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*After the Prestige Oil Spill: Measures Taken by Spain in an Evolving Legal Framework**

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INTRODUCTION

In supporting the freedom of navigation principle, *Grotius* argued in 1609 that navigation was an innocuous activity, causing neither danger nor harm to any State.[1] Further evolution has proven *ad libitum* that, whatever the merits of the said principle might be, *Grotius*' assertion cannot be held true nowadays.

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[1] Huig de Groot, (1609), *De jure praedae commentarius, ex Auctoris Codice descripsit et vulgavit, H.G. Hamaker, Hagae Comitum*, 1868, p. 228.

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When the United Nations Convention on the Law of the Sea (UNCLOS) was adopted in 1982, it was already evident in practice that maritime transport of oil might have severe adverse effects for the environment and the economic interests of the affected coastal States, as a source of operative and accidental pollution. However, UNCLOS confirmed the paramount rank of the freedom of navigation principle, and the correlative outstanding role of the flag State with respect to its exercise, while trying to strike some balance by upholding the prescriptive and enforcement powers of coastal States and, mostly, port States.[2]

In the absence of adequate preventive and protective international rules, coastal States have resorted in the past to unilateral measures, such as the ones adopted by Canada in 1975, through the Arctic Waters Pollution Prevention Act,[3] by the USA in 1990, through the Oil Pollution Act, and by the European Union in 1995 after the accident of the *Erika* on the French coast. The reaction of coastal States affected by oil spills after a long series of increasingly catastrophic accidents shows that they are no longer willing to suffer similar environmental and economic disasters in the future. The fact that there is no coastal State free from the risk of being polluted by oil resulting from the operation of vessels, as well as the increasing frequency of oil spills with catastrophic environmental and economic dimensions, also support the trend towards the adoption of stricter internationally agreed measures concerning safer navigation of vessels devoted to oil transport.

We shall summarize hereafter the main measures taken by Spain and other coastal States after the accident of the oil tanker *Prestige* and further actions promoted in regional (European Union, EU) and global organizations (International Maritime Organization, IMO), in order to improve the existing international legal framework.

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[2] We do not intend to review here the extent of the powers granted by UNCLOS to the different categories of States concerned with freedom of navigation with respect to pollution from ships; in Spanish legal doctrine this question has been examined *inter alia* by: Juste Ruiz, J., *Derecho internacional del medio ambiente*, Madrid (McGraw-Hill) 1999, pp. 167–175; Bou Franch, V., "Riflessione sulle misure di prevenzione dell'inquinamento marino dopo l'incidente della *Prestige*". In: M. C. Ciciriello (ed.), *La protezione del Mare Mediterraneo dall'inquinamento. Problemi vecchi e nuovi*, 2003, Ed. Scientifica, Napoli, pp. 27–70. See also, with respect to the Prestige accident: *Revista Española de Derecho Internacional*, vol. LV-2003, n. 1, with articles by Fernández De Casadevante Romaní, C.; Fernández Tomás, A.; Juste Ruiz, J.; Pueyo Losa, J./Lirola Delgado, I./Jorge Urbina, J.; Sobrino Heredia, J.M.

[3] According to the declaration made by the Canadian Prime Minister, Mr. *Pierre Trudeau* in support of the Act: "Where no law exists, or where law is clearly insufficient, there is no international common law applying to the Arctic Seas, we are saying somebody has to preserve this area for mankind until the international law develops. And we are prepared to help it develop by taking steps on our own and eventually, if there is a conference of nations concerned with the Arctic, we will of course be a very active member in such a conference and try to establish an international regime. But, in the meantime, we had to act now". *ILM*, 1970, p. 600.

I. RESPONSE TO THE OIL SPILL AND SUBSEQUENT MEASURES

1. Intervention at sea and contingency action

Intervention in the event of an accident at sea which might cause pollution damage to a coastal State, in order "to take and enforce measures", is permitted by international law only when a maritime casualty has occurred or the threat of it is "imminent" (UNCLOS, Article 221).[4] This attributive rule has nonetheless serious shortcomings, namely: it leaves to the ship's Master the power to decide at which moment a "casualty" is declared; it does not provide for preventive notification of the risk to the coastal State; and it only permits the coastal State to intervene once the pollution or threat of pollution "following" upon a maritime casualty may reasonably be expected to result in "major harmful consequences".

In the case of the *Prestige*, the "Mayday" was given by the Captain on Wednesday 13 November 2002, at 15.30 hours, when the ship was approximately 28 miles off the West Coast of Galicia (Spain) in severe stormy weather conditions. The tanker started listing and leaking significant amounts of heavy fuel oil while it was some 30 km off Cape Finisterre. The ship was in danger of sinking because of a 35 metre crack in the starboard side of the hull. Whatever the term employed for the description of the situation could be (incident, accident, emergency, distress), it does not seem dubious that it constituted a "casualty" empowering the coastal State to adopt prescriptive and enforcement measures under Article 221 of UNCLOS and the 1969 Intervention Convention.

Upon the request of the Captain, the Spanish maritime authorities airlifted off the crew, with the exception of the Master and two other crew members who stayed on board to receive the assistance of a tug, before also being airlifted off. Following instructions from the owner and his insurer, the Dutch salvage company "SMIT" took control of the vessel. The ship was towed to open seas, and while there were on-going discussions about where it could find a safe haven to transfer its cargo to another ship, the situation deteriorated on board. Over the following five days the tanker in distress was towed first to the North-East, until approaching nearly three miles off the coast, then to the North-West departing some 90 miles from the shore and then South and South-West to the outer part of the Spanish EEZ. During its erratic itinerary, in a situation described as "close to sabotage", the ship released an estimated 25,000 tonnes of its heavy fuel oil cargo, producing a catastrophic impact on the neighbouring west coast of Galicia and on the North Coast of Spain, France, and Portugal.[5] The *Prestige* sank on 19 November

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[4] See also: International Convention relating to Intervention in the High Seas in Cases of Oil Pollution Casualties, 1969, as amended, and Protocol relating to Intervention in the High Seas in Cases of Pollution by Substances other than Oil, 1973.

[5] Traces of oil were detected even in the United Kingdom (the Channel Islands, Isle of Wight and Kent).

2002 some 260 km west of the Spanish coast with some 13,800 tonnes of heavy oil in its tanks.

According to the IMO Convention on Oil Pollution Preparedness, Response and Co-operation of 1990 (OPRC Convention),[6] the ship should have applied its own onboard contingency plan, something that became difficult once the members of the crew were airlifted off immediately after notification of the casualty. Spain applied its own National Contingency Plan on Marine Pollution established, in application of the OPRC Convention and Article 87 of the Spanish Ports and Merchant Shipping Act, by a Ministerial Order of 23 February 2001.

The implementation of the Spanish National Contingency Plan on Marine Pollution in the case at hand has given rise to much controversy, both technical and political, principally concerning the option taken by the Spanish Government to tow the *Prestige* away from the Spanish coasts.[7] Whereas this type of decision is always open to criticism, several elements should be taken into consideration when legally assessing the option taken by the Spanish authorities. In the first place, the duty of the coastal State to render assistance (Article 98.2 of UNCLOS) does not in any way require it to take one specific course of action such as, for instance, towing a ship in a casualty situation to a place of refuge in or near its coasts. Moreover, at the time of the accident, there were no global, regional or national rules imposing legal obligations with respect to places or ports of refuge[8] on coastal States. With that in view, given the circumstances of this case,[9] and considering the consistent international practice in cases such as this,[10] it should not come as a surprise that Spain exerted its right to order the ship far from the Spanish coast. The right to protect "their coastline or related interests, including fishing" from pollution or threat of pollution constitutes the ultimate interest of the coastal State when dealing with maritime casualties, as recognized in Article 221.1 of UNCLOS. If, in the case of the *Prestige*, this right was exerted beyond all rea-

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[6] Spain ratified the OPRC Convention on 3 December 1993 (*Boletín Oficial del Estado*, 5 June 1995).

[7] For a quite complete legal assessment of the implementation of Spain's 2001 National Accidental Sea Pollution Contingency Plan in the case of the *Prestige* catastrophe see Meilán Gil, J. L., (Director), *Problemas jurídico-administrativos planteados por el Prestige*, Thomson-Aranzadi, 2005, pp. 121–143.

[8] As an informative document of IMO recognizes "these provisions (of UNCLOS, SOLAS, and the SALVAGE Conventions) do not themselves give a right to entry into a place of refuge, nor do they explicitly refer to the question of a coastal State's obligation to establish places of refuge. On the other hand, neither do they preclude such a principle". See *"Places of refuge" – addressing the problem of providing place of refuge to vessels in distress* (available at: <http://www.imo.org>).

[9] That is, mainly: poor navigability of the ship, collapse of the engines, extremely bad weather conditions, increasing risk of sinking, specially noxious character of the cargo, increasing amount of the oil spill, absence of advisable places or ports of refuge, opposition by local authorities and populations, etc.

[10] The action taken by Spain with respect to the casualty of the *Prestige*, directing it far away from the Spanish coastline, constitutes common practice in the field. One

sonable standards,[11] this would only be determined, absent any claim for the responsibility of Spain for an international wrongful act, when a final decision is taken in the proceedings pending before national Courts, in Spain and abroad.[12]

The type of oil carried by the *Prestige* was very persistent and difficult to clean up, and it took a massive amount of national and international cooperation, both by Government officials and by civil volunteers, to cope with the pollution caused by the disaster. Major clean-up operations were carried out at sea and on shore in Spain using vessels from Spain and nine other European countries and collecting around 141,000 tonnes of oily waste. After completing these clean up operations on the Spanish coasts, removal of the oil from the wreck was successfully achieved between May and October 2004 by the Spanish oil company Repsol YPF.[13] The cargo remaining in the wreck was removed using aluminium shuttle containers filled by gravity through holes cut in the tanks. Some 13,000 tonnes of heavy fuel oil were removed from the forepart of the wreck and approximately 700 tonnes were left in the aft section and treated with biological agents aimed at accelerating the degradation of the oil. The estimated cost of this operation was 100 million.

Whatever the final judgement about the efficiency (or inefficiency) of the contingency action developed by the Spanish authorities in executing the National Contingency Plan should be, it should be recognized that two years after the catastrophe, clean up operations have been completed and the remaining fuel on the wreck has been successfully removed and transferred to land. In addition, as we shall see later on,[14] economic aids and other promotional measures to alleviate the situations of those affected have been implemented, and payments for compensations for damages have been anticipated to victims.

2. Unilateral and bilaterally agreed measures concerning certain oil tankers

The first strictly unilateral legal measure adopted by Spain after the accident of the *Prestige* was the enactment of Royal Decree-Act No. 9/2002, of 13 December

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significant case occurred in December 2001–January 2002, when the damaged tanker *Castor* was towed around the Mediterranean Sea for over a month before a place could be found where a successful lightering operation could be carried out. See: *"Places of refuge" – addressing the problem of providing place of refuge to vessels in distress. doc. cit.*

[11] Art. 300 of UNCLOS provides that States Parties "shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner that would not constitute an abuse of right".

[12] See *infra.* II, 3.

[13] The ambitious operation for the recovery of the oil in the wreck was completed on 27 October 2004 "with a degree of success that surprised even those responsible for the extraction". Lloyd's List, 15 November 2004 (n. 58788), p. 10.

[14] *Infra*, II, 2.

1992.[15] According to this Royal Decree-Act, from 1 January 2003 onwards the entering into Spanish ports of single hull oil tankers, flying whatever flag, and carrying heavy fuel oil, tar, bitumen or heavy crude oil is forbidden and, in case of violation of the ban, sanctioned with a fine of up to 3 million. As far as this legal measure concerns exclusively the entering into Spanish ports and does not affect international navigation through other Spanish maritime zones in any other way, its conformity with International Law is not questioned.[16]

Yet, before the oil spill caused by the *Prestige* reached the French Atlantic coasts,[17] Spain and France held their fifteenth bilateral summit at Malaga (Spain), on 26 November 2002. On this date, the competent Ministers of the two States issued a Joint *Communiqué*[18] starting with the assertion that both States coincided in considering the "unavoidable necessity" of adopting measures in order to impede in the future the repetition of ecological disasters caused by "substandard" oil tankers such as the *Erika* on the French coasts or the *Prestige* on the Spanish coasts. The agreement reached by both States implied the undertaking to promote different measures that should be adopted by different international organizations, such as the European Union, the IMO or other international fora, as well as the adoption of immediate measures by the two States. The first paragraph of point 4 of this Joint *Communiqué* stated that Spain and France agreed to elaborate proposals, in the field of the International Law of the Sea, allowing Member States acting as coastal States to control on a non-discriminatory basis and, if necessary, to limit the traffic of ships carrying dangerous goods within the exclusive economic zone. Its second paragraph provided for immediate information and intervention measures with respect to certain oil tankers, as it stated the following:

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[15] This Royal Decree-Act was published in the Spanish *Boletín Oficial del Estado*, 14 December 2002, No. 299.

[16] Article 112 of the Spanish Act No. 27/1992, of 24 November 1992, concerning National Ports and Merchant Shipping states that: "In order to protect the safety of navigation and prevent pollution of the marine environment in waters over which Spain exercises sovereignty, sovereign rights or jurisdiction, the Ministry of Public Works and Transport, through the ports authorities and the harbour-Masters' offices, may visit, inspect, search, seize, initiate legal proceedings and, in general, take any steps deemed necessary in respect of ships which infringe or may infringe those legal rights". Before the *Prestige* accident took place, Spain had never invoked Article 112 of this Act as a legal basis for the expulsion of any oil tanker from its exclusive economic zone. In fact, before the accident of the *Prestige*, Spain had never expelled any foreign vessel from its maritime zones.

[17] On 31 December 2003, the pollution provoked by the *Prestige* oil spill reached the French coasts and the first lumps of oil were washed up on the beaches of the Landes and the Gironde. A week later, more than 200 km of the French Atlantic coastline from the Spanish border to L'Ile d'Yeu were affected.

[18] This text has not been officially published in Spain. The authors thank the *Comisionado del Gobierno para las actuaciones derivadas de la catástrofe del buque Prestige* for his readiness to provide them with a copy of this document.

> "Spain and France agree to establish a firm control, in their exclusive economic zones, of all ships more than 15 years old, single hull, carrying fuel and tar, when they suppose a risk for the protection of the marine environment. For this aim, Spain and France will establish a system of detailed information at the entrance of their exclusive economic zones allowing, in cases where doubts exist, an exhaustive control of the ship in the sea, the result of which could mean the obligation of leaving the zone. Spain and France will ask the European Union to study the conditions for the generalization of this measure".[19]

In fact, the first news about this agreement was given at the press conference held jointly by the President of the Spanish Government, Mr. *José María Aznar*, and the President of the French Republic, Mr. *Jacques Chirac*, at the end of the fifteenth Spanish-French Summit. At this press conference, the President of the Spanish Government began by declaring that:

> "Today Spain and France have wished to take a new step forward, so we will adopt jointly agreed measures in our respective exclusive economic zones. Hence, we have decided that, from tomorrow onwards, ships built more than 15 years ago, with a single hull, carrying fuel or tar, not equipped with mechanisms for measuring the level and pressure of oil and representing a threat for our coasts, will be exhaustively controlled".

This may give rise to the expulsion of these ships from the exclusive economic zone if they constitute a danger, except if the authorities of these ships give all the complete information about their cargo, their destination, the documents concerning their flag States, the detailed information on all the operators and all the operations affecting the transport that they are carrying out and that there is within those ships. In cases of doubt, the pertinent State's specialist will carry out an inspection, and of course, if needed, there will be the pertinent consequences if the due securities are not given, including the decision of expulsion from the exclusive economic zones of France or Spain.

All this is based on Article 56 of the United Nations Convention on the Law of the Sea[20] and it will enter into force in our exclusive economic zones from tomorrow onwards".[21]

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[19] Private translation.

[20] An additional legal argument was introduced on 30 December 2002, when the Spanish Ministry on Transport and Public Works, Mr. *Francisco Álvarez-Cascos*, during his intervention before the Infrastructures Commission of the Spanish Congress, declared that: "the Spanish Government, as well as the French Government, applying Articles 56 and 73 of the Convention of the United Nations on the Law of the Sea, began immediately to impede the entrance in their exclusive economic zones of those ships that, due to their characteristics and cargo, may produce an adverse effect on the marine environment" (emphasis added). Private translation. See the document *Congreso de los Diputados*, (30 December 2002): *Comparecencia del Ministro de Fomento, Francisco Álvarez-Cascos, ante la Comisión de Infraestructuras. Cit.*

[21] Private translation. See *Conferencia de prensa del Presidente del Gobierno, Don José*

At the same press conference, the President of the French Republic, Mr. *Jacques Chirac*, added the following:

> "Moreover, we have decided, I wish to remind you, that from tomorrow onwards all ships with doubtful characteristics (single hull, more than 15 years old, carrying heavy fuel or tar) and dangerous for ecosystems can be checked and, in cases of infringement of the rules, excluded from our 200 mile zones. We will propose to Copenhagen (European Council) the extension of these measures to the European countries as a whole, so that they can join us".[22]

It is also interesting to note that during this press conference, a journalist asked whether this new proposal was in conformity with International Law and, if this was the case, why it had not been adopted until that moment. The President of the French Republic, Mr. *Jacques Chirac*, answered this question, saying that:

> "A moment ago, the President of Government, Mr. *Aznar*, commented that this decision is based on Article 56. Why was this policy not proposed before? I think that it is, simply, because we have an International Law of the Sea that is a kind of historic monument, conceived for guaranteeing an absolute freedom of navigation through all the seas in the world and that it was difficult to criticize such a monument. Moreover, decisions were in general taken at the International Maritime Organization. As you know, there the corridors are

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María Aznar, y del Presidente de la República Francesa, Jacques Chirac (Málaga, 26 November 2002), 4 pp. The original Spanish document is available at: <http://www.la-moncloa.es>.

[22] Private translation. *Ibid.* These declarations were published on a widespread basis . Two official notes dated the 26 November 2002 from the Spanish Ministry for the Presidency and from the Spanish First Vice-Presidency of the Government stated, with the same wording, that: "the President of the Government, *José María Aznar*, and the President of the French Republic, Mr. *Jacques Chirac*, have agreed today, during the Spanish-French Summit held at Malaga, to implement from tomorrow onwards exhaustive controls for ships more than 15 years old that navigate through the zone of exclusion of 200 marine miles and carrying dangerous goods such as fuel, tar or of any other type and that represent a threat for the coasts of the two States. This decision, adopted by both countries, could give rise to the expulsion of the ship navigating through this area, except when the authority of the ship offers all the information required, such as the information concerning their cargo, operators and destination. In cases of negative answers, both States will adopt measures against them, which may include the expulsion of these ships from the exclusive economic zones of both countries. The decision adopted today by both States has its legal basis in Article 56 of the United Nations Convention on the Law of the Sea". Private translation. All declarations and notes issued by the Spanish Ministry for the Presidency are available at <http://www.mpr.es>. All declarations and notes issued by the Spanish First Vice-Presidency of the Government are available at <http://www.la-moncloa.es>.

shared depending on the tonnes transported and this, of course, gives the responsibility for taking decisions mainly to those States with a flag of convenience.

Today we have decided that what has already taken place is enough. As far as our two countries are concerned, in a way that is in perfect harmony with International Law, we have adopted this initiative and we ask our partners to do so too. As far as we are concerned, this decision is irrevocable".[23]

As the declarations made by the President of the Spanish Government at the press conference following the bilateral Spanish-French Summit reveal, the actions contemplated by France and Spain were directed only against a very particular kind of oil tanker, that is, "ships built more than 15 years ago, with a single hull, carrying fuel or tar, not equipped with mechanisms for measuring the level and pressure of oil and representing a threat for our coasts". It is interesting to note that these actions were not directed only at vessels flying a flag of convenience (which in fact is what takes place in most of the cases), but against any vessel that meets the envisaged conditions, irrespective of the flag it flies. Unlike in the case of fisheries, in the case of doubtful oil tankers it is not the lack of control of the flag State that causes the environmental risk or threat, but the mere presence of these vessels within the exclusive economic zones. Hence, in the opinion of France and Spain, it is the need to avoid this environmental threat that justifies the expulsion of any oil tanker that meets these conditions from their exclusive economic zones.

Spain and France immediately implemented the decision to expel this particular kind of oil tanker from their exclusive economic zones. Spain expelled from its exclusive economic zone the following tankers: on 30 November 2002, the single hull oil tanker *Moskowsky Festival*, flying the flag of Malta;[24] on 4 December, the oil tanker *Evgueny Titov*, also flying the flag of Malta;[25] on 9 December, the oil tanker *Teekay Foam*, flying the flag of the Bahamas;[26] on 10 December, the oil

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[23] Private translation. See *Conferencia de prensa . . . cit.*

[24] "The President of the Government, *José María Aznar*, announced today that last night the first expulsion from Spanish territorial waters of a vessel that did not comply with the conditions agreed with France after the oil spill of the *Prestige* took place. It is the *Moskowsky*, an oil tanker flying the flag of Malta, more than 15 years old, single hull, carrying fuel and whose destination was Gibraltar. The Spanish Government has recommended that the Portuguese authorities move it further away from the 200 miles from its coasts, as Spain has done following the bilateral agreement signed with France for the protection of the waters of the two countries against the transport of dangerous goods during the last bilateral summit at Malaga". Private translation. See the document Vicepresidencia Primera del Gobierno, (1 December 2002): *El Gobierno informa. El barco Moskowsky, de bandera maltesa, fue expulsado de la zona económica exclusiva española*, 6 pp.

[25] See the document Vicepresidencia Primera del Gobierno, (4 December 2002): *El Gobierno informa. Nota 49. Más de 8.200 toneladas recogidas ya en el mar*, p. 1.

[26] See Ministerio de Defensa, (9 December 2002): *Nota de prensa del Ministerio de*

tanker *South Trader*, flying the flag of Liberia;[27] on 11 December, the oil tanker *Byzantio*, flying the flag of Malta;[28] on 18 December, the tanker *Néstor C*;[29] on 21 December, the oil tanker *Stmichaelis*, flying the flag of Greece and, once again, the *Moskowsky Festival*;[30] on 30 December the expulsion of other three oil tankers (the *Majory*, flying the flag of Malta; the *Kriti Filoxenia*, flying the flag of Greece; the *Aquarius*, flying the flag of Belize) was announced;[31] etc. France reacted in a similar way.[32] Only one flag State affected by these measures, Greece, issued a diplomatic protest against these expulsions.

Spain also succeeded in getting other European States (Portugal, Italy and Germany) associated with the Spanish-French decisions not to allow the navigation of sub-

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Defensa: La Armada ha expulsado hoy de aguas españolas al petrolero "Teekay Foam", 1 p.; and Vicepresidencia Primera del Gobierno, (9 December 2002): *El Gobierno informa. Nota 63. España expulsa de sus aguas a otro petrolero por no cumplir las normas de seguridad*, 6 pp. All the declarations and notes issued by the Spanish Ministry on Defence are available at <http://www.la-moncloa.es>.

[27] See the document *Congreso de los Diputados*, (10 December 2002): *Comparecencia del Ministro de Fomento, Francisco Álvarez-Cascos, ante la Comisión de Infraestructuras*, p. 12.

[28] See the documents *Xunta de Galicia. Oficina Informativa Comisión Seguimiento Prestige*, (11 December 2002): *Nota 68. Se amplia el Real Decreto de ayudas a los afectados a las Comunidades Autónomas de Asturias, Cantabria y País Vasco*, 1 p.; and Vicepresidencia Primera del Gobierno, (13 December 2002): *El Gobierno informa. Nota 75. El Gobierno amplia las ayudas a Asturias, Cantabria y País Vasco*, 4 pp. All the declarations and notes issued by the regional government of Galicia and by the *Oficina Informativa de la Comisión de Seguimiento del Prestige* are available at <http://www.xunta.es>.

[29] See *Ministerio de Fomento*, (19 December 2002): *El Gobierno informa. Las Autoridades Marítimas españolas prohíben la entrada del buque "Néstor C" en puerto español*, 2 pp.

[30] See *Xunta De Galicia. Oficina Informativa Comisión Seguimiento Prestige*, (21 December 2002): *Nota 95. Un patrullero de la Armada impedirá la entrada en aguas españolas a dos buques mercantes monocasco*, 5 pp.

[31] See the document *Congreso De Los Diputados*, (30 December 2002): *Comparecencia del Ministro de Fomento, Francisco Álvarez-Cascos, ante la Comisión de Infraestructuras, cit.*

[32] For instance, "A destroyer from the French Navy navigates with the *Enalios Titan*, a single hull oil tanker, built in 1978 and carrying 81.185 tonnes of fuel oil in order to abandon the French economic zone. Moreover, the French authorities have informed this tanker that, due to the agreements signed by France and Spain at Malaga, it cannot enter into the Spanish exclusive economic zone. If this tanker does not comply with this order and tries to enter into the Spanish exclusive economic zone, the frigate *Baleares* is ready to force it to retire from the Galician coasts". Private translation. See the documents *Vicepresidencia Primera del Gobierno*, (3 December 2002): *El Gobierno informa. Nota 47. Francia y España expulsan a un buque de bandera de Malta cargado con 81,185 toneladas de fuel-oil*, pp. 1–2; and *Ministerio De Defensa*, (4 December 2002): *Nota de prensa del Ministerio de Defensa: Colaboración de las Fuerzas Armadas en la protección de la costa gallega*, 2 p.

standard oil tankers within the 200 mile limit.[33] A "Joint Spanish-Italian Declaration concerning safety of transport in oil tankers", signed on 17 March 2003 by the Spanish Ministry on Transport and Public Works, Mr. *Francisco Álvarez-Cascos*, and the Ministry on Infrastructures and Transport of the Italian Republic, Mr. *Pietro Lunardi*, stated that:

> "Both countries will help each other in the adoption of measures in conformity with the International Law of the Sea allowing to limit on a non discriminatory basis the traffic of vessels transporting dangerous and polluting goods within the 200 mile limit from their coasts. This initiative pretends to reduce the risk and the consequences of an accident as much as, in average cases, to assist the vessel without danger for the environment, thanks to the remoteness from the coasts of those special transit routes.
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> To this aim, Spain and Italy will establish a system of detailed information at the entrance of their exclusive economic zones in order to allow, in cases where doubts exist, an exhaustive control of the ship in the sea. Spain and Italy will ask the European Union to study the conditions for the generalization of these measures. (. . .)
>
> The transport of heavy crude oil and fuel oil, as well as bitumen and tar will only be allowed in double hull oil tankers. Spain and Italy reaffirm their aim to ensure, initially through domestic measures, not to allow the entrance of single hull oil tankers carrying cargoes such as the afore-mentioned into their ports, anchorage and transfer places. Both States undertake to work for the quick adoption of these measures by the European Union and jointly or subsequently by the IMO".[34]

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[33] At the press conference held jointly by the President of the Council of Ministers of the Italian Republic, Mr. *Silvio Berlusconi*, and the President of the Spanish Government, Mr. *José María Aznar*, at the end of the bilateral Italian-Spanish Summit on 28 November 2002, the Spanish President stated that: "President *Berlusconi* knows the letter that I have sent to the President of the (European) Commission and also to all my colleagues in the European Union. President *Berlusconi* has told me that he assumes the contents of this letter as his own and that, moreover, Italy is ready to accede to the agreement between France and Spain, agreement to which Portugal has acceded this morning in a conversation that I have held with the Portuguese Prime Minister". Private translation. See *Conferencia de prensa del Presidente del Consejo de Ministros de la República Italiana, Silvio Berlusconi, y del Presidente del Gobierno, Don José María Aznar (28 November 2002)*. The Spanish text of this document is available at <http://www.lamoncloa.es>.

[34] See the document *Ministerio de Fomento*, (17 March 2003): *El Gobierno informa. El Ministro de Fomento y el Ministro de Infraestructuras y Transportes de Italia firman la "Declaración Hispano-Italiana sobre la seguridad del transporte en buques tanques"*, 4 pp. This document is available at: <http://www.mfom.es>.

3. Subsequent action promoted at the EU and the IMO

As announced at the press conference closing the bilateral Summit of Malaga, France and Spain tried to give a larger scope to the bilaterally agreed measures, by seeking the support of the European Union (EU)[35] and promoting their adoption by the competent instances of the International Maritime Organization (IMO).

a) *Regional measures: the case for the European Union*

On 21 November 2002, only eight days after the *Prestige* accident took place, the President of the Spanish Government wrote a letter to the President of the European Council, the President of the European Commission and to all Prime Ministers and Heads of State of the European Union proposing the urgent adoption of several measures in order to improve the safety of navigation.[36] The European Commission also reacted speedily and on 3 December 2002 adopted a Communication on improving safety at sea in response to the *Prestige* accident,[37] which recommended a series of measures for the further development and strengthening of the so called *Erika* I and *Erika* II packages.[38]

Following these legal initiatives, the Council of Ministers on Transport, Telecommunications and Energy (the "Transport" Council) held at Brussels on 5–6

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[35] At the press conference closing the bilateral Spanish-French Summit at Malaga, the President of the Spanish Government declared that: "As you know, I have written firstly to the President of the European Council, Mr. *Rasmussen*, and to the President of the European Commission, and in the same way I have written a letter to all the Prime Ministers and Heads of State of the European Union, proposing the urgent adoption of seven points concerning maritime safety: the establishment of the Maritime Safety Agency; the establishment of a European compensation fund; the revision of the calendar for the introduction of the double hull for ships or an equivalent design for single hull oil tankers; a clear improvement on the inspection of vessels; to strengthen the mechanisms for the control of maritime traffic; the abolition inside the European Union of territories where no control is established that act as paradises; and the elaboration of new proposals in the field of International Maritime Law. As you also know, last Sunday, in the meeting I held with the President of the (European) Commission, *Romano Prodi*, the Commission backed these proposals fully". Private translation. See *Conferencia de prensa del Presidente del Gobierno, Don José María Aznar, y del Presidente de la República Francesa, Jacques Chirac (Málaga, 26 November 2002)*, 4 p. *Cit.*

[36] *Ibid.* See also the document *Congreso de los Diputados*, (10 December 2002): *Comparecencia del Ministro de Fomento, Francisco Álvarez-Cascos, ante la Comisión de Infraestructuras*, p. 12.

[37] *Commission of the European Communities*, document COM (2002) 681 final (Brussels, 3.12.2002): *Communication from the Commission to the European Parliament and to the Council on improving safety at sea in response to the Prestige accident*, 27 pp. This document is also published in *Bulletin of the European Union*, 12-2002, point 1.4.72. All the European documents are available at <http://europa.eu.int/eur-lex/en/index.html>.

[38] These EU legislative "packages" were adopted respectively on 21 March 2000 (*Erika* I) and 6 December 2000 (*Erika* II), in response to the accident of the oil tanker *Erika* on 12 December 1999 on the Atlantic coast of France.

December 2002, decided by unanimity of the Ministers from the 15 Member States to implement all the proposals contained in the letter from the President of the Spanish Government, Mr. *José María Aznar*. In particular, conclusions numbers 9 and 11 of this "Transport" Council must be highlighted. They read as follows:

> "9. Agrees to reinforce mechanisms for the control of maritime traffic along the coasts of the Member States of the European Union through the establishment by the Member States, where appropriate and in accordance with international law, of a preventive distance for ships on which demonstrated irregularities have been established;
>
> 11. Invites Member States to adopt measures, in compliance with international law of the sea, which would permit coastal States to control and possibly to limit, in a non-discriminatory way, the traffic of vessels carrying dangerous and polluting goods, within 200 miles of their coastline, and invites the Commission to examine measures to limit the presence of single-hull tankers of more than 15 years of age carrying heavy grades of oil within the exclusive economic zone of the Member States, or, where appropriate and in accordance with international law, within 200 miles of their coastline".[39]

The European Council of Copenhagen (12–13 December 2002) backed all these conclusions unanimously. The Presidency conclusions of this European Council stated the following:

> "The European Council expresses its regret and grave concerns with regard to the serious accident of the *Prestige* oil tanker off the north-west coast of Spain. The ensuing damage to the marine and socioeconomic environment and the threat to the livelihood of thousands of persons are intolerable. The European Union expresses its solidarity with the States, regions and populations that have been affected and its support and recognition of the efforts of the affected States, institutions and civil society towards the recovery of the polluted areas.
>
> The European Council recalls its conclusions in Nice in December 2000 concerning the *Erika* measures and acknowledges the determined efforts in the Euro-pean Community and the IMO since the *Erika* accident to enhance maritime safety and pollution prevention. The Union is determined to take all necessary measures to avoid a repetition of similar catastrophes and welcomes the rapid responses by the Council and the Commission. The Union will also continue to play a leading role in international efforts in pursuit of this objective, in particular within the IMO. The conclusions of the Transport Council on

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[39] See Document 15121/02 (Presse 380): Council of the European Union, *2472nd Council Meeting – Transport, Telecommunications and Energy – Brussels, 5–6 December 2002*, p. 32. The "Environment" Council on 9 December 2002 also adopted all these same conclusions. See Document 15101/02 (Presse 379), Council of the European Union: *2473rd meeting of the Council (Environment) held in Brussels on 9 December 2002*, p. 22.

6 December 2002 and the Environmental Council on 9 December 2002 should be implemented in all their aspects without delay".[40]

Implementing these conclusions, on 20 December 2002 the European Commission sent to the European Parliament and to the Council a new proposal amending Regulation (EC) No. 417/2002 of the European Parliament and the Council on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No. 2978/94.[41] The proposal contained three relevant amendments. First, considering that heavy oils are the most polluting type of oil and that in view of its relatively low commercial value and comparative small risk of fire or explosion they are regularly carried in older tankers nearing the end of their economic lives, the Regulation bans the transport of heavy oils[42] in single hull tankers bound for or leaving the ports of European Union Member States. Second, the Regulation sets out a speeded up timetable for the withdrawal of single hull oil tankers.[43] Third, the Regulation calls for the strengthening and implementation as soon as possible of the special inspection regime for oil tankers in order to assess the structural condition of single hull oil tankers over 15 years of age. In accordance with the new procedures envisaged, all single hull oil tankers, including the smaller ones that were initially left out of the equation, shall be submitted to the Condition Assessment Scheme (CAS).[44] The new Regulation was adopted on 22 July 2003 and entered into force on 21 October 2003.[45]

The European Commission also adopted other initiatives concerning a Proposal for a Directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences on 5 March 2003[46] and a

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[40] Conclusions of the European Council (Copenhagen, 12–13 December 2002), *Bulletin of the European Union*, 12-2002, Presidency conclusions, pars. I.11.32–33.

[41] The Commission Proposal was published as document COM(2002) 780 in the *Bulletin of the European Union*, 12-2002, point 1.4.78.

[42] The categories of heavy oil concerned are heavy fuel oil, heavy crude oil, waste oils, bitumen and tar.

[43] According to the new timetable, the cut-off date for operating Category 1 tankers moves from 2007 to 2005 with an age limit of 23 years; the proposed cut-off date for Category 2 tankers is 2010 and an age limit of 28 years, in line with the US 1990 Oil Pollution Act; and for the Category 3 tankers the age limit is the same as for Category 2 tankers.

[44] The CAS is an additional reinforced inspection regime specially drawn up to detect the structural weakness of single hull oil tankers; pursuant to this proposal, all single hull oil tankers that do not satisfy the tests of this evaluation system, even if they are relatively recent, may not be allowed to enter into the ports of the European Union and fly the flag of a European Union Member State.

[45] Regulation (EC) No. 1726/2003 of the European Parliament and of the Council of 22 July 2003 amending Regulation (EC) No. 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers is published in *Official Journal* L 249, of 1.10.2003, p. 1.

[46] See document COM(2003) 92 final 2003/0037(COD), (Brussels, 5.3.2003): Commission

Proposal for a Council Framework Decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.[47] Independently of the future adoption of these proposals, the European Commission has recognised that European interests need to be better defended and represented at the international level, making a very clear appeal for a necessary revision of UNCLOS:

> "Europe's coasts, in particular the Atlantic and the Mediterranean seaboards, are extremely vulnerable to the risks of major pollution incidents. The principle of freedom of the seas and impunity of the flag State still holds way in international maritime transport. The Commission considers that robust maritime safety measures should be adopted at the international level, in the form of stricter navigation rules for ships carrying pollutant goods and more stringent controls on flag States. At the same time, a thorough study should be made of the extent to which international law, and in particular the United Nations Convention on the Law of the Sea dating from 1982, is suited to deal with the growing risks inherent in the carriage of pollutant substances by ships that are occasionally substandard. Civil society quite rightly appears to be increasingly less willing to accept the enormous economic and environmental costs of

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cont.

of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences*, 27 pp. This document has also been published in *Bulletin of the European Union* 3-2003, point 1.4.47. This proposal concerns two different measures. First, the introduction into Community Law of international rules concerning pollution discharges from oil tankers and other vessels. It also provides for effective implementation mechanisms regulated in detail, including illegal discharges on the high seas. The second measure establishes that infringement of the rules concerning discharges (as set down by the 1973/78 MARPOL Convention, but also pollution resulting from damage to the vessel), will be criminal infringements, and provides indications about the penalties to be imposed. These provisions apply to all persons, i.e. not just ship-owners but also the owner of the cargo, the classification society and any other person concerned by reason of grave negligence. The sanctions will probably often take the form of financial penalties, but where individuals are concerned they may include, in the most serious cases, imprisonment. These penalties will be appropriate, having a dissuasive nature, and will be applied throughout the Community. They will also be justified and not insurable penalties.

[47] See the document COM(2003) 227 final, 2003/0088 (CNS), (Brussels, 2.5.2003): Commission of the European Communities, *Proposal for a Council Framework Decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution*, 16 pp. This document has also been published in *Bulletin of the European Union* 5-2003, point 1.4.55. This proposal for a Framework Decision aims to strengthen the criminal-law measures, to approximate the provisions laid down by law or regulation in the Member States concerning ship-source pollution offences (in particular, establishing common penalties and comparable procedural guarantees in the most serious cases of ship-source pollution) and to facilitate and encourage cooperation between Member States to repress these offences.

pollution on the scale caused by the *Erika* and the *Prestige* in the name of freedom of the seas, and the principles in question should therefore be re-examined with a view to better protecting the legitimate interests of coastal States".[48]

b) Multilateral measures: the case for the International Maritime Organization

On 25 November 2002, at the opening meeting of the 89th Council of the IMO, the Permanent Spanish Representation made an important intervention on the *Prestige* accident that had taken place only 12 days before.[49] During this intervention, the Spanish Representative proposed a package of legal measures that should be adopted by the IMO "independently of what will be done at the European Community level". These measures were the following:

"1. To move forward the traffic of vessels with dangerous goods from the current traffic separation scheme at Finisterre and from other maritime corridors. To this aim, Spain will immediately submit a proposal to this Organization;
2. The need of the fastest implementation of an Audit Plan following the IMO model in order to audit flag States with a mandatory character, as was agreed with Spanish support at the last Meeting in Japan;
3. To improve the inspection systems for vessels by the port State, i.e. reducing the terms for inspection, introducing broadened mandatory inspections for vessels that have already shown deficiencies in previous inspections, improving the national mechanisms for the control of maritime traffic;
4. A stricter requirement on the implementation of obligations by the classification societies concerning the minimum prescriptions provided for by the SOLAS Convention, that is, Assembly Resolutions A.739(18) and A.789(19);
5. To control and require new responsibilities for the recognised organizations that act under the name of flag States;
6. To implement the Guidelines on places of refuge without invading the sovereign powers of coastal States concerning the protection of their coasts and related interests, these places of refuge being designated depending on the circumstances of each case, on the capacity of each coastal State to react in cases of emergency and on the guarantees given by the commercial interests on the ship and/or the cargo;

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[48] See European Commission, Directorate-General for Energy and Transport. Memo (21 October 2003): *Safer seas: the fight goes on*, p. 7.

[49] It must be recalled that, pursuant to Article 211.1 of UNCLOS, a "competent international organization" or a "general diplomatic conference" may establish international rules to prevent pollution of the marine environment from vessels. Moreover, these rules are not limited by any requirement concerning the "design, construction, manning or equipment of ships". Hence, it is not surprising that, after the *Prestige* accident, the affected coastal States, backed by all European Union Member States, strengthened their efforts to modify the international legal framework at the IMO.

7. An urgent improvement of the international *régime* on compensation for damages resulting from oil pollution, with enough amounts and quick payments, including the contribution by the responsible persons of these traffics to provide coastal States with the means for combating in the most efficient way these catastrophes;
8. The elimination of transitional periods for the phasing-out of single hull oil tankers;
9. To continue the IMO efforts to improve the training and living conditions on board; and
10. The accelerated establishment of safety equipment on board of all vessels, such as automatic identification systems, voyage data recorders, etc."[50]

On 27 February 2003, Spain submitted its proposal for a new traffic separation scheme, mandatory for all double hull oil tankers, off the coast of Galicia and 33–40 marine miles distant from the coast. This proposal was discussed at the Subcommittee on Safety of Navigation (NAV 49) of the IMO at its meetings from 30 June to 4 July 2003 and was approved by the Maritime Safety Committee in 2004. It must be noted that although UNCLOS does not expressly contemplate the adoption of traffic maritime schemes within the exclusive economic zone, this possibility is in conformity with its Article 211.1.

Another Spanish legal initiative concerned the controversial issue of places and ports of refuge.[51] Although the European Commission was already working on a proposal concerning Draft Guidelines for the establishment of places and ports of refuge for ships in distress, on 24 March 2003, last day for the submission of new proposals, no proposal was submitted to the IMO Subcommittees. Hence, Spain took the initiative and, on that date, presented two proposals in order to avoid a delay of one year in their adoption. The first Spanish proposal concerned the Guidelines for the establishment of places and ports of refuge for ships in distress. According

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[50] Private translation. For the original Spanish text of these proposals, see the document *Ministerio De Fomento*, (25 November 2002): *El Gobierno informa. España ha anunciado hoy en la OMI la inmediata propuesta de un dispositivo de tráfico más alejado de las costas para los buques con mercancías peligrosas*, 4 pp. It is interesting to note that in this very same meeting, the Representations of Algeria, Bahamas, Belize, Denmark, France, Greece, India, Iceland, Morocco, Nigeria, Philippines and Portugal, announced their support for all or some of the Spanish proposals.

