particular situation in relation to UCH in the contiguous zone, continental shelf or exclusive economic zone of the coastal State. Without being a title of attribution of competences in favour of the coastal State in these spaces, which would go far beyond the provisions of the Convention on the law of the sea, this Agreement recognizes the differences in the internal legislation, because some States, such as Spain,[6]

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1 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972), 823 *UNTS* 231 (BOE No. 30 and 31, 4 and 5 February 1986).

2 Convention concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975), 1037 *UNTS* 151 (BOE No. 156, 1 July 1982).

3 Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956), 249 *UNTS* 215 (BOE No. 282, 24 November 1960) and Protocols of the same date (BOE No. 178, 25 July 1992) and Protocol of 26 March 1999 (BOE No. 77, 30 March 2004). Vid. G. CARDUCCI, "L'obligation de restitution des biens culturels et des objets d'art en cas de conflit armé: droit coutumier et droit international conventionel avant et après la Convention de la Haye de 1954", *RGDIP* (2000-2), at 289.

4 European Convention on the Protection of the Archaeological Heritage (adopted 6 May 1969, entered into force 20 November 1970), *CETS* No. 66 (BOE No. 160, 5 July 1975).

5 European Convention on the Protection of the Archaeological Heritage (Revised) (adopted 16 January 1992, entered into force on 25 July 1995), *CETS* No. 143 (BOE 20 July 2011). The *raison d'être* of the elaboration of a new Convention on the subject is due to the new problems that affect the archaeological heritage that, in general, were not present in the 1960s. Vid. in this regard the explanatory report to the Convention.

6 The same applies to the relevant Australian legislation. Vid. C. Johnson, "For keeping or for keeps? An Australian perspective on challenges facing the development of a regime for the protection of underwater cultural heritage", 1 *Melbourne*

come to extend their jurisdiction to 200 miles, while others limit it to the territorial sea or the twenty-four miles. Therefore, without going to speak out about problems belonging to the Law of the sea, this Convention tries to avoid the lack of protection of the UCH because of controversies related to the determination of the competent jurisdiction. Otherwise, it sends a message to the States concerned so that, in the event that they have decided to extend its jurisdiction to the UCH located beyond the territorial sea, do so with all the consequences and, therefore, apply the protection regime established in the Convention to cultural property located in these waters.

(2) International agreements in the field of the law of the sea.

Spain has also participated actively in the major international agreements adopted in the strict sphere of the law of the sea in its main historical stages. Although, in general, the agreements concluded, beyond two ambiguous provisions contained in the 1982 LOSC (Articles 149 and 303), have not included a specific legal regime applicable to the underwater cultural heritage, their legal status has been, and remains for many States, the basic legal regime applicable to the matter.

In this way, Spain ratified in its day the Geneva Conventions of 29 April 1958. In the absence of specific regulations, it is necessary to recognize, under this legal regime, the application of the principle of sovereignty of the coastal State on the activities directed at underwater heritage located in their internal waters and territorial sea, and the application of a principle of freedom of the high seas beyond the limits of the territorial sea. Therefore, the need to have the authorization of the coastal State in each specific activity of removal or archaeological research carried out in these waters of other States, and the free exercise of the same activities if the remains were found outside the territorial sea. The US Courts recognized these ideas in connection with the discovery of the *Nuestra Señora de Atocha*. In this case, it was a Spanish ship sunken in 1622 on the US Continental Shelf. It was located in 1971 by two companies from Florida. The US Supreme Court said, firstly, that this area was not under jurisdiction of Florida and, later, that the rules of USA did not grant jurisdiction over treasures located on the Continental Shelf.[7] Nonetheless, this conventional regime must be nuanced depending on the content, not answered, of the domestic laws of some States, such as Spain, which have extended their competence in relation to the UCH to the outer Continental shelf boundary as I will have the opportunity to expose later.

Spain has also ratified the 1982 United Nations Convention on the law of the sea (LOSC), the main conventional instrument of our days for the regulation of the legal regime of the seas.[8] It's a Convention that did emerge the underwater archaeology as a problem of international law,[9] including

Journal of International Law (2000), at 19. Vid. text of the *Historic Shipwreck Act 1976* in L.V. Prott, I. Srong, *Background materials on the protection of the underwater cultural heritage* (vol. I, UNESCO, Nautical Archaeology Society, Paris, 1999), at. 1.

7 Vid. in this regard L. Migliorino, *Il recupero degli oggetti storici ed archeologici sommersi nel Diritto internazionale* (Giufrrè editore, Milán, 1984), at. 134; and N. Ronzitti, "Stato costiero, archeologia sottomarina e tutela del patrimonio storico sommerso", *Il Dirito Marittimo* (1984), at 18.

8 UN Convention on the Law of the Sea, 1833 UNTS 3 (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter). In force for Spain since 14 February 1997 (BOE No. 39, 14 February 1997).

9 T. Treves, "Stato costiero e archeologia sottomarina", *Riv.Dir.Int.* (1993), at. 698.

 DOI: 10.17103/sybil.21.26

two provisions, the arts. 149 and 303, laying down, with little success, the regime applicable to these goods in certain marine areas. This has meant the introduction of a special regime applicable only in contiguous zone (even to consider the creation of a new space marine called by the doctrine marine archaeological zone) and in the Area. In addition, article 303.1 applicable to all marine areas, establishes "the duty to protect objects of an archaeological and historical nature found at sea", and the obligation of cooperation "for this purpose". It is a provision which stands on the line of the duties assumed by States under cooperation agreements relating to the protection of the cultural heritage which, however, has been deservedly criticized for the doctrine because it is a provision which sets only too generic and vague cooperation obligations as to have a significant normative content.[10]

It is, in short, a legal regime essential in our days, to the extent that a larger number of States are not joining the list of States party at the 2001 UNESCO Convention. A legal regime that, except for the indicated provisions, involves the application of the general rules of the different marine areas to the UCH. Therefore, is does not serve the interests of the State of origin of the wrecks founded in waters of other States, leaving such property submitted to the territorial sovereignty of the coastal State; and even though the extension of the jurisdiction of the coastal State to 24 miles is a point worth highlighting, for stealing a handful of miles at the principle of the freedom of the seas, the problems generated by the interpretation of Article 303(2) break with the positive prospects that could be deduced from this precept, and not allow to say that it has improved the regime of the Geneva Convention on territorial sea and contiguous zone. In addition, the LOSC has omitted any reference to a specific regime for the UCH in the exclusive economic zone and continental shelf, what constitutes a significant gap. It's true that the LOSC has introduced a provision directed at UCH located beyond the jurisdiction of the States, but the doubts that also generate its interpretation allow affirming that, in practice, remains the principle of freedom of the seas in relation to these objects. A regime that is unsatisfactory because it does not protect adequately the rights of States of origin (though Article 149 include a reference to them) and because, ultimately, it leaves in the hands of hunting treasures the fate of many wrecks found in a good part of marine spaces.

Halfway between the conventional rules on the protection of the cultural heritage and which establish the legal regime of the seas is the specific Convention adopted by UNESCO for the protection of the underwater cultural heritage. Entered into force, in general and for Spain, on January 2, 2009, once ratified by 20 States, in the spring of 2017 it obliges fifty-six States.[11] Without going to appreciate in detail its contents,[12] it is remarkable that we are in presence of a specific legal regime applicable to UCH. It aims to put a curb to the multiple shortcomings presented by the international regulations in force exposed in the previous sections, and to the varied activities undertaken by companies specialized in removals of wrecks against the logical criteria of conservation required by the UCH. It is an agreement that was approved by the General Conference of UNESCO

[10] L. Caflisch, "Submarine antiquities and the international law of the sea", *NYIL* (1982), at 20.

[11] Convention on the Protection of Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009), 2562 UNTS 1 (BOE No. 55, 5 March 2009).

[12] Vid. F.J. Carrera Hernández, *Protección internacional del patrimonio cultural submarino* (ed. Universidad de Salamanca, Salamanca, 2005).

on 2 November 2001, after several years of discussions that, finally, not stacked in the achievement of a consensus on its content despite the efforts made to achieve a balance; this situation has found a clear reflection in the articulated text of the Convention, to the detriment of the interests of the UCH.[13] It is the reference text in our days, and Spain is among the States that have ratified it earlier. However, the still relative acceptance prevents consider it as a universal regime that will necessarily be present in the disputes that may arise in this area in relation to States, such as United States Russia, China or United Kingdom, which have not accepted the agreement.

Finally, it is necessary to make reference to two legal regimes in additional way by its impact on the protection of the underwater cultural heritage. The first, into the regime of maritime law, is the regulation derived from the International Convention on maritime search and rescue. It's a not designed legislation to address the specific problems of the protection of the wrecks but which raises its application to certain cases related to his recovery. Spain has ratified this Convention, but has done so in an environmentally friendly manner from the point of view of the cultural heritage; Spain reserves the right not to apply the Convention in the case of a maritime property of cultural character that present a historical, archaeological or historic interest and which is in the bottom of the sea.[14]

The second is the result of the specific legislation adopted in relation to the Mediterranean Sea. Spain is a State party in the Convention for the protection of the marine environment and the coastal region of the Mediterranean,[15] and in the Barcelona Protocol on specially protected areas and biological diversity in the Mediterranean. This last instrument allows the creation of specially protected areas in the marine areas under the sovereignty or jurisdiction of the coastal State.[16] The objective of these areas can also be the safeguarding of places of particular importance because of his cultural interest (Art. 4(d)). Among the measures that can be taken by the coastal State are the regulation or prohibition of any activity involving the exploration or modification of the soil or the exploitation of the subsoil of the land part, the seabed or the subsoil.[17] In Spain there have been

[13] See the text in Proceedings of the UNESCO General Conference, 31th meeting, Paris, 15 October- 3 November 2001, at. 53 (Res. 31 C/24). The text was approved with 87 votes in favour (as Spain), four votes against (Russia, Norway, Turkey and Venezuela) and fifteen abstentions (Germany, Brazil, Colombia, France, Greece, G-Bissau, Iceland, Israel, Netherlands, Paraguay, United Kingdom, Czech Republic, Sweden, Switzerland and Uruguay).

The draft Convention arrived the General Conference without consensus. Even in Commission IV five States voted against and nineteen they abstained (see debate 4. Point 8.4. Records of the General Conference of UNESCO, 31st session, p. 163).

[14] SAR Convention, made in Hamburg the 27 April 1979. In force since 22 June 1985. Spain is State party since 13 March 1993 (BOE No. 103, 30 April 1993).

[15] Convention of 16 February 1976 (BOE No. 22, 21 February 1978), emended in 1995 (BOE No. 173, 19 July 2004).

[16] Art. 5(1) and Art. 7 of the Barcelona Protocol of 10 June 1995 on specially protected areas and biological diversity in the Mediterranean, in force since 12 December 1999 (BOE No. 302, 18 December 1999).

[17] Art. 6(e). Although the primary objective of the Convention is the conservation of the natural heritage, trying to achieve other objectives such as the conservation of the cultural heritage, is highly desirable in the case of SPAMI's and constitutes a factor favorable to the inclusion of a place on the list, insofar as it remains compatible with the conservation objectives (annex I).

About the protection of the UCH in the Mediterranean Sea vid. U. LEANZA, "Il patrimoni culturale sottomarino del mediterráneo", in G. Camarda, T. Scovazzi, *The protection of the underwater cultural heritage. Legal aspects* (Giuffrè editore, Milán, 2002), at. 253. Vid. also J-P Beurier, "Commentaire de la déclaration de Syracuse sur le patrimoine culturel sous-marin de la mer Méditerranée", in *ibidem*, at 279.

included in the specially protected areas of interest for the Mediterranean list (SPAMI's List) the Cap de Creus, the Islands Medes, Columbretes, Cabrera, the Mar Menor and the Mediterranean area east of the coast of Murcia, Almeria, Cabo de Gata-Níjar, seabed the cliffs of Maro-Cerro Gordo and the island of Alborán.[18]

Inside this framework, Spain has also accepted the 2008 Protocol's about integrated management of coastal zones of the Mediterranean, affecting the internal waters and the territorial sea.[19] Article 13, intended to the cultural heritage, establishes the duty to take protection measures also in relation to underwater cultural heritage, the conservation *in situ* as a priority option, and the conservation of elements extracted, ensuring that they are not subject to exchange, sale, bought or bartered as commercial goods.

(B) SPANISH LEGISLATIVE PRACTICE RELATED TO THE PROTECTION OF UCH

The absence of an international legal framework specific and clear applicable universally to the UCH for many years, even at present, determines that such heritage has been subject to a plurality of divergent national legislations which are not characterized, in the majority of cases, to carry out a proper or specific protection of the UCH. That heritage, is subjected, in many cases, to the domestic laws of salvage and findings, favouring the existence of treasure seekers characterized, in good logic, by the search for economic profitability to its operations, without taking into account that, in the case of cultural, historical or archaeological heritage, rather than of economic profitability it is necessary to refer to the protection in strict sense; protection even *in situ* in many cases, avoiding extracting any object. Logically, if we add to this general framework the difficulties to determine the jurisdiction in the protection of UCH beyond 24 miles, it is logical to understand why also proliferate here the flags of convenience, allowing carrying out underwater excavations under a legal umbrella little guard in areas not subject to the sovereignty of the coastal State from the point of view of protecting UCH.
Spain has a domestic legislation that moves away from this approach, notwithstanding that it is necessary to address a legislative reform that responds with greater attention to the specific problems raised by the protection of the underwater cultural heritage, especially after the ratification by Spain of the UNESCO Convention. This work of reform has already begun, as outlined below. By using the same structure of the previous paragraph, I will expose the most relevant internal rules on the subject, differentiating which aims to adjustment the sovereignty or jurisdiction of Spain in the maritime spaces and which are intended, more specifically, the protection of the cultural heritage. They must not forget, however, the references made in the previous section regarding the inclusion of certain Spanish areas in the SPAMI's list.

(1) Legislation on the law of the sea and marine spaces

Spain has issued several regulations in order to extend their jurisdiction over the different marine

[18] See the reference with data here.
[19] In force since 24 March 2011. BOE No. 70, 21 March 2011.

 DOI: 10.17103/sybil.21.26

areas in accordance with the options that the exposed conventional regime allows. In general, they are rules adopted much before the adoption of the text of the Convention concerning the protection of UCH, even of the LOSC, which explains, in the majority of cases, the absence of specific provisions applicable to the underwater cultural heritage. Therefore, except for the important qualifications that are included below, they are standards which are essentially directed to take generically the prerogatives that international law permits to the States in every marine space.

From this point of view, and in relation to the territorial sea, it is necessary to take into account the Law 10/1977, which extends the Spanish sovereignty until the twelve nautical miles.[20] In relation to the exclusive economic zone in waters of the Cantabrian Sea and the Atlantic, it is necessary to take into account the Law 15/1978 on economic zone exclusive. It extends the sovereignty and jurisdiction of Spain up to two hundred miles.[21] The most striking aspect of this regulation contains in its Art. 1 in relation to the Spanish archipelagos, considering the application of a kind of archipelagic principle at the time of the delimitation of this space, pointing out that the outer limit of the economic zone is measured from the straight baselines that unite the end points of the islands and islets of the archipelago. This legal regime is completed with Law 44/2010 of Canarian waters (*aguas canarias*).[22]

In relation to the exclusive Spanish economic zone in the Mediterranean Sea, after years of absence policy and subsequent partial regulation through a fishing area,[23] Spain proceeded to regulate the exclusive economic zone in the North-Western Mediterranean, from *Cabo de Gata* to the French border, through Royal Decree 236/2013.[24] Regarding the Spanish continental shelf, its geographical extension is covered already by Spanish law on exclusive economic zone in the majority of cases, without prejudice to the existence of specific rules applicable to the exploitation of hydrocarbons.[25]

This legal regime is completed with two rules. On the one hand, the Spanish law of ports of the

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[20] Law 10/1977, 4 January, on the Territorial Sea (BOE No. 7, 8 January 1977).

[21] Law 15/1978, 20 February 1978, on the Economic Zone (BOE No. 46, 23 February 1978).

[22] Law 44/2010, 30 December 2010, on the Canary Island Waters (BOE No. 318, 31 December 2010). "Artículo único: 1. Entre los puntos extremos más salientes de las islas e islotes que integran, según el artículo 2 de su Estatuto de Autonomía, el Archipiélago canario, se trazará un contorno perimetral que siga la configuración general del archipiélago, tal como se establece en el Anexo de esta Ley. Las aguas que queden integradas dentro de este contorno perimetral recibirán la denominación de aguas canarias y constituyen el especial ámbito marítimo de la Comunidad Autónoma de Canarias. 2. El ejercicio de las competencias estatales o autonómicas sobre las aguas canarias y, en su caso, sobre los restantes espacios marítimos que rodean a Canarias sobre los que el Estado español ejerza soberanía o jurisdicción se realizará teniendo en cuenta la distribución material de competencias establecidas constitucional y estatutariamente tanto para dichos espacios como para los terrestres". Vid. E. Orihuela, "La delimitación de los espacios marinos en los archipiélagos de Estado. Reflexiones a la luz de la ley 44/2010, de 30 de diciembre de aguas canarias", 21 *REEI* (2011).

[23] Royal Decree 1315/1997, 1 August 1997, establishing a Fisheries Protection Zone in the Mediterranean (BOE No. 204, 26 August 1997), amended by Royal Decree 431/2000, 31 March 2000 (BOE No. 79, 1 April 2000). Vid. V.L. Gutiérrez Castillo, E.M. Vázquez Gómez, "La zone de protection de la pêche établie par l'Espagne en Méditerranée", 13 *Espaces et ressources maritimes* (1999-2000), at 207.

[24] Royal Decree 236/2013, 5 April 2013, establishing the Spanish Exclusive Economic Zone in the North-West Mediterranean (BOE No. 92, 17 April 2013).

[25] Art. 2 (1) of the Law 34/1998, of October 7th, in the sector of hydrocarbons, consider State public property "los yacimientos de hidrocarburos y almacenamientos subterráneos existentes en el territorio del Estado y en el subsuelo del mar territorial y de los fondos marinos que estén bajo la soberanía del Reino de España conforme a la legislación vigente y a los convenios y tratados internacionales de los que sea parte" (BOE No. 241, 8 October 1998).

State and of the merchant shipping that includes additional provisions on the competence of Spain on the different marine areas (internal waters, territorial sea, contiguous zone and exclusive economic zone). In relation to the contiguous zone, and up to the approval of the general Law of navigation, can be considered that it has been the applicable basic legislation.[26] Art. 8 (1) establishes that is contiguous zone which extends from the outer limit of the territorial sea up to twenty-four nautical miles counted from the baselines from which the breadth of the territorial sea is measured. This wording has made it possible to say that Spain was exerting in its contiguous zone those skills acknowledged by public international law. Therefore, from the perspective of LOSC, not only the contained in Art. 33, but also those laid down in Art. 303 (2) relating to underwater cultural heritage. Another interpretation might have required the adoption of specific provisions relating to the UCH in the contiguous zone.[27]

On the other hand, it is necessary to take into account the general Law of maritime navigation, adopted after the adoption by Spain of the national plan on underwater archaeological heritage which I will make reference in the following section. In this case, and for this reason, it contains provisions related to the UCH from different points of view.[28] Firstly, it includes references to navigation activities in Spanish waters that can compromise the underwater heritage. As a result, they can set exceptions to the general regime of navigation and underwater activities carried out in the Spanish maritime spaces for reasons of conservation of underwater cultural heritage (Art. 20); this Law also requires respect for the rules on the protection of the underwater cultural heritage in the case of innocent passage through the territorial sea (Art. 38). Secondly, if it still remained some doubt, it extends Spanish jurisdiction over the UCH to the contiguous zone.[29] Thirdly, the Law precludes the application of Salvage Law to underwater cultural heritage, not allowing considering salvage any operation directed over UCH, which is governed by specific legislation and existing international treaties to which Spain is a party (Art. 358). It refers also to the specific legislation, and excludes, with exceptions, the application of the chapter relating to shipwrecks and sunken property (Art. 369) and relating the extraction of goods forming part of the underwater cultural heritage (Art. 381). Fourthly, in relation to the wrecks of State, Art. 382 refers to the UNESCO Convention to determine the legal

[26] Royal Legislative Decree 2/2011 of September 5, approving the consolidated text of the State Ports and Merchant Marine Act (BOE No. 253, 20 October 2011).

[27] Indeed, Art. 40 (1) of the Law 16/1985 of 25 June on Spanish historical heritage, deemed to be part of the Spanish historic heritage goods of historic character, that can be studied with archaeological methodology, extracted or not, and whether they are on the surface or underground, in the territorial sea or on the continental shelf. While in the contiguous zone applies the residual regime of the continental shelf, this provision does not mention the contiguous zone. So a different interpretation of the Spanish Law of State ports and merchant marine could have led to interpretations which deny the competence of Spain about the UCH located in the contiguous zone, especially if we take into account that conventional law does not cover the extension of the jurisdiction of the coastal State in such categorical terms about the continental shelf in connection with UCH.

[28] Law 14/2014, 24 May 2014, on Maritime Navigation (BOE No. 180, of 25 July 2014). English version available here.

[29] Art. 23 (2) establishes that "Unauthorised extraction of archaeological and historic objects found on the seabed or subsoil of water in the contiguous zone shall be considered a breach of the laws and regulations referred to in the preceding Section, as well as of the provisions on underwater cultural heritage".

Art. 383 adds: "In all cases, administrative authorisation shall be required to extract archaeological or historic objects located on the seabed of the Spanish contiguous zone. Recovery of such goods without the required authorisation shall be penalised as an offence committed in Spanish territory".

regime applicable to operations on their remains.

Finally, Art. 383, of special interest for heritage in the exclusive economic zone or continental shelf (though I have already pointed out that it is also applicable in the contiguous zone by completing the regime of Art. 23.2), performs a referral to specific legislation, especially to the UNESCO Convention, in terms of regulation and authorisation of activities on UCH. It is a provision which can serve to avoid apparent incompatibility presented by the Spanish law on cultural heritage with the Convention.

(2) Rules concerning the protection of cultural heritage

Spain has adopted internal rules concerning the protection of cultural heritage in the central State and regional level. They are not specific rules relating to the protection of the underwater cultural heritage. However, they include specific provisions applicable to this category of goods.

At the State level, the applicable Law was adopted in 1985, long before the adoption of the UNESCO Convention in the matter, even of the entry into force of the LOSC.[30] This Law allows to apply its contents to UCH in various aspects which regulates (such as the inclusion of obligations of inventory goods, the need to adopt measures for the conservation and to prevent the looting or illicit export, the declaration as *BIC*, goods of cultural interest...) because it is considered as part of the Spanish historic heritage the property of historical character that can be studied with archaeological methodology, extracted or not, and whether they are on the surface or underground, in the territorial sea or on the continental shelf (art. 40.1). Similar references are included when defining the archaeological zones (art. 15.5) and archaeological excavations (art. 41). With this legal regime, Spain has clearly opted to establish a precise legal regime for cultural heritage from the time of the exploration or, in the case of findings, ruling out the application of the rules of the Spanish civil code in these cases. The most striking aspect of the Spanish legislation, as I have already advanced in the previous section, derived from the expansion of the Spanish competence on heritage submerged up to the outer limit of the continental shelf. This regulation, however, does not contain rules directed to UCH dipped in the waters of third countries or in waters not subject to the jurisdiction of any State, neither has accommodated its content to the provisions of the UNESCO Convention.

The truth is that the ratification by Spain of the 2001 UNESCO Convention and various incidents, as the derivative of the case of *La Mercedes*, has shown greater sensitivity and concern of the Spanish authorities in the protection of this particular category of cultural heritage. The first result has been the elaboration of a national plan on underwater archaeological heritage on 30 November 2007, developed through a green paper agreed between all the institutions involved. The main actor is the Ministry of education and culture and, linked to this, the National Centre for Underwater Archaeological Research (MNAM-CNIAS). The relevant role that can play other ministries has led to the signing of three cooperation agreements with the Ministries of defence, interior and foreign affairs in order to strengthen the protection of the underwater heritage. In the case of the Ministry of foreign

[30] Law 16/1985, June 25th, on Spanish historical heritage (BOE No. 155, 29 June 1985). Vid. also Royal Decree 111/1986, January 10th, of partial development of Law 16/1985 (BOE No. 24, 28 January 1986).

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affairs, the question is to adequately cover the performance of Spain before wrecks found outside Spanish waters, actions that are designed from the national plan itself.[31] In general, therefore, the national plan aims to achieve coordination of all actors involved in the protection of UCH. From this point of view, coordination with the Spanish autonomous communities (which in Spain also take responsibilities in relation to the archaeological heritage and have laws for the protection of historical and cultural heritage) is transcendental to avoid distortions to concrete actions that can only benefit the treasure hunters. The national plan, at the time, tries to define the priorities of Spain in relation to its protection. These include the adoption of a new Law that suits their contents to the commitments entered into by Spain. Among many other aspects, this new Law could allow to include a definition of underwater cultural heritage.

(C) JUDICIAL PRACTICE: ATTITUDE OF SPAIN BEFORE THE DEPREDATIONS OF THE UCH

The attitude of the Spanish authorities in our recent history before to the most striking cases of looting of shipwrecks can be analysed by distinguishing two different stages. During a very long first stage, in Spain there was no political will for the protection of this type of heritage, neither to protect the interests of Spain, especially when there were wrecks sunken outside Spanish waters. The plundering of the *Nuestra Señora de Atocha* at the end of the 1970s is perhaps the prime example of the passive attitude of Spain before the underwater cultural heritage in general, but the same fate ran the *Santa Rosalea*, the *San Lorenzo de el Escorial* or the *Santa Clara*, among others.[32]

The turning point occurs in the last years of the last millennium as a result of the case of the *Juno* and *La Galga*. Spain, with its new attitude, joined in the judicial procedures developed in the United States Courts, getting the rights in relation with both wrecks. The Spanish position was based on the maintenance of property rights on the wrecks and on the negation of abandonment, required by U.S. law to recognize the rights of removal to others.[33] In this case, therefore, Spain expressed its new options of foreign policy concerning the protection of UCH which lies beyond our waters, which translates, in cases such as the indicated, in the development of an active attitude toward judicial procedures developed in other States.

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[31] References to all these documents can be found on the website of the Ministry of education and culture of Spain here.

[32] The *Atocha* was a Galleon of the firm earth fleet sunken in 1622 in the Florida straits 10 miles off the coast. The property of load in gold and silver was awarded to the treasure hunter Mel Fischer by the Courts of Florida, before Spanish passivity. For a more detailed explanation of the Spanish attitude in this and other cases vid. M. Aznar, *La protección internacional del patrimonio cultural subacuático, con especial referencia al caso de España* (Tirant lo Blanch, Valencia, 2004) and V. BOU, *La flota imperial española y su protección como patrimonio cultural subacuático* (Minim, Valencia, 2005).

[33] They are two Spanish frigates sunken in 1802 and 1732 off the coasts of the United States because of two storms. The Courts of the State of Virginia stated the persistence of the property right of the State of the flag in relation to warships, at least in the absence of an explicit act of abandonment by the flag State. The arguments of Spain were that these wrecks were tombs where remains the rests of Spanish military personnel. In addition, Spain never abandoned the vessels and, therefore, they remained as Spanish Navy ships, being applicable the doctrine of immunity. The Court of appeals of Virginia gave Spain the reason because there was no public and express abandonment of the remains (vid. in this regard M. Aznar, "La reclamación española sobre los galeones hundidos frente a las costas de los Estados Unidos de América: el caso de La Galga y la Juno", *REDI* (2000-1), at. 247; L. Vierucci, "Le statut juridique des navires de guerre ayant coulé dans des eaux étrangéres: le cas des fregates espagnoles Juno et La Galga retrouvees au large des cotes des Etats Unies", *RGDIP* (2001-3), at. 705.

In that cases, Spain is located in the position in which it is necessary to defend the heritage before foreign courts and States where traditionally the solution to these conflicts derived towards the application of the law of salvage and finds[34]. That means that Spain has participated in judicial procedures that our State has not excited. They are procedures in which we participate as a result of a complaint filed by others (the hunting treasures) in order to acquire rights of ownership or possession over the property or, at least, receive a ransom as a result of its finding. In these procedures, one of the main questions it is to valuing the right of ownership according to the Law of the United States (Admiralty Law), far away from the normal standards of the rules concerning the protection of cultural heritage.

History has become to repeat later, as happened with the *Nôtre Dame de la Deliverance*[35]or the *San Salvador,*[36]and in a most striking manner, in the case of *La Mercedes.*[37] The last mentioned is a case of spoliation by the company *Odyssey*. This American company was developing underwater exploration activities in the *Alborán* Sea to, according with UK authorities, locate the *Sussex*, a British Galleon sunken in 1641. However, from April 2007, once completed his documentary research, the ship turned to the Atlantic, discovering the remains and the treasure of *La Mercedes* and starring in a spectacular pillaging. On May 18, 2007 *Odyssey* announced the finding about six hundred thousand coins, most silver, minted in Peru at the end of the 18th century. The load was transported from Gibraltar to Tampa in the United States. Previously the company had recovered a small block of bronze, dropping it to U.S. Court and requesting that the wreck was subjected to a measure of arrest. This was the beginning of an action *in rem* and the establishment of a nexus of connection between the jurisdiction of the United States and the wreck located thousands of kilometers away.[38]

Through this action, *Odyssey* created a legal fiction allowing an extraterritorial exercise of U.S. jurisdiction, transferring the case to the substantive law of that State (to the right of salvage and findings). For this reason, *Odyssey* claimed possession and property rights on the assets recovered and those which remained in the area of the discovery, and a reward for his services. All seasoned with a strategy of confusion about the wreck, hiding the place of location and pointing out that it was not a single wreck, but an amalgam of remains from different shipwrecks.

The topic of *La Mercedes* is certainly the case that greater public impact has had. The media have tried to approach quite rightly to the citizen the different facts of the case, showing great sensitivity.

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34 See O. Varmer, *Underwater cultural heritage law study*, OCS Study, BOEM 2014-005.

35 In this case were at stake the remains of a French Galleon, chartered by Spain, found by the company *Sub Sea Research*, from Portland, in the continental shelf of the United States, 40 miles off the coast of *Cayo Oeste*.

36 Vessel intended for the carriage of troops, sunken in 1812 on the Bay of Maldonado (Uruguay).

37 *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 2379 (2012).

For an evaluation of this first judicial pronouncement in the United States vid. F.J. Carrera Hernández, "El asunto del Nuestra Señora de la Mercedes (*Odyssey*)", 17 REEI (2009). For an appraisal of the case after the Supreme Court Judgment vid. M.J. Aznar, "Patrimonio cultural subacuático español ante Tribunales extranjeros o internacionales: los casos de La Mercedes y del Louisa", 19 *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* (2015), 44-77.

38 In this action *in rem*, the plaintiff is the company *Odyssey*, while the respondent *in rem* is the wreck 'unknown', parties which were joined as claimants of property, Spain, as owner of the ship *La Mercedes* and its cargo; Peru, as this State believes that it is the State of origin of the recovered property; and twenty-five descendants of persons who had used the Spanish frigate to move their goods towards Spain.

This same sensitivity has been manifest in the attitude of the Spanish Government, acting with great diligence in the courts of the United States and finally getting the recovery of the coins. In this kind of issues Spain has had to defend arguments aimed at the application of the principle of immunity to the wrecks of state's vessels, irrespective of the place in which they were located, and has denied the abandonment of our historical vessels that are under water. All that according to the specific circumstances present in this kind of cases, as I've already pointed. It is a very important legal success because, as Aznar pointed, these decisions clearly establish that private companies cannot and should not start any recovery operation over sunken ships of state without the express consent of the flag State (and the coastal State when necessary). Companies hunting treasures should take note that it will not receive any prize for operations not authorized, despite the huge amount of money invested in them. On the contrary, who consider themselves injured States could initiate actions, civil and/or criminal, against those companies, as the practice is proving particularly in the case of Spain.[39]

The origin of this case also serves to illustrate the Spanish position in reverse; in other words, our position towards the wrecks of third States located in our waters. As I have already said, when the company began its exploration activities which led him to the discovery of *La Mercedes*, *Odyssey* did so in order to locate the *Sussex*, British state Galleon sunken in Spanish waters in 1694. Spain cooperated with United Kingdom authorizing the archaeological exploration, including the recovery of certain objects, always under strict conditions. Later they signed the *Agreement concerning the Shipwreck of H.H.S. Sussex*, which is inspired by two basic principles: respect for sovereign immunity and public property (from United Kingdom) of the wreck; and respect for the sovereign powers of the coastal State over its waters; in this case, the Spain's powers over the territorial sea, demanding at all times the authorization from the Spanish authorities to act on the remains. The Spanish attitude, therefore, is consistent with which has claimed to other States when it was Spanish heritage submerged in the waters of others States.[40]

Last, the Spanish authorities have also been very actives in other cases related to activities carried out by foreign vessels on goods immersed in Spanish waters. This has happened in relation to the actions carried out in 2012 and 2013 in the Alboran Sea by the *Seaway Invincible* and the *Seaway Endeavour* (both flying the flag of Togo and owned by the Swedish company Seaway Offshore Ltd.). These vessels have been expelled from Spanish waters on more than one occasion, in accordance with Spanish legislation on the protection of cultural heritage, due to the realization of unauthorized exploration activities on underwater cultural heritage.[41]

Some years before, Spain has successfully defended its exclusive competence on the activities carried out by foreign vessels in the internal waters and in the Spanish Territorial sea. This was the case with the *Louisa*, a merchant ship that had been authorized to carry out oil and gas research activities in the Bay of Cadiz, but was finally detained as a result of unauthorized activities against

[39] Aznar, *supra* n. 37, at 65.

[40] Vid. text in Aznar, *supra* n. 31, at 602.

[41] M.J.Aznar, 'The Contiguous Zone as an Archaeological Maritime Zone', 29 *The International Journal of Marine and Coastal Law* (2014), 1-51, at 29.

 DOI: 10.17103/sybil.21.26

the UCH. This is a case which has given rise to various pronouncements by the Spanish judicial authorities, as well as the International Tribunal on the Law of the Sea, following the demand filed by the State of the flag (Saint Vicent and The Grenadines) against Spain as a result of the arrest of their ships in the Spanish port. The Court has recognized that it has no jurisdiction to address the issue because, in the case, the State of the flag was questioning the correct application of the law of the Sea in relation to the criminal procedure developed in Spain against the offenders. But, at the same time, which is truly relevant to our effects, The Court recognized the competence of the coastal State (Spain) to address and stop a foreign ship in its ports as a result of illicit activities directed against the UCH.[42]

(D) CONCLUSION

Being Spain a country with large interests in relation to the activities directed at underwater cultural heritage, it must be recognized that our country has begun to truly worry about its protection only in the past twenty years. Until then, in Spain has lacked a true political, to internally and externally, directed to the protection of the UCH. With the turn of the millennium, however, Spain clearly changed its attitude. This change, which began to show through an active defence of our interests in courts proceedings initiated by treasure hunters in the United States, has led him to be included in the listing of the first States which have ratified the 2001 UNESCO Convention. The elaboration of a national plan on underwater archaeological heritage represents a point and continued in the same way. However, the task has not been completed. Spain needs to adopt new internal rules on historical heritage that reflect the new commitments assumed at the international level in this matter. At the same time, Spain must improve its coordination with the Autonomous Communities (Regions) in all actions that could be necessary to undertake. The peculiar distribution of competences between the State and the Regions can't impede the set of actions that are needed to adopt in each specific situation.

[42] Judgment of the International Tribunal for the law of the sea, *The M/V "LOUISA" case* (Saint Vicent and The Grenadines v. Kingdom of Spain), 21.5.2013.

 DOI: 10.17103/sybil.21.26

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

Security and military questions

Carlos ESPALIÚ BERDUD*

(A) INTRODUCTION

Spain's geographical, historical and economic circumstances have made it a seafaring nation. As such, for centuries the Spanish Navy was able to secure important overseas possessions in Europe, Africa, America and Asia. Nevertheless, current global complexities and threats make it almost impossible for a country to safeguard its security and defence with its own forces alone. Therefore, the Spanish security and defence architecture, in addition to its forces (the internal pillar), is founded on the support of Spain's allies (the external pillar), linked to its membership of the European Union (EU) and the North Atlantic Treaty Organization (NATO) and its the bilateral alliance with the United States.[1] For the purposes of this collective work, which is intended to mark the twentieth anniversary of the coming into force of the Law of the Sea Convention of 10 December 1982 (LOSC) for Spain, we will focus only on the maritime aspects of those pillars, although it should be noted that these aspects of security are interlinked.[2]

In this chapter, we recapitulate the Spanish practice of these twenty years since the application of the LOSC relative to security and military questions. Taking into account that this period has constituted one of peace, there have been few developments regarding the rules of International

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1 See in this regard: F. Aznar Fernández-Montesinos, 'United States. Cooperation & Security' (Instituto Español de Estudios Estratégicos, Analysis Document, 37, 2016), at 9.

2 States are currently facing a new generation of complex problems whose effects reach beyond their frontiers and borders. Because they are not exclusively military, they could not react efficiently alone and with fragmented policies. Comprehensive and collective approaches and actions were thus required to face new threats, such as maritime piracy, terrorism, illegal traffic of human beings, drug trafficking and illegal arms smuggling. In that context, the concept of maritime security has emerged as a set of activities and means aimed at protecting the life of people and goods at sea, both through the adoption of preventive measures and through corrective actions. With the change of Millennium, this renewed dimension has led the more relevant states and international organisations to adopt comprehensive maritime strategies or policies against these new threats. In Spain, this trend led to the adoption in 2013 of its own Maritime Security Strategy (see: Presidency of the Government of Spain, *The National Maritime Security Strategy* (2013), which develops the provisions set out in the National Security Strategy of 2013 and adapts them to the special requirements of the maritime domain, in line with the other international strategic instruments, which is examined in more detail in another chapter of this collective work. On this question, see the contribution in this volume by Blázquez Navarro on "The National Maritime Strategy".

 DOI: 10.17103/sybil.21.27

Humanitarian Law (IHL) that regulate armed conflicts at sea.[3]

We will not address the different aspects concerning warships[4] such as navigation rights[5] since their particular regime is developed in more depth in subsequent chapters of this collective work. For now, we will say that the LOSC recognizes sovereign immunity to foreign warships and considers this type of vessels as the principal element for maintaining peace and security at sea[6] by affording it competences in the following matters: exercise of the right of visit and verification of the ship's right to fly its flag (Article 110); exercise of the right of hot pursuit (Article 111.5); seizure of a pirate ship (Articles 105 and 107); exercise of powers of enforcement against foreign vessels to protect the marine environment (Article 224). Besides these questions, competences are also granted to warships through the following treaties that deal with specific matters: measures to be adopted against a suspicious vessel of being engaged in the smuggling of migrants by sea (Article 9. 4 of the Palermo Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations

[3] In this regard, it is important to stress that the rules of International Humanitarian Law are applicable to any use of force, irrespective of its intensity or legal justification. Indeed, according to Art. 2, para. 1 of the I Geneva Convention of 1949 (Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field), "[i]n addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them". In the commentary edited by the International Committee of the Red Cross to this paragraph, it is stated that: "It remains to ascertain what is meant by 'armed conflict'. The substitution of this much more general expression for the word 'war' was deliberate. One may argue almost endlessly about the legal definition of 'war'. A state can always pretend, when it commits a hostile act against another state, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression 'armed conflict' makes such arguments less easy. Any difference arising between two states and leading to the intervention of armed forces [...] is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims". [...] (see: *The Geneva Conventions of 12 August 1949, Commentary published under the general editorship of Jean Pictet, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (International Committee of the Red Cross, Geneva, 1952), at 32.

The rules of the IHL that regulate armed conflicts at sea will be applied in all the circumstances and in an equal way to all the parts in an armed conflict, without prejudice of the international responsibility that could correspond to the State for having had recourse to the use of force in violation of the United Nations Charter and other norms of international law. Having said that, it should nevertheless be kept in mind that modern naval operations are no longer conducted in a purely maritime environment. At present, naval forces operate together with other forces, especially air forces, and, therefore, they can no longer be considered bound by only one set of rules specifically and exclusively designed for them. In any case, it should be highlighted that the corpus of rules applicable today to the naval warfare has mainly a customary nature and has been put together in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, on 12 June 1994. See: *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 12 June 1994.

[4] Art. 29 of LOSC provides a definition of warship for the purposes of the Convention. According to it: "[...] 'warship' means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline".

[5] Warships have the right to navigate through the territorial sea of foreign states as long as the passage is innocent (Articles 17-19 LOSC), but they required a specific permission to enter the internal waters and the ports of a foreign state. In Spanish Law, navigation through the maritime internal waters and their entrance in Spanish ports is regulated in Art. 51 of the Law 14/2014 on Maritime Navigation of 24 July 2014. (BOE No. 180, of 25 July 2014), an English version available here. On this question, see the contribution in this volume by Díez-Hochleitner on "Maritime zones under sovereignty and navigation".

[6] In this sense see: *Manual de Derecho del Mar, Vol. 1, Parte General* (Ministerio de Defensa. Secretaría General Técnica, 2016), at 55.

Convention against Transnational Organized Crime, 2000); measures to be adopted against a suspicious vessel of being engaged in illicit trafficking by sea (Article 17.10 United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988); measures to be adopted in order to assure the implementation of the measures set forth in the Convention (Article 8 bis. 10. d Convention for the suppression of unlawful acts against the safety of maritime navigation, SUA Convention 2005).

In view of the above, the second part of this chapter addresses Spanish military alliances. In the third part, we discuss the Spanish Navy and its role in a democratic State. Finally, we present our conclusion.

(B) SPANISH MILITARY ALLIANCES

(1) Spain's adhesion to NATO and participation in its naval operations.

Following the restoration of democracy, Spain struggled to emerge from decades of international isolation. To this end, it sought to improve its bilateral relations with the United States and to join the principal western international organisations. Spain first declared its intention to become a new member of the Alliance in December 1981. After having its application immediately accepted, Spain joined the Atlantic Organization on 30 May 1982, when it deposited its instrument of accession with the Government of the United States, in accordance with Article 10 of the Washington Treaty of 1949.[7]

Initially, Spain played a full role in the political instances of NATO, but refrained from participating in the integrated military structure, due to a strong anti-Atlanticist mood among Spanish public opinion. However, its position was reaffirmed in a referendum held in 1986. The modality of Spanish participation was defined by six Agreements of Coordination between the Spanish military authorities and those of NATO. According to these agreements, Spain would keep its forces under NATO command but would not accept deployment of its forces outside its borders for long periods of time. Over time, Spanish reservations gradually diminished and, on 14 November 1996, the Spanish Parliament endorsed the country's participation in the integrated military command structure,[8] a decision that coincided, not surprisingly, with the appointment of Javier Solana as NATO Secretary General. Spain finally became fully incorporated into the integrated military structure of the Alliance on 1 January 1999.

In what concerns maritime defence, NATO adopted the Alliance Maritime Strategy in 2011, which, in line with its Strategic Concept, sets out ways in which sea power could help respond to critical challenges facing the Alliance —both now and in the future— as well as the roles —long-term and new— that NATO forces may have to conduct in the maritime environment in order to contribute to

7 BOE No. 129, 10 May 1982.

8 See the *Congress acceptance of the participation of Spain in the military structure of NATO*, BOCG, Serie E, No 65, 18 November 1996.

 DOI: 10.17103/sybil.21.27

the Alliance's defence and security and to promote its values.[9]

In recent years, Spain has participated in a number of NATO naval military operations, described in another part of this collective work. Operation *Active Endeavour*, initiated in the immediate aftermath of the September 11 (2001) terrorist attacks in the United States, was conducted by the Alliance in direct application of the collective self-defence clause Article 5 of the North Atlantic Treaty. The aim of the operation was to deter, defend, disrupt and protect against terrorist activity in the Mediterranean.[10] At a meeting of the North Atlantic Council in Warsaw 8-9 July 2016, Operation *Active Endeavour* was replaced by a non-Article 5 Maritime Security Operation, Operation *Sea Guardian*, in order to perform the full range of Maritime Security Operation tasks as needed.[11] Building on previous counter-piracy missions, NATO's *Ocean Shield* naval operation, approved by the North Atlantic Council on 17 August 2009 and terminated on 15 December 2016, focused on at-sea counter-piracy operations off the Horn of Africa, in conjunction with the EU naval operation *Atalanta* and the US-led Combined Task Force 151, established in January 2009.[12] According to Spanish government sources, Spain contributed to Operation *Ocean Shield* from December 2013 to June 2014 with an F 100 class frigate.[13]

(2) Bilateral agreements with the United States of America.

Ever since Spain and the United States (US) initiated diplomatic relations in 1785, with the exception of the Spanish-American war in the late 19th Century, the two countries have remained allies and partners. Following Spain's non-aggression policy during the Second World War, its signing of the Mutual Defense Assistance Agreement on 26 September 1953 – the so-called *Pacts of Madrid* – represented an important boost for the re-establishment of diplomatic, defence and economic ties between the two countries. Part of the 1953 pacts allowed the establishment of American air bases at Torrejón de Ardoz, Zaragoza and Morón de la Frontera and a US naval base at Rota (Cadiz)[14] in exchange for economic and military aid, but without outlining clearly the scope of that assistance. Notwithstanding the title of the agreement, "Mutual Defense Assistance Agreement", it is quite difficult to ascertain what obligations the US had assumed with regard to Spain's defence. It certainly

9 *Alliance Maritime Strategy*. For a commentary on this instrument see: F. Álvarez Blanco, 'Visión de la Armada sobre la seguridad marítima en nuestro país y la necesidad de una estrategia marítima de seguridad', in: *Enfoque integral de la seguridad en el espacio marítimo español* (Escuela de Altos Estudios de la Defensa, Monografías 135, Ministerio de Defensa de España, 2013) 145-181, at 154-157.

10 See: *Operation Active Endeavour*.

11 See: *North Atlantic Council approved Operation Sea Guardian*, Warsaw Summit Communique issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8-9 July 2016, para. 91. In principle, *Operation Sea Guardian* is intended to conduct any of the agreed seven maritime security operational tasks: maritime situational awareness, freedom of navigation, maritime interdiction, countering the proliferation of weapons of mass destruction, protecting critical infrastructure, countering terrorism at sea and maritime security capacity-building.

12 See: *Combined Task Force 151*.

13 See: *Defence: Spanish participation in Operation Ocean Shield*, Spain, La Moncloa, Gobierno de España.

14 *Agreement on Mutual Defense Assistance, Sept. 26, 1953, United States Spain*, 4 United States Treaties and Other International Agreements (UST) 1950-1982; 1876, United States Treaties and Other International Agreements No. 2849; 207 UNTS 87. With regard to this Pacts, see: R. Piñeiro Álvarez, 'Los Convenios Hispano-Americanos de 1953', 11 *Historia Actual Online* (2006), 175-181.

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could not be considered a pact for setting up a system of collective self-defence. At any rate, it is clear that with these bases, the US had strengthened its presence in the Mediterranean, in a further step to assure US predominance in its rivalry with the URSS during the Cold War, while Spain acquired international recognition, gradually bringing to an end its international isolation after the Spanish civil war.

The restoration of democracy in Spain in 1975 saw its bilateral relations reinforced and stabilized. As a result, in 1982, Spain and the US signed a new executive agreement on the use of Spanish bases. This agreement, the Agreement on Friendship, Defense and Cooperation[15] allowed the US retain its use of the Rota naval base and the airbases at Torrejón de Ardoz, Zaragoza, and Morón de la Frontera, as well as a number of storage and communications facilities.

Spain's entry into NATO in 1982 and subsequent membership of the then European Communities in 1986 also meant a significant strengthening of bilateral relations with the United States, culminating in the signing of the Agreement on Defence Cooperation in 1988.[16] Article 31 and Annex 2 of said agreement set forth the rules for the use of the Rota naval base, whose installations fall strictly under the Spanish flag. However the US and Spanish navies cooperate together and share many of the base's facilities. The American base at Rota supports the strategic priorities of Naval Forces Europe-Africa, 6th Fleet and COCOM by providing airfield and port facilities, security, force protection, logistical support, administrative support and emergency services to all US and NATO forces.[17] The Agreement has been subsequently revised three times through the Protocols of Amendment, on 10 December, 2002, 10 October 2012 and 17 June 2015,[18] which, among others, have allowed the installation of a NATO ballistic missile defence system on US Navy *Aegis* ships at Rota.[19]

(3) The Western European Union and the EU

The Western European Union (WEU) was born out of the Treaty on Economic, Social and Cultural Collaboration and Collective Self-Defence (known as the Treaty of Brussels), signed in Brussels on 17 March 1948, as amended and completed by the Protocol signed in Paris on 23 October 1954. It was mainly committed to mutual defence should any of the signatories be the victim of an armed attack in Europe.[20] Spain signed up to the WEU in 1988.[21]

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[15] Agreement on Friendship, Defense and Cooperation (adopted 2 July 1982, entered into force 14 May 1983) 1871 *UNTS* 381.

[16] See: *Agreement of defense cooperation between the U.S.A and the Kingdom of Spain with annexes and notes*, of 1 december 1988.

[17] Commander, Navy Installations Command, *Naval Station Rota*.

[18] *Protocols between the United States of America and Spain amending the Agreement of 1 December 1988*, Treaties and other International Act Series 13-521.1.

[19] For a comment on the bilateral agreements between Spain and the US in defence matters see: Aznar Fernández-Montesinos, *supra* n. ¡Error! Marcador no definido., at 12; S. D. Murphy, 'The Role of Bilateral Defense Agreements in Maintaining the European Security Equilibrium', 24 *Cornell International Law Journal* (1991) 415-435, at 427-429; A. Viñas, 'La negociación y renegociación de los acuerdos hispano-norteamericanos, 1953-1988: Una visión estructural', 25 *Cuadernos de Historia Contemporánea* (2003), 83-108.

[20] According to the Art. V of the modified Brussels Treaty of 1948, "If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Art.

The WEU was largely evanescent for decades until the late eighties, when it was decided to set up some naval operations, starting with Operation *Cleansweep*, which helped to complete clearance of a 300-mile sea lane from the Strait of Hormuz, following the laying of mines in the Persian Gulf during the Iran-Iraq war.[22] The experience gained from these activities was instrumental in strengthening Europe's potential for concerted action in the future.

Building on the WEU's achievements and the principle of European solidarity, the EU has been undertaking crisis management tasks since 2000, and has developed a Common Security and Defence Policy (CSDP) over the years that was given a decisive impulse by the Lisbon Treaty of 2007. Among other things, the Lisbon Treaty included both a mutual assistance and a solidarity clause, which assumes responsibility for mutual defence set forth in the modified Treaty of Brussels. In fact, Article 42.7 of the Treaty on the European Union (TEU) now specifies that, if a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power. Thus, with WEU no longer needed, the States Parties to the Modified Treaty of Brussels decided collectively in 2010 to terminate that treaty, thereby effectively closing the organization.[23] At present, the CSDP is regulated in Section 2, of Chapter 2, of Title V TEU. According to Article 42(1) TEU, CSDP "[...] shall provide the Union with an operational capacity drawing on civilian and military assets", which can be used "[...] on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter". The kind and nature of CSDP operations are further specified in Article 43(1) TEU, which refers to "joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation." This provision further states that "[...] All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories". Among the CSDP operations, the two approved naval operations —*Atalanta* and *Sophia*— are dealt with in other chapters of this *Yearbook*'s section.[24]

(C) THE SPANISH NAVY AND ITS ROLE IN A DEMOCRATIC STATE

(1) Functions and competences of the Navy.

Given that today's risks and threats are now global, highly diverse nature and, in many cases, highly interdependent, the Spanish Navy has undertaken reforms and adopted strategies to address the

51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power."

[21] *Adhesion of Spain to the* WEU, BOE No. 110, 8 May 1990.

[22] On Operation *Cleansweep* see: W., Van Eekelen, 'Naval cooperation in WEU', 18 *Marine Policy* (1994), 534-537.

[23] Statement of the Presidency of the Permanent Council of the WEU on behalf of the High Contracting Parties to the Modified Brussels Treaty terminating the Treaty – Belgium, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom, Brussels, 31 March 2010.

[24] On these questions, see the contributions in this volume by Sobrino Heredia on "Piracy" and by García Andrade on "Migrants by Sea".

 DOI: 10.17103/sybil.21.27

conflicts of the 21st century. The Navy has moved from the traditional concept of territorial *defence* to a more complex one of *security*, which is broader in scope and not limited to certain physical spaces. *Security* is an aim that cannot be achieved through defence alone; hence it is imperative to view security from an integral perspective, requiring the full cooperation of the modern state's many agencies and bodies.

Furthermore, as highlighted in the introduction, Spain's increased activity in the international sphere since its return to democracy —a novelty in comparison with Spain's previous isolation and that of past centuries— calls for the international perspective to be taken into account when it comes to security. The Spanish Navy's role is no longer confined to the protection of Spanish territorial waters and areas of interest, but also to the defence of areas and interests of the international community. The new horizons of the security make imperative the cooperation with security agencies of other countries and international organisations.[25]

Therefore, the Organic Law 5/2005 of 17 November 2005 on National Defence,[26] Spain's basic norm in defence and security matters for defining missions, includes a flexible approach, unlike the fixed division of the past[27] between external and internal action, emphasizing the need for cooperation among the different agencies of the state with competences in security matters.[28] Moreover, the Organic Law 5/2005 underscores that the Spanish armed forces' current role is to contribute not only to Spain's security and defence interests, but also to cooperate with international forces for the sake of the security of Spain's allies and the maintenance of the peace and the stability of the entire international community, in the frame of the international organizations in which Spain takes part, under the supreme responsibility of the Security Council of the United Nations.[29]

Article 16 of the Organic Law 5/2005 specifies the type of operations that the Spanish armed forces can undertake. Among other operations, the Law specifies that it appertain to them the implementation of any activity aimed at assuring the sovereignty and independence of Spain, as well as to protecting the life of its population and its interests.[30] On the other hand, Article 16 envisages the cooperation of Spain's armed forces in peace-keeping and international stability operations in those zones where they may be compromised, the restoration of the security and governance as well as the reconstruction of a country, region or certain zone, in conformity with the international treaties

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[25] For a broader explanation of the necessity of a comprehensive and coordinated maritime strategy see, among others: F. Del Pozo, 'La mar nunca está en calma (II). Análisis del concepto de seguridad marítima en España', (Instituto Español de Estudios Estratégicos, Documento de Investigación del Instituto Español de Estudios Estratégicos 12, 2015), at 17-18.

[26] Organic Law 5/2005, 17 November 2005, on National Defense (BOE No. 276, 18 November 2005).

[27] Following a process similar to that of other European coastal states and of other advanced nations, the second half of the 20th century saw the Spanish Navy losing competences in favour of the civil sector, such as the maritime jurisdiction for crimes occurring in the maritime scenario as, for example, meaningful shipwrecks, discipline on board of merchant ships, etc. For their part, warships, that had had wide competences in the pursuit of crimes at sea, fishing vigilance and others, began to lose them through successive legislative acts implementing important transformations of the armed forces in this period, in general consistent with the principle according to which armed forces are an instrument of the exterior action of the state but not of the interior action. In this regard see: Pozo, *supra* n. 2525, at 32-33.

[28] Organic Law 5/2005, Art. 15(3).

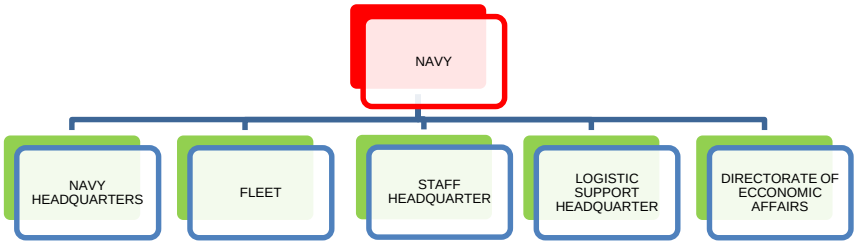
[29] *Ibid.*, Art. 15(2).

[30] *Ibid.*, Art. 16(a).

and agreements in force.[31] Furthermore, Article 16 entrusts the armed forces with the support to the State Security Forces and Bodies in the fight against the terrorism and to the institutions and bodies responsible for the tasks of land, maritime and air search and rescue.[32] Article 16 also establishes that the Spanish Navy is tasked with surveying the maritime spaces, as part of State's action in the sea.[33]

(2) Structure of the Navy

The Spanish Navy's structure has changed over the years according to its missions and the changing nature of armed conflicts. To increase the effectiveness of the Armed Forces in the fulfilment of missions as entrusted to them by the Constitution of 1978, the Organic Law 5/2005 organizes the entire Armed Forces according to criteria that facilitate joint action by the Army, the Navy and the Air Forces. Unlike the previous norms, which attributed particular missions to each branch of the Armed Forces, the Organic Law 5/2005 considers the Armed Forces to be a single entity embodying the different forms of action of its components. This facilitates the ideal employment of its capacities, without diminishing the specific capacities of those components.[34] In what concerns the basic structure of the Spanish Navy, as set forth by the Order DEF/1642/2015, of 30 July 2015 and developed by the Instruction 4/2016 of the Chief Admiral of the Navy,[35] of 15 January 2016, is as follows:[36]



(3) Operations and missions of the Spanish Navy in the years following the adoption of LOSC

Let's examine the Spanish practice in recent years since the adoption of the LOSC, in order to know whether the Spanish Navy has had to intervene either in the defence of the Spanish territories and interests or in the defence of the interests of the international community, as envisaged in the Organic Law 5/2005 of National Security.

(a) The defence of the Spanish maritime spaces and interests.

It is important to point out from the outset that there have been no military conflicts compromising

[31] *Ibid.*, Art. 16(b).
[32] *Ibid.*, Art. 16(c).
[33] *Ibid.*, Art. 16(a). For a more extensive exposition of the mission of the Navy see: *Manual de Derecho del Mar*, *supra* n..6, at 105-118.
[34] Organic Law 5/2005, 17 November 2005, on National Defense (BOE No. 276, 18 November 2005).
[35] See: Ministerio de Defensa de España, Armada Española, *Structure of the Navy*.
[36] For a complete explanation of this structure see: *Armada Española* (Escuela superior de las Fuerzas Armadas, 2012), 51-88.

 DOI: 10.17103/sybil.21.27

Spain's maritime security and, fortunately, there is no reason to believe that one will occur in the coming years. Nevertheless, the 1995 'halibut crisis' with Canada[37] over the freedom of fishing rights, as enshrined in Article 87 LOSC, and the Spain's dispute with Morocco over Parsley Island[38] in 2002, suggests that military confrontation is not necessarily a thing of the past. In this regard, there are two situations that could worsen and escalate and, eventually, jeopardize Spain's maritime security: a hypothetical conflict with the United Kingdom over the waters of Gibraltar,[39] or an even more hypothetical conflict over an independent Catalonia.

(b) The defence of the interests of the international community

In recent years, the defensive or military aspects of maritime security have acquired great relevance in public opinion and accordingly in Spanish politics and law. Indeed, the vast numbers of people attempting to illegally reach Spanish and European coasts in recent years, together with the associated phenomenon of people smuggling; the rebirth of the maritime piracy and its threat to Spanish and other nations' interests in the Gulf of Aden, and the increase in jihadist terrorist attacks we are witnessing, have placed the security issues at the top of the agenda.

In this regard, the Spanish Navy has also taken an active involvement in a number of international naval operations, such as the EU's *Atalanta* and *Sophia* missions against maritime piracy in the Gulf of Aden and human trafficking in the Mediterranean respectively, as well as in other NATO naval operations mentioned above.

(D) CONCLUSION

[37] On 9 March 1995, the *Estai*, a fishing vessel flying the Spanish flag and manned by a Spanish crew, was intercepted and boarded some 245 miles off the Canadian coast by Canadian Government vessels. The Spanish Government and the EU categorically condemned the act alleging that the Canadian authorities breached the universally accepted norm of customary international law codified in Art. 92 and articles to the same effect of LOSC, according to which ships on the high seas shall be subject to the exclusive jurisdiction of the flag state. Canada replied that the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen. Spain reacted by deploying some patrol boats to protect its country's fishing vessels. In April 1995 Canada and the EU signed an agreement on fisheries in the context of the Northwest Atlantic Fisheries Organization Convention that put an end to the crisis regarding the fisheries issues. Nevertheless, on 28 March 1995, Spain filed an application against Canada before the International Court of Justice asking for reparation for the violation of its rights under international law (see: *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court*, ICJ Reports (1998) 432, at 443-444. By a Judgment of 4 December 1998, the Court found that it had no jurisdiction to adjudicate upon the dispute between Spain and Canada (*ibid.*, at 468).

[38] In fact, it is tiny rocky islet located in the Strait of Gibraltar, some two hundred fifty metres off the Moroccan coast and 13.5 kilometres from the Spanish coast. The islet is around 0.15 square kilometres in size and up to seventy-four metres in height. On 11 July 2002, members of the Moroccan Army occupied the islet, whose sovereignty is disputed between Spain and Morocco. After unsuccessful diplomatic exchanges, on 17 July 2002 Spanish military forces expelled the Moroccan soldiers. Some days later, the Spanish military abandoned the islet, returning the situation back to as it was before the 11 July 2002. In this regard see: Cortes Generales, Diario de Sesiones del Congreso de los Diputados, Comisiones, Año 2002 VII Legislatura Núm. 543, Conjunta de Asuntos Exteriores y Defensa, Sesiones núms. 32 y 28, respectivamente celebrada el miércoles, 17 de julio de 2002, Comparecencia urgente de los señores ministros de Asuntos Exteriores (Palacio Vallelersundi) y de Defensa (Trillo Figueroa y Martínez-Conde), conjuntamente, para informar sobre la evolución de los acontecimientos tras la ocupación de la isla Perejil el día 11 de julio. A solicitud del Gobierno. (Número de expediente 214/000136.)

[39] On this question, see the contribution in this volume by del Valle Gálvez on "Maritime zones around Gibraltar" and the contribution by López Martín on "Navigation through the Strait of Gibraltar".

Once the Franco dictatorship came to an end, Spain embarked on a process of integration in international organisations that have had relevant consequences regarding military and security matters. When Spain joined NATO and the EU, it assumed important obligations in defence matters, such as the mutual assistance clause in the event of armed attack, in effect both in NATO and European law. In addition, Spain has extended its agreements for US armed forces to continue using military bases on Spanish territory, such as the Rota naval base, which is of major strategic value to the Mediterranean and the Middle-East. Over the last two decades, membership of those international organisations has seen the modernization of Spanish Navy and new position in a fully multilateral context. Notwithstanding its improved military preparedness, Spain has enjoyed a period of peace and prosperity unknown in previous centuries, a circumstance that is largely owed to its integration in these international organisations. Thus, since the entry into force of LOSC, the Spanish Navy's military activity has been centred on its participation in NATO and EU operations whenever the UN Security Council have called for its assistance.

As we have already underlined, Spain has not been involved in any open armed conflicts in the last two decades, but there have been several extremely tense situations with regard to the defence of the Spanish maritime spaces or interests, such as the clash with Canada over fishing on the high seas in 1995; the dispute with Morocco over Parsley Island in 2002, or the latent conflict with the United Kingdom for the sovereignty over Gibraltar and the projection of its maritime spaces.

In addition to the process of internationalization, new threats and risks to modern societies, such as jihadism, smuggling of migrants by sea, maritime piracy and cyber-attacks, have led its armed forces to move from defence to security, a new concept that requires multidisciplinary approaches and collaboration between the different agencies competences in law enforcement. Spain is no exception, and since 2013 it has been struggling to implement a national maritime security strategy, which would pool the efforts of the many national and regional agencies, with a primary role for the Navy nonetheless.[40] Some legislation has been passed to assure the efficiency of this process and to avoid overlapping functions and actions between the different actors involved. A central place is reserved to the Organic Law 5/2005 of National Security.

In coming years, once the United Kingdom has left the EU, an advance is expected in the European integration of defence matters, which will reinforce the trend to internationalization. Finally, we hope that some present situations of risk, such as the disputes over Gibraltar or the issue of Catalonia, do not develop into military conflicts.

[40] On this question, see the contribution in this volume by Blázquez Navarro on "The National Maritime Strategy".

 DOI: 10.17103/sybil.21.27

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

Piracy

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(A) INTRODUCTION

Maritime piracy is an ancient, recurring and present-day crime affecting the interests of the international community as a whole. Unlike in the past, however, today this crime occurs not only in its traditional form —illegal acts of violence, detention or depredation committed on the high seas for private ends by the crew or passengers of private ships— but also as illegal acts of violence committed in territorial waters and/or for political reasons, which hinders both its prevention and repression.[1]

Spain is a country with a long maritime tradition and an extensive coast. It has felt the impact of these acts of violence at sea from time immemorial. Berber pirates once hindered the navigation of the Mediterranean and raided the coasts of the Spanish Levant, whilst pirates, buccaneers and filibusters harassed traffic between the Iberian Peninsula and the Americas; hence the Spanish authorities' concern for this crime at the time and their search for ways to address it, including, amongst others, the creation of the Navy Marine Corps to protect ships.

This "classical" piracy evolved and expanded between the 15th and 18th centuries, from the opening of the new maritime trade routes to the acquisition by states of powerful navies able to stop the pirates. Thereafter, piracy did not disappear but rather moved to other regions, where the presence of the Spanish fleet or interests was much smaller, with the consequent ebbing in Spain's interest in the repression of this international crime.

From the 19th century until the present one, international —and Spanish— attention to the criminal activity of pirates declined considerably. This was largely due to the remoteness of this activity from the major international maritime trade routes of the time and its minor media and

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1 In contemporary piracy, private ends are often confused with political and terrorist objectives. Indeed, to be more effective, piracy is often coupled with banditry, situations that combine international and common law crimes that may moreover be further compounded by acts of terrorism, which logistically and financially support each other. On these matters, see, amongst others: E. Bertin-Mourot, *Terrorisme et piraterie : des menaces contemporaines à la sûreté des transports maritimes de marchandises* (Ed. L'Harmattan, Paris, 2005); M.N. Murphy, *Contemporary Piracy and Maritime Terrorism: The Threat to International Security* (Abingdon Routledge for the International Institute for Strategic Studies, London, 2007); J.M. Sobrino Heredia, "Piratería marítima y terrorismo en el mar", *Cursos de Derecho Internacional Vitoria-Gazteiz* (Universidad del País Vasco, Bilbao, 2009), at 80-147; P. Chapleau and J.P. Pancracio, *La piraterie maritime. Droit, practiques et enjeux* (Ed. Vuibert, Paris, 2014); and P. Koutrakos, P. and A. Skordas, *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing, London, 2014).

 DOI: 10.17103/sybil.21.28

political impact. Thus, when the law of the sea began to be codified in the mid-20th century, neither the international conferences where it was discussed, nor the conventions in which it was ultimately set out (including both the Geneva and the Montego Bay Conventions[2]) showed any particular concern for this crime, but rather projected the idea that it was little more than an obsolete illicit activity or one that had fallen into disuse.

However, the maritime reality soon gave the lie to this perception, for shortly after the LOSC was signed, in 1982, acts of violence at sea began to proliferate. Events such as those befalling the Vietnamese boat people and incidents such as the hijacking of the *Achille Lauro*, coupled with the rise in transnational organized crime in Southeast Asia and its impact on maritime traffic, harshly showed that an activity thought to have been consigned to the history books was once again present on the world stage.

Notwithstanding the above, it was especially in the first decade of the 21st century that violence at sea emerged as a serious international problem. Acts of piracy have been multiplying, as have the maritime areas in which they occur. The reasons are manifold: the weakening or disappearance of central authorities in various states, the difficult economic and social situation in others, the cross-border presence of radical political and religious movements, organized crime, etc. All of these factors translate to "failed" or dangerous states and seas, where the acts of piracy that increasingly affect the security of maritime traffic are concentrated. In addition to in Southeast Asia, the situation is particularly serious in the Indian Ocean, off the coast of Somalia, and in West Africa, especially in the Gulf of Guinea. Spain maintains an important presence in both of the latter two maritime areas, through its commercial and, especially, its industrial fishing fleets.

The presence of Spanish-flagged ships in waters where acts of piracy are proliferating soon gave rise to incidents of various degrees of seriousness. The one to raise the alarm amongst the Spanish authorities, due to its gravity and repercussions, was the hijacking of the Spanish fishing vessel *Playa de Bakio* in April 2008.[3] That incident showed the broad impunity enjoyed by Somali pirates to date and the lack of an organized international response to these events, as well as the lack of legal mechanisms in Spanish law to effectively prosecute these criminal acts.

This event, which caught the Spanish authorities off guard, was followed by other acts of violence at sea affecting Spanish-flagged vessels, in both the Indian Ocean and the Gulf of Guinea, prompting the Spanish government to take a series of measures to prevent and repress these actions. These measures were implemented on multiple fronts —the international (B), regional (C) and domestic

[2] The UN Convention on the Law of the Sea, 1833 UNTS 3 (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter) treats piracy very similarly —indeed, virtually identically— to how it is treated under the 1958 Geneva Convention on the High Seas, although it offers a very different legal regime for maritime areas and navigation. Articles 100 to 107 are devoted to piracy and establish the duty for all states to cooperate in the repression thereof. These provisions mainly cover the definitions of *piracy* and *pirate ship*, the seizure of pirate ships, and liability for such seizures. Articles 105 (on the seizure of a ship) and 110 (on the right of visit that warships on the high seas have in relation to a foreign ship) provide a legal basis for responding to acts of piracy. This legal basis also applies to the EEZ under Article 58(2). For an analysis of these provisions, see J.M. Sobrino Heredia, "Piratería marítima...", *supra* n. 1, at 100-113.

[3] The tuna vessel *Playa de Bakio* was hijacked from 20 to 26 April 2008. During that time, the crew of the Spanish trawler was held hostage by pirates off the coast of Somalia. Following payment of a substantial ransom, the pirates left the ship. Since then, the Spanish tuna fleet in the area has sustained around a hundred attacks and attempted boardings.

 DOI: 10.17103/sybil.21.28

(D)— offering proof that Spain has gradually come to favour an increasingly broad conception of maritime piracy.

(B) AN INTERNATIONAL RESPONSE

Illegal acts of violence, detention or depredation at sea cover a wide variety of acts, both with regard to their nature and to the area where they are committed. Not all of these acts can be classified as international crimes of maritime piracy; hence, the need to turn to various legal instruments to seek a response to this problem.

The first such instrument is the well-known law of the sea, codified and implemented through LOSC, which, in particular through Article 101, includes a limited definition of piracy: in terms of both where the crime is committed and the characteristics of the vessels involved, as well as the reasons for the act. The terms of other articles, such as Article 58(2), have made it possible to broaden the conception of piracy contemplated under the Convention, but even so it does not cover all acts of violence at sea.

Thus, there arose the need to define these acts and establish mechanisms to prevent and ultimately repress them, which was attempted with the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.[4] The IMO has also carried out important work, adopting numerous resolutions on the matter in favour of expanding the conception of maritime piracy to include armed robbery against ships as well. Likewise, the International Maritime Bureau (IMB), which has proposed a very broad definition of piracy as an "act of boarding or attempting to board a ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act".[5]

This broad conception of maritime piracy can also be found in an avalanche of UN Security Council resolutions, beginning with Resolution 1814 (2008)[6], which affirms that international law, as reflected in the LOSC, sets out the legal framework applicable to combating piracy and armed robbery. This has made it possible, ever since, for international organizations and individual states to carry out actions to prevent and repress these crimes off the coast of Somalia, leading to a, perhaps temporary, decline in violence at sea in this region.[7] At the root of these Security Council resolutions, which have

4 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221, as amended on 14 October 2005 (IMO, Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21, Nov. 1, 2005) (hereinafter, 1988/2005 SUA Convention).

5 International Maritime Bureau, *Piracy and armed robbery against ships*. *Annual Report*, 2007.

6 S/RES/1814 (2008), 15 May 2008.

7 From a peak of 47 hijackings in 2010, Somali piracy fell to none in 2013 and 2014. Three international military missions, military convoys, the hiring of armed private security contractors on board ships and self-defence in the form of evasive manoeuvres or the enclosure of the crew in a safe area are some of the reasons for this decline in piracy off the Somali coast. However, the first quarter of 2017 saw a slight increase in these acts, perhaps due to the completion of the NATO military operation. These new attacks include the one suffered by the merchant vessel *Cotina*, whose hijacking was

 DOI: 10.17103/sybil.21.28

proliferated and whose effects have been extended to date, lies the uptick in acts of piracy in the Indian Ocean in those years, the attacks on World Food Programme vessels, the efforts of an eight-country working group led by Spain in support of new measures to combat piracy, and certain especially dramatic events, such as the hijacking of the French vessel *Le Ponant* and the Spanish trawler *Playa de Bakio* in 2008.

Specifically, the need to increase international measures led France and Spain, amongst other countries, to propose the adoption of a text by the Security Council that would allow the hot pursuit of pirates without the barriers imposed by territorial waters in cases of *flagrante delicto* and the conducting of international maritime patrols in the most dangerous areas in which the pirates act. This was achieved in UN Security Council Resolution 1816 (2008),[8] which authorized states cooperating with the Transitional Federal Government of Somalia to enter the territorial waters of Somalia and to use all means necessary to repress piracy, a possibility that Resolution 1851 of 16 December 2008[9] further extended to Somali territory itself and to the country's airspace. Thus, Spain, upon seeing that the acts of violence and pressure on its commercial and fishing fleet were growing more pronounced in this maritime area, became one of the countries to make the greatest effort to seek international legal coverage to repress that violence. At the same time, as will be seen below, from the outset it sent ships and aircraft to collaborate both with NATO and, later, in the context of the EU, on the surveillance and repression of piracy.[10] These efforts were further supplemented by its active participation from the start in the Contact Group on Piracy off the Coast of Somalia (CGPCS).[11]

Another region of the world beset by piracy that is giving rise to an international response in whose design and implementation Spain is involved is the Gulf of Guinea. This is because Spanish-flagged vessels and vessels owned by Spaniards have been subject to these illicit activities.[12] The seriousness of the crimes committed in this region, coupled with the particularly violent way in which they are committed, led the UN Security Council to warn in two different resolutions of the growing threat posed by piracy and armed robbery in the region and to express its support for regional organizations to combat this scourge and encourage Member States to support them and to take measures to counter these criminal activities.[13] In this regard, Spain, both individually and within the framework of the EU, is taking measures to prevent and repress the activity of pirates, ranging from sending ships to participating in training projects for the naval forces of countries in the region.

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prevented by the Spanish Navy ship *Galicia*.

8 S/RES/1816 (2008), 2 June 2008.

9 S/RES/1851 (2008), 16 December 2008.

10 In September 2008, Spain launched an exclusively national operation called *Centinela Índico* (Indian Sentinel), involving the deployment of a maritime surveillance aircraft to Djibouti.

11 The Contact Group was established as an international cooperation mechanism to combat piracy, as requested in Resolution 1851, which was sponsored by the US and unanimously adopted on 16 December 2008.

12 Most recently, a group of armed pirates attacked the Spanish LNG carrier *La Mancha Knutsen* in March 2017, as it sailed through waters in the Gulf of Guinea. On the activity of pirates in this region of the world, see, amongst others: Ad. Anyimadu, *Maritime Security in the Gulf of Guinea: Lesson Learned from the Indian Ocean* (Ed. Chatham House, London, 2013).

13 S/RES/2018 (2011), 31 October 2011, and S/RES/2039 (2012), 29 February 2012.

(C) A REGIONAL RESPONSE

Under the legal umbrella of the UN Security Council resolutions in particular and international law in general, three major military operations have been conducted by air and sea in the Indian Ocean: a coalition of Combined Maritime Forces, led by the US and represented by Combined Task Force 151; a pair of NATO-led air and sea operations (the operations Allied Protector and Ocean Shield); and, finally, the third operation, conducted by the EU, called EU NAVFOR Somalia or Operation *Atalanta*.[14] Spain's collaboration or participation in these operations has been, and remains, quite considerable,[15] particularly, for obvious reasons, in Operation *Atalanta*.

With regard to this latter operation, it is worth recalling that, following the capture of the fishing vessel *Playa de Bakio*, and on the occasion of the Spanish-French summit of 27 June 2008, a coordination cell was established[16] through which Spain organized Operation *Centinela Índico* (Indian Sentinel) and based on which Operation *Atalanta* would later be organized. To this end, Spain promoted the inclusion on the agenda of the Council of Ministers for Fisheries and Maritime Affairs and the General Affairs Council of the EU of the issue of piracy in the fisheries sector. In this context, the Council adopted Joint Action 2008/851/CFSP of 10 November 2008, authorizing an EU military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.[17] The operation is also tasked with protecting World Food Programme ships and other vulnerable maritime vessels, monitoring fishing activities off the coast of Somalia, and providing support to other EU programmes and missions in the region. In December 2009, the Council – at Spain's request – amended it to enable EU NAVFOR to supervise fishing activities off the Somali coast and around the Seychelles (where most of the Spanish fishing vessels operate). The operation, in which the Spanish Navy has a very strong presence,[18] is carried out in

[14] For an examination of these military operations, see: J.M. Sobrino Heredia, "Les opérations militaires Internationales dans la prévention et la poursuite de la piraterie maritime et l'usage de la force", in J.M. Faramiñán Gilbert and V.L. Gutiérrez Castillo (eds.), *Coopération, sécurité et développement durable dans les mers et les océans. Une référence spéciale à la Méditerranée/Sea and ocean-related cooperation, security and sustainable development: An analysis with a special focus on the Mediterranean* (Ed. Huygens, Barcelona, 2013), at 215-228.

[15] The Spanish Navy has participated in multinational initiatives to improve maritime security, such as the African Partnership Station (APS), organized annually by the United States Africa Command (AFRICOM). It has likewise collaborated on the US initiatives Combined Task Force 150 (CTF-150) and 151 (CTF-151) as part of a multinational coalition dedicated to preventing terrorism and international crimes at sea, in which the Spanish Navy has permanently maintained a ship. Spain also participates, through both the EU and NATO, in the fight against piracy in the region. The inclusion of Spanish warships in Standing NATO Maritime Groups 1 and 2 and the Spanish Navy's participation in EU NAVFOR are an important factor in increasing maritime security in the area.

[16] When, on 19 September 2008, the EU created a Naval Coordination Cell (EUNAVCO) in Brussels to support UN Security Council Resolution 1816, the mission was placed under the command of a Spanish naval officer.

[17] OJ L301, 10 November 2008, at 33.

[18] From the start of the operation, 32 Spanish ships have participated in a naval group whose command is rotated every four months amongst the countries contributing forces. To date, Spain has commanded the group (EU NAVFOR) six times since the operation was launched. Spain complements its contribution with the "Orión" detachment in Djibouti, which normally has a P-3 Orion maritime patrol aircraft and a D-4 VIGMA (CN 235). Since the operation began, they have carried out an average of 13 missions, or 100 flight hours, a month. Spain participates in the operation with one or two ships and the "Orión" Air Force detachment, equipped with a Maritime Patrol and Reconnaissance Aircraft (MPRA) unit deployed in Djibouti. Additionally, it is the only country to maintain standing surface facilities and the "Orión" detachment, such that it is presently the largest contributor to the operation.

collaboration with and with the authorization of the Transitional Federal Government of Somalia, as well as the Republic of Djibouti and the Republic of Seychelles, to deploy the European forces involved in the operation. Its duration has been successively extended until December 2018.[19] Since it was launched, European sailors involved in Operation *Atalanta* have detained and brought to court numerous pirates, in addition to preventing many hijackings and significantly reducing assaults on ships in the region. Specifically, with regard to Spain, since Operation *Atalanta* began, Spanish naval units have captured a total of 168 pirates, of whom 50 were brought to justice (14 in Spain, 7 in France, 1 in Djibouti, 17 in Kenya and 11 in Seychelles) and 118 released at various points along the Somali coast.[20]

However, Operation *Atalanta* is not the only one the EU is conducting in the region; it is complemented by two other missions, in which Spain also plays an important role: the European Union Training Mission (EUTM) Somalia, which aims to train the Somali armed and security forces,[21] and EUCAP Nestor, which seeks to build and strengthen maritime capabilities throughout the region, including, in addition to in Somalia, in other countries in the region, such as Djibouti, Kenya or Seychelles.[22] To this end, Spain supports the creation of a true regional maritime capability in the area and considers that this mission should be viewed as a necessary complement to the *Atalanta* and EUTM-Somalia operations, within the global approach the region requires.

Another regional piracy hotspot, as already noted, is the Gulf of Guinea. In implementation of UN Security Council resolutions, the EU and Spain have deployed their forces to combat violence at sea in the waters of this African region, too. As in Somalia, piracy in the Gulf of Guinea is rooted in endemic poverty, insecurity, inequality, corruption, misrule and the presence of armed groups. However, it differs from piracy in Somalia in various ways: the absence of "failed" states; the purpose of the crime, which here is related to the theft of goods (hydrocarbons) rather than hijackings; the violence employed, as no ransom is sought; and the fact that it often occurs in territorial waters, such that the vessels most often affected are not fishing vessels but oil or gas tankers. In light of this reality, in January 2013, the EU launched a cooperation programme with several African countries to build coastguard capabilities and strengthen the exchange of information in order to enhance the security of

[19] In May 2016, the EU approved the Triple Review, the result of a consensus amongst the Member States, establishing the basis for furthering the EU's comprehensive approach to the Horn of Africa. With regard to its impact on *Atalanta*, the operation's mandate was extended until December 2018.

[20] It is well known that Operation *Atalanta*'s weak point is the prosecution and, where applicable, imprisonment of pirates.

[21] On 15 February 2010, the European Council adopted Council Decision 2010/96/CFSP (OJ L 44 of 19 February 2010, p. 16) to launch a military mission to train Somali security forces in Bihanga, Uganda (EU Training Mission, EUTM), as a contribution to the training programme being carried out by AMISOM. Spain offered to be the framework country for the EUTM mission, which it thus leads with the ensuing additional effort (30% of the instructors and 50% of the commands up to 38 of the 134 members).

[22] Council Decision 2012/389/CFSP, of 16 July 2012 (OJ L 187 of 17 July 2012, p. 40). The objective of EUCAP Nestor is to build regional maritime capacities in Western Indian Ocean states, promoting the development of a national capacity to enhance maritime security, including counter-piracy and maritime governance. The deployment of Spanish military personnel, which began in September 2012, ended on 17 February 2016. Spain continues to participate through the deployment of four civilians in the area.

maritime routes and counter piracy in the Gulf of Guinea.[23] The EU's economic contribution to this programme, called Critical Maritime Routes in the Gulf of Guinea (CRIMGO), amounts to €4.5 million, and seven countries with coasts in the Gulf of Guinea are involved: Togo, Benin, Cameroon, Equatorial Guinea, Gabon, Nigeria, and São Tomé and Príncipe. The Spanish Navy participates in this initiative. Specifically, several Spanish naval units are involved in various regional exercises, such as the Express series (Saharan Express and Obangame Express). They also carry out bilateral training activities according to the needs and requirements of the countries in the area and collaborate with the naval forces of countries such as the US, France and the UK, which, unlike Spain's, have local facilities from which to ensure a continuous presence and cooperation.[24] Additionally, in conjunction with Portugal, another European country with a marked historical presence in the region, Spain is designing a combined joint initiative, the Spanish-Luso Expeditionary Tactical Group (GTELE from the Spanish), which seeks to group the two countries' military activities in the area of the Gulf of Guinea, thereby fostering coordination and synergies. Unlike in Somalia, it is a setting in which the establishment of international naval protection operations or the use of private security contractors may not be enough to stop the pirates' actions due to their special nature. Thus, Spain's action is aimed, first, at strengthening the maritime capabilities and domestic security of the states in the region and, second, at supporting regional cooperation efforts undertaken by regional organizations and bodies in the area.

(D) A DOMESTIC RESPONSE

Piracy generates not only a universal policing jurisdiction, but also a universal criminal jurisdiction. However, the repression of piracy raises an additional question insofar as piracy is both an international crime and a crime under domestic laws. To this end, and although there is no obligation to adopt them, there are national laws and criminal codes with provisions that also apply to piracy and, thus, to the repression of such acts.

In the case of Spain, the country's domestic law has not always dealt with this crime, nor has it

[23] The EU approved an EU-Gulf of Guinea Action Plan (2015-2020) in which it advocates drawing on the experience of the missions in the Horn of Africa and emphasizes maritime capacity-building in coastal states that suffer from piracy, in addition to promoting the Yaoundé Code of Conduct concerning the repression of piracy, armed robbery against ships, and illicit maritime activity in West and Central Africa. Council Conclusions on the Gulf of Guinea Action Plan 2015-20120, Doc. 7168/15, Brussels, 16.3.2015.

[24] The Spanish Navy organizes four-month missions in which patrol boats, such as the *Serviola* and the *Vigía*, stay at ports in the region and patrol and monitor the sea. At each port where they make a stopover, they establish a close relationship with the navy of the country in question, thereby enabling the planning of maritime security cooperation and training activities. This initiative is supplemented with patrols and joint manoeuvres by both navies on the high seas. The objective, in addition to combatting piracy, is to train sailors and officers from the coastal countries of the Gulf of Guinea to be able to conduct effective operations to combat plundering at sea on their own. For more information on these activities and on Spain's interests in the region in general, see, amongst others: Escuela Superior de las Fuerzas Armadas, *La piratería emergente en el Golfo de Guinea. Estrategia de la UE para el Golfo de Guinea* (Ministerio de Defensa, Madrid, 2014); and G. Escribano and F. Arteaga, "Seguridad y recursos en el Golfo de Guinea: algunas implicaciones para España", *ARI 28/2013*, 16 July 2013.

always done so in the same way.[25] This is clear from a reading of the Spanish Criminal Codes of 1822, 1844 (reformed in 1850 and 1870) and, in the 20th century, 1928,[26] 1932, 1944,[27] 1963, and 1973. In their day, these texts, supplemented by special criminal legislation, enabled the prosecution of this crime in Spain. However, the situation dramatically changed with the Criminal Code of 1995, which did not include the crime of piracy, as lawmakers considered it to be an anachronism. This situation persisted for 15 years, until the reform implemented under Organic Law 5/2010, of 22 June 2010, which reintroduced the crime of piracy in Title XXIV (Crimes against the International Community), Chapter V of Book II (Criminal Offences and Penalties).[28]

This reform was more than necessary, for the intervening years had seen a proliferation of acts of violence at sea affecting Spanish interests, the prosecution of which faced serious legal obstacles, as shown by the hijacking of the Spanish-flagged vessel *Alakrana* in Somali waters in October 2009, the detention of two of the alleged pirates, their transfer to Spain, and the challenges involved in trying and convicting them.[29]

The amendment introduced by Organic Law 5/2010 is reflected in two new articles, 616 ter[30] and 616 quater,[31] of the Criminal Code. These provisions contain a very broad definition of the crime of piracy that goes beyond the terms of Article 101 LOSC and is based on the provisions of the 1988/2005 SUA Convention, the resolutions of the IMO and the IMB, and the precedents developed by the Security Council in its resolutions on piracy off the Somali coast. With regard to the new definition of the crime of piracy, the fact that the territorial scope of commission of the crime is the sea in general and not just the high seas and maritime areas not subject to the jurisdiction of any state

[25] G.A. Oanta, "The Legal Treatment of Maritime Piracy Carried Out by the Spanish Legislator", G. Andreone et al. (eds.), *Insecurity at Sea: Piracy and Other Risks to Navigation* (Ed. Francesco Giannini & Figli S.P.A., Naples, 2013), at 123-135; and F.M. Marín Castán, "Tratamiento jurídico de la piratería marítima en el Ordenamiento Jurídico Español", 2 *Documento Marco del IEEE* (Instituto Español de Estudios Estratégicos, Madrid, 2011) 7-24.

[26] A definition of piracy was first included in Article 245 of the 1928 Criminal Code, which provided: 'The crime of piracy is committed by anyone who, without authorization or a letter of marque from the government empowered to grant it, or through the abuse of a legitimate letter of marque or carrying such letters from multiple states, directs, commands or crews one or more armed ships or ships with armed crews that sail the seas committing, at sea, on their coasts or on other vessels, robberies or acts of violence."

[27] The common Criminal Code of 1944, which survived in the codes of 1963 and 1973, refers to piracy. Although it does not contain a definition of the crime, it can be concluded from its provisions that it considers as such not only acts of depredation and violence against persons committed at sea or from the sea by individuals from the crew of a vessel or on board it, but also the facilitating of a vessel's seizure with violence, or the robbing, harming or injury of the persons on board.

[28] Organic Law 5/2010, 22 June 2010, amending Organic Law 10/1995, 23 November 1995, on the Criminal Code (BOE No. 152, of 23 June 2010).

[29] As the crime of piracy did not exist, the Spanish National High Court prosecuted them for crimes of illegal detention and violent armed robbery.

[30] Art. 616 *ter*: 'Anyone who, through violence, intimidation or deceit, seizes, damages or destroys an aircraft, ship or other kind of vessel or platform in the sea, or who attacks the persons, cargo or property found aboard them, shall be convicted of the crime of piracy and punished with a prison sentence of ten to fifteen years.'

[31] Art. 616 *quater*: 'Anyone who, in the prevention or persecution of the events provided for in the preceding Article, resists or disobeys a warship or military aircraft or any other vessel or aircraft bearing clear markings and identifiable as a vessel or aircraft in the service of the Spanish state and authorized for this purpose, shall be punished with a prison sentence of one to three years. If force or violence is used in the aforementioned conduct, a prison sentence of ten to fifteen years will be imposed.'

stands out, as does the exclusion of the subjective element "private end", so difficult to prove in modern piracy. At the same time, the covered conducts are increased through the tacit inclusion of armed robbery or even maritime terrorism.[32]

These provisions of the reformed 1995 Spanish Criminal Code, coupled with the terms of Art. 23(4)(d) of the Organic Law on the Judicial Power,[33] also amended, by Organic Law 1/2009, of 3 November 2009,[34] and by Organic Law 1/2014, on Universal Jurisdiction[35] (under which, in application of the principle of universal jurisdiction, Spanish courts may try and prosecute crimes of piracy committed outside the national territory, provided the crime is committed against a vessel or aircraft flying the Spanish flag and the principles of territoriality and active personality are met), enable Spain to fulfil its duty to cooperate on the prevention and repression of maritime piracy established under Article 100 LOSC.[36] Thus, the Spanish naval forces can, in the context of the military operations in which they collaborate and individually where the occasion so requires, combat piracy, detain pirates and, where advisable, transfer them to Spanish territory to be tried.[37] However, if Spain does not wish to exercise its jurisdiction, it may also transfer it to a third party that does wish to exercise it.[38]

Finally, attention should be called to another new feature in Spanish law, namely, that concerning private security services on Spanish vessels.[39] In this regard, it should be noted that, although the protection of maritime navigation is essentially being provided by armed forces from other states and international organizations, the increase in piracy and armed robbery at sea has led some flag states to authorize their ships to carry private armed forces on board. In the case of Spain, the 2009 hijacking

[32] Given the breadth of the crime of piracy and in keeping with the 1988/2005 SUA Convention, it could include acts of violence at sea for political reasons and terrorist purposes. However, it is worth recalling that terrorism is defined as a crime in its own right in Articles 571 to 580 of the Spanish Criminal Code.

[33] Organic Law 6/1985, 1 July 1985, on the Judicial Power (BOE No. 157, 2 July 1985). It regulates the jurisdiction of the Spanish courts to try certain crimes committed by Spaniards or foreigners outside the national territory in accordance with the principle of universal justice.

[34] BOE no. 266, of 4 November 2009.

[35] Organic Law 1/2014, 13 March 2014, on Universal Jurisdiction (BOE No. 63, 14 March 2014).

[36] On this matter, see, amongst others: J.L. Rodríguez Villasante y Prieto, "Aspectos jurídico-penales del crimen internacional de piratería", in R. Castillejo (ed.), *La persecución de los actos de piratería en las Costas Somalíes* (Ed. Tirant, Valencia, 2011), at 113.

[37] By way of example, this happened with the Somali pirates who attempted to board the supply ship for the Spanish-flagged combat vessel *Patiño* under the EU NAVFOR command on 12 January 2012, who were tried by the First Section of the Criminal Division of the National High Court and convicted, amongst other crimes, of attempted piracy. Likewise, pirates caught by the ships of third countries as they attacked Spanish-flagged ships have been handed over to Spain and tried by Spanish courts for the crime of piracy, as in the case of the seven Somali pirates who attacked the Spanish-flagged tuna vessel *Izurdia* in the Indian Ocean in October 2012 and were convicted by the Third Section of the Criminal Division of the National High Court on 2 February 2015.

[38] To facilitate this situation, the EU has concluded agreements with Indian Ocean coastal states, such as Kenya (Council Decision 2009/293/CFSP) or the Republic of Seychelles (Council Decision 2009/877/CFSP), so that alleged pirates captured in the framework of Operation *Atalanta* can be handed over to and tried in those states. For example, in the case of the *Nepheli*, a Panamanian-flagged merchant vessel assaulted by Somali pirates on 6 May 2009, a Spanish Navy ship intervened and detained the seven assailants. The next day, the same thing happened with the Maltese-flagged merchant vessel *Anny Petrakis*. In both cases, the detainees were brought before Duty Central Magistrate's Court No. 4 of the National High Court, although they were ultimately handed over to the Kenyan authorities, who tried and convicted them.

[39] J.M. Sánchez Patrón, "Piratería marítima, fuerza armada y seguridad privada", *Revista Electrónica de Estudios Internacionales* (2012), at 1.

of the Spanish vessel *Alakrana* marked the start of armed security services for these types of ships, made possible through the amendment of Spanish law on private security services to allow their existence, the use of weapons of war, and the presence of security contractors on board Spanish-flagged ships navigating in waters where there is a serious risk to the safety of persons and/or property.[40] Consequently, today Spanish vessels, especially deep-sea fishing vessels, may carry private security contractors on board to defend them against pirates, something that can already be seen in practice, as evidenced by the frequent confrontations and incidents of this nature.[41]

(E) FINAL CONSIDERATIONS

Violence at sea, of which piracy is one of the main manifestations, has directly affected Spain, its maritime interests, and the security of its nationals and of ships flying its flag.

The upsurge in these criminal activities in the first decade of the 21st century caught the Spanish authorities off guard. The first measures they took were thus purely reactive: paying ransoms to secure the release of kidnapped Spanish citizens, deploying naval forces to protect ships. However, these measures were shortly joined by others aimed at preventing piracy and collaborating both internationally and regionally on its prevention and repression.

In these scenarios, the Spanish government's actions —coupled with those of other states— contributed to both the adoption by the Security Council of a battery of resolutions, first on piracy off the coast of Somalia and then on piracy in the Gulf of Guinea, and the launch by the EU of Operation *Atalanta* in Somalia and the implementation of the CRIMGO programme in the Gulf of Guinea. Spanish naval forces have played and continue to play a very significant role in the execution of these initiatives, in terms of both the number of troops assigned to them and the continuous nature of the human and financial effort involved.

At the same time, albeit with some delay, Spanish law has been updated —in particular, the Criminal Code, the Organic Law on the Judiciary, and the Law on Private Security— with a view to reintroducing the crime of piracy in the Spanish legal system, clarifying the application of universal jurisdiction in this matter by Spanish judges, and enabling private security services on Spanish-flagged vessels.

[40] Law 5/2014, 4 April 2014, on Private Security (BOE No. 83, 5 April 2014). Royal Decree 1628/2009, 30 October 2009, amending certain precepts of the Private Security Regulations, approved by Royal Decree 2364/1994, 9 December 1994, and the Weapons Regulations, approved by Royal Decree 137/1993, 29 January 1993 (BOE No. 264, 2 November 2009).

[41] Many pirate attacks against Spanish-flagged vessels have been repelled through the use of weapons carried by private security contractors on board. By way of example, one might point to the incidents affecting the fishing vessels *Ortube Berria* in 2009 and 2010, *Albacan*, *Albacora*, *Elai Mai*, *Demiku* and *Playa de Anzoras* in 2010, *Felipe Ruano* in 2011, or *Txori Argi* in 2014.

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

Migrants by Sea

Paula GARCÍA ANDRADE*

Migration by sea has become a serious concern for Spain mainly since the "*cayuco* crisis" which considerably affected our country in 2006, peaking the arrivals by sea of North-African and Sub-Saharan nationals into the Canary Islands an all-time high of 39.180.[1] After a very noticeable decrease, maritime migration into Spain has been experiencing a slight rise since 2011, within the context of the so-called "Arab Spring" and the subsequent humanitarian emergency in Libya, together with the historic movements of population provoked by the civil war in Syria.[2] Arrivals by sea to Spain have clearly increased in 2016,[3] and again in 2017.[4] Even though Spanish figures are moderate in comparison to the arrivals in Italy for instance,[5] or total arrivals in the Mediterranean,[6] the importance of migration by sea is undisputable as illegal border crossings at sea borders in the whole EU represented 71.4 % of the total amount for 2016, and 79.7% of overall illegal border crossings for the first quarter of 2017.[7] The most serious aspect of this phenomenon is unquestionably the death toll derived from the hazardous journeys migrants undertake to reach European shores, 2016 being the deadliest year so far in the Mediterranean,[8] and also in Spanish waters.[9]

Against this backdrop, Spanish authorities, as well as other EU Southern Member States, have been

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1 Spanish Ministry of Interior, "Assessment 2015 on the fight against irregular immigration " (*Balance 2015 Lucha contra la Inmigración Irregular*)

2 Migrants arriving into Spain by sea reached 5.443 in 2011, 3.237 in 2013, 4.552 in 2014, and 5312 in 2015 (*Ibid.*).

3 According to IOM, 8.162 arrivals, to mainland coasts only, were registered in 2016 (El País, "*Las llegadas por mar de migrantes a la Península se duplicaron en 2016*", 22.1.2017).

4 As of 18 July 2017, the number of migrants arrived in Spain by sea reached 7.547, a rise of 104.2% compared to the same period of 2016 (El País, "*Rescatados casi 600 inmigrantes en las costas en menos de 12 horas*", 17.8.2017. According to Frontex, in July 2017 "Spain continued to see the heaviest migratory pressure since 2009": Frontex, "Migratory flows in July: numbers fall in Italy but remain high in Spain", press release, 14.8.2017.

5 Only in the first five months of 2017, 60.228 migrants arrived by sea in Italy: The Guardian, "Italy considers closing its ports to boats carrying migrants", 28.6.2017.

6 IOM, "Mediterranean Migrant Arrivals Top 363,348 in 2016; Deaths at Sea: 5,079", 6.1.2017.

7 Data extracted from FRONTEX, Frontex Risk Analysis Network Quarterly Report, Quarter 1 – January March 2017, July 2017.

8 5079 persons have died or went missing in Mediterranean waters in 2016, in comparison to the 3.771 fatalities of 2015 or 1.500 in 2011: IOM, "Mediterranean Migrant Arrivals Top 363,348 in 2016; Deaths at Sea: 5,079", 6.1.2017. IOM records 2.726 migrant deaths in 2017 so far: see the information published by the IOM Missing Migrants Project available here.

9 The number of deaths of migrants trying to reach Spanish coasts in 2016 has doubled with respect to 2014, rising from 131 to 295: APDHA, *Balance migratorio Frontera Sur 2016*, February 2017.

 DOI: 10.17103/sybil.21.29

activating different sectors-related measures to tackle migration by sea, and both its causes and consequences, as well as to dismantle the criminal organisations which turn high profits from the smuggling of migrants.[10] Undoubtedly the law of the sea is one of the main branches of law in which the State attempts to find the adequate answers to this phenomenon, which comes to be a challenge to the peaceful use of the seas. The 20th anniversary of the entry into force in Spain of the United Nations Convention on the Law of the Sea (hereinafter, LOSC)[11] constitutes therefore the perfect occasion to revisit the Spanish practice regarding the management of migration by sea and, especially, how the Spanish authorities have been making use of the powers set in the specific provisions LOSC which are applicable to this field.[12]

For that purpose, this contribution will be structured into three sections, corresponding to the three types of State jurisdiction. Firstly, we will examine how Spain has made use of its prescriptive or normative powers regarding the prevention and fight against migration by sea. In particular, we will analyse how the Spanish legislator has reflected in internal legal norms the LOSC provisions regarding the interdiction powers the Convention attributes to the State in the different maritime zones (A). In a second section, the analysis of Spanish enforcement powers will lead us to consider the authorities which are in charge of executing these norms and the kind of operations within which interception and rescue functions are being implemented by Spain (B). In a third section, the curial or adjudicatory jurisdiction of Spain will be briefly reviewed, by presenting the evolution of the competence of Spanish courts to try the criminal offence of smuggling of migrants committed at sea (C).

Albeit clearly focused on the Spanish practice, it will be however imperative to make some references to certain European Union norms and practice, as a consequence of the competences transferred to the Organisation in the field of immigration and borders.

(A) SPANISH PRESCRIPTIVE JURISDICTION WITH REGARD TO MIGRATION BY SEA

After a very long process, on 25 September 2014, the Spanish Law 14/2014 on Maritime Navigation, entered into force.[13] Although it does not contain a complete regulation of the field, Law 14/2014 aims at undertaking a wide reform of the Spanish maritime law, also attempting to ensure consistency with international norms in this field, while reinforcing the protection of certain national interests in which some deficiencies have been detected, immigration being one of them.[14]

A first title of the Law, on the administrative regulation of navigation, is inspired, according to its preamble, by the LOSC, and includes rules on policing navigation to be applied to national and foreign ships within maritime areas over which Spain exercises sovereignty, sovereign rights or jurisdiction.

For our purposes, in addition to Spanish ports in which internal legislation on immigration applies,[15]

[10] See, inter alia, UNODC, *Smuggling of Migrants by Sea*, Issue paper, United Nations, 2011.

[11] UN Convention on the Law of the Sea, 1833 UNTS 3 (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter).

[12] See the Spanish bibliography on the Law of the sea selected by Abegón, Maestro and Vázquez.

[13] Law 14/2014, 24 May 2014, on Maritime Navigation (BOE No. 180, 25 May 2014), an English version available here.

[14] Preamble to Law 14/2014.

[15] Art. 7 of Law 14/2014. As far as Spanish immigration legislation is concerned, cfr. Organic Law 4/2000, 11 January

Law 14/2014 states, in Article 19, that navigation through Spanish maritime spaces shall comply with the prescriptions of the LOSC, respecting however the restrictions and requirements of this law and, where appropriate, pursuant to the laws on safety, defence, customs, health, border controls and immigration. Among the exceptions to the right to navigation in Spanish waters, Article 20(1) of Law 14/2014 refers to those situations in which the passage of foreign ships is not innocent, a regime which implies the respect of laws and regulations on immigration[16]. The loading or unloading of persons in the territorial sea contrary to these rules entails thus a non-innocent passage for being prejudicial to the good order and security of the coastal State and therefore empowers Spanish authorities to stop vessels suspected of transporting potential irregular migrants.[17] An extensive interpretation could possibly be accorded to these terms used in Article 19 LOSC so that it is not necessary for exercising interdiction powers to await for the physical unloading of migrants within the territorial sea or at the coast. This interpretation seems confirmed by Article 21(1)(h) LOSC, which authorises the coastal State to adopt legislation relating to innocent passage through the territorial sea in respect of the *prevention of* immigration laws and regulations.

In any case, *pateras*, *cayucos* and inflatable boats, normally used by migrants to arrive to Spanish coasts, should most probably be qualified as ships without nationality, which are not even entitled to the right to innocent passage, according to Article 17 LOSC.[18] A verification should however be made on whether the boat is registered in any State, unlikely possibility since their small size could determine their exclusion from generally accepted international regulations and thus from the State registry of ships.[19] Not being apt for navigation, those vessels would lack the status of ship.

The Law on Maritime Navigation also refers to the regime applicable to the contiguous zone, in which Spanish authorities exercise control over foreign ships in order to prevent infringements of the laws and regulations of immigration that could be committed in national territory or in the territorial sea, as well its jurisdiction to punish the authors of those infringements.[20] While the LOSC only refers to a necessity criterion when qualifying the kind of measures that coastal States may adopt in the contiguous zone, Article 35 of Law 14/2014 specifies that, when the competent authority is aware that a foreign vessel located in the contiguous zone has breached, is breaching or intends to breach the legislation mentioned in Article 23 —including thus immigration law—, that authority will be entitled to intercept the ship, to request information or perform the necessary inspection.[21] In case of need, any proportional measure to prevent or punish the infraction could be adopted, including arrest and escorting it to port.[22] Nonetheless, it could be argued that the latter measures should only be adopted

2000, on rights and freedoms of foreigners in Spain and their social integration (BOE No. 10, 12 January 2000) and its Regulation approved by Royal Decree 557/2011, 20 April 2011 (BOE no. 103, 30 April 2011).

16 Arts. 37 to 39 of Law 14/2014,

17 Art. 39 of Law 14/2014 includes this by indirect reference to those situations foreseen in the LOSC.

18 According to Art. 17 LOSC, "ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea".

19 Art. 94(2)(a) LOSC.

20 Art. 23 LOSC.

21 Art. 35(1) of Law 14/2014.

22 Art. 35(2) of Law 14/2014.

with the purpose of punishing the infringement of immigration regulations committed by foreign vessels in the territory or in the territorial sea, and not to prevent it as that would be clearly disproportionate.[23]

At this point, it must be highlighted that Spain might be empowered to exercise its interception functions also against vessels which, crossing the Spanish territorial sea or its contiguous zone, head not towards Spanish coasts but the coast of another Member State with the intention to disembark therein. According to the European Commission, the coastal Member State, Spain in this case, would not just be entitled but even bound to intercept that vessel in Spanish waters, an obligation that would flow from EU legislation on the crossing of external borders and the establishment of an area without internal border controls.[24]

As it is only directly concerned with maritime zones under its sovereignty or jurisdiction, Spanish normative practice does not deal with the regime applicable to the high seas, subject to freedom of navigation and to the principle of exclusive jurisdiction of the flag State.[25] As exceptions to that principle, the LOSC recognises the right to some kind of intervention of the State on the high seas — with different degrees of intensity— towards ships engaged in slave trade, piracy, unauthorised broadcasting, or ships without nationality. Interdiction powers against vessels suspected of being engaged in smuggling of migrants are therefore not explicitly regulated in the LOSC. However, an implicit opening can be found when the latter establishes that the right to visit a vessel on the high seas could also "derive from powers conferred by a treaty",[26] a reference which, in the field of migration, should be understood as made to the Palermo Protocol against smuggling of migrants by sea of 2000.[27]

In particular, while Article 7 of this Protocol enjoins States Parties to cooperate to the fullest extent possible to prevent and supress the smuggling of migrants by sea in accordance with the international law of the sea, Article 8 specifies interdiction powers against vessels suspected of being engaged in smuggling of migrants in waters beyond State jurisdiction. If the ship is of the nationality of the interdicting State, the latter may request the assistance of other State Parties, which shall render it to the extent possible within their means. If the ship is flying the flag of another State Party, the interdicting State may notify this to the flag State, request confirmation of registry and, if so, request its authorization to, *inter alia*, board the vessel, search it, or to take any other appropriate measure against the vessel, persons and cargo on board if evidence is found of its engagement in smuggling of migrants.[28] Consequently, as it can be appreciated, no real exception to the exclusive jurisdiction of the

[23] European Commission, Staff Working Document, "Study on the international law instruments in relation to illegal immigration by sea", SEC 2007, 691, p. 19.

[24] Ibid., pp. 2 and 12.

[25] Art. 87 and 92(1) LOSC, respectively. Law 14/2014 applies nonetheless to any ship flying Spanish flag wherever it is located and without prejudice to the powers that correspond to other coastal or port States on the basis of international treaties (Art. 5(1)).

[26] Art. 110.1 LOSC.

[27] Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations Convention against transnational organized crime (adopted 12 December 2000, entered into force 28 January 2004), 2241 UNTS 507 (BOE No. 295, 10 December 2003).

[28] In the event that the flag State does not authorise visiting and searching the ship, the right to hot pursuit could be applied in order to allow for arresting the vessel and driving it to port (Art. 111 LOSC). However, as the persecution must

flag state is granted by the Palermo Protocol. In the event that the vessel is without nationality, the Smuggling Protocol authorises the interdicting State to board and search the vessel, and if evidence confirming the suspicion is found, to take appropriate measures in accordance with relevant domestic and international law. To this purpose, the LOSC only allows for a right of visit in Article 110(1), while Spanish legislation does not deal with this issue.

In this scenario and also considering that the Spanish legislator has not specifically addressed any of the obligations imposed by the Smuggling Protocol, it is imperative to refer to EU legislation, which can be considered as part of the normative practice of Spain because of its direct integration into the national legal order. This is the case of Regulation no. 656/2014 of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in operations coordinated by Frontex,[29] which was adopted in 2014 to replace Council Decision 2010/252/EU.[30] Regulation 656/2014 advances in the detail of measures which can be adopted regarding interception in the high seas in accordance with the Smuggling Protocol, but also in the territorial sea and contiguous zone of EU Member States. It presents, however, a specific material scope of application: firstly, its rules apply to border surveillance operations carried out by Member States but in the context of operational cooperation coordinated by Frontex; secondly, interception in the high seas only concerns smuggling of migrants, while interdiction in the territorial sea and contiguous zone affect both vessels engaged in smuggling of migrants and vessels carrying persons intending to irregularly cross border checks.[31]

In particular, according to Regulation 656/2014, Spain, acting as host Member State of the operation coordinated by Frontex or as neighbouring participating Member State, is bound to authorise in its territorial sea that participating units request information and documentation on the ship and on persons on board; stop, board and search the vessels; and question persons and inform them on penalties for facilitation of the trip.[32] Also, it may – not shall – authorise seizing the vessel and apprehending persons on board, ordering the vessel to alter its course or conducting the vessel or persons to the coastal Member State.[33] The two same kinds of measures are to be adopted within the contiguous zone of the host Member State or a neighbouring participating Member State,[34] requiring coastal State's

initiate in the territorial waters or contiguous zone of the coastal State, the most plausible reading of this right would be that the coastal State attempts to prevent or repress irregular "emigration", in contradiction thus with the fundamental right to leave one's own country.

29 Regulation (EU) No. 656/2014 of the European Parliament and of the Council, of 15 May 2014, establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2014, L 189/93).

30 Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2010, L 111/20). Annulled by the European Court of Justice for being adopted by means of an implementing measure instead of a legislative act when it contained essential elements of the surveillance of the sea external borders of Member States: Case C-355/10, *Parliament v Council*, ECLI:EU:C:2012:516.

31 This is a salient and necessary distinction, as only the possible commission of the criminal act of smuggling of migrants would seem to legally justify the adoption of certain measures against vessels in the high seas.

32 Art. 6(1) Regulation 656/2014.

33 Art. 6(2) Regulation 656/2014.

34 Art. 8(1) Regulation 656/2014.

consent in case the contiguous zone corresponds to a non-participating Member State.[35] Quite importantly, authorisations in this maritime space relate to measures which are necessary for preventing the infringement of immigration law, and not for punishing it, confirming the idea reflected above. Measures to be applied in the high seas include requesting information and documentation; stopping, boarding and searching the vessel, its cargo and persons on board; seizing the vessel and apprehending persons; warning and ordering the vessel not to enter the territorial sea or contiguous zone or to alter its course towards another destination; conducting the vessel or persons on board to a third country, to the host Member State or to a neighbouring participating Member State.[36] All of them are however subject to the authorisation of the flag State, without thus softening the principle of exclusive jurisdiction of the latter.

It is interesting to note that Regulation 656/2014 and the Spanish Law 14/2014 were adopted almost simultaneously, the EU norm being enacted two months earlier than the national one. However, the common rules introduced by the EU legislator do not seem to lead to an "occupation of the field" which would have pre-empted the national legislator from regulating the interception powers of the State.[37] Firstly, the Spanish Law 14/2014 deals with State interdiction powers regarding any threat to maritime navigation and national interests, while Regulation 656/2014 exclusively concerns migration. Secondly, the latter is only applicable to operations of maritime surveillance deployed under the coordination of Frontex, leaving thus some discretion to Member States at implementing its international maritime obligations when carrying out its own surveillance activities outside the Frontex umbrella.[38]

The treatment of Spanish interception powers in the high seas cannot be complete without at least a brief reference to its participation in EUNAVFOR MED Operation Sophia,[39] an EU military operation aimed at disrupting the business model of migrant smuggling and human trafficking in the Southern Central Mediterranean and prevent the further loss of life at sea. In October 2015, it entered in its second stage entailing boarding, search, seizure and diversion in the high seas of vessels suspected of being used for the commission of these crimes, the powers of EU participating Member States being based on a Security Council Resolution. The Security Council, acting under Chapter VII of the Charter of the United Nations, has authorised States to inspect on the high seas off the Libyan coast vessels suspected of being used for migrant smuggling or human trafficking from Libya, provided however that States "make good faith efforts to obtain the consent of the vessels' flag State prior to using the authority outlined in this paragraph".[40] Although EU Member States are not authorized to intervene in Libyan

35 Art. 8(2) Regulation 656/2014.

36 See Art. 7 Regulation 656/2014.

37 In the sense of Art. 2(2) of the Treaty on the Functioning of the European Union.

38 Although the margin for Member States' independent action is less and less wide in this field, Art. 8(2) of Regulation 2016/1624 of the European Parliament and of the Council, of 14 September 2016, on the European Border and Coast Guard (OJ 2016, L 251/1) establishes that "Member States may continue cooperation at an operational level with other Member States and/or third countries, where such cooperation is compatible with the tasks of the Agency". Nevertheless, "Member States shall refrain from any activity which could jeopardise the functioning of the Agency or the attainment of its objectives".

39 Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (OJ 2015, L 122/31).

40 S/RES/2240 (2015), 9 October 2015, para. 7. Para. 8 authorises the seizure of vessels inspected under the authority conferred under the previous paragraph.

territorial waters, as originally foreseen in Council Decision 2015/778, the derogation to the exclusive jurisdiction of the flag State in the high seas —or at least the transformation of obtaining its consent in a mere obligation of means for the intercepting State— is to be highlighted.