[51] The Protocol concerning cooperation in preventing pollution from ships and, in cases of emergency, combating pollution of the Mediterranean Sea (Valletta, 25 January 2002) refers to this issue in its Article 16, entitled "Reception of ships in distress in ports and places of refuge", which reads as follows: "The Parties shall define national, sub-regional or regional strategies concerning reception in places of refuge, including ports, of ships in distress presenting a threat to the marine environment. They shall cooperate to this end and inform the Regional Centre of the measures they have adopted". The text of this Protocol is available at <http://www.unepmap.org>.

to this, Spain held that only those ships in distress complying with all the international norms on safety of navigation, with all their data and operators clearly identified and offering an unlimited financial guarantee would be able to enter into places or ports of refuge. The second Spanish proposal concerned the auditing of flag States. Spain held that the audit model that the IMO had to elaborate must be mandatory for all flag States and that there must be public access to the results of any auditing.[52] After consideration by the competent Committees of IMO, the Assembly of the Organization adopted on 5 December 2003 its Resolution A.949 (23) "Guidelines on places of refuge for ships in need of assistance",[53] as well as its Resolution A.950 (23) "Maritime Assistance Services (MAS)".[54]

In parallel with the adoption of European Regulation (EC) No. 1726/2003 of the European Parliament and of the Council of 22 July 2003 amending Regulation (EC) No. 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers, the 15 European Union Member States and the European Commission submitted to the IMO's Marine Environment Protection Committee a proposal for amending the 1973/78 MARPOL Convention in order to ensure that similar measures would apply worldwide. The European Union proposal was examined at the 49th session of the Marine Environment Protection Committee that met during the week from 14 to 18 July 2003. The majority of the delegations present accepted in principle the European Union recommendations concerning the accelerated withdrawal of single hull oil tankers, the reinforcement of the condition assessment scheme (CAS) and the banning of the carriage of heavy oils in single hull tankers. However, no final decision was taken and the negotiations on the final version of the amendments to the 1973/78 MARPOL Convention will continue in the IMO General Assembly during an extraordinary session of the Committee in December 2003.

Additionally, implementing one of the conclusions of the European "Transport" Council,[55] on 11 April 2003 six European Union Member States (Belgium, France,

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[52] The Spanish texts of both proposals are annexed to the document *Ministerio de Fomento*, (27 March 2003): *El Gobierno informa. El Ministerio de Fomento presenta nuevas propuestas ante la OMI para mejorar la seguridad marítima*, 15 pp.

[53] Doc. A/23 Res. 949, 5 March 2004. See Sánchez Ramos, B. "Nuevos avances en el acceso a lugares de refugio: las directrices sobre lugares de refugio para buques en peligro de la Organización Marítima Internacional", *Revista Electrónica de Estudios Internacionales*, 8, 2004, 15 p. (available at <http://www.reei.org>).

[54] Doc. A/23 Res. 950, 5 March 2004.

[55] According to Conclusion number 10, the Council "urges the Member States that have common interests in sensitive sea areas to identify and formulate coordinated proposals for the areas to be protected as Particular Sensitive Areas by IMO. Urges the IMO to develop the use of the instrument of designating Sensitive Sea Areas (SSA) and Particularly Sensitive Sea Areas (PSSA)". See Document 15121/02 (Presse 380): Council of the European Union, *2472nd Council Meeting – Transport, Telecommunications and Energy – Brussels, 5–6 December 2002*, p. 32.

Ireland, Portugal, Spain and United Kingdom), with the support of the European Commission, submitted a proposal to the IMO for the designation of a vast Particularly Sensitive Sea Area (PSSA) covering their Atlantic exclusive economic zones and corresponding to most of the European Union Atlantic area.[56] Under this proposal, this marine area will enjoy special protection as a consequence of the introduction of restrictive measures (including expulsion) for the navigation of single hull oil tankers carrying heavy oils. A preliminary examination in the IMO in July 2003 made it possible to give support to this proposal, which was approved "in principle" at the 49th session of the Marine Environmental Protection Committee (MEPC) of IMO, pending approval of associated protective measures. Also, in October 2003, Spain submitted a proposal for the designation of the waters of the Canary Islands as a PSSA,[57] which was approved "in principle" by the plenary at MEPC 51 (29 March–2 April 2004),[58] pending approval of the proposed protective measures by the IMO Subcommittee on Safety of Navigation.

Finally, it must be remembered that the only proposal made by the European Commission included in the "*Erika* I and II packages" that was not adopted as a Community norm consisted in raising the upper limits on the amounts payable as a compensation for the victims of oil spills from EUR 200 million to EUR one billion. The Council of Ministers decided to negotiate this very same proposal at the IMO in order to obtain a similar agreement worldwide. After the European Union Member States supported this proposal at the IMO on 9 May 2003,[59] the International Diplomatic Conference, convened at London from 12 to 16 May 2003, succeeded in adopting a new Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992.[60] Although other different proposals were submitted and discussed,[61] the firm attitude shown by the European Union Member States and the

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[56] See the document *Ministerio de Fomento* (12 April 2003): *El Gobierno informa. España presenta ante la OMI nuevas iniciativas para la protección del medio ambiente marino*, 2 pp.

[57] Doc. MEPC 51/8, 24 October 2003.

[58] In addition to the Canary Islands PSSA, MEPC 51 also approved "in principle" PSSAs for the Baltic Sea and the Galapagos Archipelago, with the opposition of the Russian Federation, Liberia and Panama.

[59] See the document *Ministerio de Fomento*, (3 May 2003): *El Gobierno informa. España propondrá la ampliación del fondo para daños por hidrocarburos a 1.000 millones de euros*, 2 pp.

[60] See the 2003 Draft Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 Doc. LEG/CONF.14/DC/2, 16 May 2003; see also the document *Ministerio de Fomento*, (16 May 2003): *El Gobierno informa. La OMI acepta la propuesta del Ministerio de Fomento. La indemnización por daños debidos a la contaminación por hidrocarburos alcanzará los 1,000 millones de euros*, 4 pp.

[61] For instance, Japan presented a proposal to increase the compensation fund up to EUR 500 million.

European Commission[62] resulted in the adoption of a new Protocol to the 1971 Fund Convention, establishing a new supplementary fund with 750 million DTS/SDR (just over USD 1152 million), that is almost the amount originally proposed by the European Union Member States. Following ratification by Spain on Friday 3 December 2004, the required number of contracting Parties for the entering into force of the 2003 Protocol establishing an International Oil Pollution Compensation Supplementary Fund was completed, and the new IOPC Supplementary Fund came into existence on 3 March 2005, three months after the date of Spain's ratification.

4. New Spanish legislation concerning vessel traffic monitoring and information

In pursuance of European Union Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002, establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, Spain adopted Royal Decree 210/2004, of 6 February, establishing a system of monitoring and information concerning maritime traffic.[63] Previous implementation of Directive 2002/59/EC was partially accomplished by Spanish Act 62/2003, of 30 December, on fiscal, administrative and social measures, whose Article 108 deals with authorizations to enter into places or ports of refuge. Now, Royal Decree 210/2004 completes the transposition of the EU Directive by providing for a more comprehensive and integrated system of vessel traffic monitoring and information.

According to the provisions in Chapter I, this Royal Decree aims at increasing maritime safety, improving the ability of the maritime administration to respond to potentially dangerous situations and better prevent pollution by ships.[64] It applies to merchant ships over 300 GRT, although its provisions concerning response to accidents and places of refuge (Articles 17–25) also apply to fishing, historical and recreational craft.[65]

Chapter II of the Royal Decree requires prior notification of the information specified in Annex I by all vessels bound for a Spanish port and subsequent monitoring of their compliance with vessel traffic services (VTS) established in execu-

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[62] The European Commission had held that: "In the context of the 1990 Oil Pollution Act, the USA set up their own arrangement, comprising a compensation fund of $ 1 billion, and decided not to get involved in the international arrangement. In the event of the failure of its proposals at international level, it is clear that, like the USA, the European Union will have to address the question of whether or not it will stay within the FIPOL regime". See European Commission, Directorate-General for Energy and Transport. Memo (21 October 2003): *Safer seas: the fight goes on*, p. 7.

[63] *BOE* of 14 February 2004.

[64] Art. 1.

[65] Art. 2.

tion of, or with due consideration for, the relevant IMO rules.[66] Compliance with vessel traffic organization services is mandatory for all ships in the territorial sea, for ships flying an EU Member State flag or with destination to an EU port in other Spanish waters beyond the territorial sea and, "whenever it is possible", also for ships flying the flag of non EU Member States or not bound for EU ports.[67] Ships calling into Spanish ports shall be equipped with an Automatic Identification System (AIS) and a Voyage Data Record (VDR) System.[68]

In accordance with Chapter III, all ships carrying dangerous or polluting goods shall notify all relevant information specified in Annex I to the competent maritime authorities before loading in a Spanish port, or leaving from a Spanish port, or when the ship is bound for a Spanish port. The duty to notify affects the owner, the operator, the agent and the Captain. The Spanish Director General of Merchant Shipping can exempt its application with respect to coasting trade.

Chapter IV deals with monitoring of dangerous ships and intervention in case of problems or accidents at sea. It identifies as "potentially dangerous" ships all vessels having one of the following characteristics: ships involved in incidents or accidents at sea; ships not complying with mandatory notification or information provisions; ships having realized voluntary releases of oil or other violations of MARPOL; and ships whose access to an EU port has been denied. The presence of these ships in Spanish waters shall be notified to the Spanish administrative maritime authorities and to coastal stations of other EU Member States concerned. The Spanish maritime administration shall undertake convenient "inspections or verifications" with respect to those ships and inform all interested EU Member States.[69]

Any "incident or accident" (including "situations" susceptible of producing pollution of an EU coastal Member State and "spots" of polluting substances, containers or bulk) shall be immediately notified to coastal stations. In such a case the Spanish maritime administration can adopt *inter alia* any of the following measures: a) imposing a given route on the ship; b) giving the Captain a term for putting an end to the risk; c) placing on board a team responsible for assessment of risks, assistance to the Master and information to coastal stations; and d) ordering the Captain to direct the ship to a place of refuge.[70]

With respect to this latter option, the Royal Decree calls for the elaboration of plans, accessible at the request of interested parties, aimed at bringing ships in need of assistance into waters under Spanish jurisdiction. Authorization for a requesting ship to enter into a given place of refuge, which is not mandatory for the coastal State, shall be granted when the Administration decides, in view of the

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[66] Namely, rules 10 and 11 of Chapter V of SOLAS.
[67] Art. 8.
[68] Arts. 6 and 10, respectively.
[69] Art. 16.
[70] Art. 19.

relevant information and other elements available, that the foreseeable resulting damage would be inferior to other alternative measures of assistance; if such is not the case, the authorization shall be denied, in a motivated decision, by the Spanish Maritime Administration. In weighing the elements for its decision, acting on a case by case basis, the competent maritime authority shall apply the specific criteria listed in Article 21 of the Royal Decree, which follows those contained in the IMO guidelines on places of refuge for ships in need of assistance [Resolution A/949 (23)]. The criteria for objective analysis, listed in Article 21 shall be further developed by subsequent more detailed regulatory procedures.[71] However, the authorization to enter into a place of refuge shall be contingent upon the constitution of a financial guarantee for ships carrying particularly dangerous substances.[72]

The decision-making process shall start at the request of the ship's Captain or a representative of the shipping company, who shall indicate the reasons supporting its request for a place of refuge. The decision as to granting or not the permit requested is taken by the Director General of Merchant Shipping, who may delegate in the Maritime Captain of the circumscription in which the ship is located.[73]

Although Spain is one of the few Member States that has already transposed into domestic law European Directive 2002/59/EC on places of refuge, criticism against the high amount of the financial guarantees required by this Royal Decree has been voiced from ship-owners and salvers seeking a safe haven for a casualty along the Spanish coastline.[74]

II. LIABILITY, RESPONSIBILITY AND COMPENSATION FOR DAMAGES

The extraordinarily damaging consequences of the oil spill caused by the *Prestige* have given rise to a difficult scenario with respect to issues of liability, responsibility and compensation for damages. As in precedent occasions, criminal proceedings have been instituted against different persons before the competent Spanish Court in Corcubión (La Coruña, Spain). Whatever may be the reasons for it, the criminal nature of the judicial proceedings does not help to facilitate the application of the existing legal regimes on civil liability and compensation for damages. We shall try to summarize the main elements of the complex questions raised in this respect, as they have developed in practice.

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[71] The fifth additional provision of the Royal Decree states that: "within a two year delay the Maritime Administration will adapt existing plans and procedures on places of refuge to the IMO guidelines".

[72] Arts. 22 and 23.

[73] Art. 24.

[74] See: *Lloyd's List*, 18 February 2004 (n. 58598) p. 3; 20 February 2004 (n. 58600) p. 7; 15 April 2004 (n. 58639) p. 14.

1. Criminal prosecution of the Captain

The Captain of the ship, *Apostolos Mangouras*, was arrested on 15 November 2002 and indicted with charges of crimes against natural resources and the environment (Arts. 325 and following of the Spanish Criminal Code) and disobedience to the competent Authority. On 17 November 2002 the Instruction Court number 4 of La Coruña rendered an Order of provisional imprisonment against the Captain, with bail of 3 million, which was confirmed by the Provincial Criminal Court of La Coruña (3rd Section) on 3 January 2003. The implementation of the judicial Order of provisional imprisonment against the Captain of the ship and the quite severe accompanying conditions, raised some criticisms.

The criminal indictment of the Master of the *Prestige* is based on the assumption that the relevant provisions in Articles 73 (more related to violation of fisheries laws and regulations), 226 and 230 of UNCLOS do not preclude his prosecution for disobedience to Spanish authorities and environmental crime, for two different reasons. First, Article 230 provides that "monetary penalties only" may be imposed with respect to violations of applicable national and international law for the prevention, reduction and control of pollution committed by foreign vessels beyond the territorial sea or in the territorial sea, "except in the cases of a wilful and serious act of pollution in the territorial sea".[75] In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognized rights of the accused shall be observed". Actually, Captain *Mangouras* committed the alleged violations both beyond and within the territorial sea, thus producing an (arguably) wilful and serious act of pollution in the territorial sea and the Spanish coast. Second, disobedience to authorities and ecological crime are separate charges not covered under Article 230 of UNCLOS, which refers only to violations of national laws or applicable international rules and standards "for the prevention, reduction and control of pollution". Arguably, this was not the case with respect to Captain *Mangouras*; at the time of the commission of the alleged crimes he was not exercising normal freedom of navigation or innocent passage, but mastering a vessel affected by a "casualty", under the authority of the coastal State (Article 221). The crimes allegedly committed by him do not relate to violations of ordinary rules for the prevention, reduction and control of pollution, but rather to violations of orders of the competent Governmental Authorities in view of avoiding an ecological catastrophe. Thus, by disobeying these orders, he allegedly might have contributed to originating such an unwanted result.

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[75] Art. 230 of UNCLOS, entitled "Monetary penalties and the observance of recognized rights of the accused", reads as follows:

"1. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.

On the other hand, the severe economic and personal conditions of the bail imposed on the Captain have given rise to persistent objections. In the view of the Spanish Courts, the unusually high amount of the bail is justified by the extraordinary foreseeable amount of the damages caused by the *Prestige*, as well as linked to the fact that, in Spanish criminal law, the person guilty of a crime bears the civil liability for damages resulting from its criminal conduct (Criminal Code, Article 2). However, after several appeals to review the 3 million bail had been rejected, the lawyers acting for the Captain filed a case before the European Court of Human Rights, in a bid to have his strict bail conditions cased.[76] Other announced claims concerning the "excessive" amount of the bail and the severe restrictions of the freedom of movements imposed on the Captain have not resulted in a formal application before the International Tribunal for the Law of the Sea (UNCLOS, Annex VI). In this latter case, it seems also doubtful whether the provisions concerning prompt release of vessels and crews of UNCLOS (Article 292), would have granted the exercise of jurisdiction by ITLOS in the matter.[77]

Be as it may, after the failure of the judicial appeals filed by the Master's lawyers to relax the bail conditions imposed on him, the Greek Ambassador in Spain notified the Court, on 10 August 2004, of the pledge of its Government to secure the implementation of the obligations of Captain *Mangouras*. As a result, by an Order issued on 15 November 2004, the Court in Corcubión, while not accepting a reduction of the amount of the bail imposed, allowed the Captain to travel to Greece and await judgement there.

2. Financial assistance to victims and advance payments of compensations

At the time of the accident, Spain was a Contracting Party to most IMO Conventions concerning marine safety, including both the International Convention

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2. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels in the territorial sea, except in the case of a wilful and serious act of pollution in the territorial sea.
3. In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognized rights of the accused shall be observed".

[76] *Lloyd's List*, 29 March 2004 (No. 58626), p. 1, and 2 April 2004 (No. 58630), p. 7.

[77] Art. 292 of UNCLOS should be read in connection both with Art. 73.2, concerning the exercise of the coastal States' sovereign rights over living resources in the EEZ, and Art. 226.1 b), applicable to the present case, which reads as follows: "If the investigation indicates a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security".

on Civil Liability for Oil Pollution Damage 1969 (and its Protocols of 1976 and 1992) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (and its Protocols of 1976 and 1992).

Immediately after the accident, Spain adopted a series of legislative measures oriented at reducing the economic and social consequences of the accident. Royal Decree-Act 7/2002, of 22 November, concerning compensatory measures regarding the *Prestige* accident, provided for a series of promotional measures for immediate financial assistance consisting in: payment of 40 per day to all those directly affected by the fishing bans; a 100% waiver of Social Security payments and tax relief exemptions in the fishing, shell harvesting and aquaculture sectors. A series of preferential lines of credit, totalling 100 million,[78] were also made available to affected individuals and companies through the State controlled Spanish Official Credit Institute. On 13 December 2002, Spain passed a new Royal Decree-Act 8/2002, extending the above measures to the affected sectors in Asturias, Cantabria and the Basque Country and expanding their application to other sectors with a high dependence on the closed fisheries, such as fish vendors, fishing net repairers, and employees of fishing co-operatives, fish markets and ice factories. In addition, Spain approved Order APU/3289/2002, of 23 December, establishing procedures for the granting of financial aids aimed at restoring damages to public installations caused by the accident.

However, in the light of the foreseeable length of the proceedings on compensation for damages under the CLC and FUND Conventions 1992 and its inherent quantitative limitations (171,5 million whereas estimated damages could rise above 1.000 million),[79] the Spanish Government introduced a new mechanism to fully compensate the victims of the pollution. It is relevant to note in this respect, that unlike in previous cases the *Prestige* insurer (the London Club) decided not to make individual compensation payments up to the ship-owner's limitation amount. The decision was allegedly adopted following legal advice that if the Club were to make payments to claimants in line with past practice, it was likely that those payments would not be taken into account by the Spanish Courts when the ship-owner set up the limitation fund, with the result that the Club could end up paying twice the limitation amount. However, after several meetings between lawyers of both parties, on 28 May 2003 the ship-owner deposited 22,771,986 before the Criminal Court in Corcubión for the purpose of constituting the limitation fund.[80]

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[78] See Doc. 92/FUND/EXC.22/8, 7 October 2003, par. 8,3.

[79] Approximately 23.5 million compensation is available from the ship-owner's liability insurer (the London P&I Club). Additional compensation of up to approximately 148 million is available from the 1992 Fund. In other words, a total of 171.5 million is available. As estimated at the Executive Committee's May 2004 session, this available sum will be distributed to compensate victims of pollution, in Spain (834.8 million), France (176 million) and Portugal (3.3 million).

[80] See Doc. 92/FUND/EXC.22/8, 7 October 2003, par. 9.

On the other hand, at its May 2003 session the Executive Committee decided that the 1992 Fund's payments should for the time being be limited to 15% of the loss or damage actually suffered by the respective claimants as assessed by the experts engaged by the London Club and the Fund. In spite of the deep concern expressed by both the Spanish and French delegations at the IOPC, the Executive Committee maintained the 15% limitation level of payments, the lowest in the Fund's history, at its October 2004 session in view of the remaining uncertainties as to the level of admissible claims.

Confronted with that situation, an innovative regime was established by Royal Decree-Act 4/2003, of 30 June, regarding payment of compensation for damages caused by the accident of the vessel *Prestige*, and subsequent regulations contained in Royal Decree 1053/2003, of 1 August. The overriding aim of the system is to provide rapid compensation for damages and save the victims from protracted processes of recognising their rights to compensation. The system for advance compensation is applicable to individuals or legal entities,[81] be they Spanish or not, who have incurred damages in Spain as a result of the accident of the *Prestige*, and not to those affected in other countries. The system will only apply to those victims who expressly state their will to adhere to it by subscribing a transactional agreement with the Spanish Government destined to the payment of an amount in compensation for the damages incurred as a result of pollution. The initial limit of the sum available for the payment of indemnities, for claims submitted before 31 December 2003, was 160 million, but a new Royal Decree-Act 4/2004, of 3 July, increased the funds available for compensation to 249.5 million. In addition, the Decree extended the period in which victims could claim for losses suffered directly as a result of the incident to include 2004. The funds available for compensation of losses occurring during 2004 were limited by the Decree to 3 million and claimants were required to submit claims by 31 March 2005.

The celebration of each individual agreement implies:[82]

a) That the victim has the right to receive from the Spanish Government the stipulated amount as compensation.
b) That the victim thereby declares all claims to be satisfied, and thus renounces any national or international claims outstanding.
c) That the Spanish Government thereby assumes any rights or actions that may correspond to the victims who subscribed the agreement.

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[81] Public bodies other than the Spanish Government (i.e. Governments of Autonomous Regions, municipalities and local authorities) can also adhere to the advance compensation system, by subscribing Agreements of Collaboration with the Spanish Government, which in such case will also subrogate in all rights and actions for compensation that may correspond to these bodies as a result of the disaster.

[82] See Vázquez Guillén, A., "*Prestige* and the Law: Regulations and compensations", *17th Annual Oil Pollution Conference (London 15–16 March 2004), Lloyd's List Events*, 2004.

d) That the fact of subscribing this agreement in no way supposes the recognition of responsibility by the Spanish Government.

The sum paid in compensation to each claimant is to be determined according to the damages actually incurred, following the same assessment criteria used by the 1992 CLC and Fund Conventions. All payments will be channelled through a single public financial institution, the Official Credit Institute (*Instituto de Crédito Oficial*, ICO). The Spanish Government will subsequently take all legal and extra legal actions necessary, both in Spain and abroad, to obtain compensation for damages directly incurred by the State (costs and expenses of clean up operations, compensation payments to fishermen and shellfish harvesters, tax relief for businesses affected by the spill, administration costs and costs relating to publicity campaigns). It will also take the same actions with respect to the recovery of damages arising from the compensation to other public and private persons to whom the State subrogates as a result of transactional agreements made in application of Royal Decree-Act 4/2003 and Royal Decree-Act 4/2004.[83] The question as to whether this subrogation also applies to future damages appearing after the advance payoff is made has been considered and eventually rejected by legal doctrine.[84]

In implementing the above-summarized system, the Spanish delegation at the Fund Executive Committee session in October 2003 proposed that the Fund should, subject to certain safeguards, make advance payments on account of the final amount that will eventually correspond to Spain. The matter was referred to the IMO Assembly which authorized the IOPC Fund Director to make a payment of 15% of the amount of the claims submitted, subject to the Spanish Government providing a guarantee from a financial institution, not from the Spanish State, having the financial standing required by the 1992 Fund's Internal Investment Guidelines. On that basis, as authorized by the Assembly, an advance payment fixed at a total sum of 57.5 million, was granted at the IOPC Fund Executive Committee session in October 2003, on the basis of the initial study of the invoices already presented by the Spanish Government and the overall assessment of the total admissible damages for Spain.[85] The whole of this advance sum, which

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[83] The subrogation by the Spanish authorities in those claims is made pursuant to Art. 9.3 of the 1992 Fund Convention: "Without prejudice to any other rights of subrogation or recourse against the Fund which may exist, a Contracting State or agency thereof which has paid compensation for pollution damage in accordance with provisions of national law shall acquire by subrogation the rights that the person so compensated would have enjoyed under this Convention".

[84] See: Meilan Gil, J. L., (Director), *Problemas jurídico-administrativos planteados por el Prestige*, Thomson-Aranzadi, 2005.

[85] The first claim received from the Spanish Government had been assessed by the Director on an interim basis at 107 million and a payment of 16,050,000, corresponding to 15% of the assessed amount, had been made in December 2003. The Director had made a general assessment of the total of the admissible damage in Spain at 303 million and,

was transferred to the Spanish Government on 17 December 2003 against a Bank guarantee from ICO and an undertaking by the Spanish Government to repay it if the Executive Committee so decided, was made available by the Spanish authorities for the payment of compensation to the victims.

By February 2004 the Spanish Government had received almost 29,000 claims for compensation, most of them related to workers in the fisheries sector, from victims of the *Prestige* accident who wished to use the payment mechanism set out in the Royal Decree-Acts. On 18 February 2004, 15 months after the accident, in execution of agreements passed by the Government with affected claimants, approximately 12,000 victims in the fisheries sector had already received compensation, for a total sum of 51 million. In August 2004, agreements were reached with the great majority of the workers in that sector and payments totalling 71 million were made to them under the Royal Law-Decrees.[86]

In July 2004 the Spanish Government submitted a request to the Court in Corcubión for the release to it of the 22,777,986 deposited with the Court by the ship-owner for the purpose of constituting the limitation fund. In its request, the Spanish Government argued that the Court should release this amount to it, since it was paying compensation to the victims of the spill. The 1992 Fund and other parties in the legal proceedings before the Court in Corcubión submitted pleadings opposing this request and in July 2004 the Court rejected the Spanish Government's request on procedural grounds. The Spanish Government appealed against this decision but on 4 October 2004 the appeal was withdrawn.

So, at the end of 2004, Spain had only received an advance sum of 57.5 million from the 1992 Fund whereas costs incurred by the Government in response to the damages resulting from the accident amount to not less than 1,000 million.

3. Court actions in Spain and abroad

Given that the foreseeable amounts of compensations to be covered by the CLC and IOPC Fund regimes (171.5 million) lie far below the actual amount of claims submitted by public and private victims in Spain,[87] several initiatives have been

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as authorised by the Assembly, in December 2003 he had also made a further payment of 41,505,000 against a bank guarantee provided by a Spanish bank, bringing the total amount paid by the 1992 Fund to the Spanish Government to 57,555,000.

[86] The remaining claims formulated by 3.638 persons under the Decrees would be subject to individual assessments by the *Consorcio de Compensación de Seguros*, a State-owned insurance organization set up to pay claims for damage not normally covered by commercial insurance policies, such as damage due to terrorist activity or natural disasters. As at May 2005, payments made to 19,500 workers of the fisheries sector amounted to some 88 million (see: Doc. 92/FUND/EXC.29/4, 9 June 2005, par. 5.6).

[87] Claims for damages incurred in Spain were estimated at the Executive Committee's May 2004 session at 834.8 million.

made in order to pursue legal actions against other possible responsible individuals or legal persons involved with the *Prestige* accident. Some 2020 claimants have joined the legal proceedings before the criminal Court in Corcubión, of whom 208 have also submitted claims to the IOPC Fund's Claims Handling Office in La Coruña. It is expected that some of these claimants who had settled with the Spanish Government under the Royal Decrees will withdraw their claims from court proceedings.[88]

In addition to the criminal prosecution of the Captain of the *Prestige*, in 2003 the Court in Corcubión also accepted the criminal indictment of the Spanish Director General of Merchant Shipping, *José Luis López Sors*, on charges of reckless conduct. If successful, this indictment might have important consequences not only for the concerned person, but also for the Spanish State which, on a subsidiary basis, will bear the civil liability resulting from his criminal offence. The Court in Corcubión also admitted the imputation of the Greek citizen *Michael Magretis*, as manager of the operator of the ship, the Greek established Liberian corporation Universe Maritime Ltd, however Mr. *Magretis* regretfully died soon after his indictment.

On the other hand, in May 2005 the Criminal Court in Corcubión, in its role of investigating the cause of the incident and potential liabilities, following a request by the Public Prosecutor, had declared that the ship-owner might be directly liable for the damage caused by the incident. In its decision the Court held that, under Spanish law, any person who had incurred in criminal liability also has civil liability for the damage arising from the criminal action. In the Court's decision it was stated that the Master of the *Prestige*, who had had the control and had commanded the ship, might have criminal liability arising from the event and that the ship-owner might be directly liable for the damage caused. Once the investigation had been concluded, the Court file would be passed on to a Criminal Court judge who would render a judgement on the criminal and civil liabilities arising out of the incident. The Court, taking into account that the Spanish Government had paid compensation to victims as a result of the incident for 87,774,614.59, had ordered the ship-owner to provide the Court security in that amount in addition to the limitation amount applicable to the *Prestige,* which the ship-owner had deposited with the limitation Court.[89]

However, as this Court decision raised criticisms by the Director and several delegations at the June 2005 session of the Fund's Executive Committee,[90] the Court in Corcubión moved to link the liability of Universe Maritime Ltd to the prosecution of the Captain, in view of the "contractual relationship" existing

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[88] See Doc. 92/FUND/EXC.29/4, 9 June 2005, par. 11.1.
[89] See Doc. 92/FUND/EXC.29/6, 28 June 2005, par. 3.2.29–3.2.30.
[90] See Doc. 92/FUND/EXC.29/6, 28 June 2005, par. 3.2.31–3.2.35.

between the operator company and the said Captain. Thus, on 5 July 2005, the Court of Corcubión ordered the operator Universe Maritime to attach 87.7 million to cover the sum already paid by the Spanish Administration to the victims of the accident.[91]

The question may be raised as to how those judicial proceedings are compatible with the provisions of the CLC, channelling the liability for any pollution damage caused by the ship as a result of an accident exclusively to the owner of the ship.[92] In answering that question, it should be kept in mind that Article III, paragraph 4, of the CLC affirms that "no claim for compensation for pollution damage may be made" against the owner and other expressly excluded persons (including the operator of the ship), "unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result". One permissible reading of this provision is that it does not preclude the competent national Court to entertain criminal or civil actions against individuals or legal persons listed in Article III, paragraph 4 of the 1992 CLC, either for wilful acts or omissions or reckless conduct resulting in pollution damages. In any case, the provision under consideration does not prevent the competent national Court to entertain civil liability or criminal claims against any other individuals or legal persons not expressly excluded by Article III, paragraph 4, of the 1992 CLC.[93] Moreover, damaged parties could eventually seek compensation against any liable parties before the Courts of a third State not being a party to the CLC and Fund Conventions.

Under these assumptions, both the Kingdom of Spain and certain constituents of the Basque Country (*Comunidad Autónoma del País Vasco et al.*) have brought claims against other possible holders of legal responsibilities or liabilities before the Courts of the United States of America. The rationale of these legal actions stands on the assumption that the application of the objective civil liability regime

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[91] *El País*, 6 July 2005.

[92] In June 2005, at the 29th session of the Executive Committee, "The Director stated that the investigating Criminal Court had appeared to have based its decision on Spanish criminal law without taking into account the relevant provisions of the 1992 Civil Liability Convention, which formed part of Spanish law. He drew attention to the fact that Article III.4 of the 1992 Civil Liability Convention prohibited claims for compensation against the ship-owner otherwise than in accordance with the Convention and also prohibited (other than in certain circumstances set out in the Convention) claims for compensation for pollution damage, under the Convention or otherwise, against the members of the crew or the charterer, manager and operator of the ship. The Director expressed the view that the decision by the Court did not respect these provisions. He stated that the Fund was not party to these proceedings and could not appeal against the decision". Doc. 92/FUND/EXC.29/6, 28 June 2005, par. 3.2.31.

[93] For instance, the classification society. See Camarda, G. "Natura e responsabilità delle società di classificazione delle navi", in *Mare, porti e reti infrastrutturali: per una nuova política dei transporti*", Messina, 2002, pp. 339–374.

provided for by the CLC and Fund Conventions does not preclude the introduction of separate tort actions based on fault or negligence against other responsible physical or legal persons involved in the accident of the oil tanker *Prestige*. The judicial claims introduced affect, in a first step, the classification company acting in the case of the *Prestige*, that is, the US Corporation American Bureau of Shipping Inc. (ABS).

The Government of the Basque Country has sued ABS before the United States District Court for the Southern District of Texas. The lawsuit introduced by the Basque Government before the US Federal Court in Houston charges ABS with negligence and gross negligence, alleging that it breached its duty of care "by failing to perform an adequate inspection of the *Prestige*, and by classifying it as seaworthy, when the vessel simply was not".[94] The Texas action was later transferred to the United States Federal Court of New York where it is pending as *Comunidad Autónoma del País Vasco et al. v. ABS*.[95]

The Kingdom of Spain is also pursuing legal actions before the same United States Federal Court of New York, on its own behalf and as a trustee, against the involved US Classification Corporation (American Bureau of Shipping Inc. ABS). In its complaint, the Plaintiff State alleges that ABS was negligent in classifying the *Prestige* as fit to carry fuel cargo. In particular the plaintiff claims that, although the vessel was listed in the "ABS Record" and it issued documents certifying its classification, structural details of the *Prestige* did not satisfy relevant ABS fatigue and other requirements for steel vessels[96] and that the ABS surveyor failed to comply with the ballast tank requirement in effect at the time of the May 2002 annual survey of the ship.[97]

The Defendant ABS filed a counterclaim seeking a declaratory judgement that Spain is obliged to indemnify ABS and/or contribute to payments because of Spain's alleged negligence in responding to the *Prestige* disaster. By a Memorandum Order of 3 August 2004, the competent US District Court for the Southern District of New York dismissed the defendant ABS' counterclaim,[98] accepting the plaintiff's contention that the Court lacks subject matter jurisdiction for ABS' counterclaims because the Foreign Sovereignty Immunities Act (FSIA) bars them.[99] In discussing ABS' counterclaim the Court has determined that ABS has failed to

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[94] *Lloyd's List*, 14 May 2003, p. 3.

[95] 04 Civ. 671 (LTS) (RLE).

[96] In completing its 1973 "Rules for Building and Classing Steel Vessels", in 1993 ABS developed the ABS "Safe Hull" program that assessed the "fatigue life" and structural strength of steel vessels in light of certain fatigue criteria (Complaint, par. 33).

[97] ABS conducted an "annual class survey" of the *Prestige* in Dubai, United Arab Emirates from 15 to 26 May 2002. (*Ibid.*, par. 37).

[98] Pursuant to Rule 12(b)(1) of the Federal Rules on Civil Procedure for lack of subject matter jurisdiction.

[99] 28 U.S.C. par. 1602–1611 ("FSIA").

fulfil its burden of evidence that immunity shall not be granted under the statutory exceptions of the FSIA which require that the counterclaims arose from the same "transaction or occurrence that is the subject matter of the claim of the foreign State" at the time the pleading is served. Thus, in applying the identity and maturity test, the Court found that:

> "Plaintiffs' claims in the instant action concern alleged breaches by ABS of its duty to exercise care in inspecting and classifying the *Prestige*, namely, whether ABS inspections of the *Prestige* failed to identify the fatal structural weaknesses that led to the ship's disintegration, and/or whether ABS certified the *Prestige* for duty for which it was not in fact fit. ABS' counterclaims, however, relate to whether ABS is entitled to indemnification or contribution by Spain for any judgement ABS incurs "anywhere in the world" in connection with the *Prestige*-related litigation against it. Although both sets of claims relate to the *Prestige* oil spill, the relationship between the "core issues" presented by them is not sufficiently logical for them to arise from the same transaction within the meaning of the statutory exception. The issues presented by ABS' claims involve Spain's duties, if any, to ABS or others in connection with vessels in distress. Spain's claims, by contrast, involve whether ABS deviated from the proper practices of classification societies in its continuing certification of the *Prestige*. Those sets of issues are . . . unrelated . . . Moreover, ABS' counterclaims suffer from an even greater deficiency arising from the fact that it seeks indemnification and contribution for judgements it has not yet incurred, in favour of parties not yet identified, on the basis of claims not yet pleaded".

For these reasons, the *Memorandum* Order issued by the Court on 3 August 2004, granted Spain's motion to dismiss the ABS counterclaim, thus leaving the way open for the follow up of the proceedings as they were initially formulated. In the current phase of the pleadings before the New York Federal Court, Spain has expanded the reach of its action so as also to include ABS Group and ABS Consulting, to prevent that in case of being found guilty, the mother Corporation ABS could allege its insolvency as a "non profit" entity.

4. State responsibility

With respect to issues regarding State responsibility the *Prestige* case has followed the usual trend in situations of environmental disasters, with some particular features. No claims for State responsibility have been formally presented, in spite of expressed concerns regarding the wrongfulness of certain governmental conducts. And, as in other similar cases, legal claims arising from damages suffered as a consequence of the accident have followed only international civil liability procedures.

However, most surprisingly, the wrongfulness of the conduct of the victim State has occasionally been evoked in international fora, perhaps as a reflection of the strong political criticism voiced in domestic affairs. The most significant concern about the action taken by Spain in its intervention with respect to the *Prestige*

casualty have been expressed by the Bahamas, the flag State, at the 21st session of the IOPC Fund Executive Committee, held from 7 to 9 May 2003. Following the Spanish delegation's presentation on the Spanish authorities' response to the incident,[100] which was received with gratitude by a number of delegations:

> "The observer delegation of the Bahamas, the flag state of the *Prestige*, expressed concern regarding the late submission of the document by the Spanish delegation and stated that the information contained in the document was counter to its own understanding of events. That delegation, whilst commending the action of the Spanish rescue services in saving the lives of the crew of the *Prestige*, stated that in its view, had the authorities allowed the vessel to enter a port of refuge this would most likely have prevented the sinking of the vessel and reduced the amount of oil spilled. The Bahamas delegation stated that, despite a number of official requests, it had had difficulty obtaining information from the Spanish authorities for their own investigation into the cause of the incident".[101]

The Spanish delegation expressed its deep dissatisfaction in respect of the intervention by the Bahamas delegation and this delegation in turn expressed its deep dissatisfaction in respect of the intervention by the Spanish delegation and reiterated its strong disagreement with the description of the incident put forward by the Spanish authorities.[102]

Although confrontation between the Bahamas and Spain has continued after the presentation of their respective investigations into the cause of the accident in 2005,[103] it is unlikely that the responsibility of the victim State could be formally

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[100] See: Doc. 92.FUND/EXC.21/5, 9 May 2003, *Record of Decisions of the Twenty-First Session of the Executive Committee*: "The Spanish delegation mentioned that in managing the crisis the Spanish authorities had pursued the following objectives: the saving of human life, combating the pollution, preventing the tanker from running aground and minimising the risks to the Spanish coast and its local population (par. 3.2.6). The Spanish delegation further mentioned that once the first three objectives had been successfully executed, the authorities had considered three possibilities for minimising the risks to the coast and its population, namely allowing the vessel entry into a port or other place of refuge, removal of part of the cargo at sea, or towing the tanker away from the coast to calm waters where a cargo transfer could take place. It was stated that after taking into account all the circumstances, including the risk posed by the structurally damaged ship, the hazards posed by the rocky and dangerous coastline and adverse weather conditions and the risks to the rich fisheries in the Galician estuaries, the authorities had decided to order the vessel to be towed away from the coast to calm waters to enable a lightering operation to be carried out. It was remarked that the decision taken was in accordance with Spanish and EU legislation and was consistent with decisions taken in respect of previous major casualties" (par. 3.2.7).

[101] *Ibid.*, par. 3.2.12.

[102] *Ibid.*, pars. 3.2.13–3.2.14.

[103] The Bahamas Maritime Authority (BMA), the authority of the flag State, carried out an

engaged with respect to international wrongful acts allegedly committed by Spain in responding to the *Prestige* casualty. After much debate about the Spanish authorities' decision to tow the *Prestige* away from its coasts, it is quite doubtful that its decision violated any specific international legal norms applicable to the case at hand. It is also doubtful that Spain's intervention could be considered as contravening the proportionality and reasonability criteria established with respect to its right to take and enforce measures following upon a maritime casualty in accordance with international law, both customary and conventional.[104]

It is, in contrast, all the more surprising that the responsibility of the flag State has not been questioned given the vast array of specific rules of international law binding on it with respect of ships flying its flag, particularly in cases of ships carrying dangerous or noxious substances such as heavy oil. These international obligations also apply to States such as the Bahamas, considered as one of the examples of the States having "open registers" which are used to obtain "flags of convenience". As two distinguished international law scholars have written:

> "The more convincing proposition is not that international law prohibits flags of convenience, but that once a state has conferred the right to fly its flag, international law requires it to exercise effective jurisdiction and control over the ship in administrative, technical, and social matters. Thus it is the flag state which is responsible for regulating safety at sea and the prevention of collisions, the manning of ships and the competence of their crews, and for setting standards of construction, design, equipment, and seaworthiness. These responsibilities also include taking measures to prevent pollution".[105]

Among the obligations binding on all flag States particular mention can be made of the following duties: a) "to take such measures for ships flying its flag as are

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investigation into the cause of the accident. A brief summary of the report on the investigation was presented to the Executive Committee at its March 2005 session (document 92FUND/EXC.28/5, section 13.1). The discussion of the report at the session is reflected in the Record of Decisions (document 92FUND/EXC.28/8, paragraphs 3.4.52–3.4.60). The Spanish Ministry on Promotion has carried out an investigation into the cause of the incident through the Permanent Commission on the Investigation of Maritime Casualties (the Commission) that has the task of determining the technical causes of maritime accidents. The report of the investigation, which was made available to the 1992 Fund in April 2005, extends to some 420 pages and contains a narrative of events, an analysis of the evidence, conclusions, recommendations and appendices. The report does not address blame or liability. See Doc. 92/FUND/EXC.29/4, 9 June 2005, par. 13.1–13.3. and Doc. 92/FUND/EXC.29/6, 28 June 2005, *Record of Decisions of the Twenty-Ninth Session of the Executive Committee*, pars. 3.2.79–3.2.85.