After having presented the normative practice on intercepting migration in maritime zones under Spanish jurisdiction and in the high seas, a very relevant parcel of Spanish prescriptive jurisdiction also concerns interception that takes place in the territorial waters of third countries of origin or transit of migration flows headed to Spanish soil. To that effect, Spain has concluded with Cape Verde an Agreement on joint surveillance of maritime spaces under sovereignty and jurisdiction of Cape Verde, signed in February 2008 and in force since April 2009.[41] This international treaty represents a remarkable exception in the Spanish practice, as the establishment of other joint sea operations of surveillance that take place in the territorial waters of third countries has not apparently been set through the conclusion of international agreements between the States concerned but just on the basis of non-public arrangements between the police authorities.[42] Since these operations are not founded on international agreements, they will be examined in the next section related to the Spanish executive practice, focusing thus our attention here in the Hispano-Cape Verdean treaty. This Agreement, which precisely refers in its preamble to the LOSC and the Smuggling Protocol, is aimed at setting the conditions for the joint surveillance and patrolling of the maritime spaces under Cape Verdean sovereignty and jurisdiction in order to intercept vessels suspected of engaging in different forms of organised crime such as smuggling of persons, drugs or arms. Since this cooperation is to be deployed within waters under Cape Verdean sovereignty, the exclusive powers coastal States enjoy over their territorial waters lead to the necessary granting of an explicit authorisation to States like Spain in order to carry out any kind of interdiction activity. The powers of agents from the authorised State will depend on the scope of that authorisation, contained in the Agreement in question.

On the modalities of implementation, the Agreement foresees the possibility to patrol Cape Verdean waters with aircrafts from both Parties; by means of Spanish ships and aircrafts with effective and mandatory presence on board of Cape Verdean agents; or through Cape Verdean ships and aircrafts with Spanish agents on board.[43] However, the following two provisions state that Spanish participation in joint patrols will be made through aircrafts and ships, while Cape Verdean participation will consist of naval and air units, as well as of personnel and military equipment on board naval and air Spanish units.[44] It is important to note, as the Agreement does, that at least one agent from the Cape Verdean coast guard shall always be on board Spanish ships and aircrafts,[45] and that, except for those situations foreseen in international law, any exercise of public authority —such as inspection, visit or capture— can only be executed by Cape Verdean authorities or under their command.[46] This would be indeed the

[41] Agreement between the Kingdom of Spain and the Republic of Cape Verde on joint surveillance of maritime spaces under the sovereignty and jurisdiction of Cape Verde, done at Praia on 21 February 2008 (BOE no. 136, 5 June 2009).

[42] This was however also the case of joint patrols between Spain and Cape Verde before the Agreement, as they have been in place since March 2007 on the basis of a Memorandum: Spanish Ministry of Defence, Press Release, 6 October 2007.

[43] Art. 3(1) of the Agreement.

[44] Art. 4 and 5 of the Agreement.

[45] Art. 6(4) of the Agreement.

[46] Art. 6(5) of the Agreement.

usual mode of action since the coastal State's legislation is to be normally enforced by its own agents.

Issues such as patrol modes, periods, length, operational procedures or exchange of information are to be planned and agreed on by the Parties.[47] The Agreement also deals with the respective responsibilities of acts carried out within joint surveillance missions and the possible claims to be filed by their respective staff or third parties.[48] One of its final clauses refer to the non-affectation of rights and obligations of both Parties under other international treaties, a provision that could be read as an implicit reference to the Geneva Convention on the Status of Refugees and other international instruments on human rights protection.[49] The commitments contained therein will be relevant for Cape Verde, but also for Spanish authorities in case their participation in interception activities activate the criteria for the attribution of international responsibility.

Although the conclusion of an international treaty for authorising this kind of limitation on State sovereignty and for distributing international responsibility is to be welcomed, this Agreement between Spain and Cape Verde is not devoid of criticism since joint patrols between both countries have been in place since March 2007, almost one year before its signature and thus only on the basis of an informal and not public arrangement.[50] Requesting the Spanish Parliament consent for the ratification of this Agreement by Spain —through Article 94 of the Spanish Constitution— one year after patrolling activities have been operationalised would also be controversial.

(B) SPANISH ENFORCEMENT JURISDICTION TOWARDS MIGRATION BY SEA

This section must start by considering which authorities are in charge of enforcing the norms previously examined. Under Spanish legislation, control of entry and exit from national territory by nationals and aliens, as well as the functions provided in the aliens, immigration and asylum legislation correspond to the national police corps,[51] while the *Guardia Civil* is competent for the custody of coasts, borders and ports,[52] being therefore the latter responsible for carrying out the above-mentioned interception powers at sea against vessels suspected of transporting irregular migrants or engaging in smuggling of migrants. In particular, Royal Decree 246/1991 confers these tasks to the Maritime Service of the *Guardia Civil*, by indicating that the functions bestowed on the *Guardia Civil* by Organic law on the State Security Forces are to be exercised in the Spanish maritime waters up to the external limit of the territorial sea, and, exceptionally, out of it, in accordance with international treaties in force.[53] Also within the *Guardia Civil*, reference should be made to the Centre for Coordination of Maritime Surveillance of Coasts and

47 Art. 3(2), 6(1), 6(6), and 7 of the Agreement.

48 Art. 8 and 10 of the Agreement.

49 Art. 12 of the Agreement.

50 Joint patrols between Spain and Cape Verde would have been in place since the signature, in March 2007, of a Memorandum between both countries: Spanish Ministry of Defence, Press Release, 6 October 2007.

51 Art. 12(1)(A)(b) y (c) of Spanish Organic Law 2/86, 13 March 1986, on the State Security Forces (BOE no. 63, 14 March 1986, as amended for the last time by Organic Law 9/2015, of 28 July).

52 Art. 12(1)(B)(d) of Organic Law 2/86.

53 Art. 1 of Royal Decree 246/1991, of 22 February, regulating the Maritime Service of the *Guardia Civil* (BOE no. 52, 1 March 1991). On the exercise of powers by the *Guardia Civil* out of the territorial sea, see the contribution in this volume by Lirola Delgado and Jorge Urbina on "Police at sea".

Borders, an advising and coordination organ that has become a key tool for the Spanish Ministry of Interior for the coordination and supervision of operations on the surveillance of sea borders, as well as for the follow-up of emergency situations and in which the information received from the sensor stations of the Integrated System of External Surveillance (SIVE) is integrated.[54] The Centre is connected with the four Regional Centres of Maritime Surveillance for the Mediterranean, in Valencia, the Strait, in Algeciras, the Atlantic, in Las Palmas, and for the Cantabrian, in La Coruña,[55] and it has been designated as national coordination centre for the EU information-exchange network on border surveillance, EUROSUR.[56]

The *Guardia Civil* agents from the Maritime Service exercise therefore the interception powers described above in the waters under Spanish jurisdiction. Apart from usual surveillance activities, reference can be made here to different maritime operations coordinated by the Frontex Agency in which several Member States participate, Spain acting as host Member State in some of these operations.[57] Examples of this practice are HERA operations, running since the migration crisis of 2006 in the Atlantic region, and aimed at implementing coordinated operational activities in order to control migratory flows from West and North African countries towards the Canary Islands; as well as INDALO and MINERVA operations, both in motion since 2007 and deployed in the Western Mediterranean region in order to combat irregular immigration by sea headed towards the Spanish coast of Levante, in the case of INDALO, and towards the South of Spain, including seaports of Algeciras, Almería and Ceuta, in the case of MINERVA. These three operations have now been transformed into European Patrols Network - EPN operations.[58]

A distinctive feature of the Spanish response to migration by sea is nonetheless the practice of engaging in surveillance activities, such as joint patrols, within the territorial waters of third States, particularly the African countries of origin and transit of the most significant part of migration flows arriving to Spanish soil. With the exception of the Hispano-Cape Verdean treaty mentioned above, the agreements that lie at the basis of this practice are not public. Instead, Spain would have concluded some kind of arrangements, declarations or memoranda of understanding —in short, non-legally binding agreements— with countries such as Morocco,[59] Mauritania,[60] Senegal,[61] Gambia, Guinea or Guinea Bissau[62] in order to set up joint patrols to be deployed in the sovereign waters of these countries.

As already mentioned in the previous section, the development of surveillance and interception

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[54] See the Spanish *Guardia Civil* website for further information on the technical functioning of SIVE.

[55] Order PRE/2523/2008, 4 September 2008, creating the *Guardia Civil* Centres on maritime surveillance of coasts and borders (BOE No. 215, 5 September 2008).

[56] Regulation (EU) No. 1052/2013 of the European Parliament and of the Council, 22 October 2013, establishing the European Border Surveillance System (Eurosur) (OJ 2013, L 295/11).

[57] Arts. 14-16 of Regulation 2016/1624.

[58] EPN is a permanent regional border security network, aimed at reinforcing monitoring and surveillance of the southern maritime border of EU Member States, by means of a multi-agency approach and through the coordination of national centres. See here more information on Frontex operations.

[59] *Maroc Hebdo International* no. 584, 12-18 December 2003.

[60] Spanish Interior Ministry, press release of 15 May 2006.

[61] Spanish Interior Ministry, press release of 22 August 2006.

[62] Spanish Interior Ministry, press release of 28 February 2008. And before the conclusion of the bilateral treaty, also with Cape Verde, as already mentioned: see, Defence Ministry, press release of 6 October 2007.

activities in the territorial sea of another coastal State is subject to the latter's consent since the use of enforcement powers in a foreign territory entails a limitation of sovereign rights. It is therefore assumed that the African country's authorisation for that purpose lies in those unpublished arrangements, subscribed in some cases —as can be inferred from available information— by the Spanish *Guardia Civil* and the other State's border authority.[63] While that authorisation could imply the participation of Spanish State ships in surveillance activities or allow for the presence of Spanish agents on board the coastal State's ships, it seems that coastal State's agents should always be on board the units participating in joint patrols since they would be the sole agents empowered to enforce the coastal State's legislation on migration and borders against vessels intercepted in its territorial sea. From Frontex information, it can be inferred that law enforcement officers from the coastal State would always be present on board Member States' ships and would be responsible for diverting vessels,[64] although there could be variations between the different arrangements. A similar scenario would derive from observing the rules applicable to the members of European Border and Coast Guard teams, who "may only perform tasks and exercises powers under instructions from and, as a general rule, in the presence of border guards or staff involved in return-related tasks of host Member State".[65] Nevertheless, the host Member State may authorise members of the teams to act on its behalf,[66] something that could also happen within the framework of joint patrols agreed with third countries.

On the basis of these arrangements, to which decreases of irregular migration by sea into Spain are usually attributed by the Spanish government, national operations as well as Frontex coordinated operations have been deployed. On the one hand, as examples of the first type, ATLANTIS was a maritime operation starting in May 2006 which aimed at fighting against irregular immigration by sea with the inclusion of joint patrols in Mauritanian waters, as well as training to be provided by the *Guardia Civil*, supply of surveillance equipment by Spain, and the sending of a Spanish liaison officer.[67] The SEA HORSE project, in 2006, also comprised the strengthening of joint patrols in Moroccan waters and their extension to other African countries involved, while the "Noble Centinela" Operation, in 2006 too, included patrolling activities of the area covering Cape Verde, Senegal, Mauritania and the Canary Islands.[68] On the other hand, the above-mentioned Frontex sea operation HERA includes the deployment of joint patrols in sovereign waters of Mauritania, Cape Verde or Senegal,[69] based on the Spanish arrangements with these countries.

It is important to note that a significant part of these interception operations, regardless of the maritime zone of deployment (Spanish territorial sea or contiguous zone, high seas, or territorial waters of third countries), are transformed at some point into search and rescue operations, or at least the

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[63] These would be thus technical arrangements implementing some sort of agreement adopted at political level, which are not public either.

[64] Frontex, "Hera 2008 and Nautilus 2008 Statistics", news release of 23 September 2008.

[65] Art. 40(3) of Regulation 2016/1624.

[66] Ibid.

[67] *Guardia Civil*, Spanish Ministry of Interior, press release of 21 June 2006.

[68] Spanish Ministry of Defence, press release of 6 October 2007.

[69] Frontex, News, "Longest Frontex coordinated operation – Hera, the Canary Islands", 19.12.2006, available at For current EPN-HERA 2016 operation, see Frontex Annual Report on the implementation on the EU Regulation 656/2014, 18 July 2017.

likely execution of this kind of task has to be taken into consideration when planning and deploying patrols aimed at maritime surveillance for the prevention and repression of irregular migration and smuggling of migrants. This is due to the nature and deplorable conditions of the ships in which migrants sail. Article 98 LOSC includes the duty of any State to request the masters of ships flying its flag to render assistance to any person found at sea in danger of being lost and to proceed rapidly to the rescue of persons in distress, in so far as this can be done without serious danger to the ship, the crew or the passengers, as well as the obligation of every coastal State of promoting the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and also to cooperate with neighbouring States for this purpose. This last mandate has been implemented by means of the establishment of the Spanish Maritime Safety Agency (*Sociedad de Salvamento Marítimo*),[70] assigned to the Ministry of Public Works and Transport and whose main objective is to provide the public services of search and rescue of human life at sea, the prevention and fight against marine pollution, services of maritime traffic control and monitoring, maritime safety, and vessels assistance.[71] The Spanish Agency also cooperates with other States for those purposes.[72]

The clear but scarce obligations laid down in the LOSC are complemented by the provisions of the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention), the 1979 International Convention on Maritime Search and Rescue (SAR Convention) and the 1989 International Convention on Salvage, which mainly universalize the duty of assistance "regardless of the nationality or status of such persons or the circumstances in which they are found"; enjoin States parties to promptly release assisting ships from their obligations and specify further State responsibilities for search and rescue regions, like delivering rescued persons to a place of safety.

Although Spain has not enacted additional national norms relating to the duties of assistance to people in distress at sea, Spanish executive practice on the implementation of the obligations imposed by the LOSC, the SAR and the SOLAS Convention, is abundant. Firstly, the Spanish Maritime Safety Agency has rescued in 2016 6.726 persons in 464 *pateras*, which represents a raise of 59% in relation to 2015, when emergencies related to irregular immigration lead to the rescue of 4.232 persons with assistance to 505 *pateras*.[73] The data evolution shows how after an exceptional peak of 30.496 persons rescued in 2006, matching with the *cayuco* crisis, assistances related to migration started to drop, experimenting however a constant increase since the current migration crisis starting in 2013.[74] The number of potential migrants rescued by Spanish State vessels within different EU operations is remarkable,[75] for instance within the framework of Spanish participation in the EUNAVFOR MED

[70] Established by the Law 27/1992, of 24 November, on State Ports and Merchant Marine (BOE No. 283, 25 November 1992).

[71] Art. 268 of the Royal Legislative Decree 2/2011, 5 September 2011, approving the consolidated text of the Law State Ports and Merchant Marine (BOE No. 253, 20 October 2011).

[72] See, e.g., the Cooperation Agreement on fight against marine pollution and maritime safety between the Kingdom of Spain and the Kingdom of Morocco, done "ad referendum" in Rabat on 6 February 1996 (BOE No. 253, 22 October 1999).

[73] *Informe Anual Salvamento Marítimo 2016*

[74] *Informe Anual Sociedad de Salvamento y Seguridad Marítima 2015*, at 33.

[75] See, for instance, El País, "Rescatados casi 600 inmigrantes en las costas en menos de 12 horas", 17 August 2017.

Sophia,[76] as it is also the practice of Spanish private shipmasters of rendering assistance to migrants in distress at sea and try to disembark them, irrespective of the risks or costs in which they might incur.[77]

Disembarkation of rescued migrants is precisely one of the controversial aspects for which the international law of the sea does not provide an answer.[78] In addition to certain resolutions and recommendations issued by organisations such as IMO attempting to guide or orientate State practice,[79] the legal vacuum has been partially filled, as far as Spain and the rest of EU Member States are concerned, by Regulation 656/2014. Article 10 of this EU norm indicates that disembarkation shall take place in the coastal Member State in case of interception in the territorial sea or contiguous zone; and in the third country of departure or, if that is not possible, in the host Member State of the operation in case of interception on the high seas. In case of search and rescue situations, the host Member State and the participating Member States must identify a place of safety in cooperation with the responsible Rescue Coordination Centre for the region in which the incident occurs, and to ultimately disembark in the host Member State if safety of the persons and of the participating unit allows for it. These considerations are however to be qualified by the principle of *non-refoulement* in its broad sense, comprising both the rule in Article 33 of the Geneva Convention on the Status of Refugees and in Article 3 of the ECHR, in line with Article 4 of Regulation 656/2014.[80] Although these rules do not solve those incidents in which it is a third country that denies disembarkation of potential migrants rescued at sea,[81] at least they are clarifying for EU Member States. According to Frontex reports on the implementation of Regulation 656/2014,[82] host Member States have usually assumed the responsibility for the disembarkation of persons apprehended or rescued in their territory or even beyond.[83]

(C) SPANISH ADJUDICATORY JURISDICTION ON MIGRATION BY SEA

An analysis of the Spanish practice on State action regarding migration by sea cannot be complete without examining, at least briefly, the jurisdictional powers or adjudicative jurisdiction of the State in

[76] Spanish Navy, Spanish Ministry of Defence, "La fragata 'Numancia' rescata a 436 migrantes en aguas del mar de Libia", 4 May 2016.

[77] El Mundo, "Tres pesqueros vinculados a Santa Pola han rescatado a inmigrantes desde 2006", 14 October 2007.

[78] Just note that Art. 18 LOSC accepts that innocent passage includes stopping and anchoring only in so far as these are incidental to ordinary navigation or rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress. However, at least the Convention does not get to specify a right to access to port in these cases.

[79] IMO Maritime Safety Committee, "Guidelines on the treatment of persons rescued at sea", Res. MSC.167 (78), 20 May 2004, para. 6.12.

[80] This provision states that "No person shall, in contravention of the principle of *non-refoulement*, be disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a country where, inter alia, there is a serious risk that he or she would be subjected to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a serious risk of an expulsion, removal or extradition to another country in contravention of the principle of *non-refoulement*." The rest of the provision is inspired by *Hirsi Jamaa and others v Italy* ECHR (GC), application no. 27765/09.

[81] See, *inter alia*, El País, "Inmigrantes africanos sobreviven agarrados a una red en el Mediterráneo", 29.5.2007.

[82] These reports are made pursuant to Art. 13 of Regulation 656/2014.

[83] See, e.g., Frontex Annual Report on the implementation on the EU Regulation 656/2014, 18 July 2017.

this field, more particularly in relation to the smuggling of migrants or, as it is categorised in Article 318 *bis* of the Spanish Criminal Code, the criminal offences against the rights of foreigners when committed on the sea.

To this effect, the Law 14/2014 on Maritime Navigation recognises, in Article 12, Spanish criminal jurisdiction against foreign ships in Spanish ports and internal waters.[84] In its Article 44, Law 14/2014 directly refers to Article 27(1) LOSC with regard to the exercise of criminal jurisdiction against foreign vessels in Spanish territorial sea, jurisdiction which must not be exercised unless the consequences of the crime extend to the coastal State; if the crime disturbs the peace of the country or the good order of the territorial sea; at the request of the shipmaster or a diplomatic or consular officer of the flag State; or if necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances. The first scenarios seem to be easily applicable to the smuggling of migrants by sea. Finally, Article 23 of Law 14/2014, governing the regime applicable to the contiguous zone, includes also a reference to the administrative and criminal jurisdiction of Spain regarding the punishment of infractions to immigration legislation which may be committed in national territory or territorial sea.

Apart from this, no specific norm on the adjudicatory powers of the State with regard to smuggling of migrants is to be found in the LOSC, but in the United Nations Convention against Transnational Organised Crime (hereinafter UNCTOC),[85] and in the above-mentioned Palermo Protocol on Smuggling on Migrants which supplements it. While the Protocol binds Spain to establish the smuggling of migrants as a criminal offence,[86] the UNCTOC entitles the State to extend its jurisdiction to those cases in which the offence is committed outside its territory.[87] This possibility of extraterritorial jurisdiction requires, however, a connection with the State exercising jurisdiction in the sense that the offence "is committed outside its territory with a view to the commission of a serious crime within its territory".[88]

In a first stage after the ratification of these international instruments, the Spanish Supreme Court has declared Spanish jurisdiction to try cases of smuggling of migrants committed by aliens outside the territorial sea on the basis of the UNCTOC and the Smuggling Protocol combined with Article 23(4)(h) of the Spanish Organic Law on the Judicial Power (hereinafter OLJP).[89] Since this provision allowed

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[84] On this question, see the contribution in this volume by Díez-Hochleitner on "Maritime zones under sovereignty and navigation".

[85] United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003), 2225 UNTS 209 (BOE No. 233, 29 September 2003).

[86] Art. 3(a) of the Smuggling Protocol.

[87] Art. 15(2) of UNCTOC. Art. 1 of the Smuggling Protocol establishes that the UNCTOC applies, *mutatis mutandis*, to this Protocol unless otherwise provided herein.

[88] Art. 15(2)(c)(i) of UNCTOC. Note also that the UNCTOC conditions the extension of jurisdiction to the offence being committed by a member of an organised criminal group, although in the Spanish Criminal Code this constitutes an aggravating circumstance (Art. 318 *bis* (3)(a), which is however acceptable on the basis of Art. 15(6) of UNCTOC.

[89] Organic Law 6/1985, 1 July 1985, on the Judicial Power (BOE No. 157, 2 July 1985). Judgments of the Spanish Supreme Court no. 561/2007, 15 June 2007; no. 582/2007 and 628/2007, 21 June 2007; no. 554/2007, 25 June 2007; no. 618/2007, 26 June 2007; no. 622/2007, 5 July 2007; and no. 788/2007, 8 October 2007. In judgment no. 606/2007, 1 June 2007, the Supreme Court accepted the jurisdiction of Spanish courts regarding a vessel rescued in the territorial waters of Morocco, carrying 131 migrants in the hold of the ship. The legality of the arrest and of courts' jurisdiction are based on several disorganized arguments related to the LOSC and also to the right to visit ships without nationality as enshrined in the Smuggling Protocol.

for jurisdiction over offences committed outside national territory "that, pursuant to international treaties or conventions *must* be pursued in Spain", the Supreme Court's reasoning may be controversial in light of the optional character of Article 15(2) UNCTOC.

The Spanish legislator made however use of that option through Organic Law 13/2007, which amended Article 23(4) of the OLJP in order to include, *inter alia*, the commission outside Spanish territory of "illegal smuggling or clandestine immigration of persons, whether workers or not".[90] The reform undertaken in 2009 considerably reduced the scope of the universal jurisdiction regarding the criminal offences in Article 23(4) by requesting their authors to be in Spain, the existence of victims of Spanish nationality or any other relevant connection with Spain, in addition to the subsidiarity of Spanish competence.[91]

Still a further amendment on the principle of universal jurisdiction was introduced by Organic Law 1/2014.[92] In addition to the introduction of connection criteria related to the principles of personality and territoriality regarding several criminal offences listed in Article 23(4) of the OLJP,[93] paragraph d) of this provision establishes that Spanish courts are to be competent to try "criminal offences on piracy, terrorism, illegal traffic of drugs, narcotics or psychotropic substances, trafficking of human beings, against rights of foreign citizens and offences against safety in maritime navigation committed in maritime spaces, in the situations foreseen in treaties ratified by Spain or in normative acts of an International Organisation of which Spain takes part". In spite of a questionable punctuation, the terms "in maritime spaces" shall serve to qualify any of these offences and not just the last one, mainly because some of the offences listed in Article 23(4)(d) are also included in additional paragraphs of Article 23(4) without the maritime qualification.[94] Moreover, the last sentence in Article 23(4)(d) of OLJP must be interpreted as referred to any other situations of optional or mandatory jurisdiction foreseen in international treaties or EU law acts. Paragraph p) of the same provision, mentioning cases of mandatory jurisdiction in very clear terms, favours this broad interpretation for Article 23(4)(d).

The Spanish Supreme Court supports the reading of this provision presented herein.[95] Although its doctrine has mainly been presented in cases regarding illegal trafficking on drugs committed in the high seas and in light of the scarcity of trials related to smuggling of migrants at sea after Organic Law 1/2014,[96] it seems interesting to highlight how the Court considers the criminal offences listed in Article

[90] Art. 23(4)(g) of the OLJP, as amended by Organic Law 13/2007, 19 November 2007, for the extraterritorial prosecution of illegal smuggling or clandestine immigration of people (BOE No. 278, 20 November 2007).

[91] See however the judgement of the Supreme Court no. 1166/2010, 21 December 2010, in which the Spanish jurisdiction regarding the commission of smuggling of migrants by a vessel intercepted in the high seas is simply founded on the corresponding provisions of the UNCTOC and the Palermo Smuggling Protocol with no basis on Art. 23(4) of the OLJP.

[92] Organic Law 1/2014, 13 March 2014, on Universal Jurisdiction (BOE No. 63, 14 March 2014).

[93] The salient restrictive twist given by Organic Law 1/2014 to the attributions of jurisdiction in Art. 23(4) lies at the basis of the appeal of unconstitutionality brought against it by the Socialist Group in the Spanish Congress: Appeal of unconstitutionality no. 3754/2014, whose admissibility has been declared on 22 July 2014 (still pending).

[94] This is the case of terrorism (e), illegal trafficking on drugs (i), and trafficking of human beings (m).

[95] See the Judgements of the Spanish Supreme Court (Criminal Chamber, Section 1) no. 593/2014, 24 July 2014, §5, and no. 628/2016, 14 July 2016, §2.

[96] In one of the few recent cases in this field, the Provincial High Court of Granada declared Spanish jurisdiction against the persons driving a vessel transporting 70 undocumented migrants which was intercepted outside Spanish waters on the basis of Art. 23(1) of the OLJP and thus the principle of territoriality. Quite strikingly, the judgment argues that this is a

23(4)(d) of the OLJP as those which coastal States must pay attention to when committed at the sea because they are protecting, with the means at their disposal, the whole continent and even if the destination of the authors is any of the members of the community in which they integrate, as it is the case of coastal States from the EU. This justifies, according to the Supreme Court, that the attribution of jurisdiction operated by this provision presents a special configuration and must therefore be applicable preferentially when the crime takes place at sea, the authorisation contained in international treaties being enough to promulgate, through a national legislative act, this extension of jurisdiction.

(D) SOME CONCLUDING REMARKS

The phenomenon of migration by sea has deeply affected Spain, especially since the beginning of the twenty-first century when it became established as one of the main Southern gateways to Europe. This condition has forced Spanish authorities to design and develop an elaborated and abundant practice aimed at deterring the significant influx of migrants arriving at its shores, as well as fighting against those who make profit out of their despair. Within this practice, the exploitation of the powers granted by the United Nations Convention on the Law of the Sea has been crucial. Although the "constitution of the oceans" did not explicitly foresee State prerogatives to act against irregular migration and migrant smuggling, the *effet utile* interpretation of its provisions together with the adoption of other international instruments such as the Palermo Protocol and the rescue-related conventions have provided Spain with quite useful tools to cope with migration by sea and its consequences. The legislating exercises of the European Union, such as Regulation 656/2014, have enlarged in some aspects and better specified in others how to employ the LOSC powers regarding migration. The preservation of the exclusive jurisdiction of the flag State in the high seas and the still ambiguous rules on disembarkation of apprehended and rescued migrants continue to be problematic, even though some positive steps have been taken.

Still, the most remarkable aspect of the Spanish practice over migration by sea is probably its extraterritorial character, especially from the perspective of its normative and enforcement powers. If one thing characterises the response of Spain to migrant arrivals by sea is undoubtedly the practice of concluding bilateral agreements or arrangements with the authorities of African countries of origin and transit of migration towards Spanish coasts. These instruments serve as legal basis for the deployment of joint patrols in the territorial waters of third countries, opening the latter also for surveillance activities undertaken within operations in which other EU Member States participate under the coordination of Frontex. Consequently, the need to obtain the coastal State consent to operate in its waters and the implementing mode chosen by Spain for these joint patrols may also be indicative of the importance the respect of the law of the sea rules entails. However, this does not supress the controversies this practice creates mainly in terms of international responsibility attribution in case of

criminal offence of mere activity so that it is committed in advance, leading to the exhaustion of the action when reaching Spanish soil carried out by Spanish authorities: Judgment of the Provincial High Court of Granada (section 1), no. 348/2014, 4 June 2014, §2. In this regard, see also judgment of the Supreme Court no. 36/2008, 31 January 2008.

individuals' affectation during the patrolling activities, and also from the perspective of the numbers of returns and claims for international protection the State may be trying to avoid. The application of the law of the sea rules to migration control requests therefore to be supplemented and completed with the correct implementation of international refugee law and more generally of international human rights law, in which Spanish practice could present a quite different picture.

DOI: 10.17103/sybil.21.29

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

Spain and the fight against IIU fishing

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(A) INTRODUCTION

There can be no doubt that the Convention on the Law of the Sea (the LOSC)[1] is the basis for contemporary international fisheries law, which is essentially completed by two other, very relevant international Conventions: the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas[2], and the 1995 UN Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks[3]. Spain is bound by these international treaties, and other multilateral or bilateral international regulations related to the conservation and sustainable management of living marine resources, either as an individual country or as a European Union (EU) Member State.

In this context, it should be noted at the outset that the effect of the LOSC and these international regulations on Spanish fishing legislation was influenced by the fact that Spain had already been a member of the then European Community (now the EU) since 1 January 1986 when the LOSC came into force for Spain on 14 February 1997, and protection of marine resources is an exclusive competence of the EU[4]. This basic premise, which influences absolutely everything, given that Spain must accomplish the Common Fisheries Policy (CFP), also applies to the fight against illegal, unreported and unregulated (IUU) fishing, in which the EU has developed a leading role internationally. It is also worth mentioning that the fight against IUU fishing, and the concept of IUU fishing itself, arose internationally from the Code of Conduct for Responsible Fisheries,

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1 Official State Gazette [*Boletín Oficial del Estado;* BOE] No. 39, 14 February 1997 and Official Journal (OJ) of the European Union (or of the European Communities, as was) L 179, 23.6.1998.

2 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (adopted 24 November 1993, entered into force 24 April 2003), 2221 UNTS 91 (OJ L 177, 16.7.1996).

3 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001), 2167 UNTS 3 (BOE No. 175, 21 July 2004).

4 In the Spanish literature, see L.I. Sánchez Rodríguez (ed.), *España y el régimen internacional de la pesca maritime* (Tecnos, Madrid, 1986), generally and as a pioneer in the field of relations between fishing in Spain and international regulations. On this question, see the contribution in this volume by Casado Ragión on "Fisheries".

 DOI: 10.17103/sybil.21.30

approved by the United Nations Food and Agriculture Organization (FAO) Conference in 1995[5], and that it was the EU which would spearhead and lead the fight against this type of fishing internationally by adopting the legislation of 2008–2009 which I will discuss later.

As an introduction, I am first going to present some basic aspects of fisheries regulation, in the context of both international and EU law. Secondly, I will address the general aspects of sea fishing regulation in Spain.

(1) The international and European legal context for fishing

Referring to the international context, we only need mention that, since the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas[6], fishing has been incorporated into international law as a new sphere of regulation with regards the essential conservation and sustainable management of fisheries resources[7]. This is occurring as the States not only become aware of the depletion of some species and discover that overfishing can exhaust these ichthyologic resources, but also as new marine spaces are being established, particularly the exclusive economic zone. As well as allowing the States to establish fisheries regulations to apply to all spaces under their jurisdiction, be it the territorial sea or the exclusive economic zone, these two factors have also led to the restriction of the traditional principle of international law: freedom of fishing on the high seas

With reference to the spaces which come under the jurisdiction of the States, the LOSC effectively establishes the duty to protect living marine resources from overexploitation and preserve the maximum sustainable yield, and to cooperate with in respect of straddling fish stocks and highly migratory fish stocks[8]. It also establishes the double obligation of the States on the high seas: conservation, respecting the principle of maximum sustainable yield, and the duty of cooperation between States whose nationals exploit identical living resources, or different living resources in the same area, and coastal States, in regard to straddling fish stocks and highly migratory fish stocks especially[9].

In addition to these provisions, in the 1990s a systemic approach to fishing was adopted by the FAO, and the principle of responsible fishing was born[10]. In this dynamic, the FAO adopted the 1993 Agreement and then, in 1995, the Code of Conduct, both mentioned previously. These two

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5 Adopted by resolution 4/95, of 31 October 1995, of the FAO Conference (FAO doc. C 1995/REP).

6 Convention on Fishing and Conservation of the Living Resources of the High Seas (adopted 29 April 1958, entered into force 20 March 1966), 559 UNTS 285 (BOE No. 309, 27 December 1971).

7 In the Spanish literature on this subject, see M. Corral Suárez, *La Conservación de los Recursos Biológicos del Mar en el Derecho Internacional Vigente* (University of Valladolid, 1993); J.M. Sobrino Heredia, "La cooperación internacional en la conservación y gestión de los recursos pesqueros", in 2 *Cursos Euromediterráneos Bancaja de Derecho Internacional* (1998), 429-525; and E.J. Martínez Pérez, *El desarrollo sostenible como justificación de las acciones unilaterales para la conservación de los recursos marinos* (MAPA, Madrid, 2004), especially pp. 103-172.

8 Arts. 61–68 LOSC.

9 Essentially Arts. 117–119 LOSC. In the Spanish literature, see R. Casado Raigón, *La pesca en alta mar* (Junta de Andalucía, Seville, 1994); M. Badenes Castillo, *La crisis de la libertad de pesca en alta mar* (McGraw-Hill, Madrid, 1997); and R. Casado Raigón, "La pêche en haute mer", in D. Vignes, G. Cataldi, R. Casado Raigón, *Le Droit International de la Pêche Maritime* (Bruylant, Brussells, 2000), 117-242.

10 This occurred at the 1992 Cancun Conference (FAO doc. CL 102/19).

 DOI: 10.17103/sybil.21.30

international instruments were contemporaneous with the Fish Stocks Agreement, although the latter was closely linked to the LOSC and its implementation[11]. These three international instruments, together with the LOSC, are fundamental to the current international fisheries law, as they establish specific international conservation and management measures for fisheries resources. The two Agreements are obligatory judicial instruments for the signatory States, although one applies to a more restricted space scope (the high seas) and the other is applicable to more restricted material scope, as it only refers to straddling fish stocks and highly migratory fish stocks. The Code of Conduct itself is not legally binding, but it does cover all types of fisheries, in all maritime spaces.

The duties of conservation and sustainable management, and cooperation between States, also led to the adoption of the various regional agreements and, from an institutional perspective and mostly under the auspices of the FAO, to the establishment of the various Regional Fisheries Management Organizations (RFMOs) that have competence for sustainable management of the resources in a particular marine sector (regional or sub-regional) or of a particular species, or various species[12]. There is absolutely no doubt that current international law, with the LOSC at its heart, has established limits to fishing activities to give rise to reasonable and responsible exploitation of fisheries resources based on the principle of maximum sustainable yield, configuring international legal obligations for the States, be these mainly flag States, or port or coastal States[13].

These same objectives of conservation and sustainable management of fisheries resources by establishing total allowable catches (TACs), a regime of fishing licences and technical conservation measures and measures to limit fishing, are also objectives of the EU's now fully mature CFP. Although European Community fishing policy became independent from Community agricultural policy through regulations on fisheries products and modernisation of the fisheries sector in the 1960s and 1970s, it was not until Council Regulation (EEC) No. 170/83 of 25 January 1983 that a Community system for the conservation and management of fisheries resources was established[14]. Spain became a part of this CFP on 1 January 1986 when it joined the European Community, in the framework of an transitional period which concluded on 1 January 1996[15]. The CFP was subject to its first reform via various regulations adopted between 1992 and 1995, then a second reform in 2002, and finally the third and current reform which was implemented through Regulation (EU) No. 1380/2013, of the European Parliament and of the Council of 11 December 2013[16].

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[11] This came into force generally on 16 November 1994.

[12] For information on these fisheries organisations in Spanish literature, see E. Vázquez Gómez, *Las organizaciones internacionales de ordenación pesquera. La cooperación para la conservación y gestión de los recursos vivos del alta mar* (Junta de Andalucía, Seville, 2002). For the problems associated with participation in these organisations, see M. Hinojo Rojas, "El acceso de terceros Estados a las organizaciones internacionales de pesca: una cuestión a revisar", in J.M. Sobrino Heredia (Dir.), *La toma de decisiones en el ámbito marítimo: su repercusión en la cooperación internacional y en la situación de las gentes del mar* (Bomarzo, Albacete, 2016), 167-188.

[13] See the complete analysis by a member of the Spanish delegation at the LOSC in J.A. de Yturriaga, *The International Regime of Fisheries. From UNCLOS 1982 to the Presential Sea* (Kluwer Law International, Dordecht, 1997).

[14] OJ L 24, 22 January 1983.

[15] Cf. Article 154-176 of the Act of Adhesion of 12 June 1985 (BOE No. 1, 1 January 1986) and the Council Regulation (EC) No. 1275/94 of 30 May 1994 on adjustments to the arrangements in the fisheries chapters of the Act of Accession of Spain and Portugal (OJ L 140, 3 June 1994)

[16] OJ L 354, 28 December 2013.

 DOI: 10.17103/sybil.21.30

For our purposes, it is must be noted that the CFP shall cover the conservation of marine biological resources and the management of fisheries and fleets exploiting such resources, as well as the processing and marketing of fisheries and aquaculture products. With respect to its scope, the CFP covers all these activities when they are carried out in the territory of a Member State to which the Treaty applies; in Union waters, including by fishing vessels flying the flag of, and registered in, third countries; by Union fishing vessels outside Union waters; or by nationals of Member States, without prejudice to the primary responsibility of the flag State[17].

The fundamental issue in all cases is that conservation of marine biological resources within the CFP is the exclusive competence of the European Union, in accordance with Article 3.1.d) of the Treaty on the Functioning of the European Union (TFEU), while the EU shares competences with its Member States in the other areas covered by the CFP[18]. This is relevant in two ways, for the purposes of this study. First, the EU has exclusive competence to celebrate international fisheries agreements, is member of various RFMOs, and it is part of two important international agreements which exclude the Member States: the above-mentioned 1993 FAO Agreement and the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing[19]. Second, establishment of fisheries control regimes is also the exclusive competence of the EU[20], based on Council Regulation (EC) No. 1224/2009 of 20 November 2009, establishing a Community control system for ensuring compliance with the rules of the common fisheries policy[21], which includes the entirety of community legislation on the fight against IUU fishing.

(2) Regulation of sea fishing in Spain

Spanish legislation on fishing matters has two constitutionally relevant dimensions: first, distribution of competence between the State and the Self-governing Communities and second, the constitutional principle of sustainable development. In the first case, and aside from other provisions on competence[22], it should be noted that Article 149(1)(19) of the Spanish Constitution [*Constitución Española*, CE hereinafter] establishes that the State should have exclusive competence over "sea fishing, without prejudice to the powers that, in regulations governing this sector, may be vested to the Self-

[17] Art. 1 of Regulation (EU) No. 1380/2013. For general information on the CFP in Spanish literature, see R. Casado Raigón (Dir.), *L'Europe et la mer. Pêche, navigation et environnement marin / Europe and the Sea. Fisheries, Navigation and Marine Environment* (Bruyland, Brussells 2005); F.J. Carrera Hernández, "La Política Pesquera Común", in M. López Escudero, J. Martin y Pérez de Nanclares (Coords.), *Derecho comunitario material* (McGraw Hill, Madrid, 2000), 222-233; G.A. Oanta, "La política pesquera común", in M. Ortega Gómez (ed.), *Las políticas de la Unión Europea en el siglo XXI* (Bosch Editor, Barcelona, 2016), 117-151; and the monographic issue coordinated by J. Sobrino Heredia on the Common Fisheries Policy in the journal *Noticias de la Unión Europea*. No. 326. March 2012.

[18] Art. 4(2)(d) TFEU.

[19] OJ L 191, 22 July 2011.

[20] Specifically, the European Fisheries Control Agency (EFCA), established by Council Regulation (CE) No. 768/2005 of 26 April 2005 (OJ L 128, 21 May 2005), has its headquarters in the city of Vigo.

[21] OJ L343, 22 December 2009.

[22] The State also has exclusive competence for the "basic rules and coordination of general economic planning", which cover the basic legislation on trading fisheries resources (Article 149(1)(13) CE) and the "merchant navy and registering of ships", which also covers registration of fishing vessels (Article 149(1)(20) CE).

governing Communities". Article 148(1)(11) CE allows the Self-governing Communities to assume exclusive competence over "inland water fishing, the shellfish industry and fish farming, hunting and river fishing". The conflict of competence arising from these provisions was resolved by the Constitutional Court, by differentiating between two distinct concepts of competence in Article 149(1)(19) CE: sea fishing and management of the fisheries sector. The first refers to aspects related to protection of fisheries resources in external waters[23], and the second refers to aspects related to the economic and social dimension of fishing, although the State retains exclusive competence for dictating the basic legislation on management of the fisheries sector[24].

The second constitutionally relevant dimension is Article 45 CE which, among the governing principles of social and economic policy, incorporates the "right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it". To this end, "public authorities shall watch over a rational use of all natural resources with a view to protecting and improving the quality of life, and preserving and restoring the environment" and, for anyone who should infringe these provisions: "criminal or, where applicable, administrative sanctions shall be imposed, under the terms established by the law, and they shall be obliged to repair the damage caused". In other words, together with the recognition of the right to an adequate environment, Spain has a constitutional mandate to establish both administrative and criminal sanctions in the field of environmental protection.

In this respect, one of the first important Laws is Law 53/1982 of 13 July[25], which categorises infringements and establishes administrative sanctions for fishing offences perpetrated in waters under Spanish jurisdiction, by Spanish or foreign vessels, and those committed by Spanish flagged vessels in waters which come under the jurisdiction of other States or on the high seas. This first post-constitutional Law was repealed by Law 14/1998 of 1 June[26], which established a more complete control regime to protect fisheries resources. This takes us to fundamental Law 3/2001 of 26 March, the State Maritime Fisheries Law[27], still in force, which has established a wide and comprehensive regulatory framework describing the general guiding principles of the legal framework for the economic and productive fishing sector. The Law regulates sea fishing, for which the State has exclusive competence, and establishes the basic legislation on management of the fisheries sector, facilitating its regulatory development and execution by the Self-governing Communities.

For our purposes, the Law first introduces a general regime of measures to conserve, protect and regenerate fisheries resources, inspired by international norms. These measures are applicable to fishing activity carried out by Spanish vessels in waters under Spanish jurisdiction, in waters under

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[23] Understood as the maritime waters under Spanish sovereignty or jurisdiction, located outside the baselines used to delimit marine spaces under the jurisdiction of the State.

[24] For general information, see G.A. Barrio García, *Régimen jurídico de la pesca marítima* (Marcial Pons, Madrid, 1998), especially at 130-193.

[25] BOE No. 181, 30 July 1982.

[26] BOE No. 131, 2 June 1998.

[27] Law 3/2001, of 20 March, on State Marine Fisheries (BOE No. 75, 28 March 2001). See J. Juste Ruiz, "La Ley 3/2001, de 26 de marzo, de pesca marítima del Estado: análisis y evaluación", 54 *Revista Española de Derecho Internacional* (2002), 95-114.

the jurisdiction of other EU Member States, in waters of third countries (without prejudice to the country's own legislation or to international treaties), as well as to these vessels in the high seas, in compliance with current international law. The measures are also applicable to EU vessels in waters under Spanish jurisdiction, in compliance with EU legislation, and to vessels from third countries in waters under Spanish jurisdiction, in compliance with both EU legislation and the rules laid down by international treaties. Secondly, compliance with this conservation legislation is guaranteed by the establishment and adoption of inspection and control measures, both on the sea and on land whenever fish catches and fishing gear is landed, unloaded and stored. Finally, the Law regulates a framework of infringements and sanctions (which I will refer to later) in which the material scope applicable to sea fishing is differentiated from that applicable to management of the fisheries sector and trading of fisheries products.

(B) ILLEGAL, UNREPORTED, AND UNREGULATED FISHING (IUU FISHING) AND THE INTERNATIONAL FIGHT AGAINST THIS TYPE OF FISHING

Now that we have established the antecedents, and the content and general scope of maritime fisheries legislation in Spain, I shall discuss the emergence of the concept of IUU fishing and the fight against this type of fishing, especially EU action in this respect.

(1) The concept of IUU fishing: emergence and international scope

In the last few decades, we have come to realise that a great deal of illegal or poorly regulated overfishing has been allowed to occur due to inadequate international regulation of the marine spaces, the ineffective regulation and control by certain flag States, the excessive capacity of some States' fisheries sectors and, especially, the considerable economic benefits that this activity generates[28]. So IUU fishing has become a large-scale international phenomenon with significant economic social and environmental consequences. The severity of these environmental and socio-economic effects led to the identification, in the late 1990s, of the IUU fishing phenomenon and to the first international actions which led to the adoption of the International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU) by the FAO Council in 2001[29].

The Plan of Action included a definition of the phenomenon which shapes the entirety of current thinking on IUU fishing. So the IPOA-IUU essentially defines illegal fishing as fishing activities carried out in violation of current norms, whether these are of a national or international nature. The same IPOA-IUU also considers fishing activities which have not been declared, or which have been

[28] For general information information on these issues, see J.M. Sobrino Heredia, "La tensión entre la gobernanza zonal y la gobernanza global en la conservación y gestión de los recursos pesqueros", in J.M. Sobrino Heredia (Dir.), *La contribución de la convención de las Naciones Unidas sobre el derecho del mar a la buena gobernanza de los mares y océanos* (Ed. Sicentifica, Milano, 2014, Vol. 2), 455-483.

[29] Adopted 23 June 2001. FAO Council report, CL 120/REP. For more information in the Spanish literature on this Plan, see A. Rey Aneiros, J. Sobrino Heredia, "Plan de acción internacional para prevenir, desalentar y eliminar la pesca ilegal, no declarada y no reglamentada (United Nations Food and Agriculture Organisation. Roma, 2001)", 54 *Revista Española de Derecho Internacional* (2002), 481-487.

incompletely declared, to be unreported fishing in violation of the relevant legal provisions. So unreported fishing is really no more than a form of illegal fishing, as it is defined by the violation of national regulations, or of the proceedings of an RFMO, regarding declaration of the activity or the catch resulting from the activity.

The IPOA-IUU also states that fishing activities which occur "in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law" are classed as unregulated fishing. The second part of this definition is difficult to grasp, as the absence of relevant legislation does not necessarily mean that the fishing activity is harmful, or that it should be prosecuted, or that it is necessarily associated with illegal fishing. This all generates a certain ambiguity, as it can mean that a component of IUU fishing, specifically the part known as unregulated fishing, does not represent a breach of regional and international measures for conservation and management of fisheries resources.

Ultimately, I consider that we are confronted with only two types of activity: either illegal or unregulated, but these are addressed as one, although, in my opinion, they should be differentiated[30]. In any case, despite these conceptual ambiguities, what is clear about the provisions of the IPOA-IUU and international action in this respect is that, generally, the concept of IUU fishing "aims to cover all forms of fishing that impoverish fisheries resources, whether carried out at the margin of international and national mechanisms whose objective is to ensure that fishing is developed in a responsible manner, or whether contravening these mechanisms"[31].

The Plan of Action envisages measures to prevent, deter and eliminate IUU fishing which are applicable to all States (flag States, coastal States and port States), commercial measures, which are becoming increasingly relevant[32], and cooperation with RFMOs, but the most significant development in international regulation has occurred in relation to port States and, to a much lesser degree, flag States. Indeed, in respect of the first two points, a Model Scheme on Port State Measures to Combat IUU Fishing was established by FAO in 2005 and finally, as mentioned previously, the FAO Port State Measures Agreement, in force since 5 June 2016, was adopted in 2009. The EU is a part of this Agreement and played a significant role in its adoption[33]. Regarding the last two points, and

30 R. Casado Raigón, "El Acuerdo de la FAO de 2009 sobre medidas del Estado rector del puerto destinadas a prevenir, desalentar y eliminar la pesca ilegal, no declarada y no reglamentada", 326 *Noticias de la Unión Europea* (2012), at 4.

31 T. Treves, "La pesca ilegal, no declarada y no reglamentada: Estado del pabellón, Estado costero y Estado del Puerto", in J. Pueyo Losa, J. Jorge Urbina (Coord.), *La cooperación internacional en la ordenación de los mares y océanos* (Iustel, Madrid, 2009), at 135.

32 On this subject: J. Jorge Urbina, "La cooperación internacional en la aplicación de medidas comerciales para luchar contra la pesca ilegal, no declarada y no reglamentada", 33 *Revista Electrónica de Estudios Internacionales* (2017) [doi: 10.17103/reei.33.04].

33 X. Pons Rafols, "La Unión Europea y el Acuerdo de la FAO sobre las medidas del Estado rector del puerto

considering that an instrument which is legally binding for flag States may be adopted in the future, the FAO adopted the Voluntary Guidelines for Flag State Performance in 2014[34].

(2) EU activities in relation to IUU fishing

The EU has been a leader in the fight against IUU fishing for many years due to its own competences and the interests of its considerable coastline, its significant fishing fleet and extractive capacity, and its position as the largest importer of fisheries products worldwide. It originally adopted a Community action plan for the eradication of IUU fishing, proposed by the Commission in 2002[35], complemented by the development, implementation and control of the CFP. Having realized that the most effective measures against IUU fishing are those which aim to reduce the benefit and increase the cost of this type of fishing, the Commission spearheaded a strategy which culminated in the adoption of two central regulations: Council Regulation (EC) No. 1005/2008 of 19 September 2008[36] and Commission Regulation (EC) No. 1010/2009 of 22 October 2009[37]. These aim to prevent, deter and eliminate IUU fishing, ensuring that all States, both member States and third States, comply with their international obligations to conserve and manage fisheries resources sustainably. This EU legal framework on IUU fishing, which complements the other EU fisheries regulations, came into force on 1 January 2010 and has been developed and updated various times since then.

With regards to the scope of this legislation specifically, it should be noted that it covers any type of sea fisheries activity, whether carried out in EU waters, in waters under the jurisdiction of a third State, or on the high seas, and whether or not these zones are subject to a special regulatory regime by an RFMO. It therefore involves a significant regulatory intent to combat IUU, which transcends waters under the jurisdiction of the Member States and goes further than the CFP itself, thereby including an extraterritorial component. Applying the same logic to its subjective scope of application, this legislation is applicable to all fishing vessels under the flag of an EU Member State, but also to all fishing vessels flagged by third States. The only requirement for the legislation to be applied is the existence of a link to the EU: either access to Member State ports, or fisheries products being traded to or from the EU, or that the fishing vessel is flagged in a Member State, or its owners, operators or charterers are Member State nationals.

Likewise, the EU regulation establishes that it is applicable to IUU fishing, using the FAO definition adopted by the EU to which I have just referred, and complementing it with some general assumptions about IUU fishing which enable the circumstances of IUU fishing to be defined and delimited more precisely. However, the regulations not only refer to fishing activities in the strict

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destinadas a prevenir, desalentar y eliminar la pesca ilegal, no declarada y no reglamentada", 27 *Revista General de Derecho Europeo* (2012).

[34] Adopted by the Committee on Fisheries and endorsed by the FAO Council (FAO doc. FIPI/R1101, Appendix H, p. 106ff).

[35] Document COM(2002) 180 final, 28 May 2002. For more on this plan, see J.M. Sobrino Heredia, "La reforma de la Política Pesquera Común y la pesca ilegal, no declarada y no reglamentada", 277 *Noticias de la Unión Europea* (2008), especially pp. 85 *ff*.

[36] OJ L 286, 29 October 2008.

[37] OJ L 280, 27 October 2009.

sense, but also cover other activities associated with fishing or related activities, such as the dispatch, trans-shipment, processing, unloading, selling and distribution of fish and fisheries products that could be derived from IUU fishing.

In addition to requiring that all commercial exchanges are accompanied by a catch certificate validated by the flag State and strengthening the measures available to port Members State authorities to monitor and inspect fishing vessels from third countries, EU regulations establish a complete system of IUU fishing infringements and sanctions. The EU IUU fishing vessel list, which also lists vessels identified as such by the RFMOs, and the list of non-cooperating States which do not collaborate or do not adequately control fishing activities carried out in their jurisdiction, breaching international obligations, are particularly relevant. Third States to which sanctions will be applied, especially sanctions of a commercial nature, can be included in this list by a system of pre-identification and identification.

The commercial approach, via the requirement for catch certificates, is one of the axes of European regulations and there is no doubt that it has had a significant effect on the fight against IUU fishing, both within the EU and internationally. Linked to the EU fisheries control measures and the review of the CFP, these measures have improved compliance with measures of fish conservation and sustainable fisheries management by the EU Member States. In any case, the scope of the EU action has to be considered positively, as it has led third States to adopt measures against IUU fishing if they want fisheries products originating in their territory or caught by vessels under their flags to be able to be traded and to enter into the European market. This justifies the EU's reputation for leadership in the fight against IUU fishing[38].

(c) Spain's leadership in the fight against IUU fishing: more lights than shadows

I will tackle specific analysis of Spanish activity in the fight against IUU fishing from three perspectives. Firstly, I will analyse the legal and regulatory changes adopted since 2002 to strengthen the fight against IUU fishing. Secondly, I will discuss the administrative and criminal penalties established by Spain in the fight against IUU fishing. Thirdly, I will consider activities against IUU fishing and, specifically, the jurisdictional limits of the Spanish courts to prosecute IUU fishing on the high seas.

(1) Legal and regulatory modifications to fortify the fight against IUU fishing

As I mentioned previously, Spanish legislation on prosecuting and sanctioning illegal fishing activities already existed, the most important of which was Law 3/2001 of 26 March, the State Maritime Fisheries Act[39]. This legislation is particularly relevant to illegal fishing activities committed by vessels

[38] X. Pons Rafols, "El protagonismo de la Unión Europea en la lucha contra la pesca ilegal, no declarada y no reglamentada", in J. Pueyo Losa and J. Jorge Urbina (Coords.), *La gobernanza marítima europea. Retos planteados por la reforma de la política pesquera común* (Thomson Reuters Aranzadi, 2016), 177-201.

[39] Spain quickly signed up to the IPOA-IUU measures and the Community Action Plan, and also adopted its own

under flags of convenience, especially those of States which do not cooperate in the conservation of fisheries resources. In this respect, we need only summarise some provisions that are still valid: Royal Decree 798/1995 of 19 May[40], which excludes the possibility of certain benefits for vessels which wish to export to particular countries; Royal Decree 601/1999 of 16 April[41], which prohibits inscription of fishing companies domiciled in a state which does not cooperate in the conservation of fisheries resources; Royal Decree 1797/1999 of 26 November[42], which establishes control of fishing operations by vessels from third countries in waters under Spanish sovereignty or jurisdiction; or Royal Decree 3448/2000 of 22 December[43], which stipulates that authorisation to enter in joint ventures is conditional on satisfactory guarantees that international law will not be violated. Along these same lines, Part V of Law 3/2001 establishes a regime of sea fishing infringements and sanctions, categorising the infringements arising from non-compliance with, or violation of, the obligations established in international fishing covenants, agreements or treaties.

Once the IPOA-IUU had been adopted, Royal Decree 1134/2002 of 31 October[44], on the application of sea fishing sanctions to Spanish crewmembers of vessels with flags of convenience, incorporated IPOA-IUU recommendations. It stipulated that a breach of marine fisheries obligations, especially those laid down in the LOSC, or violation of the conservation and management measures adopted by RFMOs of which the EU or Spain are part, by any physical or legal person with Spanish nationality legally associated with a vessel from a third country, will be penalised according to the regime of infringements and sanctions regulated by Law Law 3/2001 if the flag State does not have exercised the authority to sanction[45]. Also worthy of mention is Royal Decree 747/2008 of 9 May[46], which regulates the sanctions regime for marine fisheries on the high seas, introducing the required changes to the sanctions procedure to make it more effective regarding IUU fishing.

Once EU IUU fishing regulations were approved, and without prejudice to the direct applicability of this legislation, procedures were established to control access to port services, and landing and trans-shipment of fishing vessels from third countries, and to control the introduction of fisheries products into Spanish territory and their exportation and re-exportation as well as to regulate those aspects which would require amendment to EU legislation[47]. This was implemented with effect from 1 January 2010, the date that EU legislation came into force, by Order ARM/3522/2009 of 23

Plan of Action, joining the FAO in sponsoring an international conference on IUU fishing, held in Santiago de Compostela on 25–26 November 2002 (*Conferencia Internacional contra la pesca ilegal, no declarada y no reglamentada. La pesca INDNR/IUU*. MAPA. Madrid 2004).

40 BOE No. 154, 29 June 1995.

41 BOE No. 103, 30 April 1999.

42 BOE No. 301, 17 December 1999.

43 BOE No. 307, 23 December 2000.

44 BOE No. 262, 1 November 2002.

45 Spanish legislation characterises a flag of convenience as that granted by a countries or territories classified by the RFMOs as non-cooperating in their regulatory area, according to the criteria established by said organisations, therefore considering that stateless vessels, or vessels without nationality, will be considered to be vessels with flags of convenience.