[104] UNCLOS, Art. 221 and 1969 Intervention Convention.

[105] Birnie, P.; Boyle, A., *International Law and the Environment*, (Clarendon Press – Oxford), 1992, p. 264.

necessary to ensure safety at sea" with regard, *inter alia*, to its seaworthiness;[106] b) to adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag;[107] and c) to ensure compliance by vessels flying their flag with applicable international rules and standards and provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.[108] In this respect, Article 217.2 of UNCLOS affirms that:

> "States shall, in particular, take appropriate measures in order to ensure that vessels flying their flag or of their registry are prohibited from sailing, until they can proceed to sea in compliance with the requirements of the international rules and standards referred to in paragraph 1, including requirements in respect of design, construction, equipment and manning of vessels".

Moreover, the draft Articles on Prevention of Transboundary Harm from Hazardous Activities, adopted by the UN International Law Commission in 2001,[109] provide for a series of special rules which also bind upon flag States with respect to their ships carrying dangerous substances.[110] And it should be also recalled that, as pointed out by *Birnie* and *Boyle*, "(a) number of authors have argued that in respect to ultrahazardous activities at sea, such as the operation of large oil tankers, the liability of the flag State is strict . . .".[111]

As provided for in Article 235 of UNCLOS, regarding responsibility and liability, "States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law". However, once again, in the case

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[106] UNCLOS, Art. 94.3, a).

[107] UNCLOS, Art. 211.2.

[108] UNCLOS, Art. 217.1.

[109] See: Report of the International Law Commission on the work of its Fifty-third session, *Official records of the General Assembly, Fifty-sixth session, Suplement no. 10* (A/56/10), Chapter V, pp. 337–436.

[110] As explained in the commentary of the draft Articles, "the prime example of such a situation is innocent passage of a foreign ship through the territorial sea. In such situations, if the activity leading to significant transboundary harm emanates from the foreign ship, the flag State and not the territorial State must comply with the provisions of the present articles" (Report of the International Law Commission . . . *cit.*, p. 384 (8). One of the special rules contained in the draft articles affirms that: "The State of origin shall, without delay and by the most expeditious means, at its disposal, notify the State likely to be affected of an emergency concerning an activity within the scope of the present articles and provide it with all relevant and available information" (Article 17).

[111] Birnie, P.; Boyle, A., *op. cit.*, p. 264, quoting Smith, B. D., *State Responsibility and the Marine Environment. The Rules of Decision*, Oxford, 1988, pp. 114–118; 160–163; 210–213 and Handle, G. "State Liability for Accidental Transnational Environmental Damage by Private Persons", *American Journal of International Law*, 74, 1980, p. 547.

of the *Prestige* no claims have been made by affected States with respect to other States' accountability for marine pollution.

CONCLUSION

To face an oil spill is not a new problem in international law. However, the intensity and the increasing frequency of oil spills all over the world, as well as their catastrophic environmental and economic consequences for the coastal States affected, make evident the need to reconsider some of the most deeply rooted norms of international law, such as the dogma of freedom of navigation. The phenomenon of oil spills also questions other norms, such as the pre-eminent jurisdiction of the flag State over the design, construction, manning and equipment of their ships until stricter development of generally accepted international rules or standards take place. The same can be said with respect to the persistent limitation of liability of the polluter until it is lifted to a new ceiling, still allowing the polluter not to compensate for all the damages caused. Other tolerated practices, such as the existence of flags of convenience or the utilization of substandard tankers for the carriage of dangerous and ultrahazardous substances or goods reflect the need to revise a complex set of norms in order to enjoy safer navigation.

Accidents like the *Prestige* always generate some pressure for the development of new norms aimed at preventing the repetition of the same type of disaster. The emerging right of coastal States not to tolerate irresponsible navigation of dangerous ships through their waters, the development of stricter monitoring and inspection procedures, the establishment of places or ports of refuge, the institution of Particularly Sensitive Sea Areas or the accelerated withdrawal of single hull oil tankers are some of the most important legal developments that are taking place after the *Prestige* accident. Obviously, if these new legal developments are correctly implemented, they will contribute to safer navigation.

But questions still arise. Are these measures sufficient? Is the international community able to impose and require responsible navigation? The answers seem mostly in the negative. Even after the *Prestige* accident, the flag State maintains most of its legal privileges, still living in a golden paradise. No one has asked for the international responsibility of a flag State not ensuring the safety of their tanks; the limited compensation for damages is channelled through private liability systems not affecting the flag State; private insurance companies and the IOPC fund will have to pay for its negligence, never the flag State. As one author put it "As the ship goes down, flag State jurisdiction goes down with it. And it is left to others to clean the mess".[112]

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[112] Fleischer, K. A. "Implementation of the Convention in the Light of Customary International Law, Prior Treaty Regimes and Domestic Law" in Vidas, D. and Ostreng, W. (editors) *Order for the Oceans at the Turn of the Century*, 1999, p. 529.

Even the situation of the victim State has not significantly improved. Although a new IOPC Supplementary Fund has been created as a consequence of the *Prestige* accident, this fund will not apply retroactively to the case at hand. In fact, Spain still faces two main risks for its diligent reaction to an environmental disaster caused by a foreign tanker. First, having spent more than 1,000 million in response to the damages resulting from the accident, it has only received an advance sum of 57.5 million from the 1992 Fund, and it seems clear that Spain will be reimbursed only in a small part for the costs already incurred. Second, although currently trial is still pending, there is the possibility of Spain being condemned, on a subsidiary basis, if the Court accepts the charges of reckless conduct formulated against the Director General of Merchant Shipping in office at the time of the accident. None of these risks are for the flag State, the Bahamas, or the polluting vessels, but for the victim State. In these circumstances, it can be held that nowadays to pollute is still a good business not adequately sanctioned by international law.

Spain and the War on Iraq

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The war on Iraq in 2003 had an important impact on Spain, both internationally because of the position taken by our country, and on the domestic political front. Furthermore, the government's clear support of intervention under the Popular Party changed radically after the Socialist Party won the March 2004 elections, going from active involvement in the use of force, unprecedented in our recent history, to total disengagement. A close look at Spanish practice on this issue is, therefore, of special interest.

We have divided this paper into three parts. In the first we deal with Spain's positions in the United Nations; in the second, we examine legislative consideration of the government's stance throughout a number of heated sessions in the Spanish Parliament; in the third, we discuss Spain's constitutional regulatory environment relating to Spain's participation in military conflicts. In each of these sections, the change in the governing party marked a decisive turning point in the direction taken in practice.

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I. SPAIN'S POSITION IN THE UNITED NATIONS: FROM SUPPORT FOR UNILATERAL INTERVENTION TO DEFENCE OF MULTILATERALISM

From the start of its membership on the Security Council as a non-permanent member in January 2003, Spain characterised itself as being keenly receptive to the positions of the United States and the United Kingdom and by its consistent support of the war, as shown in successive interventions by its representatives on the Council. Nonetheless, from 8 October 2002, the Ministry of Foreign Affairs had possession of a report by the Head of its International Legal Advisory Office[1] which, in analysing the principle of the prohibition of the use of force and in particular the right to self-defence and the system of collective security established in the United Nations Charter, underscored "the Security Council's monopoly of authorization of legitimate use of force on behalf of the international community", and offered an in-depth analysis of the Council's position thereon, in particular:

> "the established practice . . ., under Article 42 of the Charter and as a last resort when all other measures taken to resolve a crisis of concern to the international community fail, of authorising certain States or organizations to use force to achieve specific goals as set forth by the Council in each situation and in the framework of certain conditions also established by the Council, on a case-by-case basis, depending on the circumstances prevailing in the particular situation at hand."

The Report then went on to discuss in detail the Security Council's position on Iraq, rejecting the theory of authorisation supposedly emanating implicitly from Resolution 678 (1990),[2] stating:

> "what for the United States and the United Kingdom is a kind of contractual relationship between the coalition and Iraq that could be resolved at any moment by a castigatory operation if Iraq fails to comply with its obligations, for the Security Council as a whole is an institutionalized regime subject to

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[1] The text of the Report was found at *http://www.diariodirecto.com/int/int030317informe.html.*

[2] On the problem of implicit authorizations see, inter alia, C. Denis, "La Résolution 678 (1990) peut-elle légitimer les actiones armées menées contre l'Irak postérieurement à l'adoption de la Résolution 687 (1991)", *RBDI*, 1998, pp. 485–537; O. Corten and F. Dubuisson, "L'hypothèse d'une règle emergente fondant une intervention militaire sur une 'autorisation implicite' du Conseil de Sécurité", *RGDIP*, pp. 873–910; J. Lobel and M. Ratner, "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime", *AJIL*, 1999, pp. 124–154; U. Villani, "La nuova crisi del Golfo e l'uso della forza contro l'Iraq", *RDI*, 1999, pp. 451–462; P. Palchetti, "L'uso della forza contro l'Iraq: la ris. 678 (1990) legittima ancora l'azione militare degli Stati?", *RDI*, 1998, pp. 471–475; U. Villani, *L'ONU e la crisi del Golfo*, Bari, Cacucci Ed., 2005, pp. 136–141.

international supervision, so therefore any resort to the use of force in response to non-compliance by Iraq must be always backed by the Council upon appropriate verification of serious non-compliance, in addition to or followed by issuance of a serious warning to Iraqi authorities."

A study of Council practice led the Report to conclude that:

"we face a situation with which the Security Council is actively dealing, and it is therefore first and foremost up to the Security Council to adopt any measures as may be necessary at any given time to enforce its mandates and obtain compliance with the will of the international community, and no country can place itself in the position that corresponds to the Council on behalf of the international community as a whole."

However, the well-founded opinions contained in this Report were not taken into account by Spain's representatives on the Security Council; on the contrary, Spain aligned itself with the position of the United States from the start, accepting its assessment of the situation and its interpretation of prior Security Council resolutions as permitting intervention. At the 5 February 2003 session at which Secretary of State C. Powell exhibited the alleged evidence of Iraq's possession of weapons of mass destruction and its links to terrorism, the then-Spanish Minister of Foreign Affairs, Ms. Palacio took the floor, and stated:

"The Secretary of State has put before us compelling data pointing to the existence of weapons of mass destruction and to the consequences of their possible use. Those data also confirm that Iraq is deceiving the international community and that it is not cooperating. Legally speaking, and in the context of the United Nations and of Resolution 1441 (2002) in particular, that information leads to the legal conclusion that there has been a flagrant violation of the obligations established in Resolution 1441 (2002)".[3]

This explains the Minister's negative assessment of the reports submitted by H. Blixy M. ElBaradei at the 14 February 2003 session, where she stated:

"Like hundreds of millions of citizens the world over, I have been following the words of the inspectors, of Mr. Blix and of Mr. ElBaradei with great care and attention and with an eagerness to hear just one sentence – an affirmation of active, immediate and complete cooperation by Saddam Hussein's regime. The inspectors have not been able to make that affirmation".[4]

Spain's support of intervention even led it to co-sponsor with the United States and the United Kingdom the two draft resolutions seeking to establish a legal basis for the action. As is well known, both drafts resorted to the fallacious theory of

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[3] Security Council, 4701st meeting, 5 February 2003, Doc. S/PV 4701, p. 28.
[4] Security Council, 4707th meeting, 14 February 2003, Doc. S/PV 4707, p. 16.

linked resolutions, looking to the Council to find non-compliance with Resolution 1441 (2002) in order to revitalize the use of force authorisation contained in Resolution 678 (1990), and considering it unnecessary for the Council to have to expressly approve any new authorisation. The draft submitted on 24 February 2003, after citing the major Council Resolutions on Iraq starting with Resolution 661 (1990) and referring to the most pertinent provisions of Resolution 1441, noted that "Iraq has submitted a declaration pursuant to its Resolution 1441 (2002) containing false statements and omissions and has failed to comply with, and cooperate fully in the implementation of that resolution" and in the preamble limited itself to proclaiming that "Iraq has failed to take the final opportunity afforded it in Resolution 1441 (2002)". The second draft, submitted on 7 March, added a deadline of 17 March upon recognition of non-compliance, during which the Council could reach the conclusion that Iraq had changed its attitude, leaving it implicit that if this were not the case the authorisation to act would automatically come into force.[5]

Having failed to get approval for a new Resolution as featured above, it is worthy of note that in the dramatic Security Council session of 19 March 2003, held just hours before the commencement of military action, it was the representative of Spain who took on the job of demonstrating the existence of a legal basis to permit intervention, on which neither the representative of the United States nor of the United Kingdom took a stand. The Spanish Representative, Mr. Arias, stated:

> "Spain understands, and it has demonstrated that since it became a member of the Council, that a new resolution, even if it were politically desirable, would not be legally necessary.
>
> Indeed, the legitimate recourse to the use of force to disarm Iraq of its weapons of mass destruction is based on the logical linking of Resolutions 660 (1990), 678 (1990), 687 (1991) and 1441 (2002), adopted pursuant to Chapter VII of the Charter.
>
> Resolution 660 (1990) considered the Iraqi invasion of Kuwait a breach of the peace and international security. Therefore, at that time, Iraq not only constituted a threat to peace and international security, but was also in breach of the peace and international security.
>
> Iraq did not comply with that demand of the Council, which requested, in its second Resolution, that Member States use all means necessary to make Iraq

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[5] The operative part of the draft Resolution had the Council stating that it would "Find that Iraq has failed to take the final opportunity offered by Resolution 1441 (2002), unless, on or before March 17, 2003, the Council reaches the conclusion that Iraq has shown full, unconditional, immediate and active cooperation in conformance with its obligations to disarm under Resolution 1441 (2002) and relevant prior resolutions, and has surrendered all weapons, weapons support and distribution systems and structures prohibited by Resolution 687 (1991) and all relevant Resolutions thereafter, and all information relating to their prior destruction."

comply with resolution 660 (1990). An international coalition, under mandate, intervened militarily and restored international legality.

Resolution 687 (1991) declared a cease-fire, subordinating it to compliance with a number of conditions. The majority of them demanded the disarmament of weapon of mass destruction. They also referred to humanitarian matters, terrorism and the payment of war reparations. With the exception of the last issue, the remaining conditions were not met.

Iraq has provided cover to terrorists and has recently boasted of training suicide teams. Saddam Hussein's regime has not returned all those who disappeared or were taken prisoner. It continues to fail to provide information, in a clear, complete and authentic manner, on the whereabouts of its weapons and its programmes for weapons of mass destruction. Let us recall that paragraph 9 of Resolution 687 (1991) demanded that Iraq present to the Secretary-General, within a period of 15 days, a detailed report on the locations and characteristics of all its weapons of mass destruction. Twelve years later that information still has not been provided in a comprehensive manner, as demanded by the Council.

Resolution 687 (1991), therefore, left in abeyance Resolution 678 (1990), which authorized the use of force. It left it in abeyance, but it did not abolish it. The content of Resolution 678 (1990) continues to be perfectly valid, and that is recalled in Resolution 1441 (2002), unanimously adopted by the Council four and a half months ago.

Resolution 1441 (2002) recognizes that Iraq's non-compliance with the Council's resolutions constitutes a threat to international peace and security, it recalls that these have not been restored in the region – I am using the language of the resolution – and it decides that Iraq has failed to comply and continues to fail to comply most seriously with the demands imposed by the international community".[6]

The fact that actions were being coordinated between Spain and the United States was shown clearly by the fact that the letter sent the following day by the United States Representative to the Chairman of the Security Council informing of the commencement of hostilities justified the action based on the same theory of linked resolutions.[7]

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[6] Security Council, 4721st meeting, 19 March 2003, Doc. S/PV. 4721, pp. 15–16.

[7] "The actions being taken are authorized under existing Council resolutions, including its Resolutions 678 (1990) and 687 (1991)... Iraq continues to be in material breach of its disarmament obligations under Resolution 687 (1991), as the Council affirmed in its Resolution 1441 (2002)... The Government of Iraq decided not to avail itself of its final opportunity under Resolution 1441 (2002) and has clearly committed additional violations. In view of Iraq's material breaches, the basis for the cease-fire has been removed and use of force is authorized under Resolution 678 (1990)" (*Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, Doc. S/2003/351).

In parallel to the role assumed by the Security Council, the Spanish Government sponsored a letter that was signed by the prime ministers of Spain, Italy, the United Kingdom, Portugal, Denmark, Poland, Hungary and the Czech Republic on 29 January 2003, in defence of the transatlantic link and warning Iraq of the consequences of its attitude and on 16 March of that year then Prime Minister Mr. Aznar participated in the Azores summit which gave the ultimatum to Iraq. As a corollary, on the day military operations began, Prime Minister Mr. Aznar made the following statement:

> "Early this morning the last efforts concluded without result to get a decision by Saddam Hussein – to abandon power and leave Iraq – that would avoid the grave consequences of which the International Community has warned.
>
> The Iraqi regime has consummated its challenge to legality, ignoring its obligation to disarm as demanded by the United Nations for twelve years, up to Security Council Resolution 1441 passed nearly five months ago.
>
> Saddam Hussein has rejected his last opportunity.
>
> With a full sense of responsibility, the Government of the Nation supports the reestablishment of international legality and compliance with the obligations determined to guarantee peace and security . . .
>
> We concur with a large group of countries with which we share the principal concern of achieving effective peace and conditions of security in relations among States . . .
>
> We have assumed our responsibilities. There were more comfortable options, but we do not want to leave to the future the dangers we should confront in the present.
>
> In doing so, we act in accordance with the spirit and the letter of international law . . .
>
> At the same time, I want to assure the Spanish people that the military actions undertaken will be consistent with and proportionate to the goal of making the disarmament of Iraq possible under the terms of Security Council Resolution 1441 . . .".[8]

The Spanish government's decision to support the war against Iraq and to adopt the United States' reasoning was made clear at the 27 March 2003 session of the Security Council, where the Spanish representative, Mr. Arias, stated:

> "Saddam Hussein's repeated non-compliance over the past 12 years with his obligation to eliminate his weapons of mass destruction – as set forth in many resolutions of the Security Council and most recently in Resolution 1441 (2002), which gave Iraq one last chance to disarm – has compelled an international coalition, which includes my country, to take enforcement action to achieve that disarmament.

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[8] The text of this Declaration was found on 20 March 2003 at *http://www.mpr.es/irak/default.asp*.

> Spain and other members of the Security Council used to the maximum all available diplomatic resources to achieve the disarmament of Iraq by peaceful means. Resolution 1441 (2002) and its reference to others adopted by this Council supported the legality of the action undertaken by the coalition. We want military operations to end as soon as possible, with a minimum loss of human life".[9]

After the war ended, Spain once again co-sponsored with the United States and the United Kingdom a draft which would become Resolution 1483 (2003), by which the Security Council accepted the *fait accompli* and endorsed the decisions of the Coalition Provisional Authority in exchange for a discreet role in Iraqi reconstruction. In explaining his support for the Resolution, the Spanish representative stated:

> "I believe that this is a very important day for the people of Iraq as well as for the United Nations. The Security Council, as a whole, has understood that the time to be realistic has now come. Some may say that this resolution is not perfect, but no one can deny that it provides an appropriate legal framework for dealing with the special, anomalous and grave situation facing the international community".[10]

Once the United Nations was able to deal once again with Iraq, Spain was one of the States showing the greatest optimism relating to the situation in the country

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[9] Security Council, 4726th meeting, 27 March 2003, Doc. S/PV. 4726, p. 29. The similarity in reasoning between the United States and United Kingdom representatives continued. In fact, at the same session, Sir Jeremy Greenstock (United Kingdom) stated: "The action that the United Kingdom is now taking with its coalition partners to uphold United Nations resolutions is both legitimate and multilateral. The use of force is authorized in the current circumstances under Security Council Resolutions 678 (1990), 687 (1991) and 1441 (2002). A broad coalition of well over 40 States is supporting this action materially or politically" (S/PV. 4726, p. 23); for his part, Mr. Negroponte (United States) said: "It was regrettable that the Government of Iraq decided not to take the final opportunity for compliance provided in Security Council Resolution 1441 (2002). The coalition response is legitimate and not unilateral. Resolution 687 (1991) imposed a series of obligations on Iraq that were the conditions of the cease-fire. It has long been recognized and understood that a material breach of those obligations removes the basis of the cease-fire and revives the authority to use force under resolution 678 (1990). Resolution 1441 (2002) explicitly found Iraq in continuing material breach. In view of Iraq's additional material breaches, the basis for the existing cease-fire has been removed and the use of force is authorized under Resolution 678 (1990)" (S/PV. 4726, p. 25).

[10] Security Council, 4761st meeting, 22 May 2003, Doc. S/PV. 4761, p. 6. It is appropriate to recall that Resolution 1483 marks the meeting point of the States that supported the war and those that were against it. The positive stances of France, Germany and Russia regarding the Resolution are dealt with in my article "El Consejo de Seguridad en la guerra contra Irak: ¿ONG privilegiada, convalidador complaciente u órgano primordial?" ("The Security Council on the war on Iraq: privileged NGO, complacent validator or principal body"), *REDI*, vol. LV, 2003, p. 218.

after the military action. There is a statement in this regard by Foreign Minister Ms. Palacio, who, at the 22 July 2003 Security Council session after stressing the importance of the impending constitutional process in Iraq, stated:

> "Members may feel that some of these features are familiar to some of us who are members of the European Union, because, as some members have undoubtedly noted, these points faithfully describe the method whereby we Europeans came together to endow ourselves with a constitution. These are the distinctive features of the recently concluded Convention for the Future of Europe, which just presented the preliminary draft of a European constitution".[11]

This same optimism was shown by Mr. Arias when Resolutions 1500 (2003)[12] and 1511 (2003), also co-sponsored by Spain, were approved:

> "I wish to convey the Spanish delegation's unreserved satisfaction that this resolution, so important for the future of Iraq, was unanimously adopted. Spain was a resolute sponsor of the draft resolution, convinced that it constituted an important step towards improving the lives of the Iraqis and restoring to them control of their own destiny. We believe that the resolution is good news for the Iraqi people, for the region and for the United Nations. Iraq deserved – and deserves – the sincere consensus of the Security Council and its undivided support and unity. It is a people who have suffered three decades of dictatorship and who must see a better future before it. The resolution should help to achieve that.
>
> (. . .) Lastly, it is good news for this Council and the United Nations, because differences of the past are being reduced. From the unity, which we trust will be unrestricted, we will be able to make efforts that will be beneficial to those who most need them – in other words, the people of Iraq".[13]

When the government changed hands in Spain, the position of the Security Council on Iraq was already consolidated in the abovementioned Resolutions 1483, 1500 and 1511. Surely for that reason Spain voted in favour of Resolution 1546 (2004), but significant nuances in our country's position were visible. First, this time it did not co-sponsor the draft resolution, although it did ensure that the text included certain features; second, the new Spanish representative, Mr. Yánez-Barnuevo[14] stated his government's desire for the United Nations to have a more leading role in Iraq and for the multinational force to withdraw as soon as possible. He stated:

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[11] Security Council, 4791st meeting, 22 July 2003, Doc. S/PV. 4791, p. 33.
[12] See Security Council, 4808th meeting, 14 August 2003, Doc. S/PV. 4808, p. 4.
[13] Security Council, 4844th meeting, 16 October 2003, Doc. S/PV. 4844, p. 8.
[14] Who, in October 2000, drafted the Foreign Ministry's International Legal Advisory Report referred to above.

"Spain has voted in favour of Security Council Resolution 1546 (2004), thus joining the consensus expressed by the members of the Council. The Spanish delegation has cooperated actively in the formation of that consensus, offering ideas and contributions to the process of drafting the text of the resolution together with other delegations, particularly those of Brazil and Chile.

For us, this is certainly not about the ideal resolution. Actually, Spain would have wanted the United Nations to have assumed guidance of the political and military process in Iraq and that it would have been possible to accelerate even more the political transition in Iraq to a fully normalized situation.

(. . .) Spain has been promoting a more ambitious role for the United Nations in Iraq. The United Nations will continue its performance, essentially in complementing the political process, supporting preparations to hold a national conference and assisting the Independent Electoral Commission, as well as the interim and transitional Governments, in the preparation of the electoral processes. My Government believes that United Nations activities in Iraq must effectively help in the political transition process, which should include recognition of a clear and defined temporary time period to conclude its activities.

A fundamental aspect of the resolution that we have just adopted is related to the security architecture, referred to also in the letters addressed to the President of the Security Council by the Prime Minister of Iraq, Mr. Allawi, and by the Secretary of State of the United States, Mr. Powell. I would like to make a few brief comments in that regard.

My Government hopes that the agreements concluded from now on in the area of security between the interim Government and the multinational force will fully respect Iraqi sovereignty and will faithfully reflect the principle of authority that should govern the relationship between that Government and its armed forces and security forces. It also hopes that agreements will be reached soon on an operation policy that will enable the interim Government to affirm its authority in sensitive cases, so that its due control over the political process is maintained at all times. We also hope that in that context of authority and the exercise of sovereignty, the interim Government – with the assistance that each instance might require, including from the United Nations – will promote a national reconciliation process in which today's dissident elements will be gradually integrated and will be able to contribute to Iraq's stability and thus to that of the region.

(. . .) With regard to humanitarian issues, Spain is pleased that the preamble to the resolution notes the commitment of all forces to act in accordance with international law, including humanitarian law, and to cooperate with relevant international organizations. Spain would have liked this provision, which appeals to all parties to observe and ensure respect for such humanitarian principles, to have been included in the operative part of the resolution as well.

As members know, Spain has attached particular importance to the Security Council receiving periodic reports – quarterly if possible – from the multinational

force as well as the reports submitted to the Council by the Secretary General. We welcome the fact that the resolution has reflected that proposal.

We also deem it to be of great importance that the resolution, as requested by Spain and other members of the Council, sets 31 December 2005 as the deadline for the completion of the transitional political process and, therefore, the end of the presence of the multinational force. Spain considers that that force's presence in Iraq should be for as limited a time as possible".[15]

II. PARLIAMENTARY MONITORING OF SPAIN'S INVOLVEMENT IN THE WAR ON IRAQ: A STORY IN TWO OPPOSING PHASES

Analysis of this subject in the Spanish parliament reveals two features: one is the deep rift occurring between the governing party and the other political groups; the other is the broad discussion of the issue, giving rise to a large number of intense, bitter debates and initiatives.[16] In any case, the change in Government and in the make-up of Parliament after the March 14, 2004 elections led to two opposing phases in Parliament as regards the war in Iraq.

1. Support for the war by the Popular Party Government and unsuccessful efforts of the opposition to prevent it.

Throughout its many different appearances, the Government defended its position by using the same arguments as it used in the Security Council. In essence, from a position of alignment with the United States, it sought to maintain that its position was based on respect for international law, the need to implement Security Council Resolutions, and that such Resolutions provided the legal basis for intervention. In September 2002, in an appearance by the Minister of Foreign Affairs before the lower house's Foreign Affairs Committee to explain her Ministry's overall policy, Ms. Palacio stated:

"The Government of Spain's position is crystal clear . . . From 12 August there are statements by this Government setting forth two principles: first, Iraq is a real danger for all of us; second, the natural place to resolve this is the United

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[15] Security Council, 4987th meeting, 8 June 2004, Doc. S/PV. 4987, pp. 11–12.

[16] The principal debates and actions took place in the Congress of Deputies, owing to its scope of responsibility under the Spanish bicameral parliamentary system; nonetheless, the subject of Iraq was also discussed in the Senate. On this item, see *BOCG, Diario de Sesiones del Senado, Comisiones, Comisión de Asuntos Exteriores*, VII Legislature, 2002, no. 342; *BOCG, Diario de Sesiones del Senado, Pleno*, VII Legislature, 2003, no. 127; *BOCG, Diario de Sesiones del Senado, Pleno*, VII Legislature, 2003, no. 124; *BOCG, Diario de Sesiones del Senado, Pleno*, VII Legislature, 2003, no. 128.

Nations, because everything stems from its non-compliance with United Nations resolutions".[17]

Several months later, with the conflict looming, the Minister outlined the theory of linked resolutions to the same Committee; disagreeing with the opposition she stated:

"They want to make a differentiation with respect to Resolutions 678 and 687, the so-called Gulf War resolutions. There is no difference, there is a link. If we are where we are it is because Resolution 687 established a cease-fire and conditions for maintaining it, none of which have been complied with, so we are precisely in that same framework".[18]

Days later, Ms. Palacio was back before the Committee reporting on the Security Council sessions at which the H. Blix and ElBaradei reports were presented. She stressed the non-compliance by Iraq and the gravity of the situation, stating:

"The Government will work for a new resolution from the reiterated position that, while it is not legally essential – as we have consistently maintained –, it is politically desirable".[19]

The intention to achieve another Resolution was reiterated by Prime Minister Mr. Aznar in his appearance before a plenary session of Congress in the crucial moments prior to intervention. The Prime Minister stated:

" . . . the Government has shown its choice and its desire for the matter to continue in the United Nations. Furthermore, although Resolution 1441 states literally that it is a last chance, the Government is working and will work to get another Security Council resolution . . .".[20]

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[17] Appearance on 24 September 2002, *BOCG, Diario de Sesiones del Congreso de los Diputados, Comisiones, Asuntos Exteriores*, VII Legislature, 2002, no. 554, p. 17751.

[18] Appearance on 23 January 2003, *BOCG, Diario de Sesiones del Congreso de los Diputados, Comisiones, Asuntos Exteriores*, VII Legislature, 2003, no. 676, p. 21921. In a later appearance before a joint meeting of the Foreign Affairs and Defence Committees, the Minister repeated the same reasoning (See *BOCG, Diario de Sesiones del Congreso de los Diputados, Comisiones, Conjunta de Asuntos Exteriores y Defensa*, VII Legislature, 2003, no. 716, p. 22973; also p. 23002).

[19] Appearance on 31 January 2003, *BOCG, Diario de Sesiones del Congreso de los Diputados*, Comisiones, Asuntos Exteriores, VII Legislature, 2003, no. 678, pp. 21969–21970. In his appearance on 25 February 2003, the Minister stated again that "the Government has always maintained . . . that a second resolution was not legally essential, but that it was politically desirable" (*BOCG, Diario de Sesiones del Congreso de los Diputados, Comisiones, Asuntos Exteriores*, VII Legislature, 2003, no. 700, p. 22605).

[20] Appearance on 5 February 2003, *BOCG, Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente*, VII Legislature, 2003, no. 222, p. 11253. On 5 March, the Prime Minister said "we are considering a draft of a new resolution

After participating in the meeting in the Azores, Aznar went before the congressional Plenary to justify his action and inform of his decision to send a military contingent to Iraq in the event of war. After stating that the international fight against terrorism benefits Spain, "standing alongside the nations seeking to actively promote the defence of the principles that enable us to live in freedom and democracy" and "that the international community does not remain paralysed when the time comes to take difficult but unavoidable decisions," he added:

> "The statements we approved at the recent meeting in the Azores mean just that. Spain is in this position because it is the best for our national interests and we are in this position because we need security and legality".[21]

He went on to report:

> "In view of the international situation, as well as precedents of Spain's participation in previous crises, the Government today, by virtue of its power to direct foreign and defence policy under the Constitution, has taken some decisions . . . in the event there is an intervention, Spain will not participate in attack or offensive missions. Therefore, there will be no Spanish combat troops in the theatre of operations . . .
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> . . . the Government understands that it must contribute to the international effort in a mission of joint humanitarian support . . .".[22]

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which is under discussion at this time, and which is being discussed and negotiated at this time. This new resolution seeks . . . to reaffirm the Security Council's position in the United Nations" (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 231, p. 11774).

[21] Appearance on 18 March 2003 (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 236, p. 12057).

[22] *Ibid.*, p. 236. The Prime Minister then set forth the features of Spain's involvement in the action: "For such purpose, Spain will send the *Galicia* to the area, equipped with medical capabilities to carry out surgery, provide intensive care and hospital beds . . . It will also carry vehicles and vessels for the same purpose and have the capability to act as an emergency coordination centre. It will carry a 120-troop Naval Protection Unit. The ship will include Army engineer and nuclear, bacteriological and chemical defense units . . . In escort, security and support duties the *Galicia* will be accompanied by a Navy Frigate and the *Marqués de la Ensenada* oil tanker. This amounts to an approximately 900-strong contingent. Likewise, Spain and its Government promise to participate actively in humanitarian aid work with the local population . . . The Government will also have commitments in the stabilization and normalization process on Iraqi territory, as appropriate. Apart from this . . . we have made available to the Atlantic Alliance for use in the defense of Turkey – in the event the country is attacked – six F-18 fighter aircraft, supported by a Hercules C-130 tanker aircraft, with their respective crews, along with a salvage and rescue helicopter" (*Ibid.*, pp. 12058–12059). These decisions were set forth in a Council of Ministers Agreement of 21 March 2003 authorizing the participation of Spanish military units in Iraq, subject to later amendment on 25 April and 11 July.

Furthermore, when in the course of the debate several members challenged the legality of intervention, Mr. Aznar once again referred to the theory of linked resolutions, as follows:

> "Intervention . . . has a very broad legal basis established in Resolution 678, in Resolution 687 of April 3, 1991 and, of course, in Resolution 1441. Resolution 687 established a ceasefire, conditional on compliance with certain terms . . .[23]
>
> Resolution 687 suspended, but did not cancel authorization for the use of force. Resolutions 678 and 687 are fully in force and what is occurring there is a flagrant violation of the ceasefire conditions; therefore, authorization under Chapter VII of the United Nations Charter has been in force fully since 1990".[24]

Conversely to the Government's position, all the other political groups stated their opposition to the war. The statements made and actions taken show two different lines of argument: on the one hand, the illegality of military intervention and Spain's participation in it; on the other, concern over the use of the Agreement on Defence Cooperation between Spain and the United States in support of military actions against Iraq. To defend these arguments, all means of parliamentary control provided for under the Spanish Constitution were used,[25]

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[23] *Ibid.*, p. 12066.

[24] *Ibid.*, p. 12075.

[25] Mainly questions, urgent requests for explanation (many of which gave rise to motions) and motions. The questions asked included: a question from Deputy Gaspar Llamazares Trigo, Federal United Left Parliamentary Group "What will Spain's involvement in the United States-Iraq attack be?" (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2002, no. 187, pp. 9315–9316); the question asked by Deputy José Luis Rodríguez Zapatero, Socialist Parliamentary Group "What is the Government's position regarding possibly military action by the United States against Iraq? (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2002, no. 184, pp. 9198–9199); the one asked by Deputy Gaspar Llamazares Trigo, Federal United Left Parliamentary Group "What position will Spain defend at the next United Nations Security Council meeting on the war on Iraq" (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 225, pp. 11458–11460); another by Deputy Gaspar Llamazares Trigo, Federal United Left Parliamentary Group "Why has your Government sponsored an illegal, illegitimate war against the Iraqi people?", the one from Deputy José Luis Rodríguez Zapatero, Socialist Parliamentary Group "What are the reasons for Spain's participation in the war on Iraq", the one by Deputy Jesús Caldera Sánchez-Capitán, "Why has the Government supported a breach of international law?" (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, núm. 238).

The urgent requests from the Congress for explanation, include, inter alia: from the Mixed Parliamentary Group, on the support by the Spanish State of a potential attack of Iraq by the United States (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2002, no. 187, pp. 9341–9347) gave rise to a motion (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2002, no. 188, pp. 9388–9392); from the Socialist

although the Government's absolute majority enabled it to maintain its position unaltered.[26]

Throughout the military intervention, accusations that the Spanish participation was illegal under international law were refuted by the Government before the

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Parliamentary Group on the Government's decision in the Iraq crisis; from the Federal United Left Parliamentary Group asking the Government to explain its position on a potential war in Iraq; from the Catalonian Parliamentary Group (*Convergencia i Unió*) on the measures the Government intended to take relating to the Iraq conflict (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 222) that also gave rise to motions (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 24; *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 230; *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 233); from the Federal United Left Parliamentary Group for the Government to explain its final decision on Spain's sponsorship of and participation in the announced war against Iraq (*BOCG, Diario de Sesiones del Congreso de los Diputados*, VII Legislature, 2003, no. 234); from the Socialist Parliamentary Group on the purpose and results of the meeting held at the Lajes (Azores) military base, from the Mixed Parliamentary group on the Spanish Government's participation in the war of aggression against Iraq (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 238) with subsequent motions (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, nos. 237, 240 and 243); from the Socialist Parliamentary Group on returning to the guidelines of Spanish foreign policy; from the Federal United Left Parliamentary Group on the repercussions on Spain of the new phase of the war against Iraq (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 247; subsequent motion *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 248).

Regarding the proposed motions, in addition to those cited above: from the Mixed Parliamentary Group relating to the Spanish Government's position in the event of a U.S. military attack on Iraq (*BOCG, Congreso de los Diputados*, VII Legislature, Serie D, no. 403, pp. 11–12); from the Federal United Left Parliamentary Group on Spain's role in a potential U. S. military attack on Iraq, from the Mixed Parliamentary Group relating to the Government's position in the event of a war against Iraq, from the Socialist Parliamentary Group on Spain's position in the Iraq crisis, from the Mixed Parliamentary Group for Spain to oppose armed intervention in Iraq (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 224); from the Mixed Parliamentary Group relating to the prosecution of crimes committed by those who promote, aid or unleash aggression against Iraq entered in the early morning of 20 March 2003 (*BOCG, Congreso de los Diputados*, Serie D, VII Legislature, 2003, no. 514, pp. 5–6); from the Catalonian Parliamentary Group (*Convergència i Unió*) rejecting the war in Iraq and with measures to be adopted by the Government in relation to this serious conflict (*ibid.*, p. 7–8).

[26] It is noteworthy here that along with the three major issues indicated, the deaths of two Spanish journalists in Iraq caused a great impact in Spain and the presentation in Congress of four motions (*BOCG, Diario de Sesiones del Congreso de los Diputados*,

Parliament by invoking Security Council Resolutions 678, 687 and 1441, as previously indicated. Later, the adoption of Resolution 1483 provided a new element justifying Spain's presence in Iraq. In an appearance before the Defence Committee of the Congress of Deputies, the Minister of Defence maintained the legality of the decisions taken by the Council of Ministers (cabinet) to send troops without distinguishing between the war phase and the later phase, saying that:

> "This is derived . . . from Resolution 1483 passed by United Nations Security Council on 22 May. It is very important . . . that we analyse this resolution . . . It is said at times, hastily I think, that this mission lacks United Nations support, which is totally false. It took a great deal of effort, certainly, to draft, amend and finally approve Resolution 1483. After countless negotiations, a text was finally accepted that is, without doubt, the key to understanding the missions that our armed forces will perform in Iraq and to fully legitimizing such missions in accordance with international law".[27]

The debate that ensued during that session is particularly interesting, because, among other things, the Minister called the Spanish military presence a peacekeeping operation, contrary to the criteria of the other political groups that considered that it made it an occupying power, despite the position being then backed by Resolution 1483. In this context, the Defence Minister stated:

> "We . . . are not an occupying power . . . The occupying powers are the United States of America and the United Kingdom, to whom occupying power status and later on, authority, pertains. Other, non-occupying States . . . are currently working there or perhaps will in the future. What will Spain's work be? A peacekeeping mission".[28]

The Minister of Foreign Affairs also made similar statements before the Foreign Affairs Committee of the Congress of Deputies:

> "Allow me to remind you . . . that Resolution 1483 fully legitimizes the actions of the Spanish Armed Forces in Iraq and makes clear that they are not . . . an occupying power".[29]

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Plenary and Standing Committee, VII Legislature, no. 246; *BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, no. 528, pp. 8 and 12; *BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, no. 529, p. 7; *BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, no. 535, pp. 8–11).

[27] Appearance on 17 July 2003. *BOCG, Diario de Sesiones del Congreso de los Diputados*, Commissions, Defence, VII Legislature, 2003, no. 799, p. 25221.

[28] *Ibid.*, p. 25242. See opposition statements by deputies Marín González (p. 25230), Campuzano i Canadès (p. 25232) and Llamazares Trigo (p. 25234).

[29] Appearance 28 August 2003, *BOCG, Diario de Sesiones del Congreso de los Diputados*, Commissions, Foreign Affairs, VII Legislature, 2003, no. 801, p. 25278.

As regards use by the United States of possibilities under the bilateral defence agreement as logistical support for its actions in Iraq, both during the war and in the period immediately following it, on numerous occasions political opposition groups asked that use of the military bases not be granted, criticising the Spanish Government's permissiveness.[30] Of the many initiatives, of particular interest was the motion to the Plenary by all the political opposition groups asking the Government to deny the use of Spanish bases, territory and airspace for purposes relating to the military intervention in Iraq,[31] and the motion proposed by five political groups, urging the Government "not to allow the Government of the United States of America, in application of the Agreement on Defence Co-operation, to use Spanish bases, territory, territorial sea or airspace for objectives relating to military intervention in Iraq, because pre-emptive war was contrary to international law."[32]

None of this led the Government to alter its decision. The Minister of Defence stated before the Senate that:

> "there is a defence cooperation agreement between Spain and the United States referring to the use of facilities and authorizations, that is being implemented currently . . .