46 BOE No. 129, 28 May 2008.

47 A computer application called the *Sistema Integrado de Gestión para el Control de la Pesca INDNR* [Integrated Management System to Control IUU Fishing], known as SIGCPI, was established by the General Secretariat for Fisheries for this purpose.

December[48], repealed some months later by Order ARM/2077/2010 of 27 July[49].

In any case, over and above these rules, it seemed reasonable to situate the concept of IUU fishing and the legal measures to fight against this type of fishing at the legislative level, to give it superior legal status. This was attempted initially by the Draft Bill for Sustainable Fishing, a legislative initiative presented to Congress in September 2010[50]. The Draft Bill's name itself highlighted its intention and its association with international developments on responsible fishing. The Draft Bill was all-embracing and intended to replace Law 3/2001 completely, but it expired on dissolution of Parliament and convocation of the general elections of 2011.

The successful legal change which incorporated measures against IUU fishing finally took place in 2014, with the adoption of Law 33/2014 of 26 December, which amended Law 3/2001, the State Maritime Fisheries Act[51], and which is particularly relevant to us. Starting with the consideration that IUU Fishing is one of the greatest threats to the sustainable use of living aquatic resources and to marine biodiversity, and that the advances made at EU and international levels should be reflected in domestic law, various amendments were made to the prevailing Law, including changes to the measures against IUU fishing. In this respect, the new Article 40 *bis* of the Law establishes that the relevant control and inspection measures would be adopted to ensure that fisheries products imported into Spain and exported from Spain have all been caught in accordance with international conservation and management measures and are not derived from IUU fishing. These measures will be particularly directed at preventing, deterring and eliminating activity by stateless vessels, vessels registered in countries classified as offering flags of convenience or vessels from third countries identified as having engaged in illegal fishing activities. The new provision also envisages development of the actions required to effectively dissuade Spanish nationals from carrying out IUU fishing activities or facilitating these activities by vessels registered in third countries and fishing outside EU waters. This will include measures to identify these nationals, and audit activities carried out by nationals linked to vessels from third countries which fish outside EU waters[52].

The most important aspect of the 2014 amendment to Law 3/2001 is complete renewal of Part V, on sea fishing infringements and sanctions, an amendment which also covers basic regulation of the sanctions regime for the fisheries sector and commercialisation of fisheries products. This sanctions regime is primarily aimed at those behaviours and events that occur within territory and maritime waters under Spanish sovereignty or jurisdiction. The secondary targets are behaviours and events occurring outside this territory or maritime waters but committed by physical or legal persons on board nationally flagged vessels or availing themselves of these vessels. In third place, again outside this territory or maritime waters but committed by physical or legal persons of Spanish nationality, on board stateless vessels or vessels with foreign flags or availing themselves of these, whenever the

48 BOE No. 35, 31 December 2009.

49 BOE No. 185, 31 July 2010.

50 *Proyecto de Ley de Pesca Sostenible* [Draft Bill for Sustainable Fishing] in the *Boletín Oficial de las Cortes Generales. Congreso de los Diputados*, Series A, No. 95-1, 8 September 2010.

51 See Law 3/2001, of 20 March, on State Marine Fisheries (BOE No. 75, 28 March 2001), consolidated text as amended.

52 Trading fisheries products of any origin or provenance, including holding, possessing, transporting, trafficking, storing, transforming, displaying and selling, is prohibited if the products originate from IUU fishing (Article 79).

flag State has not exercised their sanctioning authority. Finally, in fourth place, this sanctions legislation will also be applicable to events or behaviours detected in territory or maritime waters under Spanish sovereignty or jurisdiction and considered to be IUU fishing, even when committed outside this territorial range. This is independent of the perpetrator's nationality and the vessel's flag[53].

(2) The establishment of administrative and criminal sanctions in the fight against IUU fishing

It is worth considering some issues with the sanctions regime under the current State Maritime Fisheries Act. Firstly, the responsibility generated is strictly administrative, which does not exclude sanctions of a different class that may arise[54]. Therefore, according to the principle of *non bis in idem*, behaviours which have already been subject to criminal or administrative sanctions cannot be sanctioned again, in cases where the identity of subject, fact and legal ground are known[55]. If the behaviour could be considered an offence, the administration will pass the case to the competent jurisdiction and will abstain from following sanctions procedures until the judicial authority issues their final judgement, acquits or dismisses the case, or the case is returned by the public prosecution service.

Secondly, there is a notable '*plus*' in the classification, as infringements which are classified as minor are actually considered severe, and those that are classified as severe are considered very severe, in cases where the violation has been committed by a physical or legal person legally linked to stateless vessels, vessels with flags of convenience or vessels registered in third countries identified by the RFMOs or other international organisations as having engaged in IUU fishing activities or activities incompatible with conservation and management measures[56]. Likewise, breaching the duties established under international treaties on sea fishing or the rules established by the RFMOs are classed as severe infringements when they breach conservation and management measures[57]. When these violations could endanger or impede the normal execution of established obligations, or when these involve, or could involve, a breach of the duties assumed by the State, they will be considered very severe infringements[58]. Equally, participation in trans-shipments or joint fishing operations with stateless vessels or third-country vessels identified as having engaged in IUU fishing activities or activities incompatible with conservation measures for fisheries resources, or providing assistance or re-supplying such vessels are considered very severe infringements[59]; as is participating in the operation, management or ownership of stateless vessels, or third-country vessels identified as having engaged in IUU fishing activities or activities incompatible with conservation and management measures, or exercising mercantile, commercial, corporate, or financial activities with these vessels[60].

53 Article 90.
54 Article 92(1).
55 Article 92(2).
56 Article 100(1)(l) and Article 101(m).
57 Article 100(1)(m).
58 Article 101(j).
59 Article 101(k).
60 Article 101(l).

 DOI: 10.17103/sybil.21.30

Royal Decree 182/2015 of 13 March[61], which approved the current regulations for the sanctions regime for maritime fisheries in external waters and which replaces Royal Decree 747/2008, was adopted in application of the provisions of the modified Part V of the State Maritime Fisheries Act. The new regulations stem from substantial amendments to the infringements and sanctions regime, and they also support Spain's determination to lead the EU in applying the principles of fish stock sustainability driven by the CFP, by strengthening the policy of EU control, the fight against IUU fishing and respect for CFP rules.

In relation to the criminal dimension of the campaign against IUU fishing, we should highlight that environmental crime was not fully introduced into the Criminal Code [*Código Penal;* CP] until 1995. Infringements and sanctions against illegal fishing were an exclusively administrative issue in Spain, except in the case of fishing with explosives[62]. It is particularly relevant to us that, once CP reforms in 2010 and 2015 amended the 1995 provisions, the criminal regulations currently in force largely constitute white criminal norms, which need to be incorporated into other different regulations[63]. So Article 334 CP refers to national lists and existing legislation to criminally sanction the fishing of endangered species, which is aggravated if it involves species classified as endangered by extinction. In the same way, Article 335 CP penalises fishing when this is expressly prohibited under specific fishing legislation, whether this legislation arises from the State or the self-governing Communities. Finally, Article 336 CP sanctions fishing using methods which are destructive or non-selective for wildlife. Criminal legislation is territorial in all of these scenarios, since the CP can only pursue offences against natural resources and the environment committed on the high seas if they involve contaminating activities which cause, or could cause, significant damage to the quality of air, soil or water, or animals or plants, with an aggravated sub-type if this conduct severely prejudices the equilibrium of natural systems (Article 325 CP).

On the one hand, these provisions mean that we often find ourselves faced with a difficult and complex delimitation between administrative and criminal offence, which can often lead to a merely quantitative distinction without a precise definition. Conversely, these legal references can give rise to overlaps or concurrence between the criminal penalty and the authority to apply administrative sanctions, scenarios in which the principle of *non bis in idem*, recognised and developed in Spanish constitutional law as a fundamental right, would be applicable. Spanish administrative fisheries legislation, and its catalogue of infringements and sanctions, is much more complete and precise than criminal proceedings in this respect, and I believe that criminal penalties for IUU fishing should also be clearly addressed.

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[61] BOE No. 63, 14 March 2015.

[62] The 2010 amendment of the Criminal Code involved amongst other issues, the transposition of Directive 2008/99/EC of the European Parliament and of the Council, of 19 November 2008 (OJ L 328, 6 December 2008), on protection of the environment through criminal law, which extended the scope of legal protection for wildlife.

[63] Such as the above mentioned State Law on Marine Fisheries, or Law 42/2007 of 13 December, on Natural Heritage and Biodiversity (BOE No. 299, 14 December 2007), or Law 41/2010 of 29 December, on Protection of the Marine Environment (BOE No. 317, 30 December 2010).

(3) Actions against IUU fishing and the jurisdictional limits of the Spanish courts

Spain has a long fishing tradition, and IUU fishing activities have been recorded in Spain, or been committed by Spanish physical or legal persons, throughout this long history. Some non-governmental organisations have repeatedly condemned these cases[64] and questioned the use of certain Spanish ports by fishing vessels dedicated to IUU fishing[65]. The media have also referenced activities against IUU fishing, by highlighting recent Operations Sparrow I, Sparrow II and Yuyus, which resulted in significant financial penalties being issued by the Spanish Ministry of Agriculture and Fisheries, Food and the Environment. Government authorities have insisted publicly that the fight against IUU fishing is an absolute priority and that Spanish operations are the best in Europe against this type of fishing.

In this context, and that of judicial action against IUU fishing, we should highlight the recent Sentence 974/2016 of the Criminal Section of the Supreme Court, of 23 December 2016, which closed a case brought by the National Court (*Audiencia Nacional*) related to offences against wildlife and of money laundering committed in international waters by vessels with Spanish interests but flying flags of convenience, through the Spanish court's lack of jurisdiction. Beyond the procedural details of the case[66], the most relevant point is that this Sentence reveals the extraterritorial weakness in criminal justice's fight against IUU fishing[67].

The matter which was taken before the Supreme Court concerned a clan which is very well known to the police, both in Spain and abroad, as an international pirate fishing clan: *Vidal Armadores*. This episode actually started in January 2015, when vessels from this company, under flags of convenience and formally belonging to Panamanian companies, were detected and boarded by New Zealand sea patrols while fishing for toothfish (*Dissostichus* spp.) using dragnets, or gillnets, in the area protected by the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR)[68]. During their investigations, the National Court prosecution service considered that Spanish jurisdiction was competent to try offences committed outside national territory, as long as the criminals were Spanish, and a case was opened which was the start of Operation Yuyus. This investigation led to the detention and imprisonment of various members of this criminal group in March 2016. They were investigated for offences against natural resources and the environment, membership of a criminal

[64] See, for example, the list of cases where Spanish companies associated with IUU fishing have been exposed by *Veterinarios sin Fronteras* [Veterinarians without Borders] in *Pesca ilegal en España. Suma y sigue*. Barcelona, February 2010.

[65] Greenpeace denounced Puerto de la Luz in Las Palmas, Gran Canaria recently, with the subsequent denial of the Ministry of Agriculture and Fisheries, Food and the Environment.

[66] An appeal for reversal against an order issued by the Fourth Section of the National Court's Criminal Division (an interlocutory appeal) which dismissed the appeal and confirmed the ruling of the Central Court of Instruction No. 3, confirming the authority of the National Court to hear this complaint by the public prosecution service. In other words: the Supreme Court, in resolving a questionable appeal for reversal, dismissed the preliminary draft proceedings without setting a precedent resolution on the one hand; and, on the other hand, it discontinued the investigation started by the National Court and endorsed by its own Criminal Division, surprisingly without waiting for sentence.

[67] M.A. García García-Revillo, "Falta de jurisdicción de los tribunales españoles para conocer de delitos contra el medio ambiente (pesca IUU) cometidos por españoles mediante buques de pabellón extranjero en alta mar", 69 *Revista Española de Derecho Internacional* (2017), 345-351.

[68] BOE No. 125, 25 May 1985.

group, money laundering and falsifying documents.

However, the Supreme Court adjusted closely to the criminal law principle of territoriality and deemed that the principle of personality in the application of criminal norms, which acts as an exception to the principle of territoriality, demands that the behaviour be punishable also in the place of realization[69]. Double incrimination therefore operates as a *conditio sine qua non* so that an offence committed outside Spain by a Spaniard, or by any foreigner who has acquired Spanish nationality after the event in question, can be investigated and judged by the Spanish courts. For the Supreme Court, the behaviours that were the subject of the public prosecution's complaint were committed in international waters and the CAMLR Convention does not admit the existence of this double incrimination, as it does not include the intention to impose obligatory criminal sanctions on fishing infringements. The Supreme Court could not, therefore, fit these behaviours into either Article 23(2) or into the criminal types defined in Articles 23(3) and 23(4) of the Organic Law on the Judiciary to enable Spanish jurisdiction to be established[70], and so it ordered that the case be closed [71].

The Supreme Court ruling was accompanied by a dissenting vote from Judge Antonio del Moral, who, as well as voicing scathing criticism of the procedure, considered that the spaces situated at the limits of national sovereignty could not be converted "in the 21st century into 'lawless towns', where anything goes, except crimes governed by the principle of universal justice and which conform to an extensive, but nevertheless limited, list which has significant absences" [72]. To avoid this anomy and impunity, I consider that the international rules, including CAMLR Convention and EU regulations on IUU fishing, and internal criminal legislation, should clearly establish the obligation to prosecute this type of IUU fishing with criminal sanctions, as is already the case in the administrative field, regardless of the marine space it occurs in, or the vessel's flag, or the nationality of the participants in these activities.

(D) FINAL REMARKS

In this section of final remarks, I should first indicate that international development of the duties of

[69] Basing their reasoning strictly on the question of jurisdiction of the Spanish courts, without analysing whether the toothfish is an endangered species or included on the list of endangered species and whether this could fit into the criminal definitions in Arts 334 and 335 CP.

[70] Article 23(4)(d) of the Organic Law on the Judiciary refers to certain offences committed in marine spaces which can be prosecuted by the Spanish courts under the circumstances described in the treaties ratified by Spain, or in the legal proceedings of an international organisation of which Spain is a member, but it does not include the offence of illegal fishing amongst these offences.

[71] There were two more judicial proceedings in this matter: the NGOs Oceana and Greenpeace presented appeals for annulment in March 2017, but the Supreme Court rejected them (*La Voz de Galicia*, 26 April 2017). Furthermore, after dismissal, an action was brought before the Supreme Court which aimed to obtain formal recognition of a judicial error, which could serve to claim the corresponding compensation from the State. It is worth mentioning in this respect, at least, that the Supreme Court decided to reject the claim of judicial error (Supreme Court Order, Criminal Division, 15 June 2017).

[72] In the same vein, I also consider that the alleged offences which were the object of the complaint had unquestionably been committed in international waters, but, in their efforts to verify double incriminations, the Supreme Court should not have focussed on the simple criterion of the location where the alleged offence was committed, but should have concentrated on comparing the behaviours with the criminal legislation of the flag State, in this case, Equatorial Guinea. This consideration might have allowed the principle of personality to be applied as the exception to the rule of territoriality.

the States to conserve and manage fisheries resources sustainably, which is based on the axes and foundation formed by the LOSC, led to the IUU fishing phenomenon being identified and a wide range of international measures against this type of fishing being adopted. The EU has adopted comprehensive legislation in this fight against IUU fishing, centred on the commercial dimension and on the control exercised by the port State, which has a highly relevant internationally due to its extraterritorial effect. Both the international and the European aspects provide the context for, and influence, Spanish political and legal activity on fish sector.

Secondly, we should recognise that Spain, which has the largest EU fishing fleet and one of the most powerful internationally, has experienced and, unfortunately, continues to experience the phenomenon of IUU fishing on her borders and outside them. The immediate economic benefits of IUU fishing generate criminal groups worldwide, and Spain is not immune from this organised criminality. However, political will has been steadily increasing for some years, transcending governments of diverse political orientation. It has produced exhaustive legislation and defined a complete catalogue of fishing offences and penalties, and engaged in continuing judicial, police and inspection activities against IUU fishing, which has made Spain one of the leaders in the fight against this type of fishing, both within the EU and internationally.

Thirdly, I still believe that further developments should be made, both internationally and within Spain. Internationally, there is no doubt that the requirement for flag State compliance with international obligations should be further strengthened legally and that the work of the RFMOs should also be reinforced, by clarifying controversial aspects of their membership, giving their procedures legal standing and bolstering their capacity to enforce and penalise. I believe that new developments are required within Spanish law, especially in criminal and procedural matters, particularly allowing the exercise of Spanish jurisdiction in IUU fishing offences committed by Spanish or foreign physical or legal persons in the various marine spaces, whether or not these are under Spanish jurisdiction, in all circumstances covered by treaties ratified by Spain, or situations included in international organisations' legal instruments related to IUU fishing.

 DOI: 10.17103/sybil.21.30

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

Police at Sea

Isabel LIROLA DELGADO & Julio JORGE URBINA*

(A) THE FRAGMENTED AND DISPERSE LEGISLATION REGARDING MARITIME LAW ENFORCEMENT IN SPANISH LAW

The regulation regarding maritime law enforcement in Spanish Law is defined by its fragmented and disperses nature. There is no single legislative act to regulate these powers as a whole and in a systematic manner. Furthermore, there is an absence of a definition of maritime policing including all the actions which the Spanish authorities may carry out in order to enforce compliance with the Law of the Sea, particularly as far as the rules contained in the United Nations Convention on the Law of the Sea (LOSC), are concerned, along with other related treaties, with the aim of forcing any possible offender to observe the law.

The closest term to this idea, although it does not encompass all of its aspects, is that of "policing navigation" included in Law 14/2014 on Maritime Navigation[1]. The text of this Act contains the basic legislation regarding maritime policing powers in Spain covering two criteria. According to a territorial criterion, the afore-mentioned powers are applied to all vessels which are sailing in waters over which Spain has sovereignty, sovereign rights or jurisdiction (Article 4.1). According to the criterion of the flag, these powers are exercised over Spanish vessels, regardless of the place where they are located and without prejudice to the powers that, pursuant to the applicable treaties, are the remit of other coastal States or that of the port (Article 5(1)).

In general, all vessels sailing in Spanish waters, be it in transit or in order to enter or leave ports or terminals located on the Spanish coast, have the obligation to respect the rules of the Law of the Sea and "the restrictions and requisites established in this Act and, where appropriate, pursuant to the laws on safety, defence, customs, health, border controls and immigration" (Article 19). Likewise, Article 20 gives the Spanish maritime authorities the power to condition, restrict or prohibit navigation in certain spaces in the Spanish maritime areas for reasons of maritime safety and security, the conservation of marine biodiversity or of underwater cultural heritage and in order to prevent

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[1] Law 14/2014, 24 May 2014, on Maritime Navigation (BOE No. 180, of 25 July 2014), an English version available here.

 DOI: 10.17103/sybil.21.31

unlawful activities or conducting any prohibited trafficking.

More specifically, the regulation of maritime law enforcement powers is carried out in accordance with the maritime zone in which the vessel is located. Thus, in internal waters and in ports, ships must respect the "port legislation, safety, customs, borders and immigration, police, health, the environment and fishing, as well as the operating conditions established" (Article 7(1)). The Spanish maritime authorities may prohibit or condition entry to ports due to emergency reasons or specific risks to public health, safety of navigation, protection of traffic and the port facilities, repression of illegal fishing or environmental sustainability, according to the terms foreseen in the applicable provisions (Article 7(2))[2].

In territorial sea, in addition to the LOSC, ships must respect the provisions of the aforementioned Act, along with other laws and regulations governing navigation, border controls and immigration, customs, health and public security as well as those relating to the protection of the marine environment and underwater cultural heritage (Article 38)[3]. In the event that the passage of foreign ships through territorial sea is not innocent, the Spanish Maritime Administration may condition, restrict or prohibit navigation in those waters (Article 20(1))[4].

In the contiguous zone, Spain is authorised to exercise control over foreign ships in order to prevent breaches of customs, tax, health and border control and immigration laws which may be committed within Spanish territory and in territorial waters, as well as in its criminal and administrative jurisdiction, and to penalise those who commit offences against such laws (Article 23)[5].

As far as the exclusive economic zone is concerned, it is established that "[t]he Government shall ensure that when foreign [fishing] ships exercise their rights and fulfil their duties in the exclusive economic zone they duly take into account the rights of the Spanish State and fulfil the provisions of this Act and those of the fishing legislation, that comply with European Union and International Law" (Article 24.3).

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[2] Furthermore, Art. 8(2) allows the Maritime Administration to provisionally propose the prohibition of navigation in ports and their access channels, as well as the entry and exit of ships when there are "reasons of protection, emergency, public security, and environmental or public security reasons". In this regard, according to Art. 266.4.a) and b) of the Royal Legislative Decree 2/2011 of September 5, approving the consolidated text of the State Ports and Merchant Marine Act (BOE No. 253, 20 October 2011), "the authorisation or prohibition of entry and exit of ships in waters situated in zones in which Spain exercises sovereignty, sovereign rights or jurisdiction, and the dispatch of ships" corresponds to the harbour master, along with the designation of "prohibited zones for navigation for reasons of maritime safety and protection [security], safety of navigation, the prevention and combating of marine contamination or other duly justified causes". On this question, see the contribution in this volume by Díez-Hochleitner on "Maritime zones under sovereignty and navigation".

[3] When the wreck of the frigate *Nuestra Señora de las Mercedes* was plundered, the *Ocean Alert* (12th July 2007) and the *Odyssey Explorer* (16th October 2007), belonging to the company *Odyssey Marine Explorer*, were intercepted by the Maritime Service of the Civil Guard on leaving the port of Gibraltar in execution of an order from the Examining Magistrate's Court Nº 3 of La Línea de la Concepción. Both ships were transferred to the port of Algeciras in order to be inspected and their occupants to be identified. The captain of the latter ship was arrested for a crime of disobedience, after denying access to the ship and not providing the means for the ship to be boarded. On this question, see the contribution in this volume by Carrera Hernández on "Protecting Underwater Cultural Heritage".

[4] On this question, see the contribution in this volume by Díez-Hochleitner on "Maritime zones under sovereignty and navigation".

[5] According to paragraph 2, the unauthorised extraction of archaeological and historic objects found on the seabed or subsoil of water in the contiguous zone shall be considered a breach of the laws and regulations referred to in the preceding Section, as well as of the provisions on underwater cultural heritage.

These provisions relating to policing navigation are complemented by the legislation regarding State ports and merchant shipping. Thus, the Royal Legislative Decree 2/2011, of 5th September, which approved the Consolidated Text of the Law on State Ports and Merchant Marine states that "in order to prevent the carrying out of unlawful activities or the exercise of any prohibited trafficking, the Government may impede, restrict or condition the navigation of certain categories of civil ships in internal waters, the territorial sea or the contiguous zone" (Article 301).

More specifically, in matters relating to maritime security, Royal Decree 1617/2007, of 7th December, setting measures to improve protection of ports and maritime transport[6] establishes measures to "increase the protection of ports against the threat of deliberate events or unlawful acts which affect maritime security, and to determine the competent entities and institutions in the application of the measures contained in the legislation relating to the protection of maritime transport". As far as the safety of navigation is concerned, Article 3 of Royal Decree 394/2007, of 31 March, on measures applicable to vessels in transit carrying out discharge in Spanish maritime waters[7] regulates the policing measures which may be adopted by the Spanish Maritime Administration in collaboration with other coastal States and with port States in order to avoid the discharge of contaminating substances in Spanish maritime waters by vessels in transit[8]. These measures must be compatible with the rules contained in Part XII, section 7, of the LOSC.

As far as fishing is concerned[9], the exercise of policing powers is regulated by Royal Decree 176/2003, of 14 February, regulating the monitoring and enforcement of sea fishing activity[10], which defines maritime fishing inspectors carrying out their jobs as law enforcement officer (Article 2.2) and defines their sphere of activity (Article 3) and their roles (Article 4). To this effect, it is stipulated that, if necessary, to ensure the effective fulfilment of their task, fishing inspectors may request the support of the State and Autonomous Communities law enforcement agencies[11].

As for the fight against different kinds of unlawful trafficking, Law 12/1995, of 12 December, on the suppression of smuggling[12] includes within this offence the clandestine contraband or transhipment of any kind of goods within internal waters or in Spanish territorial sea or contiguous zone, or in the

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6 BOE No. 304, 20 December 2007.

7 Royal Decree 394/2007, 31 March 2007, on Measures Dealing with Ships in Transit that Perform Polluting Discharges in Spanish Waters, transposing EP and Council Directive 2005/35/EC (OJ 2005 L 255/11) (BOE No. 81, 4 April 2007).

8 Paragraph 2 of this article establishes that "when there is evidence that a vessel navigating in Spanish territorial waters or waters in the Spanish exclusive economic zone has carried out a contaminating discharge which entails or may entail considerable prejudice to the natural resources of these waters, to the coast or to contiguous areas, the Spanish Maritime Administration shall adopt the necessary police measures including, when appropriate, the detention of the ship, for the protection of this legal interests. If necessary, appropriate disciplinary proceedings shall be initiated or the case shall be forwarded to the public prosecutor. The flag State of the ship must be informed in all cases".

9 On actions against IUU fishing and the jurisdictional limits of the Spanish courts, see the contribution in this volume by Pons Rafols on "IIU fishing".

10 BOE No. 50, 27 February 2003.

11 However, the Ministry of Agriculture and Fisheries, Food and Environment lacks the necessary material means to effectively carry out these surveillance tasks on fishing. Therefore, agreements have been signed with the Ministry of Defence and the Ministry of the Interior so that ships belonging to the Navy and the Maritime Service of the Civil Guard may collaborate in inspection and monitoring activities.

12 BOE No. 297, 13 December 1995.

 DOI: 10.17103/sybil.21.31

circumstances set out in article 111 of the LOSC (Article 2(1)(g))[13]. As far as the unlawful trafficking of weapons is concerned[14], Article 11 of Law 53/2007, of 28 December, on the control of foreign trade in defence and dual-use material[15] enables the Spanish authorities to confiscate defence material, other material and products and technology of dual use in transit through the maritime area which is subject to Spanish sovereignty, when the circumstances set out in Article 8 of the Law arise.

(B) THE EXTRA-TERRITORIAL EXERCISE OF MARITIME LAW ENFORCEMENT JURISDICTION

The Spanish authorities may also exercise their maritime law enforcement jurisdiction extra-territorially, in other words, over vessels whose flag State is not Spain and outside of maritime zones in which Spain has sovereignty or sovereign rights. This is made possible due to the attribution of jurisdiction laid out in Article 23(4) of Law 6/1985, of 1 July, on the Judicial Power, in the version resulting from Law 1/2014, of 13 March, modifying the Organic Law 6/1985, of 1 July, of the Judicial Power, on Universal Jurisdiction[16]. The afore-mentioned provision, in section (d), establishes the jurisdiction of the Spanish courts relating to "crimes of piracy, terrorism, the illegal trafficking of toxic drugs, narcotic drugs and psychotropic substances, trafficking in human beings, crimes against the rights of foreign citizens and crimes against shipping safety perpetrated at sea, in those cases envisaged in the treaties ratified by Spain or in the regulatory acts of an International Organisation of which Spain is a member". "In accordance with this principle, its application is connected to the existence of an international treaty which attributes jurisdiction to Spanish authorities to board, seize and prosecute these crimes[17].

Without detriment to the questions which arise in relation to the rest of the offences contemplated in section (d)[18], the regulation in section (i) of the article 23(4) of the conditions for the attribution of jurisdiction to Spain in cases of drug trafficking (the Spanish nationality of the suspect or the carrying out of acts with a view to committing such crimes in Spanish territory) has led to problems of interpretation with regard to the interception by the Spanish authorities of vessels used for drug trafficking on the high seas. Such doubts have been resolved in a series of judgements handed down by the Second Division of the Supreme Court, responding to appeals for annulment from the public prosecution service against writs from the Criminal Division of the National High Court (*Audiencia*

[13] It should be mentioned that this legal text alludes to the LOSC in its definition of smuggling when this treaty did not come into force for Spain until 14th February 1997, whereas Art. 2(1)(i) of Royal Decree 1649/1998, of 24 July, implementing Title II of Organic Law 12/1995, of 12 December, on the repression of smuggling relating to administrative offences of smuggling (BOE No. 214, 7 September 1998) mentions the Geneva Convention on the High Seas, of 29 April 1958, when Spain was already part of the LOSC.

[14] On 21st August 2015, the replenishment oiler *Cantabria*, part of the Standing NATO Maritime Group 2, boarded and searched a merchant vessel on the high seas as part of the NATO operation *Active Endeavour*. The merchant vessel boarded was suspected of the unlawful trafficking of weapons and activities related to terrorism. On the Spanish participation in NATO naval operations, see the contribution in this volume by Espaliú Berdud on "Security and military questions".

[15] BOE No. 312, 29 December 2007.

[16] Organic Law 1/2014, 13 March 2014, on Universal Jurisdiction (BOE No. 63, 14 March 2014).

[17] This has been confirmed by the Supreme Court in the STS 592/2014, 24 July 2014 (ECLI: ES:TS:2014:3082) and in the STS 1977/2015, 25 March 2015 (ECLI: ES:TS:2015:1977).

[18] On this question, see the contribution in this volume by García Andrade on "Migrants by Sea".

Nacional) which confirmed the dismissal of criminal proceedings following drug crimes decreed by the Central Examining Magistrate's Courts in accordance with an "unexpected" lack of jurisdiction resulting from the modification of Article 23.4 of the Organic Law on the Judicial Power put into effect by Organic Law 1/2014.

In these judgements, the Supreme Court recognises that the vague wording of these provisions has given rise to diverging interpretations. Faced with this situation, the Court has clarified that sections (d) and (i) of Article 23.4 establish two distinct and autonomous rules for attributing jurisdiction. Although they refer to the same types of conduct (crimes relating to the illegal trafficking of drugs, narcotics or psychotropic substances), both "are distinguished by one fundamental element: section (d) is applied specifically when dealing with actions carried out in "marine areas" (international waters), whereas if this circumstance is not met, section i) shall be applied". Therefore, as the Supreme Court has pointed out, section (d) must be applied in a preferential manner when international treaties allow for such an attribution so that via a legislative act of the concerned State (such as Organic Law 1/2014) "it can be proclaimed that jurisdiction is held with the entitlement of the afore-mentioned international treaties"[19].

This interpretation also extends to actions carried out in the contiguous zone. In relation to this aspect, the Public Prosecution Service has expressly stated that "the contiguous zone allows the coastal State to take the afore-mentioned measures. Thus, while not forming part of the national territory, our domestic law foresees the commission of crimes which can be prosecuted in Spain. Therefore, it can be considered that we are dealing with a crime committed outside of the national territory, as laid out in Article 23(4)(d) of the Organic Law on the Judicial Power"[20].

Spain's exercising of maritime law enforcement jurisdiction in an extra-territorial dimension may also be provided for in cooperation agreements with other States which allow for joint patrols, as is the case of the *Agreement between Spain and Cape Verde on the joint surveillance of maritime spaces under Cape Verde's sovereignty and jurisdiction*[21].

(C) THE LACK OF A SINGLE STATE AGENCY RESPONSIBLE FOR THE SURVEILLANCE AND MONITORING OF MARITIME ZONES OVER WHICH SPAIN HAS SOVEREIGNTY, SOVEREIGN RIGHTS OR JURISDICTION

The complexity and fragmentary nature that characterises the regulation of maritime policing powers is demonstrated in the institutions responsible for carrying them out. What is more, the term "Maritime Administration" employed by the Spanish legislation does not correspond to a set of institutions that can exercise these powers. Mention is made exclusively to the Ministry for

[19] STS 592/2014, 24 July 2014 (ECLI: ES:TS:2014:3082); STS 3089/2014, 24 July 2014 (ECLI: ES:TS:2014:3089); STS 5199/2014, 5 December 2014 (ECLI: ES:TS:2014:5199); STS 5433/2014, 11 December 2014 (ECLI: ES:TS:2014:5433). Also, the STS 3581/2016, 15 July 2016 (ECLI: ES:TS:2016:3581) in relation to the interception of a ship in international waters by the Civil Guard 26 miles from the Portuguese coast.

[20] STS 866/2014, 11 December 2014 (ECLI: ES:TS:2014:5433).

[21] BOE No. 136, 5 June 2009. On this question, see the contribution in this volume by García Andrade on "Migrants by Sea".

 DOI: 10.17103/sybil.21.31

Development (the Directorate General of the Merchant Marine), which is responsible for the management and monitoring of maritime traffic in waters over which Spain has sovereignty, sovereign rights or jurisdiction[22]. In reality, the Spanish Administration has no single agency responsible for the surveillance and monitoring of maritime areas. This fact is reflected in Article 223 of Royal Decree 876/2014, of 10 October, approving the General Regulations on Coasts[23], which establishes in paragraph 2 that "the functions of the General Administration of the State in the territorial sea, internal waters, the economic zone and the continental shelf in matters of defence, fisheries and aquaculture, rescue missions, the combating of pollution, human safety at sea, the extraction of remains, the protection of Spanish archaeological heritage, research and the exploitation of resources [...] shall be exercised in the appropriate manner and by the departments or institutions to which they have been entrusted". This fragmentation of maritime policing powers may give rise to a serious lack of coordination among the different ministries and agencies (not to mention the powers which may be held by the Autonomous Communities and local entities)[24], which, in theory, operate independently. In the light of this fact, collaboration among different ministries with powers concerning the surveillance and monitoring of maritime zones is essential for their roles to be carried out appropriately[25].

In accordance with the provisions of the LOSC, which attributes the exercise of maritime law enforcement jurisdiction to warships and other vessels which are clearly indicated and identifiable as being at the service of a government or authorised for that purpose, there are three State agencies in Spain which dispose of the means to exercise such jurisdiction. These agencies are distributed among three ministries: The Ministry of Defence, the Ministry for Home Affairs and the Ministry of Finance and Public Administrations. In addition to the vessels of the Spanish Navy and those of the

[22] This results from Art. 263 of the Law on State Ports and Merchant Marine.

[23] BOE No. 247, 11 October 2014.

[24] One example of the powers of the Autonomous Communities concerning surveillance and maritime monitoring can be found in the case of Galicia with Law 2/2004, of 21 April, on the creation of the Galician Coastguard Service (BOE No. 113, 10 May 204).

[25] This willingness to promote inter-ministerial collaboration is reflected in the Additional Provision Four of the Law on State Ports and Merchant Marine and has led to the signing of several agreements, such as the Interdepartmental Agreement between the Ministry of Defence and the Ministry for Home Affairs on collaboration and coordination between the Navy and the Civil Guard in the marine environment, of 14 February 2006; the Interdepartmental Agreement between the Ministry of Defence and the Ministry for Home Affairs in combating the unlawful trafficking of drugs, of 14 February 2006; the Protocol on inter-ministerial collaboration in combating human trafficking by sea, of 29 July 2005; the Interdepartmental Agreement between the Ministry of Defence (Navy) and the Ministry for Development (State Ports) on the interchanging of information; the Agreement between the Ministry of Defence and the Spanish Tax Agency on collaboration in the maritime context, of 14 September 2011; the Joint Agreement between the Ministry of Defence and the Ministry of Agriculture, Fishing and Food on the inspection and surveillance of maritime fishing activities, of 24 October 1988; the Framework Agreement between the Ministry for Home Affairs and the Ministry of Agriculture, Fishing and Food on the monitoring, inspection and surveillance of maritime fishing activities of 12 November 1997; the Agreement between the Ministry for Home Affairs (the Directorate General of the Civil Guard) and the Ministry of Agriculture, Food and Environment (General Secretariat of Fisheries) for the coordination of the use of helicopters in activities relating to surveillance missions of fishing activities, of 14 December 2015; the Interdepartmental Agreement between the Ministry of Defence and the Ministry of Culture on collaboration and coordination in the area of the protection of subaquatic archaeological heritage, of 9 July 2009; the Agreement between the Ministry for Home Affairs and the Ministry of Culture, of 21 December 2011 in order to apply the SIVE programme.

Customs Surveillance Service (which, according to Decree 1002/1961, of 22 June, of maritime surveillance[26] are classified as "auxiliaries of the Navy"[27]), ships belonging to the marine service of the Civil Guard are also considered as vessels of State at the service of public security, surveillance and the repression of unlawful activities.

According to Organic Law 2/1986, of 13 March, on State security forces and services[28], in Article 11.2 b), the role of policing in territorial waters corresponds to the Civil Guard[29]. This attribution of powers was confirmed, and even extended, by Royal Decree 246/1991, of 22 February, which regulates the maritime service of the Civil Guard[30]. According to the first article of this decree, "the functions that Organic Law 2/1986, of 13 March, on State security forces and services attributed to the Civil Guard Corps shall be exercised in Spanish maritime waters up to the outer limit of the territorial sea determined in the current legislation and, exceptionally, outside the territorial sea, in accordance with what is established in existing international treaties"[31]. Furthermore, the Order of 26 July 1994 on the regime, flagging and registration of ships of the maritime service of the Civil Guard[32]states that "the ships of the maritime service of the Civil Guard [...] shall be considered, to all intents and purposes, as ships of the State expressly authorised by the Government to exercise the functions set out by the current legislation".

However, in the absence of a modification of Organic Law 2/1986, of 13 March, in order to attribute powers to the Civil Guard to act beyond Spanish territorial waters, the position of jurisprudence is not uniform. On occasions, such actions have been backed without recourse to any kind of strong rationale[33]. On other occasions, the existence of prior judicial authorisation has been considered sufficient, under the understanding that such operations were supported by the general principle of international cooperation to combat the unlawful trafficking of narcotic drugs and psychotropic substances being carried out by vessels on the high seas and the right of visit contemplated in Articles 108 and 110 of the LOSC respectively[34]. The Supreme Court has even justified such operations by considering, erroneously, that the Civil Guard forms part of the Spanish Armed Forces[35].

On the other hand, the Spanish Customs Surveillance Service (*Servicio de Vigilancia Aduanera*,

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26 BOE No. 157, 3 July 1961.

27 They appear as such in the *Lista Oficial de Buques de la Armada*. April 2015.

28 BOE No. 63, 14 March 1986.

29 Art. 7 of Organic Law 2/1986 establishes that the members of the State law enforcement agencies shall have, to all legal purposes, the character of law enforcement officers in the exercise of their functions, which includes the Civil Guard when it acts as a maritime policing force.

30 BOE No. 52, 1 March 1991.

31 More specifically, Royal Decree 770/2017, of 28 July, which implements the basic organisational structure of the Ministry for Home Affairs (BOE No. 180, 29 July 2017) entrusts the Civil Guard with the task of "preventing and pursuing contraband, fraud, drug trafficking and other kinds of unlawful trafficking in the sphere of the functions entrusted to the Civil Guard by the current legislation, in addition to the custody, monitoring and surveillance of the coasts, borders, ports, airports and territorial waters and, in this context, the monitoring of irregular immigration".

32 BOE No. 181, 30 July 1994.

33 STS 1198/2010, 4 March 2010 (ECLI: ES:TS:2010:1198).

34 STS 2756/2008, 20 May 2008 (ECLI: ES:TS:2008:2756).

35 STS 9617/2001, 10 December 2001 (ECLI: ES:TS:2001:9617).

SVA) is attributed powers in the pursuit of contraband and other related crimes, among which drug trafficking is included. In the exercise of these powers, according to Royal Decree 319/1982, of 12 February, regarding the assignation and restructuring of the Customs Surveillance Service[36], the SVA holds responsibility for "the investigation, discovery and prosecution of contraband violations throughout the nation, territorial waters and airspace; to which effect...it will exercise the functions of maritime, air and terrestrial surveillance oriented to this end"[37]. Furthermore, according to the First Additional Provision No.1 of Organic Law 12/1995, of 12 December, regarding the repression of smuggling, in "the investigation, persecution and uncovering of smuggling activities [...] The Customs Surveillance Service shall act in coordination with the State law enforcement agencies and shall have the legal status of collaborator with the latter in the investigation, persecution and repression of smuggling"[38].

Although officers of the SVA are recognised as law enforcement officers, the exercise of their role as judicial police has not been exempt from controversy as far as the boarding and inspection of ships transporting drugs in the contiguous zone and on the high seas is concerned. In these cases, the Supreme Court has reasserted the role of the SVA as judicial police in several judgements, based on the interpretation contained in the Consultation of the Attorney General of the State 2/1999, of 1 February and in the agreement of the non-jurisdictional plenary meeting of the Second Division of the Supreme Court of 14 November 2003[39]. According to this decision, the SVA is not considered to be judicial police in the strict sense, due to the fact that it is not included in Article 283 of the Criminal Procedural Act[40], although it is in a generic sense on the basis of the drafting of the first paragraph of this Act. As a consequence, the objection to "the actions of a service such as the Customs Surveillance Service, equipped with the means to carry out interceptions and to board ships trafficking drugs in international waters as judicial police, accompanied or not by members of other State law enforcement agencies, lacks any legal basis"[41].

Last of all, the role played by the Spanish Navy must be highlighted, as it also carries out maritime law enforcement operations as set out in Organic Law 5/2005, of 17 November, on National Defence[42]. Article 16.a) mentions "the surveillance of maritime areas as a contribution to the action of the State

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36 BOE No. 48, 25 February 1982.

37 According to Art. 16(1) of Organic Law 12/1995, of 12 December, on the repression of smuggling, in the exercise of their functions of monitoring and surveillance, they may undertake to search and inspect any vehicle or means of transport.

38 In this regard, Art. 9 of Royal Decree 319/1982, of 12 February, establishes that "in carrying out their mission, the civil servants of the Customs Surveillance Service shall have the character of law enforcement officers and shall have, within their powers, the faculties and attributions laid out in the prevailing Laws for civil servants charged with investigating and uncovering the corresponding offences".

39 STS 3207/2006, 19 May 2006 (ECLI: ES:TS:2006:3207); STS 605/2007, 23 January 2007 (ECLI: ES:TS:2007:605); STS 3605/2007 20 April 2007 (ECLI: ES:TS:2007:3605); STS 4517/2007, 22 June 2007 (ECLI: ES:TS:2007:4517); STS 1410/2010, 3 March 2010 (ECLI: ES:TS:2010:1410); STS 7050/2010, 10 December 2010 (ECLI: ES:TS:2010:7050).

40 The consolidated text incorporates all the amendments up to Organic Law 13/2015 of October 5, 2015, on Reform of the Criminal Procedural Law on Strengthening Procedure Guarantees and Regulating Technological Research Measures (BOE No. 239, 6 October 2015).

41 STS 4685/2009,16 June 2009 (ECLI: ES:TS:2009:4685)

42 Organic Law 5/2005, 17 November 2005, on National Defense (BOE No. 276, 18 November 2005). On this question, see the contribution in this volume by Espaliú Berdud on "Security and military questions".

at sea" among the operations to be carried out by the Armed Forces[43]. Within the structure of the Navy, the Maritime Security and Surveillance Command is "responsible for the planning, conducting and monitoring of surveillance and security operations in maritime zones of sovereignty, responsibility and national interest"[44]. However, this role is merely a participation in the exercise of powers attributed to other State Administration bodies and is of a subsidiary nature. In order to carry out these functions, according to Royal Decree 194/2010, of 26 February, on the rules on security in the Armed Forces[45], members of the Navy shall have "the character of law enforcement officers in the exercise of functions of surveillance and maritime security legally attributed or due to international agreements subscribed to by Spain, which shall be carried out without prejudice to those attributed to members of the State law enforcement agencies or to members of other bodies with the role of maritime surveillance in the exercise of their powers" (Additional Provision First (4)).

(D) MEASURES WHICH MAY BE TAKEN BY THE SPANISH AUTHORITIES REGARDING MARITIME LAW ENFORCEMENT OPERATIONS.

As far as the exercising of maritime policing powers are concerned, the State authorities responsible for the surveillance and monitoring of Spanish maritime zones may adopt a series of measures to combat offences committed by both Spanish and foreign ships. However, no Law exists in Spain which lists or defines these measures in a systematic manner.[46] The most complete list in current

[43] In Annex D of the *Strategic Revision of Defence* (Ministry of Defence, Madrid, 2003) it is established that the contribution of the Navy to State action at sea includes "the naval presence and surveillance of our key maritime areas, the exercise of sovereignty in our territorial waters and the collaboration, along with the other State Institutions with competences at sea, in tasks such as maritime law enforcement, the combating of marine pollution, scientific research, hydrographic work, the maintenance of submarine archaeological heritage, search and rescue and cooperation in all tasks of civil protection."

[44] Ministerial Order 86/2012, of 4 de December, establishing the Surveillance and Maritime Security Command and the Defence and Air Operations Command (*Boletín Oficial del Ministerio de Defensa* nº 242, 13 December 2012).

[45] BOE No. 64, 15 March 2010.

[46] When negotiating current Law 14/2014 on Maritime Navigation, its 2008 Draft included a wide-ranging list of these kinds of measures was included in then Chapter VIII of Title I, which was dedicated to the power to intercept, inspect and detain ships. Art. 81(1) in particular, which was aimed at defining the general framework of the powers of maritime policing, established that "the Maritime Administration and the other competent bodies of the General Administration of the State may intercept, request information, visit, inspect, detain, escort to port and adopt any other measure which is deemed necessary" in order to safeguard the safety of navigation, prevent the pollution of marine environment and ensure the observance of the applicable laws and regulations "regarding national ships which contravene these legal rights or infringe upon the afore-mentioned laws". Paragraph 2 of this same article states that these measures may be adopted "regarding foreign ships which are navigating in Spanish maritime zones, respecting the provisions in this Act for ships from foreign States and in matters of right of hot pursuit". Paragraph 3 establishes the obligation to inform the diplomatic or consular representative of the flag State "of the measures adopted in the shortest possible time." In a complementary manner, Art. 82 conferred upon the "personnel endowed with public functions of inspection or monitoring" the power to board ships which were the object of maritime law enforcement action in order to carry out "the necessary inspections and actions", albeit with prior judicial authorisation to gain access to the cabins when opposition arises on the grounds of the inviolability of domicile. To that end, concerning ships in port or in internal waters, Article 20(2) of the Draft established that "the judicial authority may order the appropriate diligences to be performed aboard, as well as boarding and searching the ship, including its cabins, with no further requisite than notification to the Consul of the flag state as soon as possible", as current Law 14/2014 does in its Art. 12(2). See the 2008 Draft at Boletín de las Cortes Generales. Congreso de los Diputados, IX Legislatura, Serie A. Nº 14-1, of 19 December 2008.

legislation can be found in Article 297 of the Law on State Ports and Merchant Marine, which states that:

> "In waters in which Spain exercises sovereignty, sovereign rights or jurisdiction, with the aim of safeguarding safety of navigation and preventing the pollution of the marine environment, the Ministry for Development, by way of the Port Authorities and Harbour Masters, may visit, inspect, condition the anchoring, seize, initiate legal proceedings and, in general, adopt the measures which are deemed necessary regarding ships which infringe upon, or may infringe upon, these legal rights."

Although these measures have the objective of guaranteeing safety of navigation and preventing the pollution of the marine environment, they may also be appropriate in combating other types of offences committed in the maritime environment[47]. Furthermore, in certain cases, the possibility of retaining or immobilising the offending ship is contemplated[48].

These measures can be adopted in the maritime zones over which Spain exercises sovereignty and jurisdiction[49]. However, Law 14/2014 on Maritime Navigation only mentions maritime law enforcement measures which can be adopted in the contiguous zone. More specifically, the Spanish maritime authorities shall have the right to intercept, request information and carry out the appropriate inspection of any foreign ship located in that area which may have infringed, is infringing or may have the intention of infringing the customs, fiscal, health or border control and immigration laws or regulations, or may be carrying out the "unauthorised extraction of archaeological and historic objects found on the seabed or subsoil of water in the contiguous zone" (Article 35(1))[50]. In order to prevent or punish the infraction of these laws and regulations, if appropriate, other necessary and proportional measures can be adopted, including arrest and escorting to port (Article 35(2)).

In addition, Law 14/2014 also makes reference to the rights of hot pursuit and of visit (Article 48) and to the escorting to port of ships which have been the object of the exercise of such rights (Article

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47 In this way, Decree 1002/1961, of 22 June (BOE No. 157, 22 June 1961), recognised the power of the SVA to "detain, inspect and apprehend Spanish and foreign ships suspected of carrying out smuggling whilst navigating in Spanish territorial waters" (Art. 3).

48 The detention of the ship as a precautionary measure as part of an infringement procedure is set out in Art. 320 of the Law on State Ports and Merchant Marine and in Art. 20 of Royal Decree 1737/2010, 23 December 2010, transposing EP and Council Directive 2009/16/EC on Port State Control, and repealing Directive 95/21/EC (OJ 2009 L 131/57) (BOE No. 317, 30 December 2010), amended by Royal Decree 1004/2014, 5 December 2014, transposing EP and Council Directive 2013/28/EU, amending Directive 2009/16/CE (OJ 2013 L 218/1) (BOE No. 295, 6 December 2014).

49 The exercise of these law enforcement measures in the ports was raised in the case of the M/V *Louisa*, who was seized when it was docked in a Spanish port in the context of criminal proceedings relating to the alleged violations of Spanish laws on the protection of the underwater cultural heritage and the possession and handling of weapons of war in Spanish territory. In this case, the International Tribunal for the Law of the Sea stated "that there is no provision in the Convention which requires a port State to notify the flag State or to obtain the authorization of the flag State or of the master of a foreign vessel operated for commercial purposes such as the M/V "Louisa" before boarding and searching such a vessel docked at its port". *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports* 2013, at 39-40. On this question, see the contribution in this volume by Díez-Hochleitner on "Maritime zones under sovereignty and navigation".

50 In the application of the legislation regarding the protection of cultural heritage, naval vessels intercepted the *Seaway Invincible* (December 2012) and the *Seaway Endeavour* (26 May 2013) in waters of the Alborán Sea, in the Spanish contiguous zone, under the suspicion of searching for shipwrecks. Following their identification and inspection, the former was expelled from Spanish waters while the latter was escorted to the port of Algeciras in order to carry out an inspection.

49)[51]. In the regulation of these rights, this Act opts for "the use of the technique of remission according to the content of the international texts applicable to the different aspects of maritime navigation"[52]. In particular, it stipulates that these rights "shall be exercised for the reasons and in the manner established in the United Nations Convention on the Law of the Sea and other applicable international conventions."

As far as the right of hot pursuit is concerned, Decree 1002/1961 states that "the pursuit of foreign ships must begin whilst they are located in waters under Spanish jurisdiction and may be continued outside of territorial waters on the condition that it is not interrupted. As regards Spanish ships, pursuit may be carried out in any case and circumstance. In both cases, the pursuit must cease when the ship being pursued enters the territorial waters of another State" (Article 3).

The right of visit has not been the object of any specific regulation[53], although its content has been clarified by jurisprudence with regard to the exercise of extra-territorial maritime law enforcement jurisdiction derived from Article 23(4)(d) of the Organic Law of the Judicial Power. The Supreme Court has stated that this provision "confers jurisdiction on Spanish authorities to board, inspect, confiscate substances and detain the crew of any ship which flies the flag of another State, on the condition that authorisation is obtained from that State"[54]. The jurisprudence of this Court has reiterated the need for prior authorisation from the flag State in order to fulfil what is established in Articles 97(3) and 108 of the LOSC, in addition to Article 17(3) and 17(4) of the United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances of Vienna of 1988[55]. The State may establish its jurisdiction for the purposes of judging the accused when giving authorisation[56], or possess it by virtue of agreements adopted on the basis of Article 17.9 of the 1988 Convention, such as the *Treaty between the Kingdom of Spain and the Portuguese Republic to combat illicit drug trafficking at sea*, signed in Lisbon on 2 March 1988[57] and the *Treaty between the Kingdom of Spain and the Italian Republic*, signed in Madrid on 23 March 1990[58].

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[51] Inexplicably, the English version of Law 14/2104, carried out by the Spanish Ministry of Justice, uses the terms "the rights to pursue and inspect" that does not correspond with those of Arts. 110 and 111 LOSC.

[52] General Council of the Judiciary, *Report on the draft bill of the Law on Maritime Navigation*, of 20 December 2012.

[53] In the case of the Navy, the operational procedure to be followed in unopposed and non-cooperative boarding operations is detailed in D-SF-71 (A), *Procedimientos de actuación de los trozos de visita y registro*, General Staff of the Navy, May 2010.

[54] STS 648/2016, 15 July 2016 (ECLI:ES:TS:2016: 3581)

[55] STS 2487/2001, 26 March 2001 (ECLI: ES:TS:2001:2487); STS 1398/2003, 28 February 2003 (ECLI: ES:TS:2003:1398); STS 7739/2003, 3 December 2003 (ECLI: ES:TS:2003:7739); STS 2756/2008, 20 May 2008, (ECLI: ES:TS:2008:2756); STS 592/2014, 24 July 2014 (ECLI: ES:TS:2014:3082); STS 3089/2014, 24 July 2014 (ECLI: ES:TS:2014:3089); STS 5199/2014, 5 December 2014 (ECLI: ES:TS:2014:5199); STS 5433/2014, 11 December 2014 (ECLI: ES:TS:2014:5433). Exceptionally, the STS 7476/2003, of 25 November 2003 (ECLI: ES:TS:2003:7476) states that "the fact remains that the omission of requesting the pertinent authorisation does not have the consequences that the appellant State may attach to it. In other words, in any case it may constitute an irregularity which does not invalidate the boarding, neither does it extend its consequences to the examination of the evidence obtained without authorisation".

[56] However, in some cases, confusion remains regarding the effects attributed to the possible reservation of jurisdiction over the ship, its crew and the goods on board held by the flag State when giving authorisation, STS 3370/2007, of 4 May 2007 (ECLI: ES:TS:2007:3370).

[57] BOE No. 18, 20 January 2001. STS 4587/2015, 11 November 2015 (ECLI: ES:TS:2015:4587STS) and 5245/2015, 14 December 2015 (ECLI: ES:TS: 2015:5245).

[58] BOE No. 108, 6 May 1994. With the same aim of developing Art. 17(3) of the United Nations Convention, Spain

Likewise, the practice confirms that the right of visit can be exercised without authorisation in cases in which the ship does not exhibit an identifiable flag[59] or when the ship is "officially sailing without a flag and the apparent flag State of the ship relinquishes responsibility"[60]. This circumstance is not only common in the case of the unlawful trafficking of drugs but, as is clearly shown in practice, is also frequent in the case of vessels which are used in the unlawful trafficking of immigrants by sea to Spain[61].

(E) THE USE OF FORCE IN MARITIME LAW ENFORCEMENT OPERATIONS

As far as the exercising of these policing powers at sea are concerned, Spanish legislation has been extremely imprecise regarding the employment of coercive measures and, particularly, the use of force. The Organic Law 9/1970, of 4 July, on the Navy established that the Navy "shall have the specific mission of achieving the maritime objectives of the Nation in peace and at war, making use of force when necessary"[62]. This extremely generic reference does not allow for a definitive clarification on whether this use of force refers to situations which are not prohibited by Article 2.4 of the United Nations Charter or whether it includes maritime law enforcement activities, as Article 1.4 of this Act attributes to the Navy the mission of "ensuring the fulfilment of Laws and national and international Agreements in the maritime context".

Only Decree 1002/1961, of 22 June, relating to the Customs Surveillance Service recognises that "fiscal surveillance ships shall be equipped with the fixed and mobile weaponry necessary for the fulfilment of their mission, being able to employ them in case of self-defence and for the arrest at sea of suspicious ships" (Article 8)[63].

Although the above-mentioned *Draft Maritime Navigation Act* made reference to these types of measures in its Articles 82(3) and (4)[64], Law 14/2014 does not contain any specific mention of them[65].

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presented an "Initiative of the Kingdom of Spain with a view to adopting a Council Act establishing in accordance with Article 34 of the Treaty on European Union, the Convention on the suppression by customs administrations of illicit drug trafficking on the high seas" (OJ 2002 C 45/8).

[59] STS 5577/2006, 20 September 2006 (ECLI: ES:TS:2006:5577); STS 4310/2016, 4 October 2016 (ECLI: ES:TS:2016:4310).

[60] STS 2040/2008, 15 May 2008 (ECLI: ES:TS:2008:2040)

[61] STS 4011/2007, 25 June 2007 (ECLI: ES:TS:2007:4011); STS 5261/2007, 5 July 2007 (ECLI: ES:TS:2007:5261); STS 96/2008, 3 January 2008 (ECLI: ES:TS:2008:96). On this question, see the contribution in this volume by García Andrade on "Migrants by Sea".

[62] BOE No. 161, 7 July 1970.

[63] In this regard, Royal Decree 319/1982 establishes that "due to the nature of their missions and their condition of law enforcement officers, they shall be authorised to use weapons, in conformity with what has been established in Decree 1002/1961, of 22 June, regulating maritime surveillance."

[64] The text of Art. 82(3) is as follows: "In any case and if it is deemed necessary, the competent Administration shall adopt the necessary and proportional coercive measures in order to prevent the offending vessel from derogating from its obligations, sanctions and responsibilities." And Art. 82(4) says: "To this effect, the collaboration of the State law enforcement agencies can be sought, who shall act in accordance with the provisions of the regulating legislation, including, when necessary, the use of weapons".