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[30] As early as September 2002 the Federal United Left Parliamentary Group presented a motion on the role of the Spanish military bases used by the United States of America in a potential U.S. military attack on Iraq, urging the Government not to authorize its use (*BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2002, no 399, pp. 9–10 and no. 408, pp. 4–5; *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2002, no. 186, pp. 9288–9295); reiterating this in March 2003 (*BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, no. 501, pp. 3–4; *BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, no. 505, pp. 9–10). The Mixed Group presented other similar motions (*BOCG, Congreso*, Series D, VII Legislature, 2002, no. 403, pp. 11–12; *BOCG, Congreso*, Series D, VII Legislature, 2003, no. 477, p. 5; *BOCG, Congreso*, Series D, VII Legislature, 2003, no. 478, p. 6; *BOCG, Congreso*, Series D, VII Legislature, 2003, no. 481, pp. 7–8; *BOCG, Congreso*, Series D, VII Legislature, 2003, no. 509, pp. 9–10) and the Socialist Parliamentary Group also including the issue in some of its motions (*BOCG, Congreso*, Series D, VII Legislature, 2003, no. 477, pp. 30–31). Motions were also presented on the basis of urgent requests for explanations seeking denial of the use of the bases (see *BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, pp. 6–9 for motions presented by the Socialist and the Federal United Left Parliamentary Groups).

[31] *BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, pp. 15–16; *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, pp. 12140–12153.

[32] Motion presented by the Socialist, Federal United Left, Basque (*EAJ-PNV*), Canaries Coalition and Mixed Parliamentary Groups (*BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, no. 514, pp. 6–7).

> . . . we have applied authorisations for use of facilities – Article 18 – of authorisations for use for flights and overflights – Article 25 – and authorizations for use for ships, although on a lesser scale – Article 31 –".[33]

The Minister also spelled out before the Congress of Deputies the authorizations granted for support facilities and the authorizations for use,[34] referring in both the Congress and the Senate to Spain's obligation to comply with the agreement. During the ensuing debate, representatives of political opposition groups countered by questioning implementation of the agreement in an illegal war, alleging that more authorizations were being granted than the Minister was admitting and denouncing the permits granted by the Spanish Government for in-flight refuelling of U.S. aircraft while flying over Spanish territory.[35]

2. The Change of Government and the Withdrawal of Spanish Troops from Iraq

In fulfilment of his promise during his election campaign, Mr. Rodriguez Zapatero, in his investiture speech, said:

> "I want to state clearly that Spain will assume its international obligations as appropriate in defence of peace and security. It will do so with one single prerequisite: the prior decision of the United Nations or any other multinational organisation that binds us. In any case, the participation of Spanish troops abroad will be determined with the participation of the Parliament".[36]

Consistent with his promise, on April 18, 2004, Prime Minister Rodriguez Zapatero made public a Declaration in which, after referring to his previous statements to the effect that he would order the return of the troops from Iraq if the United Nations did not take charge of the political and military situation there and

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[33] Response in the session on 12 March 2003 to the question posed by Deputies José Cabrero Palomares and Manuel Cámara Fernández, of the Mixed Parliamentary Group, on the Government's position regarding potential military attack by the United States of America against Iraq and the use of the military bases (*BOCG, Diario de Sesiones del Senado*, Plenary, VII Legislature, 2003, no. 127, p. 7839).

[34] Appearance before the joint session of the Foreign Affairs and Defence Committees on 24 March 2003 (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Comissions, VII Legislature, 2003, no. 716, pp. 22977–22979).

[35] Speeches are found in the *BOCG, Diario de Sesiones del Congreso de los Diputados*, Commissions, VII Legislature, 2003, no. 716. The issue of in-flight refuelling of B–52 bombers especially troubled political opposition groups, who were particularly annoyed when the minister said "in-flight refuelling may or may not have taken place" (*ibid.*, p. 23006).

[36] *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VIII Legislature, 2004, no. 2, pp. 20–21.

stating that according to his information it was not foreseeable that such a Resolution would be approved, he announced that he had decided to order the return of the troops in the shortest time possible.[37]

This decision was subject to discussion in the Congress of Deputies. On 27 April, Mr. Rodríguez Zapatero went before Congress to inform of his reasons and the scope of his decision to take the necessary measures for the return of the Spanish troops serving in Iraq. In his speech, the Prime Minister stated:

> "During the previous legislative term, all the groups in this Chamber, except for the one that backed the Government, stated their opposition to the Government's decision to send the Spanish Armed Forces to Iraq. They did so because they felt the intervention in Iraq was illegitimate and illegal; because they did not share the Government's opinion of the scope of the United Nations resolutions nor the rationale leading to its decision; because they felt that military operations would not contribute effectively to international peace or security, or to the eradication of terrorism; ultimately because they represented the feelings of a majority of Spaniards".[38]

After recalling his political promise and explaining the international contacts he had had in order to evaluate the political-military situation regarding Iraq, Mr. Rodríguez Zapatero concluded:

> "In all of them, and I feel this important to refer to specifically, we were met with the certainty that it was virtually impossible to expect the United Nations to adopt a resolution before 30 June in terms that would warrant my Government reconsidering its presence in Iraq. This conviction, this certainty, has made us not delay the implementation of our promise to the citizens and the Spanish soldiers stationed in Iraq".[39]

The new Spanish Government's decision was very well received by all the groups in the entire Spanish political spectrum, with the exception of the Popular Group. A few days after the session referred to above, all groups, with the exception of the Popular Group, passed a motion of support by the Congress of Deputies for the Prime Minister's decision, stating in its preamble:

> "In December 2003, the then Prime Minister of Spain decided, without submitting his decision to the Parliament, to send a contingent of soldiers to Iraq.
>
> It was a decision taken after the so-called Azores Declaration . . . done without authorization by the Security Council and contrary to the United Nations

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[37] The text of the Declaration can be seen at *http://www.la-moncloa.es/web/asp/muestraDoc.asp?Codigo=p1804040.*

[38] *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VIII Legislature, 2004, no. 4, p. 134.

[39] *Ibid.*, p. 135.

Charter. The former Government knew that a majority of the Spanish people was against participating in the war. It also knew that the war on Iraq was going to take place without legitimate justification, despite which it involved our country in the conflict . . .

Since then it has not been possible to have the United Nations take political and military control of the occupation, nor is it reasonably foreseeable for this to take place before 30 June. This was a requisite in the electoral platform of the governing party, the *PSOE*, for keeping the troops in Iraq. It was also a demand by the other political organizations that also sponsor this Motion. If this were not the case, the above mentioned electoral promise was to bring the troops back to Spain".[40]

It is therefore proposed to agree:

"To support the Prime Minister's decision to bring the troops deployed in Iraq back to Spain in the shortest time and with the highest security possible".[41]

The motion was debated in Congress on 13 May 13, 2004 and approved with the votes of all members except for the Popular Group.[42] Along with this initiative, a number of questions were posed by different political groups, most of which were in line with the Government's position.[43] This gave the Government the opportunity to offer its assessment of Resolution 1546 (2004), done for the first time by the Minister of Foreign Affairs and Cooperation in response to a parliamentary question, as follows:

"the Government's assessment of the approval of Security Council Resolution 1546 is positive. As has been stated on other occasions, it is not ideal, it is not

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[40] *BOCG, Congreso*, Series D, VIII Legislature, 2004, no. 6, p. 48.

[41] *Ibid.*

[42] See *BOGC, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VIII Legislature, 2004, no. 7 and *BOCG, Congreso*, Series D, VIII Legislature, 2004, no. 18.

[43] This is the case with the question posed by Gaspar Llamazares Trigo (Federal United Left Group) on the financial cost of participating in the occupation of Iraq (*BOGC, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VIII Legislature, 2004, no. 12, pp. 406–407; question by Jesús Cuadrado Bausela (Socialist Parliamentary Group): "What is the Govemert's assessment of the withdrawal operation of the troops from Iraq?" (*ibid.*, no. 14, pp. 542–543); by Rafael Estrella Pedrola (Socialist Parliamentary Group): "Does the Government reaffirm that its decision to withdraw the troops from Iraq was the right one?" (*ibid.*, no. 17, pp. 660–661); written question by Francisco Rodríguez Sánchez (Mixed Group): "Government position regarding the occupation of Iraq and its consequences" (*BOCG, Congreso*, Series D, VIII Legislature, 2004, no. 111, p. 301). Against the Government position, the question posed by Gustavo de Arístegui y San Román: "What contacts did the Prime Minister have to reach the unequivocal decision that a new United Nations resolution on Iraq was not possible before June 30th?" (*BOGC, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VIII Legislature, 2004, no. 17, pp. 659–660).

> the resolution the Spanish Government would have desired, since it does not give the United Nations political and military leadership of the process of the stabilization and liberation of Iraq. Nonetheless, we feel it takes the first steps towards resolving the problem from a better perspective . . . The resolution has positive features in that it deals for the first time with the transfer of sovereignty . . . Owing to Spanish input, the resolution also included an element on respect for international humanitarian law . . .".[44]

This opinion, in line with the statements by the Spanish representative on the Security Council when the resolution was approved, was reiterated several days later by the Secretary of State for Foreign Affairs and Latin America in an appearance before Congress.[45]

III. THE SHORTCOMINGS OF THE SPANISH CONSTITUTIONAL SYSTEM AS REVEALED BY THE WAR IN IRAQ: THE PROBLEM RELATING TO ART. 63.3 OF THE SPANISH CONSTITUTION

The analysis in the previous section of this paper shows that in accordance with Spanish law the decision by the former Spanish Government to involve the country in the War in Iraq was able to be taken by the Executive without having to consult the Parliament, which only had recourse to classic monitoring procedures. This was due to the fact that the only provision that relates in any way with this type of matter is Article 63.3 of the Constitution, according to which:

> "It is incumbent upon the King, following authorization by the *Cortes Generales*, to declare war and to make peace."

During the Congress of Deputy sessions on Iraq, the Government was accused of non-compliance with Article 63.3. This argument was used particularly by the Federal United Left Parliamentary Group; its spokesperson, Mr. Llamazares Trigo stated:

> "Mr Aznar, you too have broken constitutional rules. You have involved Spain in a war without the authorisation of the Congress of Deputies, without the authorisation provided under Article 63.3 of the Spanish Constitution and without the signature of the Head of State. You have illegally usurped powers of the Congress of Deputies and the Head of State, the King."[46]

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[44] *BOGC, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VIII Legislature, 2004, no. 17, pp. 661–662.

[45] *BOCG, Diario de Sesiones del Congreso de los Diputados*, Committees, Foreign Affairs, VIII Legislature, 2004, no. 46, pp. 23–24.

[46] *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 236, p. 12080.

Although the Prime Minister did not respond at that time, at a later session the Minister of Defence did, saying:

> "a formal declaration of war is for when Spain is at war . . . regarding certain conflicts that is something that Charles Rousseau . . . even then considered an anachronism because the formal declaration of war, just like the signing of peace treaties, armistices, etc., are formalities applicable to the law of war of centuries past, but scarcely common, actually quite unusual, in the present."[47]

In defence of its line of argument, the Federal United Left Parliamentary Group submitted a motion to the Plenary demanding "the Spanish Executive to respect the procedures required under Article 63.3 of the Constitution. Consistent with the above, it urges the Government to make the required request for authorization to the *Cortes Generales* to involve Spain in a war"[48] and later proposed dealing with a conflict of jurisdiction between the Congress of Deputies and the Government "based on the reason of invasion of the jurisdiction of the Parliament in deciding to participate in the war on Iraq without the consent of the Parliament and without a formal declaration of war by the King."[49]

> Article 63.3 was also invoked by the Deputy belonging to the Basque Parliamentary Group, Mr. Anasagasti Olabeaga:
>
> "We would like to know whether hapless Constitution Article 63, which states loudly and clearly that it is up to the King, with the prior authorisation of the *Cortes Generales*, to declare war and make peace, is still in force. We would like to know whether we are at war or not because we feel that to be the crux of the matter. Are we at war or not, is Iraq a humanitarian operation or not? . . . Why is Article 63 not being applied, with the King, as stated in the Constitution, with our prior approval, the Parliament, declaring war and making peace?".[50]

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[47] *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 247, p. 12734.

[48] *BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, no. 501, pp. 5–7.

[49] *BOG, Congreso de los Diputados*, Series D, VII Legislature, 2004, no. 662, p. 481.

[50] *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 301, p. 15955. More generally, a motion presented to the Plenary by the Socialist, Catalan (*Convergència i Unió*), Federal United Left, Basque (EAJ-PNV), Canaries Coalition and Mixed Parliamentary Groups, on the Parliament's involvement in decisions regarding Spain's participation in the Iraqi crisis urging the Government "Prior to adopting any commitment relating to Spain's participation in military operations against Iraq or in support thereof, to send a report to the Parliament containing the reasons and objectives of the mission, the extent of Spanish participation and the projected credits necessary fund it to the Parliament for debate" (*BOCG, Congreso de los Diputados*, Series D, VII Legislature, no. 509, pp. 15–16; *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 237, pp. 12140–12153).

Was, however, Art. 63.3 of the Spanish Constitution applicable to Spain's participation in the War on Iraq?

1. Interpreting Art. 63.3

Art. 63.3 is, of course, an anachronistic, outmoded provision, harking back to times in which States had the right to make war. Now it is prohibited by the UN Charter, which contemplates only two exceptions: coercive measures determined by the Security Council under Art. 42 of the Charter, and the right to self-defence under Art. 51. Furthermore, in practice neither legal nor much less illegal wars are declared anymore, so the disappearance of the concept of war has taken along with it the requisite declaration formalities which used to allow for going from the law of peace to the law of war without any legal reproach. Even under current international law, the concept of war must be considered to have been replaced by the concept of international armed conflict, in line with the Geneva Conventions and Protocols on international humanitarian law, as an expression contemplating any use of force.[51] Therefore, the prior Spanish Constitution of 1931, which on one hand proclaimed the renunciation of war as an instrument of national policy and, on the other, provided for a declaration of war only in cases authorized by the League of Nations Pact was more correct in this regard.

Under these circumstances, there is agreement to indicate that Art. 63.3 should be interpreted in the light of the international rules in force. This leads to the conclusion that declarable wars would only be those that are authorized by international law, leaving us only the two exceptions established by the Charter in relation to the prohibition of the use of force: as a means of coercion as determined by the Security Council under Article 42 and the inherent right to individual or collective self-defence. Other constitutions, such as Portugal's, despite continuing to contemplate the anachronism of a declaration of war, are nuanced by specifying that it would take place "in the event of actual or imminent aggression". An amendment presented by the Communist parliamentary group proposed reducing the possibility of a declaration of war to cases of "external aggression or serious threat to the independence of the State;" but the proposal was dismissed, thereby

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[51] See E. Pérez Vera, "Artículo 63", *Comentarios a las Leyes Políticas* (O. Alzaga Villaamil dir.), T. V, EDERSA, Madrid, 1983, pp. 310–313; J. García Fernández, "Guerra y Derecho Constitucional", *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol*, no. 32, Valencia, 2000, pp. 6–46; J. García Fernández, "Guerra y Derecho constitucional. La formalización del inicio de la guerra mediante la declaración en Derecho internacional y en Derecho interno", *Estudios de Teoría del Estado y Derecho Constitucional en honor de Pablo Lucas Verdú*, (R. Morodo and P. de Vega dirs.), T. II, Madrid, 2000, pp. 1037–1086; G. de Vergottini, "Nuevos aspectos de la guerra y relaciones entre el Parlamento y el Gobierno", *Anuario Iberoamericano de Justicia Constitucional*, vol. 6, 2002, pp. 549–565.

losing the opportunity to follow the example of the Republican Constitution (of Spain) by renouncing war as an instrument of national policy or, at least, ensuring that any use of force is exercised under the terms set forth in the Charter.

Having established the physical scope of application of Article 63.3 under international law, we must nonetheless make several specific comments. First, it is possible that an international military operation expressly authorized by the Security Council on the basis of Chapter VII of the Charter might not be legally an act of war but rather an international policing measure within the scope of peacekeeping, in which case a declaration of war would not be applicable. This does not mean that it would not subject to control, however, as we will see later on. During the Gulf War of 1991, this was the position in Congress of Mr. Herrero y Rodríguez de Miñón, as Foreign Minister Fernández Ordóñez was quite relieved to hear.[52] Second, in the case of self-defence, the reaction has to be immediate, it being up to the Government to initiate actions without delay, despite having to push the declaration through Parliament in the shortest time possible. Thirdly, in connection with the consideration that while under international law only authorized wars can be declared, it must not be overlooked that prohibition does not always prevent illicit acts from being committed and therefore one cannot rule out the hypothesis that Spain sought to embark upon a type of military action that was not among those permitted.

In my opinion, in these cases Article 63.3 would also be applicable. If not, the situation would be one of the absurd, in which there would only be parliamentary monitoring of licit acts, and precisely the cases in which intervention by the Parliament would be most useful would be exclusively in the hands of the Government. This may be precisely the greatest virtue of obsolete Art. 63.3, that of mandating that this type of action be submitted to the Parliament.

This brings us to the need to determine what should be understood as constituting war, not an easy task as international law does not set a level of violence that armed operations have to reach in order for the rules on international armed conflicts to apply. Based on references made in 1986 by the International Court of Justice on the matter of Nicaragua to "the most serious forms of the use of force," which it equates to armed aggression, the definition of the concept of war must be based on the fact that open hostilities exist or are going to exist.[53] Accordingly, if

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[52] *Cortes Generales, Diario de Sesiones del Congreso de los Diputados, Comisiones*, IV Legislature, 1991, no. 198, p. 5961. For this reason I feel it unnecessary for doctrinal proposals for modification of Art. 63.3 to continue to attribute to the King the declaration of Spain's participation in collective measures, because it is a formality which is not used in practice (J.G. Ibáñez, "La regulación de las intervenciones bélicas y Europa, reformas anheladas", *El País Extra*, December 6, 2003, pp. 18–19, with reference to a proposal by Professor Carrillo Salcedo).

[53] See C. Izquierdo y L. Pérez-Prat, "La guerra constitucional", *Política Exterior*, vol. V, 1991/92, pp. 149–156.

Spain is to be involved in such a situation, even if it falls outside international law, the Government must comply with the requirements of Article 63.3 of the Constitution.

In this regard it can be said that Spain was not at war, owing to the small, auxiliary nature of its involvement, but the intervention against Iraq in 2003 showed that together with the interpretation of Art. 63.3, the important thing was Parliamentary control, not only in relation to actions determined or authorized by the Security Council but also – and above all – in relation to participation in unilateral actions. In this regard Spanish law did not have the answer at that time.

2. Improving Parliamentary Control of Spain's Participation in Overseas Military Actions

Indeed, the Spanish Constitution does not provide any mechanisms along these lines. Reference can only be made to a political agreement adopted by the congressional Plenary in November 1995 on the occasion of the 50th anniversary of the United Nations, affirming that Spain's participation in peacekeeping operations would always be under UN authority and setting forth the goal of having greater involvement by the Parliament in such matters.[54] However, taking into account that the debate was regarding the United Nations Charter, this agreement clearly only refers to actions that are legal from a standpoint of international law.

The conclusion is that this is an area clearly requiring reform to ensure parliamentary control of military actions abroad, and requiring prior authorisation in the most extreme cases. An author has stated that "the spirit of the Constitution requires parliamentary authorisation, in some cases, and parliamentary control and debate, in others," maintaining that armed actions not involving peacekeeping are actions of a military nature or at least potential uses of force and must be authorized by the Parliament, while for peacekeeping operations it would be sufficient for the government to inform the Congress; ultimately, unarmed actions should be debated *a posteriori*.[55]

So this is where things stand, the absence of constitutional provision makes it advisable to adopt legislative measures to provide for parliamentary participation. This was the stance taken by the Prime Minister, Mr. Rodríguez Zapatero, who committed himself to modifying Organic Law 6/1980, of July 1, on basic National Defence criteria, in the parliamentary debate held on April 27, 2004 on the withdrawal of the Spanish troops from Iraq stating:

> "the Government will submit to the Congress of Deputies a draft organic law modifying the Law on basic national defence criteria, to provide for real par-

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[54] *BOCG, Congreso*, V Legislature, Series E, no. 178, November 22, 1995, pp. 30–31.

[55] J. García Fernández, "El control político de las misiones militares en el exterior: derecho internacional y derecho interno", European Security and Defence Observatory, *Newsletter*, October 2003, no. 10.

ticipation by the Parliament in the decisions taken by the Government in the exercise of its constitutional functions and responsibilities."[56]

Both the Ministers of Foreign Affairs and of Defence reiterated their commitment to ensuring the involvement of the Parliament in relation to military actions abroad. When the former appeared before the Foreign Affairs Committee of the Congress of Deputies to outline his ministry's policy, he said that:

"it is the will of this Government not to commit Spain to international military operations against the will of Parliament . . . The Minister of Defence and I, both within our respective responsibilities and jointly, will make sure that Parliament is consulted on any decision of this nature."[57]

And, subsequently, in another appearance before a joint session of the Foreign Affairs and Defence Committees, the Minister for Foreign Affairs stated once again that:

"the Prime Minister announced in his investiture speech to the Congress of Deputies the Government's commitment to having any Spanish Armed Forces participation in missions abroad being agreed to – I repeat, agreed to – with the participation of Parliament . . . The Government cannot fail to assume its responsibilities under Article 97 of the Constitution, in the sense of directing domestic and foreign policy, but the constitutional mandate does not exclude the possibility that prior to the Government taking a decision it may consult Parliament, informing of the reasons and circumstances that make it think it should send troops beyond national soil, and taking note of the criteria and positions of each of the political groups represented in Parliament."[58]

At that same session, the Minister of Defence, who also spoke, announced:

"a legal modification along these lines, as well as the appearance of the Prime Minister to inform of the agreement adopted by the Council of Ministers on this matter, submitting it to debate in the Congress of Deputies and not only informing them but also requesting its ratification of the Council of Ministers' decision."[59]

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[56] *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VIII Legislature, 2004, no. 4, p. 136. See also *El País*, April 28, 2004, pp. 1 and 15. This is the formula defended by J. García Fernández, together with modification of the Chamber Regulations (*op. cit.*).

[57] *BOCG, Diario de Sesiones del Congreso de los Diputados*, Committees, Foreign Affairs, VIII Legislature, 2004, no. 24, p. 3.

[58] *BOCG, Diario de Sesiones del Congreso de los Diputados*, Committees, Joint Foreign Affairs and Defense, VIII Legislature, 2004, no. 61, p. 3.

[59] *Ibid.*, pp. 5–6.

If the Defence Minister's statement is to be taken literally, certain differences are noted with respect to the statement by the Foreign Minister, since while the latter talks about "consultations," the former seems to be accepting binding congressional control through "ratification." Nonetheless, the Minister of Defence continued, saying:

> "We give the Parliament its due respect, and before making any formal Government commitment we want to inform the members of Congress and hear their views – be it *sotto voce* or into a microphone,"[60]

making it seem that the minister in question had said more than he really intended to.

Months later, the Government approved National Defence Directive 1/2004, a program document that stated that:

> "actions by our Armed Forces abroad shall be carried out in the framework of effective multilateralism, requiring two conditions: first, that there be a prior decision by the United Nations or, when appropriate, another multinational organization to which Spain belongs, and, secondly, that they be approved with the active participation of Parliament."[61]

All of the above was set forth recently in the draft Organic Law on National Defence.[62] Its Article 16 deals with consulting the Congress of Deputies regarding operations abroad, providing:

> "1. To order operations abroad not directly related to the defence of Spain, the Government shall hold prior consultations to receive the views of the Congress of Deputies.
> 2. In missions abroad in accordance with international commitments requiring rapid or immediate response to specific situations, prior consultation shall be carried out on an urgent basis enabling such commitments to be complied with.
> 3. In cases such as those set forth in the previous paragraph, when for reasons of maximum urgency it is not possible to carry out prior consultation, the Government shall, as soon as possible, submit its decision to the Congress of Deputies."

The Law also provides for congressional monitoring of operations through regular information to be sent by the Government (Article 17). Article 18 sets forth the

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[60] *Ibid.*, p. 6.

[61] This Directive was signed by Prime Minister Mr. Rodríguez Zapatero on December 30, 2004. On the document, see F. Arteaga, "La Directiva de Defensa Nacional 1/2004", *Real Instituto Elcano de Estudios Internacionales y Estratégicos, ARI, no. 29/2005.*

[62] *BOCG, Congreso de los Diputados*, VIII Legislature, Series A, 31 March 2005, no. 31/1.

conditions under which the Spanish Armed Forces may carry out missions abroad when not directly related to the defence of Spain as follows:

"a) Missions carried out at the express request of the Government of the State in whose territory they are to be carried out or authorized by United Nations Security Council Resolutions, or, where appropriate, agreed by international organizations to which Spain belongs, particularly the European Union or the North Atlantic Treaty Organization (NATO), in the framework of their respective areas of competence.
b) Missions fulfilling the defensive, humanitarian, stabilization or peacekeeping and preservation goals set forth and ordered by said organizations.
c) Missions consistent with the United Nations Charter that do not contradict or violate the international law of treaties that Spain has incorporated into its legal system, pursuant to Article 96.1 of the Constitution."

The Law, therefore, covers the aspects not contemplated in outmoded Article 63.3 of the Constitution, setting forth a consultation mechanism, and establishes criteria for participation in military operations outside Spain. In regard to the first item, provision is made for non-binding involvement by the Congress of Deputies, which in cases of maximum urgency will be *a posteriori*.[63] In regard to the latter two items, there is a requirement for authorization by the Security Council, undoubtedly a result of the war in Iraq,[64] while Art. 18 set forth above shows faith in proper action being taken by international organizations, something which, in view of NATO's intervention in Kosovo in 1999, one cannot completely share;[65] on the other hand, the rules of international customary law are completely overlooked, despite their importance in regard to the use of force, as stated by the

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[63] Nonetheless, in 2001 the Federal United Left Parliamentary Group presented a draft bill to amend Organic Law 6/1980, of July 1, regulating basic national defense criteria, according to which "The Parliament shall expressly approve any sending of Spanish troops to missions taking place outside national territory" (*BOCG, Congreso de los Diputados*, Series B, VII Legislature, 2001, no. 167–1, p. 2). The Proposal was rejected (see *BOCG, Congreso de los Diputados*, Series B, VII Legislature, 2003, no. 167–2).

[64] Nonetheless, the Popular Group submitted an amendment seeking to change the word "authorized" to "covered" (amendment no. 214, see. *BOCG, Congreso de los Diputados,* VIII Legislature, Series A, 18 May 2005, No. 31–5, p. 92) which, according to press reports, seems to have been accepted by the Minister of Defense. The intent of the amendment is clear: to open the door to the ambiguities experienced in the case of Iraq regarding invocation of Security Council resolutions, the acceptance of which would not be wise. At the time this report was written, the result of the debate on amendments was not known.

[65] The Report of High-level Panel on Threats, Challenges and Change (2 December 2004) seems to share the same reservations when it states "In recent years, such alliance organizations as NATO . . . have undertaken peacekeeping operations beyond their mandated areas. We welcome this so long as these operations are authorized by and accountable to the Security Council" (Doc. A/59/565, p. 71).

International Court of Justice in the Case concerning Military and Paramilitary Activities in and against Nicaragua.

IV. EPILOGUE

The 2003 War against Iraq had an impact on Spanish policy and elicited a major public response, showing the existence of an ample majority of people that was against the military conflict and Spain's participation therein.

Beyond what actually took place, the case has contributed to reorienting Spain's position internationally and to improving democratic control of the government's decisions regarding military actions abroad, along with the establishment of clear limits on this type of action. Fortunately, this will be the positive legacy of the errors made in the past.

The Spanish reservation to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide

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I. INTRODUCTION

On 29 April 1999, what was then the Federal Republic of Yugoslavia – today Serbia and Montenegro – filed an application instituting proceedings against the Kingdom of Spain with the Registry of the International Court of Justice for breach of the obligation not to resort to the use of force. The applicant claimed that the Court was competent on the basis of the declarations by the respective parties accepting the compulsory jurisdiction of the Court, made in pursuance of article 36 paragraph 2 of the Court's Statute[2] and article 9 of the Convention on

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[1] The author's opinions are strictly personal and are in no way binding on the institution to which he belongs.
The author wishes to thank Lynne Moorhouse and Sherry Holbrook of the Treaties section of the United Nations Secretariat for their help. My sincerest thanks also to Professor Carlos Espósito, Assistant Director of the International Legal Department of the Ministry of Foreign Affairs, for affording me access to the Department's archives, and to Mateó Maciá for the research carried out at the archive of the Congress of Deputies. Finally, I should like to thank the International Court of Justice library staff for their kind cooperation and efficiency.

[2] "The states parties to the present Statute may at any time declare that they recognize as

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the Prevention and Punishment of the Crime of Genocide. The applicant accused the Spanish government of having resorted to force against the Federal Republic of Yugoslavia, along with the governments of other NATO Member States, by taking part in the bombing of certain targets in its territory during the airborne campaign conducted by NATO in 1999. According to the applicant, the bombing caused much loss of human life, including numerous civilians, and heavy material damage to homes, schools, hospitals, radio and television stations, places of worship and major items of infrastructure. Also, the Federal Republic of Yugoslavia accused Spain of having, along with other NATO countries, used weapons containing depleted uranium, at great risk to human health, and of having caused a serious threat to the environment by attacks against oil refineries and chemical plants. In short, the alleged acts were presumably in violation of several international norms of capital importance, including among others the obligation not to resort to the use of force against another State and "the obligation contained in the Convention on the Prevention and Punishment of the Crime of Genocide not to impose deliberately on a national group conditions of life calculated to bring about the physical destruction of the group".[3] On the day that the action was initiated, the Federal Republic of Yugoslavia also submitted a request for the indication of provisional measures constraining the Kingdom of Spain to immediately cease committing illegal acts against the Federal Republic of Yugoslavia and to refrain from repeating them.[4]

In its consideration of whether the bases of jurisdiction as invoked allowed it to declare itself competent, at least *prima facie*, to hear the case and thus be able to determine whether the circumstances warranted ordering the provisional measures requested for protection *in limine litis* of rights that would subsequently be recognised by the verdict, the Court found in respect of the respective declarations of acceptance of its compulsory jurisdiction, that reservation *c*) in the Spanish declaration of 1990 barred it from declaring itself competent in the matter. In effect, by virtue of this reservation Spain removed from the Court's jurisdiction any disputes "in regard to which the other party or parties have accepted the compulsory jurisdiction of the Court less than 12 months prior to the filing of the application bringing the dispute before the Court", and in the case under advisement, "Yugoslavia deposited its declaration of acceptance of the compulsory jurisdiction of the Court with the Secretary-General on 26 April 1999 and filed its Application instituting proceedings with the Court on 29 April 1999".[5]

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compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation".

[3] *I.C.J. Reports 1999*, p. 763, para. 3.

[4] *Ibid.*, p. 766, para. 7.

[5] *Ibid.*, pp. 770–771, para. 25.

The Court then went on to examine whether it could found its jurisdiction on the basis of article 9 of the Convention on Genocide, which establishes that:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute".

In light of the fact that Spain's instrument of accession was deposited with the Secretary General of the United Nations on 13 September 1969, including a reservation in respect of the whole of article 9, and given that the Convention does not prohibit reservation and Yugoslavia had not objected to the reservation entered by Spain, the Court declared that article 9 could not constitute a basis of jurisdiction in the matter, even *prima facie*.[6] For all those reasons, then, the High Jurisdiction rejected the request for the indication of provisional measures and further withdrew the case from the General List, convinced of the impossibility of adjudicating on the merits of the case.[7]

It might therefore be thought that the Spanish reservation to article 9 of the Convention was a factor in achieving a procedural "victory", in that an action was avoided in which Spain was accused of one of the most serious crimes against the rights of persons, quite regardless of whether or not the accusations were warranted – an issue that lies without the scope of this paper. Nonetheless, the question remains as to why Spain entered a reservation whose purpose is to evade judicial control over its conduct as it relates to the rules laid down in the Convention on the Prevention and Punishment of the Crime of Genocide, an instrument fundamental to international relations, and why it still retains that reservation now that, since the 1978 Constitution, it is "a social and democratic State, subject to the rule of law".[8]

On a unique occasion, during a luncheon at The Hague with Ambassador Juan Antonio Yáñez-Barnuevo, who as head of the Spanish delegation attending a session there of the Assembly of Parties to the Statute of the International Criminal Court, I had the opportunity to put these questions to him, mindful of his long and brilliant career in the Ministry of Foreign Affairs and his proverbial wisdom. His surprising answers prompted an investigation into the historical circumstances that surrounded Spain's accession to the Convention on the Prevention and Punishment of the Crime of Genocide and the formulation of the reservation in respect of article 9. While reflecting the essence of the results of that study, this paper has also allowed me to pay a tribute, in a modest way, to the man who provided me with

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[6] *Ibid.*, p. 772, para. 33.
[7] *Ibid.*, pp. 773–774, paras. 35 and 40.
[8] Spanish Constitution of 1978, article 1.

many answers, who, in fact, had been involved from the beginning in the process of accession to the Convention and who further deserves a significant measure of credit for the Spanish decision to become a party to the treaty. This article also examines the validity of the reservation and of the treatment it has received from the other signatory States and from the International Court of Justice itself.

II. LEGAL-HISTORICAL CIRCUMSTANCES OF SPAIN'S ACCESSION TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

It is well known that in the immediate post-World War II years, Spain was isolated internationally, and in particular was excluded from the United Nations Organisation. Initially, by virtue of Resolution 39 (I) of 12 December 1946, the General Assembly, recalling that, in the words of a Security Council subcommittee, the Franco regime was "a fascist regime patterned on, and established largely as a result of aid received from, Hitler's Nazi Germany and Mussolini's Fascist Italy", not only recommended that all UN members withdraw their ambassadors and plenipotentiary ministers accredited in Spain but also barred Spain from the UN's institutions, agencies and conferences. By Resolution 386 (V), the General Assembly revoked this prohibition on 4 November 1950, along with the recommendation to withdraw diplomatic representatives from Spain. From that point on, the situation began gradually to ease and Spain was admitted to several United Nations agencies such as the World Health Organization,[9] the World Meteorological Organization,[10] and the United Nations Educational, Scientific and Cultural Organization.[11] Finally, by Resolution 995 (X) of 14 December 1955, the General Assembly admitted Spain to the United Nations Organisation.

One consequence of the situation of international isolation was a deep mistrust on the part of Spain towards judicial means for the peaceful settlement of international disputes.[12]

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[9] 28 May 1951.

[10] 29 March 1951.

[11] 25 February 1953 (date of receipt of the notification). Prior to the cited resolution, on 4 April 1947, Spain had been admitted to membership of the International Civil Aviation Organization.

[12] As Santiago Torres Bernárdez noted, "The original ideology, the personalized and authoritarian manner in which power was exercised and the mentality of those generations still in the inner circle of Government and the high levels of the administration, explain the general circumspection showed by the Franco Governments in the fifties and sixties with respect to 'judicial settlement' as a peaceful means of settling disputes" (see S. Torres Bernárdez, "Spain and the Jurisdiction of the International Court of Justice: From Past to Present", *Archiv des Völkerrechts*, vol. 32, 1994, p. 254).

As regards the bilateral treaties concluded by Spain between 1945 and 1956, arbitration is mentioned in friendship or cooperation agreements, generally with Latin American or Arab States, or with the Philippines;[13] the one exception is the Economic Assistance Agreement concluded with the United States of America in 1953, which provided for recourse to the International Court of Justice, or alternatively arbitration. This tendency persisted, if less preponderantly, up until the constitutional era. In effect, according to Professor Andrés Sáenz de Santa María, from the end of the Second World War until 1978, Spain concluded a total of ninety-nine bilateral treaties which contained compromissory clauses contemplating the competence of arbitrating bodies,[14] although it was normally a proviso that non-jurisdictional means, preferably negotiation, be tried first.[15] In any event, it should not be thought that this inclination for arbitration was exclusive to Spain; as Louis B. Sohn has it, "[t]he second major type of binding procedure, arbitration, is by far the most popular of all settlement methods".[16]

In connection with multilateral treaties, we would stress that governments of the time tended to put off for years the ratification of or accession to any containing clauses for the judicial settlement of disputes, or else in acceding to them they excluded the control of the relevant judicial organs,[17] especially where the subject-matter of the treaty had strong political connotations, as for example in the case of treaties dealing with human rights.[18]

Particularly as regards the International Court of Justice, the aversion referred to above also manifested itself in a refusal to accept its jurisdiction as compulsory, as enshrined in the unilateral declaration contemplated in article 36 paragraph 2 of the Court's Statute,[19] and hence a refusal to resume the commitment accepted at the time of the Permanent Court of International Justice.[20] In this connection, it is

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[13] *Ibid.*, p. 253; see also M.P. Andrés Sáenz de Santa María, *El arbitraje internacional en la práctica convencional española (1794–1978)*, Servicio de publicaciones de la Universidad de Oviedo, Oviedo, 1982, pp. 167–168.

[14] *Ibid.*, p. 251.

[15] *Ibid.*, pp. 275–276.

[16] L.B. Sohn, "Settlement of Disputes Relating to the Interpretation and Application of Treaties", *RCADI*, vol. 150, 1976 II, p. 266.

[17] In this connection see J. Quel López, *Las reservas a los tratados internacionales. Un examen a la práctica española*, Servicio editorial de la Universidad del País Vasco, Bilbao, 1991, p. 254.

[18] S. Torres Bernárdez, "Spain and the Jurisdiction of the International Court of Justice: From Past to Present", ... *op. cit.*, p. 256.

[19] On this point see E. Orihuela Calatayud, "España y la jurisdicción obligatoria del Tribunal Internacional de Justicia", *REDI*, vol. XLI, 1989, pp. 69–105.

[20] On 21 September 1928, Spain unilaterally declared its acceptance of the compulsory jurisdiction of the Permanent Court of International Justice under article 36 paragraph 2 of its Statute; this provision was similar to that of the same article in the present Statute of the International Court of Justice. The declaration read as follows: "In the name of the Government of His Majesty the King of Spain, I recognise the jurisdiction of the

highly significant that on 1 April 1939, the very day on which General Franco officially announced the end of the Civil War, the national government should have sent a letter declaring its intention to terminate Spain's accession to the General Act of Arbitration adopted in Geneva on 26 September 1928;[21] article 17 of this treaty established the jurisdiction of the Permanent International Court of Justice,[22] and as Andrés Sáenz de Santa María has put it, the treaty constituted "the most important attempt to date to achieve a convention for the peaceful settlement of all international disputes".[23]

Court as mandatory for a period of ten years, *ipso facto* and without the need of any special convention in relation to any other State that accepts the same obligation – that is, in conditions of reciprocity – in respect of any dispute that may arise subsequently to the signature of this declaration, and in respect of situations or events subsequent to that signature, except in cases where the parties have agreed or agree to resort to another means of peaceful settlement" (See French text in: *CPJI*, Série D, No. 6 (Quatrième édition), 1932, p. 43).

[21] The following appears in the note accompanying the entry "Spain" in the list of signatory States and parties to the General Proceedings in the volume published by the United Nations Secretariat on the status of multilateral treaties previously deposited with the Secretary General of the United Nations, or on the relevant page of the UN website:

"Spain acceded on September 16th, 1930.

By a letter dated April 1st, 1939, and received by the Secretariat on April 8th, the Spanish National Government denounced the accession of Spain, pursuant to the terms of Article 45 of the General Act.

Under Article 45, this denunciation should have been effected six months before the expiration of the current five-year period that is to say, in this case, before February 16th, 1939.

In regard to this point, the National Government states in its letter that, as the Secretary-General and almost all the States which are parties to the General Act have "in the past . . . refused to receive any communications from the National Government, this Government could not have acted earlier in pursuance of the right which it now exercises in virtue of Article 45 of the Act".

The Secretary-General brought this communication to the knowledge of the Governments concerned."

Professor Pastor Ridruejo remarks on this fact, noting that: "Underlying this attitude there undoubtedly could be found an exacerbated sense of national sovereignty typical of authoritarian regimes and a more or less conscious mistrust of International Law and the ideology of the United Nations", see J.A. Pastor Ridruejo, "The Spanish Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice", *SYIL*, vol. I, 1991, p. 21.

[22] "All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.

It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice." With regard to the jurisprudence developed by the International Court of Justice on the General Acts, see *I.C.J. Reports 2000*, pp. 23–25, paras. 26–28.

[23] M.P. Andrés Sáenz de Santa María, *El arbitraje internacional en la práctica convencional española (1794–1978)* . . ., *op. cit.*, p. 97.