[65] However, this could be inferred from the generic mention made in Art. 35.2 of this Act to the special measures which may be adopted in the contiguous zone. This article states that "[w]here necessary, other necessary and proportional measures may be adopted to prevent or penalise the offence, including arrest and escorting it to port".

Therefore, it is necessary to turn to laws which regulate law enforcement actions in the fulfilment of their mission in a general way, which can be applied, *mutatis mutandis*, to law enforcement operations at sea[66]. This is confirmed by jurisprudence, as is stated in the writ from the Central Examining Magistrate's Court Nº 5 of the National High Court of 26 February 2016 in the case of an attempt to board the drill ship *Rowan Renaissance* on the part of Greenpeace activists in waters close to the Canary Islands[67]. In assessing the coercive measures employed by the Navy, the judge considered that they were legal due to the fact that the military personnel involved were acting as law enforcement officers exercising a role of maintenance of public order in order to guarantee compliance with an administrative decision of the General Directorate of the Merchant Marine (the creation of a maritime exclusion zone) in the face of a "a conduct of clear rebellion towards a legitimate authority" on the part of the ecologists, which led them to repeatedly disobey orders to abandon the exclusion zone. Faced with this situation, the Navy's mission was to impede the boarding of the *Rowan Renaissance*, using the minimum degree of non-lethal force.

This writ is significant because it recognises the possibility of employing coercive measures in law enforcement operations at sea. However, it is also relevant due to the fact that it determines the limits and conditions under which the actions of State agents may be considered justified:

> "1) that the active subject is a figure of authority or civil servant authorised by the corresponding provisions to make use of violent means in the exercise of the duties of his/her responsibility; 2) that the possible offence may have occurred in the course of carrying out the functions of the corresponding duties; 3) that, in order to carry out the specific duty in the sphere of which his/her activity is being carried out, the use of violence is necessary (an abstract necessity) as, without such violence, it would be impossible to fulfil the obligation incumbent upon him/her at that moment; 4) that the specific violence employed is of the lowest possible degree in order to achieve the intended aim, that is, on the one hand, that the least dangerous means is employed and, on the other hand, that this means is used in the least harmful way possible. All of this shall be measured with a relative order of criteria. In other words, the specific circumstances of the case shall be taken into account, among them the possibilities for action at the disposal of the law enforcement officer (specific necessity); and 5) the proportionality of the violence employed in relation to the situation which led to the intervention of the police".

These requirements have been formulated with a general character by the Supreme Court when it has

[66] According to the Order of 26 July 1994 on the regime, flagging and registration of ships in the Maritime Service of the Civil Guard, "the Maritime Service of the Civil Guard, with the weaponry incorporated in the ships at its disposal, shall carry out the missions which the Law attributes to it and may make use of weapons, in situations of strict necessity, in accordance with the principles included in Art. 5(2)(c) and (d) of Organic Law 2/1986, of 13 March, on the State Law Enforcement Agencies". These Art. 5(2)(c) and (d) say: "in the exercise of their functions, they shall act with the necessary decisiveness and without delay when the prevention of serious, immediate and irreparable harm depends upon it; guided in the exercise of such functions by the principles of coherence, opportunity and proportionality in the use of the means within reach" and "firearms shall only be used in situations in which there is a rationally serious risk to their life, their physical integrity or to third persons or in those circumstances which may suppose a serious risk to public safety and in accordance with the principles referred to in the previous section." More specifically, and in line with the role of the Civil Guard in the exercise of maritime policing functions, Organic Law 11/2007, of 22 October, regulating the rights and duties of the members of the Civil Guard (BOE No. 254, 23 October 2007) states that "the members of the Civil Guard are obliged to strictly observe the legislation regarding the legitimate use of force and must always respect the life and the physical and moral integrity of the person" (Art. 17).

[67] AAN 29/2016, 26 February 2016 (ECLI:ES:AN:2016:29A)

prosecuted the actions of law enforcement officers in the carrying out of their function of maintenance of public order. What the judge of the National High Court did in this case was to apply them to a maritime law enforcement operation.

Otherwise, the Spanish authorities have been opposed to the use of coercive measures in the exercise of maritime policing powers, especially in the case of fishing incidents in which Spanish vessels have been involved (seizure of the vessel *Estai* by Canadian authorities)[68]. On the contrary, the use of these measures has been raised in Spanish practice in the framework of the fight against piracy as a consequence of the participation of the Navy in the *Atalanta operation*[69]. The naval force deployed by the European Union (EU NAVFOR *Somalia*) in the Western Indian Ocean has been authorized to use armed force "to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where it is present"[70]. In the context of this operation, the Ministry of Defense has stated that the rules of engagement allow "the right of self-defence and the use of the minimum force absolutely necessary to fulfil the assigned protection mission and in this case, it would be targeted preferably at the parts of the structures of the ships which pose the least risk of damage to the crew, without excluding of course a risk-based escalation for the protected ships and / or the protection force"[71].

[68] The objection of Spain to the use of force in the application of enforcement measures in fisheries inspection activities on the high seas by other States than the flag State was included in the declaration made upon the ratification of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. The Instrument of Ratification is published in BOE No. 175, 21 July 2004. On this question, see the contribution in this volume by Borrás Pentinat on "Related agreements and Spain: Fish stocks and marine biological diversity".

[69] On this question, see the contribution in this volume by Sobrino Heredia on "Piracy".

[70] This authorization is based on the resolutions approved by the United Nations Security Council and is foreseen in the article 2(d) of *Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast* (OJ L 301, 12.11.2008).

[71] *Request for authorization from the Congress of Deputies for the participation of a Spanish military contingent in the "Operation Atalanta" of the European Union to fight against piracy in Somali waters. Madrid, 21 January 2009.* Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente, IX Legislatura, 2009, nº 58, p. 18.

 DOI: 10.17103/sybil.21.31

the SPANISH YEARBOOK of INTERNATIONAL LAW

Spain and the Law of the Sea: 20 years under LOSC

A selection of Spanish bibliography on the law of the sea and LOSC

Marta ABEGÓN NOVELLA, Ana María MAESTRO CORTIZAS and Beatriz VAZQUEZ RODRÍGUEZ*

Three young colleagues of the **Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales (AEPDIRI)** *were invited by the Editorial Board of the SYbIL to collect and comment the most relevant contributions of Spanish authors to the law of the sea, to complement the analysis of Spain's practice over the last 20 years and before included in this volume of the Yearbook. General aspects of the law of the sea, the impact of LOSC on Spanish practice as well as the relevance of this practice on the general rules of the law of the sea may be revisited from a Spanish perspective in the more than 150 contributions collected and reviewed by Marta, Ana María and Beatriz. Their more than considerable work will help those to want to have a clear and complete vision of Spanish literature on the law of the sea.*

This contribution tries to be a live section of the Agora. Therefore, new papers published by Spanish authors will be added in due time as well as others, already collected, will be completed.

(A) GENERAL CONTRIBUTIONS

González Giménez, J., 'La evolución del Derecho del mar desde el punto de vista de un mar semicerrado como el Mediterráneo', 14 *Revista electrónica de estudios internacionales* (2007) [ISSN-e: 1697-5197]: Part IX of the UNCLOS is expressly dedicated to closed or semi-enclosed seas, which, far from establishing a special legal regime for this type of seas, is limited, in the only two articles it contains, to defining what for the purposes of this Convention is understood as a closed or semi-closed sea and to suggest the way of cooperation between the coastal States of these seas as the solution to the specific problems that arise in them. Whether or not this limited and controversial regulation of closed or semi-enclosed seas is appropriate and if the Mediterranean, in particular, finds in this current legal framework useful answers to the many challenges that its complex physical configuration poses are, all of them, issues that we will be addressing throughout this work.

Pueyo Losa, J. A. (Dir.), Correia Brito, W. A. (Dir.), Ponte Iglesias, M. T. (Coord.) and Vale Pereira, M. A. (Coord.), *La gobernanza de los mares y océanos: nuevas realidades, nuevos desafíos* (Andavira Editora, Santiago de Compostela, 2012) [ISBN: 978848408671].

Pueyo Losa, J. A. and Jorge Urbina, J., *La cooperación internacional en la ordenación de los mares y océanos* (Iustel, Madrid, 2009) [ISBN: 9788498900613]: The Law of the Sea is one of the most dynamic and changing sectors of the international legal order. This is due to the very characteristics and peculiarities of the marine environment, which not only constitutes a vast natural space, but also an economic and political space, that is, a source of power and wealth. Hence the diversity and heterogeneity of the state interests that converge in it. These factors hinder the international management of the seas and oceans and make this normative sector a complex and potentially conflicting reality, as reflected in the 1982

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 DOI: 10.17103/sybil.21.34

United Nations Convention on the Law of the Sea. From this perspective, this book analyzes the role of international cooperation to face the problems that arise in the international maritime field in matters as the management and conservation of fishery resources, the protection and preservation of the marine environment or prevention of certain illegal activities at sea. In all these cases, it is noted that collaboration between States remains a basic instrument for achieving peaceful and lasting solutions to the challenge of ensuring the orderly and sustainable management of maritime spaces.

Sobrino Heredia, J. M. (Coord.), *Mares y océanos en un mundo en cambio: tendencias jurídicas, actores y factores* (Tirant lo Blanch, Valencia, 2007) [ISBN: 978484567691]: This work includes those papers and communications that feed the debate of the XXI Seminar of the AEPDIRI. Its publication is an excellent culmination of that meeting. With it opens up more interested, allows a more detailed and calm knowledge of the value of contributions and ensures a future projection of this important collective intellectual effort. It will be a work of obligatory knowledge for all those interested in the issues that affect the sea and the oceans and a valuable tool for reflection and debate on the future of international studies in the new framework of European higher studies.

Sobrino Heredia, J. M. (Dir.), *La contribución de la Convención de las Naciones Unidas sobre el Derecho del Mar a la buena gobernanza de los mares y océanos / La contribution de la convention des Nations Unies sur le droit de la mer à la bonne gouvernance des mers et des océans / The contribution of the United Nations Convention on the Law of the Sea to good governance of the oceans and seas* (Editoriale Scientifica, Napoli, 2014) [ISBN: 978-88-6342-638-0]: This book contains the updated reports and papers presented at the IVth Ordinary Symposium of the International Association of the Law of the Sea entitled "The Contribution of the United Nations Convention on the Law of the Sea to the good governance of the seas and oceans" at the University of A Coruña (Spain) on 13 and 14 December 2012.

Yturriaga Barberán, J. A., *Ámbitos de jurisdicción en la Convención de las Naciones Unidas sobre el Derecho del Mar: una perspectiva española* (Ministerio de Asuntos Exteriores, Madrid, 1996) [ISBN: 13:9788487661723]: This book describes in a comprehensive and detailed manner the development of the III United Nations Conference on the Law of the Sea and contains chapters related to the Parties to the United Nations Convention on the Law of the Sea dedicated to the Territorial Sea and the Contiguous Zone , to the Straits used for international navigation, to the Islands and Archipelagos, and to the Protection and preservation of the marine environment.

Yturriaga Barberán, J. A., *Tendencias y perspectivas actuales del Derecho del Mar* (Escuela Diplomática, Madrid, 2007) [ISBN: 100808159].

(B) LOSC NEGOTIATIONS

Casado Raigón, R., 'La convención de las Naciones Unidas sobre el derecho del mar y su pretensión de universalidad y generalidad', in Sobrino Heredia, J. M. (Dir.) *La contribución de la Convención de las Naciones Unidas sobre el Derecho del Mar a la buena gobernanza de los mares y océanos / La contribution de la convention des Nations Unies sur le droit de la mer à la bonne gouvernance des mers et des océans / The contribution of the United Nations Convention on the Law of the Sea to good governance of the oceans and seas* (Editoriale Scientifica, Napoli, 2014) Vol. 1, 9-20. [ISBN: 978-88-6342-638-0]: The UNCLOS has been a success in itself. Beyond concrete achievements, such as submitting the law of the sea to compulsory dispute settlement mechanisms (despite its many limitations), it is the whole of the Convention that must be valued.

Cervera Pery, J. R., *El derecho del mar: evolución contenido, perspectivas de bulas papales al Convenio de Jamaica* (Naval, Madrid, 1992) [ISBN: 84-7341-072-6]: The Third United Nations Conference on the Law of the Sea was the most relevant event in the history of International Maritime Law in the 1970s, which was still prolonged in the early 1980s with the signing of the Jamaica Agreement. Based on the much debated

Convention, but without losing sight of its background and the evolutionary process that could make it a reality, the author of this book traces the most direct overview of the Law of the Sea as it is shown today, full of questions not solved The author of this book recounts and analyzes, without falling pretentiously or dogmatically, all this new doctrinal framework whose repercussion will be very important for the maritime interests of Spain.

Espaliú Berdúd, C., 'Profecías de tiempos de la Convención de las Naciones Unidas sobre el Derecho del Mar acerca de los medios jurisdiccionales de arreglo pacífico de controversias', *El arreglo pacífico de las controversias internacionales:* XXIV Jornadas de la Asociación Española de Profesores de Derecho internacional y Relaciones internacionales (AEPDIRI), Córdoba, 20-22 de octubre 2011 (Tirant lo Blanch, Valencia, 2013) 331-342, [ISBN: 978-84-9033-521-5]: A few months before celebrating the anniversary of the birth of the United Nations Convention on the Law of the Sea (UNCLOS), that is an occasion to give away the prophecies that were issued in the future about the jurisdictional means of peaceful settlement of the controversies derived from its interpretation and application foreseen by the UNCLOS and see if it has been fulfilled in reality.

García García Revillo, M., 'IX United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (IX UNICPOLOS)', 1(1) *Aegean Rev Law Sea* (2010) 1-165 [DOI: 10.1007/s12180-009-0005-3]: Within the legal framework described below, the IX UNICPOLOS, that is, the IX Open-ended Informal Consultative Process on Oceans and the Law of the Sea, was held in Room 1 of the United Nations Headquarters in New York, from June 23 to 27, 2008.

Pastor Ridruejo, J. A., 'Consideraciones sobre la III Conferencia de las Naciones Unidas sobre el Derecho del Mar', 3 *Anuario español de derecho internacional* (1976) 281-296 [ISSN: 0212-0747]: The Third United Nations Conference on the Law of the Sea is presented to us as one of the most original and committed negotiations in the history of the Law of the Peoples. And also, as the most symptomatic negotiation of those that the international community has undertaken in our days. Being, in short, a very specific chapter of the new International Economic Order, its success or failure will constitute the test of what to expect from the desired construction of the latter.

Pastor Ridruejo, J. A., 'Los Estados industrializados medios, nuevo grupo de intereses en la III Conferencia de las Naciones Unidas sobre el Derecho del Mar', 1(4) *Revista de Estudios Internacionales* (1980) 915-933 [ISSN: 0210-9794]: Despite the undoubted progress made in the summer of 1980, the negotiations of the Conference on the complex issues assigned to the First Commission have not ended completely. Some of the issues that fall within the mandate of the Commission have yet to be resolved, among them and most especially the establishment of the Preparatory Commission of the Authority and the accommodation of the entry into force of the Convention to the possibilities of constituting the Council. It is likely that the Group of the Western European average industrialized states will try to take advantage of this opportunity to raise their claims once again. And the final outcome of the negotiations, which in the autumn of 1980 is finally seen to be relatively close, will shed definitive light on the real capacity of pressure of the Group.

Pastor Ridruejo, J. A., 'La Convención de 1982 sobre el Derecho del mar y los intereses de España', en *Cursos de derecho internacional de Vitoria-Gasteiz* (Vitoria-Gasteizko nazioarteko zuzenbide ikastaroak 1983) 69-104 [ISBN: 84-7585-007-3]: In the present course the author intends to interpret the keys of the abstention of Spain and also provides elements of judgment regarding the attitude of the Spanish Government against the signing of the Convention and the Cortes in the event that the question were raised of the authorization of the consent of Spain to be bound by it. In essence, it tries to offer valuations of the Convention in the interests of Spain.

Poch y Gutiérrez de Caviedes, A., (Coord.), *La actual revisión del Derecho del Mar. Una perspectiva española* (Instituto de Estudios Políticos, Madrid, 1974) [ISBN: 8425904366]: In this work it has been tried to carry out an examination of the current process of revision of the Law of the Sea from the perspective of the interests of Spain in this review process. It constitutes, therefore, an appreciation, from the angle of

one of the participating States, of a general process, of fundamental importance to the international community as a whole. Its purpose is to facilitate a better understanding of this process, and of the dominant trends and orientations in it, by Spanish readers, showing the background and the development of work carried out in this area, as well as the main problems. Also, on the other hand, to facilitate a fair assessment of Spanish interests in the Law of the Sea, and of the lines of action undertaken in the process of their revision, based on the attitudes adopted by the representatives of Spain and the relevant Spanish practice on the questions of the Law of the Sea.

(c) THE IMPACT OF THE RATIFICATION IN SPAIN

Jiménez Piernas, C., *La revisión del estatuto territorial del Estado por el nuevo Derecho del Mar (el caso de los Estados Archipelágicos)* (Instituto de Cultura Juan Gil-Albert, Alicante, 1990) [ISBN: 84-7784-049-0]: It proposes a revision of the traditional concept of territory, as well as an update on certain aspects of the acquisition and exercise of sovereignty in International Law, in light of the creation of new institutions of the Law of the Sea. This proposal is based in a purely interdisciplinary inquiry, very useful to evoke the diversity of cultural perspectives in the perception and representation of space, which constitutes the prius logical of the revision of the geocentric concept of territory.

Jiménez Piernas, C., 'Competencia territorial del Estado y problemas de aplicación del Derecho del mar: práctica española', 12 *Anuario Hispano-Luso-Americano de Derecho Internacional* (1995) 233-278 [ISSN: 0570-4316]: This article offers a summary of the legislative practice and the internal jurisprudence of Spain up to that date, with regard to the legal regime of the territorial sea and the exclusive economic zone (right of innocent passage, right of persecution, right of visit, jurisdiction of the riparian for the protection and preservation of the marine environment in the exclusive economic zone, and prohibition of the use of armed force by the riparian to exercise their rights in the exclusive economic zone).

Jiménez Piernas, C., 'La ratificación por España de la Convención de 1982 sobre el Derecho del mar y del Acuerdo de 1994 sobre la aplicación de la Parte XI: nuevos riesgos de la codificación del Derecho Internacional', 53(1) *Revista Española de Derecho Internacional* (2001) 105-124 [ISSN: 0034-9380]: The Third U.N. Conference on the Law of the Sea has closed untruly a process of codification that had begun in 1969 and formally concluded in 1982 by the adoption of the Convention on the Law of the Sea. In fact, this process finished without any consensus on the institutions and the legal regime for the management of the resources located in the «Zone». Furthermore certain States have encouraged to reopen other problems which seemed resolved by this Convention, like the regime of cooperation for the conservation and management, at the High Sea contiguous to the Exclusive Economic Zone, of straddling fish stocks and highly migratory fish stocks. This has raised a clear instability and legal uncertainty in the Law of the Sea of our days, to the prejudice of many States; these States took part actively and with good faith in this codification process. This situation benefits at the same time the richest States (which forced the adoption of the 1994 Agreement on the implementation of Part XI) and those States with long coastlines (which caused the 1995 Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks). For many reasons, Spain is left among the most prejudiced coastal States. Nonetheless this reality has not moved our legislators to define their position when they ratified the 1982 Convention or the 1994 Agreement on Part XI. These texts have passed Parliament through a simple administrative procedure without raising any debate, showing that there is a lack of a properly and long lasting Spanish State policy in the marine field.

Riquelme Cortado, R. M., 'Reflexiones sobre la firma y la ratificación de la Convención de las Naciones Unidas sobre el Derecho del Mar (1982): a propósito de la firma por España', 8 *Anuario español de derecho internacional* (1985) 185-210 [ISSN: 0212-0747]: Like the vast majority of the States invited to participate in the Third United Nations Conference on the Law of the Sea, Spain has also joined the list of the signatories of the 1982 Convention of Jamaica on December 4, 1984. This event, together with the fact

that the authorization of our Government to sign the Convention has been accompanied by a series of interpretative declarations, is sufficient reason to describe and, if possible, to question, the keys that have surrounded the Spanish firm of this, for obvious reasons, a very important multilateral treaty, in the general context of States —and state entities— that, finally, have also signed it and, where appropriate, ratified it as well as enunciating its consequences.

Riquelme Cortado, R. M., *España ante la Convención sobre el Derecho del Mar: las declaraciones formuladas* (Universidad de Murcia, Murcia, 1990) [ISBN: 84-7684-964-8]: The United Nations Convention on the Law of the Sea prohibits the submission of reservations to the articles (article 309) but, on the contrary, admits the presentation of declarations (article 310). In this regard, Spain signed the Convention accompanied by nine interpretative declarations of some of its articles: the first one with an almost political character and the remaining eight interpreting different provisions. The present work is the first published work dedicated to its detailed examination. Thus, after a first chapter devoted to the review of the provisions of UNCLOS regarding the presentation of reservations and declarations, the work identifies, classifies and addresses the content and implications of the different declarations made by Spain, paying special attention to those related to the passage in transit through the international straits and those related to the risk of marine pollution of the strait (of Gibraltar).

(D) LOSC, SPAIN AND THE EUROPEAN UNION

Carreño Gualde, V., 'TJCE - Sentencia de 30.05.2006, Comisión/Irlanda, C-459/03, MOX - La Competencia exclusiva del TJCE y la Parte XII de la Convención de las Naciones Unidas sobre el Derecho del Mar', 26 *Revista de Derecho Comunitario Europeo* (2007) 185-202 [ISSN: 1138-4026]: In the here analyzed and commented Sentence of the ECJ the determination of exclusive jurisdiction of the Court of Justice in relation to the interpretation and application of the dispositions contained in a Mixed Agreement: the United Nations Convention on the Law of the Sea: Part XII (Protection and Preservation of the Marine Environment). Through this determination, the Court considers that Ireland has failed, as alleged the Commissions in its action for failure of obligations imposed by article 292 of EC Treaty, by putting the dispute relative to the violation on the part of the United Kingdom of Part XII of the Convention through industrial activities developed by the MOX plant under a Court constituted by arbitration according to Annexed VII of this conventional instrument, that is to say, outside the communitarian legal frame, ignoring the ECJ exclusive jurisdiction. In its decision, the Courts concludes that we are facing a controversy in relation with interpretation or application of Community Law. From this point of view, the conclusion affirms that European Community has exercised its shared competence in the matter object of the dispute, the protection of marine environment against pollution, as a result of his participation in the Convention on the Law of the Sea. Consequently, this dispute is included in the field of the exclusive and obligatory jurisdiction of the Court of Justice, and no other international jurisdictional organ could take part in its resolution.

Fernández Alles, J. J., Fernández Alles, M. T., 'El Derecho europeo sobre las autopistas del mar y su incorporación al ordenamiento español (2010-2013)', 49 *Revista Española de Derecho Europeo* (2014) 55-89 [ISSN: 1579-6302]: This paper describes and analyzes the process of legal development and implementation of European law of the motorways of the sea in Spain: legislative, procedural, organizational and competence issues, where we can find the activity of economic promotion of European Union and a regime of public service (concessions and authorizations), as well as a system of national parliamentary approval. During the period 2010-2013, the Commission has processed authorizations and direct aids over motorways of the sea to allow implementation of the Motorway of the Sea of Western Europe, for transport between the ports of Gijón (2011) and Vigo (2013) to Nantes-Saint Nazaire. To accomplish the incorporation of European law on the motorway of the sea, Ports and Merchant Marine Act (2011), the parliamentary approval and aid concessions of Marco Polo Programme have led to progressively develop of a portuary coordination system, highly efficient, for the enforcement of the

European principles of free competition, environmental protection and economic integration, with the main objective of achieving a common maritime space in the European Union.

Gutiérrez Castillo, V. L., "La ordenación del espacio marítimo y la gobernanza sostenible en la Unión Europea", 35 *Revista General de Derecho Europeo* (2015) [ISSN-e: 16969634]: The Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishes a framework for maritime spatial planning aimed at promoting the sustainable growth of maritime economies, the sustainable development of marine areas and the sustainable use of marine resources. Within the Integrated Maritime Policy of the European Union, this new framework provides for the establishment and implementation by Member States of maritime spatial planning, taking into account land-sea interactions and enhanced cross-border cooperation. This work examines in detail this important Directive, showing that, although it does not inaugurate maritime space planning processes, it does represent a further step in the creation of an effective framework for the management of maritime space.

Sobrino Heredia, J. M., 'La acción de la Unión Europea en materia de seguridad marítima', 55(1) *Revista Española de Derecho Internacional* (2003) 79-116 [ISSN: 0034-9380]: The European Union, in a short period of time, has adopted a real legislative repertoire regarding maritime safety. Its effectiveness depends to a large extent on the application made by the Member States and on the consistency between those norms and in relation to international ones. For this reason, the first part of this work examines how the EU has been developing a complex normative body, mainly as a reaction to the gravity of the marine disasters that occurred in front of its coasts. Next, in its second part, the paper analyses what areas have been privileged by this legislative action, and, if the interrelation and coherence between them allows us to start talking about a Community Maritime Safety Policy. A proper EU maritime safety legislation would not only benefit the EU but would offer added value to international action and to the work of international organizations in this sector.

Sobrino Heredia, J. M., 'La Politique maritime intégrée de l'UE et les bassins maritimes européens', 1 *Paix et sécurité internationales: revue maroco-espagnole de droit international et relations internationales* (2013) 13-32 [ISSN: 1114-7326]: Since 2007 the EU is trying to implement an integrated maritime policy which covers areas as diverse as fishing, navigation and ports, marine environment, marine research, energy production, ship-building industry, maritime security, tourism and employment, coastal developments and external relations concerning maritime affairs. The aim of our work is to present, first, the legal pillars of this new policy, and then, show regional approach about European sea basins.

(E) SPAIN AND THE BODIES ESTABLISHED BY THE CONVENTION

Aznar Gómez, M. J., 'El Tribunal Internacional del Derecho del Mar', in Vázquez, E. M., Adam, M. D. and Cornago, N., *El arreglo pacífico de las controversias internacionales*: XXIV Jornadas de la Asociación Española de Profesores de Derecho internacional y Relaciones internacionales (AEPDIRI), Córdoba, 20-22 de octubre (Tirant lo Blanch, Valencia, 2013) 371-412 [ISBN: 978-84-9033-521-5]: This contribution supposes a series of general reflections on the Court following its own denomination as a scheme: thus, in a part I will analyze some questions referred to the Court as a judicial organ. In a second part, I will focus on the role of the International Court of Human Rights as an international tribunal and its role as an international dispute settlement body. Finally, the third part will focus on its specific character of the law of the sea court, analyzing some of its most recent jurisprudential contributions to this sector of our legal system and international law in general.

García García-Revillo, M., 'España y la jurisdicción del Tribunal Internacional del Derecho del Mar: la declaración de 19 de julio de 2002', 58(1) *Revista Española de Derecho Internacional* (2006) 289-308 [ISSN: 0034-9380]: The object of this paper is the study of the jurisdiction of the International Tribunal of the Law of the Sea with respect to Spain, especially after the declaration of submission to its jurisdiction made by our country on July 19, 2002. By virtue of being part of the United Nations Convention on the

Law of the Sea of December 10, 1982 (UNCLOS), the ITLOS has regard to the Spanish State, without the need for an express declaration, both voluntary and mandatory jurisdiction, although in this case only with respect to a very small number of disputes. This limited scope of compulsory jurisdiction was extended by our country through this declaration, made in accordance with Article 287 UNCLOS, which replaced the one made by Spain at the time of ratification, on January 15, 1997. On the other hand, the Spanish State is party to other treaties on the subject that also include the ITLOS as a means of settlement and, even, in some cases, as a forum of compulsory jurisdiction. In any case, it must be borne in mind that, as a member of the European Community (EC), Spain has transferred to this international integration organization competences on matters regulated by both UNCLOS and international treaties, which could affect considerably to its ability to litigate internationally for disputes concerning its interpretation and application and ratione personae competence.

García García-Revillo, M., 'La Unión Europea y el Tribunal Internacional del Derecho del Mar', in Vázquez, E. M., Adam, M. D. and Cornago, N., *El arreglo pacífico de las controversias internacionales*: XXIV Jornadas de la Asociación Española de Profesores de Derecho internacional y Relaciones internacionales (AEPDIRI), Córdoba, 20-22 de octubre (Tirant lo Blanch, Valencia, 2013) 413-444 [ISBN: 978-84-9033-521-5]: The purpose of this paper is to analyze the most outstanding current aspects in the relationship between the European Union (EU) and the International Tribunal for the Law of the Sea (hereinafter also ITLOS). More specifically, this work is confined to issues that concern the composition of the Court to judge the European Union, on the one hand, and the jurisdiction of this international judicial body to deal with matters to which the European Union is a party, for the other.

García García-Revillo, M., *The contentious and advisory jurisdiction of the International Tribunal for the Law of the Sea* (Brill, Leiden, 2015) [ISBN: 9780042009 82]: The author offers an in-depth examination of all relevant facets of the jurisdiction of this important international judicial institution. Created by the United Nations Convention on the Law of the Sea, ITLOS plays an essential role not only in respect to the interpretation of this major international treaty but also to the contemporary law of the sea in general. The book covers both the contentious (ratione materiae, ratione personae, mainline, incidental, compulsory, not compulsory) and the advisory jurisdiction of ITLOS, which are analysed not only from a theoretical perspective but also in light of the own Tribunal's jurisprudence.

(E) MARITIME ZONES AND SPACES

(1) General aspects

Meseguer Sánchez, J. L., *Los Espacios marítimos en el nuevo derecho del mar* (Marcial Pons, Madrid, 1999) [ISBN: 9788472486775]: In this work, the Law of the Sea is studied from the historical perspective of its formation and secular evolution, as well as the radical transformation of this branch of International Law due, fundamentally, to the change of political circumstances and of original defense for the economic ones that they constitute the ratio essendi of the new Law of the Sea. The first part is devoted to the historical, doctrinal and political background that affect the formation of the Law of the Sea. The second part is devoted to surface maritime spaces from the classical perspective of the duality between territorial sea and high seas, without prejudice to introduce those new expanses born of the legal vitality of the seas and oceans. Finally, the third part is dedicated to the study of the juridical regime of maritime depth spaces that truly constitute the revolution of classical international law conceived as surface right based on the ius communicationis of Francisco de Vitoria.

(2) Internal waters, bays, ports, territorial sea and archipelagic waters

Acosta, M. Á., 'Un caso paradigmático de co-partición de aguas portuarias: el régimen de navegación en los

puertos de Melilla y Beni Enzar', in Heredia, J. M. (Dir.), [ISBN: 978-88-6342-638-0] *La contribución de la Convención de las Naciones Unidas sobre el Derecho del Mar a la buena gobernanza de los mares y océanos / La contribution de la convention des Nations Unies sur le droit de la mer à la bonne gouvernance des mers et des océans / The contribution of the United Nations Convention on the Law of the Sea to good governance of the oceans and seas* (Editoriale Scientifica, Napoli, 2014) Vol. 1, 703-713 [ISBN: 978-88-6342-638-0].

Díez-Hochleitner, J., 'Régimen de la navegación de los buques de guerra extranjeros en el mar territorial español y de sus escalas en puertos', 38(2) *Revista Española de Derecho Internacional* (1986) 543-570 [ISSN: 0034-9380]: This article explores the Spanish regime on navigation of foreign warships through the territorial sea and their calls at Spanish ports. It starts by analysing Order 25/1985 of the Ministry of Defence, regulating this issue. It then studies its ties with Act 25/1964, regulating nuclear energy, the Law of the Sea and the treaties concluded with the United States of America. It concludes examining the regulations on calls of foreign warships at Spanish ports and anchorages.

Espaliú Berdud, C., *Le passage inoffensif des navires de guerre étrangers dans la mer territoriale: portée du régime contenu dans la Convention des Nations unies sur le droit de la mer* (Bruylant, Bruxelles, 2007) [ISBN: 978-2-8027-2219-9]: The main purpose of this study is to examine in greater depth the question of the ratione materiae scope of the regime of the 1982 Convention concerning the innocent passage of warships, particularly with regard to the most sensitive aspects relating to the use of force. The paper also questions whether the regime of the 1982 Convention, with respect to such ships, is applicable to non-party States as customary law (scope ratione personae). Lastly, the author turns to the rules applicable in cases where the regime provided for by the Convention is not the law between the States involved as conventional law or as customary law.

Espaliú Berdud, C., "¿Un derecho de paso "inocente" por el mar territorial de los buques extranjeros que transportan sustancias altamente contaminantes?", 60-1 *Revista Española de Derecho Internacional* (2008) 147-162 [ISSN: 00349380]: This work focuses on the right of innocent passage through the territorial sea of foreign ships transporting highly polluting substances. This is a matter of great relevance according to the magnitude of the economic, ecological and security interests that this institution tries to reconcile. The main objective is to try to measure, from the practice subsequent to United Nations Convention on the Law of the Sea, the rejection that has been generated through the passage of this kind of ships, to see if it has been translated into legal institutions and if it has been formed a customary law confirming or not the regime provided by the UNCLOS. In this sense, the author concludes that the examination of the practice subsequent to the adoption and the entry into force of the UNCLOS indicates an increasing tendency towards the restriction or even the disappearance of the right of innocent passage by the territorial sea of foreign nuclear ships or transporting nuclear substances or other harmful or dangerous substances. Numerous indications have been found of a practice and an opinion iuris that point to the birth of a rule of general international law that allows coastal States to deny, by one way or another, the right of innocent passage to this type of ship, which is contrary to the UNCLOS.

Espósito Massicci, C., 'Inmunidades respecto de los buques de guerra y aeronaves de Estados extranjeros', in Martín y Pérez de Nanclares, J. (Dir.), *La Ley Orgánica 16/2015 sobre Privilegios e Inmunidades: gestación y contenido* (Escuela Diplomática, Madrid, 2016) 339-353 [ISBN: 100993474]: The regulation of the immunities of warships, State ships and State aircraft in the new Organic Law , on privileges and Immunities of Foreign States, International Organizations with Headquarters or Offices in Spain and International Conferences and Meetings held in Spain is clear, precise and, consequently, will constitute a useful instrument for Spanish legal operators, especially for judges. This greater legal security will also benefit foreign States that have relations with Spain.

González García, I., *Bahías (su regulación en el Derecho Internacional del Mar)* (Servicio de Publicaciones de la Universidad de Cádiz, Cádiz, 1999) [ISBN: 84-7786-558-2]: This work refers to the bays and their regulation in the International Law of the Sea. The interest in the research topic is not limited only to the specific aspects of certain bays in the Spanish coast, but in general the legal regime of the bays it has

been one of the aspects less studied in the recent evolution of the International Law of the Sea, reason why the present work constitutes an interesting contribution in this respect.

(3) Contiguous zone

Aznar Gómez, M. J., 'The Contiguous Zone as an Archaeological Zone', 29 *The International Journal of Marine and Coastal Law* (2014) 1-51 [doi: 10.1163/15718085-12341305]. In the author's view, the Law of the Sea does not properly address the protection of underwater cultural heritage, especially in the contiguous zone, where the convergence of public and private activities may threaten that heritage. This article analyses the conventional regime on this issue, primarily consisting in articles 33 and 303(2) of the UN Convention on the Law of the Sea and the 2001 UNESCO Convention on the protection of underwater cultural heritage. However, this is not sufficient to provide adequate protection for underwater cultural heritage. Coastal States have thus expanded their rights over their contiguous zones. The author provides a valuable analysis of State practice on this issue, aiming at demonstrating that the expansion of the coastal States' archaeological rights over their contiguous zone has met with no clear objection among States, which now consider the protection of underwater cultural heritage indispensable to safeguard for future generations the fragile elements composing that heritage.

De Pietri, D., "La redifinición de la zona contigua por la legislación initerna de los Estados", 62 *Revista Española de Derecho Internacional* (2010) 119-144 [ISSN: 0034-9380]: This contribution analyses how the contiguous zone is re-defined by subsequent practice of States after the adoption of LOSC. It particularly focuses on domestic practice of States in different continents in order to assess how the competences of coastal States upon their contiguous zones may be wider to those foreseen in Article 33 LOSC. For this, this contribution revisit the recent importance given to the zone by States and the conflicting visions and concerns by other States with regard the traditional freedom of the seas and possible new creeping jurisdictions.

Gutiérrez Castillo, V. L., "La zone contigüe dans la Convention des Nations Unies sur le droit de la mer", 7 *Annuaire de Droit de la Mer* (2002) 149-164 [ISSN: 12838381]: Unlike the 1958 Geneva Convention on territorial waters and contiguous zones, the 1982 Convention o the law of the sea contains no rules to delimit the contiguos zones. Was this deliberate or not? After brief overview of the gradual development of the notion of contiguous zone, the author suggests that the absence of provisions governing the delimitation of contiguous zones corresponds to a deliberate choice on the part of those States taking part in the 3rd Conference on the Law of the Sea. He bases his position on the analysis of certain documents and also on international practice. In addition, the author draws a distinction between contiguous zone and archaeological zones.

(4) Exclusive economic zone and fisheries zones

Carnerero Castilla, R., *El régimen jurídico de la navegación por la zona económica exclusiva* (Servicio de Publicaciones de la Facultad de Derecho de la Universidad Complutense, Madrid, 1999) [ISBN: 84-89764-08-5]. Navigation thorugh the EEZ can give rise to conflicts between the interests of the coastal States and those of other States. This work explores the legal regime on these issues, and it is divided into five chapters. In the first chapter, the author the UNCLOS provisions on navigation through the EEZ. For that purpose, the author describes the rights of the coastal States and the rights of third States in the EEZ, comparing them and drawing conclusions on the possibilities of conflict between the two sets of rights. He then compiles the measures provided for in UNCLOS in order to ensure a balance between the existing interests, establishing the liberties of third States within another State's EEZ and the restrictions imposed on them. In the second chapter, the author analyses the restrictions imposed on freedom of navigation of foreign ships through the EEZ by some coastal States. In the third chapter, the

author focuses on the restrictions on freedom of navigation through the EEZ stemming from the coastal States' sovereign rights of exploitation of living and non-living resources, including the protection of fish stocks, the implementation of the coastal States' laws on exploitation of living resources, restrictions related to other resources and restrictions of freedom of navigation through the EEZ related to the rights of the coastal States over their continental shelf. The fourth chapter refers to restrictions on freedom of navigation through the EEZ arising from jurisdiction over artificial islands, installations and structures, as well as marine scientific research. In the fifth chapter, the author offers a study of the restrictions on freedom of navigation through the EEZ stemming from State jurisdiction in relation to protection and preservation of the environment. The author concludes with some remarks about the necessity of restrictions on freedom of navigation of foreign vessels through the EEZ in order to ensure maritime safety and security, and to protect the rights and interests of the coastal States in their EEZ, among other reasons, as well as on the scope and extension of those restrictions and on the balance between the rights of coastal States and the rights of third States in the EEZ.

Gutiérrez Castillo, V. L., de Faramiñán, J. M., 'Una nueva zona jurisdiccional en el Mediterráneo: la zona de protección ecológica francesa', 8 *Revista Electrónica de Estudios Internacionales* (2004) [ISSN: 1697-5197]. This note analyses the Ecological Protection Zone established in the Mediterranean Sea in January 2004 by the French Government, regarding three topics: the geopolitical peculiarities of the Mediterranean Sea and how it is affected by marine pollution; the legal and political reasons that serve as its basis and the relevant national and international law on conservation.

Martínez Puñal, A., *Los derechos de los Estados sin litoral y en situación geográfica desventajosa en la zona económica exclusiva* (Xunta de Galicia, Santiago de Compostela, 1988) [ISBN: 84-505-7191-X]. This book explains the subject of the rights of landlocked and geographically disadvantaged States to exploit natural resources in the Exclusive Economic Zone, focusing on the debates held by the Seabed Committee and the III United Nations Conference on the Law of the Sea, and also on regulation provided by UNCLOS.

Pueyo Losa, J. A., "La indeterminación del nuevo orden jurídico marítimo internacional: Reflexiones sobre el carácter consuetudinario de la zona económica exclusiva y el valor de la Nueva Convención sobre el derecho del mar", 37-2 *Revista Española de Derecho Internacional* (1985) 323-354 [ISSN: 00349380]. The present work focuses on the analysis of the legal regime of the Exclusive Economic Zone as an institution that determines the transformations undergone by the traditional regulation of the exploitation of the living resources of the sea. According to the author, the EEZ will condition not only the freedom of fishing but most probably other classic uses and freedoms of the high seas. To this end, the paper examines, first, the value of the United Nations Convention on the Law of the Sea to determine the content of the EEZ as customary law; and, second, the legal regime of the EEZ.

Sobrino Heredia, J. M., 'L'approche nationale en matière des zones maritimes en Méditerranée', 13 *Anuario da Facultade de Dereito da Universidade da Coruña* (2009) [ISSN: 1138-039X] 753-772. Fishing zones, ecological zones and mixed zones are maritime areas whose geographic and legal characteristics are closely related to the EEZ. However, the creation of areas that are geographically less extensive than the EEZ does not necessarily reduce the problem of delimitation between States with adjacent or opposite coasts, nor does it eliminate the risks that impede freedom of navigation, which will continue to exist in these areas, giving rise to legal confrontations and controversies where maritime jurisdictions interfere.

Zavala, J., *Consenso y confrontación en la delimitación de la ZEE y de la plataforma continental* (Dykinson, Madrid, 1998) [ISBN: 84-9155-397-2]. In this work, the author analyses the regime on delimitation of the EEZ and the continental shelf. It consists of three parts, each one divided into different chapters. In the first part, the author examines the negotiating process of articles 74, 83 and 121 of UNCLOS. In the first two chapters, he analyses the debates and proposals on the aforementioned topics during the second and the third sessions of the third UN Conference on the Law of the Sea, analyzing the main trends and developments on the first drafts of the abovementioned articles. In the third chapter, the author analyses the impact of the islands regime on the delimitation of the EEZ and the continental shelf. In the second

part, the author explores State practice subsequent to the Third UN Conference on the Law of the Sea, analysing the main treaties about delimitation and drawing some conclusions on the trends followed in those treaties. In the third party, the author examines the main judgments and arbitral awards on the principles of equidistance and equity in delimitation cases. It also offers an interesting and self-explaining annex with cartographic materials.

(5) Continental shelf and its extension

Albiol Biosca, G., "La distribución del suelo y del subsuelo marino en el nuevo derecho del mar", 1 *Cursos de Derecho Internacional de Vitoria-Gasteiz* (1986) 93-136 [ISBN: 8475850936]. This work aims at analysing UNCLOS developments on the law of the continental shelf, the deep sea-bed and ocean resources. It is divided into three parts. The first one is dedicated to the origins and review of the distribution of the sea-bed, the second part analyses the concept of continental shelf and determines its legal regime, and the last one examines the deep sea-bed regime, distinguishing between multilateral cooperation measures and unilateral legislation.

Faramiñán Gilbert, J. M., 'Consideraciones jurídicas sobre la extensión de la plataforma continental (PC) más allá de las 200 (M) millas marinas (algunas referencias a la plataforma continental española)', in Bou Franch, V. E., and Juste Ruiz, J. (Coords.) and Sánchez Patrón J. M., (Dir.), *Derecho del mar y sostenibilidad ambiental en el Mediterráneo* (Tirant lo Blanch, Valencia, 2014) [ISBN: 9788490531785] 59-86. In this chapter, the author presents some legal considerations about the extension of the continental shelf beyond 200 nautical miles, including his opinion about the Spanish continental shelf. First, he exposes the legal framework of the continental shelf within UNCLOS. Second, he analyses the relation between the outer limits of the continental shelf and other maritime spaces (namely, the EEZ and the seabed area). Afterwards, he examines the role of the Commission on the Limits of the Continental Shelf, the concept and the rules on the extension of the continental shelf beyond 200 nautical miles, including the procedure before the CLCS. The author then focuses on the case of the Spanish continental shelf.

Faramiñán Gilbert, J. M., Gutiérrez Castillo, V. L., *El Mediterráneo y la delimitación de su plataforma continental* (Tirant lo Blanch, Valencia, 2007) [ISBN 978-84-8456-654-0]. Undoubtedly, the continental shelf is one of the most suggestive topics of the law of the sea. The evolution of its legal regulation has become a faithful reflection of the adaptation of international law to the advances of technology, and it represents an icon of the claims of developing countries. The determination of its confines is of special interest in the Mediterranean, a semi-enclosed sea, where the delimitation of boundaries of areas subject to the sovereignty and jurisdiction of its coastal states is extraordinarily complex. The study of international law, the analysis of the domestic law of the affected States and the proposal of solutions to potential border conflicts are, among others, some of the issues rigorously addressed by the authors of the work.

Gutiérrez Espada, C.,'Reflexiones sobre el aprovechamiento de los recursos del suelo y subsuelo del mar: de la plataforma continental a la zona de los fondos marinos', 4 *Anuario de Derecho Marítimo* (1986) 157-184 [ISSN: 0211-8432]. In this article, the author analyses the changes made in the Law of the Sea with regard to the management of the resources present in the continental shelf and the seabed, holding a positive view of the declaration of the latter as common heritage of mankind. For the purpose of this study, the author divides the article into five parts. The first part introduces the subject and the outline of the article. In the second part, the authot explores the regime of the 1958 Geneva Convention on the Continental Shelf, which started the attribution of sovereign rights over the continental shelf to coastal states. In the third part, he analyses the developments represented by UNCLOS, noting that the new concept of islands and rocks has an impact on the concept of continental shelf and that the new convention limits the expansion of the continental shelf. In the fourth part, the author examines the regulation of the seabed and the International Seabed Authority in UNCLOS. In the fifth part, the author expresses his foubts concerning the fate of the concept of common heritage of mankind declared in UNCLOS.

Sánchez Rodríguez, L. I., "La Sentencia del Tribunal Internacional de Justicia, de 24 de febrero de 1982, en el asunto relativo a la plataforma continental entre Túnez y la Jamahiriya Árabe Libia", 35-1 *Revista Española de Derecho Internacional* (1983) 61-84 [ISSN: 00349380]: The process of creating and expanding maritime areas subject to the jurisdiction or sovereignty of States has increased the need for their delimitation between neighboring countries whose coasts are adjacent or opposite. This need to delimit spaces is manifested in two dimensions: on the one hand, in the increase of international agreements on the subject; on the other hand, with the increasing appearance of international disputes arising from discrepancies on the principles and usable methods, as well as on the material delimitation in each specific case. In this context is inserted the ICJ Judgment of 24 February 1982 in the case concerning the Continental shelf (Tunisia/ Libyan Arab Jamahiriya), which the present work examines in detail. This note focuses on the judgment of the case concerning the continental shelf between Tunisia and the Lybian Arab Jamahiriya. It briefly examines recent practice on maritime delimitation and previous cases on delimitation of the continental shelf before making a critical analysis of the background and legal questions arisen in the judgment, including each party's claims and the merits of the case, as wells as the author's own observations regarding the case.

(6) High seas and the Area

Albiol Biosca, G., *El régimen jurídico de los fondos marinos internacionales* (Tecnos, Madrid, 1984) [ISBN: 8430910530]: Shortly after the adoption of the United Nations Convention on the Law of the Sea, this work studies the law applicable to the seabed located beyond national jurisdiction. This space, previously inaccessible, has awakened the interest and attention of both States and companies. Therefore, the adoption of a specific regulation for this area is the greatest novelty of the recent multilateral convention. This work, already classic, studies monographically this new legal regime, indicating the background and the foreseeable social impact of its provisions. It discusses the concrete scope of the notion of "Common Heritage of Mankind", the conditions of feasibility of an effective international administration of the area and the effects of the exploitation of its resources in international trade and in underdeveloped countries.

Badenes Casino, M., *La crisis de la libertad de pesca en alta mar* (MacGraw-Hill, Madrid, 1997) [ISBN: 84-481-1124-9]. The objective of this work is to study systematically the legal regulation of fisheries on the high seas, as well as recent events that allow us to speak about a situation of crisis in the traditional rule of freedom of fishing on the high seas. The regulations governing fishing on the high seas have undergone a constant evolution from their customary origins, a development that has not ended with the adoption of the 1982 United Nations Convention on the Law of the Sea. A constant feature of contemporary Law of the Sea is the progressive geographical reduction of the space considered as high seas, including new manifestations of international law, known as "creeping jurisdiction", such as Chile's presential sea or the Agreement on straddling fish stocks and highly migratory fish stocks adopted by the United Nations General Assembly in 1995. In addition, a special reference is made to the fisheries dispute between Spain and Canada because of its relevance and interest for Spain.

Casado Raigón, R., *La pesca en alta mar* (Consejería de Agricultura y Pesca del Gobierno de Andalucía, Sevilla, 1994) [ISBN: 84-87564-99-2]. In this book, the author analyses the high seas fisheries regime and the challenges faced in the past decades. For the purpose of analysis, this work is divided into three parts. In the first one, the author examines the provisions on high seas fisheries contained in UNCLOS, focusing on conservation and cooperation measures. In the second part, the author addresses the problems that this issue has been faced with in the last decade, such as large-scale pelagic drift-net fishing, straddling fish stocks and institutionalized cooperation in this field. In the third part, the problem of progressive jurisdiction and presential sea and the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks are analysed. The author concludes with some valuable remarks about the undeniable development of the Law of the Sea on this topic.

Díez-Hochleitner, J., 'Demanda de España contra Canadá ante la Corte Internacional de Justicia', 47(1) *Revista*

Española de Derecho Internacional (1995) 287-308 [ISSN: 0034-9380]. This note addresses the seizure of the Spanish vessel Estai by Canadian authorities and the subsequent conflict between Spain and Canada regarding the exploitation of living resources on the high seas adjacent to the coasts of Canada, focusing on the fisheries jurisdiction case submitted to the International Court of Justice by Spain related to this incident and the Canadian Coastal Fisheries Protection Act Amendment of 12 May 1994, an example of the concept of creeping jurisdiction, which entitled the Canadian maritime authorities to take measures in order to protect straddling fish stocks in a NAFO Regulatory Area, thus expanding their rights under UNCLOS.

Iglesias Berlanga, M., *La regulación jurídica de los recursos vivos de la alta mar – Especial referencia a los intereses españoles* (DILEX, Madrid, 2003) [ISBN: 84-88910-43-6]. Encouraged by several countries interested in controlling high seas fisheries, the recent resurrection of Selden's Mare Clausum has resulted in a restriction of the freedom of fishing, the freedom of navigation on the high seas and the principle of exclusive jurisdiction of the flag State over its vessels in that zone, enshrined in the 1958 Geneva Conventions on the high seas and on fishing and conservation of the living resources of the high seas, and in Part VII of the United Nations Convention on the Law of the Sea of 1982. In this line, both the presence of national appropriation legislation (particularly the Canadian law on coastal fisheries) and the current status of the 1995 New York Agreement constitute the main object of this work, which takes into account their implications for remote fishing countries, and especially for Spain, for it may entail a nationalization of the world industrial fishing. From this point of view, the need to strengthen internationally institutionalized systems for the protection of the living resources of the high seas and the analysis of relations and possible jurisdictional and jurisprudential tensions between the Court of the Hague and the Hamburg Court in order to solve the foreseeable multiplication of extractive and commercial controversies beyond 200 miles, complete the full intention of this work: to offer a global perspective of an evolutionary process, supposedly unfinished but a fortiori limited by the physical magnitude of the oceanic space.

Juste Ruiz, J., 'La pesca española ante el actual proceso de revisión del Derecho del mar (con especial referencia a la problemática de nuestra flota del sur)', 1 *Anuario de Derecho Marítimo* (1981) 419-446 [ISSN: 0211-8432]. This article focuses on the impact of the increase of maritime spaces subject to the jurisdiction of the coastal state due to the adoption of UNCLOS on the Spanish fishing industry. It is divided into two parts. The first part is dedicated to the regulation of fisheries in the EEZ under UNCLOS and international practice, focusing on the jurisdiction of the ICJ in cases concerning fisheries. The second part covers the Spanish reaction to these developments in International Law, distinguishing between the treaties concluded by Spain in the field of fisheries and the diplomatic and legal practice relating to fisheries. He concludes with some comments about the uncertainty surrounding the new regime and the lack of consistency of the Spanish reaction to the proposals presented during the III UN Conference on the Law of the Sea.

Juste Ruiz, J., 'Los recursos de los fondos marinos más allá de la jurisdicción nacional como patrimonio común de la humanidad', 33 *Revista Aranzadi de Derecho Ambiental* (2016) 25-42. Existing resources in marine areas beyond national jurisdiction are controversial. UNCLOS proclaims freedom of access to the resources of the deep waters of the high seas and declares that those resources and the subsoil of the seabed are common heritage of mankind. This article examines the resources of the seabed beyond 200 nautical miles as common heritage of mankind, which are currently raising the interests of many States. The author first introduces the topic, outlining the evolution of the regime on the resources present on the deep waters and subsoil of the seabed, and then analyses their legal status and exploitation regime under UNCLOS. Afterwards, he details the law on the different kinds of resources, distinguishing between mineral resources and living, genetic and geological resources. He concludes that, despite the feasibility of their exploitation, those resources must remain common heritage of makind.

Juste Ruiz, J. and Castillo Daudí, M. V., "La explotación de la Zona de los fondos marinos más allá de la

jurisdicción nacional: El Patrimonio común de la Humanidad frente a las legislaciones nacionales", 7 *Anuario de Derecho Internacional* (1983-1984) 65-90 [ISSN: 02120747]: The purpose of this paper is to examine the issues raised by the calification of the international seabed area as a "common heritage of Mankind" and the difficulties that remain for the establishment of an international exploitation regime that makes this principle operational. Thus, the work studies, firstly, the consideration of the Area as a common heritage of Mankind and its regulation; and, secondly, it analyses the system of exploitation of their resources, distinguishing between the system provided by UNCLOS and the systems of national exploitation provided by the laws of some States.

Lirola Delgado, I., 'La represión del tráfico ilícito de drogas en Alta Mar: cooperación internacional y práctica estatal', 12 *Anuario Español de Derecho Internacional* (1996) 523-576 [ISSN: 0212-0747]. In this article, the author examines the regulation of prevention and suppression of the maritime trade in illicit drugs. After an introduction and a section on the general aspects of the regime, international cooperation for the suppression of trade in illicit drugs on the high seas is analysed, focusing on its two levels (multilateral and bilateral cooperation). In this section, the main relevant multilateral treaties are studied: United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), and Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances (1995). Besides, the author includes an analysis of the treaty for the respression of maritime trade in illicit drugs concluded between Spain and Italy. In the following section, the author provides some trends in State practice, focusing on the United States of America and Spain. The author concludes with some final remarks in which the maritime trade in illict drugs is situated within the context of the general fight against trade in illicit drugs. She also remarks the importance of the principle and shared responsibility in this area and explores the possibility of punishment of these conducts as a crime against humanity. In the general framework for cooperation, the instruments analysed in this article have led to an increase of the efficiency of the measures against maritime trade in illicit drugs, using three methods: a) the waiver to act without the prior authorization of the flag state, b) the concession of a tacit authorisation by the flag state in some circumstances, and c) the introduction of measures to simplify and expedite the process of prior authorization of the flag state. However, the author stresses the importance of the general codification of these norms in order to adequately address the subject.

Navarro Batista, N., *Fondos marinos y Patrimonio Común de la Humanidad* (Universidad de Salamanca, Salamanca, 2000) [ISBN: 9788478009640]: The aim of this work is the study of the reforms that the 1994 Agreement has introduced into the regime of the International Seabed Area incorporated to the 1982 United Nations Convention on the Law of the Sea. Therefore, the work examines, firstly, the essential content of Part XI of the 1982 Convention; and, secondly, it analyzes the factors that have led to the elaboration of a new treaty. These premises allow deepening the examination of its main characteristics, beginning with its more formal aspects to stop later on in the substantive reforms.

Ponte Iglesias, M. T., "La Zona Internacional de los Fondos Marinos como Patrimonio Común de la Humanidad: una aspiración truncada", *Cursos de Derecho Internacional de Vitoria-Gasteiz* (1997) 177-205 [ISBN: 847585060X]: The present work, one of the first on the subject, asks whether the decision to reserve a part of the sea and its mineral resources for the benefit of all humanity has been an operational decision or, on the contrary, constitutes a beautiful idea without real representation, especially after the adoption of the 1994 Agreement. To answer this question, it examines how the figure of the Area has been configured as a common heritage of Mankind until its expression in the 1982 United Nations Convention on the Law of the Sea and to what extent the amendments introduced by the 1994 Agreement have had an impact on the legal status of the Area and its resources.

Salamanca Aguado, E., *La zona internacional de los fondos marinos: Patrimonio Común de la Humanidad* (Dykinson, Madrid, 2003) [ISBN: 9788497720205]: The present work examines in detail the legal regime of the International Seabed Area from the perspective of its consideration as a common heritage of

mankind. This work is articulated in six chapters that, with a critical perspective, trace the evolution of the regime, from the negotiation of the provisions included in Part XI of the Convention until its modification in 1994 searching a greater participation in the Convention. The author reflects on the regression that the 1994 Agreement supposes for the principle of common heritage of Mankind applied to the Area. In this regard, if in the original Part XI the effective participation of developing States in activities in the Area was guaranteed as an inherent element to the common heritage of mankind, the 1994 Agreement only establishes an equitable distribution of benefits derived from activities in the Area, taking into account the interests and needs of developing States. The fundamental difference between the two regulations is that the second perpetuates the real inequality between States with an exclusively distributive effect, while the former tends to compensate for inequalities between States.