Another factor contributing to the aversion to judicial settlement, and particularly to accepting the jurisdiction of the International Court of Justice, was that at the time Spain had a case pending before that court, namely that of *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain).* In effect, in 1958 the Belgian government brought an action against its Spanish counterpart in connection with a dispute arising from the judicial declaration of bankruptcy of Barcelona Traction, a Canadian company with major interests in Catalonia. The object of the action was to seek reparations for damages sustained by Belgian stockholders of the company, arising out of acts, allegedly in breach of international law, carried out to their detriment by organs of the Spanish State. The basis of competence sustained by Belgium in its application was Article 17 of the Treaty of Conciliation, Judicial Settlement and Arbitration between Belgium and Spain, signed on 19 July 1927, and Article 37 of the Statute of the Court.[24] In 1961, the Belgian government gave notice of discontinuance of the proceedings so as to allow a series of negotiations to go forward between the representatives of the various private interests concerned, and consequently the case was removed from the Court's General List. However, when the negotiations foundered, Belgium decided to present another application on 19 June 1962. In 1963, the Spanish government filed four preliminary exceptions, the first two of which were rejected by the Court in a decision dated 24 July 1964. The Court took the view that the other two exceptions were not exclusively preliminary in nature and should be joined to the merits of the case. The third preliminary exception concerned the lack of capacity on the part of Belgium to file an application in defence of a Canadian company despite the fact that some of its stockholders were Belgians. The fourth exception concerned the failure to exhaust all local remedies through the Spanish judicial system before resorting to the International Court of Justice. Finally, on 5 February 1970, the Court admitted Spain's third exception on the ground that Belgium did not possess *jus standi* to extend diplomatic protection to the Belgian stockholders of a Canadian company in connection with certain measures instituted by the Spanish authorities against the company. In conclusion, the Court did not consider the merits of the case and ordered its removal from the General List.[25]

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[24] Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

[25] *I.C.J. Reports 1970*, p. 51. Spain had likewise been a party before the Permanent Court of International Justice in the *Borchgrave* case, which went on during the Civil War. In effect, on 20 February 1937, Belgium and Spain decided to enter into an undertaking whereby they brought before the Court a dispute in connection with the international liability attaching to the Spanish government for the disappearance in Madrid, on 20 December 1936, of Baron Jacques de Borchgrave, a Belgian citizen who was assisting in the work of his country's embassy in the Spanish capital. However, again by mutual

This is the context surrounding the personal experience of Ambassador Yáñez-Barnuevo, whose original story was amplified over a succession of further interviews. Recently recruited to the Diplomatic Corps, Mr. Yáñez-Barnuevo served in the Directorate General of International Organisations from 1967 to 1969. One of his first tasks was to conduct a study on the situation of Spain vis-à-vis human rights treaties; the study was prompted by criticisms levelled at Spain at the time by a Specialist American journal for its scant participation in treaties dealing with this subject. The young diplomat discovered that indeed Spain had not ratified any of the major treaties on human rights:[26] neither the Convention on the Prevention and Punishment of the Crime of Genocide, adopted in New York on 9 December 1948, nor the International Convention on the Elimination of All Forms of Racial Discrimination, adopted in New York on 7 March 1966; nor again the International Pact on Political and Civil Rights adopted in New York on 16 December 1966; nor the optional Protocol to the latter, adopted on the same date and at the same place; nor the International Pact on Economic, Social and Cultural Rights adopted in New York on 16 December 1966; nor the Convention on Imprescriptibility of Crimes of War and Against Humanity adopted in New York on 26 November 1968. In other related matters, the situation differed little. For instance, Spain was not a party to any convention on refugees and stateless persons existing at the time. With regard to traffic in human beings, Spain had only consented to commit to a minority of existing treaties; it was a party only to the International Convention for the Suppression of the Traffic in Women and Children adopted in Geneva on 30 September 1921, and the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others adopted in New York on 21 March 1950. On matters of the situation of women, Spain had not ratified any of the existing treaties. Of course, not being a member of the Council of Europe, Spain was not a party to any of the conventions on human rights promoted by the Council. As regards the humanitarian law of war, it must be said that at that time Spain had ratified a large number of treaties, including the four 1949 Geneva Conventions.[27]

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agreement, Spain and Belgium dropped the case in January 1938 (see *Permanent Court of International Justice. Series A/B, Judgments, Orders and Advisory Opinions*, no. 73, p. 5).

[26] See *http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI.*

[27] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864 (Ratification or accession 05.12.1864); Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 (Ratification or accession 04.09.1900); Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864. The Hague, 29 July 1899 (Ratification or accession 04.09.1900); Declaration (IV,1), to Prohibit, for the Term of

III. PROCEDURE FOLLOWED IN SPAIN'S ACCESSION TO THE CONVENTION ON GENOCIDE.

In light of the situation as outlined above, Juan Antonio Yáñez-Barnuevo put forward a proposal to examine the possibility of Spain's acceding to some of the principal conventions on human rights, or to those that had attracted most international consensus. However, aware as he was of the aversion to judicial means for the peaceful settlement of conflicts, as noted, in order to improve the chances of his proposal being accepted, he decided to suggest at the same time that reservations be entered in each case in respect of articles contemplating the jurisdiction of the International Court of Justice. His proposal placed the central emphasis on accession to the Convention on Genocide, the Convention on the Elimination of All Forms of Racial Discrimination, and the Supplementary Convention on the

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Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature. The Hague, 29 July 1899 (Ratification or accession 04.09.1900); Declaration (IV,2) concerning Asphyxiating Gases. The Hague, 29 July 1899 (Ratification or accession 04.11.1900); Declaration (IV,3) concerning Expanding Bullets. The Hague, 29 July 1899 (Ratification or accession 04.11.1900); Convention for the Exemption of Hospital Ships, in Time of War, from The Payment of all Dues and Taxes Imposed for the Benefit of the State. The Hague, 21 December 1904 (Ratification or accession 10.05.1907); Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 6 July 1906 (Ratification or accession 11.10.1907); Convention (III) relative to the Opening of Hostilities. The Hague, 18 October 1907 (Ratification or accession 18.03.1913); Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague, 18 October 1907 (Ratification or accession 18.03.1913); Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities. The Hague, 18 October 1907 (Ratification or accession 18.03.1913); Convention (VII) relating to the Conversion of Merchant Ships into War-Ships. The Hague, 18 October 1907 (Ratification or accession 18.03.1913); Convention (IX) concerning Bombardment by Naval Forces in Time of War. The Hague, 18 October 1907 (Ratification or accession 24.02.1913); Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. The Hague, 18 October 1907 (Ratification or accession 18.03.1913); Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War. The Hague, 18 October 1907 (Ratification or accession 18.03.1913); Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925 (Ratification or accession 22.08.1929); Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 27 July 1929 (Ratification or accession 06.08.1939); Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929 (Ratification or accession 06.08.1930); Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954 (Ratification or accession 07.07.1960) (see *http://www.icrc.org/ihl.nsf/WebPAYS?OpenView&Start=150&Count=150&Expand=206.1#206.1*). On Spain's accession to the four Geneva Conventions, see J. Quel López, *Las reservas a los tratados internacionales. Un examen a la práctica española, . . . op. cit.*, pp. 235–238.

Abolition of Slavery, adopted at the European headquarters of the United Nations in Geneva, on 7 September 1956.

The Directorate General of International Organisations asked the Foreign Ministry's International Legal Department to report on the desirability of becoming a party to the Convention on Genocide, and also the Convention on the Elimination of All Forms of Racial Discrimination. In its report, dated 25 October 1967, the Legal Department, having first analysed the salient aspects of the treaty, stated that it could see no objections to Spain's accession. Having regard to the clause of submission in article 9, the report stressed that until that time it had been the object of several reservations on the part of the socialist countries and some other States, among them the Philippines, and that furthermore, according to a ruling of the International Court of Justice of 1951, reservations could be made to the convention insofar as these did not run counter to the object and purpose thereof. The Legal Department concluded in this respect:

> "It is therefore legally possible to formulate a reservation in respect of the jurisdiction of the International Court of Justice, which must be decided upon by the higher authority for reasons of general policy of the Department, bearing in mind that in recent years Spain has not been accepting recourse to the Court for the settlement of disputes on the interpretation of Conventions, and there is no special reason to depart from that policy in the present case".[28]

In light of the favourable report from the Legal Department, the Directorate General of International Organisations decided to initiate procedures for Spanish accession to the Convention on Genocide. In the external context, the procedure for the signing and presentation of the consent to be bound was regulated in article 9 of the Convention. In accordance with that article, the possibility of becoming parties to the treaty extended to all Member States of the United Nations and those non-members to which the General Assembly had issued an invitation to do so. By virtue of Resolution 368 (IV) of 3 December 1949, the General Assembly had asked the Secretary General "to dispatch invitations to become parties to the Convention to each non-member State which was or thereafter became an active Member of one or more of the specialized agencies of the United Nations, or which was or thereafter became a party to the Statute of the International Court

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[28] Report of 25 October 1967 by the International Legal Department of the Ministry of Foreign Affairs of Spain. ("Existe, pues, la posibilidad jurídica de formular una reserva a la jurisdicción del Tribunal Internacional de Justicia, sobre lo que debe decidir la Superioridad por motivos de política general del Departamento, teniendo en cuenta que España no viene aceptando, en los últimos tiempos, el recurso al Tribunal para la solución de disputas sobre interpretación de Convenios, y que no existe motivo especial que aconseje en este caso apartarse de tal política."). As regards the Convention on Elimination of All Forms of Racial Discrimination, the conclusion it reached was similar to that regarding the undertaking contained in article 22 thereof.

of Justice". The Secretary General accordingly commenced to issue the requisite invitations to those States meeting the conditions referred to. At the outset, Spain did not meet these requirements, as noted earlier because of General Assembly Resolution 39 (I) of 12 December 1946, which barred Spain from UN institutions, agencies and conferences. Later on, despite having been admitted as a member of several special agencies in the United Nations system[29] following the lifting of the ban by Resolution 386 (V) of 4 November 1950, Spain never received an invitation from the Secretary General of the United Nations to become a party to the Convention on Genocide prior to 1955, the year in which it was admitted to membership of the United Nations Organisation, and thereafter it was entitled to accede to the Convention automatically.

Having regard to the procedure for the presentation of consent in the internal sphere, it should be noted that at the time of the Franco regime, the capacity to consent to be bound by treaties lay *de facto* with the Head of State, although this capacity was not enshrined in any law. Thus, according to Professor Pastor Ridruejo, it was understood that the function of ratifying treaties was one of the general powers vouchsafed to the Head of State by the Decree of 29 September 1936, and also by the laws of 30 January 1938 and 8 August 1939[30] respectively. This faculty aside, it would be fair to say generally that all aspects having to do with the State's exterior activity came within the purview of the Government.

Parliament – the Cortes were obviously not democratically elected – was involved very little in the conclusion of treaties and the formulation of reservations. Summarising their role, Professor Remiro stressed that the Cortes' sole function was to "catalyse the inevitable accord of the people whom they represent[ed] – by law – with the Government's necessarily right decisions in the conduct of the State's international relations".[31] The Cortes' intervention was expressly regulated in article 14 of the Law Constituting the Cortes of 17 July 1942 (as amended by the Organic Law of the State of 10 January 1967) and article 9 of the Organic Law of the State. The intention was firstly that ratification of the treaties listed in article 14.I of the Law Constituting the Cortes[32] and article 9 of the Organic Law of the State[33] should be legally subject to parliamentary approval. These were

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[29] See section 2 of this article.

[30] J.A. Pastor Ridruejo, "La estipulación y la eficacia interna de los tratados en derecho español", *REDI*, vol. 17, 1964, p. 43.

[31] A. Remiro Brotons, *Las Cortes y la Política exterior española (1942–1976)*, Cuadernos de la Cátedra "J.B. Scott", Universidad de Valladolid, 1977, p. 9.

[32] "I. Ratification of international treaties or conventions which affect the full sovereignty or the territorial integrity of Spain shall be dealt with in a Law approved by the Cortes in Full Session."

[33] The Head of State requires an act, or a resolution or authorisation as appropriate, for the following purposes: a) to ratify international treaties or conventions which affect the full sovereignty or the territorial integrity of Spain; b) to declare war and agree to peace; c) to undertake the actions referred to in article 12 of the Law of Succession and any others established in other provisions of the fundamental Laws of the Kingdom.

treaties affecting the full sovereignty or the territorial integrity of the State and conventions entailing peace agreements or the declaration of war. Secondly, article 14.II of the Law Constituting the Cortes provided that the full Cortes, or a Commission thereof as appropriate, should simply be required to give voice for the ratification of all other treaties affecting matters for whose regulation they were competent under articles 10 and 12.[34]

The Law Constituting the Cortes and the Organic Law of the State referred solely to the "ratification" of treaties and not to "accession". This last was regulated in article 10 paragraph 5 of the State Legal Regime of the Administration Act, which required the Government's authorisation for the negotiation and signing of international treaties and conventions and for [accession] to existing ones.[35] In 1970 Professor García Arias noted in this respect that despite the strict distinction, "Spanish practice in recent decades has been chaotically varied, as regards

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[34] Article 10 of the Law Constituting the Cortes provided thus: The Cortes, in Full Session, shall deliberate on any actions or laws having any of the following purposes: a) The ordinary and extraordinary State budgets; b) Major economic and financial transactions; c) The establishment or reform of the tax system; d) Banking and monetary organisation; e) Economic control of the Trade Unions and any legislative measures that may decisively affect the economy of the nation; f) Basic laws regulating the acquisition and loss of Spanish nationality and the duties and rights of Spaniards; g) The political and legal organisation of State institutions; h) The bases of local government; i) The bases of Civil, Mercantile, Social, Criminal and Procedural Law; j) The bases of the Judiciary and the Public Administration; k) The bases for the organisation of agriculture, trade and industry; l) National education plans; m) Any other Laws that the Government may, of its own accord or at the behest of the appropriate Commission, decide to submit to the Cortes in Full Session.

The Government may likewise submit to the Full Cortes items of business or resolutions not of the nature of Laws.

Article 12 of the Law Constituting the Cortes in turn provided:

I. The Commissions of the Cortes shall have competence in respect of all provisions which are not included in article ten and which must have the form of laws, either because such is established in a law subsequent to the present one or because such is ordered by a Commission comprising the President of the Cortes, a Minister designated by the Government, a Member of the Permanent Commission of the National Council, a Member of the Cortes who is a qualified Attorney, the President of the Council of State and the President of the Supreme Court of Justice. This Commission shall issue an opinion at the behest of the Government or of the Permanent Commission of the Cortes.

II. Should any Commission of the Cortes, for purposes of examination of a bill, a draft act or an independent motion, raise an issue for which the Cortes are not competent, the President of the Cortes may, on his own initiative or at the Government's request, require the opinion of the Commission referred to in the foregoing paragraph. Should the Commission conclude that it is not within the purview of the Cortes, the matter shall be removed from the Commission's agenda.

[35] On the role of the Cortes in accession to treaties, see L. García Arias, "Sobre el papel del órgano legislativo en lo referente a la adhesión de España a los convenios internacionales", *REDI*, vol. XXIII, 1970, no. 4, pp. 773–774.

both the Executive and the Legislative authorities; recently, the Government has evinced a tendency to allow the Cortes a greater role, not only for purposes of ratification but even for purposes of [accession]".[36] Likewise, in the light of actual practice, in 1977 Professor Remiro proposed a broad interpretation of the term "ratification", wherein the relevance of the Cortes' intervention was determined solely by the subject matter of the treaty.[37]

The doctrine highlights another series of treaties that required parliamentary approval although this was not expressly provided in the Law Constituting the Cortes and the Organic Law of the State. According to Professor Remiro Brotóns, these were first and foremost treaties whose terms entailed the reform or repeal of Fundamental Laws, by analogy with the terms of article 10 of the Head of State (Succession) Act.[38] Secondly, parliamentary approval was also required for conventions entailing taxpaying obligations for individuals, again by analogy, in this case to article 9 of the Customary Law [*Fuero*] of the Spanish people of 17 July 1945, which provided that "Spaniards shall contribute to the upkeep of public burdens according to their financial capacity. No-one shall be obliged to pay taxes that have not been established under a law approved by the Cortes".[39]

In cases requiring the intervention of the Cortes, this should naturally take place prior to the expression of the State's consent to be bound by a treaty; however, as Professor Remiro Brotóns noted, the Government occasionally put the question to the Cortes *ex post*.[40]

Despite this general recognition, on paper, that the Cortes had a binding say by way of resolution or law, the actual tendency in practice was the opposite, for a number of reasons: first of all, the power to determine whether a matter came within the purview of the Cortes lay with the Government; and in the second place, the Cortes themselves took no pains "to uphold the House's constitutional right to intervene in the process of concluding treaties".[41] Thus, as Professor Remiro Brotóns put it in 1977, in the preceding thirty-five years Spain had not concluded a single treaty that met any of the conditions in which a resolution or act of parliament was required.[42]

Returning specifically to the formalities of the Convention on Genocide, the Legal Department's report mentioned earlier indicated the steps required:

> "In view of the nature of this Convention and its inevitable legislative consequences, this International Legal Department takes the view that once decided

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[36] *Ibid.*, p. 773. In this connection, see also: A. Remiro Brotóns, *Las Cortes y la Política exterior española (1942–1976), . . . op. cit.*, p. 22.
[37] *Ibid.*, pp. 28–29.
[38] *Ibid.*, p. 35.
[39] *Ibid.*
[40] *Ibid.*, p. 31.
[41] *Ibid.*, p. 26.
[42] *Ibid.*, p. 36.

> by the Government, Spain's [accession] ought to be remitted to the Cortes for consideration by a Commission in a process analogous to that of the ratification of Treaties. Once the Cortes have pronounced thereon, the instrument of accession, signed by the Head of State, must be deposited with the United Nations Secretariat."

As we can see, although this is a case of accession rather than ratification, the procedure proposed is the one required for the latter. Therefore, as this is not one of the matters listed in article 14 paragraph I of the Law Constituting the Cortes, the Cortes should simply give their opinion. At the same time, as it does not concern any of the matters coming within the purview of the Cortes in Plenary Session by virtue of article 10 of the same Law but is a treaty whose application would entail legislation, it had to be examined by a Commission as provided in article 12 of the Law Constituting the Cortes.

And these were in fact the steps followed in practice: on 23 April 1968, the President of the Cortes ordered its publication in the Official Gazette of the Spanish Cortes (*BOCG*) and remitted the text of the convention to the Foreign Affairs Commission for examination, but reserving the right of the other Members, irrespective of the Commission on which they sat, to submit comments on the text during the fifteen days following its publication.[43] It is worth noting in this connection that the text published in the *BOCG* made no reference to the reservation to article 9 of the Convention proposed by the Executive. At the end of the statutory period, on 31 May 1968, the Foreign Affairs Commission of the Spanish Cortes issued an opinion in favour of [accession];[44] this was read out at the Plenary Session held on 18 June 1968.[45] Finally, on 13 September 1968 Spain formally acceded to the Convention on the Prevention and Punishment of the Crime of Genocide, at the same time entering the reservation to article 9.[46] That same day, Spain also acceded to the Convention on Elimination of All Forms of Racial Discrimination,[47] with a reservation in respect of article 22, which recognises the International Court of Justice as competent to settle disputes arising in connection with the interpretation and application of the convention.[48] Earlier, on 21 November

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[43] *BOCG* no. 1,003 of 26 April 1968, p. 21443 *et seq.*

[44] *BOCG* no. 1,009 of 12 June 1968, p. 21575. The document notes, possibly because this was a blanket formula, that the opinion thus issued was favourable to "ratification".

[45] *BOCG* no. 1,011 of 18 June 1968, p. 21666.

[46] Published in the *BOE* no. 34, of 8 February 1969, p. 1944 *et seq.* The convention came into force for Spain on 13 December 1968.

[47] Published in the *BOE* no. 118, of 17 May 1969, p. 7462 *et seq.* The convention came into force for Spain on 4 January 1969.

[48] "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement".

1967, Spain had acceded to another convention at the suggestion of Ambassador Yánez-Barnuevo, namely the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, in this case without reservations, which are expressly prohibited by article 9.

IV. VALIDITY OF THE SPANISH RESERVATION IN RESPECT OF ARTICLE 9 OF THE CONVENTION ON GENOCIDE AND REACTIONS THERETO OF OTHER SIGNATORY STATES.

The Convention on Genocide makes no stipulation regarding the possibility of entering reservations. An examination of the preliminary work reveals that this was no oversight, but that the reason for the silence was that it was not deemed necessary to make any particular provision in that respect. In effect, in the draft convention remitted to governments for examination, the Secretary General of the United Nations included an article heading (17) entitled "Reservations", but without any text. The reason for this was that he believed that blanket reservations had no place in a convention of the kind proposed, "which does not deal with the private interests of a State, but with the preservation of an element of international order".[49] The only government that made any comment in this connection was the United States, which observed that the convention ought not to include any provision in respect of reservations. None of the successive bodies entrusted with the drafting of the convention subsequently deemed it necessary to include any provision regarding reservations, and thus the Convention in its final form was approved by the General Assembly in full session on 9 December 1948 without any reference to this point.[50] Furthermore, the preliminary work in connection with the drafting of article 9 proper shows that there was no serious proposal in the sense of permitting reservations thereto.[51] Nonetheless, the minutes recording the discussions of the Sixth Committee of the General Assembly demonstrate that following the approval of the whole text of the Convention at its 132nd meeting, there was an argument among the various delegations in the course of which the possibility was mooted of entering reservations in respect of certain articles of the Convention, among them article 9.[52]

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[49] See the written report submitted by the United Nations Secretary General in the proceedings relating to the advisory opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (*I.C.J. Pleadings, Oral Arguments, Documents*, p. 88).

[50] *Ibid.*

[51] *Ibid.*, pp. 90–92.

[52] *Ibid.*, pp. 92–95.

In view of the Convention on Genocide's silence on the subject, when some of the States which began ratification included some reservations, essentially in connection with article 9, and other States objected to them, the Secretary General of the United Nations, as depositary of the Convention, was forced to go to the General Assembly and ask for guidelines on how he should act in connection with reservations to it.[53] The General Assembly in turn resolved to seek an advisory opinion from the International Court of Justice; this was made public on 28 May 1951, responding to the three concrete questions that the consulting body had put to it. The advisory opinion provides some interesting considerations regarding the validity of reservations in general, and also – although it did not address the subject directly – regarding the validity of reservations in respect of the article discussed in this paper.

Firstly, in its advisory opinion of 28 May 1951, the Court took the view that a degree of consensus had been reached in the General Assembly regarding the possibility of entering reservations to the Convention, as witness the very fact that the resolution requesting the ruling had raised the question of whether the State entering a reservation could be considered a party to the Convention in the face of objection to that reservation by one or more States.[54] Secondly, in a *dictum* that would profoundly affect subsequent treaty law, the Court stated that, absent any specific provision in a treaty with regard to the admissibility of reservations, the question must be addressed in the light of the object and purpose of the treaty.[55] In the specific case of the Convention on Genocide, the Court stated that it had been adopted for reasons of humanity and civilisation; and more specifically:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946)."[56]

In this way, according to the Court, the object and purpose of the Convention showed that the General Assembly and the countries adopting it intended that the largest possible number of States be parties to it.[57] Moreover, "the complete exclu-

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[53] The Secretary General faced a problem with article 13. To set a date for deposit of the twentieth instrument of ratification or accession, he needed to know whether and under what conditions he could accept instruments of ratification or accession that were accompanied by reservations.

[54] *I.C.J. Reports 1951*, pp. 22–23.

[55] *Ibid.*, p. 24.

[56] *Ibid.*, p. 23.

[57] *Ibid.*, p. 24.

sion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are at its basis".[58] These words, clearly favourable to the acceptance of reservations to the Convention, which were uttered at a time when several States had already drawn up reservations to it and particularly to article 9,[59] surely suggest that the Court had seen no obstacle to the possibility of States entering reservations to the Convention in general, or indeed to reservations specifically addressed to the compromissory clause it contained.

The repercussions of the Court's advisory opinion were, as we know, immense. As a first step, in resolution 598 (VI) of 12 January 1952 the General Assembly recommended that States "be guided in regard to the Convention on the Prevention and Punishment of the Crime of Genocide by the advisory opinion of the International Court of Justice of 28 May 1951"; then secondly, in the same resolution the General Assembly recommended that the Secretary General, as depositary, adapt his practice to the Court's ruling. Finally, the rule proposed by the Court whereby it was up to the parties to the Convention on Genocide to examine the compatibility of reservations with the object and purpose of the Convention, was enshrined by the legislating States in article 19, c) of the 1969 Vienna Convention on the law of treaties as a universal criterion for application in determining the admissibility of a reservation in the event that the terms of a treaty make no provision.

Since the adoption of the 1969 Vienna Convention on the law of treaties, much has been written and debated as to whether these general rules apply equally to human rights treaties, and in particular stress has been placed on the risk entailed in leaving analysis of the compatibility of reservations with the object and purpose of the treaty up to the contracting States.[60] However, universal practice shows that

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[58] *Ibid.*

[59] See the written report submitted by the United Nations Secretary General in the proceedings relating to the advisory opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (*I.C.J. Pleadings, Oral Arguments, Documents*, pp. 97–103). See in this connection the collective dissenting opinion of judges Guerrero, McNair, Read and Hsu Mo attached to the International Court of Justice's advisory opinion (*I.C.J. Reports 1951*, p. 45); see also the argument of the United States of America in the stage relating to the appropriateness of provisional measures in the case concerning *Legality of Use of Force (Yugoslavia* v. *United States of America)* (see CR 99/24, para. 2.14).

[60] Among the recent bibliography on the question, see G. Cohen-Jonathan,"Les reserves dans les traités institutionnels relatifs aux droits de l'homme. Nouveaux aspects européens et internationaux", *RGDIP*, 1996–4, pp. 915–949; R. Goodman,"Human Rights Treaties, Invalid Reservations, and State Consent", *AJIL*, vol. 96, 2002, pp. 531–560; M. Rama-Montaldo, "Human Rights Conventions and Reservations to Treaties", *Héctor Gros Espiell. Amicorum Liber,* vol. 2, Bruylant, Bruxelles, 1997, pp. 1261–1277; D. Shelton, "State Practice on Reservations to Human Rights Treaties", *Canadian Human Rights Yearbook. Annuaire canadien des droits de la personne*, 1983, pp. 205–234;

this is still the rule, in spite of some attempts to assign the role of checking the validity of reservations to institutional organs. This was confirmed by the International Law Commission – the body which since 1993 the United Nations General Assembly has entrusted with the task of examining reservations – in its preliminary conclusions of 1997 on reservations to normative multilateral treaties, including treaties on human rights. In effect, this document affirms that the content of articles 19 to 23 of the Vienna conventions on the laws of treaties of 1969 and 1986 govern the rules on reservations to treaties; and it particularly stresses that the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations to treaties of all kinds, including those relating to human rights.[61]

For all the above reasons, we believe that in analysing the validity of the Spanish reservation to article 9 of the Convention on Genocide, we are bound to consider the reactions of the other signatory States to the Spanish reservation and to others of [ ] similar nature. We would note in this connection that another sixteen States besides Spain entered reservations in respect of article 9.[62] The import of the reservations varies widely, but most seek to bar the Court's jurisdiction, or at least to render it subject to the express consent of the reserver in the event that a dispute is placed before the High Jurisdiction. Some, on the other hand, required

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Simma, B., "Reservations to Human Rights Treaties- Some Recent Developments", *Liber amicorum Professor Seidhl-Hohenveldern – in honour of his 80th birthday*, Kluwer Law International, 1998, pp. 659–682; M.M. Sychold, "Ratification of the Genocide Convention: the Legal Effects in Light of Reservations and Objections", *RSDIE*, vol. 8, 1998, no. 4, pp. 533–552. On the question of whether reservations to clauses for peaceful settlement of disputes included in treaties are generally compatible with the object and purpose thereof, see M.P. Andrés Sáenz de Santa María, *El arbitraje internacional en la práctica convencional española (1794–1978)...*, *op. cit.*, p. 216.

[61] "1. The Commission reiterates its view that articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations;

2. The Commission considers that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty;

3. The Commission considers that these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Conventions govern reservations to such instruments;"[...].

[62] Algeria, Argentina, Bahrain, Bangladesh, China, India, Malaysia, Morocco, Philippines, Rwanda, Serbia and Montenegro, Singapore, United States of America, Venezuela, Viet-Nam and Yemen. For the text of the reservations see *http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp#N20.*

the express consent of all or almost all of the parties to the dispute; take for example the following reservation:

> "1. The Socialist Republic of Viet Nam does not consider itself bound by article IX of the Convention which provides the jurisdiction of the International Court of Justice in solving disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the Convention at the request of any of the parties to disputes. The Socialist Republic of Viet Nam is of the view that, regarding the jurisdiction of the International Court of Justice in solving disputes referred to in article IX of the Convention, the consent of the parties to the disputes except the criminals is diametrically necessary for the submission of a given dispute to the International Court of Justice for decision."

Along with the seventeen States which currently maintain reservations in respect of article 9, there is a group of ten States – consisting essentially of countries from the former socialist group[63] – which initially entered reservations then withdrew them.

Only two States, the Netherlands and the United Kingdom, have raised express objections to the Spanish reservation to article 9. The first went so far as to declare that it did not consider Spain to be a party to the Convention. Let us look at these two objections:

> Netherlands: 27 December 1989. " [. . .] the Government of the Kingdom of the Netherlands recalls its declaration, made on 20 June 1966 on the occasion of the accession of the Kingdom of the Netherlands to the Convention [. . .] stating that in its opinion the reservations in respect of article IX of the Convention, made at that time by a number of states, were incompatible with the object and purpose of the Convention, and that the Government of the Kingdom of the Netherlands did not consider states making such reservations parties to the Convention. Accordingly, the Government of the Kingdom of the Netherlands does not consider the United States of America a party to the Convention. Similarly, the Government of the Kingdom of the Netherlands does not consider parties to the Convention other states which have made such reservations, i.e., in addition to the states mentioned in the aforementioned declaration, the People's Republic of China, Democratic Yemen, the German Democratic Republic, the Mongolian People's Republic, the Philippines, Rwanda, Spain, Venezuela, and Viet Nam, on the other hand, the Government of the Kingdom of the Netherlands does consider parties to the Convention those states that have since withdrawn their reservations, i.e., the Union of Soviet Socialist Republics,

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[63] Albania, Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, Mongolia, Poland, Romania, Ukrainian Soviet Socialist Republic and Union of Soviet Socialist Republics. See *http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp#N20.*

> the Byelorussian Soviet Socialist Republic, and the Ukrainian Soviet Socialist Republic."[64]

The United Kingdom, for its part, warned that:

> "The Government of the United Kingdom do not accept the reservations to articles 4, 7, 8, 9 or 12 of the Convention made by Albania, Algeria, Argentina, Bulgaria, Burma, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, India, Mongolia, Morocco, the Philippines, Poland, Romania, Spain, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics or Venezuela." [. . .] On 21 November 1975, "The Government of the United Kingdom of Great Britain and Northern Ireland have consistently stated that they are unable to accept reservations in respect of article 9 of the said Convention; in their view this is not the kind of reservation which intending parties to the Convention have the right to make."[65]

Aside from these two cases in which Spain is specifically mentioned, a good number of States have raised objections of one kind or another to reservations in respect of article 9: some objected to reservations to the provision in general and others objected to the reservations entered by certain States.[66] Thus, one might take the view that this group of States implicitly objected to the Spanish reservation as well; some other States might have objected expressly had Spain entered its reservation prior to accession and ratification by these States. Most of the objecting States had nothing to say on the matter of whether the author of a reservation should be considered a party to the treaty.[67]

Finally, one further point about States which have objected in one way or another to reservations made to article 9 of the Convention is that some, in addition to the Netherlands and the United Kingdom, have affirmed that such a reservation is incompatible with the object and purpose of the Convention on Genocide.[68]

Having reviewed the reactions of the parties to the Convention on Genocide, it behoves us also to look at how the jurisprudence deals with the reservation to article 9 subsequently to the advisory opinion of 1951. We would note in this connection that the International Court of Justice has had to deal with reservations to

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[64] *Ibid.*

[65] *Ibid.*

[66] Australia, Belgium, Brazil, China, Ecuador, Greece, Mexico, Norway and Sri Lanka. See *http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty1.asp.*

[67] China stated that it did not consider States that entered the reservation parties, and Mexico, referring to the United States reservation to article 9, noted that it did consider it a party to the Convention. See *http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty1.asp.*

[68] Brazil, China, Greece and Mexico. See *http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty1.asp.*

article 9 on several occasions since that date and has never declared one invalid or even raised any doubts as to their validity.

To the contrary, as it did in the cases concerning *Legality of use of force (Yugoslavia v. Spain)* and *Legality of use of force (Yugoslavia v. United States of America)*, it has accepted their validity and on that ground has denied its jurisdiction. In the case in which Spain was involved, as we noted in the introduction, it analyses the reservation of 13 September 1968 and its effects in paragraphs 29 to 33 of its Order of 2 June 1999 regarding the request for provisional measures. Its reasoning there is essentially that since the Convention does not prohibit reservations and Yugoslavia had not objected to Spain's reservation to article 9, then that reservation must stand and the Court must declare itself incompetent.[69]

In its Order of 10 July 2002, in which it pronounced on a request for provisional measures in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, the Court went a step further in admitting the validity of the reservation and virtually dispelled all doubt, on this occasion stating that the reservation "does not bear on the substance of the law, but only on the Court's jurisdiction" and that it therefore "does not appear contrary to the object and purpose of the Convention".[70]

In the case concerning the *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), the Court dealt with the reservation to article 9 entered by Serbia and Montenegro upon presenting its instrument of accession to the Convention on Genocide on 6 March 2001 and did not reject it in any way.[71] This is not entirely conclusive, however, in that

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[69] *I.C.J. Reports 1999*, p. 772. In the case of Yugoslavia versus the United States, its analysis was the same as in paragraphs 21 to 25 (*I.C.J. Reports 1999*, pp. 923–924). In this line see Pellet, A., "La CIJ et les reserves aux traités. Remarques cursives sur une révolution jurisprudentielle", *Liber Amicorum Judge Shigeru Oda*, Kluwer Law International, 2002, p. 500.

[70] *I.C.J. Reports 2002*, pp. 245–246, para. 72. The full text of this crucial paragraph reads as follows: "72. Whereas the Genocide Convention does not prohibit reservations; whereas the Congo did not object to Rwanda's reservation when it was made; whereas that reservation does not bear on the substance of the law, but only on the Court's jurisdiction; whereas it therefore does not appear contrary to the object and purpose of the Convention; whereas it is immaterial that different solutions have been adopted for courts of a different character; whereas, specifically, it is immaterial that the International Criminal Tribunal for crimes committed in Rwanda was established at Rwanda's request by a mandatory decision of the Security Council or that Article 120 of the Statute of the International Criminal Court signed at Rome on 17 July 1998 prohibits all reservations to that Statute".

[71] "53. The Government of Croatia, on 18 May 2001, and the Presidency of Bosnia and Herzegovina, on 27 December 2001, objected to the deposit of the instrument of accession by the FRY, on the basis that as one of the successor States to the former SFRY,

the situation of the Federal Republic of Yugoslavia as regards the Convention on Genocide was a marginal issue in the case in point. This was the review of a decision, and therefore the Court's concern was to ascertain whether the admission of the Federal Republic of Yugoslavia to the United Nations on 1 November 2000 constituted a new fact, not known to the Federal Republic of Yugoslavia or to the Court before the latter issued its ruling on competence in the original case (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*) on 11 July 1996, knowledge of which might have altered the original decision. As we know, that decision rested upon the view that the situation *sui generis* of the Federal Republic of Yugoslavia vis-à-vis the United Nations Organisation as from General Assembly resolution 47/1 of 22 September 1992, which indicated that the Federal Republic of Yugoslavia could not take part in the work of the General Assembly, did not prevent it from appearing before the Court.

In its rulings of 15 December 2004 on competence in the case concerning *Legality of Use of Force*, the Court made no attempt to analyse this issue. Taking the view that in 1999 Serbia and Montenegro lacked the capacity to appear before it under article 35 paragraph 1, since it was not a party to the Court's Statute, and concluding that it likewise had no right of access by virtue of article 35 paragraph 2 – access to the Court for States not parties to the Statute – the Court decided that there was no need to determine whether or not it could found its jurisdiction under the Convention on Genocide in the cases at issue,[72] as the applicant had stated at the outset.

Our view, then, is that there are elements in the preparatory work for the Convention which could suggest that the compatibility of the reservations to article 9 of the Convention on Genocide with the object and purpose of the treaty is at best doubtful. The proposal drawn up by the Special Committee on Genocide set up by the Economic and Social Council by resolution dated 3 March 1948 contained an

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it was already bound by the Genocide Convention. The two States also objected to the FRY's reservation. In this regard Croatia stated that it was "incompatible with the object and purpose of the Convention" whereas Bosnia and Herzegovina stated that it was made several years after 27 April 1992, "the day on which the FRY became bound to the Genocide Convention in its entirety". On 2 April 2002, the Government of Sweden informed the Secretary-General that it considered the FRY to be one of the successor States to the SFRY "and, as such, a Party to the Convention from the date of entering into force of the Convention for the Socialist Federal Republic of Yugoslavia". Therefore, the Government of Sweden considered the FRY's reservation "as having been made too late and thus null and void" (Multilateral Treaties deposited with the Secretary-General at *http://untreaty.un.org*). To date there has been no further reaction from States parties to the Genocide Convention." (*I.C.J. Reports 2003*, para. 53).

[72] See paragraph 127 of the decision in the case concerning *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)* at *http://www.icj-cij.org/cijwww/cdocket/cybe/cybe-frame.htm.*

article 10 declaring the International Court of Justice competent to hear disputes arising from the interpretation and application of the Convention.[73] In the Sixth Commission of the UN General Assembly – Legal Affairs – Belgium and the United Kingdom presented a joint amendment regarding article 10 of the Special Committee's proposal.[74] This joint amendment invested the International Court of Justice with competence to hear not only disputes relating to the interpretation and application of the Convention, but also disputes concerning its "fulfilment", "including disputes relating to the responsibility of a State for any of the acts enumerated in articles 2 and 4".[75] In explaining the amendment, the British delegate, Mr. Fitzmaurice, said that "[t]he delegations of Belgium and the United Kingdom had always maintained that the convention would be incomplete if no mention were made of the responsibility of States for the acts enumerated in articles 2 and 4".[76] Later on, the British delegate insisted that:

> "At the 102nd meeting, during the discussion of the competence of national courts and the reference of disputes to the Security Council, the representative of the United Kingdom had been impressed by the fact that all speakers had recognized that the responsibility of the State was almost always involved in all acts of genocide; the Committee, therefore, could not reject a text mentioning the responsibility of the State".[77]

Thus, in my opinion, this resolved to render the convention effective by making the Court competent to hear disputes arising from failure to fulfil the obligations contained therein highlights the fundamental importance of article 9 in the treaty as a whole for the drafters of the amendment.[78] For his part, the Belgian representative on the Sixth Commission had already declared during the discussion on another

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[73] Doc. E/794, "Report of the *ad hoc* Committee on Genocide", *Economic and Social Council Official Records: Third Year, Seventh Session, Supplement No. 6*, Lake Success, New York, pp. 13–14.

[74] Doc. A/C.6/258, *Official Records of the Third Session of the General Assembly, Part. I, Sixth Committee, Annexes to the Summary Records of Meetings*, 1948, Geneva, p. 28.

[75] *Ibid.* The full text of the joint amendment reads: "Any dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV, shall be submitted to the International Court of Justice at the request of any of the High Contracting Parties".

[76] "Hundred and Third Meeting, 52. Continuation of the consideration of the draft convention on genocide [E/794]: report of the Economic and Social Council [A/633]", *Official Records of the Third Session of the General Assembly, Part. I, Sixth Committee, Summary Records of Meetings*, 1948, Palais de Chaillot, Paris, p. 430.

[77] *Ibid.*

[78] Another debatable issue is whether or not the joint amendment was necessary; normally, the terms "interpretation" and "application" appearing in most compromissory clauses allow the Court to examine the international liability attaching to States for violation of international obligations acquired through accession to the treaty.

prior provision, that "It [is] in connexion with prevention that the International Court of Justice could be useful, for it alone [is] competent to decide whether or not a State [is] guilty of violating the terms of the convention and to determine the necessary legal redress".[79] In the view of Belgium, then, the International Court of Justice could be of decisive assistance in the prevention of genocide.[80] For all these reasons, we are forced to conclude that for the authors of the joint amendment to what was then article 10, if recourse to the Court was associated with the attainment of one of the Convention's purposes – the prevention and punishment of the crime of genocide – then a reservation to the compromissory clause would be contrary to the object and purpose of the treaty, and hence invalid.[81] Be it remembered, on the other hand, that the cited joint amendment, with a modification proposed by India, was eventually approved by the Sixth Commission by 23 votes in favour to 13 against with 8 abstentions[82] and came to be included in essence in the definitive version of article 9 of the Convention.

At the same time, it is curious to note that one of the States that have described reservations to article 9 as contrary to the object and purpose of the treaty should be the United Kingdom, one of the co-authors of the cited amendment, and that Belgium, the other co-author, although not going so far as to make an outright statement, did – in ratifying the Convention on 5 September 1951 – in fact oppose the reservations entered by the then Soviet Republics, among them reservations to article 9.[83]

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[79] "Ninety-Eighth Meeting, 47. Continuation of the consideration of the draft convention on genocide [E/794]: report of the Economic and Social Council [A/633]", *Official Records of the Third Session of the General Assembly, Part. I, Sixth Committee, Summary Records of Meetings*, 1948, Palais de Chaillot, Paris, p. 375.

[80] *Ibid.* On the characterisation of compromissory clauses as a means for the protection of human rights, see Ochoa Ruiz, N., "Las cláusulas compromisorias de las Convenciones de Derechos Humanos de las Naciones Unidas a la Jurisdicción de la Corte Internacional de Justicia: ¿Un mecanismo jurisdiccional de protección de los Derechos Humanos?", *ADI*, vol. XIX, 2003, pp. 267–275.

[81] According to the United States of America, on the other hand, "The possibility of recourse to this Court for settlement of disputes is not central to the overall system of the Convention, which has as its essential elements the definition of the crime of genocide and the creation of obligations to try and punish those responsible for genocide." (See the argument of the United States of America in the stage relating to the suitability of provisional measures in the case, brought before the International Court of Justice, concerning *Legality of Use of Force (Yugoslavia* v. *United States of America)* (CR 99/24, para. 2.17).

[82] "Hundred and Third Meeting, 53. Continuation of the consideration of the draft convention on genocide [E/794]: report of the Economic and Social Council [A/633]", *Official Records of the Third Session of the General Assembly, Part. I, Sixth Committee, Summary Records of Meetings,* 1948, Palais de Chaillot, Paris, p. 447.

[83] "The Government of Belgium does not accept the reservations made by Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics."

The fact that the jurisprudence of the International Court of Justice considers compromissory clauses containing the terms "interpretation" and "application" to acceptably vouchsafe it the competence necessary to examine the liability of States parties to whatever treaty is concerned has probably precluded a truly clear appreciation of the scope that the authors of the cited joint amendment intended the compromissory clause in the Convention on Genocide to have.