Sobrino Heredia, J. M., "El régimen jurídico de la explotación de los fondos marinos y oceánicos y los intereses de España", 3 *Anuario da Facultade de Dereito da Universidade da Coruña* (1999) 609-634 [ISSN: 1138039X]: The adoption of the 1994 Agreement has facilitated the universalization de facto of the United Nations Convention on the Law of the Sea and has also allowed the implementation, in a short time, of the institutional mechanisms provided in Part XI and its Annexes. In this long process, Spain, according to the author, has behaved more as a spectator than an actor. A number of reasons explain this secondary role and have made it difficult to identify and defend Spain's interests in this field, especially in the context of a very long and extremely complex global negotiations. To show this, the work is structured in two sections. The first one describes the process of defining the International Seabed Area, showing the confrontation of interests between the countries of the North and those of the South and trying to identify what the position of Spain has been. The second section examines the legal regime of the Area and its institutional structure as resulted from the UNCLOS and the 1994 Agreement, highlighting the marginal role that is reserved to Spain in this structure.

Sobrino Heredia, J. M., *La cooperación internacional en la conservación y gestión de los recursos pesqueros de la Alta Mar* (Aranzadi, Pamplona, 1999) [ISBN: 84-8410-309-9]. This study deals with the search for a balance between community interests in the conservation and management of the high seas resources and the protection of the marine environment, and the individual interests of the various States (coastal or long-distance fishing) in the use and exploitation of resources through the exercise of fishing rights in the high seas. To this end, the first part of the report examines the principle of freedom of fishing and how it has been affected by certain States which, by claiming a special interest in the high seas adjacent to their EEZ, try to expand their fishing competences in this marine space. In contrast with these unilateral actions, the practice offers other examples which give rise to the concern to protect the resources of the high seas in the interest of the international community as a whole, through international cooperation procedures, which can consist in the collective or multilateral management of these resources. This can be interpreted as a glimpse of the beginning of a process that can lead to transform this international space into an internationalized space. This process is enshrined in the second part of this work.

Vázquez Gómez, E. M., *Las organizaciones internacionales de ordenación pesquera: la cooperación para la conservación y la gestión de los recursos vivos del alta mar* (Consejería de Agricultura y Pesca del Gobierno de Andalucía, Sevilla, 2002) [ISBN: 84-8474-058-7]. The international community is of utter importance for the conservation and management of living marine resources. International cooperation in this field is one of the main obligations under UNCLOS and customary law. Commercial fishing raised awareness that natural resources are exhaustible and bolstered institutionalised forms of international cooperation for the conservation and management of fish stocks. This work analyses this kind of international cooperation, and it is divided into two parts, each one comprising two chapters: the first one undertakes the study of the scope and regulation of regional fisheries management organisations, including recent developments, and the second part focuses on regional fisheries management organisations. She concludes with some interesting remarks about the evolution of the Law of the Sea on this topic, and warning that RFMOs should not become a form of creeping jurisdiction.

Yturriaga Barberán, J. A., 'Los mares presenciales: del dicho al hecho no hay tanto trecho', 12 *Anuario Hispano-Luso-Americano de Derecho Internacional* (1995) 389-440 [ISSN: 0570-4316]: This paper examines the doctrine of the so-called "Presential Seas" that has inspired the adoption of provisions tending to recognize certain competences in the high seas by Chile and Argentina. For the author, this doctrine is between legality and International illegality and involves the risk of being expanded among States with a wide seafront. After an analysis of the regulation of straddling populations in the UNCLOS, of the proposals in the framework of the United Nations Conference on Environment and Development, as well as of the United Nations Conference on straddling fish stocks and highly migratory fish stocks, the work examines the theory and practice about the Presential Seas as well as the phenomenon of the unilateral extension of Canada's jurisdiction to the High Seas.

Yturriaga Barberán, J. A., *The international regime of fisheries from UNCLOS 1982 to the presential sea* (Brill / Nijhoff, The Hague, 1997) [ISBN: 9789041103659]: Until recently, the international community failed to adopt either an agreed limit for the breadth of the territorial sea or a satisfactory regime of fisheries in the waters adjacent to the territorial sea. This provoked an eruption of unilateral acts by which coastal states extended their jurisdiction towards the high seas. The Third U.N. Conference on the Law of the Sea accepted the establishment of a 12-mile territorial sea and a 200-mile exclusive economic zone. While taking into account the non-existent rights and interests of the so-called geographically disadvantaged states and of states with broad continental shelves, the 1982 Convention on the Law of the Sea practically ignored existing rights and interests of habitual fishing states. It maintained the well-established principle of freedom of fishing on the high seas but with specific conditions. Dissatisfied with the Convention's regulation of fishing on the high seas, a few states elected to hold a U.N. Conference on Straddling and Highly Migratory Fish Stocks which adopted the 1995 Agreement for the implementation of the provisions of the Convention relating to the conservation and management of such stocks. Similarly, some of these states, like Chile, Argentina, and Canada, adopted legislation extending their jurisdiction beyond their respective 200-mile fishing or exclusive economic zones. This book explores these events in the historical development of the international regulations of fisheries and concludes with a look into recent developments in the area. It traces the evolution of the international regime on the conservation, management and exploitation of marine fisheries. It describes this regime under UNCLOS and the UN Fish Stocks Convention, and analyses recent case law and State practice, which are enriched by the valuable experience of the author. It also analyses the trend towards the development of State sovereignty over portions of the high seas, represented by the theory of the presential sea endorsed by some Latin American coastal States and the Canadian efforts to regulate the high sea stocks that straddle its EEZ.

(7) Islands and archipelagos

Gutiérrez Castillo, V. L., 'Análisis histórico-jurídico de la isla andaluza de Alborán', 6 *Revista Electrónica de Estudios Internacionales* (2003) [ISSN: 1697-5197]. Alboran Island is a small island located off the Spanish South Eastern coast. This article analyses the application of the distinction between the concept of island and the concept of rock in UNCLOS in this case, remarking that Alboran Island is arguably a rock and not an island. Thus, it is only entitled to a territorial sea and a contiguous zone.

Jiménez Piernas, C., 'Incidencia del Principio archipelágico en la problemática marítima y autonómica de Canarias', 33(2) *Revista Española de Derecho Internacional* (1981) 523-552 [ISSN: 0034-9380]: This article explains the process that, within the Third Conference on the Law of the Sea, led to denying the application of the archipelagic principle to the archipelagos of the State, and the consequences that ensued for the Canary Islands.

Jiménez Piernas, C., *El proceso de formación del Derecho Internacional de los Archipiélagos* (Servicio de Publicaciones de la Universidad Complutense, Madrid, 1982) [ISBN: XXXX]. This thesis analyses the genesis and development of the archipelagic concept and regime through state practice, international conferences, judicial decisions and academic doctrine. This work is divided into two volumes. In the first

one, the author describes the inconsistency of the archipelagic institution until the 1960s, examining the main trends about this issue. In the second volume, he explores the developments represented by the Third UN Conference on the Law of the Sea and its status as customary international law.

Jiménez Piernas, C., *La revisión del Estatuto Territorial del Estado por el nuevo Derecho del Mar: el caso de los Estados Archipelágicos* (Instituto de Cultura Juan Gil-Albert, Alicante, 1990) [ISBN: 84-7784-049-0]. In this book, the author proposes to adopt a more inclusive term to refer to the physical basis of the State, given that, in modern conceptions of International Law, the notion of territory includes more than land, which is often regarded as a synonym of territory. In this regard, it is important to note the existence of archipelagic States, in which there is no physical continuity, at least over the water surface. This has historically led to an unfair maritime delimitation of their territory and has hampered their development. The author examines the most notorious cases of archipelagic States, concluding that the legal status of the territory of a State must be revised.

Marín López, A., "El régimen de las islas en el actual Derecho del Mar", 38-1 *Revista Española de Derecho Internacional* (1986) 151-170 [ISBN: 00349380]. This note examines the development of the islands regime in International Law, focusing on the changes made by the Third UN Conference on the Law of the Sea. First, it offers a perspective of the evolution of the regulation of islands in International Law. Second, it analyses the concept and types of islands, distinguishing them from rocks. Third, it examines the legal regime on islands and their maritime zones. Finally, some conclusions are drawn regarding the relevance of UNCLOS for the regime on islands.

Pueyo Losa, J., *El archipiélago oceánico. Regulación jurídico-marítima internacional* (Internacional Law Association, Madrid, 1981) [ISBN: 84-300-4831-6]: This third volume of the series of monographs published by the Spanish Section of the Internatiopnal Law Association, as a reflection of the individual and collective work carried out within it, constitutes an important contribution to the study of a sector of the Law of Peoples as paradigmatic as The Law of the Sea. The work deals with the analysis of a juridical-maritime figure that constitutes a relevant manifestation of the complex range of interests and contradictions that characterize the very essence of maritime international law: that is, the figure of the oceanic archipelago.

Sobrido Prieto, M., 'The position of the European Union on the Svalbard waters', in Conde, E. and Iglesias S., (Coords.), *Global Challenges in the Arctic Region: Sovereignty, Environment and Geopolitical Balance* (Routledge, Abingdon, 2017) [ISBN: 9781472463258] 75-106. In this chapter, the author exposes the position of the European Union on the very special case of the Svalbard waters, stating the existing doubts abot the scope of the restrictions on the Norwegian sovereignty over the archipelago, in particular, regarding the territorial scope of the Treaty of Paris. In the fisrt part, the author further explains that the main problems concerning these waters were related to fishing in the waters of the Fihseries Protection Zone around Svalbard, providing an analysis of the legal discusssion about the waters off Svalbard and its continental shelf. The second part is focused on the position of the European Union, which is not a party to the Treaty of Paris, regarding this issue.

(8) Straits (excluding the Strait of Gibraltar)

López Martín, A. G., *La navegación por los estrechos. Geoestrategia y Derecho* (Dykinson, Madrid, 2008) [ISBN: 9788498492071]. One of the most important legal questions concerning maritime navigation has invariably been the one concerning passage through the Straits, and this is due to the incontestable strategic and commercial interests in the presence. Some interests that have "imposed" a profound change in the regime of navigation, embodied in the right of passage in transit enshrined in the United Nations Convention on the Law of the Sea of 1982, which favors the global strategic interests of the Great Powers, in the same direct relation that moves away from the sacred sovereign rights of the States bordering straits and affects its security. However, there are many unknowns left open by the 1982 Convention, such as the determination of the concept of an international strait or the correct location of all straits in the world in

each of the eight categories established by the Convention, so that is the regime of step that governs in each of them. Such doubts are dissipated and resolved in this work, which also includes the domestic legislation in force in each of the international straits, as well as the traffic separation devices and other security measures in them. This provides a complete study of the current situation in which the regulation of navigation by international straits is found.

López Martín, A. G., 'El "cierre" del estrecho de Ormuz: un análisis desde el derecho internacional', 25 *Revista Electrónica de Estudios Internacionales* (2013) 1-42 [ISSN: 1697-5197]: In recent years, the Islamic Republic of Iran is threatening a possible closure of the Strait of Hormuz, which is a coastal State. Concern about the negative effects that could lead the closure, especially from the economic point of view, given that is the strait with greater traffic of oil in the world, leads us to analyze whether the closure would be legitimate. We wonder if from the point of view of International Law Iran has the right to close the Strait of Hormuz or, where appropriate, to impose passage rates. An analysis that focuses mainly on the rules of the Law of Sea concerning the international straits, not to mention some aspects of international responsibility, as is the score on the possible closure as a countermeasure against the sanctions imposed by the United States of America and some States of the European Union.

(9) Other spaces

Iglesias Sánchez, S., 'The Arctic development: New navigational routes and maritime governance', in Conde E., Iglesias, S. (Coords.), *Global Challenges in the Arctic Region: Sovereignty, Environment and Geopolitical Balance* (Routledge, Abingdon, 2017) [ISBN: 9781472463258] 196-213. In this chapter, the author analyses the legal developments entailed by the new Arctic navigation routes. The author introduces the Northeast Passage, the Northern Sea Route and the Transpolar Route, and examines their regime under UNCLOS and its development through the adoption of the Polar Code. The author concludes by stating the pending issues in this matter and the multiple options for cooperation on Arctic shipping.

López Martín, A. G., *International Straits: Concept, Classification and Rules of Passage* (Springer, Heidelberg, 2010) [DOI: 10.1007/978-3-642-12906-3]: This book analyzes the regime of navigation in historical relation to the United Nations Convention of the Law of Sea (UNCLOS) of 10 December 1982, and then analyzes in detail the concept of international straits to arrive at a complete definition. This work examines the eight categories of straits laid out in the UNCLOS. It analyzes the right of innocent passage and the regime of transit passage, both systems of navigation in international straits, and then presents the domestic legislation and the traffic separation schemes which apply to international straits. Finally, the work includes a complete catalogue of straits with the reference to their respective UNCLOS articles.

Manero Salvador, A., *El deshielo del Ártico: retos para el derecho internacional, la delimitación de los espacios marinos y la protección y preservación del medio ambiente* (Thomson Reuters-Aranzadi / Universidad Carlos III, Cizur Menor, 2011) [ISBN: 978-84-9903-778-3]. This work analyses the maritime delimitations in the Arctic region and the environmental protection and conservation regime in this area. It is divided into two parts, corresponding to the aforementioned main topics covered therein. In the first part, the author explores the issue of the delimitation and the legal nature of the marine spaces in the Arctic region, including the Eastern Greenland case. The author points out that the sector theory, albeit deemed the most accepted among Arctic States, is, in fact, only endorsed by Canada and Russia, and has been questioned by Denmark, the United States of America and Norway. This part also offers a study of the cases on delimitation of the continental shelf in the Arctic region and an analysis of navigation through the Northwest Passage and the Northern Sea Route. The second part of this work explores the regime on protection and preservation of the environment in the Arctic region, first focusing on the treaty regime, especially the Arctic clause provided for in Article 234 UNCLOS, and then on soft law instruments.

(F) DELIMITATION

Carnerero Castilla, R., 'La delimitación marítima entre Guyana y Surinam: entre la equidistancia y las circunstancias especiales', in Sánchez, L. I., Quel, F. J., López, A. G., *El poder de los jueces y el Estado actual del derecho internacional* (Universidad del País Vasco, Bilbao, 2010) [ISBN: 978-84-9860-436-8] 605-616. This book chapter focuses on the case concerning the delimitation of Guyana's maritime boundary with Suriname. The author briefly analyses the background of the controversy and addresses the special circumstances with regard to the delimitation of the territorial sea and the application of the principle of equidistance in the process of delimitation of the EEZ and the continental shelves between Guyana and Suriname. He concludes with some remarks on some security and compliance questions stemming from the case.

Casado Raigón, R., Gutiérrez Castillo, V. L., 'Marruecos y España. La delimitación de sus espacios marítimos', in Mariño F. M., (Coord.), *El derecho internacional en los albores del siglo XXI: homenaje al profesor Juan Manuel Castro-Rial Canosa* (Trotta: Fundación Juan March, Madrid, 2002) [ISBN: 84-8164-576-1] 85-106. The delimitation of maritime boundaries between States with opposite or adjacent coasts must be effected by agreement on the basis of international law, in order to achieve an equitable solution. However, few agreements have been reached in this field. In the case of Spain, its maritime claims overlap those of its neighbouring countries. Negotiations have been especially tough with Morocco, which has claimed sovereignty over part of the Spanish territory, namely, Ceuta, Melilla, Vélez de la Gomera, Alhucemas, and the Chafarinas islands since its independence in 1956. Those claims have influenced the negotiations for the delimitation of maritime boundaries between Spain and Morocco. The authors study Spanish and Moroccan law on maritime spaces in order to establish overlapping claims and analyse this situation in the light of the Law of the Sea, focusing on the Strait of Gibraltar, the Alboran Sea and the Atlantic area. They conclude that, leaving aside territorial claims, a strictly legal delimitation of maritime boundaries between Spain and Morocco will be difficult to achieve due to the presence of islands, rocks and strategic enclaves. Thus, the authors favour the search for an equitable solution.

Conde Pérez, E., 'Pasado colonial y otras rencillas entre vecinos. La sentencia de la Corte Internacional de Justicia de 16 de marzo de 2001 en el asunto de la delimitación marítima y de las cuestiones territoriales entre Qatar y Bahrein (Qatar c. Bahrein, fondo)', in Sánchez, L. I., Quel, F. J., López, A. G., *El poder de los jueces y el Estado actual del derecho internacional* (Universidad del País Vasco, Bilbao, 2010) [ISBN: 978-84-9860-436-8] 59-84. In this chapter, the author analyses the case concerning maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v Bahrain), in which the ICJ decided the attribution of sovereignty over some disputed islands and the maritime delimitation between Qatar and Bahrain. The author offers a brief historical review of the controversy before analysing the case. She first undertakes its procedural nuances and, afterwards, the substantive issues discussed in the judgment of the ICJ, focusing on the delimitation of the territorial sea, the EEZ and the continental shelf between the two countries. In the conclusions of the chapter, the author sums up the contributions of this judgment to international law.

Conde Pérez, E., '¿Una bisectriz equidistante o la equidistancia a través de la bisectriz? El asunto de la controversia territorial y marítima entre Nicaragua y Honduras en el mar Caribe (Nicaragua c. Honduras). Sentencia de la CIJ de 8 de octubre de 2007', in Sánchez, L. I., Quel, F. J., López, A. G., *El poder de los jueces y el Estado actual del derecho internacional* (Universidad del País Vasco, Bilbao, 2010) [ISBN: 978-84-9860-436-8] 617-638. This chapter focuses on the territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea. After introducing the question of sovereignty over the islands and some considerations about the critical date and the uti possidetis principle, the author analyses the application of the bisector method in this case. In order to determine the maritime boundary between two adjacent States, a single maritime boundary must be drawn. Due to the specific circumstances of the case (with the presence of islands and other geographical circumstances), the Court was unable to apply the equidistance method, and made use of the bisector method instead. The author

then studies the starting and ending points of the line to be drawn. She concludes with some remarks about the role of equity in maritime delimitations.

Conde Pérez, E., 'Delimitaciones marítimas y territoriales en el Ártico: desarrollo y tendencias', 68(1) *Revista Española de Derecho Internacional* (2016) 235-239 [ISSN: 0034-9380]. All Arctic States, except for the United States, are party to UNCLOS. However, the United States has traditionally considered its provisions to be customary law and has thus abode by them. Therefore, territorial disputes in the Arctic have been resolved according to the provisions contained in this convention. In this note, the author briefly refers to the territorial dispute over Hans Island, and then examines some cases of maritime delimitation, distinguishing between achieved and pending delimitations, as well as the delimitation of the continental shelf beyond 200 nautical miles, which can lead to further discuputes, given that some countries' claims overlap or may overlap. The author concludes that the Arctic has remained a space of peaceful cooperation, with scarce territorial disputes and multiple agreements, and foresees the joint negotiation of overlapping territorial claims.

González Giménez, J., 'Las líneas de base en el mar Mediterráneo: ¿discrecionalidad o arbitrariedad en la acción estatal?' 59(1) *Revista Española de Derecho Internacional* (2007) 65-101[ISSN: 0034-9380]: The breadth of the maritime zones under national jurisdiction is to be measured from baselines. The rules for drawing baselines are contained in the 1982 United Nations Convention on the Law of the Sea. These rules are too ambiguous. They allow excessive baseline claims, which can extend national jurisdiction significantly seaward in a manner that prejudices international interests. The practice of Mediterranean States in establishing baselines is examined in light of these rules.

Espósito Massicci, C., 'Sobre el establecimiento de una línea mediana como límite marítimo provisional entre España y Marruecos frente a las costas de las Islas Canarias', 13 *Revista Jurídica de la Universidad Autónoma de Madrid* (2005) 91-107 [ISSN: 1575-720-X]. In this article, the author addresses the issue of maritime delimitation between the Canary Islands and the coast of the Kingdom of Morocco, which has been object of bilateral negotiations since 2003. For that purpose, he describes the results of those negotiations and then analyses the hypothetical establishment of a provisional equidistance boundary between the coasts of the two adjacent States and the geomorphical, legal, political and economic factors that might be relevant for its modification. The author concludes that the establishment of a provisional equidistance line could be beneficial for Spain and Morocco from an international legal perspective.

Gutiérrez Castillo, V. L., *España y sus fronteras en el mar. Estudio de la delimitación de sus espacios marinos*, (Publicaciones Universidad de Córdoba, Córdoba 2004) [ISBN: 84-9772-528-X]: Spain, a state (peninsular and island) with a coastline of about eight thousand kilometers in length, extends to two continents and presides one of the international straits with the highest maritime traffic in the world. This circumstance, coupled with the adjacency and opposition of its coasts to those of other States, provokes the inevitable overlapping of its marine spaces with those projected by Algeria, France, Italy, Morocco and Portugal, as well as with the alleged British waters of the colony of Gibraltar. Thus arises the need to set boundaries and borders at sea. In view of this situation, the present monograph is justified, in which the author carries out an exhaustive study of the international and state rules concerning the law of the sea in general and the delimitation of marine spaces in particular. It also offers a complete analysis of its application in Spain and its environment, proposing possible solutions to the controversies that, traditionally, affect the foreign policy of our country. Issues such as those relating to the sovereignty of the island of Perejil, the delimitation of marine spaces in the Strait of Gibraltar or Spanish territory in Africa are addressed with serious and solid legal foundation. In short, we are dealing with an interesting work, of indisputable topicality, in which it has been possible to correctly combine scientific rigor with practicality and conceptual clarity.

Gutiérrez Castillo, V. L., 'Análisis del sistema de líneas de base español a la luz de la Convención de Naciones Unidas sobre el Derecho del Mar de 1982', in Sobrino Heredia, J. M., (Coord.), *Mares y océanos en un mundo en cambio: tendencias jurídicas, actores y factores* (Tirant lo Blanch, Valencia, 2007) 171-198 [ISBN:

978-84-8456-769-1]: The Spanish baseline system is a mixed system. Decree 2510/77 establishes straight baselines along the entire Spanish coast, but not in its entirety, since in some sections the normal baseline has been preferred, which, according to Law No. 20 / 67 of April 8, 1967 and Decree No. 3281/68 of December 26, 1968, is determined by the screened low tide line, whose reference level is that of the mean sea level. In our opinion, the Spanish route of straight baselines deserves a positive evaluation, since, although some traces seem difficult to justify, most of the straight baselines are not separated from the direction general of the coast, do not enclose large swaths of water, nor usually exceed 24 mm. Taking into account all these circumstances, we insist that the system of baselines traced by Spain is in accordance with the UNCLOS, since we understand, it must be evaluated according to its purpose of any baseline system, which does not it is other than to facilitate the determination of the outer limit of the territorial sea, and that of not acquiring new interior waters.

Jiménez Piernas, C., 'La relevancia de la frontera terrestre en la jurisprudencia sobre delimitación de los espacios marinos entre Estados adyacentes', in Mariño, F. M., (Coord.), *El derecho internacional en los albores del siglo XXI: homenaje al profesor Juan Manuel Castro-Rial Canosa* (Trotta: Fundación Juan March, Madrid, 2002) [ISBN: 84-8164-576-1] 393-422. In this book chapter, the author analyses the impact of land boundaries on maritime boundaries between adjacent States in case law, as a relevant circumstance to take into account in maritime delimitation. The author focuses on the land boundary terminus and the direction of the land boundary in the judgments and awards of international courts. In the first case, to which the second party of the article is dedicated, the author states the recognition of the land boundary terminus as a relevant circumstance of geopolitical nature in the process of maritime delimitation. In early judgments, the ICJ considered the position of the intersection of the land frontier with the coastline as relevant in order to establish the starting point of maritime boundaries. This reasonment was followed through by arbitral courts, and soon became one of the elements to take into account in order to achieve an equitable result in maritime delimitation. However, this was note the case of the direction of the land boundary, which has not been acknowledged as a relevant circumstance in maritime delimitation, given that its result must be verified in each case. The author reaffirms his findings in the conclusions of the chapter.

Jiménez Pienas, C., La jurisprudencia sobre delimitación de los espacios marítimos: una prueba de la unidad del ordenamiento internacional', in Vázquez, E. M., Adam, M. D., Cornago N., (Coords.), *El arreglo pacífico de las controversias internacionales:* XXIV Jornadas de la Asociación Española de Profesores de Derecho internacional y Relaciones internacionales (AEPDIRI), Córdoba, 20-22 de octubre (Tirant lo Blanch, Valencia, 2013) [ISBN: 978-84-9033-521-5] 241-276: The present work deals with the jurisprudence of the ICJ, as well as that of the ITLOS and arbitral tribunals, as an example of the progress made in relation to the jurisdictional settlement of disputes in the Law of the Sea, which can serve as a thermometer to evaluate the health of a legal system caracterized by its decentralized nature. The paper analyzes the normative framework foreseen in the UNCLOS, the normative interaction in this matter and the role played by the international jurisprudence, and the customary rule on delimitation, its interpretation and evolution. The analysis allows to conclude that, in general terms and to date, the jurisdictional solution of the disputes regarding the delimitation of marine spaces has been satisfactory, which does not prevent identifying some uncertainties.

Juste Ruiz, J., 'Delimitaciones marinas en África occidental: el laudo arbitral sobre la delimitación de la frontera marítima en Guinea y Guinea-Bissau', 42-1 *Revista Española de Derecho Internacional* (1990) 7-42 [ISSN: 0034-9380]. In this article, the author analyses the impact of the award in the matter of an arbitration concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau in International Law, highlighting the utilization of the uti possidetis principle in the maritime context and the determination of a border that would encompass the territorial sea, the EEZ and the continental shelf. The article consists of two parts preceded by an introduction on the background of the case. The first part covers the lack of delimitation of maritime boundaries in the 1886 convention between France and Portugal, the interpretation of its provisions and its consequences for the case. In the second part, the

author examines the equitable delimitation of the disputed maritime spaces under International Law. He concludes with some remarks on the similarities between arbitral awards and the judgments of the International Court of Justice on maritime delitimation and a critical analysis of the award.

López Martín, A. G., 'El asunto relativo a la delimitación marítima y cuestiones territoriales entre Qatar y Bahrein (Qatar c. Bahrein). Sentencia del Tribunal Internacional de Justicia de 16 de marzo de 2001', 54(1) *Revista Española de Derecho Internacional* (2002) 143-157 [ISSN: 0034-9380]. In its judgment in the case concerning maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v Bahrain), of 16 March 2001, the ICJ decided the attribution of sovereignty over Zubarah, the Hawar Islands, Janan, Qit'at Jadarah and Fasht ad Dibal, as well as the single maritime boundary between Qatar and Bahrain. The ICJ thus put an end to a sixty-year territorial dispute, and also to one of the longest and most innovating litigations in its history. The author notes that this judgment highlighted the connection between the law of State territory and the law of the sea and made important contribution to both branches of legal knowledge. After providing a brief historical review of the conflict, the author analyses the question relating to the territory of each island or group of islands and the different criteria for maritime delimitation, criticising the admission of a British decision of 1939 as a legal title to territory, and the 'proclamation' the existence of a right of innocent passage between the islands of Bahrain, despite the fact that it was generally recognized in Article 8(2) of UNCLOS.

López Marín, A. G., 'Nuevamente, delimitación conjunta de la frontera terrestre y marítima y, además, responsabilidad. La sentencia de la Corte Internacional de Justicia de 10 de octubre de 2002 en el asunto relativo a la frontera terrestre y marítima entre Camerún y Nigeria (Camerún c. Nigeria. Guinea Ecuatorial interviniente)', in Sánchez, L. I., Quel F. J., López, A. G., *El poder de los jueces y el Estado actual del derecho internacional* (Universidad del País Vasco, Bilbao, 2010) [ISBN: 978-84-9860-436-8] 171-196. This chapter focuses on the case concerning Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening). The author provides a general brackground of the controversy and thoroughly describes the development of the proceedings, before analising the judgment rendered by the ICJ on the dispute, highlighting three aspects: land boundary delimitation, maritime boundary delimitation and international responsibility.

Orihuela Calatayud, E., *España y la delimitación de sus espacios marinos* (Universidad de Murcia, Murcia, 1989) [ISBN: 84-7684-160-4]: Spain, a state with a coastline of about eight thousand kilometers in length, extends to two continents and presides one of the international straits of greatest maritime traffic in the world. This circumstance, together with the adjacency and opposition of its coasts to those of other States, provokes the inevitable overlapping of its marine spaces with those projected by Algeria, France, Italy, Morocco and Portugal, as well as with the claimed British waters of the colony of Gibraltar. This work constitutes an exhaustive study of the international and domestic norms related to the Law of the sea, in general, and to the delimitation of the marine spaces in particular. It also offers a complete analysis of its application in Spain and its surroundings, raising possible solutions to the controversies that traditionally affect our foreign policy, such as the sovereignty over the "Isla de Perejil" or the delimitation of the marine spaces in the Strait of Gibraltar, among other.

Orihuela Calatayud, E., 'La delimitación de los espacios marinos en los archipiélagos de Estado: Reflexiones a la luz de la ley 44/2010, de 30 de diciembre de aguas canarias', 21 *Revista Electrónica de Estudios Internacionales* (2011) [ISSN-e: 1697-5197]: The passing of the Canary Water Act, of 30th December 2010, give us a new opportunity to reflect about the application of the archipelagic principle respect to the State archipelagos and to assess the effects and consequences that the application of this Act bring. The Spanish action derived from this Law joins the action of other mixed States which intend to promote a change in the Law of the Sea, aiming either to extend the scope of the principle for including the archipelagoes of States or to favor, also, a change in its regulation. This paper analyzes the issues related to the regulation of the archipelagoes by the International La of the Sea, the ones derived from the application of the archipelagic principle to the State archipelagoes and specially the consequences of the

new Spanish Act, most of which have not cleared up by that regulation.

Pastor Palomar, A., *Delimitación Marítima entre Estados. Formaciones Insulares y Bajíos* (Tirant Lo Blanch, Valencia, 2017) [ISBN: 9788491199892]. In the law of the sea, the delimitation of spaces between States is the most contentious dispute in international courts. In this context, this monograph studies the international legal regime of the islands, shoals, rocks, reefs, atolls, islets, cays and banks. The analysis is not limited to the main categories (islands and shoals), since others can also play and, in fact, play an important role in many maritime delimitations. A dispute such as that of the South China Sea, still unresolved despite the arbitration award of July 12, 2016, demonstrates the need to specify the applicable law and its geopolitical relevance. The analysis also affects Spain, which has pending a series of maritime delimitations and territorial disputes with the presence of these geographical formations. In the present work the reader will find a systematic exposition of legal practice in the matter, that is to say: two hundred marine delimitations, some thirty international judicial and arbitral disputes, a hundred treaties, another hundred national legislations of States and territorial entities of the five continents, and several legal disputes of domestic law. With all this, possible juridical precedents of a sector of the international law that forge to the geography, without remaking it, are analysed.

Pozo Serrano, M. P., '¿Hacia una solución "económicamente" equitativa? Reflexiones sobre la evolución de la jurisprudencia internacional en materia de delimitación marítima', 13 *Anuario Español de Derecho Internacional* (1997) 407-466 [ISSN: 0212-0747]. In the Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) case, the ICJ defined a maritime boundary in order to ensure equitable access to fishery resources, introducing a new economic factor to take into account in the process of delimitation. This article covers the incidence of economic factors in judicial delimitation in case law, analysing the evolution of the decisions of international courts on maritime delimitation. For study purposes, the article is divided into three parts: one related to the presence of natural resources in the disputed area, another one dedicated to the Parties' general economic situation, and the last one covering socioeconomic factors relating to economic dependence on the resources existing in the disputed area, including historical rights. The author concludes underlying that, although the delimitation of the continental shelf between States shall be effected on the basis of international law in order to achieve an equitable solution, some economic circumstances can be relevant for the delimitation process. The presence of natural resources in the area is one of them, as long as their existence and location are known or can be easily determined. If it is just a mere hypothesis, the presence of natural resources in the area becomes irrelevant for maritime delimitation. This criterion had been previously acknowledged by the ICJ, stating that economic considerations were not relevant for the delimitation process but coul not be disregarded either, as they should be considered in order to verify equity in the result of the delimitation process. The Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) case is thus a turning point in the ICJ criteria for maritime delimitation.

Ruiloba García, E., *Circunstancias especiales y equidad en la delimitación de los espacios marítimos* (Real Instituto de Estudios Europeos, Zaragoza, 2001) [ISBN: 8495929015]. This thesis focuses on the study of those special circumstances that must be taken into account in order that all delimitation of the sea spaces between two or more States is equitable. The first chapter is devoted to the process of historical formation of the norms that govern maritime delimitation. In the second chapter delimitation is approached in its factual dimension. The purpose of the third chapter is to define the concept and nature of the delimitation operation. Chapter four determines the content of the rules applicable to the delimitation of maritime spaces. Finally, the fifth chapter analyses the scope and significance of the special circumstances by examining the various circumstances that the International Tribunals have considered relevant in each specific case, in order to achieve a fair outcome.

Saura Estapà, J., *Límites del mar territorial* (Bosch, Barcelona, 1996) [ISBN: 8476983824]: The object of this study is the analysis of the international legal regulation of the limits of the territorial sea contained in the United Nations Conventions that have codified this matter (1985 Geneva Convention relative to the

territorial sea and the contiguous zone; the United Nations on the Law of the Sea, 1982) as in the field of customary law. It will begin by determining the width that can reach the territorial sea, to continue with the study of the different baselines, from which it is measured, not only that width, but also that of almost all the marine spaces on which the coastal State exercises some kind of competition. Finally, the last chapter is devoted to the examination of special situations that may occur in the littoral of the riparian and that have an influence when measuring the width of the territorial sea, in order to finish determining the methods and technical criteria used in the design of the outer limit of said marine space.

Saura Estapà, J., *Delimitación jurídica internacional de la plataforma continental* (Tecnos, Madrid, 1996) [ISBN: 84-309-2939-8] This thesis analyses the rules on the limits of the continental shelf. It is structured in three parts, each one analysing one of the limits of the continental shelf: its inner limits, which encompass the outer limits of the territorial sea; its outer limits, subject to two different procedures of determination in the 1958 Sea Shelf Convention and in UNCLOS, and the delimitation of the continental shelf between States with adjacent or opposite coasts. It includes a special chapter about joint delimitation of the sea shelf and the Exclusive Economic Zone.

Torres Ugena, N., 'Delimitación de fronteras a partir de la sucesión colonial. La demanda de revisión de la sentencia de 11 de septiembre de 1992 en el asunto de la diferencia fronteriza, terrestre, insular y marítima (El Salvador c. Honduras; Nicaragua interviniente) (El Salvador c. Honduras)', in Sánchez, L. I., Quel, F. J., López, A. G., *El poder de los jueces y el Estado actual del derecho internacional* (Universidad del País Vasco, Bilbao, 2010) [ISBN: 978-84-9860-436-8] 261-280. This chapter provides an analysis of the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) case. It starts introducing the background of the controversy and then focuses on the legal situation of islands and the estuary of the Goascorán River. Afterwards, it examines the application of the uti possidetis principle and the process of avulsion in the 1992 judgment. The author concludes with a legal analysis of the application for revision of the judgment, examining every requisite provided for in article 61 of the Sttatute of the ICJ and discussing its inadmission by the Court.

(G) GIBRALTAR (INCLUDING DELIMITATIONS AND NAVIGATION TRHOUGH ITS STRAIT)

Acosta Sánchez, M. Á., 'Encuentros y desencuentros hispano-británicos en las aguas en torno a Gibraltar: ¿son posibles acuerdos de cooperación práctica?' 28 *Anuario Español de Derecho Internacional* (2012) 233-275 [ISSN: 0212-0747]: The dispute between Spain and United Kingdom over the sovereignty of Gibraltar and the water jurisdiction has been exacerbated in recent years by the increasing incidents among its Security Forces. Such incidents have become a political demonstration of national positions about the maritime areas. That is why we are required to adopt action protocols, respecting national sovereignty claim, and in order to face illegal traffics in the area of Strait of Gibraltar.

Cepillo Galvín, M.A., 'The control of maritime traffic in the Strait of Gibraltar', 18 *Spanish Yearbook of International Law* (2013-2014) 299-308: The control of maritime traffic in the Strait of Gibraltar is conditioned by the regulation established in the United Nations Convention on the Law of the Sea, of 1982, in relation to straits used for international navigation where transit passage is applied. In this respect, it is necessary a cooperation between Spain and Morocco in order to designate sea lanes and establish a traffic separation scheme in that space. An analysis of this cooperation and of the last modifications of the Traffic Separation Scheme of the Strait of Gibraltar after the new Tangier-Med port being brought into service will be carried out in this paper.

Fernández-Sánchez, P. A., 'La controversia sobre la titularidad jurídico-internacional de los espacios marítimos adyacentes a Gibraltar', 67(2) *Revista Española de Derecho Internacional* (2015) 13-47 [DOI: http://dx.doi.org/10.17103/http://dx.doi.org/10.17103/redi.67.2.2015.1.01]: The study seeks to identify the applicable law relating to the sovereign title of Gibraltar's adjacent Marie waters. To this end, the author considers four elements. The first element relates to the specific colonial situation where the United

Nations have been continuously outlining the need for negotiations between the Administrator Power (UK) and Spain to proceed to the reintegration of Gibraltar into the Spanish territory, taking into account the interest and legitimate aspirations of the population of Gibraltar which are consistent with International Law. It also analyzes the cessions of the port of Gibraltar to the UK, which currently manages the port and it internal waters. The principle of lex specialis derogat legi generali is also analyzed, where the Treaty of Utrecht is considered as lex specialis and the Law of the Sea as lex generalis and, finally, the application of the «dry shore» theory to the specific case of Gibraltar.

González García, I., 'La Bahía de Algeciras y las aguas españolas', in del Valle J. A., (Coord.), *Gibraltar, 300 años* (Servicio de Publicaciones de la Universidad de Cádiz, Cádiz, 2004) 211-236 [ISBN: 84-96274-43-8]: Addressing the analysis of the Bay of Algeciras and Spanish waters, in accordance with the provisions of Article X of the Treaty of Utrecht, is not a task free from difficulties, as evidenced by the fact that the same conventional basis is alleged by the United Kingdom as legal title to identify British waters in the Bay of Gibraltar. In accordance with the International Law of the Sea, it is our intention to offer the initial legal framework that will reward us to understand, in practice, the indeterminacy existing in relation to the legal nature of the waters included in the Bay of Algeciras.

González García, I., Los espacios marítimos del istmo y Peñón de Gibraltar: cuestiones en torno a su delimitación' in Sobrino Heredia, J. M., (Coord.), *Mares y océanos en un mundo en cambio: tendencias jurídicas, actores y factores* (Tirant lo Blanch, Valencia, 2007) [ISBN: 978-84-8456-769-1] 141-170. This book chapter is focused on the delimitation of maritime spaces off the isthmus and the rock of Gibraltar. It is divided into three parts. The first one covers the Treaty of Utrecht and the regime of the waters; the second one explores the regime of waters off the Rock of Gibraltar and the Bay of Algeciras, and the third one examines the waters off the isthmus. In the conclusions, the author states that the Spanish posture in this controversy is not consistent with the practice followed in past centuries –except for the waters off the isthmus–, and the consolidation of the British posture on the subject of the waters off the rock. She also favours dialogue and cooperation in order to find a solution for the maritime delimitation between Spain and Gibraltar.

González García, I., Acosta Sánchez, M. Á., 'La difícil aplicación de la estrategia marina europea y la protección del medio marino en la bahía de Algeciras/Gibraltar', 25 *Revista Electrónica de Estudios Internacionales* (2013) [ISSN: 1697-5197]: The transposal into national law of the European Marine Strategy represents the first step towards the establishment of the so-called European Maritime Policy. This new policy aims to provide a sustainable and coherent dimension to human interventions on the European coasts. In the Spanish case, the Law 41/2010 has transposed the EU Strategy in a much clearer manner than the wording of the EU lawmaker. One of the Spanish regions that necessitates demarcation lines is the area between the Strait of Gibraltar and Isla de Alborán, where maritime boundaries are yet to be defined. Indeed, the existence of a territorial dispute between Spain and the United Kingdom over the waters around Gibraltar and the recent conflict regarding the Sites of Community Importance (SCI) have created serious difficulties in implementing the Marine Strategy.

Gutiérrez Castillo, V. L., 'Legal Regime on Navigation through the Strait of Gibraltar: The Role of its Coastal States', 2017(2) *Il Diritto Marittimo* (2017) 349-365 [ISSN: 1826-8595]: The Strait of Gibraltar has all the characteristics of the straits used for international navigation. Its coastal states are signatories of the United Nations Convention on the Law of the Sea and accept the transit passage regime. The agreements between the international community and the States bordering the Strait regarding the definition of maritime navigation lanes, with particular stress on the rights and obligations of the said States, as well as the international commitments undertaken by both States in terms of environmental protection and how their pledge is affected by the applicable navigation regime in the Strait are discussed in this study.

Gutiérrez Castillo, V. L., García Blesa, J., 'Le Détroit de Gibraltar et l'application de la normative de l'Union Europeenne relative aux énergies renouvelables', 1 *Paix et sécurité internationales: revue maroco-espagnole de droit international et relations internationales* (2013) 103-119 [ISSN-e: 23410868]: The purpose of this

paper is to review the configuration and point out the weaknesses of the main legal regimes of environmental protection of the Mediterranean Sea applicable to the implementation of marine renewable energies in the maritime and coastal areas of the EU, focusing on Strait of Gibraltar. Renewable energy sources have become a strategic industry for Europe over the last years due, among other things, to the need for finding cheap and clean energy sources. Within this context, marine renewable energies attract a lot of attention from the EU and several Member States. However, the development of this industry without a sound environmental protection and preservation policy and regulation, might well result in a rather negative impact on the affected marine ecosystems. On the other hand, the legal framework established by the EU and other international legal regimes for the protection of the marine environment seems to give much room for Member States putting economic objectives before environmental considerations.

Jiménez Piernas, C., "El *Brexit* y Gibraltar: las aguas de la colonia", en Martín Martínez, M.M., y Martín y Pérez de Nanclares, J. (Coords.), *El Brexit y Gibraltar. Un reto con oportunidades conjuntas* (Ministerio de Asuntos Exteriores, Escuela Diplomática, Madrid, 2017), 79-92 [ISSN: 978-84-95265-77-7]: The author briefly explains the Anglo-Spanish controversy on the legal status of the colony's surrounding waters. In view of Brexit, the author proposes an arrangement or compromise that he understands would be reasonnably satisfying for both sides. This proposal is built upon the following points: the regression of Spanish sovereignty over the Rock; a regime of co-sovereignty for the military base; a privileged regime of transit passage and overflight for British warships and aircraft on the Algeciras Bay; and the recognition by the United Kingdom of certain Spanish historic rights in that bay.

Orihuela Calatayud, E., "La delimitación de los espacios marinos en España: perspectivas futuras", in Martín y Pérez de Nanclares, J., (Coord.), *España y la práctica del Derecho internacional: LXXV Aniversario de la Asesoría Jurídica Internacional del MAEC* (Ministerio de Asuntos Exteriores, Escuela Diplomática, Madrid, 2014) 121-141 [ISBN: 100962350].

Valle Gálvez, J. A., '¿De verdad cedimos el Peñón? Opciones estratégicas de España a los 300 años del Tratado de Utrecht', 65(2) *Revista Española de Derecho Internacional* (2013) 117-156 [ISSN: 0034-9380]: The 300th anniversary of the Treaty of Utrecht is an opportune moment to reflect on the legal framework of this longstanding dispute, its current relevance, the prevailing differences, the possibilities of finding common ground in order to reach an agreement, and on the way in which the parties use legal concepts and institutions for their own interests. Following changes in the three Governments between 2011 and 2012, the Gibraltar question is currently marked by a situation of structural crisis, given the grave doubts concerning the bilateral legal framework as well as that of the United Nations. In addition, the traditional tenets of Spanish policy on Gibraltar have been called into question. Spain needs to reassess its strategies with regard to Gibraltar, which requires the reopening of bilateral negotiations that are prepared to take an imaginative approach in their search for solutions, and to consider the option of finding a judicial solution, which would be a high risk alternative. Having ruled out the renewal of the dialogue Forum established in 2004, the strategic options are limited, although a series of tactical approaches are always possible. This article also questions whether the cession of the city of Gibraltar under the terms of the Treaty of Utrecht automatically included the cession of The Rock or not, which would have implications for the theory of the "Costa Seca" (dry coast) doctrine defended by Spain.

Valle Gálvez, J. A., 'España y la cuestión de Gibraltar a los 300 años del Tratado de Utrecht', 1 *Cuadernos de Gibraltar – Gibraltar Reports: Revista Académica sobre la Controversia de Gibraltar – Academic Journal about the Gibraltar Dispute* (2015) 83-96 [ISSN-e: 2444-7382]: This year 2013 marks 300 years of the Treaty of Peace and Friendship between Spain and Great Britain, signed in Utrecht on July 13, 1713, by which the crown of Spain ceded Gibraltar to the United Kingdom of Great Britain. The cession opened a historical controversy between Spain and the United Kingdom that has become a historical and permanent claim of the State, before what is perceived as an amputation of the territory of Spain. The truth is that at present the question of Gibraltar is in a negotiating crisis of a structural nature, since there is a deep questioning

of bilateral and United Nations legal frameworks. Spain in this way must consider its strategies with regard to Gibraltar, which entails, among other options, relaunching bilateral negotiations with an imaginative search for solutions, and weighing the option of a judicial solution.

Valle Gálvez, J. A., El Houdaïgui, R., Acosta Sánchez, M. Á., (Dirs.), *Las dimensiones internacionales del Estrecho de Gibraltar* (Dykinson, Madrid, 2006) [ISBN: 9788497728577]: This book is the result of the papers presented at the I Euro-Moroccan Dialogue, organized by the University Classroom of the Strait at the Faculty of Law, Economics and Social Sciences of Tangier, with the aim of discussing problems common to each other side of the Strait of Gibraltar. This area, brimming with issues of International Law and International Relations, raises many issues that are addressed by Andalusian and Moroccan professors and diplomats and has contributions in French, Spanish and Arabic. And it is that this book intends that the sharing of the various international issues and perspectives dealt with be known on both sides of the Strait.

Valle Gálvez, J. A., González García, I., Verdú Baeza, J., '¿Es posible un acuerdo de delimitación de aguas con Gibraltar?', in González García I., *Gibraltar y el foro tripartito de diálogo* (Dykinson, Madrid, 2009) 293-318 [ISBN: 978-84-9849-826-4]: In the present work it is proposed that Spain and the United Kingdom agree in writing to the provisional exercise of differentiated jurisdictions in the maritime spaces around the Peñon; As will be explained, this Water Demarcation Agreement can not only preserve and reaffirm the Spanish position, but could also point to a specific statute for the waters of the isthmus, helping to consolidate the different situation of the isthmus that connects the Rock with the Line; and of course, this may be beneficial for the traditional political and legal position of Spain in the historical controversy over the Rock. Even the Agreement could potentially be beneficial also for Gibraltar, as it would provide a title or frame of reference on a de facto control situation maintained to date, and that would give it legal certainty.

Valle Gálvez, J. A., González García, I., Verdú Baeza, J., 'Propuestas para un acuerdo práctico sobre las aguas de Gibraltar', in Aznar, M. J., (Coord.), *Estudios de Derecho Internacional y de Derecho Europeo en Homenaje al Profesor Manuel Pérez González* (Tirant lo Blanch, Valencia, 2012) [ISBN: 978-84-9004-999-0] 407-440. In this chapter, the authors explore some proposals in order to reach an agreement on the waters off Gibraltar. For that purpose, they expose the current situation, characterised by the absence of an agreement on this subject, and the distinction between the waters off the Rock of Gibraltar and those off the isthmus. Afterwards, they analyse its environmental impact and its consequences on navigation through those waters, and the need for an agreement. Finally, they examine the possibility to reach an agreement and some precedents that might be useful in order to determine a regime for the waters off Gibraltar, and then propose some options for the content of the agreement.

Verdú Baeza, J., 'La controversia sobre las aguas de Gibraltar: el mito de la costa seca', 66(1) *Revista Española de Derecho Internacional* (2014) 81-123 [ISSN: 0034-9380]: The legal status of the waters around Gibraltar is a dispute with its own specific characteristics, which overlap and interrelate with the other controversies surrounding Gibraltar. Recently, disagreements between the parties have led to a number of confrontations. This paper stresses the weakness of the Spanish positions in its attempts to deny the existence of waters under the jurisdiction of Gibraltar, an interpretation known as the «costa seca» or dry coast doctrine. It is our opinion that this untenable doctrine has neither legal nor historical support and, this being the case, Spanish policy regarding Gibraltar's water needs to be thoroughly revised, in an attempt at avoiding confrontation and at seeking dialogue and negotiation.

Verdú Baeza, J., 'Las aguas de Gibraltar, el Tratado de Utrecht y el Derecho Internacional del Mar', 1 *Cuadernos de Gibraltar – Gibraltar Reports: Revista Académica sobre la Controversia de Gibraltar – Academic Journal about the Gibraltar Dispute* (2015) 97-132 [ISSN-e: 2444-7382]: The legal nature of the waters surrounding Gibraltar as well as the delimitation of marine spaces in the Bay of Algeciras in relation to Spanish waters constitutes a controversy with its own specific characteristics that overlaps and interrelates deeply with the rest of the controversies opened in around Gibraltar. If in any way the controversy over waters has

always been traditionally present in the positions of the parties in the Gibraltarian controversy, in recent times the reiteration of incidents in the Gibraltarian waters has acquired a special dimension overlapping on the general framework of treatment of the controversy, having been one of the main causes of paralysis of the process known as the Tripartite Dialogue Forum, original and courageous formula for dealing with cross-border issues, constituting today a dangerous reason for hardening the positions of the parties as a result of the respective changes of Government both in Gibraltar and in Spain at the end of 2011 and the fishing conflict around these waters that especially contaminates the Gibraltarian issue since May 2012. In this sense, the Gibraltarian decision in July 2013, after one year of continuous incidents, of throwing artificial reefs is in a part of the waters near the airport has triggered one of the most intense crises in the complex relations around the Rock, with measures of Spanish reaction consisting mainly of the hardening of controls in the fence / border that have caused the intervention of the European Commission, multiplying the incidents and diplomatic tensions between the parties.

(H) INTERESTS

(1) Fisheries and other living resources

Abad Castelos, M., Rey Aneiros, A., 'Una nueva Política Pesquera Común. Comentario al Reglamento (CE) n.º 2371/2002 del Consejo, de 20 de diciembre de 2002, sobre la conservación y la explotación sostenible de los recursos pesqueros en virtud de la Política Pesquera Común', 1 *Revista General de Derecho Europeo*, 2003 [ISSN: 1696-9634]: On December 20, the Council adopted the new Regulation that will govern the Common Fisheries Policy (hereinafter PPC) during the coming years (Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy). In Article 14.2 of the Regulation that has governed this Common Policy during the last ten years (Council Regulation (EEC) No. 3760/92 of December 20, 1992, establishing a Community regime for fisheries and aquaculture) it was expected that such revision of the regime should begin with a reflection by the Commission before December 31, 2001, and end with new regulations of the Council adopted before 31 December 2002. The first step was actually carried out in March 2001, with the presentation by the Commission of the "Green Paper on the future of the Common Fisheries Policy". The controversial content of this document of the Commission already made foresee that this new revision of the CFP would be especially intense. Finally, the new basic Regulation has not come to mean a simple adjustment of the current regime but, on the contrary, the revision has been substantial and global. This Regulation has also been accompanied by a framework of new provisions on structures, urgent measures for the scrapping of ships, annual distribution of total allowable catches, technical measures, access and fishing opportunities for deep-water species, etc.

Badenes Casino, M., 'Las poblaciones de peces transzonales y altamente migratorias en el Derecho Internacional', 12 *Anuario Español de Derecho Internacional* (1996) 91-145 [ISSN: 02120747]. This work analyses the regime of straddling and highly migratory fish stocks in International Law. It examines, firstly, the development of the interests over this kind of resources during the Third United Nations Conference on the Law of the Sea and its regime under UNCLOS, as well as the subsequent practice stemming from this regulation. The work analyses, secondly, the conferences and the negotiations that led to the adoption of the 1995 Convention on Straddling and Highly Migratory Fish Stocks, and it concludes with a study of its provisions.

Bou Franch, V. E., "La protección de los mamíferos marinos en el mar Mediterráneo", 14 *Anuario Español de Derecho Internacional* (1998) 2-51 [ISSN: 02120747]: This work examines the main international legal instruments that protect marine mammals in the Mediterranean Sea. Their measures provide both direct and indirect protection. Within the measures that provide direct protection, it should be recalled the inclusion of existing marine mammals in the Mediterranean Sea in both the List of threatened and endangered species annexed to the Barcelona Protocol of 1995 and the establishment of an indicative list

of Mediterranean cetaceans annexed to the Agreement of 1996. Indirect protection has been achieved by safeguarding their habitats as well as regulating fishing methods that may accidentally affect the conservation of marine mammals.

Carrera Hernández, F. J., *Política pesquera y responsabilidad internacional de la Unión Europea* (Ediciones Universidad de Salamanca, Salamanca, 2010) [ISBN: 9788469352618]: This work addresses two major blocks of legal problems: the first one, related to the European Union competence to conclude international agreements on conservation and access to the waters of third States; the second one, around the international responsibility of the European Union in case of violation of such agreements. The first block leads to the examination of the international legal personality of the European Union, its external competence, the exclusivity of its powers in matters of fisheries resources and the procedure for concluding bilateral agreements with third States. The second block analyses the responsibility for attributable acts in relation to bilateral fishing agreements or claims submitted by third States.

Casado Raigón R., (Dir.), *L'Europe et la mer. Pêche, navigation et environnement marin / Europe and the Sea. Fisheries, Navigation and Marine Environment* (Bruylant, Brussells 2005) [ISBN: 280272052]: This book contains the results of the Colloquium of the International Association of the Law of the Sea (ASSIDMer), which, on the theme of Europe and the Sea, was held at the Faculty of Law of the Universidad de Córdoba (Spain) in 2003 and attended by a hundred lawyers and prestigious Maritimists from four continents (Europe, Asia, Africa and America) and twenty countries. The work developed during the symposium was divided into three sessions: the first session devoted to sea fishing, the second one to maritime navigation and the third one to the marine environment. Each of the three sessions consisted of a general report and various specific reports. The Symposium ended with the general conclusions drawn up by the President of the AssIDMer, Professor Daniel Vignes, and various complementary reports.

Casado Raigón, R., "Nuevas tendencias en materia de conservación y gestión de los recursos marinos vivos", in Sobrino Heredia, J. M., (Coord.), *Mares y océanos en un mundo en cambio: tendencias jurídicas, actores y factores* (Tirant lo Blanch, Valencia, 2007) [ISBN: 978484567691] 73-98: The conservation and management of living marine resources is governed by two basic instruments: the United Nations Convention on the Law of the Sea and the 1995 United Nations Fish Stocks Agreement, this latter with very much less acceptance. This work examines the 1995 Agreement with a critical point of view face to its next review conference, which discussed, among others, the conservation of marine living resources, the ecosystem approach, the principles of precaution and compatibility, the IUU fishing and the establishment of protected marine areas.

Casado Raigón, R., "La aplicación de la política pesquera común en el mar Mediterráneo", in Badia Martí, A. M., Pigrau i Solé, A., Olesti Rayo, A., (Coords.), *Derecho internacional y comunitario ante los retos de nuestro tiempo: homenaje a la profesora Victoria Abellán Honrubia*, Vol. 2 (Marcial Pons, Madrid, 2009) [ISBN: 9788497686662] 895-920: The Mediterranean Sea has cultural, geographical, economic, social, biological or environmental characteristics that have conditioned the application of the common fisheries policy in that sea. Only after 1997, with the establishment of the fishing protection zone and with the accession of Cyprus and Malta, the Community Fishing Area in the Mediterranean Sea began to extend beyond twelve nautical miles. This work examines this peculiarity by analysing the EC-Regulation 1626/94 and its limitations, the areas of national jurisdiction established in the Mediterranean Sea, and the EC-Regulation 1967/2006 and, in particular, the fishing protected areas that it contemplates.

Corral Suárez, M., *La conservación de los recursos biológicos del mar en el derecho internacional vigente* (Universidad of Valladolid, Valladolid, 1993) [ISBN: 8477623689]: The fishing activity is as old as the history of the Humanity. At present, however, it presents a different dimension, since today the conflicts related to fishing are no longer localized or limited, but, on the contrary, they affect the most of the States and refer to almost all of the marine spaces. This situation is the consequence of the evolution of International law and the Law of the sea in particular. The work has two parts. The first one examines

the genesis of regulation of the conservation of the living resources of the sea, focusing on the background, the adoption of the 1958 Geneva Convention and the revision of the issue at the III United Nations Conference on the Law of the sea. In the second part, the work analyses the current state of the Law on the conservation of living resources of the sea: from the provisions included in the Geneva Convention that are still in force to the new emerging principles, through the examination of the provisions of the 1982 United Nations Convention on the Law of the Sea and other conventions on the matter.

Forcada Barona, I., "La evolución de los principios jurídicos que rigen la explotación de los recursos económicos de los fondos marinos y del alta mar: retorno a la soberanía", 14 *Anuario de Derecho Internacional* (1998) 53-112 [ISSN: 02120747]: This work examines the evolution of the legal principles governing the exploitation of international seabed and High Seas resources. Two important agreements have been adopted in both areas: the 1994 Agreement relating to the Implementation of Part XI of the UNCLOS and the Agreement of 1995 on the Implementation of its provisions regarding the conservation and management of Straddling Fish Stocks and Highly migratory fish stocks. The first one has been acclaimed for contributing to universal participation in the UNCLOS; the second one, for clarifying and developing its provisions through the cooperation between States. In spite of this initial enthusiasm, the author considers that both reforms are a step backwards: the 1994 Agreement depletes the status of Common heritage of mankind applied to international seabed and the 1995 Agreement has extended the exercise of sovereign competences to areas formerly subject to the regime of freedom of the high seas.

González García, I., 'Los acuerdos comunitarios de pesca con Marruecos y el problema de las aguas del Sáhara Occidental', 36 *Revista Española de Derecho Europeo* (2010) 521-563 [ISSN: 15796302]: This work examines the issues that are raised by the adoption of fisheries agreements by the European Community with Morocco, which extend to the waters of Western Sahara, specifically the most recent agreements (1988, 1992, 1999 and 2005), which have been in force since February 2007. The core issue here is that European Community institutions have recognized the Moroccan practice of licensing EU vessels to fish in waters off the coast of the Sahara, notwithstanding the fact that these waters have not been mentioned or explicitly defined in the agreement text (neither in the Agreement, nor the Protocol nor the Annex). The development of the 2007 Fisheries Agreement and the European Community's actions appear contrary to the rules of International Law. According to the United Nations, the Western Sahara is a territory under decolonization, and the UN's resolutions do not grant Morocco the status of administrative power, however it does grant de Saharawi people the right to exploit their natural resources.

González Giménez, J., *El Mar Mediterráneo: régimen jurídico internacional: de las zonas de pesca a las zonas de protección* (Atelier, Barcelona, 2007) [ISBN: 9788496758155]: The singularity of the Mediterranean Sea acquires a special intensity in the establishment of maritime zones by the coastal States, and its legal regime deserves an examination in detail. The interest of coastal States to ensure the exclusive use of natural resources in large areas adjacent to the territorial sea, and exercise there the corresponding exclusive jurisdiction, has contributed to transform the Law of the sea. This work answers to some of the questions that this raises, particularly about the role played by the Mediterranean coastal States in that transformation, or the coordinated or unilateral character of the establishment of exclusive fishing zones, exclusive economic zones or ecological and fisheries protection zones.

Gutiérrez Espada, C., 'Desventuras contemporáneas de la libertad de pesca en alta mar', 17 *Anales de Derecho* (1999) 227-258 [e-ISSN: 19895992]: The present work carries out a review of the evolution of the principle of freedom of fishing on the high seas, and its progressive reduction. The author points out three main stages: the golden age of the principle until the seventies; the beginning of its decline in the 1980s, particularly with the adoption of the United Nations Convention on the Law of the Sea; and its progressive abolition through further developments, such as the 1995 Agreement and unilateral acts of States.

Hinojo Rojas, M., "El acceso de terceros Estados a las organizaciones internacionales de pesca: una cuestión a

revisar", in Sobrino Heredia, J. M., (Dir.), *La toma de decisiones en el ámbito marítimo: su repercusión en la cooperación internacional y en la situación de las gentes del mar* (Bomarzo, Albacete, 2016) [ISBN: 9788416608515] 167-188: The purpose of this paper is to examine the issue of the access by third States to international fisheries organizations. This problem is framed in the context of a principle of freedom of fishing on the High Seas that, today, far from having the same content as in its origins, must be interpreted in a way that allows the balance between the interests of all States, as well as the interests of the international community as a whole. This work shows how there are important limits to the access of third States in these fishing organizations and how these limits undoubtedly affects the possibility of those States of exploiting fishing resources.

Juste Ruiz, J., "Explotación, conservación y protección de los recursos biológicos en el Mediterráneo: aplicación de la política pesquera común y medidas unilaterales y concertadas de los Estados ribereños", in Caflisch, L., Bermejo García, R., Díez-Hochleitner, J. and Gutiérrez Espada, C., (Coords.), *El derecho internacional: normas, hechos y valores: Liber amicorum José Antonio Pastor Ridruejo* (Universidad Complutense, Madrid, 2005) [ISBN: 8484810593] 413-439: The situation in the Mediterranean Sea is clearly conditioned by the geographical, oceanographic and biological peculiarities of this sea. Due to these, the Mediterranean area was left out of the global fishery crisis of the 1970s, but since then, scientists have begun to warn of the progressive depletion of numerous fish stocks. The present work examines, in the first place, the progressive application of the common fisheries policy in the Mediterranean Sea and, secondly, the national legislation and regional agreements that have been adopted for the protection of its biological resources.

López Rueda, F. C., "La nueva política comunitaria de pesca sostenible", 31 *Anuario de Derecho Marítimo* (2014) 153-193 [ISSN: 02118432]. This article analyses the reform of the CFP in the European Union. For that purpose, the author introduces the concern for sustainability, which emerged in the 1980s and was included as a principle of the CFP, as well as the scope and the challenges faced by the fishing industry (overexploitation of the resources, excessive fishing capacity, bycatches and discard policy, IUU fishing, etc.). The author considers that the previous CFP was unable to overcome those challenges and that this situation is to be corrected by the new CFP. He than analyses the scope, the objectives and principles of the new CFP, as well as conservation measures, and the proceeds to examine the precautionary principle, the maximum sustainable yield, the ecosystem approach to fisheries and the multiannual plans. He then focuses on the discard policy and the landing obligation, the management of fishing capacity, the regionalisation and decentralisation of conservation measures, sustainable aquaculture and the common organisation of the markes, as well as state control and state aids in this field. The author concludes that sustainability should prevail in the regulation of the fishing industry,and that the approach adopted by the new CFP should be strengthened in the future, focusing on the correct implementation of the law.

Rey Aneiros, A., "Hacia un nuevo marco jurídico internacional de la pesca en alta mar: la NAFO en esta encrucijada", 62-2 *Revista Española de Derecho Internacional* (2010) 77-109 [ISSN: 00349380]: Despite the lack of evidence of disputes open in recent years, the fishing relations between the international actors on the two sides of the Atlantic have been far from cosy since the end of the "Halibut War". In fact, surprisingly intense legal-diplomatic activity has been underway since the late 1990s. All this activity raised hopes in both Canada and the EU that a balance had been struck between their respective interests and that an effective role could finally be set out for NAFO (the Northwest Atlantic Fisheries Organization) in the Northwest Atlantic. The twenty-first century, however, began with substantial differences between certain NAFO members (principally Canada and Spain) over the application of the organization's rules. Serious infringements were detected in the NAFO area that were not always duly penalized by flag States, and differences re-emerged. On the one hand, the Canadian government debated the possibility of adopting positions to remedy the failure of the NAFO project: the extension of Canada's Exclusive Economic Zone, jurisdiction beyond the 200-mile limit, application of custodial management, and the reform or even replacement of NAFO. Spain and the EU, in turn, from the time the earliest signs of dispute began to appear, actively sought a multilateral solution to the problems

detected in the management of NAFO. Via their participation in international forums they have advocated strengthening international fisheries organizations, furthered the creation of new IFOs in response to new requirements, and encouraged reform wherever needed, as in the case of NAFO. The action of Spain and the EU has also been the result of pressure brought to bear by the regions and industries most deeply involved in fishing in the area. Oddly (or not), the solution adopted in 2007 to reform and create a new NAFO Convention has not fully satisfied either the Northeastern Canadian provinces or the Spanish and Portuguese regions, but it is the equilibrium solution (admittedly unstable until it proves its effectiveness) defended by the Canadian and EU administrations. These, briefly, are the issues addressed in this article, which aims to shed light on possible laboratory tests for a new international law of high seas fisheries.

Ruiloba García, E., "Las zonas de explotación conjunta de los recursos pesqueros: una forma alternativa de cooperación", 54-2 *Revista Española de Derecho Internacional* (2002) 753-773 [ISSN: 00349380]: This work analyses the areas that have been established for the exploration and joint exploitation of fishery resources, also known as "common fishing areas". The work is structured in two parts. The first part deals with the relationship between the delimitation of marine spaces and the establishment of areas of joint exploitation. After establishing the functional nature of cross-border cooperation in these areas, the second part examines the different common fishng areas that States have established in practice.

Sobrino Heredia, J. M., "Perspectivas de cambio en la política de conservación y gestión de los recursos pesqueros de la Unión Europea", 11 *Revista de Derecho Comunitario Europeo* (2002) 7-43 [ISSN: 11384026]: The Common Fisheries Policy, in its current form, comes to an end on 31 December 2002. In order to prepare its review, in March 2001, the European Commission presented its Green Paper on the future of the CFP, opening the debate on the scope and content of this Policy's reform. The present study figures within this debate. It attempts to reflect on the future of European Union's conservation and management of fishery resources Policy, which constitutes the backbone of the CFP. It proposes certain changes within the CFP, destined in our opinion, to favour the development of a sustainable fishing industry, which is both economically profitable and ecologically responsible. This paper is divided into two parts. In the first part, the internal aspect of this Policy and more specifically subjects such as waters access, exploitation control, conservation and control mesures are examined. In the second, its external aspect and the fisheries international agreements and the participation of the EC in the fisheries regional Organizations in particular. The main idea of this study is that this Policy's review should be in line the achievement of a complete integration of the Community fishing sector in the inter- nal Market and the norms relative to the fundamental liberties and free competition should also be applied to it. In summary, it would be based on the elimination of the existing repeals which impede the true achievement of the Fishery Common Market. Equally, it proposes to strengthen the role of the Community Institutions regarding the management of the internal and external fishing resources in accordance with the exclusive nature of the Community competences in that field.

Sobrino Heredia, J. M., López Veiga, E. C. and Rey Aneiros, A., *La integración del enfoque ecosistémico en la política pesquera común de la Unión Europea* (Tirant lo Blanch, Valencia, 2010) [ISBN: 9788498768855]: The present work addresses the design of a model for the reform of the Common Fisheries Policy of the European Union that integrates the ecosystem approach. This study is divided into two major sections. The first section is devoted to the examination of fisheries management in the International law of the sea, exposing, on the one hand, the evolution of the management of the fisheries, from a traditional management to a management focused on the ecosystems; and, on the other hand, the technical and scientific aspects surrounding the ecosystemic management of fisheries. The second section addresses the issue of fisheries management by the EU within the framework of the Common Fisheries Policy by focusing, firstly, on its evolution and on the achievements and difficulties it has encountered and, secondly, on a proposal ecosystem approach for a new Common Fisheries Policy.

Sobrino Heredia J. M. and Oanta, G. A., "The Sustainable Fisheries Partnership Agreements of the European

Union and the Objectives of the Common Fisheries Policy: Fisheries and/or Development?", 19 *Spanish Yearbook of International Law* (2015) 61-85 [doi: 10.17103/sybil.19.04]: The documents published by the European Commission within the framework of the latest Common Fisheries Policy reform include the "new" Sustainable Fisheries Partnership Agreements. This work analyses whether their inclusion reinforces the objectives of the Common Fisheries Policy by facilitating the development of a coherent and comprehensive external fishing policy, respectful with the international fisheries norms. In order to address it, this work examines, firstly, the European Union's fisheries treaty practice and, secondly, the changes introduced by the new Agreements regarding this practice and their compliance with the objectives of the Common Fisheries Policy.

Teijo García, C.,"Pesca y cooperación al desarrollo en el marco de las relaciones Unión Europea-ACP", 31 *Revista de Derecho Comunitario Europeo* (2008) 743-771 [ISSN: 11384026]: The interaction between the external dimension of the Common Fisheries Policy and the Development Cooperation Policy of the European Union has traditionally been considered problematic. Various analyses have pointed out that fisheries policy has frequently violated the mandate of Article 178 of the Treaty establishing the European Community, which compels EC to take into account development cooperation goals when it implements other policies. However, European institutions have promoted in recent years a process to improve the coherence of the Common Fisheries Policy with Development Cooperation Policy. This work makes an introductory analysis about this reform process in three basic dimensions: the new Fisheries Partnership Agreements, the growth of development projects on fisheries cooperation and, finally, the changes experienced by some commercial aspects that contribute to shape the relationship of EU-ACP on the fishing ground.

Vázquez Gómez, E. M., *Las Organizaciones internacionales de ordenación pesquera: la cooperación para la conservación y la gestión de los recursos vivos del alta mar* (Consejería de Agricultura y Pesca, Sevilla, 2002) [ISBN: 8484740587]: This work shows how the institutionalized cooperation constitutes the best instrument for the fulfillment of the obligation that every State has to cooperate to conserve and manage the living resources of the high seas and, consequently, to achieve the establishment of rational, sustainable and responsible fishing. The work has two parts: the first one is devoted to examining the scope to which the action of fishing organizations is limited and the International Law of the Sea to which they are subject. The second part analyzes the fishery management organizations themselves, with special attention to the main issues that arise in relation to current trends in international fisheries law.

(2) Non-living resources

Abad Castelos, M., *Las energías renovables marinas y la riqueza potencial de los océanos. ¿Un mar de dudas o un mar de oportunidades?* (Bosch, Barcelona, 2013) [ISBN: 8494143522]: From a universal perspective, marine renewable energies are still in a very embryonic stage. Even so, it can be expected that, if developed, multiple benefits could be achieved at the international level. The benefits are connected with the well-known triple dimension of sustainable development and can therefore be achieved in environmental, social, economic and political terms. First of all, its potential role in mitigating climate change must be highlighted. However, certain problematic aspects are also perceptible, as far as the environmental, social and economic aspects are concerned. With this in mind, this book examines the main legal aspects involved. Given that international law is a reference legal order in this field, the main objective is to examine its content and scope, as well as to identify possible gaps that may exist for the use of renewable energy from the seas and oceans. The conclusions reached are based on a vision favorable to the progressive expansion of the different marine renewable energies.

Abad Castelos, M., "Mar, energía y ordenamiento jurídico: seguridad y sostenibilidad como referentes ineludibles para la estrategia de España", in IEEE, *Documentos de Seguridad y Defensa 67*: Desafíos nacionales en el sector marítimo (2015) [ISBN: 9788490910344] 67-158: This paper examines the main issues of energy in relation to the sea, using the perspective of International law. The most important

implications of the participation of corporations in such sector, and also the international legal order on safety, security and sustainability are discussed. Both fossil energies and marine renewable energies are explored. In the case of hydrocarbons, oil and gas, an approach to the regulation of all possible operations is made to cover prospecting, exploring for and exploiting them, transporting and conducting of energy and the environmental protection in this regard, including prevention and action in case of oil spills and the responsibility triggered. With respect to marine renewable energies, the different types which can be harnessed from the marine environment and their current stage of deployment are also examined, besides the main benefits and challenges to overcome. It is concluded that the advantages clearly outweigh the disadvantages. While the latter are essentially economic, the former may be located in the three dimensions of sustainable development, ie. social, economic and environmental. In short, the strengths are connected primarily with benefits derived from reducing our energy dependence and the use of safer and cleaner energy, which directly impact positively on the reduction of gases that cause global warming and climate change mitigation.

Gutiérrez Castillo, V. L., and García Blesa, J., "The Environmental Protection Regimes Governing Maritime Renewable Energies in the EU and their Implementation in the Marine and Coastal Areas of the South of Spain", 17 *Spanish Yearbook of International Law* (2011-2012) [ISSN: 09280634]: The purpose of this paper is to review the configuration and point out the weaknesses of the main legal regimes of environmental protection of the Mediterranean Sea applicable to the implementation of marine renewable energies in the maritime and coastal areas of the EU. Renewable energy sources have become a strategic industry for Europe over the last years due, among other factors, to the need for finding cheap and clean energy sources. Within this context, marine renewable energies attract a lot of attention from the EU and several Member States. However, the development of this industry without an appropriate environmental protection and preservation policy, might well result in a rather negative impact on the affected marine ecosystems. On the other hand, the legal framework for the protection of the marine environment established by the EU, as well as other international legal regimes, seems to give much room for Member States priorizing economic objectives rather than environmental considerations.

Gutiérrez Espada, C., "Reflexiones sobre el aprovechamiento de los recursos del suelo y subsuelo del mar: de la plataforma continental a la zona de los fondos marinos", 4 *Anuario de Derecho Marítimo* (1986) 157-184 [ISSN: 02118432]. This article provides some remarks on the exploitation of the resources found on the continental shelf and the seabed. The author compares the regime on this matter under the 1958 Geneva Convention and UNCLOS, considering the developments introduced by the latter and the declaration of the seabed as common heritage of the mankind as positive. He concludes with some doubts about the feasibility of the treatment of the seabed and its resources as common heritage of mankind, given the (then) recent changes in the interests of the United States of America, the German Federal Republic, the United Kingdom, France, the Soviet Union and Japan, which constitues a real threat to the implementation of the UNCLOS provisions on this matter, in the author's view.

Martínez Pérez, E. J., "The environmental Legal Framework of the Development of Blue Energy in Europe", in Andreone, G., *The Future of the Law of the Sea. Bringing gaps between National, Individual and Common Interests* (Springer, 2017) 127-144 [ISBN: 9783319512730] The new energy ocean energy sources, they help reduce greenhouse gas emissions, they boost energy security, they favor industrial and technological developments, and they are a major source of jobs in high-unemployment areas. But they also face important challenges, such as the high costs of technology, the development of grid connections for renewable marine energy, and the issue we will address here, uncertainty over the environmental impact of the new installations and their compatibility with other maritime activities. So when projects of this kind are introduced, rigorous assessments of their environmental effects must be run to identify the project of protected projects areas, on plants and animals, and on other uses, such as navigation. These assessments must take account of EU law in the framework of biodiversity policy and integrated maritime policy, pay special attention to the rules of maritime spatial planning and marine strategy, and not overlook the international legal established by international environmental law and marine law.

(3) Marine environment and special protected zones

Bou Franch, V. E., Badenes Casino, M., 'La protección internacional de zonas y especies en la región mediterránea', 13 *Anuario Español de Derecho Internacional* (1997) 33-129 [ISSN: 0212-747]. The Mediterranean Sea is the biggest semi-enclosed sea in the world. It separates and connects Asia, Africa and Europe, which are regions with very different fishing interests, and this has an impact on the exploitation of living resources therein. Fishing is essential for its coastal States and for the economy of the Mediterranean region. This article aims at examining how those resources are regulated in international fisheries and environmental law. In the first part of this work, the authors analyse all the relevant international treaties on environmental law, both of a global and a Mediterranean scope. In the second part, the authors examine the regulation of fisheries and protection of marine resources in the Mediterranean sea, noting an increasing environmental awareness in those instruments. The authors conclude summarising the evolution of the regulation of the exploitation of living resources in the Mediterranean sea towards a more sustainable approach.

Carreño Gualde, V., *La protección internacional del medio marino mediterráneo* (Tecnos, Madrid, 1999) [ISBN: 97884309331136]: The need to protect the marine environment through common actions aimed at preventing and eliminating pollution is one of the fundamental concerns of the international community. As a consequence of its special vulnerability, this need is of particular intensity in the Mediterranean Sea. In this sense, this work is dedicated to the study of the international legal protection of the mediterranean marine environment. In the first place, it examines the universal norms applicable to the protection of the sea. Secondly, it pays particular attention to the legal results achieved by the cooperation of coastal States within the framework of the Mediterranean Action Plan. The research is completed, thirdly, with the analysis of the most relevant legislative practice by the coastal States, and especially the Spanish practice.

Conde Pérez, E., "El Derecho Internacional ante el proceso de cambio climático en el Ártico. Especial referencia al Derecho del Mar", in Ministerio de Defensa, *Documentos de Seguridad y Defensa* 58: Energía y clima en el área de la seguridad y la defensa (Ministerio de Defensa, Madrid, 2013) [ISBN: 9788497818667] 175-196: As a result of new opportunities for explotation derived from the climate change, the Arctic region has become a focus of geostrategic interest where the sovereign interests of the coastal States and those of the international community as a whole converge. In the absence of a specific legal regime for the area - widely claimed by the doctrine -, Public International Law, and especially the Law of the Sea, is the legal tool that will serve to harmonize these interests. This work analyses the opportunities and challenges that climate change means to the Arctic region from the particular point of view of the Law of the Sea. In this sense, it examines the sovereign aspirations for an expanded continental shelf, the debate about the legal status of the Arctic ocean passages or the rights and duties of States in the exploitation of its resources.

Fernández Beistegui, C. F., "La preservación del medio marino en el nuevo Derecho del Mar", 7 *Anuario de Derecho Marítimo* (1989) 143-179 [ISSN: 02118432]. This articles focuses on the preservation of marine environment in the new law of the sea. The author introduces the main shortcomings of international law on the matter and then analyses the developments under UNCLOS, focusing on the competences of the coastal states in their internal waters, their territorial sea and in their EEZ, as well as on the competences of flag states and port states. He concludes that, while the UNCLOS has provided a useful legal framework, some of its provisions are ambiguous and optional, depending largely on the will of the states.

Fernández Beistegui, C. F., "Las zonas marinas especialmente sensibles (ZMES): las incertidumbres de las medidas previstas para su protección", 21 *Anuario de Derecho Marítimo* (2004) 89-119 [ISSN: 02118432]. In this article, the author examines the regime on Particularly Sensitive Sea Areas (PSSAs). For that purpose, he analyses their origin and evolution within the context of the IMO, as well as the ecological, socioeconomic and cultural, and scientific criteria for the designation of PSSAs, which the author finds ambiguous given its alternative formulation in the 2001 Guidelines. The author examines the PSSA protection measures, focusing on the possibility of their establishment by the coastal state or the IMO, depending on the location of the PSSA. Finally, the author provides a thorough analysis of the

competences of the IMO and the coastal states over the PSSAs before concluding the need for PSSAs and the positive impact of the intervention of the IMO on the matter.

García Rubio, M. P., and Álvarez González, S., *La Responsabilidad por los daños causados por el hundimiento del Prestige* (Iustel, Madrid, 2007) [ISBN: 9788496717152]: The responsibility arising from the damage caused by the sinking of the Prestige vessel is multiple and affects various subjects. From a multidisciplinary perspective, the present work addresses, on the one hand, the typology of the damages caused and the different regimes of repairing them. On the other hand, the work also addresses other aspects related to the prevention of this type of catastrophes, both at the community and national and regional levels. The result is a plural work that, from different points of view, analyzes the effectiveness of the system of prevention and repairation of discharges of hydrocarbons in the sea.

Jorge Urbina, J., "Prevención y control de la contaminación causada por buques en el mar territorial: competencias del estado ribereño y contribución de las organizaciones internacionales", 60-1 *Revista Española de Derecho Internacional* (2008) 71-95 [ISSN: 00349380].: The coastal State may adopt the territorial sea in a series of measures to preserve the marine environment that allows it to act pre-emptively before the risks of pollution from ships navigating off its coast. However, also in this space maritime is noted the tension between the protection of the marine environment and freedom of navigation recognized all foreign ships through the right of innocent passage. Thus, some state practice - for the time being not significant- intended to rid the coastal State of the restrictions imposed by UNCLOS, especially in the regulation of the right of innocent passage, to prevent the navigation of any ship potentially dangerous before that the pollutant discharge has occurred. Despite this practice, the prevention of vessel-source pollution must be the result of concerted action by all States, especially through international organizations such as the IMO or the EU, which they are playing a very important role in this area. Only through international cooperation will be achieving this goal in an effective way.

Jorge Urbina, J., Lirola Delgado, I. and Pueyo Losa, J. A., "En torno a la revisión del régimen jurídico internacional de seguridad marítima y protección del medio marino a la luz del accidente del Prestige", 55-1 *Revista Española de Derecho Internacional* (2003) 43-78 [ISSN: 00349380]: The Prestige's accident is the last example of a long series of marine accidents that have affected the cost of Galicia with very serious environmental and socio-economic consequences. For this reason, it raises again the question concerning which measures can be adopted by the coastal State in order to control the navigation of substandard ships in their maritime spaces, particularly in the Exclusive Economic Zone, with the purpose of preventing possible acts of marine pollution. In the current international legal frame represented by the 1982 United Nations Convention on the Law of the Sea and in face of the reiterated passivity of the Flag State which is favored by the existence of Flags of convenience, the scarce powers recognized to the coastal State within its EEZ do not allow him to carry out an effective task of control and prevention of all the risks posed by the navigation of substandard ships in front of its coast. This happens, as the Prestige's case clearly shows, in spite of the existence of Port State control mechanisms established at a regional level, such as the Paris MOU or the European Union. In this situation, it seems necessary to proceed to an effective application of all the possibilities offered by the 1982 Convention to the coastal State, like the establishing of special protection areas or marine traffic systems. But, mainly, the Prestige's casualty raises the opportunity of proceeding to a revision of the EEZ legal régime that could grant the coastal State with wider control competences to protect its marine environment. This proposal which is supported by the existence of an important state practice, should be developed through agreed initiatives and cooperation in the regional frame. Also, all these measures should be completed with a strengthening of the Port State that allows this figure to take advantage of all the possibilities it offers.

Jorge Urbina, J., Ponte Iglesias, M. T., (Coords.), *Protección de intereses colectivos en el derecho del mar y cooperación internacional* (Iustel, Madrid, 2012) [ISBN: 9788498902082]: The marine environment constitutes a vast natural space in which, due to its own characteristics, not only a diversity and

heterogeneity of state interests converge, but also a set of collective interests that have been promoted and protected in the current international maritime legal order. This was fully reflected in the United Nations Convention on the Law of the Sea of 1982, in which the Preamble reminds us that "the problems of ocean space are closely interrelated and need to be considered as a whole". That is why, in this Constitution for the Oceans, state powers and activities carried out in the seas and oceans are regulated in order to ensure the protection of such collective interests, such as freedom of navigation, conservation of marine living resources, preservation of the marine environment, maritime safety, etc. However, problems and threats affecting such interests have increased and diversified and require political and legal responses based on international cooperation, at the universal and regional levels, to address the phenomenon of overfishing, illegal, unreported and unregulated fishing, marine pollution, climate change or certain criminal activities such as piracy. In all these cases, as discussed in the various works included in the book, collaboration between States remains critical to achieving peaceful and durable solutions to the challenge of ensuring proper governance of the seas and oceans.

Juste Ruiz, J., "El vertimiento de desechos radioactivos en el mar: aspectos de Derecho Internacional", *Cursos de Derecho Internacional de Vitoria-Gasteiz* (1985) 209-256 [ISBN: 847585060X: This paper examines the international law aspects regarding the dumping of radioactive waste at sea, a complex and multidimensional issue on which there are serious disparities between the criteria of States. To do this, the work examines, first, the international norms on the subject, especially included in the 1972 London Convention of the Prevention of Marine Pollution of Dumping of Wastes and other Matter. Secondly, it analyzes the problem of toxic discharges in the High Seas and their evacuation from the seabed. Finally, the study addresses the position of Spain around this matter and its diplomatic action.

Juste Ruiz, J., "El accidente del Prestige y el Derecho internacional: de la prevención fallida a la reparación insuficiente", 55-1 *Revista Española de Derecho Internacional*, (2003) 15-42 [ISSN: 00349380]: The environmental catastrophe caused by the oil tanker 'Prestige' once again demonstrates the international dimensions of this type of maritime accidents. This catastrophe shows that the existent precautionary measures are not entirely effective in avoiding the risks of oil tanker accidents and also that the damages caused by them are not always sufficiently repaired. International and domestic legislations related to navigation sometimes allow situations that create excessive risks for the safety of coastal States in the case of ships transporting hazardous substances. Those overly permissive rules are the origin of the problems that we suffer today, in consequence, it is necessary to achieve a reform of international regulations and domestic laws that ensure that this kind of accidents will never happen again.

Juste Ruiz, J., "Compensation for Pollution Damage caused by Oil Tanker Accidents: From 'Erika' to 'Prestige'", 1 *Aegean Review of the Law of the Sea and Maritime Law* (2010) 37-60 [ISSN: 18649610]: The international legal regime for repairing oil pollution damages works quite efficiently in case of minor oil spills. However, the accidents of "Erika" and "Prestige" vessels disclose the serious implementation gaps affecting the international civil liability regime when applied to major marine casualties producing extensive pollution damage. In such cases, the ceilings for compensation are manifestly too low and most of the pollution damage provoked is not remedied. Recent developments by national and European Courts relating to the "Erika" accident have made progress towards a more comprehensive compensation of pollution damage. But, in the "Prestige" case, the United States Courts have taken a more conservative stand with respect to actions brought by Spain against the Classification Society American Bureau of Shipping.

Juste Ruiz, J., "La directive européenne sur la sécurité des opérations pétrolières et gazières en mer", 1 *Revue Juridique de l'Environnement* (2014) 23-43 [ISSN: 03970299]: Following the accident at the Deepwater Horizon drilling platform in the Gulf of Mexico in 2010, the European Union adopted the directive 2013/30/EU of June 12, 2013 on safety of offshore oil and gas operations and amending directive 2004/35/EC. The aim of this work is to analyse in detail this normative. Its main purpose is to prevent major accidents and limit its consequences by establishing minimum safety requirements which might

also indirectly contribute to improving the environmental and health protection of workers in oil operations at sea. The directive also amends directive 2004/35/ EC of 21 April 2004 on environmental liability to make it applicable at sea. Overall, Directive 2013/30/EU make a step forward in safety of offshore oil and gas operations. But the rules established are neither clear nor complete: they contain only obligations declined in terms of soft law which do not apply to major accidents that may occur on the high seas in the marine regions of the Union or on waters outside the Union.

Juste Ruiz, J., Bou Franch, V. E., (Dirs.), Sánchez Patrón, J. M., (Coord), *Derecho del mar y sostenibilidad ambiental en el Mediterráneo* (Tirant lo Blanc, Valencia, 2014) [ISBN: 9788490531785]: This book analyzes the recent developments in the Law of the Sea to promote a sustainable exploration and exploitation of marine resources and the protection and preservation of the seas and oceans, taking particular account of the situation in the Mediterranean Sea. These developments are occurring at a very rapid pace thanks to the action of international organizations and programs, such as the United Nations, the International Maritime Organization and the UNEP Regional Seas Program, which have devoted particular attention to issues of sustainability and governance of the sea. The European Union is also developing a very ambitious maritime policy and plays an important role in the Mediterranean Sea.

Martínez Pérez, E. J., *El desarrollo sostenible como justificación de las acciones unilaterales para la conservación de los recursos marinos* (Ministerio de Agricultura, Pesca y Alimentación, Madrid, 2004) [ISBN: 8449106192]: The purpose of this work is to examine the legality of unilateral actions in the light of international law in the field of sustainable development. To do this, the book dedicates its first part to learn about the different types of coercive measures that come with each of the unilateral manifestations. Thus, the first chapter focuses on trade restrictions and their compatibility with GATT / WTO provisions, and the second chapter addresses the issue of the use of force in the framework of management and enforcement measures for the conservation of living resources in the high seas. In the second part, the excuses alleged by the States to avoid responsibility for their actions are presented, paying special attention to the impact that the concept and the principles that serve as a basis for sustainable development exercise, and that will unquestionably delimit its scope. Hence the third chapter addresses the content and legal nature of each of these principles in the context of the conservation of the living resources of the sea, and, finally, in the fourth chapter, the configuration of these justifications in the field of sustainable development is analyzed.

Meseguer Sánchez, J. L., *Derecho internacional de los ecosistemas marinos* (Marcial Pons, Madrid, 2011) [ISBN: 9788429016512]: This work analyses the Law of marine ecosystems from a multidisciplinary perspective of the new principles of "soft law" for the conservation and integral management of the resources of the marine environment: principles of the sustainable and responsible fisheries, precautionary measures, marine biodiversity and the marine ecosystem approach. The book includes an introduction about the concept and nature of "soft law" and three parts that examine, respectively, the Code of Conduct for Responsible Fisheries; the International Plans of Action developed by FAO; and the United Nations General Assembly Resolutions on Fisheries.

Sánchez Ramos, B., "Nuevos avances en el acceso a lugares de refugio: las directrices sobre lugares de refugio para buques en peligro adoptadas por la Organización Marítima Internacional", 8 *Revista Electrónica de Estudios Internacionales* (2004) 1-15 [ISSN: 16975197]: Although International Maritime Organization had already adopted several Conventions with the aim of preventing the pollution of the marine environment by tankers, the latest accidents of the Erika, Castor and Prestige vessels have highlighted the need to take measures regarding access to places of refuge for ships in distress. The present work focuses on the study of access to places of refuge both from a general perspective, through the analysis of the provisions of International Law of the Sea and the recent IMO Guidelines, as well as from a regional perspective, reflected in the dispositions that the European Union has adopted in the matter, with a special consideration to the action of Spain.

(4) Marine scientific research

Casado Raigón, R., "La investigación científica en los espacios marinos reconocidos por el Derecho internacional", 68-2 *Revista Española de Derecho Internacional* (2016) 183-206 [ISSN: 00349380]: This work studies the legal regime of marine scientific research applicable to the different maritime areas recognized by international law declared in the United Nations Convention on the Law of the Sea. The Convention does not define what it means by marine scientific research, but from its Part XIII can be deduced a unitary and broad concept, applicable in principle to activities not expressly contemplated and to those that have an industrial or commercial purpose or involve the exploration and exploration of the marine environment. International practice, moreover, confirms the principle of the consent of the coastal State, which is not necessarily express, for the conduct of MCI activities by other States or by the competent international organizations. This does not mean that all the provisions of Part XIII declare or crystallize general international law and that they are not exempt from requiring development because of their insufficient gaps, particularly those relating to scientific research in areas beyond national jurisdiction.

Conde Pérez, E., *La Investigación científica marina: régimen jurídico* (Marcial Pons, Madrid, 1998) [ISBN: 8472485269]: This work raises the obstacles that have been erected to the free marine scientific research, with a particular interest in finding ways of agreeing between interests in presence. The author proposes a re-reading of part XIII of the United Nations Convention on the Law of the Sea in order to impose the principles of notification and fulfillment of certain additional conditions for the development of the research activities.

Conde Pérez, E., "Retos jurídicos de las actividades de bioprospección marina: especial referencia a las zonas polares", 68-2 *Revista Española de Derecho Internacional* (2016) 253-275 [ISSN: 00349380]: Marine bioprospecting activities open immense possibilities to develop products in multiple areas that affect our daily lives. However, the joint implementation of various legal instruments - the United Nations Convention on the Law of the Sea, the Convention on Biological Diversity and related instruments - highlight the existence of legal gaps in their regulation. This work refers to marine bioprospecting activities in the polar spaces - Arctic and Antarctica - in order to establish a comparison that yields very different results - with serious problems of concept in one case (Antarctica) and with important national solutions and regional ones in the other (Arctic) - which can serve as a basis for addressing the issue constructively in the future.

Pérez González, M., "La investigación científica marina y el nuevo derecho del mar desde la perspectiva española", 5 *Anuario de Derecho Marítimo* (1987) 45-96 [ISSN: 02118432]. In this article, the author discusses the role of marine scientific research after UNCLOS from a Spanish perspective. He first introduces the importance of marine scientific research as an activity with legal and political consequences, and as a kind of freedom, subject, however, to some limits and state interests. Afterwards, the author analyses the legal regime on marine scientific research before and after UNCLOS, and tries to foresee some changes of international practice on this matter. This article includes some considerations on Spanish legal and conventional practice. The author concludes that international practice is critical in order to establish the scope and the impact of the developments represented by UNCLOS, which, in the present case, indicates that the UNCLOs provisions on the subject have been implemented on the whole.

(5) Underwater cultural heritage

Aznar Gómez, M. J., *La protección internacional del patrimonio cultural subacuático con especial referencia al caso de España* (Tirant lo Blanch, Valencia, 2004) [ISBN: 8484561097]: Underwater cultural heritage includes submerged remains of entire cities, harbor and docks, fishing gear and thousands of wrecks scattered across the seas and oceans of our planet. This heritage of Mankind has not until recent years received the doctrinal attention it deserves nor the normative protection that its importance for all peoples demands. Current international law can not remedy, today, the cacophonous national legislation that States have

adopted for this purpose. Thus, UNESCO adopted the Convention on the Protection of the Underwater Cultural Heritage on 2 November 2001. This Convention, despite its defects, presents an overall treatment which, above all, adheres to the strictest archaeological protocols in the protection of underwater cultural heritage. Together with the analysis of all these issues, this work aims to highlight the Spanish case and the threats that surround its underwater cultural heritage.

Aznar Gómez, M. J., 'Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage', 25 *The International Journal of Marine and Coastal Law* (2010) 209–236 [ISSN: 09273522]: Two sets of quite related judicial decisions in the US, regarding in rem actions directed at several Spanish State shipwrecks, have completed a new legal framework that must be kept in mind not only for treasure-hunter companies and any other persons trying to gain any right over the wrecks of sunken State vessels, but also for States trying to seek a clear interpretation of the legal status of those vessels in current international law. These decisions might complete the new legal layout given by the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage, in particular giving full meaning to the 'without prejudice' clause included in its Art. 2(8) relating to sovereign immunities and State vessels; they might also ease future ratification of that Convention by reluctant States like the United Kingdom, France or the United States.

Aznar Gómez, M.J., 'Patrimonio cultural subacuático español ante tribunales extranjeros: los casos de la Mercedes y del Louisa", in 19 *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* (2015), pp. 47-77: Several key cases discussing the question of the protection of underwater cultural heritage have occurred in Spain in the last decade. In particular, two cases —the plundering of the *Mercedes* frigate in front of the Portuguese Algarve and the plunder from the *Louisa* ship in the Bay of Cadiz— have led to a renewed interest in protecting an archaeological legacy that has been neglected in our country. Both cases have been judicially discussed: the first before the courts of the United States of America and the second before the International Tribunal for the Law of the Sea. In both cases judicial decisions have been favourable to Spain, confirming in particular two issues —the principle of immunity of sunken state vessels and the sovereign jurisdiction of the coastal State over its territorial sea in the protection of underwater cultural heritage— which reinforce the Spanish position in that particular area. However, further political and legislative efforts are still needed to significantly improve the protection of underwater cultural heritage by Spain, within and beyond its waters. This paper tries to address all these questions.

Bou Franch, V., *La flota imperial española y su protección como patrimonio cultural subacuático* (Minim, Valencia, 2005) [ISBN: 8496033376]: After an introduction to the problems posed by the international protection of the remains of the Spanish imperial fleet as underwater cultural heritage, this book has four parts. The first part examines the consideration of the Spanish imperial fleet as underwater cultural heritage. The second part analyzes the current International Law and the protection of the underwater cultural heritage. The third part studies Spanish law and practice on warships and other ancient and sunken state ships. The fourth and last part deals with the future perspectives of underwater cultural heritage.

Carrera Hernández, F. J., *Protección internacional del patrimonio cultural submarino* (Universidad de Salamanca, Salamanca, 2005) [ISBN: 8478005226]: The aim of this work is to offer an analysis of the problems posed by the extraction and protection of underwater cultural heritage from the perspective of Public International Law. The book is structured in three chapters. The first one exposes the current legal regime in relation to the underwater cultural heritage, which is scarce and shows the need for the entry into force of a specific agreement on the matter. The second chapter analyzes the issue in depth, in particular from the perspective of the Jamaica Convention. Finally, the third chapter examines the content and implications of the UNESCO Convention of November 2nd, 2001.

Espósito, C. and Fraile, C., 'The UNESCO Convention on Underwater Cultural Heritage: A Spanish View', in David D. Caron and Harry N. Scheiber (eds.), *Bringing New Law to Ocean Waters* (Brill, Leiden, 2004) 201-223: This contribution offers an analysis of the 2001 UNESCO Convention on the Protection of the

Underwater Cultural Heritage. The first part describes the context and origin of the UNESCO Convention. It briefly introduces international law on the protection of underwater cultural heritage as it stands in the United Nations Convention on the Law of the Sea and provides a brief account of the negotiations of the UNESCO Convention, its participants, and the values and interests at stake. Part II contains a general assessment of the UNESCO Convention, with an emphasis on certain particularly controversial concepts, such as the definition of underwater cultural heritage, the status of state vessels, the relationship between UNCLOS and the UNESCO Convention, the regimes of jurisdiction and protection of underwater cultural heritage in the different maritime zones, and the prohibition of commercial activities. The chapter concludes with an appreciation of the general exercise and its potential efficacy.

García García-Revillo, M., and Agudo Zamora, M. J., "Underwater cultural heritage and submerged objects: conceptual problems, regulatory difficulties. The case of Spain", 14 *Spanish Yearbook of International Law* (2008) 1-33 [ISSN: 09280634]: The entry into force of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage means certainly good news for the protection of this part of the legacy of past generations. A great deal still remains to be done, however. 2001 Convention has a limited personal and material scope of application. In its absence, the international regime applicable to this kind of heritage spreads out among a number of heterogeneous instruments focused on diverse topics. One of the problems that the said diversity and heterogeneity causes is the variety of terms and definitions used by it. On the other hand, the implementation of a series of instruments so different becomes particularly complex when referring to States that have partially transferred their competences "up" to a regional integration organization, like the European Union, and "down" to decentralized territorial units, like the so-called Autonomous Communities. To this respect, the case of Spain provides with a good example of such difficulties.

Juste Ruiz, J., "La protección internacional de los hallazgos marítimos de interés histórico cultural", 20 *Anuario de Derecho Marítimo* (2003) 63-99 [ISSN: 02118432]. This article focuses on the international regime of findings of historical and cultural relevance at sea. The author approaches the subject by distinguishing between three regimes: its regime under maritime law, its regime under the law of the sea, and its regime under the 2001 UN Convention on the protection of the underwater cultural heritage. He concludes that the latter is an important step in the protection of unterwater cultural heritage and has filled the lacunae existing in international law, even though it has not achieved a general consensus on the matter.

(6) Security issues

Carreño Gualde, V., "Suppression of the Illicit Traffic in Narcotic Drugs and Psycotropic Substances on the High Seas: Spanish Case Law", 4 *Spanish Yearbook of International Law* (1995-1996) 91-106 [Doi: 10.1163/221161296X00037]: This work has two parts. The first one examines the general regulatory framework relating to the suppression of the Illicit traffic in drugs on the High Seas: basically, the United Nations Convention on the Law of the Sea and the Convention against illicit traffic in narcotic drugs and psycotropic substances of 20 Decembre 1988. In the second part, the work examines the Spanish practice, both conventional and case-law practice. Conventional practice shows that international cooperation in this field, both general and regional, has been developed by upholding the application of the principle of exclusive jurisdiction of the flag State over its vessels, which exercise freedom of navigation on the High Seas, since prior consent is a necessary requisite for legitimating the intervention of third states with regard to vessels in its sea area. In orther to achieve more efficiency in the supression of the ilicit traffic of drugs in the high seas, nonetheless, some strategies have been developed, particularly in the conventions drawn uo in the regional and bilateral spheres.

Espaliú Berdud, C., "Las solicitudes de pronta liberación de buques y de sus tripulaciones ante la Corte Internacional de justicia: compatibilidad del artículo 292 de la CNUDM y los textos reguladores de la actividad de la corte", 8 *Revista de Estudios Jurídicos* (2008) 79-106 [ISSN: 1576124X]: The Article 292 of

the United Nations Convention on the Law of the Sea foreseen that the questions relating to the prompt release of vessels and their crews may be submitted to some international jurisdictions, among others the International Tribunal for the Law of the Sea and the ICJ. Nevertheless, in reality all of them have been submitted to the ITLOS. The article tries to find out whether the provisions of Article 292 UNCLOS and the provisions which regulate the functioning of the ICJ are incompatible. The author arrives to the conclusion that only Article 34 of the ICJ Statute impedes the submission of prompt release questions to the ICJ by international organisations. For the rest, except decisions based on political grounds, there is nothing which bars the possibility to submit questions of prompt release to the ICJ.

Lirola Delgado, I., "La represión del tráfico ilícito de drogas en Alta Mar: cooperación internacional y práctica estatal", 12 *Anuario Español de Derecho Internacional* (1996) 523-576 [ISSN: 02120747]: The aim of this paper is to examine the international norms aimed at suppressing illicit drug trafficking on the high seas, seeking the principles and mechanisms on which they are articulated and considering their adequacy to the efficiency requirements that a criminal activity of this size would require. Thus, taking as a starting point the general aspects of the legal regime of the high seas, this work analyzes first the international cooperation at the multilateral and bilateral levels, focusing the latter on the bilateral cooperation developed by the US and Spain; of which some manifestations of unilateral practice are also examined.

Sobrino Heredia, J. M., "La protección marítima, nueva dimensión de la política marítima de la Unión Europea", 27 *Revista de Derecho Comunitario Europeo* (2007) 417-462 [ISSN: 11384026]. The maritime insecurity and the criminality at sea have increased, as it happens, for instance, with the pirate attacks, the illegal immigration and the menace of terrorist acts. In the European Union, the heterogeneity of the menaces derived from these illicit acts, together with the diversity of national systems of risks management, intensifies the danger and hinders the creation of a space for the maritime security. Before this situation it is necessary a common reply to these risks. In this sense, the maritime policy of the European Union slightly introduces a small progress in this matter. This research aims to analyze the transversal nature of the main risks and the need to adopt a Communitarian reply inspired by the subsidiary principles, loyal cooperation, complementarity and articulation between the national, communitarian and intergovernmental policies, in order to improve the maritime protection.

Sobrino Heredia, J. M., (Dir.), *Sûreté maritime et violence en mer* (Bruylant, Paris, 2011) [ISBN: 9782802730170]: With the 1982 United Nations Convention on the Law of the Sea, the States Parties wanted to establish a new legal order for the promotion of the peaceful uses of the seas and oceans. A quarter of a century later, it is clear that, unfortunately, that did not happen. Indeed, crime at sea has increased and become more frequent, often manifesting itself in forms not foreseen by the drafters of this Convention. Thus, growing maritime insecurity emerges, arising not only from natural hazards or caused by shipping, but also derived from intentional illicit actions. Association internationale de Droit de la Mer (ASSIDMer), aware of the relevance and importance of the problems related to violence at sea, has selected for its Third Ordinary Symposium held in La Coruña (Spain) in 2009, the theme Maritime security and violence at sea. The work focused on three topics: illegal trafficking of persons and transnational organized delinquency; terrorism and maritime piracy; and protection and safety in maritime transport. This volume contains the work presented on this occasion by a variety of jurists and professionals in the field from several countries and institutions. Each of its three parts is composed of a general report, reports on national measures as well as those of the European Union and international organizations, supplemented by reports and by a conclusion of the meeting. All of this was also enriched by a synthesis of the reflections that took place during the round table in which the judges of the International Tribunal for the Law of the Sea took part, and by general conclusions.

Sobrino Heredia, J. M., "Vulnerabilidad del espacio marítimo en la UE: hacia una política de protección marítima en el marco de la política marítima integrada", in de Tomás Morales, M. S., (Coord.), *Retos del derecho ante las nuevas amenazas* (Dykinson, Madrid, 2015) [ISBN: 9788490852576] 29-52: More than 70% of the EU's external borders are maritime. Also, on commercial terms or regarding shipbuilding, port

activities, energy production or tourism, the seas and oceans are one of its main sources of wealth. The importance of the sea to the EU, together with the vulnerability of maritime areas and augmented by a diversity of risks and threats, has led the European authorities to introduce the issue of maritime security and safety into its Integrated Maritime Policy. In this context, the EU has been developing a Maritime Safety Strategy (which was finally approved in 2014). This paper presents this strategy. Firstly, the paper examines the strategic maritime interests of the EU. Then, it addresses the risks and threats that may affect the European maritime space. Finally, the work analyzes the measures and instruments that could remedy or mitigate the vulnerability of the UE maritime space.

(7) Piracy and terrorism at sea

Espaliú Berdud, C., "The crime of maritime piracy in the 2010 reform of the Spanish Penal Code", 16 *Spanish Yearbook of International Law* (2010) 55-93 [ISSN: 09280634]: In 2010, the Spanish Criminal Code has been reformed in order to include again the crime of maritime piracy after the recrudescence of this phenomenon in the waters of the Horn of Africa. Due to the fact that Spain is a maritime country, the internal regulation against piracy is ancient and rich. This crime was already described in the Siete Partidas (Seven-Part Code), the Castilian statutory code compiled during the reign of Alfonso X of Castile (1252–1284), and has been punish at least from 1801, by an Order of the King Carlos IV consecrated to the regulation of Privateering. Later, in the epoch of the codification, it starts being included usually in the Criminal Codes, but this trend broke with the absence of Piracy in the Criminal Code of 1995, because it had stopped being frequent in practice. The historical analysis of all this regulation demonstrates that Spanish Law has always recognized the nature of crime against the law of nations of Piracy and, at the moment of typifying and punishing it, has transposed the universal competence of jurisdiction that was conferred by Public International Law. The 2010 reform consists in the introduction of two new articles in the Criminal Code: in the first place, Article 616 ter, which possesses a very wide material, spatial and personal scope, allowing to chase all kinds of acts of violence or depredation in the sea against the ships and platforms, persons or goods on board, with independence of the nationality of the authors and of the victims, of the maritime space and nationality of the craft or platform where they have been committed, or of the motivation that has stimulated the authors. With such a wide scope, the recent regulation answers correctly to the new reality of the piracy, which frequently is carried out in the territorial waters of failed States, or that is difficult to distinguish of the maritime terrorism when the pirates are nothing more than a link of a criminal chain formed with political purposes. In the second place, another article has been included, 616 quáter, which does not have very much sense regarding to the fact that it typifies and penalizes as piracy conducts that should be considered to be rather like constitutive of the crimes of resistance, disobedience or attempt on the authority or its agents typified in other chapters of the Criminal Code.

Espaliú Berdud, C., "La operación Atalanta de la Unión Europea en el marco de la lucha contra la piratería marítima", 79 *Revista de las Cortes Generales* (2010) 103-159 [ISSN: 02130130]: The international community has been trying to remedy for almost two decades the situation in Somalia. In recent years, it has reacted face to the problem of piracy with the instruments provided for in international law. However, those instruments have proved to be ineffective. The aim of this work is to deepen into the role played by the European Union and some of its Member States in particular at providing new legal and military solutions to the phenomenon of maritime piracy, both within the framework of international and UE legal order. The work analyses, firstly, the evolution of the treatment of piracy throughout history in order to present its current regulation. Secondly, it examines the fight against piracy in general, and within the framework of the EU legal order, both at the supra-state level and in the domestic law. Finally, the paper focuses on various actions of international organizations aimed at eradicating piracy in the specific case of Somalia.

Juste Ruiz, J., "Piratería en aguas somalíes: reacción internacional y derecho español", in Aznar Gómez, M. J., (Coord.) and Cardona Llorens, J., (Ed. lit.), *Estudios de derecho internacional y de derecho europeo en*

homenaje al profesor Manuel Pérez González. Vol. 1 (Tirant lo Blanch, Valencia, 2012) [ISBN: 9788490047897] 733-758: Maritime piracy has recently shown signs of a permanent vitality in particular in some areas of the planet that are visited by Spanish ships. In the face of the dangers of this new challenge for international maritime security, it has been established a universal and regional framework to prevent and fight maritime piracy and armed robbery at sea. In general, it can be said that the results of military actions undertaken under the auspices of the competent international organizations and organisms have been relatively effective and have contributed to containing the rise of piracy in some particularly turbulent regions. However, the mechanisms established in domestic legal systems have been much less effective. The present work examines the international regulation regarding the repression of the crime of piracy; the international response to stop piracy activities on the coast of Somalia, especially through international and regional cooperation; and the provisions of the Spanish legal system.

López Lorca, B., *La piratería y otros delitos contra la seguridad de la navegación marítima* (Tirant lo Blanch, Valencia, 2015) [ISBN: 9788490860465]: This book focuses on the analysis of the regulation of the different manifestations of violence at sea that affect the safety of maritime navigation, paying special attention to the crime of piracy insofar as this criminal activity constitutes at present the principal threat to this legal good. It is an articulated investigation on a criminological, international juridical and criminal-legal analysis. The opportunity of this work is underlined by the participation of the Spanish courts in the international cooperation strategies for the prevention and repression of piracy (Alakrana case, Patiño case, Izurdia case), as well as the need to solve the interpretative problems posed by the offences introduced by the legislator in the criminal code reform in 2010.

López Rueda, F. C., "Piratería marítima, terrorismo y figuras afines", 29 *Anuario de Derecho Marítimo* (2012) 55-123 [ISSN: 02118432]. In this article, the concept and law on piracy, terrorism and other similar activities are analysed. The author first describes the historical evolution of piracy since ancient Roman times, drawing the conclusion that it is linked to business and commercial activity. He then establishes the objectives and methodology of his work, and analyses the situation in modern times and the strategies used in national and international law to fight against this phenomenon. Afterwards, the author studies the context of the topic in international law and the terminology and the concept of piracy both in national and international law. He then analyses the distinction between piracy and other legal concepts, such as crimes against maritime security, boarding and terrorism. The author then proceeds to analyse the regulation of piracy under UNCLOS, the SUA Convention, the Convention against the taking of hostages, the law of the European Union and some bilateral and multilateral international agreements. The author continues by offering an analysis of the Spanish criminal and administrative law on the subject, and finishes with some considerations of private international law before introducing his conclusions on piracy. Those conclusions are the absence of an exclusive concept of piracy, the multidisciplinary approach of international actors to the subject, the development of national law against piracy, the existence of problems of jurisdiction and the identification of applicable law, the lack of uniformity in international law and the need for an international court with jurisdiction over piracy crimes committed on the high seas.

Oanta, G. A., "The Legal Treatment of Maritime Piracy Carried Out by the Spanish Legislator", *Insecurity at Sea: Piracy and Other Risks to Navigation* (Ed. Francesco Giannini & Figli S.P.A., Naples, 2013) [ISBN13: 9788874316793] 123-135: Traditionally, maritime piracy has come and gone into the Spanish legal system and its classification has caused major legal problems in Spain, especially in recent years. The present study is divided into two main parts: In the first part, it addresses the legal regulation of maritime piracy in Spain before the reform of its Criminal Code in 2010 and which legal problems in Spain caused the arrest of the persons responsible of the hijacking of the fishing vessel Alakrana. In the second part, it analyses the today legal norms regulating maritime piracy in the Spanish legal System as well as its more direct consequences.

Rodríguez Villasante y Prieto, J. L., "Aspectos jurídico-penales del crimen internacional de piratería", in

Castillejo, R., (Ed.), *La persecución de los actos de piratería en las Costas Somalíes* (Tirant lo Blanch, Valencia, 2011) [ISBN: 97884998598736] 113-144: The present work examines the main criminal legal problems posed by the repression of international piracy crime (problems related to the definition of crime itself or with the criteria of attribution of jurisdiction, among others) and proposes possible solutions, both regionally and internationally through international standards. Among the latter, the conclusion of an agreement on the matter, the modification of the United Nations Convention on the Law of the Sea, the creation of an international criminal court "ad hoc" or the incorporation of the crime of piracy in the statute of the International Criminal Court.

Sánchez Patrón, J. M., "La legítima defensa ante la piratería marítima", 28 *Revista Electrónica de Estudios Internacionales* (2014) 1-39 [Doi: 10.17103/reei.28.06]: The resurgence of maritime piracy and the importance of their means employed have forced States to repel the attacks of sea pirates in self-defence, and not only perform police work against this illegal activity. Furthermore, the extension and severity of this phenomenon explain that merchant and fishing vessels attacked for sea pirates have engaged their own defense with private security companies. This contribution attempts to answer the questions posed by the use of legitimate defense by States against armed attacks from private actors, as well as the use of armed force by private security companies to respond this kind of attacks from maritime piracy.

Sobrino Heredia, J. M., "Piratería y terrorismo en el mar", 1 *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz* (2008) 81-148 [ISBN: 9788498602425]. Maritime piracy is an ancestral international crime and it is still common nowadays. However, the modern forms of piracy are not based on the original practice (iuris gentium piracy): illegal and violent acts committed on the high seas with a financial or personal objective. On the contrary, piracy is defined as an act of violence or detention, a predatory act in territorial waters and/or under political issues (pseudo piracy and terrorism at sea), when the animus ferendi and the political objective are intertwined, complicating its prevention and its resolution. As a consequence, new violent manifestations on the sea do not fit into any category of maritime piracy in international law. The author proposes the convenience to revise the notion of piracy in order to broaden its scope and some legal solutions to this problem, which encompass both its prevention and repression.