To close this section on the validity of the Spanish reservation, in the final analysis we must consider its effects, albeit in a general way. It should be noted in this respect that, under the rule laid down in article 21 paragraph 1 of the 1969 Vienna Convention on the Law of Treaties, article 9 must stand in relations between States which explicitly or implicitly accept it, to the extent determined by the reservation. Similarly, having regard to States that have objected to the reservation in respect of article 9 of the Convention on Genocide without actually opposing the Convention's entering into force between them and the State making the reservation, under the rule laid down by article 21 paragraph 3 of the Vienna Convention on the Law of Treaties, it follows that article 9 will not be applicable to mutual relations between those States.

V. CONCLUSION

Given the silence of the Convention on Genocide regarding the possibility of entering reservations, we must perforce examine the compatibility of such reservations with the object and purpose of the treaty. In the section dealing with the validity of reservations to article 9, we saw that, to judge by the preparatory work leading up to the drafting of the article, such compatibility is doubtful. What the drafters of article 9 had in mind was not simply to give the Court competence to hear disputes arising from the interpretation and application of the Convention, but by substantiating the liability of States for violation of the obligations contained therein, actually to associate it with one of the ends pursued – namely, the prevention of genocide. The conclusion to be garnered from a study of the reactions of the States parties is equally doubtful: on the one hand 27 States have entered reservations to the article (17 currently in force), while on the other hand 11 have objected to them, in some cases stressing their incompatibility with the object and purpose of the treaty. Nevertheless, the International Court of Justice has never cast doubt on their validity, and recently it has even gone so far as to state that they are not contrary to the object and purpose of the Convention.

In fact, our analysis of the historical circumstances in which Spain acceded to the Convention shows that the reason why it entered a reservation to article 9 was the Franco regime's reluctance, especially in its early years, to recognise the jurisdiction of international judicial bodies for the peaceful settlement of disputes. As the International Legal Department of the Ministry of Foreign Affairs asserted in its report of 25 October 1967 – to which we have referred several times and which is of key importance in clarifying the position of the Spanish administration – "Spain [had not been] accepting, in recent years, recourse to the [International] Court [of

Justice] for the settlement of disputes over the interpretation of Conventions". Hence, we are forced to rule out any suspicion as to the possibility of intent to conceal practices contrary to the Convention. Indeed, the Legal Department seemed fully to concur with the objectives pursued by the treaty, noting that "it is through Conventions such as the one here in point, despite their imperfections, that the juridical conscience of the international community in criminal matters is given form in Positive International Law", and that "the provision of a conventional juridical basis for the condemnation of genocide reinforces the moral postulates in which it is rooted".

However, while the rationale behind Spain's entry of a reservation to article 9 in 1968 is explicable, the same cannot be said, from a standpoint of juridical consistency, of its maintenance at this time, when Spain, having attained a constitution ensuring the rule of law internally, has progressively sought to respect the same values in the international sphere. In fact, it is fair to say that Spain has already come a long way in this direction, becoming party – in addition to the conventions referred to particularly in this paper – to the major conventions relating to the protection of human rights, within the spheres of both the United Nations[84] and the Council of Europe,[85] and accepting the means of control established by these conventions for purposes of their application.[86]

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[84] International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966 (ratified by Spain on 27 April 1977); International Covenant on Civil and Political Rights, New York, 16 December 1966 (ratified by Spain on 27 April 1977); Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979 (ratified by Spain on 5 January 1984); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, New York, 6 October 1999 (ratified by Spain on 6 July 2001); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984 (ratified by Spain on 21 October 1987); Amendments to articles 17 (7) and 18 (5) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 8 September 1992 (Spain adhered on 5 May 1999); Convention on the Rights of the Child, New York, 20 November 1989 (ratified by Spain on 6 December 1990); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, New York, 25 May 2000 (ratified by Spain on 8 March 2002; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, New York, 25 May 2000 (ratified by Spain on 18 December 2001); Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, New York, 15 December 1989 (ratified by Spain on 11 April 1991); Agreement establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean, Madrid, 24 July 1992 (ratified by Spain on 7 December 1994) (see *http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/chapterIV.asp*).

[85] Convention for the Protection of Human Rights and Fundamental Freedoms, 4/11/1950 (ratification or accession on 4/10/1979); Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20/3/1952 (ratification or accession on 27/11/1990); European Social Charter, 18/10/1961 (ratification or accession on 6/5/1980); Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental

To crown this advance in the acceptance of international legal commitments in the sphere of human rights, since 24 October 2000 Spain has been a party to the Statute of the International Criminal Court of 17 July 1998 and hence accepts the Court's jurisdiction for the judgment of individuals responsible for committing, among others, the crime of genocide, as provided by articles 5 and 6 of the Statute. Indeed, this is yet another reason why it makes little sense for Spain to try and evade scrutiny of its international liability when the individuals responsible could be tried for the same alleged deeds.

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Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions, 6/5/1963 (ratification or accession on 6/4/1982); Protocol No. 3 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 29, 30 and 34 of the Convention, 6/5/1963, (ratification or accession on 4/10/1979); Protocol No. 5 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 22 and 40 of the Convention, 20/1/1966, (ratification or accession on 4/10/1979); European Agreement relating to Persons participating in Proceedings of the European Commission and Court of Human Rights, 6/5/1969 (ratification or accession on 23/6/1989); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, 28/4/1983 (ratification or accession on 14/1/1985); Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 19/3/1985 (ratification or accession on 23/6/1989); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26/11/1987 (ratification or accession on 2/5/1989); Additional Protocol to the European Social Charter, 5/5/1988 (ratification or accession on 24/1/2000); Protocol amending the European Social Charter, 21/10/1991 (ratification or accession on 24/1/2000); European Charter for Regional or Minority Languages, 5/11/1992 (ratification or accession on 9/4/2001); Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 4/11/1993 (ratification or accession on 8/6/1995); Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 4/11/1993 (ratification or accession on 8/6/1995); Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 11/5/1994 (ratification or accession on 16/12/1996; Framework Convention for the Protection of National Minorities, 1/2/1995 (ratification or accession on 1/9/1995); European Agreement relating to persons participating in proceedings of the European Court of Human Rights, 5/3/1996 (ratification or accession on 19/1/2001); Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, 5/3/1996 (ratification or accession on 21/1/1999) (See *http://conventions.coe.int/Treaty/EN/cadreprincipal.htm*).

[86] As from 11 March 1998, Spain accepts the competence of the Human Rights Committee by virtue of article 41 of the International Covenant on Civil and Political Rights; also, since 25 January 1985 it has agreed to be bound by the system of individual claims established in the Optional Protocol to the Covenant. Within the European sphere, as we saw in note 81, Spain is fully integrated in the system of protection of human rights instituted by the Rome Convention of 4 November 1950 and protocols, including the eleventh protocol, which among other things establishes the jurisdiction of the European Court of Human Rights as mandatory and allows individuals to submit complaints to it directly.

Also, on 29 October 1990 Spain accepted the compulsory jurisdiction of the International Court of Justice in depositing a unilateral declaration under article 36 paragraph 2 of the Court's Statute with the United Nations Secretary General.[87] The Spanish declaration is couched in very general terms and could readily serve to vouchsafe the necessary jurisdiction to the Court in disputes relating to the interpretation or application of the Convention on Genocide, always provided that competence in the case at issue is not barred by the reservations and conditions included therein and also in the declaration of the opposing party under the principle of reciprocity;[88] as we see it, this makes it even less reasonable to maintain the reservation in respect of article 9 of the Convention on Genocide.

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[87] "1. On behalf of the Spanish Government, I have the honour to declare that the Kingdom of Spain accepts as compulsory ipso facto and without special agreement, the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the Court, in relation to any other State accepting the same obligation, on condition of reciprocity, in legal disputes not included among the following situations and exceptions:

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

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

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

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

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

3. The present Declaration, which is deposited with the Secretary-General of the United Nations in conformity with Article 36, paragraph 4, of the Statute of the International Court of Justice, shall remain in force until such time as it has been withdrawn by the Spanish Government or superseded by another declaration by the latter. The withdrawal of the Declaration shall become effective after a period of six months has elapsed from the date of receipt by the Secretary-General of the United Nations of the relevant notification by the Spanish Government. However, in respect of States which have established a period of less than six months between notification of the withdrawal of their Declaration and its becoming effective, the withdrawal of the Spanish Declaration shall become effective after such shorter period has elapsed." Madrid, 15 October 1990. (Signed) Francisco Fernandez Ordóñez, Minister for Foreign Affairs.

[88] In addition to the works mentioned so far, on the Spanish declaration and its effects see M.P. Andrés Sáenz de Santamaría, "España y el Tribunal Internacional de Justicia", *Meridiano*

The inconsistency of carrying on with the reservation was made patent on 22 October 1999, when the Spanish government informed the United Nations Secretary General, as depositary, that it had decided to withdraw the reservation to article 22 of the Convention on the Elimination of All Forms of Racial Discrimination entered at the time of acceding[89] – which reservation, as we know, was entered at the same time as the one to article 9 of the Convention on Genocide, and for the same reasons.

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Ceri, 1995, no. 3; J.D. González Campos,"España reconoce como obligatoria la jurisdicción de la C.I.J. de conformidad con el art. 36.2 del Estatuto", *REDI*, vol. XLII, 1990, pp. 360–365 and F. Jiménez García, *La jurisdicción obligatoria unilateral del Tribunal Internacional de Justicia. Sus efectos para España*, Dykinson, Madrid, 1999, pp. 60–66.

[89] See *http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty2.asp*.

The Incipient Immigration Policy of the European Union and Regularisation of Aliens in Spain

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I. INTRODUCTION

Early in January 2005, a little over a year after the publication of the latest amendment of *Organic Law 4/2000*[1] *on the rights and freedoms of aliens in Spain and their social integration* (hereafter OL), the *BOE* published Royal Decree 2393/2004 of 30 December (hereafter RD) approving the Regulation implementing the said OL.[2]

The result of a high degree of consensus,[3] this decree is intended to facilitate orderly legal immigration without relenting in the fight against illegal immigration. In that context it introduces some changes regarding the requirements and conditions applicable to consolidated channels for the admission of aliens to live and work Spain while tightening the precautions to prevent legal fraud.

The regulation also takes into account the real situation in Spain at the time of its enactment – that is, the presence of thousands of aliens in irregular situations. Indeed, according to the provisional statistics furnished by the National Institute for Statistics (INE),[4] of the 43.97 million inhabitants accounted for in Spain at 1 January 2005 (770,000 more than the previous year), 3.69 million are aliens, many of whom (almost 1.5 million) are living in Spain in an irregular situation.[5]

In order to deal with this reality, the RD provides an exception to the general rules governing the granting of residence and work authorisations with a view to normalising the situation of all those aliens who have been continuously in Spain since at least six months prior to its entry into force and can show that they have employment for the future. This exception is justified, then, not only by the enormous number of immigrants living in Spain in irregular situations, but also and most importantly, by the desire to bring them formally into the Spanish labour market.[6]

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1 OL 4/2000 of 11 January, amended by OL 8/2000 of 22 December and by OL 14/2003 of 20 November (*BOE* no. 279 of 21 November 2003, pp. 41193–41204). For the consolidated text, see Fernández Rozas, C. and Fernández Pérez, A. (Eds.), *Ley de extranjería y legislación complementaria*, 4th ed., Madrid 2005, pp. 275–414.

2 *BOE* no. 6 of 7 January 2005, pp. 485–539.

3 As the Government reported, the regulation, which has the support of the vast majority of political parties and the Forum for Social Integration of Immigrants and has merited the favourable opinion of the Council of State, the Economic and Social Council and the General Council of the Judiciary, was agreed with the social agents in the Committee for Dialogue, and in its drafting account was taken of proposals from Autonomous Communities, Local Authorities, professional associations and NGOs. (See press note "Government gives green light to Aliens Regulation with increased consensus", of 30 December 2004, at *http://www.tt.mtas.es/periodico*).

4 See INE press note of 27 April 2005, published at *http://www.ine.es/prensa*.

5 Note, however, that these figures are for registered aliens, around 1.5 million of whom are known not to have an alien's card. But there is no way of knowing the number of aliens living in Spain irregularly without having registered, or how many may have left the country without having notified the Registry.

6 In this connection it should be borne in mind that a significant proportion of the persons

The object of this article is precisely the normalisation process initiated by the Third Transitional Provision of the RD. However, because it is exceptional, it will be well to begin with a brief analysis of the rules of authorisation for temporary residence and work as laid down in a general way by the Regulation. And in addition, in view of the progressive communitarisation of EU immigration and aliens policies initiated by the adoption of the Amsterdam Treaty, we need to examine how well these internal Spanish regulations sit with the legal *acquis* of the EU in these matters.

II. THE REGULATION OF IMMIGRATION IN THE EU

1. Communitarisation of EU immigration and aliens policy

The process of communitarisation of EU immigration policy commenced with the adoption of the Amsterdam Treaty in 1997.[7] The objectives of the Union cited there include maintaining and developing the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.[8]

To that end, a new Title IV was included in the TEC, entitled "Visas, asylum, immigration and other policies related to free movement of persons", with the aim of preparing and implementing a set of common rules to regulate, among other things, EU immigration policy (articles 61 to 69 of the TEC). Our particular interest here is in article 63.3, whereby the Council was to adopt:[9]

"3) measures on immigration policy within the following areas:

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who would qualify for inclusion in the transitional scheme referred to were already doing some kind of work in Spain, if irregularly, being exploited as cheap labour in the submerged economy.

[7] In force from 1 May 1999 (*BOE* no. 109 of 7 May 1999, pp. 17146–17202) until 1 February 2003, the date of entry in to force of the version amended at Nice (*BOE* no. 24 of 28 January 2003, pp. 3426–3427).

[8] See Article 2 of the TEU. On the creation of that area of freedom, security and justice by the Treaty of Amsterdam, see also Escobar Hernández, C., "Extranjería y ciudadanía de la Unión Europea", in *Extranjería e inmigración en España y la Unión Europea,* Colección Escuela Diplomática, no. 3 (1998), 103–126, pp. 120–126; González Vega, J. A., "En torno a los otros europeos: Derecho Internacional y Derecho europeo ante la inmigración", in VVAA, *Ética, pluralismo y flujos migratorios en la Europa de los 25*, Oviedo 2005, 103–151, pp. 124–138; Martín y Pérez de Nanclares, J., *La inmigración y el asilo en la Unión Europea. Hacia un nuevo espacio de libertad, seguridad y justicia*, Madrid 2002; and Valle Gálvez, A., "La refundación de la libre circulación de personas, tercer pilar y *Schengen*: el espacio europeo de libertad, seguridad y justicia", in *RDCE no.* 3 (1998), 41–78, pp. 46–56.

[9] Note, however, that the transfer of competences in matters of immigration to the EU does not exclude national competence; as the penultimate paragraph of Article 63 itself

(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion,
(b) illegal immigration and illegal residence, including repatriation of illegal residents".

Shortly after the Treaty of Amsterdam came into force,[10] the European Council of Tampere in October 1999 reaffirmed the importance of creating such an area of freedom, security and justice and agreed on the need to develop a common immigration policy based on four essential elements: collaboration with the countries of origin, definition of a common European system of asylum, fair treatment of the nationals of third States and management of migratory flows.

More specifically, having regard to this last aspect – that is, management of migratory flows – the European Council at Tampere acknowledged the need for approximation of national legislations on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin. To that end it requested rapid decisions by the Council, on the basis of proposals by the Commission, such decisions to take into account not only the reception capacity of each Member State, but also their historical and cultural links with the countries of origin.[11]

In response to this demand for the building of a common immigration policy, in November 2000 the Commission presented a communication to the European Parliament (EP) and to the Council on "a Community policy on migration",[12] in

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states that measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements. This is, then, an area of shared competences, which are normally implemented by means of Directives, which by their very nature require intervention by the Member States (Article 249 TEC).

[10] Even before the Treaty came into force, in order to assure that this new common regulation was adopted in a reasonable time, in June 1998 the Cardiff European Council asked the Council and the Commission to prepare an Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (see the conclusions of the cited European Council in *EU Bulletin*, 6-1998). In compliance with that request, on 3 December 1998 the Council of JHA Ministers approved the Action Plan drawn up jointly with the Commission. Both institutions based themselves on the shared idea that asylum and immigration are independent spheres, and as regards action in connection with immigration they recommended that particular priority be given to combating illegal immigration while ensuring the integration and rights of third-country nationals legally present in the EU and affording the necessary protection to whoever requires it (See the text of the Action Plan in *OJEC* C 19 of 23 January 1999, pp. 1–15. Para. 8 cited).

[11] See Conclusions of the Tampere European Council of 15 and 16 October 1999, particularly conclusion no. 20 (*EU Bulletin* 10-1999, pp. 7 *et seq.*).

[12] COM (2000) 757 final of 22 November 2000.

which it proposed a means of translating these general guidelines into concrete actions. Since then, work has proceeded in the four areas identified by the European Council at Tampere, and on the basis of the Commission's proposals progress has slowly been made towards the definition of a common legal framework through the approval of an array of Directives.[13]

2. The EU's position on the management of economic immigration

In its communication on "a common immigration policy", the Commission had addressed the need for a change of approach in matters of immigration, whose starting-point should be the abandonment of the idea which had underpinned the restrictive policies of the Member States for the past thirty years – namely that Europe did not need economic and labour immigration.[14] In the future, then, the issue should be tackled on the basis of an analysis of the existing economic and demographic context of the EU: in other words, taking full account of the population decrease forecast for the coming decades, shortage of skilled and unskilled manpower in certain sectors, and increasing migratory pressure. It should also consider the fact that, along with immigration for humanitarian reasons and immigration resulting from family reunion, the EU receives ever more economic immigrants, many of whom are compelled to seek work in an irregular fashion owing to the difficulty of joining the labour market by way of the legally established channels.

In this connection the Commission warned that while immigration cannot of itself be considered a solution to the problems of the labour market, proper regulation of immigration could be a positive factor for the labour market, for economic growth and to assure the continuity of social security systems in the EU, and thus help facilitate compliance with the Lisbon objectives.[15]

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[13] This is illustrated for example by the adoption of the Directive on the right to family reunion (Council Directive 2003/86/EC of 22 September 2003, *OJEU* L 251 of 3 October 2003, pp. 12 *et seq.*). On this subject, see García Rodríguez, I., "The Right to Family Reunification in the Spanish Law System", in *SYIL*, vol. VII (1999-2000), 1–37, pp. 10–18. The same goes for the Directive on third-party nationals with long-term resident status (Council Directive 2003/109/EC of 25 November 2003, *OJEU* L16 of 23 January 2004, pp. 44–53). On this last see Crespo Navarro, E., "La Directiva 2003/109/CE relativa al estatuto de los nacionales de terceros Estados residentes de larga duración y la normativa española en la materia", in *RDCE*, no. 18 (2004), 531–552.

[14] In effect, as the Commission itself explained in a later communication, following the crisis of the 1970s and the increase in flows of illegal immigration during the 1980s and 1990s the controls on admission of third-party nationals to work were tightened up in the laws of the Member States to protect their own domestic labour markets, and in some cases they went so far as to freeze the hiring of aliens. See document COM (2004) 412 final of 4 June 2004.

[15] It should be remembered that at the Lisbon European Council of 23 and 24 March 2000

This new, more flexible and better coordinated approach to immigration was to materialise in the definition of a common policy that would allow for the complexity of the phenomenon, the various interconnected aspects and their impact on the countries of origin and destination. At the same time, given the differences among the Member States on this subject, the best way to regulate and manage that common policy would be to define a global, EU wide legal framework within which each Member State could develop and apply its own national policies.

Such an approach necessitated in the first place the establishment of proper channels for legal immigration, and that in turn required the implementation of an open method of coordination among the Member States.[16] To that end the Commission determined to develop, in consultation with the Member States, a common legal framework for the admission of economic immigrants from third countries, leaving the specific measures to applied at a national level up to each Member State. But it was also necessary to reinforce the fight against illegal immigration, not only by intensifying cooperation and consolidation of border controls but also by guaranteeing that labour legislation would be applicable to nationals of third States.

In a report on the said communication[17], compiled at the Commission's request, the Economic and Social Committee (ESC) stressed the need to put an end to the high level of irregular immigration on the basis of an analysis of the main factors behind it, specifically the lack of expectations in the countries of origin combined with growing demand for unskilled labour in certain sectors such as agriculture, construction, catering and domestic service. In short, it pointed to the existence in

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the EU set itself a new strategic objective for the coming decade: "to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion". And to that end it agreed on a number of global objectives in employment for 2010 (see conclusions of the Lisbon European Council in *EU Bulletin* 3-2000, pp. 7–19). In order to accomplish these objectives, on 22 July 2003 the Council adopted a set of Guidelines for employment policies of the Member States, which took into account the role of immigration. Guidelines nos. 5 and 7 in particular addressed the need to regularise undeclared working, an issue which is directly linked to irregular immigration. (See Council Decision 2003/578/EC on the guidelines for employment policies of the Member States, in *OJEU* L 197 of 5 August 2003).

[16] Since the responsibility of deciding on the needs for different categories of workers would still lie with the Member States, depending not only on the needs of the labour market but also on other factors, such as agreements concluded with the countries of origin. That approach was later complemented by the Commission in its communication on "an open method of coordination for the Community immigration policy" [COM (2001) 387 final of 11 July 2001].

[17] ESC opinion on "Communication from the Commission to the Council and the EP on a Community policy on migration", (2001/C260/19), *OJEC* C 260 of 17 September 2001, pp. 104–112.

the EU of a demand for labour which, because of the restrictive immigration policies maintained by the Member States, has come to be satisfied by means of irregular immigration, to the detriment of lawful competition among employers, of the rights of workers and of the very social security system existing in all the Member States.

The ESC then proposed three mechanisms for combating irregular immigration. The first, as proposed in the Commission's communication, was to reform the existing legal framework so as to facilitate legal entry for economic immigrants. To that end, two possible options were considered: a prior offer of employment as a blanket requirement, or alternatively the option of a visa to seek employment in sectors where employers need to interview prospective employees first. For the rest, it did not rule out the possibility of establishing annual quotas, provided that the ordering and application of such quotas was conceived flexibly and that they could not be applied in cases of admission for humanitarian reasons or for family reunion.

A second line to staunch irregular immigration would be to combat the submerged economy which offers work to irregular immigrants, by means of legislative and fiscal measures and sanctioning mechanisms, the latter not confined to penalising illegal trafficking in immigrants but also illegal hiring and exploitation of such workers by employers.

Finally, to supplement this, the ESC proposed dealing with the existing situation by means of measures to achieve a gradual regularisation of the situation of the huge number of immigrants living irregularly in EU territory, on the basis of circumstances such as an employment relationship, family ties, the existence of ties in the host society, and others.

On the basis of all these proposals, in July 2001 the Commission adopted a draft Directive on "the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities". Although it was favourably received by the institutions and bodies consulted,[18] it could not be approved by the Council due to the objections of some Member States, and the debate in the Council was confined to a first reading of the draft.

The Commission's proposal was intended to establish common definitions, criteria and procedures regarding conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, based on forms already used successfully in the Member States. Thus, among other things it laid down common criteria for admission, such as analysis of

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[18] See the draft Directive in the document COM (2001) 386 final of 11 July 2001. See also the opinions of the EP of 12 February 2003 (document A5-0010/2003); of the Economic and Social Committee of 16 January 2002 (document 2002/C 80/08, in *OJEU* C 80 of 3 April 2002, pp. 37–40); and of the Committee of the Regions of 13 March 2002 (document CdR 306/2001, *OJEU* C 192 of 12 August 2002, pp. 20–23).

economic needs; it granted rights to third-country nationals while respecting the right of Member States to limit economic immigration; and it envisaged the establishment of a single national application procedure for the issue of a residence and work permit in a single document, which could moreover by applied for by the employer. On the other hand, the only circumstance that it recognised as allowing legal entry for purposes of employment was possession by the immigrant of a prior offer of employment.

In view of this situation, in its Report on the Draft Directive[19] the ESC reiterated its position in favour of the admission of a second avenue, namely the temporary visa for job-seekers, at least in certain sectors such as domestic service, especially the care of children and old people, where prior acquaintance of employer and employee is essential.

Later on, a study on "links between legal and illegal immigration" undertaken at the request of the European Council of Salonica[20] and published by the Commission[21] pointed to the need to adopt a new approach to the question of regulation of legal avenues of economic immigration at an EU level, to which end the Commission announced the start-up of a process of consultation and the presentation of a Green Paper, in which the proposals originally presented would be re-examined in the light of the difficulties raised at the Council. For the rest, the study highlighted the existence of some kind of link between legal and illegal immigration, albeit this is a complex and not a direct relationship, in which a variety of factors are involved. The study concluded that, irrespective of whatever legal avenues are opened up, there will always be some level of illegal immigration, and therefore the fight against it must continue to be a part of the management of immigration. In particular, it proposed the adoption of preventive measures and the elimination of incentives such as the non-regulated labour market.[22] In this connection, the fight against the submerged economy must necessarily be incorporated as a common objective of EU immigration and employment policies.

Also among the future priorities declared by the Commission in its communication on "the area of freedom, security and justice: assessment of the Tampere Programme and future orientations",[23] is the promotion of a genuine common policy

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[19] Document 2002/C 80/08, *OJEU* C 80 of 3 April 2002, p. 38.

[20] Held on 19 and 20 June 2003 (see conclusions in *EU Bulletin* 6-2003, pp. 9–28).

[21] COM (2004) 412 final of 4 June 2004, cited *supra*. That study analysed the question of whether the existence of legal channels for the admission of immigrants reduces illegal immigration, and to what extent a policy of legal migration influences flows of illegal immigration and cooperation with third countries to combat it.

[22] The existence of that link between undeclared working and illegal immigration, and the need for action to render it less attractive to employers and to potential irregular immigrants, had already been highlighted by the Commission in a communication regarding the common policy on illegal immigration, dated 15 November 2001 [COM (2001) 672 final].

[23] COM (2004) 401 final of 2 June 2004.

on the management of migration flows. The Commission stresses that a realistic approach based on the EU's economic and demographic needs ought to facilitate the legal admission of immigrants under the aegis of a coherent policy that assures fair treatment of third-country nationals. A policy that includes respect for Community preference and guarantees the right of Member States to limit third-country nationals entering their territory seeking to take up paid employment or self-employed economic activities to a concrete number. And be it understood once again that the credibility of a positive and open common approach will depend to a great extent on the capacity of the EU to control illegal immigration.

For its part, the Treaty establishing a Constitution for Europe[24] also recognises the importance of the issue. Thus, Article III-267 states that:

"1) The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2) For the purposes of paragraph 1, European laws or framework laws shall establish measures in the following areas:

a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion (. . .);

5) This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed".

In response to the ambitions declared in that Treaty and with a view to preparing the EU for its entry into force, five years after the Tampere meeting, the European Council at Brussels[25] saw fit to adopt a new five-year plan, to be called "The Hague Programme".

Reiterating the links between submerged economy, illegal employment and irregular immigration, the Programme invited Member States to accomplish the targets for reduction of the submerged economy established in the European employment strategy. In addition, it invited the Commission to present, before the end of 2005, a plan for policy on legal migration which should include admission procedures capable of responding rapidly to fluctuating demand for migratory work on the labour market, reminding it that the setting of admission allowances for migratory labour is still a matter for the Member States.

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[24] Adopted by the European Council at Brussels on 17 and 18 June 2004, signed at Rome on 29 October 2004, and pending ratification by the Member States.

[25] See Conclusions of the Brussels European Council held on 4 and 5 November 2004, in *EU Bulletin* 11-2004, particularly Annex I which contains the Hague Programme referred to, especially section III 1.4).

To this end the Commission presented a Green Paper entitled "An EU approach to managing Economic Migration"[26] the purpose of which, as it had already announced, was to highlight the main problems, bearing in mind the concerns expressed by the Member States at the Council during the debate of the Draft Directive on conditions of entry and residence for economic immigrants, and the possible options for definition of the much-awaited EU legal framework for economic migration. The object of all this was to inaugurate a debate on the issue among all the interested parties,[27] upon conclusion of which it would be in a position to present the Plan requested by the European Council.

3. Regularisation processes in the EU

The adoption of exceptional measures for the regularisation of immigrants is not an isolated phenomenon affecting Spain alone. Indeed, as the Commission points out in its "Study on the links between legal and illegal immigration",[28] this is in fact a relatively frequent practice in the EU, to the extent that there have been more than twenty-six regularisation operations since the seventies, and especially starting in the nineties. On the other hand, this does not mean that all Member States have adopted measures of this kind; some have always been reluctant to do so.

At all events, as the Commission notes, most of the Member States acknowledge that in certain circumstances it may become necessary for practical reasons to undertake a regularisation process so that persons who do not meet the requirements established by law for the acquisition of legal residence can do so nonetheless. In particular, one of the considerations that lead States to adopt mechanisms of this kind is the need to integrate such people in society, and above all to attract them to the legal labour market.

In any case, the way in which regularisation is put into practice is not always the same. Some States opt for temporary regularisations while others also allow permanent schemes. Some only favour such measures in exceptional cases and only allow regularisation for humanitarian reasons or for protection; normally linked to asylum policy, these measures are intended to normalise the situation of specific categories of persons who are unable to apply for international protection but who cannot be repatriated. For example in Germany, where the situation of Bosnians affected by the war was regularised in 1999,[29] there are many individuals

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[26] COM (2004) 811 final of 11 January 2005.

[27] In particular, the Commission invited contributions to the debate not only from Community institutions and bodies and the Member States, but also from regional and local authorities, social interlocutors (especially unions and employers), NGOs, candidate countries, associate third States, academic sectors and individuals.

[28] COM (2004) 412 final, cited *supra*.

[29] In this connection see Decision no. 159 adopted by the *Sitzung der Ständigen Konferenz*

from Afghanistan, Iraq or the Balkans living without a legal permit who do not qualify for asylum as they cannot prove they have been persecuted in their own countries but who cannot be returned to their countries of origin for humanitarian reasons, or in some cases because they are unable to prove their nationality.

The Commission's study also analyses the phenomenon in terms of efficacy. In that respect, the advantages to be derived from these processes would include enabling governments to manage the population better through enhanced information on the population actually present in the country, helping to reduce illegal working and to increase public revenue from taxes and Social Security payments, insofar as the granting of a residence permit is contingent on the alien's having a job.

There are, however, not inconsiderable negative consequences that we could mention. In the first place, there is the possible stimulation of illegal immigration, what has come to be known as the *call effect*, which means that the wrong message is being sent, namely that living irregularly in the territory of the State concerned will be tolerated in the long run. In its communication the Commission illustrates this negative consequence by means of a case study of Belgium, where two large-scale regularisation programmes have been implemented, one in 1974 and the other in 1999. *Ex-post* assessments of the latter programme have shown that as a result the number of aliens residing irregularly actually increased. In practice, then, regularisation processes tend to be repeated after a number of years, which means that illegal immigration persists and that such measures – at least as they have tended to be applied – do not reduce irregular immigration in the long term. And that is not to mention possible implications for other Member States given the removal of controls on internal EU borders.

It was precisely in view of those possible consequences for other Member States, and partly because of the reactions in some Member States[30] to the process initiated in Spain, that the Commission, together with the Presidency of the EU, proposed to the Council of JHA (Justice and Home Affairs) Ministers that a system of prior mutual information and alerts be set up linking the persons responsible for immigration and asylum policies in the Member States, to be applicable to any major decision concerning immigration that one or more States propose to adopt. This initiative was welcomed by the JHA Council, which at its session of 14 April 2005 asked the Commission to present a proposal in that respect.[31]

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der Innenminister und-senatoren der Länder held on 18 and 19 November 1999 at Görlitz; and also the parliamentary question *Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke und der Fraktion der PDS, BT-* Drs. 14/1072.

[30] We refer to the request for explanations by Germany and the Netherlands in January.

[31] See the joint press communiqué by the Presidency and the Commission of 11 February 2005, which contains the text of the letter sent by the representatives of the two bodies to the Council proposing the start-up of such a mutual rapid alert information system, at

III. TEMPORARY RESIDENCE AND WORK AUTHORISATIONS IN SPAIN UNDER THE GENERAL REGIME

1. Introduction

Title II, Chapter II of *OL 4/2000 on rights and freedoms of aliens in Spain and their social integration* refers to the different situations in which aliens may find themselves in Spain, distinguishing between visitors and residents. A visitor may stay in Spanish territory for a limited period of time, in principle not exceeding ninety days, and requires no prior authorisation.[32] The situation of a resident, on the other hand, is precisely defined, under article 30bis of the OL, as requiring the person to possess a residence authorisation. Such residence may be temporary – from ninety days to five years – or permanent, meaning of indefinite duration.

To be granted a temporary residence authorisation, article 31 of the OL requires alien applicants to provide evidence that they have sufficient means to cover their living and other expenses, and those of their family where applicable, without needing to undertake any paid activity throughout the duration of their stay; or else that during such time they intend to take up employment or undertake self-employed activity and have obtained the requisite administrative authorisation therefore, or lastly, that they qualify for family reunion. Saving exceptions, permanent residence, on the other hand, can only be granted after the subject has lived in Spain continuously for five years.[33]

We shall now concentrate briefly on the case of temporary residence tied to the undertaking of paid employment,[34] since the normalisation process provided in the

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http://www.eu2005.lu/fr/actualites/communiques; also the press communiqués published after session no. 2642 of the Council of JHA Ministers held on 24 February 2005 at Brussels, and no. 2652 of 14 April the same year, both at *http://www.ue.eu.int/Newsroom.*

[32] Quite apart from the requirement of a visa to enter the country where applicable. On countries whose nationals are required to obtain a visa to cross the EU's external borders, see Council Regulation (EC) 539/2001 of 15 March 2001 establishing a list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (*OJEC* L 81 of 21 March 2001, pp. 1–7), amended by Council Regulation (EC) 2414/2001 of 7 December 2001 (*OJEC* L 327 of 12 December 2001, pp. 1–2) and by Council Regulation (EC) 453/2003 of 6 March 2003 (*OJEU* L 69 of 13 March 2003, pp. 10–11). See also the web page of the Spanish Ministry of the Interior, which shows a list of the countries whose nationals do not require a visa to enter Spain: *http://www.mir.es/sites/mir/extranje/control_fronteras/documentos_entrada.html#dina.*

[33] Article 32 of the OL.

[34] For cases of residence linked to the exercise of self-employed activities, see articles 58 to 62 of the implementing Regulation, and for the other two cases mentioned, see articles 34 to 37 regarding residence without paid economic activity and articles 38 to 44 regarding the case of residence for family reunion.

Third Transitional Provision of the RD, the main object of this study, is available only for this category of temporary residence. That is logical if we consider firstly, that most of the aliens living irregularly in Spain have come with the intention of taking up employment, and secondly that the measure is intended to bring into the legal labour market those aliens who are already in Spain working illegally. For that reason those wishing to benefit from the measure are required to demonstrate a real and effective link with the labour market.

2. General regime for temporary residence and work authorisations: hiring of aliens in unpopular occupations or on a quota basis

According to the general regime provided in the Regulation, application for an employee's residence and work authorisation may be made by aliens residing outside Spain and in possession of the requisite visa where applicable, and aliens who are resident or on study visits in Spain, without the need of a visa, and holders of a job-seeker's visa as established in the agreement on quotas. In any case, all alien workers living in Spain on an irregular basis are excluded.[35]

Leaving aside the special situations contemplated in the Regulation, such as temporary residence and employment for a fixed term or within the framework of trans-national provision of services, or activities for which no authorisation is required,[36] the granting of an employee's temporary residence and work authorisation is subject to prior application by the employer who intends to hire a non-resident alien worker.[37]

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[35] The duration of the authorisation will be one year in the first instance and may be limited to a geographic area and sector of economic activity as determined in accordance with the guidelines laid down for these purposes by the Secretary of State for Immigration and Emigration (Article 49.2 of the Regulation). In the case of resident aliens the duration of the authorisation will depend on how long they have previously been living in Spain in a regular situation (Article 49.3 of the Regulation). Regarding the exclusion of aliens in an irregular situation, see articles 50 g) and 77.2 of the Regulation.

[36] According to article 55 of the Regulation, authorisation in cases of fixed-term employment is for seasonal work (Article 42 OL); works or services for the assembly of industrial or electric plants, construction of infrastructures, buildings and electricity, gas, railway, telephone and other networks; temporary activities carried out by senior executives, professional sportspeople, performing artists and other groups as may be determined by order of the Ministry of Labour and Social Affairs; or, lastly, activities for training in and undertaking of professional practices. Authorisations of this kind are dealt with in Title IV Chapter I section 2 (Articles 55 to 57) of the Regulation. Having regard to transnational provision of services, see article 43 of the OL and Title IV Chapter I section 4 (Articles 63 to 70) of the Regulation. And finally, regarding activities for which no authorisation is required, see article 41 of the OL and articles 68 to 70 of the Regulation.

[37] Article 36.1 and 3 of the OL.

But the Regulation only recognises two circumstances in which an employer can hire a non-resident alien. The first is when the national employment situation permits hiring, in the case of an unpopular occupation, or else where the employer furnishes evidence of difficulty in finding employees to cover the vacancy. The second is by way of scheduled hiring of alien workers on the basis of quotas approved annually by the Government.

Having regard to the first case, it is envisaged that every three months, on the basis of the available information on management of the job offers submitted by employers to the public employment services, a catalogue of unpopular occupations will be compiled for each province and for Ceuta and Melilla. The inclusion of a given occupation in the catalogue will enable employers to make the appropriate application for a residence and work authorisation to cover the vacancy by hiring a non-resident alien, provided that all the other requirements for its granting are fulfilled. Similarly, when the public employment service certifies that an employer's efforts to cover a vacancy show that the position is a difficult one to fill, despite its not being classified as an unpopular occupation, it will be assumed that the national employment situation permits such hiring.[38]

Article 39 of the OL and Title V of the Regulation regulate the second of the circumstances referred to, that is hiring on a quota basis. Under the terms of these norms, in light of the national employment situation and taking the proposals of the Autonomous Communities and the most representative trade union and employers' organisations into consideration, the Government may approve a quota of alien workers.

The purpose of the quota is to facilitate programmed hiring of alien workers by setting a provisional number[39] of stable job offers and defining the characteristics of these. But in addition, the order establishing the quota may also set a certain number of visas for job seekers. Of this type of visas, some may be intended for children or grandchildren of native Spaniards, and others may be reserved for certain sectors of activity or occupations in a specific geographic area.[40]

In any event, hiring through the quota system does not apply to aliens already present or resident in Spain, since workers are to be selected in their countries of origin on the basis of blanket offers made by employers, with priority going to countries with which Spain has signed an agreement on the regulation and ordering of migratory flows.[41]

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[38] See article 38 of the OL and articles 48 to 54 of the Regulation.

[39] What makes this provisional is the fact that it can be reviewed in the course of the year to bring it into line with the evolution of labour market. As noted in RD 2393/2004, the idea of making the quota adaptable to the circumstances is to help move up from a simple numerical estimate to a concept that encompasses everything from the possibilities of training and selection at source (in which employers can play a part, see article 80.3 of the Regulation) to subsequent social intervention to facilitate integration.

[40] Articles 39.3 of the OL and 82 of the Regulation and article 39.4 of the OL and 83 of the Regulation, respectively.

[41] A case in point is Ecuador, the country of origin of the second largest contingent of

3. Authorisation of temporary residence and work authorisations in consideration of ties

As we saw, the basic idea underlying regulation of the granting of work authorisations to aliens in Spain is that the hiring be done in the country of origin, so that it is not possible in principle to hire aliens who are already living in Spain in an irregular situation. Nonetheless, an individual always has the possibility exceptionally of regularising his or her situation by seeking a temporary residence and work authorisation in consideration of ties as provided in article 31.3 of the OL and implemented by article 45 sections 2, 6 and 7 of the regulation implementing it. According to these sections, the Administration may grant a temporary work authorisation in consideration of ties, in three cases.

The first is employment, provided that the person has no criminal record in Spain or his/her country of origin[42] and produces evidence of having lived continuously in Spanish territory for at least two years and of having been in employment for not less than one year. The second is when an alien with no criminal record provides evidence of having lived continuously in Spain for at least three years and has a contract of employment lasting not less than one year, signed by the employer at the time of applying for the authorisation. In the latter case the applicant must also provide evidence of being the spouse, ancestor or direct descendant of other resident aliens, or else must present a report from the Local Authority where he/she is habitually resident demonstrating his/her social integration. Finally,

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aliens registered in Spain (492,000 according to provisional INE figures at 1 January 2005) after Morocco (with more than 500,000). On 29 May 2001 Spain signed an Agreement with Ecuador for the regularisation and regulation of migratory flows (provisional application of the Agreement *BOE* no. 164 of 10 July 2001, pp. 24909–24912). In addition, article 14.3 of that Agreement allowed the Government to carry out a campaign to regularise the situation of aliens of Ecuadorian nationality present in Spain irregularly. Spain has concluded agreements of this kind with other States apart from Ecuador, including Colombia, the Dominican Republic and Morocco in 2001 (provisional application of the Agreement between Spain and Colombia of 21 May, in *BOE* no. 159 of 4 July 2001, pp. 23724–23726; provisional application of the Agreement between Spain and Morocco of 25 July, in *BOE* no. 226 of 20 September 2001, pp. 35091–35093; and provisional application of the Agreement between Spain and the Dominican Republic of 17 December, *BOE* no. 31 of 5 February 2002, pp. 4414–4417, rectification in *BOE* no. 70 of 22 March 2002, p. 11561); with Romania on 23 January 2002 (*BOE* no. 289 of 3 December 2002, pp. 42170–42172); or more recently, with Bulgaria on 28 October 2003 (provisional application *BOE* no. 299 of 15 December 2003, pp. 44453–44455; and entry into force, *BOE* no. 81 of 5 April 2005, p. 11477) and with Peru on 6 July 2004 (Provisional application in *BOE* no. 237 of 1 October 2004, p. 32770–32771). On agreements of this kind, see Ripoll Carulla, S., "Spain's Bilateral Agreements on Foreign Workers: a New Instrument of Spanish Immigration and Development Policy", in *SYIL*, vol. VII (1999–2000), 39–49, pp. 42–47.

[42] It is worth noting that the requirement of a check of criminal records in the country of origin is a novelty introduced by the Regulation.

the children of a mother or a father who was originally Spanish may obtain a residence authorisation in consideration of ties. Such authorisations are valid for one year only, as are the work authorisations granted along with them in consideration of ties.

It must be stressed that the opportunity of obtaining a Spanish residence authorisation in consideration of ties has been extensively used and in practice has enabled numerous persons to obtain work authorisations. This is borne out by a Resolution of the Directorate-General for Regulation of Migrations of 23 April 2002 in which, precisely because of the problems of excess labour in certain provinces and sectors of activity caused at that time by the large number of work authorisations granted through this procedure, it was decided to expand the geographic validity of these authorisations from the applicant's province of residence or a specific sector of activity, to which they were restricted in principle, to the entire national territory and all sectors of activity.[43]

IV. THE REGULARISATION PROCESS CONTEMPLATED IN THE THIRD TRANSITIONAL PROVISION OF ROYAL DECREE 2393/2004

1. Background

As we noted in the Introduction, the Third Transitional Provision of RD 2393/2004 contains a temporary exception to the general rules for admission of alien workers laid down in the Regulation. The purpose of this provision is within a period of three months to permit the normalisation of the situation of immigrants who are living in Spain irregularly by allowing them to obtain a temporary residence and work authorisation.

The procedure for these purposes, regulated by the cited Third Transitional Provision and implemented by Order PRE/140/2005 of 2 February,[44] was set in motion on 7 February last, when both instruments came into force, and concluded on 7 May 2005.

Be it noted that this is not the first time that a special regularisation process like the one discussed here has been opened in Spain. Already during the Partido Popular government, precisely as a result of the establishment of a new aliens regime with the approval of OL 4/2000 of 11 January, the presence of a large number of immigrants in an irregular situation was taken into account, and it was decided to introduce extraordinary measures to regularise them. Thus, in its First

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[43] For the text of the Resolution, see Fernández Rozas, C., and Fernández Pérez, A. (Eds.), *Ley de extranjería . . ., op. cit.*, pp. 310–311.

[44] *BOE* no. 29 of 3 February 2005, pp. 3709–3723.

Transitional Provision the cited OL charged the Executive with the task of determining a procedure to allow what were then called residence or residence and work "permits"[45] to be obtained by aliens who had been in Spain continuously since 1 June 1999[46] and could produce evidence of having applied for a residence or work permit at any time or having possessed one in the last three years.

In obedience to that mandate, the Government approved Royal Decree 239/2000 of 18 February[47] laying down a procedure to implement the regularisation, further extending its sphere of application to asylum seekers whose request[48] had been denied, to relatives of those accepted under the procedure and to aliens who were relatives of EC residents or Spaniards.

Only a few months after the conclusion of the term allowed for regularisation under that procedure, following an election victory which gave the *Partido Popular* an absolute majority in parliament, OL 8/2000 of 22 December introduced the first thoroughgoing reform of OL 4/2000.[49] The fourth Transitional Provision of the new Organic Law provided for the initiation of a process to re-examine those regularisation applications which had been refused only for failure to produce evidence of having lived continuously in Spain since 1 June 1999. In pursuance of Royal Decree 142/2001 of 16 February establishing the requirements for these purposes, the competent administrative organs proceeded *ex officio* to re-examine such applications, for which they were allowed a period of three months.

2. Procedure

A) *Legitimation*

This latest normalisation process targets extra-Community nationals who are in Spain on an irregular basis but possess a real and verifiable link with the labour market. This is borne out by the sphere of application of the cited regulation, and particularly by the subjects who are legitimised for purposes of applying for normalisation, and by the requirements for applicants.

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[45] The sole additional provision of OL 14/2003 of 20 November ordains that all references to the term "permit" in OL 4/2000 be replaced by the word "authorisation".

[46] To accredit this, a certificate of registration in the municipal roll as in the 2005 regularisation process was not required; it was sufficient to present a copy of the passport, a registration voucher or a valid travel document along with the application.

[47] *BOE* no. 43 of 19 February 2000, pp. 7578–7581. Correction of errata in *BOE* no. 59 of 9 March 2000, p. 9696.

[48] Presented before 1 February 2000 (article 1.2 of the Royal Decree).

[49] Besides adding a preamble and seven new articles, OL 8/2000 amended practically all of the provision of OL 4/2000 and replaced the previous additional provision with two new ones. On that reform and the international legal context, and especially the Community context within which it took place, see Jiménez Piernas, C., "La comunitarización de las políticas de inmigración y extranjería: especial referencia a España", *RDCE* no. 13 (2002), 857–894, p. 858.

More specifically, except in the case of hourly-paid domestic service, it is up to the employers wishing to hire alien workers in that situation, or their legal representatives, to make the initial application for a residence and work authorisation on their behalf. For these purposes, the employer or his legal representative must appear personally before the competent organ to process the application.[50]

Having regard to domestic service, the regulations distinguish between two situations which are subject to different rules. On the one hand there is domestic service for a single employer or householder, which for purposes of applying for normalisation is the same as other types of paid employment. On the other hand there is domestic service on a part-time or occasional basis, carried on simultaneously for more than one householder. In the latter case it is up to the alien worker him/herself to present an initial application for residence and work authorisation, for which purpose he/she must make a personal appearance.

B) *Requirements*

Some of the requirements to qualify for this normalisation process are common to the two situations mentioned, while others are specific to each category.

a. *Common requirements*

Among the common requirements we would highlight first that the alien worker must have been registered in the municipal roll of a Spanish town for at least six months prior to the entry into force of the RD – that is, since 8 August 2004 at the latest – and must present a passport, travel document or registration certificate accrediting his/her continuous presence in Spanish territory throughout that period.

In addition, both in cases of part-time domestic service and in all other cases of paid employment, the services agreed or the conditions stipulated in the contract, as the case may be, must conform to the conditions of employment established by the current regulations for the same activity, occupational category and locality.

Again in all cases, the alien worker must have no criminal record entailing offences classified in the legal system, either in Spain or in the countries in which he/she has resided in the last five years; and also he/she must not have been barred from entering the country,[51] except where such prohibition is solely in connection

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[50] The personal attendance requirement, affecting both the employer and the alien worker, provided that the latter is in Spain, was introduced in the third Additional Provision of OL 4/2000 by OL 14/2003.

[51] As provided in article 26 of the OL 4/2000 and article 10 of the implementing Regulation, entry to Spain is prohibited for: aliens who have previously been expelled or in respect of whom an expulsion order has been issued (unless the procedure has lapsed or the limitation on the violation or sanction has expired), for the duration of the ban on entry imposed by the expulsion order; aliens for whom a return order has been

with an unenforced expulsion order issued in respect of infringements of stay entitlements or irregular working as provided in OL 4/2000.[52]

Finally, the worker must be guaranteed a minimum period of employment, which as a general rule is set at six months. In cases of paid employment where the employer presents the application, he must also demonstrate that there is a contract signed by the worker, setting forth his undertaking to maintain the employment for the said minimum period,[53] although logically the force of such a contract will be contingent on the worker's obtaining the requisite residence and work authorisation.

b. *Specific requirements for each category*

To obtain an authorisation in the case of paid employment other than hourly-paid domestic service, the employer applying must be registered in the appropriate Social Security register, must not be in arrears in respect of social security contributions and taxes, and where appropriate must provide evidence of possessing adequate financial, material and personal means with which to hire the worker. For

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issued and in respect of whom the ban on entry established by the return order still stands; those in respect of whom it has been learned through INTERPOL or any other channel of international judicial or police cooperation that they are wanted by the authorities of other States on criminal warrants for serious common crimes which constitute offences in Spain, and who may be arrested where appropriate; those whose entry is prohibited by international conventions to which Spain is a party (save exceptionally for humanitarian reasons or reasons of national interest); and finally, aliens who have been expressly forbidden by order of the Ministry of the Interior to enter the country because of activities contrary to Spanish interests or to human rights, because of known connections with domestic or international criminal organisations, or for other judicial or administrative reasons warranting such a measure, which persons may be liable to arrest where appropriate.

[52] Such infringements, which are considered very serious, are set forth in sections a) and b) of article 53 of the OL and refer to cases in which the worker's situation in Spanish territory is irregular through failure to obtain an extension to their stay, because they have no residence authorisation or it expired more than three months previously, unless they have applied for a renewal in due time; or where the worker is working in Spain without a work authorisation or a prior authorisation to work when he/she does not possess a valid residence authorisation.

[53] Nonetheless, there are some exceptions depending on the sector of activity in which it is proposed to work. For instance, in the agricultural sector the minimum period is to be three months; in construction and catering there is a maximum period of twelve months in which to honour the undertaking; in the domestic service sector where there is a single employer, there is a minimum of eighty effective working hours per month or forty hours per week, without prejudice to the number of hours that the parties agree the worker is to be at the employer's disposal. Finally, for part-time contracts the duration of the employment is to increase in proportion to the reduction of the working day, so that the sum of all the daily hours worked under different contracts of part-time employment concluded during the lifetime of the authorisation is equal to at least the minimum period stipulated as a general rule.

his/her part, the worker is required to possess duly recognised qualifications if necessary or to provide evidence of having the training required for the job that he/she is to do.

On the other hand, if the applicant engages in part-time domestic service, working simultaneously for more than one householder, provided that he/she is not one of the persons expressly excluded from the scope of application of the Special Regime for Domestic Employees,[54] he/she must satisfy the requirements established to qualify for that Regime. In particular, he/she must carry out exclusively domestic tasks in the home where the householder dwells, for an aggregate of at least thirty effective working hours a week distributed over at least twelve days per month, and must receive remuneration of some kind in return.

C) *Processing and effects*

If all the above-mentioned requirements are met, the employer – or the worker where appropriate – may present the requisite application to the competent organs, along with all the documents accrediting compliance with the requirements in each case and the identity of the employer or the householder of the home where the service is to be provided. Where applications are presented by the employer, they must be accompanied by a declaration from the latter that he is not in any of the situations causing denial of residence and work authorisation for employees provided in the Regulation.[55]

Because this is an exceptional procedure, applications are processed preferentially, and acceptance for processing automatically entails *ex* officio shelving of any other residence or residence and work application previously submitted in the name of that alien. The Government Delegate, or Sub-Delegate depending on whether the unit involved is a uniprovincial Autonomous Community or a province, must notify the interested party, whether the employer or the worker, of its decision within a maximum of three months as from the day following presentation at the appropriate registry.

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[54] The Special Regime for domestic employees expressly excludes relatives of the householder down to the second degree of consanguinity or affinity, save in exceptional cases; adopted or *de facto* or *de jure* foster children; persons providing services on a basis of friendship, benevolence or good neighbourliness; drivers of motor vehicles in the service of private individuals; and persons providing gardening or child-care services where such services are not part of the generality of domestic tasks.

[55] The reference is specifically to the causes of denial listed in sections d), e) and k) of article 53.1 of the Regulation, namely: having rendered the job posts it is sought to fill vacant in the last twelve months by dismissals considered unfair or void; having been sanctioned by firm decision in the last twelve months for violations classified as very serious in OL 4/2000, or for violations relating to aliens classified as serious or very serious in the consolidated text of the Law on infractions and sanctions in breach of the social order, approved by Legislative RD 5/2000 of 4 August; or having been convicted by firm decision of offences against workers' rights or against foreign citizens, unless the offences have been expunged from the record.

If notice is not received within that time it must be understood that the residence and work authorisation has been denied. A favourable resolution implies that the authorisation will be granted; however, this is not automatic but is conditional upon compliance with the requirement that the worker register or be registered with the Social Security. This step, and payment of the fiscal charges for granting of the authorisation, must be completed within one month as from notification of the resolution. Only then will the authorisation come into force;[56] this will last for one year and will cause the shelving of any outstanding expulsion orders and the revocation *ex officio* of any resolutions sanctioning the grantee for infringements of stay entitlements or irregular working as noted earlier.[57] The worker is then required to apply personally, within a maximum of one month thereafter, for an alien's identity card,[58] which will be issued for as long as the authorisation is valid.

3. Course of the process

One of the criticisms most commonly levelled at the exceptional normalisation process for immigrants analysed here has been that it is excessively strict to require a certificate from the municipal roll as proof that an alien worker has been continuously in Spanish territory for the six months required by the RD.

This criticism is founded on the fact that in practice, although registration in the municipal roll is open to all individuals regardless of whether their situation as regards residence in the municipality concerned is regular or irregular, and even despite the advantages attendant on registration,[59] many of the aliens resident in

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[56] Conversely, if one month elapses without the worker becoming affiliated or registered with the Social Security, the authorisation will be void and the applicant will be required to state the reasons for failure to satisfy the condition required, with a warning that if this is unjustified or the reasons adduced are not considered adequate, future applications presented as part of the normalisation process may be denied.

[57] It is interesting to note in this connection that during the course of 2004 the Ministry of the Interior was only able to enforce 26% of the expulsion orders issued for immigrants. More specifically, of 50,644 expulsion orders issued in 2004, only 13,296 were carried out, leaving a total of 37,348 immigrants for whom expulsion orders were issued in the last year (*El País*, 3 March 2005, p. 29).

[58] Article 4.2 of OL 4/2000, in the final wording after the amendment introduced by OL 14/2003, provides that: "All aliens to whom a visa has been issued or an authorisation to remain in Spain for longer than six months shall be issued with an alien's identity card, *for which they must apply in person* within one month of their entry in Spain or the granting of the authorisation as the case may be" (our italics). As the document warranting administrative authorisation to stay, the alien's identity card will conform to the terms of Council Regulation 1030/2002 of 13 June 2002 establishing a uniform model of residence permit for third-country nationals (*OJEC* L157 of 15 June 2002, pp. 1–7).

[59] Registration in the municipal roll entitles the alien to health care, education and other services available to any foreigner in Spain regardless of whether his/her situation is regular.

Spain in an irregular situation are not included in the population census. Failure to register has been the result of lack of motivation in some cases and fear of expulsion in may others, especially since the promulgation of OL 14/2003 of 20 November,[60] article three of which amended the *Local Government (Bases of Regulation) Act*, Law 7/1985 of 2 April, and introduced a new seventh Additional Provision allowing the Directorate-General of Police to access data from municipal rolls.[61]

Thus, practically since the outset of the process, various sources have been calling for flexibilisation of the requirement, to avoid numerous persons being excluded from regularisation despite having a contract of employment and having in fact been in Spain since the established date. Such calls have come from the Ombudsman, the Council of Attorneys, employers, NGOs and immigrants themselves, asking for the admission of documents other than the certificate from the municipal roll as proof of uninterrupted presence in Spain.

The Government for its part systematically refused to amend the Royal Decree. However, in response to the results of the first two months of the process, the Ministry of Labour announced the possibility of a meeting with the Committee for Social Dialogue to examine ways of achieving the flexibilisation called for on the basis of the legislation currently in force.[62] At that meeting it was agreed with the representatives of employers and unions to ask the Census Council for an assessment of the feasibility of resorting to a legal formula in existence since 1997, namely "registration by omission",[63] so that aliens who were not registered in the municipal roll before 8 August 2004 but were able to present reliable public documents demonstrating that they had been in Spain since then could apply for normalisation.

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[60] *BOE* no. 279 of 21 November 2003, pp. 41193–41204. Cited *supra.*

[61] According to the first paragraph of the cited additional provision: "Solely for purposes of the exercise of the competences established in the Organic Law on rights and freedoms and social integration of aliens in Spain with regard to the control and continuance of aliens in Spain, the Directorate-General of Police shall have access to data for aliens registered in Municipal Rolls, preferably via telematic media".

[62] According to the *Situation Report* made public by the Ministry of Labour and Social Affairs on 7 April 2005, two months after the commencement of the process, almost 310,000 applications had been received, 64.1% of which were presented in the Autonomous Communities of Madrid, Catalonia and Valencia (the Report can be found at *http://www.tt.mtas.es/periodico*). Although the Government judged the figure to be positive, there can be no denying that it falls far short of the 800,000 applications which were hoped for at the outset of the process. This is perhaps one of the reasons why the Executive eventually acceded to flexibilising the registration requirement.

[63] This formula is contained in the Joint Resolution of 1 April 1997 by the President of the National Institute of Statistics and the Director General of Territorial Cooperation issuing technical instructions to Local Authorities regarding management and reviewing of the Municipal Roll (*BOE*, no. 87 of 11 April 1997, pp. 11449–11473).

The eventual solution to this problem, which was set forth in a Resolution of the President of the National Institute of Statistics and the Director-General for Local Cooperation,[64] was not, as had been mooted, to allow retrospective registration in the municipal roll. In fact it was simply to accept the inclusion in municipal roll certificates requested for normalisation purposes[65] of a note specifying the documents accrediting that the applicant had been in Spain since the date established in the third Transitional Provision of the RD. This did not of course affect the date of registration, which would be that of application in all cases.

In order to avoid having Local Authorities apply different criteria, the abovementioned Resolution listed seven documents, which were the only ones that they would consider valid for the issue of certificates.[66] In addition, given the imminence of the conclusion of the process, the Resolution provided for the eventuality that a Local Authority might not be able to issue a certificate at the time it was requested. In such cases, the applicant should be issued with a duly-registered copy of the application to enable him/her to commence the procedure for normalisation of his/her situation within the time allowed.

It is also worth noting that the employers had previously succeeded in getting the Ministry of Labour and Social Affairs to accept a flexible interpretation of the requirements applicable to hiring in the agricultural sector for purposes of the

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[64] Resolution of 14 April 2005 by the President of the National Institute of Statistics and the Director General of Territorial Cooperation issuing technical instructions to Local Authorities regarding the issue of registration certificates accrediting residence prior to 8 August 2004 for aliens affected by the normalisation and registered later than that date (*BOE*, no. 91 of 16 April 2005, pp. 13164–13167). The Minister of Labour and Social Affairs expressed the hope that the Resolution of 14 April would affect "tens of thousands" of immigrants (see *El País*, 16 April 2005, p. 30).

[65] The regulation refers, of course, to certificates requested by aliens not satisfying the requirement of having been registered before 8 August. More specifically, the reference was to applications for certificates in respect of municipal roll registrations effected after 8 August 2004, or else applications for certificates presented along with an application for registration or inclusion by reason of omission in cases where the alien had never been registered before.

[66] The regulation specifically includes among the documents acceptable as accrediting presence in Spain: 1) Copy of the application for registration, pending or denied and duly registered in the municipality; 2) Health care card from a public health service showing the date of registration, or where applicable a certificate showing the date of first registration; 3) Copy of the application for schooling of minors, duly registered; 4) Copy of the application for social help, duly registered, certification of the Social Services report, or notice of granting of social help; 5) Employment registration document or certificate thereof issued by the Social Security; 6) Copy of application for asylum, duly registered; 7) Notification of decisions under the aliens regulations issued by the Ministry of the Interior. It is further required that these be original documents or certified copies, that they have been issued and/or registered by a Spanish Public Administration; that they contain the identification details of the interested party, and that they have been issued or registered or refer to acts or documents dated before 8 August 2004.

normalisation process. In support of greater tolerance in the deadlines, the agricultural employers, and also some Autonomous Communities such as Murcia, pointed at the time to the difficulties that had been caused by frosts in January and February, which had seriously affected harvests. As a result, with regard to the requirement obliging the employer to provide evidence of a contract of employment concluded with the worker in which the former undertook to retain the latter in employment for at least three months, allowance was made for the possibility, as in the catering and construction sectors, of the undertaking to hire materialising over three consecutive months or on aggregate within the period of one year.

4. Final assessment

The deadline for presentation of applications was midnight on 7 May 2005, by which time a total of 690,679 applications had been submitted. Of these, more than half came from only three Autonomous Communities: Madrid (171,012), Catalonia (139,485) and Valencia (107,012). As to the nationality of the applicants, a very large number were Ecuadorians (more than 20% of the total), followed by Romanians (over 17%) and Moroccans (almost 13%). The rest, each accounting for less than 10%, were Colombians, Bolivians, Bulgarians, Argentines, Ukrainians and others. Also, domestic service is the sector most implicated in regularisation, accounting for almost a third of all applications, followed by construction and then agriculture.

Upon conclusion of the term provided for completion of the regularisation process, the procedure for obtaining residence and work authorisations in Spain will have to be adapted to the general regime laid down in the Regulation. Thus, leaving aside the possibility, which remains open, of applications in consideration of ties, the Government has stressed that this is the last time that there will be a campaign of regularisation of the situation of aliens living irregularly in Spain and has given particular notice to employers that any measures adopted in future will be specifically designed to combat irregular employment.

In this connection it is intended to intensify work inspections and to prosecute and severely sanction offences by employers;[67] the unions have announced that they will be collaborating with the Government by reporting employers who fail to take the opportunity to regularise the situation of their workers.

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[67] On 12 May, on the occasion of a meeting with the Committee for Social Dialogue to report the outcome of the normalisation process, the Minister of Labour and Social Affairs presented the Action Plan of the Work and Social Security Inspectorate to combat irregular employment. The action plan had been announced in February, with the expectation that there would be almost half a million inspections by the end of 2005. To see the Ministry of Labour and Social Affairs press note of 12 May, go to *http://www.tt.mtas.es/periodico/Laboral/200505/LAB20050512_2.htm.*

V. COMPLIANCE OF SPANISH REGULATIONS WITH EU POLICY

One of the chief objectives pursued by the Government in enacting RD 2393/2004 of 30 December was to facilitate legal, orderly immigration while seeking at the same time to deal with the large numbers of irregular immigrants in Spanish territory. To that end, the sole article of the RD approves the Regulation implementing the OL which establishes the rules applicable to the admission of economic immigrants and seeks to flexibilise the regular channels of admission. In addition, to deal with the large numbers of immigrants actually living in Spain in irregular situations, the third Transitional Provision introduces an exceptional regularisation process. The question is: are such measures consistent with EU immigration policy?

First of all, the fact is that at this point in time a common EU immigration policy cannot be said to exist, especially as regards the question of migratory flows, where it has not yet been possible to reach agreement on the definition of a common legal framework. Nonetheless, given the complexity of the phenomenon of migration, the number of different interconnected aspects making it necessary to approach the subject from a variety of different perspectives at once, and the repercussions that any national measure adopted in this field will obviously have on the other Member States, it is most desirable that in the not-too-distant future, the work currently being done by the Commission produce agreement in the Council so that a Directive can be issued defining such a common legal framework.

For the moment, in the absence of a genuine common EU immigration policy, there are signs nonetheless of some movement towards definition of such a policy. To begin with for instance, it seems clear that a change of approach is needed to deal with the new situation – the new economic and demographic context – in which the EU has been immersed in the last few decades. Also, there seems to be little doubt that this brings with it, first and foremost, a need for proper regulation of economic immigration based on common criteria which will facilitate legal admission, including the analysis of economic needs and based upon collaboration with the countries of origin. It likewise seems clear that this is not the only way to put an end to the high level of irregular immigration in EU territory and that since irregular immigration and employment are mutually-fomenting phenomena, it is essential to supplement measures combatting irregular immigration with measures to deal with the submerged economy.

As regards regulation of the admission of economic immigrants in particular, both the practical and the theoretical approaches of the EU reveal certain generally-shared lines of action to which the provisions of the Spanish Regulation conform. For instance, like the draft Directive originally presented by the Commission, this Regulation is founded on the distinction between a general regime and certain special cases (such as fixed-term jobs or the provision of transnational services) and the channels it introduces for legal admission of workers are based on justified economic needs as determined by the national employment situation, alongside a

quota system. In addition, in response to reiterated calls from the ESC to deal with the demands of reality, it introduces a visa for job-seekers as a supplement to selection in the country of origin. Finally, it facilitates the application formalities by establishing a single procedure for residence and work authorisations and involves the employer in the processing by allowing the latter to present the application.

At a EU level regularisation processes are seen as a type of measure that is necessary exceptionally to deal with a situation that cannot readily be tackled in any other way, and a number of Member States have used measures of this kind. For its part, the ESC does not rule out recourse to regularisation as an instrument in the fight against irregular immigration. The Commission itself has highlighted some of its positive effects, such as the fact that it gives the State a greater degree of control over immigration in its territory, it brings a good number of aliens who had hitherto belonged to the submerged economy into legal employment, and it augments public revenue from taxes and Social Security contributions, which in turn facilitates the social integration of immigrants.

However, in terms of appropriateness for accomplishing the objective pursued – namely to put an end to irregular immigration – a regularisation process like the one considered here cannot be conceived as an end in itself, that is as an actual instrument for managing immigration. It must rather be considered as an additional measure, of an exceptional nature, within an overall programme of action to combat irregular immigration. An overall programme that provides more flexible legal channels of immigration, taking into account not only the needs of the labour market but also the possibilities of integrating nationals of third States, that awards priority to collaboration with the countries of origin, that simplifies the formalities for renewal of authorisations once granted, and above all that introduces follow-on control and punitive mechanisms to deal firmly with irregular employment, the principal stimulus for irregular immigration. This is the rationale behind the statements and warnings issued by the Ministry of Labour and Social Affairs regarding a forthcoming campaign of work inspections targeting employers who have not taken advantage of the opportunity to regularise the situation of their workers. Otherwise any mass regularisation initiative like the one analysed in this article becomes no more than a stopgap solution that will inevitably have to repeated at a later date – as witness the fact that in Spain such measures have become necessary on several occasions in the last five years.

Spanish Diplomatic and Parliamentary Practice in Public International Law, 2004

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Except when otherwise indicated, the texts quoted in this section come from the OID, and more specifically from the OID publication *Pol. Ext.* 2004 (*http://www.mae.es*), and from the International Legal Service of the Ministry of Foreign Affairs, whose collaboration we appreciate.

The following is a list of abbreviations related to the documentation of the Spanish Parliament used in the preparation of this Section (*http://www.congreso.es*, and *http://www.senado.es*).

BOCG-Cortes Generales – Boletín Oficial de las Cortes Generales. Cortes Generales. Serie A, Actividades Parlamentarias (Official Journal of the Spanish Parliament. Spanish Parliament. Series A, Parliamentary Activities).

BOCG-Congreso.D – Boletín Oficial de las Cortes Generales. Sección Congreso de los Diputados. Serie D, Actos de control (Official Journal of the Spanish Parliament. Congress of Deputies. Series D, Acts of Control).

BOCG-Senado.I – Boletín Oficial de las Cortes Generales. Sección Senado. Serie I, Boletín General (Official Journal of the Spanish Parliament. Senate. Series I, General Journal).

DSCG-Comisiones Mixtas – Diario de Sesiones de las Cortes Generales, Comisiones Mixtas (Official Record of the Spanish Parliament. Joint Committee Meetings).

DSC-C – Diario de Sesiones del Congreso. Comisiones (Official Record of the Congress of Deputies. Committee Meetings).

DSC-P – Diario de Sesiones del Congreso. Pleno y Diputación Permanente (Official Record of the Congress of Deputies. Plenary Sessions and Standing Committee).

DSS-C – Diario de Sesiones del Senado. Comisiones (Official Record of the Senate. Committee Meetings).

DSS-P – Diario de Sesiones del Senado. Pleno (Official Record of the Senate. Plenary Sessions).

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I. INTERNATIONAL LAW IN GENERAL

The XIV Ibero-American Summit of Heads of State and Government, held in San José (Costa Rica), 19–20 November 2004, approved a Final Declaration that included:

4. We reaffirm our commitment to International Law, to the purposes and principles enshrined in the Charter of the United Nations, respect for the sovereignty and legal equality of States, use of force in international relations, respect for territorial integrity, the peaceful settlement of disputes and the protection and promotion of all human rights.

5. We undertake to strengthen multilateralism by way of a comprehensive and integral reform of the United Nations, seeking efficiency, transparency, representation and democracy by updating and improving the United Nations system and its different bodies, its agencies and organisations, giving it the ability to fulfill its role in the prevention of threats, safeguarding international peace and security and to promote cooperation for social and economic development.

(. . .)

8. We reiterate our vigorous rejection of unilateral, extraterritorial application of laws and measures which contravene international law, such as the Helms-Burton Act and urge the Government of the United States of America to put an end to its application.

10. We confirm that education is a fundamental and inalienable human right which has as its object the full development of the human personality and to the strengthening of respect for human rights and individual liberties, a basic instrument to promote development and equity. Education that is democratic, accessible and of high quality is an essential foundation in order to achieve sustainable development, increase productivity, to profit from scientific and technological advances, to reinforce cultural identities and to consolidate the values of democratic and pacific coexistence, to reduce poverty and the social divide.

(. . .)

21. We undertake to strengthen Ibero-American cooperation in the sphere of education and to work together to fortify the different means and mechanisms of international cooperation, so that no country committed to achieving Education for All will be thwarted in this achievement by a lack of resources

(. . .)".

The Final Declaration adopted by the Heads of State and Government of Latin America, the Caribbean and the European Union at the III Summit held in Guadalajara (Mexico), on 28–29 May 2004, stated as follows:

". . . We underline our respect for and full compliance with international law and the purposes and principles contained in the Charter of the United Nations, including the principles of nonintervention and self-determination, respect for sovereignty, territorial integrity and equality among States, which together with the respect for human rights, the promotion of democracy and cooperation for

economic and social development are the basis for the relations between our regions. We strive to strengthen the respect for all these principles and to meet the challenges and seize opportunities of an increasingly globalised world, in a spirit of equality, respect, partnership and cooperation.

4. We believe that democracy, the rule of law and social and economic development are essential for peace and security in our regions. We will continue to strengthen democracy and enhance and consolidate democratic institutions in each of our countries.

5. We reiterate our commitment to the promotion and protection of all human rights: civil, political, economic, social and cultural rights, including the right to development and fundamental freedoms. We reaffirm our belief that human rights are universal, interdependent and indivisible. We recognise that the promotion and the protection of these rights, which belong to all human beings, is the responsibility of States.

6. We fully support the strengthening of the international system for the promotion and protection of human rights . . .

7. We are fully committed to provide coherent and effective support to those individuals, organisations or institutions, including human rights defenders, working for the promotion and protection of human rights, in accordance with international law and UN General Assembly Resolution 53/144 on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.

8. We reiterate that an effective multilateral system, based on international law, supported by strong international institutions and with the United Nations at its centre, is essential for achieving peace and international security, sustainable development and social progress.

(. . .)

14. We recognise that the strengthening of regional organisations is an essential means of enhancing multilateralism.

15. We reaffirm our commitment to continue efforts to maintain and enhance dialogue and consultation, where appropriate, in order to define common positions and joint actions between the two regions within the various UN bodies and in major UN Conferences.

18. We express our full support for the International Criminal Court as an effective means to combat impunity from the most heinous crimes of concern to the international community. The States Parties call on those countries which have not done so to ratify or accede, as applicable, to the Rome Statute.

(. . .)

51. We underline the importance of projected agreements between the European Union and the sub-regions of Latin America and the Caribbean, which together with existing agreements and those under negotiation, will allow us to continue to build on our bi-regional strategic partnership.

(. . .)

79. We recognise the importance of regional integration and we support projects designed to promote sustainable economic, social, cultural and human development on a regional basis. We shall continue to co-operate bi-regionally in the development and institutionalisation of the integration processes in Latin America and the Caribbean".

II. SOURCES OF INTERNATIONAL LAW

1. Treaties

Compliance with the Treaty of Peace and Friendship signed in 1870 by the then Spanish Republic and the Oriental Republic of Uruguay was the subject of a parliamentary question tabled in Congress, to which the Government replied on 7 January 2004 as follows:

"Article 8 of the Treaty of Peace and Friendship signed in 1870 by the then Spanish Republic and the Oriental Republic of Uruguay provides that 'Spanish subjects in the Oriental Republic of Uruguay and citizens of the Republic in Spain may freely carry on their trades and professions, possess, purchase and sell, wholesale or retail, all kinds of goods and properties, moveable and immoveable, remove all their assets from the country, dispose of them in life or after death and succeed thereto by will or *ab intestato*, in all cases in accordance with the laws of the country, in the same terms as are or may be used by subjects of the most favoured nation'.

'Neither may therefore be subjected to any attachment or retained with their vessels, crews, carriages and trading goods of any kind, for any expedition or for any kind of public service unless the interested parties are granted compensation of a previously-agreed amount'.

Notwithstanding the foregoing, it is noted that there is a General Treaty of Cooperation and Friendship between the Kingdom of Spain and the Oriental Republic of Uruguay, signed in Madrid on 23 July 1992, article 14 of which provides that 'subject to its own laws and in accordance with international law, either party shall grant to nationals of the other party such facilities for the undertaking of lucrative activities, in trades or professions, as self-employers or as employees, in the same conditions as nationals of the State of residence or employment as may be necessary for the conduct of such activities. The issue of work permits for employees and self-employed alike shall be free of charge'.

The criterion that has been followed as a consequence of the foregoing in respect of whether or not the national employment situation is to be taken into account in dealing with work permit applications by Uruguayan nationals is that article 14 of the said General Treaty remits to the terms of the laws in either State, albeit within the same framework facilities are provided for the pursuit of lucrative activities by nationals of both States on equal terms and subject to reciprocity.

Moreover, in response to the Supreme Court judgment (Contentious-Administrative Division, Section 4) delivered on 10 October 2002 in respect of Appeal in Cassation 2806/1998 regarding the applicability of article 8 of the bilateral Treaty on Recognition, Peace and Friendship of 1870, the Interior Ministry's Government Delegation for Aliens and Immigration requested a report from the Solicitor-General's Office-Direction of the State Legal Service of the Ministry of Justice. The latter issued a report on 17 December 2002, in which it opined that the Supreme Court ruling referred to legal situations arising prior to the new General Treaty of Cooperation and Friendship of 23 July 1992.

Therefore, as the report concluded, 'and unless the Jurisprudence takes a different view in a future interpretation, it would appear that the parties undertake to grant nationals of the other party facilities for pursuing lucrative trades or professions, to issue work permits free of charge and to apply the principle of reciprocity in the effective enjoyment of the facilities referred to, but they do not directly establish a right of free exercise of trades and professions as did the former Treaty of 1870'.

Also, on 24 September 2003 the International Legal Service of the Ministry of Foreign Affairs issued its own report on this issue, taking the general view, on the one hand that the most favoured nation clause contained in article 8 of the 1870 Treaty of Peace and Friendship with Uruguay is without effect as regards the specific regime that the State would be obliged to apply to Uruguayan citizens, inasmuch as neither the existing laws on aliens nor the treaties signed by Spain in this connection regulate a preferential regime for nationals of any third State, without prejudice to any benefits which, under article 12 of the current Organic Law 4/2000 of 11 January as reformed by Organic Law 8/2000 of 22 December on rights and freedoms of aliens in Spain and their social integration, are vouchsafed to nationals of countries having historical or cultural ties with Spain, chiefly Ibero-American nationals.

Then again, as the report says, considering the rules of International Law on successive treaties between the same parties on the same matter, particularly the 1969 Vienna Convention on the Law of Treaties, the above-cited article 8 of the 1870 Treaty between Spain and Uruguay would be applicable in that part which does not conflict with the provisions of the two later treaties between the same parties on the same subject, namely sections 3 and 5 of the 1961 Agreement to eliminate visas between Spain and Uruguay and article 14 of the 1992 General Treaty of Cooperation and Friendship between Spain and Uruguay, which legislation guarantees full applicability of the rules governing aliens to Uruguayan nationals as regards entering, staying and working in Spain. In short, in consideration of all the foregoing it takes the view that in work and residence permit applications submitted by Uruguayan nationals seeking access to our labour market, the applicable provision is that of article 70.1.1.1.b) of the Regulation Implementing the above-cited Organic Law on Aliens, approved by Royal Decree 864/2001 of 20 July, which makes it obligatory to manage the specific supply of jobs with the competent Public Employment Services

in order to see that the national employment situation is effectively considered in the processing of work and residence permit applications for employees, as provided in article 38.1 of the current Aliens Act'.

Also, on 1 July 2004 in reply to a parliamentary question regarding maintenance of the current Defence Cooperation Agreement between the Kingdom of Spain and the United States, the Government stated thus:

"The existing Agreement on Defence Cooperation between the Kingdom of Spain and the USA was approved in 1988; it was modified in 2002 by Protocol of Amendment approved by the Spanish parliament with the assenting votes of the vast majority of members, including members of the *Partido Popular* and *PSOE*.

The final provision of the Protocol of Amendment establishes a new eight-year term for the Agreement, starting on 12 February 2003, the date of notice of compliance with the respective constitutional requirements regarding ratification. Therefore, the term of the revised Agreement now expires on 13 February 2011.

The Agreement establishes an equal relationship between allies, which respects Spain's absolute sovereignty over the bases and spaces subject to the Agreement; for, as article 24 states, 'the Parties reaffirm that this Agreement on Defence Cooperation has been concluded subject to recognition of Spain's absolute sovereignty and control over its territory and airspace. The authorisations established in this chapter [relating to authorisations of use] shall therefore be applied in accordance with these principles of sovereignty and control'.

In his investiture speech, the Prime Minister announced that it was his intention to maintain close relations with the United States on a basis of mutual respect between two sovereign and friendly nations. As noted earlier, the terms of the Agreement reflect just such a relationship, and therefore the Government continues to support the continuance of the Agreement in the terms and conditions established.

(. . .)". (*BOCG-Congreso.D*, VIII Leg., n. 47, pp. 53–54).

Later, on 20 October 2004, the Prime Minister Mr. Rodríguez Zapatero replied to a question in Congress in Full Session regarding renegotiation of the Agreement with the Vatican. In this regard the Prime Minister stated as follows:

"With respect to the 1979 agreements with the Vatican, I believe the positions that the Government has sustained, its legislative initiatives, are perfectly compatible with them, especially as regards the right to a religious education. I think we can concur that these agreements guarantee the right to a religious education and do not constitute an obligation. That is what best sits with the spirit of the Constitution and that is what the Government has promoted. Secondly, agreements of an economic nature. The 1979 agreement established that the Catholic Church would declare its intention to secure for itself sufficient resources to meet its needs, and that in the meantime there would be a transitional period. That is where we are now, and the Government is in no hurry to

alter this transitory situation and to talk and negotiate with the Catholic Church. And finally let me state quite clearly, harking back to the initial idea, that the Government's conception of what a secular State means, and what a democratic society means, is very clear and has three guiding principles: firstly, the extension of citizens' rights, the extension of individual freedoms and respect for all religious beliefs; secondly, an essential principle, that faith is not a matter for legislation, faith is a matter for the conscience of every individual; and thirdly, the Government has no interest in any kind of confrontation; all it asks is that everyone respect the will expressed by this House. That is the law, and that is what counts in a democracy".

(*DSC-P*, VIII Leg., n. 41, pp. 1808–1809).

Finally, on 3 November 2004 the Prime Minister also replied to a question tabled in the full parliament regarding the possibility of consulting the Constitutional Court before ratifying the Treaty establishing the European Constitution:

"The Government has heard the calls from various political parties demanding that the Constitutional Court be consulted before the referendum is called, and in pursuit of consensus and agreement among all the political parties on a matter of this kind, the Government has listened and has decided make this consultation beforehand. I simply wish to make a point here. The date of the referendum and the referendum itself were agreed by all the political parties. The only entity to call on the Council of State – obviously it is the Government that has the power to do so – for a consultation as to the compatibility of the European Constitution with our own constitutional order and the proper legal means of incorporating the former to the latter has been the Government. No other political party had anything to say on the subject until the Government took this initiative. I simply wanted to make that clear here, since I think it is a point of some importance.

(. . .)

In any event, I repeat, the Government wants a consensus, the Government has listened and we are going to consult the Constitutional Court before calling the referendum, for which we shall be asking for the authorisation of this House".

(*DSC-P*, VIII Leg., n. 46, pp. 2035–2036).

III. RELATIONS BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

a) Transposition of Community Directives

On 23 September 2004, in response to a parliamentary question on the transposition of European anti-discrimination regulations, the Government reported:

"On the legal basis of article 13 of the Treaty Establishing the European Union, on 29 June 2000, the Council of Ministers of the European Union approved

Directive 2000/43/EC relating to the application of the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin and, on 27 November of the same year, Directive 2000/78/EC on establishing a general framework for equal treatment in employment and occupation.

(. . .)

Directive 2000/43/EC, and Directive 2000/78/EC, have been incorporated into the Spanish legal system, with Law 62/2003, of 30 December, on Tax, Administrative Measures, and Social Order (published in the *BOE* of 31 December). Law 62/2003, in its Title II, 'On Social Order', Chapter III, regulates the measures for application of the principle of equal treatment, and in its Title III concerned with 'personnel in the service of Public Authorities' amends specific revisions of the legislation applicable to civil servants and statutory personnel working in Public Authorities and the State public sector, in order to complete the transposition of the aforementioned Directives in this area".

(*BOCG-Congreso.D*, VIII Leg., n. 72, p. 119).

b) Enforcement of European Court of Justice Judgment of 9 September 2004

On 6 October 2004, the Minister for Home Affairs, Mr. Alonso Suárez, in reply to a parliamentary question on the Government plans in respect of the ECJ decision against Spanish regulations on recognition of the community driving licence, stated:

"Directive 1991/439 establishes an authentic driving licence for the community area which does not need to be changed when its holder moves to one of the European Union countries. Spain and Holland interpreted this directive and transposed it in a manner based on the principle that, although it did not change, registration of the licence was necessary. The European Commission lodged an appeal with the European Court against Spain and the Netherlands, who in this case agrees with us on this question, for obvious reasons, for failure to fulfil the precise transposition of this directive, and this appeal was upheld in a judgment of 9 September 2004 of the Second Chamber of the European Court of Justice.

Firstly, in compliance with the judgments, Spain must make the appropriate amendments to the Royal Decree of 30 May 1997, approving the General Regulations for Drivers, removing all references to obligatory registration of national driving licences of other countries of the European Union, as explained in the judgment. Secondly, and with more immediate consequences, we must proceed to shelve – if necessary – any cases of sanctions initiated as a result of the regulation, which must now be revoked in fulfilment of the Court's judgment. And thirdly, provincial centres issuing driving licences must be notified that the content of paragraph two of transitional provision 7 of the aforementioned regulation is now null and void.