Sobrino Heredia, J. M., "El uso de la fuerza en la prevención y persecución de la piratería marítima frente a las costas de Somalia", 15 *Anuario da Facultade de Dereito da Universidade da Coruña* (2011) 237-262 [ISSN: 25306324]: Maritime piracy is an ancestral and current international crime. These days this crime is not based only on its original practice -illegal and violent acts portrayed in high sea with a financial or personal objective-, but also on acts of violence, detention or predatory in territorial waters and/or under political issues, hindering its prevention as well as its repression. This succeeds particularly serious in front of coasts of Somalia, where they multiply incidents involving the use of force by international military operations deployed in the area. The purpose of this paper is to examine which is the legal base for the use of force, in what situations it is possible and who is entitled to it.

Jorge Urbina, J., 'Estados fallidos y proliferación de actos contra la seguridad de la navegación marítima en las aguas somalíes: papel del Estado ribereño e importancia de la cooperación internacional', 2 *Revista Española de Relaciones Internacionales* (2010) 88-118 [ISSN-e: 19896565]: The increase of unlawful acts against the safety of maritime navigation in the Gulf of Aden and off the coast of Somalia has served to highlight the essential role of coastal States in the prosecution of various criminal activities at sea, as piracy and armed robbery against ships. The absence of state authority in this country is a key factor in the proliferation of these and other forms of maritime crimes. Faced with this grave situation has required the intervention of the Security Council. Its function was to serve as an instrument for promoting international cooperation in the suppression of these crimes, but the measures taken to this, with the consent of the Somali government, can only be temporary. The eradication of these criminal activities in the medium and long term, we need to reach a peace agreement that allows restoring stability to Somalia and the establishment of regional cooperation mechanisms that promote collaboration of

coastal States most affected.

(8) Human rights and migrants at sea

Abad Castelos, M., 'El tráfico ilícito de personas por mar y la acción de las organizaciones internacionales', 14 *Anuario de la Facultad de Derecho de la Universidad de la Coruña* (2010) 137-162 [ISSN: 16953509]: This paper, starting from the universal normative framework, emphasizes which International Organizations have worked more on the specific question of illicit trafficking of people by sea, and it examines the main actions and measures adopted by them. In the universal plan, the work carried out by UNODC, IMO and UNHCR is highlighted. However, it is in the context of International Organizations of regional and sub-regional areas where, for diverse reasons, greater levels of operative measures and technical collaboration have been reached. In addition to this, the singly useful role carried out by the so called Regional Consultative Processes is also analyzed, and, furthermore attention is focused on the importance of strengthening cooperation to several levels, that is to say, not only among the States, but between all concerned players: States, IO and other international agencies, Regional Consultative Processes and civil society.

Acosta Sánchez, M. A., Remi Njiki, M. and del Valle Gálvez, J. A., (Dir.), Inmigración, seguridad y fronteras: Problemáticas de España, Marruecos y la Unión Europea en el área del Estrecho (Dykinson, Madrid, 2012) [ISBN: 9788490310465]: The Strait of Gibraltar area is undoubtedly a very interesting place for internationalist analysts and academics, because here there are many problems associated with this particular border area, which derive from its status as a strategic maritime passage, a division of continents, separation and cooperation between states and cultures. For Spain, in particular, it is the place where controversies and disputed borders are located, such as Gibraltar, and also territories claimed by Morocco in North Africa. The book has two parts. The first part examines the issues and problems related to immigration and borders both in Spain and in the European Union. The second part focuses on the different immigration, security and development problems in the Strait area and, in particular, it analyses the economic, democratic, legal and social issues posed by several EU common policies.

Casado Raigón, R., "Traffic illicite des personnes et criminalité transnationale organisée", in Sobrino Heredia, J. M., (Dir.), *Sûreté maritime et violence en mer* (Bruylant, Paris, 2011) [ISBN: 9782802730170] 3-18: Transnational organised crimes are usually linked to one another. This chapter focuses on two of them: smuggling of migrants and human trafficking at sea. He first addresses the relevant legal concepts and the main legal instruments ruegulating this subject: the Protocol against the Smuggling of Migrants by Land, Sea and Air; UNCLOS and the second supplementary Protocol to the SUA Convention. The author also explains some bilateral agreements on the subject. He then focuses on the possibilities and shortcomings of the existing legal framework. The author concludes that the Protocol against the smuggling of migrants by land, sea and air has given a concrete content to the UNCLOS provisions on the right of visit, that the preferent jurisdiction of the flag state is a principle of international law in statu nascendi, and that the implementation of the aforementioned protocol should be strengthened in the future

Fernández Sánchez, P. A., "Tráfico ilegal de personas y cooperación marítima internacional", in Pueyo Losa, J. A., and Jorge Urbina, J., *La cooperación internacional en la ordenación de los mares y océanos* (Iustel, Madrid, 2009) [ISBN: 9788498900613] 363-396: The illegal Human trafficking has, on the one hand, a migratory aspect, since it is related to the recruitment and transfer of people from one State to another, through irregular channels, regardless of whether their purpose is sexual exploitation, labor exploitation or slavery, terrorism or the search for better living conditions, among others. And, on the other hand, the illegal Human trafficking has a criminal aspect. When the transport is by sea, also, depending on the maritime space where the traffic is being carried out, the legal consequences are different. Following this idea, this work examines the applicable legal regime in the cases of illegal Human trafficking in the marine spaces under state sovereignty, in the marine spaces under limited state sovereignty, and in the High Seas. Finally, it also examines international maritime cooperation in the fight against this

phenomenon.

García Andrade, P., "Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective", in Ryan, B., Mitsilegas, V., (Eds.), *Extraterritorial Immigration Control. Legal Challenges* (Brill-Martinus Nijhoff, 2010) [Doi: 10.1163/ej.9789004172333.i-441] 311-346. This book chapter examines the extraterritorial strategies to tackle irregular immigration by sea from a Spanish perspective. The author introduces the context of the matter and the main extraterritorial strategies adopted by Spain in order to fight clandestine immigration. The chapter is divided into two sections. In the first section, the author explores the interception operations carried out by the Spanish authorities in order to prevent irregular immigration by sea, with a special reference to the interception operations led by Spain and their connection with FRONTEX operations. In the second section, the author analyses the Spanish criminal jurisdiction law and case law on the extraterritorial pursuit of the smuggling of irregular migrants and the repatriation process to which intercepted immigrants are subject. The chapter finishes with some conclusions on the subject. The author remarks that the fight against irregular migration has become a control of irregular migration, which has led to major problems. She also remarks that supervision of the conformity of interception operations is extremely difficult due to the lack of publication of the agreements between the countries, and that the shifting of migration routes has posed some difficult challenges for both transit and destination countries. She finally stresses the need for a greater commitment to the principle of loyal cooperation of Member States with regard to the FRONTEX Agency and some concerns about the extraterritorialisation of the operations of the Spanish authorities.

Lirola Delgado, I., "España y la lucha contra el tráfico ilícito de inmigrantes por mar", in Pueyo Losa, J. A. and Jorge Urbina, J., *La cooperación internacional en la ordenación de los mares y océanos* (Iustel, Madrid, 2009) [ISBN: 9788498900613] 397-429: In recent years, Spain has become a preferred destination for the illegal traffic of immigrants by sea. This work examines, in the first place, the issues raised by the adaptation of the Spanish legal system to the obligations assumed under the Protocol Against the Smuggling of Migrants by Land, Sea and Air. Secondly, the work studies the typology and content of the legal instruments developed for cooperation in immigration and / or criminal matters among the States parties that are located in the smuggling routes of migrants by sae. Finally, it analyzes the particular problems that arise for Spain to make compatible the repressive and dissuasive aspects of the illegal traffic of migrants by sea with the obligations of respect to the rights of migrants and the duty to provide assistance at sea that International Law establishes.

Moreno Lax, V. and Papastavridis, E., (Eds.), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights* (Brill/Nijhoff, 2017) [ISBN13: 9789004300743]: This book aims to address 'boat migration' with a holistic approach. The different chapters consider the multiple facets of the phenomenon and the complex challenges they pose, bringing together knowledge from several disciplines and regions of the world within a single collection. Together, they provide an integrated picture of transnational movements of people by sea with a view to making a decisive contribution to our understanding of current trends and future perspectives and their treatment from legal-doctrinal, legal-theoretical, and non-legal angles. The final goal is to unpack the tension that exists between security concerns and individual rights in this context and identify tools and strategies to adequately manage its various components, garnering an inter-regional / multi-disciplinary dialogue, including input from international law, law of the sea, maritime security, migration and refugee studies, and human rights, to address the position of 'migrants at sea' thoroughly.

Oliva Martínez, J. D., "Derecho del mar e inmigración irregular", 17 *Revista de Derecho Migratorio y Extranjería* (2008) [ISSN: 16953509] 265-289: This work makes an approximation to the international legal framework related to the search, interception or rescue of vessels in danger in territorial or international waters and their relationship with the international obligations of Spain linked to the protection of human rights, the preservation of dignity and the treatment granted to irregular immigrants or asylum seekers who, on occasion, are the protagonists of this type of journey. The ultimate objective is to clarify what are the

rules that must be met by the authorities and the captains of ships sailing under the Spanish flag, taking into account the context that places our country as the destination of a large part of illegal immigration by sea that aims to reach European territory.

Rodríguez Carrión, J. L., "El salvamento marítimo de vidas humanas en el Convenio Internacional de Naciones Unidas de 1989", 11 *Anuario de Derecho Marítimo* (1994) 137-158 [ISSN: 02118432]. This article explains the rescue regime under the 1989 UN Convention. The author first analyses the developments introduced by this Convention with regard to the previous 1910 Convention and critisises some of the postures adopted during the Conference. The author then focuses on the obligation to render assistance at sea and the compensation for it, which depends largely on national law provisions about the subject. The author finishes by providing twelve conclusions about the provisions of the UN Convention, summarising the obligations provided for in such Convention.

Salamanca Aguado, E., "The Trafficking of People and Smuggling of Migrants at Sea: New Approaches at the European Level", in Fernández-Sánchez, P. A., *New Approaches to the Law of the Sea (In Honor of Ambassador José Antonio de Yturriaga-Barberán* (Nova, 2017) [ISBN: 9781536120073] 259-271: The oceans have facilitated the commerce of human beigns, traded like commodities from one jurisdiction to another, and the smuggling of migrants by ilegal enterprises, due to the profitability of trafficking in person. Despite the gravity of the problema, the question of forced migrantion by sea was neither examined by the Law of the sea not by maritime law until recently. At first, the main difficulty was the absence of an adequate international legal framework but nowadays is to promote better coordination and cooperation in combating transnatonal crime, include trafficking and smuggling of persons. In this context, thi paper asesses the measures adopted at European level in the fight against trafficking in persosns and smuggling in the Mediterranean Sea.

Sobrino Heredia J. M., and Oanta, G. A., "Control y vigilancia de las fronteras en los diferentes espacios marítimos", 14 *Anuario da Facultade de Dereito da Universidade da Coruña* (2010) 759-788 [ISSN: 1138039X]: Seas and oceans are essential for the security of States and to support their development and prosperity. However, not in all maritime spaces States enjoy the same powers. This raises the question of knowing what powers States may exercise over maritime areas under their sovereignty and/or jurisdiction, and also on those where a State does not have any control. All this begs the question of delimitation of maritime boundaries and effective control over them. International Law acknowledges that States, as outlined in the first part of this work, can establish control and surveillance measures within their maritime borders, as well as deploying them in the different maritime spaces. In carrying out such activities there may be situations, as it is developed in the second part of this work, where it is necessary to search for, intercept or rescue vessels and persons at risk. This may lead to a tension between State security and the duty to protect those whose lives are at risk at sea.

(9) IIU fisheries

Andrés Sáenz de Santamaría, M. P., "Incidentes pesqueros y recurso a la fuerza. Estudio del apresamiento de buques pesqueros como medida de ejecución en el régimen internacional de pesquerías", 41-1 *Revista Española de Derecho Internacional* (1989) 7-41 [ISSN: 00349380]: The enlargement of the maritime areas in which the coastal state has jurisdiction over fishing activities has involved an automatic extension of their enforcement powers; so, different measures can be taken by the coastal state in the exercise of its sovereign rights over fisheries to ensure compliance with its national laws about this subject, being the arrest of foreign vessels one of the most important. This paper discusses upon this theme, studying its regulation in the international law as well as the national legislations and examining its content and limits from the point of view of the international law. In this way, it shows how the 1982 LOS Convention includes for the first time the arrest among the measures of enforcement in the article 73, as good as the national laws developing the new law of the sea and the fishing incidents. On the other hand, the work states the problem of the use of armed force in the development of the operations of the seizure, asserting

that there is not proportionality between the eventual offence and the measure of violence, by this reason, the arrests involving armed force are unlawful acts violating the international law. In the author's opinion, this affirmation rises from the interpretation of the article 73 par. 1 of the LOS Convention and the law of the sea as a whole, as well as from the international practice and the institution of the right of hot pursuit. Finally, the paper refers to the importance of the material questions in the operations of surveillance of the fisheries activities, pointing out a link between this subject and the due observance of the international law in the application of enforcement measures in the fisheries law.

Jorge Urbina, J., "La cooperación internacional en la aplicación de medidas comerciales para luchar contra la pesca ilegal, no declarada y no reglamentada", 33 *Revista Electrónica de Estudios Internacionales* (2017) [Doi: 10.17103/reei.33.04]: Illegal, unreported and unregulated fishing remains the main global threat to the conservation and sustainable management of living marine resources. In practice, the fight against these illegal activities requires increased involvement of market States as a result of the ineffectiveness of the flag State controls. The relevance of market measures against IUU fishing stems from two factors: the main incentive of IUU fishing is economic and fish is one of the most traded food products. Therefore, an effective means of discouraging these predatory fishing practices is to increase the costs of these activities or reduce the benefits of IUU operators. But the implementation of these measures requires international cooperation. For this reason, this paper focuses on examining the practice of regional fisheries management organizations (RFMOs), as these institutions have been pioneers in the adoption of trade measures to deny access to markets of IUU fish. These measures are more effective than those adopted unilaterally by States because they have been approved in a multilateral framework as representing RFMOs and offer more guarantees to respect the WTO rules.

Pons Rafols, F. X., "La Unión Europea y el acuerdo de la FAO sobre las medidas del Estado rector del puerto destinadas a prevenir, desalentar y eliminar la pesca ilegal, no declarada y no reglamentada", 27 *Revista General de Derecho Europeo* (2012) 1-40, [ISSN-e: 16969634]: IUU fishing is currently one of the most important threats to the conservation and management of fishery resources. The European Union has driven international action and, since the regulations adopted in 2008, has led the fight against IUU fishing through the trade focus and approach of port State measures to prevent, deter and eliminate IUU fishing. This action by the European Union interacts with international action and in particular with the adoption by the 2009 FAO Conference of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and not regulated. This study analyzes the political and legal influence of the European Union in the progressive practical implementation of the provisions of this Agreement and its future entry into force.

Sobrino Heredia, J. M., "Pabellones de conveniencia y pesca ilegal", in Vargas Gómez-Urrutia, M. and Salinas de Frías, A., (Coords.), *Soberanía del Estado y derecho internacional: homenaje al profesor Juan Antonio Carrillo Salcedo*. Vol. 2 (Universidad de Sevilla, Sevilla, 2005) [ISBN: 8447208761] 1331-1348. IUU fishing is one of the main challenges in current Law of the Sea. It affects living resources' conservation and management as well as maritime security, and it is a form of unfair competition in the fisheries sector. In order to face this challenge, the author proposes the strengthening of the genuine link that must exist between a ship and its flag State, which must exercise effective control over the former. This strengthening of the genuine link must be done by giving it specific content. The author analyses the main existing theories on this issue, and, although no concrete definition of the content of the genuine link is made, it is suggested this it should be one that emphasises the responsibility of the flag State to exercise effective jurisdiction and control over the ships flying its flag. The author also proposes some measures in order to avoid the proliferation of the fleet of convenience, stressing the responsibility of flag States in this matter.

Sobrino Heredia, J. M., "Una nueva manifestación de delincuencia organizada transnacional: las actividades de pesca ilegal, no declarada y no reglamentada", in Bou Franch, V., Juste Ruiz, J., Sánchez Patrón, J. M., (Dir.), *Derecho del mar y sostenibilidad ambiental en el Mediterráneo* (Tirant lo Blanch, Valencia, 2014)

[ISBN: 9788490531785] 147-174: The international community in view of the magnitude and seriousness of illegal, undeclared and unregulated fishing must urgently a reinforce the mechanisms to combat it, and adopt new measures that encompass this problem in its many facets. Following this premise, this work places IUU fishing as a broader problem that affects the prevention and repression of transnational organized crime. Beyond the instruments of the Law of the sea, this perspective leads to the United Nations Convention against Transnational Organized Crime, as well as to those bilateral or multilateral agreements of judicial assistance or memoranda of cooperation and understanding for conducting investigations together. It also raises the convenience of appealing not only to the fisheries authorities but also to other national authorities and regional and international police bodies such as EUROPOL and INTERPOL. In order to develop this connection, first of all, the work studies the drift of IUU fishing towards transnational organized crime, analyzing the legal response from international, European and national fisheries law. And, second, it examines he criminalization of certain IUU fishing activities, exploring the possibility of considering them as a major crime in the case of a transnational organized crime.

(I) SETTLEMENT OF DISPUTES

Abegón Novella, M., 'Las opiniones consultivas de la Sala de Controversias de los Fondos Marinos del Tribunal Internacional del Derecho del Mar como un instrumento para la protección del interés general', in Bouza, N., García, C., Rodrigo Hernández, Á. J., (Dir.), Pareja, P., (Coord.), *La gobernanza del interés público global* (Tecnos, Madrid, 2015) 547-559 [ISBN: 9788430965045]: The International Seabed Area has been recognized as common heritage of mankind, which implies the attribution of a legal status that prohibits, among others, appropriation and individual exploitation of its natural resources. The exploration and exploitation of these resources, as well as their conservation, is a matter of interest not only to States but to the international community as a whole. In the protection of this general interest, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea may be essential. Its first Advisory opinion of 1 February 2011 on the Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area suggests the important role it can play in stablishing the limits the preservation of the general interest impose with respect to the actions by States and private companies in this maritime space. This is particularly important since the 1994 Agreement modified the management model of the Area by encouraging the participation of States parties or particular entities to the detriment of the Authority.

Aznar Gómez, M. J., 'The obligation to exchange views before the International Tribunal for the Law of the Sea: a critical appraisal', 47(1) *Revue Belge de Droit International* (2014) 237-254 [ISSN: 0035-0788]: In 2006, Spanish authorities decided the immobilisation of the vessel Louisa, a vessel flying Saint Vincent and the Grenadines' flag, due to its illicit activities against underwater cultural heritage in Spanish internal waters and territorial sea. The flag State filled an application against Spain before the International Tribunal for the Law of the Sea complaining that Spain had violated the UN Convention on the Law of the Sea with that immobilisation. In its Judgement of 28 May 2013 the Tribunal concluded that it had no jurisdiction ratione materiae to entertain an application since no dispute concerning the interpretation or application of LOSC existed between the Parties. However, Spain had argued not only a lack of jurisdiction ratione materiae but that the Tribunal should have dismissed the case the applicant had not fulfilled the obligation to exchange of views as established in Article 283(1) LOSC. That question was not dealt with by the Tribunal in its Judgement, thus avoiding any discussion of the content and scope of that important procedural obligation. This Article tries to offer a critical appraisal of the position of the Tribunal in the Louisa case with regard the obligation to exchange of views as established in LOSC, bearing in mind the general principle as embodied by current general international law and its application by the ITLOS in the different cases submitted before it.

Espósito, C., 'Advisory Opinions and Jurisdiction of the International Tribunal for the Law of the Sea', in

Harry N. Scheiber and Jin-Hyun Paik (eds.), *Regions, Institutions and Law of the Sea* (M. Nijhoff Publishers, Leiden, 2013) 57-72 [available at SSRN: https://ssrn.com/abstract=2104156]: Following an introduction to the advisory jurisdiction of the Tribunal, this contribution discusses crucial aspects of the advisory function of the Seabed Disputes Chamber. It will of course consider the jurisdiction to give an advisory opinion and the issues of admissibility related to the opinion delivered by the Seabed Disputes Chamber on the Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area. The discussion, however, will not touch upon the substantive legal questions asked to the Chamber in this occasion, but deal only with procedural issues. Moreover, it will attempt to go beyond this specific case to present a general analysis of the key issues of jurisdiction and admissibility, together with some questions of procedure, that should be taken into account in order to arrive to an authoritative advisory opinion of the Seabed Disputes Chamber and, eventually, of the International Tribunal for the Law of the Sea.

García García-Revillo, M., *El tribunal internacional del Derecho del Mar: Origen, organización y competencia* (Ministerio de Asuntos Exteriores y Cooperación, Córdoba, 2005) [ISBN: 8478017917].

Juste Ruiz, J., 'Unidad y pluralismo en la jurisprudencia del Tribunal Internacional del Derecho del Mar', in Rodrigo Hernández A. J., and García Segura, C. (Ed.), *Unidad y pluralismo en el derecho internacional público y en la comunidad internacional* (Tecnos, Madrid, 2011) 287-317 [ISBN: 9788430952120]: The dispute settlement system established in Part XV of the Convention marks an important line of opening towards compulsory dispute settlement procedures even though it has not been able to overcome all the structural barriers that make the international jurisdiction dependent on the freedom of election of the Parties. In addition, the application of this system of settlement of disputes has been found in practice with operational pitfalls that have become particularly manifest in the jurisdictional work of the ITLOS.

Juste Ruiz, J., 'La solución de controversias en el convenio de las Naciones Unidas sobre el Derecho del Mar', in Bou Franch, V., (Coord.), *Nuevas controversias internacionales y nuevos mecanismos de solución* (Tirant lo Blanch, Valencia, 2005) 327-383 [ISBN: 8484561518]: The dispute settlement regime is designed in the United Nations Convention on the Law of the Sea of 10 December 1982. Despite its inherent limitations and the complexity and secrecy of some of its provisions, the system for the settlement of disputes envisaged in Part XV it represents a clear progress and constitutes one of the fundamental pivots in the general structure of the Convention.

Ojinaga Ruiz, M. R., 'La Unión Europea y los Estados miembros en los procedimientos de arreglo jurisdiccional de controversias de la CNUDM', 55 *Revista de Derecho Comunitario Europeo* (2016) 977-1018. [doi: https://doi.org/10.18042/cepc/rdce.55.06]: The European Union is increasing its participation in dispute settlement systems in the new framework of proliferation of international courts and tribunals. Specifically, the rules of the United Nations Convention on the Law of the Sea (UNCLO) on jurisdictional settlement of disputes provided in section 2 of Part XV contains express provisions dealing with the participation of EU which are of interest to the study of the issue. Furthermore, there has been decisive progress of the EU and the Member State's practice before the International Tribunal for the Law of the Sea (ITLOS). Recently, the advisory proceeding initiated by the Sub-regional Fisheries Commission (SRFC), before ITLOS (case num. 21) highlighted the internal difficulties involved in the appropriate coordination of the EU and the Member State's participation in proceedings before international tribunals. Additionally, the European Court of Justice has clarified a number of issues concerning the definition of EU position and its representation before international courts and tribunals.

Soroeta Liceras, J., *La Jurisprudencia del Tribunal Internacional del Derecho del Mar: (1997-2005)* (Dilex, Madrid, 2005) [ISBN: 8488910703]: 1997 - 2005. The law of the sea has become the greatest test-bed for the bargaining power of the States when it comes to compromise, to achieve the equilibrium of the ambassadors, where international rules are the thin line in which the actors move. The regulation of the sea is open and, therefore, in need of additional legal limits. The author studies rigorously the various incursions of the Tribunal of the Law of the Sea in material areas of necessary study in relation to the

concrete case. The general result of the research carried out places the Court in a situation quite compromised by the low solidity of its jurisprudential constructions. Thus, with regard to the arduous debate on flags of convenience and the requirement for an effective link between the vessel and the flag, the Court has not been able to adopt a clear position, even though this is a recurrent issue in the cases raised. Mercantile corsairs enjoy this sort of patent that is certainly cheap. In short, this text highlights with absolute clarity the difficulties and needs present in the application of the sector of the law of the sea, absolutely weighed down by enormous tensions.

Jorge Urbina, J., *Controversias Marítimas, Intereses Estatales y Derecho Internacional* (Dilex, Madrid, 2005) [ISBN: 9788488910578]: The Law of the Sea is currently one of the most relevant sectors of the international legal system, but also one of the most conflicting by the confluence in the regulation of the seas and oceans of diverse and conflicting state interests as a result of political inequalities, economic, technological, military or geographic in contemporary international society. Therefore, the need to peacefully accommodate the conflicting claims of States on the marine environment has led to the elaboration of a complex and imaginative dispute settlement mechanism, as set out in Part XV of the United Nations Convention on Biological Diversity. The Law of the Sea of 1982, which, far from constituting an ancillary aspect, constitutes a means of guaranteeing respect for the integrity and coherence of the complete and complex legal regime established by the aforementioned Convention. From this perspective, after examining the different political, strategic, economic or ecological factors that make the marine environment a particularly problematic area, as emphasized in international practice, the book focuses on the analysis of the role to be played by the system of settlement of disputes established in Part XV as a means of harmonizing the claims of States in the maritime field, while at the same time highlighting their peculiarities and their possible deficiencies and limitations - some of which have already been the decisions that have already been taken in the framework of this mechanism - are the fruit of precisely those opposing state interests. In this line, it should be highlighted as one of the novelties of this dispute settlement system the implementation of a new institution designed to address the various disputes that may arise in this area, the International Tribunal for the Law of the Sea. Before a specialized jurisdiction which has already begun to develop its first jurisprudence, especially in relation to certain types of disputes, but which is called upon to play a more important role as States decide to overcome their reluctance towards this means of judicial settlement, because it is an organ in which the plurality of the contemporary international society is reflected and whose action is presided over by the speed and efficiency in the treatment of the diverse subjects that are submitted to him. All this underlines the value and timeliness of this work, in view, in particular, of the important maritime interests that Spain continues to maintain, inter alia, in aspects such as fishing, protection of the marine environment or delimitation of spaces; and that make of this text a useful instrument of consultation for professionals and scholars of the Law of the Sea.

 DOI: 10.17103/sybil.21.34

the SPANISH YEARBOOK of INTERNATIONAL LAW

***La política de la Unión Europea en materia de derecho de las inversiones internacionales*. By Katia Fach Gómez (ed.) (Barcelona, J. Bosch, 2017), 406 pp. [ISBN: 978-84-946829-9-5].**

The origin of this work was the bilingual International Conference held at the Faculty of Law of the University of Zaragoza on March 20 and 21, 2017, entitled "EU Policy on International Investment: Uncertainties, Challenges, and Opportunities" and organized by Dr. Katia Fach Gómez (University of Zaragoza), Humboldt scholarship holder. She finally published the book gathering various contributions made at that conference, and divided into three parts: EU Policy on International Investment (pages 23-152); The EU proposal of a Multilateral Investment Court (pages 153-315); and Other Actors in the International Investment Policy: Civil Society and non-EU Countries (317-406).

The first part of the work consists of six chapters. The first one (pages 25-44) deals with the EU as a global actor in the post-Lisbon era. José Gustavo Prieto Muñoz (University of Verona, Italy) focuses on policy about International Investments, as a tale of triple fragmentation: A. Substantive fragmentation: the proliferation of norms. B. Institutional fragmentation: proliferation of institutions. C. Methodological fragmentation: plurality of assumptions. He concludes with several considerations about the role of the EU as a global actor. The second chapter (pages 45-68) is about investments arbitration before the Court of Justice of the European Union, and the internationalist and pro-European perspectives on intra-EU BITs. For Amir Farhadi, David Restrepo Amariles and Arnaud Van Waeyenberge (HEC Paris) the main problems are here, on one hand, the relationships between international investment law and internal market law of the European Union; and on the other hand, the incompatibility with intra-EU BITs of the internal market of the Union (respect for the principle of non-discrimination, primacy of European law, jurisdiction of the Court of Justice of the European Union and incompatibility of arbitral awards with European Union law). In chapter three (pages 69-84), Mauro Gatti (University of Luxembourg) writes about the provisional application of EU Trade and investment agreements. He suggests that the Union may bypass some of the problems created by "mixed" procedures by giving provisional application to trade and investment agreements. His analysis demonstrates that a provisionally applied agreement produces legal effects, and may therefore ensure a certain degree of legal certainty. The provisional application of EU trade and investment agreements also covers a large part of their substantive scope. Finally, provisional application should ensure a rather stable legal framework, because only the Union (and not its Member States) can decide to terminate it. Chapter four (pages 85-110) deals with the assessment of the jurisdictional conflict between the CJEU and investor-State tribunals from the perspective of neo-functionalism. Ewa Zelazna (Leicester Law School, UK) explains first the role of EU law in the process of integration, considering the constitutionalization of the Treaty, the EU external constitutionalism and finally the CJEU's attitude towards external courts and tribunals. Secondly, she focuses on the essential character of the powers of the CJEU and investor-state tribunals (CJEU's exclusive power to interpret EU law and investment arbitration, the EU investment agreements, the application of EU Law in investment disputes regarding the autonomy of EU law and the availability of the preliminary

 DOI: 10.17103/sybil.21.35

ruling procedure). Finally, the author considers other objections to the jurisdiction of external courts and their applicability to investment tribunals. In chapter fifth (pages 111-130), Ana Mercedes López Rodríguez (Loyola University Andalucía, Spain) deals with the impact of investment arbitration on the financial responsibility and the proposal of the Permanent Court of Investment in the European Union. She considers both as two sides of the same coin. The exclusive competence of the CJEU to determine the EU's financial responsibility and the obligation to compensate monetarily for infringements of investors' rights as a possible interference with the functioning of the internal market are the most important questions faced. The final chapter of this first part (pages 131-152) is about the relationships between the new commercial treaties and public administrations. Julio González García (Autónoma University of Madrid, Spain) considers on one hand the impact on those new generation treaties (NGT) on the EU regulation (their expansive commercial content, the regulatory cooperation, the complex harmonization and its impact on the European social model, the risks of the procedure and the right to legislate by the States). On the other hand, the author configures the relationships between investments arbitration and public administrations (the investor protection to guarantee their investment against arbitrary and national risks before the court as the essential purpose of investment treaties; and a critical vision based on the problems that arise in the administrative field of investment arbitration).

The second part of the book is entitled "The EU proposal of a Multilateral Investment Court" (pages 153-315). In chapter seventh (pages 155-174), Enrique Fernández Masiá (University of Castilla La Mancha, Spain) he points out that the disputes resolution system is at a crossroad, thinking about the future creation of a multilateral arbitration Court. Francisco Pascual Vives (University of Alcalá, Madrid) deals with alternatives to investments arbitration in chapter eighth (pages 175-200). He focuses particularly on strengthen the role of the State in two ways: to enlarge the resource to domestic Courts and to substitute investment arbitration for inter-state arbitration (as the Brazilian, Australian and South African experiences show). He concludes with the initiatives from the institutional structure: the creation of a permanent judicial organ, its need, advantages and the problems of coexistence between the court of justice of the European Union and a Permanent Court of Investments. The ninth chapter (pages 201-226) is devoted to the appeal mechanism in the European Union proposals of the Permanent Investment Tribunal. Esther López Barrero (UDIMA) designs the appeal as a second instance in the permanent investment courts proposed by the EU: the structure and operating rules of the Court as well as the development of the appeal procedure, pointing out its advantages and disadvantages. Fernando Gallego Osuna (European Commission) brings social and environmental considerations about the new investor-state dispute resolution mechanisms proposed by the European Union. In chapter tenth (pages 227-253) he develops the EU proposal on a permanent Court of Investments Arbitration, focused on the problems solved by the new system: lack of transparency, cost of the procedure and the right to regulate. He concludes with certain pending questions and proposals for improvement: the participation of third parties in the procedure; the inclusion of members of the courts with a scientific or technical profile; and State's control of the interpretation of international investment agreements. Chapter eleven (pages 255-278) deals with the nature and powers of arbitrators in the new generation of international Investment Agreements. Belén

 DOI: 10.17103/sybil.21.35

Olmos Giupponi (Liverpool Hope University, UK) exposes firstly the legal framework of megaregional agreements. Secondly, she analyzes deeply the TTIP, CETA and the investment court system (investment tribunal and arbitrators, appellate tribunal and applicable law, as well as the controversies surrounding CETA). About the TTIP, the author focuses on the investment court system and arbitrators (appointment and functions of the tribunal, procedural rules and arbitrators' powers, third party and non-disputing party intervention, consolidation of claims, types of awards, appeal and enforcement of awards). She finally considers the TPP model (investor-to-state dispute resolution, arbitrators' powers, transparency provisions and dispute settlement under chapter 28). The last chapter of this part (pages 279-315) wrote by Katia Fach Gómez (University of Zaragoza) is devoted to diversity and gender in international arbitration.

The third and last part of the book deals with "other Actors in the International Investment Policy: Civil Society and non-EU Countries" (pages 317-406). Chapter thirteenth (pages 319-350) by Dámaso Javier Vicente Blanco (University of Valladolid) focuses on the criticism and opposition to the international regulation of investments: from anti-globalization movements to European critical amendments in the negotiation of the TTIP. It begins with the international regulation of foreign investments and their opposition, strategies and stages. Nevertheless, the main part is about the implicit criticisms of the international regulation of investments in the European proposal for the TTIP (namely, the protection against the treaty shopping, the concept of "fair and equitable treatment", the limitation of the application of most favored nation treatment, the right to regulate, and the elimination of investment arbitration from the ISDS and its replacement by a so-called investment court system). Fernando Dias Simoes (University of Macau) analyzes in chapter fourteenth (pages 351-374) the transparency system in the European trade policymaking: the TTIP Negotiations as a case study. He criticizes the lack of transparency in the TTIP negotiations, pointing out the European Commission's 'fresh start' on TTIP and striking a balance between confidentiality and transparency. In chapter fifteenth (pages 375-390) Marina Trunk-Fedorova (Kiel Center for Eurasian Economic Law, Germany) faces the challenges to the EU policy on foreign investment on a Third Country perspective. She focuses on the new EU competencies perception by third states with the example of Russia, also exploring a possible investment agreement between both parties, being Russia a host State: the compatibility with the Russian approach and possible influences on an eventual EU-Russia investment agreement, with particular interest on the settlement of investment disputes). Finally, Weiwei Zhang (Graduate Institute of Geneva, Switzerland) analyzes in chapter sixteenth (pages 391-406) the EU-China investment agreement in making. He firstly exposes the investment liberalization in international law, mainly the BIT practices (prior to 1982 —no right for admission/establishment—; the 1982/2004 period —the rise of investment liberalization-; and after 2004 -convergence with NAFTA—) as well as the international trade agreements (namely, WTO and Free Trade Agreements). He follows with the EU-China BIT negotiations and ends up with the negotiating a stand-alone BIT to pursue investment liberalization.

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 DOI: 10.17103/sybil.21.35

the SPANISH YEARBOOK of INTERNATIONAL LAW

Espacios polares y cambio climático: Desafíos jurídico-internacionales. By Marta Sobrido Prieto (Ed.) (Tirant lo Blanch, Instituto Universitario de Estudios Europeos Salvador de Madariaga, Universidade da Coruña), 252 pages [ISBN: 9788491197782]

Due to their remoteness and inhospitable conditions, the two polar spaces of the Earth —Arctic and Antarctic— have traditionally been outside the interest of International Relations and, to a large extent, of the geostrategic interests of the States. Despite their undeniable similarities, they are two spaces characterized by their own and differentiating features, which has conditioned the creation of different mechanisms that serve to ensure their political governance. While Antarctica has become an authentic *global common*, regulated by a specific International regime, the Arctic remains a maritime space, albeit frozen, governed at different levels by International Law —especially the Law of the Sea—, different regional systems -particularly the Law of the European Union in some Arctic States- and the internal law of the Arctic States.

The complex process of climate change has been the factor that has most determined the entry of both spaces —but especially of the Arctic region, because of its physical and political conditions, just described— in the international arena. This also explains why since around 2008, many scientific studies have been devoted to these issues. Moreover, the number of scientific viewpoints from which they can be contemplated has given rise to what is now known as "Polar Law".

Against this background, the collective work edited by Professor Marta Sobrido, deals with Polar spaces from an eminently legal perspective. The work is divided into three parts dedicated to I. International Law, climate change and Polar spaces (Chapters I, II and III); II. International approach to the Arctic (Chapters IV, V, VI and VII) and III. Antarctica (Chapters VIII and IX).

To carry out this challenging task, Professor Sobrido has brought together her colleagues from the Research Group of the University Institute of European Studies "Salvador de Madariaga" (IUEE) based at the University of A Coruña, who are professors of the Faculty of Law at this same university and that of Vigo. In addition to involving these colleagues, Professor Sobrido has had the propitious idea of enriching this work with the contributions of two well-known international law experts on Polar spaces: in fact, both the professor and researcher Claudia Cinelli, and her former thesis' director, Professor Joaquin Alcaide, from the University of Seville, were among the first in Spain to address these issues. Claudia Cinelli's continued dedication to the Arctic space is evident both in her professional background and in her specialised publications in the field. The work that I have the pleasure to review is, for the rest, the result of a conference held in October 2012 at the Faculty of Law of the University of A Coruña on the "Polar spaces and global warming: international legal challenges."

In this review I would like to highlight, because of their novelty in the bibliography of our country, some of the contributions that are contained in the work. Thus, particularly interesting is the contribution of Professor Gabriela Oanta, which focuses on the analysis of the activity of the International Tribunal of the Law of the Sea regarding Polar spaces. In the same line, another remarkable contribution is Chapter VIII, by Annina Cristina Bürgin which, from the perspective of

 DOI: 10.17103/sybil.21.36

security and that of International Relations, analyses the role of NATO in the Arctic space. Finally, I consider the final contribution, written by José Antonio Quindimil López, on the role of Latin America in its projection towards the Antarctic continent and the role to be played there by UNASUR, to be especially original.

Notwithstanding this particular reference to these contributions with the intention of remarking on their originality in Spanish bibliography, the rest of the contributions that the work presents are very timely and constitute the general framework with which to establish the panorama and context of the work. Thus, Professor Sobrino Heredia correctly analyses the management of climate change, considered as a global common, from International Law (Chapter I). For its part, the general analysis of the Polar spaces is carried out by Professor Joaquín Alcaide (Cap.II). The editor, Marta Sobrido Prieto, contributes with a general and necessary chapter on the governance of the Arctic space (Chap. IV). Professor Belén Sánchez Ramos focuses on the most recent developments of the Arctic Council as the main political forum in the area (Chapter V). For her part, Claudia Cinelli makes an interesting comparison between the protection of the Arctic and Antarctic environments and that of the Arctic and the Mediterranean, reviewing international practice and culminating with the work of non-Arctic actors in the preservation of the Arctic environment. Finally, the experience and expertise of Adela Rey Aneiros is self-evident in Chapter VIII, which is dedicated to the protection of the Antarctic environment.

This work has been edited by Tirant lo Blanch along with IUEE itself, and is available in paper and digital format. Due to its very manageable format, the moderate length of its contributions and the specialised but accessible language it uses, it is a work of interest to any academic, practitioner and, of course, postgraduate and undergraduate students, since there are growing number of students who orient their final degree projects towards these topics of general interest and repercussion.

For all the above said, I can only congratulate my colleague Professor Marta Sobrido Prieto, for her wise and opportune idea of compiling this interesting and very useful work in Spanish language.

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 DOI: 10.17103/sybil.21.36

the SPANISH YEARBOOK of INTERNATIONAL LAW

La delimitación marítima entre Estados. Formaciones insulares y bajíos. By Antonio Pastor Palomar (Editorial Tirant le Blanch, Valencia, 2017) 440 pp. (Includes e-book).

The role of islands, rocks and low-tide elevations (LTEs) in maritime boundary delimitation has been widely discussed by scholars. Yet even today, it remains a highly contentious topic in international law.

States have a great interest in this particular issue since the presence of islands, rocks and LTEs can affect the location of the maritime boundary dividing the maritime zones between neighbouring States to the benefit of one of those States. Consequently, if taken into consideration, a maritime feature could push seawards the outer limits of the territorial sea (TS), the contiguous zone (CZ), the exclusive economic zone (EEZ) and the continental shelf (CS) increasing the areas and the rights of that State over those spaces, in particular its sovereign rights to explore and exploit valuable living and non-living ocean resources.

As rightly pointed out by Pastor through his book, assessing the impact of maritime features in the context of maritime delimitation is a very complex exercise that needs to be approached in a comprehensive and pragmatic ways since geographical situations can be highly variable from case to case. Also, maritime delimitation cases involving maritime features sometimes require decisions on preliminary questions, such as disputes concerning sovereignty over islands or the legal nature of a particular feature as being an "island", a "rock" or a "LTE". A good example of this complexity is reflected in the *Nicaragua v. Colombia* case concerning territorial and maritime issues. The author also mentions pending delimitations and potential conflicts involving maritime features, such as the delimitation of the CS beyond 200 nautical miles (nm) between Nicaragua and Colombia before the International Court of Justice (ICJ), the sovereignty dispute over the Perejil Island between Spain and Morocco in the Mediterranean Sea and the dispute concerning the Savage Islands (Portugal) in the Atlantic Ocean whose legal status as islands or rocks is disputed by Portugal and Spain. A further example is the very recent and controversial *South China Sea Arbitration* between the Philippines and China where the Tribunal, among other things, determined the legal status as "islands", "rocks", "LTE" or "submerged banks" of certain maritime features occupied by China in the South China Sea, including Scarborough Shoal and some of the features in the Spratly Islands.

The book written by Antonio Pastor Palomar aims at determining the legal regime governing maritime features in the context of maritime boundary delimitation between States with opposite and adjacent coasts. In this respect, the author analyses the relevant State practice (national legislation and maritime boundary agreements) and judicial decisions of national and international courts and tribunals to assess the influence of islands, rocks, LTEs and other categories of maritime features in the delimitation of maritime zones between States. With regard to this last point, Pastor provides a very interesting and innovative analysis concerning the role of the "emerging categories" (*categorías incipientes*) of maritime features, as the author called them, in the context of maritime delimitation, namely, reefs, atolls, islets, cays and banks (pp. 307-386). These are categories that scholars have not had examined in much detail. In relation to the methodology, Pastor proposes using the inductive

 DOI: 10.17103/sybil.21.37

approach, that is to say a systematic analysis of the relevant State practice and judicial decisions in order to identify the main trends or rules concerning the influence of maritime features in the delimitation of maritime boundaries and that would be applicable to other similar cases (p. 35).

The book is divided in two parts. The first part comprises one chapter (Chapter I) and the second part contains seven chapters (Chapters II to VIII). The first part gives a general overview of the legal framework of maritime features preceding the adoption of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (hereinafter the 'CTS'). The second part examines the legal regime of maritime features before and after the adoption of the 1982 United Nations Convention on the Law of the Sea (hereinafter LOSC). The author then analyses separately and in detail the legal definition of the main categories of maritime features (islands, rocks and LTEs) and the so-called "emerging categories" (reefs, atolls, islets, cays and banks) as well as their influence in the context of maritime delimitation by examining the relevant State practice and judicial decisions prior and subsequent to the adoption of LOSC.

Chapter I provides a general overview of the legal regime of maritime features from a historical perspective, including the examination of the relevant State practice and judicial decisions until the adoption of the CTS and the discussions during the First United Nations Conference on the Law of the Sea (hereinafter UNCLOS I). During this period, there were two main categories of maritime features that were later codified respectively in articles 10 and 11 of the CTS: islands and LTEs. As for the "emerging categories" of maritime features, they were assimilated and recognized as pertaining to this two main categories. In relation to their function, they were considered as being part of the coastal configuration when they were located next to the coast, as a group of features together with islands and LTEs. Consequently, they were used as basepoints from where the TS would be measured. An example is the 1951 *Anglo-Norwegian Fisheries* case, where the islands, islets, rocks and reefs forming the so-called feature *Skjaergaard* were taken into account in delimiting the TS of Norway.

Chapter II provides a short introductory framework of the legal regime of all maritime features and their legal definition as discussed during the Third United Nations Conference on the Law of the Sea (hereinafter 'UNCLOS III') and as finally adopted in the relevant provisions of LOSC. In addition, this chapter recalls the basic principles and rules governing the delimitation of the TS, the CS and the EEZ between States, such as the role of equidistance and equitable principles and the three-stage approach in the process of maritime delimitation. Regarding this chapter, four main points need to be highlighted. First, the creation of new independent States during the 20th century and the introduction of the EEZ in international law and, consequently, the extension of competences of the coastal States were major changes that lead to a revision of the existing rules provided in the 1958 Geneva Conventions, including the CTS and the 1958 Geneva Convention on the Continental Shelf (hereinafter the 'CCS'). Second, the legal terms defining islands, rocks, LTEs and other categories of maritime features are terms that leave significant scope for different interpretations. Third, the presence of islands may constitute a relevant circumstance that would justify shifting the provisional equidistance line in the context of the delimitation of maritime spaces between States. Fourth, the delimitation of maritime zones between States requires the achievement of an equitable solution

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taking into consideration all the relevant circumstances of the case. In consequence, there is not an obligation of means, but of result.

Chapters III to V discuss the legal definition of the three main categories of maritime features (islands, LTEs and rocks) and their impact in the delimitation of maritime boundaries. Chapters VI to VIII examine the other categories of maritime features.

Chapter III first analyses the legal definition of the term "island" as provided in article 121(1) LOSC, emphasizing that even if islands and LTEs are both naturally formed areas of land, surrounded by water, an island is above water at high tide. Conversely, a LTE is above water at low tide but submerged at high tide. In relation to the impact of islands in maritime boundary delimitation, the effect to be given to islands may differ since an island can be granted full effect, less than full effect (enclave, partial effect or little effect) or no effect. This will depend on different factors, such as the method of delimitation used, the location of the island, as well as on whether the delimitation concerns the TS or other maritime areas (CS or EEZ). In the case of maritime boundary agreements, this effect may also differ depending on political and economic considerations. In conclusion, as noted by the International Tribunal of the Law of the Sea (ITLOS) in the *Bay of Bengal* case: "[...] neither the case law nor State practice indicates that there is a general rule concerning the effect to be given to islands in maritime delimitation. It depends on the particular circumstances of each case."[1]

Chapter IV analyses the rules applicable to LTEs. The author starts by discussing the legal definition of LTEs as laid down in article 13(1) LOSC, stressing the problems related to the sea-level measurement to determine whether a feature is above water at low-tide and therefore considered to be a LTE. If located within the TS of the mainland or an island, a LTE can be used as a basepoint. However, the effect given to LTEs in the context of maritime delimitation may differ as they can or cannot be granted an effect in the delimitation line. The *Qatar v. Bahrain* Case (Merits) and the *Bay of Bengal Maritime Boundary Arbitration* between Bangladesh and India are a good example of this.

With the introduction of new maritime spaces, States started claiming large maritime zones, including EEZs up to 200 nm, around and from small features. In view of these claims, the subcategory of rocks within the overall category of islands was established in article 121(3) LOSC in order to limit the capacity of a certain type of islands to generate maritime spaces. Chapter V then examines the legal definition of "rocks" as provided in LOSC by highlighting the problem related to the criteria defining a rock in international law: the lack of capacity to sustain human habitation or the lack of an economic life of their own. In the context of maritime delimitation, if situated in the TS of a mainland or an island, a rock may or may not be given an effect in the delimitation line. However, if located outside the TS of a mainland or an island, a rock can only generate its own TS and a CZ. An example can be seen in the *Nicaragua v. Colombia* case in relation to the so-called maritime feature *Quitasueño*.

Chapter VI analyses the rules applied to reefs and atolls. These categories were, for the first time,

[1] *Dispute Concerning Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Reports 2012, 4, at 147.

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consecrated in articles 6 and 47(1) LOSC. Although the terms "atolls" and "reefs" are not expressly defined by LOSC, Pastor suggests that these categories must respond to the same criteria used to define islands and LTEs (pp. 76-77). He also suggests that this idea is confirmed in particular by the *South China Sea Arbitration* in respect of reefs that were qualified as being rocks (p. 402). Chapter VII deals with the category of islets. The term "islet" is not mentioned in any of the codification Conventions. However, it has been used in the practice of States and in judicial decisions related to maritime delimitation. Chapter VIII concerns cays and banks, categories that were not mention in the codification Conventions, but that have been recognized in State practice and judicial decisions. Concerning the effect given to these "emerging categories", they have been used as basepoints and granted in some cases full effect in delimitation line.

Through the book the author contributes to the debate on the legal regime of maritime features in international law giving a constructive analysis of the rules governing these features in the context of maritime delimitation and related aspects. This book therefore represents a useful reference, particularly for legal practitioners and academics interested in these matters.

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 DOI: 10.17103/sybil.21.37

the SPANISH YEARBOOK of INTERNATIONAL LAW

United Nations Convention on the Law of the Sea: A Commentary. Edited by Alexander Proelss; Assistant Editors: Amber Rose Maggio, Eike Blitza, Oliver Daum (C.H. Beck, Hart, Nomos, 2017), 2617 pages [ISBN: 9781849461924]

At first sight, it may seem somewhat strange that 35 years after its adoption, in 1982, a commentary of the United Nations Convention on the Law of the Sea (LOSC) has been released, because this type of academic work is common when we are confronted with legal instruments recently adopted or that are about to come into force. And yet, multiple reasons explain why this publication is so timely in 2017.

Since its creation at the III United Nations Conference on the Law of the Sea, the Convention of the same name has been and continues to be the object of the interest of legal practitioners and theorists. This is not surprising, since it is the longest and most comprehensive treaty in existence and throughout its 35 years since its adoption, it has proven to be a living legal text, highly flexible and adaptable to the changing circumstances of the international environment. Its quasi-universal nature reinforces the mentioned characters and explains the name under which it is known, "Constitution of the seas".

Despite all its virtues, being a framework instrument, some of its provisions have fallen short, and have demanded a subsequent regulatory development. On the one hand, to understand LOSC, we cannot forget the state practice that has helped to consolidate the customary nature of many of its provisions. On the other hand, the three institutions created by the Convention —the International Seabed Authority, the International Tribunal for the Law of the Sea and the Commission on the Limits of the Continental Shelf— in the scope of their activities or jurisprudence —in the case of the Tribunal— have necessarily contributed to the progressive development of the regime established in LOSC. An adequate knowledge of the Convention will require considering these developments, since the analysis of LOSC provisions is only possible from a joint interpretation of the convention itself, the texts that complete it and the existing practice around it, as judge V. Golitsyn, President of the International Tribunal for the Law of the Sea, points out in his Foreword.

All these issues surrounding LOSC have been taken into account in the magnificent edition of Professor Proelss' *Commentary*. The volume is already much more than a simple commentary on the United Nations Convention on the Law of the Sea: it is a comprehensive, solid and updated revision of the Law of the Sea and, as such, the publication is timely, as in the "Preface" the editor points out, the Convention "terms offer much more than one would initially expect".

As a precedent to this work, we cannot forget the Center's Law of the Sea Commentary Project-Virginia Commentary, which has led to the seven volumes plus the Supplementary Documentation of a colossal work, which is *United Nations Convention on the Law of the Sea, 1982: a commentary*, edited by Myron H. Nordquist and published by Nijhoff between 1985 and 2012. However, this work focused particularly on the legislative history of each provision, it is mainly a collection of sources and documents. In comparison to this work, the volume edited by Professor Proelss, certainly complements the previous one, but takes a step forward: it addresses the context, object and purpose

 DOI: 10.17103/sybil.21.38

of the Convention's provisions, is based on a continental European approach and focuses on the state practice of courts and organizations, derived from the Convention

This monumental study is a systematic approach analyzing each provision individually, with careful consideration of the developments and practice derived from LOSC since its adoption. The volume entails a comprehensive, objective, and authoritative analysis of each of the 320 articles and 9 annexes in the 1982 United Nations Convention on the Law of the Sea.

Every analysis is preceded by: 1. The text of the provision itself, following the Convention's structure; 2. A selected bibliography concerning every provision under commentary; 2. Documents (both international as well as internal) and 3. Cases in which the provision has been considered principally or incidentally. After this, the commentary itself contains the following aspects: I. Purpose and Function; II. Historical Background; III. Elements (this last section is divided into several subheadings). Footnotes are extensive and very well coordinated.

Particularly remarkable for its utility for practitioners and scholars is the table of cases, which are classified by the international court that has considered them: International Court of Justice, Permanent Court of International Justice, International Tribunal for the Law of the Sea, Permanent Court of Arbitration and Other International Courts. The last part of the table lists the provisions or annexes of LOSC considered by these courts.

Professor Proelss has had the virtue of gathering well-known experts in the Law of the Sea from various countries while opening this important scientific project to young professors and researchers who have done more than the mere task of coordinating the book, as acknowledged in his "Preface". Normally one single author or several authors analyze a set of articles under the same section of the Convention. This has contributed to unity and coherence in the whole project.

Interesting for the Spanish scientific community is Professor Proelss warning in his Preface against the role played by certain national research councils that do not seem to identify precisely this kind of scientific contributions as proper research. I hope that national research councils take due note of Professor Proelss' warning in order to review their scientific requirements.

As a general conclusion, the 2617 pages' volume entitled *United Nations Convention on the Law of the Sea: A Commentary* is a reference work for law practitioners, scholars, theorists, that will shed an inspiring light on future legal discussion and instruments still to come. I fully recommend it and congratulate its editor and the publishing houses for embarking in this important and necessary project.

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 DOI: 10.17103/sybil.21.38

the SPANISH YEARBOOK of INTERNATIONAL LAW

Global Challenges in the Arctic Region: Sovereignty, environment and geopolitical balance. **By Elena Conde & Sara Iglesias (eds.) (London and New York, Routledge, 2017), 464 pp.**

Some years ago, I devoured Fergus Fleming's *Ninety Degrees North: The Quest for the North Pole*, published in 2001 and translated into Spanish in 2007 by Jordi Beltrán Ferrer as *La conquista del Polo Norte*. Obviously, the work reviewed here has nothing to do with that story. I mention it only to underscore the fascinating history of a challenging space for humans, replete with expeditions, failure, disappearances, mutiny, improbable events, deceit, heroics, and even the occasional episode of anthropophagy.

Over time, the explorers naturally gave way to scientists from a variety of disciplines, natural and social. Today, the Arctic region is well known, and both technological developments and natural phenomena caused by humans, especially climate change, have aroused sovereign ambitions with the ensuing problems. These problems range from the delimitation of spaces between countries with Arctic coasts to the opening of new navigation routes through the Northwest and Northeast Passages amidst Canadian and Russian claims of sovereignty. They include projects to exploit natural resources at sea and on the continental shelf, even beyond the 200 nautical miles from any coast and at the expense of a seabed defined as the common heritage of mankind. Indeed, they encompass threats to the natural environment so far-reaching that, from a human perspective, the growing need to resettle the Inuit or Eskimos in areas less threatened by the melting ice is echoed thousands of kilometres away where, due to the rising sea levels, the people of Vanuatu, in the Pacific, or the Maldives, in the Indian Ocean, are being forced to abandon islands as poor as they are paradisiacal simply to survive.

The complex problems of the Arctic region have become a sort of "trending topic" of our days. The book reviewed here takes a multidisciplinary, if fundamentally legal and political, approach to some of them. Consisting of 22 chapters, it begins with two introductory contributions. The remainder are organised into five parts devoted to: issues of sovereignty (Part I); Arctic governance, with special emphasis on the Arctic Council and the progressive involvement of civil society (Part II); the dilemma of the displacement of the Inuit, their rights, the protection of Arctic species and the regulation of the trade in wildlife (Part III); the environment and the exploitation of fisheries and mineral resources, renewable energies, and emissions reduction (Part IV); and geopolitical and security challenges (Part V). The chapters follow an open structure that, according to the editors, reflects the "centre of gravity" of each contribution. The challenges of climate change, the conservation and protection of the environment, sustainable development, cooperation amongst Arctic States and between them and non-Arctic States, and the role to be played by the European Union lie at the core of the book and permeate its pages. However, in yet another smart decision by the editors, the last two chapters merit special attention. They are devoted to China and its aspirations —today achievable and, indeed, already partly achieved— of becoming a great power. Perhaps that is why it has already learnt to act with a certain disregard for international standards. But that is in the South China Sea, not the Arctic, where it is trying to carve out a niche for itself, as a global player, using scientific cooperation as a peaceful diplomatic weapon to penetrate and entrench its interests.

This book grew out of the R+D project "The Race for the Arctic: Issues of International Law Arising in the Light of Climate Change", proposed and led by one of the editors —Professor Elena Conde— and funded by the Spanish Ministry of Economy, Industry and Competitiveness. Conde

 DOI: 10.17103/sybil.21.39

successfully recruited 11 (mostly young) researchers to a team that, when the book was conceived, swelled to 25 (some no longer so young), who authored and co-authored the various chapters. One third of the contributors are affiliated with Spanish universities; the rest are from European, Asian and Canadian institutions, academic and otherwise.

With this book Conde and her co-editor Sara Iglesias have managed to put the Arctic question on the research agendas of jurists and political scientists at Spanish universities, as well as forge links with institutions in other countries, especially those European countries with the greatest interests in the Arctic (due to their proximity or advanced knowledge of it) and Canada. Published with care in English by Routledge, its dissemination is guaranteed. It is highly recommended.

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 DOI: 10.17103/sybil.21.39