(. . .)

I shall add a final question: it is practically impossible to require drivers in the European Union who come to live in Spain to provide notification of their change of address, which, as a result, almost immediately produces the practical impossibility of controlling the expiry of their driving licences, and the processing of any Traffic infringements. This concern has been conveyed by Home Affairs to the Ministry of Development in order to address this question, where it needs to be resolved, to the Council of Ministers of Transport of the European Union".

(*DSS-P*, VIII Leg., n. 15, p. 634)

IV. SUBJECTS OF INTERNATIONAL LAW

1. Self-Determination

a) Palestine

In reply to a parliamentary question as to whether the Road Map could be considered a valid instrument for peace in the Middle East at a Full Session of Congress on 2 June 2004, the Minister of Foreign Affairs and Cooperation, Mr. Moratinos Cuyaubé, stated as follows:

"In the opinion of the Spanish Government, the Road Map is still the initiative most likely to provide a way out of this impasse. . . . In short, the Road Map is the most appropriate initiative because, in the first place, it enjoys the support of all parties – of Israel, of the Palestinians, of the Quartet, and indeed of all the main international actors: the European Union, the Russian Federation, the United States and United Nations – and above all, because it adopts a gradual approach and its content has a political horizon which for the first time offers Palestinians the hope of achieving coexistence between two States with secure frontiers, the State of Israel and the State of Palestine, by the end of 2005. The two-State solution is therefore the solution backed by the Spanish Government. But the Spanish Government cannot simply confine itself to offering diplomatic support for the Road Map. In recent conversations with the Palestinian Prime Minister and the Israeli Foreign Minister, the Spanish Government and its Prime Minister had the opportunity to call for more active fulfilment of the Road Map, and to make this possible we shall be making all necessary diplomatic representations".

(*DSC-P*, VIII Leg., n. 14, p. 527).

Also, to a question tabled at a Full Session of Congress on 24 de November 2004 regarding the repercussions of the death of President Arafat for the Middle East peace process, the Minister replied as follows:

"The death of President Arafat is a great loss to the people of Palestine; nevertheless, as always in politics, such situations have their positive side, and the

positive side here is that it opens up a new phase – a phase for the Palestinian people, for the future Palestinian leadership, for its relations with Israel and for the search for peace in the Middle East. And it is from that perspective that the Spanish Government is working within the framework of the European Union. The essential priority at this moment is to strengthen Palestinian unity and the Palestinian leadership, and that can only happen . . . by means of democratic methods and systems – in short, through elections. This Government will therefore support the presidential elections that have been called for 9 May next, and at these elections there will be European observers, and hence also Spanish observers. In the second place, the Government of Spain, along with the members of the Union, is working on the plan presented by the Secretary-General and High Representative of the European Union, Mr. Solana, to guarantee security and reinforce the Palestinian security apparatus. Spain will also be a contributor in this respect. At the same time, we shall be taking part in reconstruction efforts and economic and financial aid to bring new hope to the Palestinian people. In addition, we wish to express our satisfaction at Prime Minister Sharon's initiative to withdraw from Gaza, and to that end this Minister, accompanied by members of this House, will be travelling to Israel, to the Palestinian territories and to Egypt on 1 to 5 December, specifically to promote the involvement of Spain and the European Union and explain what we can offer by way of solutions to a conflict to which we wish to see a happy conclusion".

(*DSC-P*, VIII Leg., n. 51, p. 2421).

b) Western Sahara

Appearing before the Senate Commission on Foreign Affairs and Cooperation on 27 September 2004 to report on Spanish foreign policy regarding the Western Sahara, the Minister of Foreign Affairs and Cooperation, Mr. Moratinos Cuyaubé stated as follows:

"(. . .)

In the last five months new circumstances have arisen, marking what we would describe as a new phase in the long process of ending the conflict in the Western Sahara, and it is vital that these circumstances be taken very much into account at the present moment in planning our future action. Of these I would mention three: first, the difficulties besetting application of the Baker Plan. Second, the resignation of special envoy James Baker in July and the appointment of Alvaro de Soto in his place. And third, the Spanish Government's commitment to increased political involvement in the question of the Sahara.

In our diplomatic action, we must therefore take these new circumstances into account, along with a number of other, more long-standing considerations. The first and essential one is to bear in mind that this is a regional dispute with international implications. Nevertheless, it is clear that despite the important regional and international ramifications, the international community has not always paid the Saharan conflict the attention it deserves, treating it as a minor issue.

This faint interest is and has long been reflected even in the United Nations Security Council. And that is why – at least in the opinion of the Government – it is Spain's responsibility to keep interest in that conflict alive and draw attention to its importance as an ineluctable factor determining the stability of North Africa, a zone that is of increasing and strategic importance for us.

The conflict in the Sahara puts at risk regional stability in North Africa in a broad, global sense, meaning more than the mere absence of armed conflict. At this moment it is – as it has been in the past – the chief obstacle to progress in the process of integration of the Maghrib and hence is a cause of what has been called the 'cost of no Maghrib' in political, economic, social and cultural terms.

North Africa currently faces major challenges and dilemmas, with their positive and negative aspects, regarding which rapprochement with the West in general and Europe in particular is a vital factor of progress. Of the negative aspects I would highlight the threat of terrorism, for which a desperate population that has yet to see any benefits from a slow economic take-off and reforms which are slow to gain momentum and give fruit create a spawning ground. Political, economic and social modernisation of the Maghrib is therefore a priority for the Spanish Government. The future of the Maghrib can no longer remain hostage to a dispute that is compromising the future of more than 60 million North Africans.

In the second place we would refer to the successive failures of the various plans and proposals adopted as solutions within the framework of the United Nations since the early 1990s and all in turn producing resolutions and reports – the Settlement Plan of 1991, the Houston Accords of 1997, the Framework Agreement of 2001, and the Baker Plan of 2003.

The first three never got anywhere owing to a combination of international and regional circumstances and internal policies of the parties and the neighbouring countries, which to a great extent have served as pretexts to mask the absence of a genuine political will to reach a solution.

Baker Plan II, presented in January 2003, has failed to materialise so far due to the impossibility of reaching a political agreement between the parties, and without such an agreement it is not possible to create conditions that will allow progress, for the same underlying reason that has caused all previous plans to founder.

Therefore, any attempt to impose a solution without consensus would simply plant the seeds of new problems for the future, thus setting back even further the ultimate goal of achieving real regional stability. Various internal, regional or international circumstances have supervened to determine that what seemed acceptable to one party at a given juncture is no longer so, and vice versa. For instance, the first Baker Plan, the framework agreement, was rejected by the Polisario Front, while Baker Plan II has not yet been fully accepted by Morocco. It is therefore important to become aware of these shifts whereby positions are developed to suit the current context, for such an exercise in

realism and respect for rights and principles can help to isolate the obstacles and eventually promote a genuine dialogue between the parties.

In short, such a dialogue is the main hope for any progress. It is not a new idea, but quite the contrary. It can be found in points 2 and 3 respectively of the regulatory parts of resolutions 1495 and 1541, all accepted and supported by the parties and by friendly helpers on the Security Council. . . . Clearly, only a political solution agreed by the parties, exclusively and hence essentially within the framework of the United Nations, and with the support of the countries in the region and other friendly nations, will it be possible to arrive at a final and fair settlement to the conflict in the Western Sahara.

The Government therefore considers that the present moment is crucial for the launching of this new phase, which I would wish to be definitive, and in which dialogue should prevail. In October the Security Council will place the question of the Western Sahara on its agenda as the extension of the MINURSO established by resolution 1541 comes to an end. By then the UN Secretary General will have reported on the situation to the Security Council on the basis of the initial contacts made in the region in September by Special Representative Mr. De Soto.

The Security Council must now set the course to be followed in the coming months. It is the Government's wish that the resolution adopted by the Council address two aspects: firstly, it should approve a renewal of the MINURSO's mandate so as to ensure that blue helmets are on the ground to observe the cease-fire and dissuade the parties from initiating any armed incidents; this should be for long enough to enable any diplomatic initiatives in this new phase to produce practical results. As far as the Spanish Government is concerned, six months would be the minimum.

Secondly, it should mandate Special Representative Alvaro de Soto to work with the parties to reach a political solution to the conflict; . . . Spain's position rests on the principle of the pursuit of a just and definitive solution, and above all one that conforms entirely to the principle of free determination for the Saharaui people and can be put to a referendum.

At the same time, . . . the Government has sought to constructively and actively assist in fostering dialogue between the parties in conflict in the Sahara, . . .

(. . .)

As I have said on more than one occasion, we do not see any conflict between a UN plan, which Spain supports, respects and seeks to apply, and a bilateral political agreement between the parties. The two actions are complementary.

This has been and continues to be the spirit of the diplomatic efforts made over these last months by the Prime Minister's office and the ministry which I head.

(. . .)

Spanish diplomacy will continue working to encourage a spirit of dialogue in the parties, and as regards the Security Council resolution it will start work

on that as soon as we have seen the Secretary-General's report to which I alluded. Within the Security Council, a small working group known as 'Friends of the Western Sahara', composed of Spain with the United States, France, the United Kingdom and Russia, will conduct the final negotiations and draft the said resolution.

(. . .)". (*DSC-C*, VIII Leg., n. 51, pp. 2–4).

On 5 October 2004, in reply to a question tabled in the Senate regarding its position on the conflict in the Sahara and the repercussions that the rapprochement would have on Morocco's claims, the Government stated:

"The position of the Spanish Government is one of active commitment. It is founded on three principles: there must be a just and definitive solution accepted by the parties; the right of the Saharaui people to free determination must be respected; and the solution must be arrived at within the framework of the United Nations.

The Government considers that the excellent relations of friendship and cooperation that it currently maintains with all the interested parties and countries constitute the best possible basis on which, through active, committed diplomacy, to promote a solution to the conflict in the Western Sahara that respects the principles I have referred to".

(*BOCG-Senado.I*, VIII Leg., n. 85, p. 20).

Finally, in reply to a question tabled in the Senate on 3 November 2004 regarding the Government's reasons for abstaining in the vote on the Resolution on the Western Sahara question approved by the Special Political and Decolonisation Committee (Fourth Committee of the United Nations General Assembly), the Minister of Foreign Affairs and Cooperation, Mr. Moratinos Coyaubé, said:

"(. . .)

All that happened in the vote on the United Nations Fourth Committee was that after ten years of consensus on the various resolutions, one country sought to force through a new draft resolution ignoring essential elements that the United Nations had approved in the last year. In these circumstances, given that we were not opposed to the substance of the draft resolution but to the manner in which that country presented it, the Government and all the European Union countries decided to abstain, and the proposing country subsequently expressed its understanding of that decision".

(*DSS-P*, VIII Leg., n. 19, p. 849).

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. Diplomatic and Consular Protection

a) Diplomatic Protection

Spain's representative, Mr. González Campos, made the following observations on the International Law Commission's draft articles on diplomatic protection to the Sixth Committee, during the General Assembly's 59th session:

> ". . . Generally speaking, the overall thrust of the draft articles on diplomatic protection was appropriate, although certain points of the draft articles and the commentaries still needed to be amended. The language of draft article 1 was not satisfactory because it did not define the basic elements of the subject matter; rather, the definition focused on measures that a State could take for the exercise of diplomatic protection, which gave rise to two adverse consequences. First, there was a reference to the procedures for the settlement of international disputes under Article 33 of the Charter of the United Nations and various General Assembly resolutions, as noted in paragraph 5 of the commentary. The reference to 'diplomatic action' covered any procedures employed by a State 'to inform another State of its views and concerns', a phrase which was unfortunate, since international practice showed that diplomatic protection consisted mainly of a State bringing a claim against another State concerning certain injuries to its nationals in order to compel that other State to abide by international law. Therefore, it was irrelevant, for the purposes of the definition, that the claim should be accompanied by a protest – although that was often the case – containing a request for an investigation into the facts or a proposal for other means of peaceful settlement. What was really relevant was that the State bringing such a claim espoused the cause of its nationals and stated as much. Second, as a result of the foregoing, the current language of draft article 1 did not distinguish between 'diplomatic protection' proper and other related concepts, such as diplomatic or consular assistance to nationals experiencing difficulties as a result of their detention or trial in another State, a situation where none of the criteria for diplomatic protection proper, such as the exhaustion of local remedies, could be invoked. That distinction was acknowledged by the Special Rapporteur in his fifth report when, in reference to article 8 C of the Treaty on European Union, he noted that it was not clear whether that provision contemplated diplomatic protection as understood in the current draft articles or only referred to immediate assistance to a national in distress. That distinction was not only a reality in daily practice but had been reflected in all recent decisions of the International Court of Justice, such as the LaGrand case and the Avena and Other Mexican Nationals case, where the Court had found that a State had obligations incumbent upon it under an international convention to render consular assistance without prejudice to the State of nationality

being able to exercise diplomatic protection later. From the two examples mentioned, it appeared that draft article 1 would require a more precise definition of diplomatic protection. To that end, he suggested the following wording for draft article 1: 'Diplomatic protection consists of formal action through which a State adopts in its own right . . .'; the rest of the paragraph would be the same as in the draft. That wording would underscore the fact that the essence of diplomatic protection was the communication through which the State of nationality made a claim for international law, in the person of its nationals, to be respected, thus distinguishing such protection from 'diplomatic or consular assistance' to nationals abroad.

61. The commentary on draft article 3, which established the basic rule that only the State of nationality was entitled to exercise diplomatic protection, except as provided in paragraph 2 which referred to draft article 8, under which diplomatic protection might be exercised in respect of stateless persons and refugees habitually resident in a State, was very brief. It was not consistent with the importance of the rule that the article established. For that reason, it should be expanded to include specific references to international jurisprudence, which had repeatedly affirmed that principle of customary law. Furthermore, it could be inferred from the language of the draft that the general rule set out in such judicial decisions, namely, that save for special agreements, nationality was obtained through a systematic interpretation of article 3, paragraph 1, of the draft read in conjunction with article 18. Nevertheless, the latter principle went further, since it excluded the application of the draft articles 'where, and to the extent that, they are inconsistent with special treaty provisions'. Therefore, a determination would have to be made as to whether the provisions of a special treaty were consistent with the draft articles, which could give rise to a degree of uncertainty and resulting conflicts of interpretation, a situation that would not be desirable. Conversely, if one were seeking assistance from the commentary on the draft, then it should be noted that it was only there that agreements on the reciprocal protection of investments had been taken into account; while that was certainly appropriate, there were other agreements that should have been included in the commentary.

62. Satisfactory amendments had been made to chapter III of the draft articles, concerning legal persons, since it went from article 9, dealing with the general rule established by the International Court of Justice in the Barcelona Traction case, to article 11, which included some exceptions for the protection of shareholders. Some doubts arose when the general rule was made more specific by requiring a connection between the company and the State. First, if with regard to the first condition the term 'formation' was used instead of 'incorporation' because it was a broader term, note should be taken of the confusion that might create in the legal systems of numerous States, since it was applicable to the 'other legal persons' referred to in draft article 13. For that reason, it would be better not to depart from the term used in the Court's deci-

sion. With regard to the second condition established in that influential decision, 'seat of its management' had been added to the condition of 'registered office' in article 9; that might be acceptable if 'management' were qualified as 'effective'. However, the addition of 'some similar connection' had taken things a step further; that should be deleted, since the recourse to similarity made that formulation too open, despite the fact that the commentary indicated the need for a connection similar to that of 'registered office' or 'seat of management'.

63. With regard to draft article 11, on the protection of shareholders, the negative wording which had been adopted was satisfactory, as were the cases envisaged in that exception to the general rule, which, according to the commentary, should be interpreted in a restrictive manner in order to prevent a plethora of international claims by different States. He had reservations with respect to paragraphs 9 and 10 of the commentary since they both cited the opinion, held by three judges of the International Court of Justice in the Barcelona Traction case, in favour of broader intervention by the State of nationality of the shareholders. That did not seem appropriate, since the repeated mention of a minority opinion weakened the rule embodied in that decision. Furthermore, it was not at all consistent with the conclusion reached in paragraph 11 of the commentary.

64. Finally, article 19 on ships' crews should be excluded from the draft because, among other things, it introduced a special case governed by the Law of the Sea (specifically, by article 292 of the United Nations Convention on the Law of the Sea) into a set of general rules. Furthermore, the introduction of that case meant a shift in the overall thrust of the draft, which upheld the general rule of diplomatic protection by the State of nationality while permitting an exception for the State of nationality of the ship; that would open up the possibility of double claims being presented. Nor would it be consistent with international practice, which held that such protection was normally exercised by the flag State".

(UN Doc., A/C.6/59/SR.18, pp. 12–13).

On 15 October 2004 in response to a parliamentary question, the Spanish Government explained the initiatives carried out to achieve the reopening and culmination of the 'Caso Soria' court case following the decision handed down by the Inter-American Human Rights Commission of the Organisation of American States (OAS):

"Following a long series of negotiations carried out during the course of 2002, the family members of Mr. Carmelo Soria and the Chilean Government reached a 'Compliance Agreement' concerning the recommendations laid down by the Inter-American Commission on Human Rights (Report 133/99 of 18 October).

The Inter-American Commission on Human Rights received a signed commitment from the Chilean Government dated 21 January 2003, took note of the said commitment and reserved the right to supervise compliance (Report 19/2003 of 6 March).

The Chilean Government has at all times kept the Spanish Government informed through its Minister of Foreign Relations regarding the steps taken in compliance with the different terms of the Agreement.

As for the delay concerning the compulsory validation by the Chilean Parliament of the Agreement between the Chilean Government and the United Nations to make compensation payment to the family of Mr. Soria, the Chilean executive explained that it will choose the moment deemed politically suitable to acquire the said validation.

The Government of Spain fully trusts that Chile will honour its commitments which, extending beyond the sphere of private matters, are international in nature. The Government of Spain shall likewise lend all necessary support to the Soria family in defence of its rights."

(*BOCG-Congreso.D*, VIII Leg., No 85, p. 99).

2. Nationality

On 5 November 2004, in response to a parliamentary question, the Spanish Government explained the result of the option granted to the survivors and family members of the victims of the 11 March terrorist attack to apply for Spanish nationality.

"1. To date 1,545 petitions have been received corresponding to 124 family members of the deceased and 1,421 injured.

2. In respect of the applications filed by family members of the deceased, a decision has been taken in 99 cases, 64 of which have been granted Spanish nationality while 35 cases have been dismissed for a number of different reasons (renouncement, the petitioner not included within the scope of Royal Decree 453/04 of 18 March on the concession of Spanish nationality to the victims of the 11 March 2004 terrorist attack, duplicate petitions, prior granting of Spanish nationality on the grounds of residence).

As for the request filed by those injured in the attack, the proceeding laid down in the aforementioned Royal Decree is more complex and requires compulsory accreditation from the Ministry of the Interior that the subject in question is indeed a victim of the attack. In this regard, 14 people have been granted nationality and 28 cases have been dismissed for the different motives already described.

3. The cases currently being processed (which cannot yet be resolved by the Ministry of Justice) are due to the following grounds: missing the mandatory report from the Directorate-General of the Police (article 222 of the Civil Registry Regulation), missing the report from the Ministry of the Interior accrediting that the subject was indeed injured in the attack (article 3.1 of Royal Decree 453/04) or pending documentaton requested directly from the interested parties (birth certificate of the petitioner, documentation justifying that the petitioner is an immediate family member of the deceased).

4. No ruling denying a petition has been delivered and in those cases in which the petitioner does not meet the criteria to be considered a victim laid

down in article 1 of RD 453/04, the case is dismissed and the interested party is duly informed."

(*BOCG-Congreso.D*, VIII Leg., No 99, p. 173).

3. Aliens

On 20 September 2004 in response to a parliamentary question, the Spanish Government offered the following data regarding the deportation of foreign nationals from 2002 to 2004:

"In response to the first four questions contained in the initiative referred to, please find attached Annex I with the data on the monthly figures corresponding to foreign nationals arrested, turned back at the border, pending return to their countries of origin and to deportation cases.

Having regard to the fifth question, the number of foreign nationals deported from Spanish territory by means of an administrative proceeding for infringement of Organic Law 4/2000 on the rights and liberties of foreign nationals in Spain and thier social integration, and who had a prior police record was as follows: 1,986 in 2002, 2,954 in 2003 and 1,361 in 2004 up to 31 May.

And likewise in respect of the sixth question raised, the number of foreign nationals deported from Spanish territory by reason of substitution of an enforceable prison sentence that otherwise would have been imposed was as follows: 606 in 2002, 978 in 2003 and 608 in 2004 up to 30 April.

And lastly, having regard to the seventh question, the number of foreign nationals, Community and non-Community members, who have been deported after having served a custodial sentence in Spain is found in Annex II.

ANNEX I

1. Foreign nationals arrested, by month, for attempting to illegally enter Spain using small boats in 2002, 2003 and 2004:

In 2002 the main countries of origin of those arrested were Morocco (8,120), Mali (2,197), Ghana (823), Nigeria (727) and Gambia (609).

In 2003 the main countries of origin of those arrested were Morocco (10,505), Mali (3,111), Gambia (932), Liberia (897) and Mauritania (602).

In 2004, up to 18 June, the main countries of origin of those arrested were Morocco (1,791), Mali (955), Gambia (586), Guinea (197) and Mauritania (164).

2. Foreign nationals denied entry at the border in 2002, 2003 and 2004:

In 2002, the main countries of origin were Ecuador (4,675), Morocco (3,011), Bolivia (856), Brazil (279) and Algeria (252).

In 2003, the main countries of origin were Ecuador (4,950), Morocco (4,682), Bolivia (871), Venezuela (590) and Brazil (584).

In 2004 up to 14 June, the main countries of origin were Brazil (1,006), Morocco (895), Bolivia (378), Venezuela (362) and Romania (179).

3. Foreign nationals pending deportation to their countries of origin in 2002, 2003 and 2004:

In 2002, the main countries of origin were Morocco (13,564), Romania (152), Ecuador (92), Russia (39) and Algeria (33).

In 2003, the main countries of origin were Morocco (12,710), Ecuador (178), Romania (109), Bolivia (104) and Russia (80).

In 2004 up to 14 June, the main countries of origin were Morocco (3,378), Romania (62), Bolivia (37), Russia (36) and Brazil (30).

4. Deportation proceedings initiated in 2002, 2003 and 2004:

(*) Data up to 30 April.

In 2002, the main countries of origin were Morocco (10,169), Romania (4,713), Ecuador (4,004), Colombia (3,528) and Algeria (3,465).

In 2003, the main countries of origin were Morocco (11,125), Romania (7,656), Ecuador (6,077), Colombia (3,039) and Algeria (2,077).

In 2004 up to 30 April, the main countries of origin were Morocco (4,013), Romania (3,264), Ecuador (2,201), Colombia (814) and Mali (729).

2002

Province/ Island	Month												
	Jan.	Feb.	March	April	May	June	July	August	Sept.	Oct.	Nov.	Dec.	Total
Almería	13	77	58	106	175	72	133	193	85	89	30	67	1098
Cádiz	12	37	160	270	245	57	159	609	1369	865	376	213	4372
Ceuta	0	0	90	43	14	31	10	0	53	0	0	0	241
Fuerteventura	423	209	471	450	367	598	358	909	1077	980	648	1046	7536
Granada	5	0	36	23	13	127	49	0	205	86	0	216	760
Lanzarote	141	147	189	178	106	132	122	167	341	186	151	115	1975
Las Palmas	28	0	1	0	0	0	0	0	59	18	9	249	364
Málaga	25	0	0	17	0	36	78	0	69	44	30	20	319
Melilla	0	0	0	0	0	0	0	0	0	5	0	0	5
Total	647	470	1005	1087	920	1053	909	1878	3258	2273	1244	1926	16670

2003

Province/ Island	Month												
	Jan.	Feb.	March	April	May	June	July	August	Sept.	Oct.	Nov.	Dec.	Total
Almería	69	6	101	34	129	167	146	770	357	301	28	35	2143
Cádiz	281	164	87	158	139	458	857	1199	762	758	172	0	5035
Ceuta	0	0	50	0	0	0	0	12	1	0	0	0	63
Fuerteventura	440	301	497	328	557	473	222	895	714	1464	680	656	7227
Granada	60	0	57	105	103	155	281	465	521	311	44	3	2105
Lanzarote	120	98	163	166	6	86	15	237	268	317	82	255	1813
Las Palmas	26	0	0	0	15	0	0	50	24	39	10	16	180
Málaga	26	4		19	33	45	56	37	51	82	33	42	428
Melilla	0	0	0	0	0	0	10	0	0	0	0	0	10
Murcia	0	0	0	0	0	4	0	0	0	0	0	0	4
Tenerife	7	28	0	12	11	0	14	1	37	0	48	11	168
Total	1029	601	955	822	993	1388	1601	3665	2735	3272	1097	1018	19176

2004 (until 18 June)

	Month												
Province/ Island	Jan.	Feb.	March	April	May	June	July	August	Sept.	Oct.	Nov.	Dec.	Total
Almería	117	63	61	133	247	42							663
Cádiz	8	26	6	36	67	12							155
Ceuta	0	0	0	0	5	4							9
Fuerteventura	769	352	246	421	360	391							2539
Granada	20	29	66	242	193	31							581
Ibiza	0	0	4	0	0	0							4
Lanzarote	86	159	0	52	0	30							327
Las Palmas	10	34	4	37	0	0							85
Málaga	73	0	0	0	58	38							169
Melilla	0	0	0	0	8	0							8
Tenerife	114	0	0	0	0	0							114
Total	1197	663	387	921	938	548	0	0	0	0	0	0	4654

	2002	2003	2004 (until 14 June)
January	794	1229	791
February	648	1630	815
March	725	1638	795
April	775	1182	658
May	865	1256	941
June	820	1614	381
July	693	1454	
August	855	1567	
September	1219	823	
October	1266	837	
November	1512	742	
December	1526	778	
Total	11698	14750	4381

	2002	2003	2004 (until 14 June)
January	1144	960	635
February	769	526	548
March	913	878	686
April	1139	790	873
May	891	772	726
June	1034	886	306
July	789	1396	
August	1889	2279	
September	2168	2366	
October	1497	1452	
November	895	773	
December	1147	606	
Total	14275	13684	3774

	2002	2003	2004 (until 14 June)
January	2610	4097	5601
February	2607	4453	4666
March	2658	4090	4967
April	3037	3304	4461
May	3129	3838	
June	3304	3738	
July	3105	3197	
August	3172	3483	
September	3827	4431	
October	5074	6042	
November	4168	5507	
December	3440	4421	
Total	40131	50061	19695

ANNEX II

7. Community and non-Community foreign nationals deported after having served a custodial sentence in Spain:

2003
Parole: 350
Full release: 414
2004 (January/February/March/April)
Parole: 105
Full release: 117".
(*BOCG-Congreso.D*, VIII Leg., No 69, pp. 271–275).

On 30 July 2004 in response to a parliamentary question, the Spanish Government explained the measures it envisaged to encourage the Kingdom of Morocco to comply with the agreements signed regarding illegal immigration with special reference to the measures concerning family regrouping of Moroccan minors who are under protection in the Autonomous Community of the Canary Islands, specifically on the Island of Fuerteventura (Las Palmas):

"Of course the readmission of illegal immigrants to their country of origin has always been an important chapter in Spanish-Moroccan relations. In this regard it should be pointed out that as normal practice Morocco readmits Moroccan nationals who are illegal in Spain.

This situation can be improved in general terms, however, on the Moroccan side especially with reference to the terms of the Agreement on the movement of persons, transit and readmission of foreign nationals entering illegally signed at Madrid on 13 February 1992 and which refers to nationals of third countries (except nationals from countries of the Arab Maghreb Union). Although greater collaboration has been observed over the last several months from the Moroccan side, both parties should strive to further this improvement in the near future.

The current attitude from the Moroccans is greater involvement. This year (2004) to date they have readmitted some Sub-Saharan Africans arriving to Spain by way of Morocco and contacts should continue with a view to making further progress in this area of cooperation through ongoing and standard compliance with the Agreement.

Having regard to the situation of non-accompanied Moroccan minors, another subject concerning the Government, it should be pointed out that Spanish-Moroccan collaboration on this aspect is based on the Memorandum of Understanding subscribed to in December 2003 and on the commitments announced during the visit made by the President of the Government to Morocco this past 23 April agreeing to pay special attention to the issue of non-accompanied minors keeping the best interests of the said minors in mind in any decisions taken.

The idea of creating care centres for Moroccan minors repatriated from Spain was raised. This would apply to minors whose families cannot be located or that are not in a position to take charge of them.

The aim here is, in addition to economic support, to provide the said centres with qualified personnel to so that the minors can receive suitable vocational training during their stay there. The Moroccan minors from the mainland and from the Canary Islands will benefit from this measure".

(*BOCG-Senado.I*, VIII Leg., No 60, pp. 3–4).

VI. STATE ORGANS

In reply to a question tabled in Congress on 7 January 2004, the Government explained why it had ordered the withdrawal of civilian personnel from the Spanish embassy in Iraq:

"The Spanish embassy in Baghdad has remained open the whole time, manned by the two diplomats posted there, some of the auxiliary staff, and the security staff. In view of the change in the Chancery headquarters, it was decided provisionally to move some of the non-diplomatic staff posted there. These have since gradually resumed their normal posts. Measures of this kind are adopted in response to developments in the situation on the ground, and it is therefore necessary to constantly review that situation and the steps decided on for the protection of the personnel posted there. The Ministry of Foreign Affairs continuously monitors developments in the situation in Iraq and is in permanent contact with the Spanish Embassy in Baghdad".

(*BOCG-Congreso.D*, VII Leg., n. 650, pp. 335–336).

Appearing before the Congress Foreign Affairs and Cooperation Commission on 20 October 2004 to report on the plans for foreign service reform, the Under-Secretary of Foreign Affairs and Cooperation, Mr. Calvo Merino, stated as follows:

". . . The first step in this direction was taken on 25 June last, when the Cabinet resolved to set up a commission for comprehensive reform of the foreign service within the Ministry of the Presidency. Its specific mission is to pass on to the Government, within a maximum of twelve months, a report containing proposals for improvement of the foreign service and for more efficient accomplishment of its purposes.

(. . .)

The functions of the Spanish services abroad have been changing rapidly since the nineteen-eighties, when Spain formally joined the ranks of European Community members and NATO and began to take a much more dynamic and prominent part in international affairs than it had hitherto. This formal assimilation has since prompted a laudable qualitative and quantitative increase in our country's international activity, but that has not been matched by adaptation of our instruments of action abroad. Indeed, a large proportion of these instruments

took shape before the advent of the present constitutional regime and reflect a conception of our foreign policy characterised by a certain lack of transparency and absence of democratic control. In a word, it was a foreign policy conceived as the work of specialists rather than as an expression of the democratic will of the citizens.

The necessary reinforcement of our presence abroad in the form of embassies, consulates, commercial offices and cultural centres, and in international organisations, has required the deployment of resources, but this has not been accompanied by a debate about the instruments of overseas action that we need. . . .

What is most important is that we are in time to seriously address the root of the problem, and that the radical change in Spain's role on the international stage must be accompanied by conscientious planning and appropriate means. Confined to a framework of action that some consider inadequate, the functioning of services overseas is still subject to the general internal administrative regime. Greater flexibility in matters of overseas procurement would therefore be advisable and welcome, subject to the necessary controls, since the complex requirements arising nowadays are sometimes very difficult to satisfy, especially in countries where our diplomatic representatives discharge their duties within highly complicated contexts. (. . .)

But more serious is the problem of coordination that this poses. Such an extraordinary proliferation of international activity is not peculiar to Spain. The sphere of overseas action has become progressively globalised and enriched, and foreign ministries cannot be expected to handle the resulting international relations on their own, in this or in any other country. So, although Decree 632/1987 restated the principle of unity of action abroad, for which heads of missions are expected to watch, in day-to-day practice they are restricted by the various administrative regimes applying to civil service personnel abroad, who may be posted in the same embassy but report to different ministerial departments. This is particularly serious as regards information, assessment and action proposals, and it is essential that we improve fluidity of communication, both from mission heads to sector counsellors from the different ministries and vice versa.

I neither can nor ought to anticipate the findings of a commission on which there are representatives of practically every ministry and which is under the aegis of the Ministry of the Presidency, but I can try to briefly sketch some of the subjects which I believe they will address.

Firstly, there is the particular nature of the foreign service. . . . this particularity really merits regulation with the rank of law which recognizes and provides means of action to deal with an undeniable fact, namely the need to operate effectively and efficiently in over a hundred different legal, political and cultural contexts. Our action abroad is subject to formalities and precautions imposed by rules which in many cases were conceived for domestic situations and which on occasions are difficult to comply with in the variegated legal contexts in which some of our diplomatic representatives work.

Secondly, there is the need for adequate human and material resources for overseas operations which tend to be increasingly ambitious but come up against constraints which prevent them from accomplishing the objectives set for them. . . .

And we cannot ignore the issue of overseas action of the autonomous communities. It hardly seems possible to carry on as if our regionally-structured State were still the old centralised State which has happily ceased to be. Constitutional Court judgment 165/1994 provided a satisfactory interpretation of article 149.1.3 of the Constitution and paved the way for active participation by the autonomous communities in overseas action, an issue that needs to be analysed and debated. . . .

For the rest, the commission will no doubt address such issues as the professional classification of foreign service staff, the need for continuous training, recruitment of personnel and the criteria that are to govern this, some of which could be considered obsolete today in a world characterised by growing democratisation of diplomatic corps. . . .

Finally, it will surely examine the need to reinforce the principle of unity of action abroad, with a view to coordinating the myriad agents operating on the international stage in such a way as to ensure that their various activities are synergic, and to prevent muddle.

It is also essential to establish a closer link between the work carried on by this House and the Senate, especially in specialised commissions like the Foreign Affairs Commission, the Cooperation Commission and the Joint Commission for the European Union, and the definition, follow-up and assessment of our foreign policy. Foreign policy has not only become a central aspect of our political debate, but its first forum must be in Parliament, . . .

Alongside the work of the commission the Ministry of Foreign Affairs and Cooperation will have to initiate a process of operational reorganisation so as to become a provider of special services to the Government, the Congress and Senate, the economic and business world, the trade unions, non-governmental organisations and citizens – in short, civil society as a whole.

Comprehensive reform of the foreign service is a perennially-postponed task of State, an outstanding issue for our democracy, in which the intervention of Parliament will be crucial.

(. . .)". (*DSC-C*, VIII Leg., n. 117, pp. 2–4).

VII. TERRITORY

1. Territorial Jurisdiction

Note: See VIII. Seas, Waterways, Ships

2. Colonies

a) Gibraltar

Appearing before the Congress in Full Session to report on the European Council held in Brussels on 17 and 18 June 2004, and referring to the draft Constitution approved for the European Union, the Prime Minister Mr. Rodríguez Zapatero stressed in connection with Gibraltar that:

> "A declaration has been adopted which – after first stressing that the Treaty is to apply to Gibraltar as a European territory whose external relations are the responsibility of a Member State, namely the United Kingdom – clearly states that this does not in any way alter the respective positions of Spain and the United Kingdom in this matter . . .".
>
> (*DSC-P*, VIII Leg., n. 20, p. 799).

In reply to a parliamentary question tabled in the Senate regarding the Government's position on the claim of sovereignty over Gibraltar, the Second Vice President and Minister of Economy and Finance, Mr. Solbes Mira, reported:

> "The process of negotiations over Gibraltar commenced with the Lisbon Declaration of 1980, implemented four years later in a joint communiqué issued at Brussels on 27 November 1984, which specified that issues of sovereignty would be addressed. And it talks about issues plural. This refers on the one hand to the isthmus and on the other hand to the rock, which was ceded by the Treaty of Utrecht.
>
> Through the joint Brussels communiqué the parties agreed, in their mutual interests, to cooperate in various fields, and periodic meetings between the respective Foreign Ministers were institutionalised. The local authorities of Gibraltar joined in the process until Joe Bossano was appointed chief minister. Since Bossano became chief minister of Gibraltar, the local authorities have not taken any further part, and that is undoubtedly a major setback for the Brussels Process set in motion in 1984.
>
> From 1984 to 1997 the Foreign Ministers of Spain and the United Kingdom met every year. There was no meeting in 1998 at the request of the United Kingdom, which adduced a work overload due to its Presidency of the European Union. And no meetings took place in 1999 or 2000.
>
> Only the political parties of Spain have always been unanimous in supporting Spain's claim to Gibraltar and the Government's strategy irrespective of their ideological position, since this is viewed as a question of State.
>
> Let me just note two examples in support of what I have just said. On 24 February 1998 the Congress Foreign Affairs Commission approved a Green Paper urging the Government to reiterate the offers to the United Kingdom of a period in which sovereignty could be exercised jointly by the two countries pending the eventual return of Gibraltar to Spain. On 3 April 2001, also under the previous Government, another Green Paper was approved urging the

Government to pursue a dialogue with the United Kingdom within the framework of the process initiated by the governments of both countries with the joint Brussels communiqué of 1984 for resolution of the issues of sovereignty referred to, and to that end the United Kingdom was urged to call a new bilateral ministerial meeting in the near future.

On 26 July 2001, ministers Josep Piqué and Jack Straw met in London. At that meeting, the Brussels Process was relaunched after having been in abeyance since 1997. These are the advances you referred to. In opposition, the Socialist Party loyally supported that relaunch. Both ministers confirmed that involvement of the Gibraltarians was an important requisite for progress in the Brussels Process and that they would welcome the attendance of the chief minister of Gibraltar at subsequent ministerial meetings. Unfortunately, such Gibraltarian participation failed to materialise with the previous Government, and that undoubtedly influenced the final outcome.

On 20 November 2001 a further ministerial meeting was held in Barcelona, and in the joint press communiqué both ministers evinced great satisfaction at the progress achieved and announced their intention to conclude a global agreement before the summer of 2002. In this joint communiqué they added that the common objective of Spain and the United Kingdom was to attain a future in which Gibraltar would enjoy more internal self-government and the opportunity to benefit fully from the advantages of normal coexistence with the neighbouring region. The guiding principle was the building of a secure, stable and prosperous future for Gibraltar, which should be endowed with a modern, stable status consistent with Spain's and the United Kingdom's common membership of NATO and the European Union.

The communiqué stressed that the voice of Gibraltar must be heard and that the invitation to Gibraltar's chief minister to attend future Brussels Process ministerial meetings had been reiterated. Both ministers, Messrs. Piqué and Straw, gave assurances that the chief minister's voice would be fully respected and that he would have the opportunity to contribute fully to the negotiations.

The last ministerial meeting in the Brussels Process to be held by the previous Government took place on 4 February 2002. Both ministers reaffirmed the wide-ranging set of commitments accepted at the earlier ministerial meetings in London and Barcelona and repeated their invitation to Gibraltar's chief minister to attend future meetings, so that he himself, and through him the people of Gibraltar, could join in the dialogue and make contributions to the benefit of Gibraltar. They added that the chief minister was warmly invited to participate on the basis of the formula 'two flags, three voices', with his own, distinct voice within the British delegation.

We come next to a key point, that is 26 June 2002. At a working dinner in London, ministers Piqué and Straw agreed to convene a formal meeting of the Brussels Process for Friday 12 July, in London. By the end of that working dinner the positions of Spain and United Kingdom had come very close together. Indeed, in the documents under negotiation, only three paragraphs remained

unresolved; these concerned three major issues – the final issues – namely the principle of consent of the people of Gibraltar, the duration of the agreement and command of the naval base. At that point, however, there was a change of minister in the Spanish Foreign Affairs department and the newly appointed minister declined to attend the meeting of 12 July 2002. Nonetheless, on the same day, 12 July, the British Foreign Secretary Mr. Straw made a speech about Gibraltar in the House of Commons, in which he asserted that Spain and the United Kingdom ought to share sovereignty over Gibraltar.

And in fact joint sovereignty was the formula negotiated by ministers Piqué and Straw, although Spain entered into these negotiations on the understanding that nothing is agreed until everything is agreed. In this way we were able to leave the mode of the global solution that would finally end the colonisation of Gibraltar open until the end.

From the summer of 2002 until the formation of the new government in the spring of 2004, the previous Government took part in no further ministerial meetings of the Brussels Process. The question of Gibraltar was not addressed again in any depth at ministerial level until the present Minister of Foreign Affairs, Mr. Moratinos . . ., met Foreign Secretary Straw in Madrid on 27 October 2004.

At the ministerial meeting in Madrid, the dialogue was resumed. A joint communiqué was issued referring to the creation of a new forum of dialogue with an open agenda on Gibraltar, in which Gibraltar would have a voice of its own. The rules for this dialogue will be agreed by all the parties involved. The fact that the new forum has an open agenda implies that whenever it judges the time right, the Spanish Government can place the negotiation of issues of sovereignty over Gibraltar on the agenda.

In the same communiqué the Minister of Foreign Affairs noted the intention of promoting local cooperation between Gibraltar and the surrounding area. Both ministers welcomed the initiative to set up a joint committee of the Government of Gibraltar-Association of Townships of the Gibraltar Area with a view to encouraging the identification and implementation of mutually beneficial projects in the sphere of local cooperation and voiced their support for the initiative in light of its intrinsic interest and the climate of mutual trust that it may help generate.

The Madrid meeting placed some stress on cooperation, which in the view of this Government possesses intrinsic value. In this connection it was agreed to explore the possibilities of reaching an agreement on Gibraltar airport using formulae that are acceptable to both sides. It was further agreed in Madrid to set up a technical working group to examine and exchange information regarding pensions of former Spanish workers in Gibraltar. This group is expected to start work shortly.

The communiqué noted that in the view of the Spanish Government, local cooperation falls within the context of objectives relating to sovereignty over Gibraltar. This is a very important sentence, and I would draw the Honourable

Member's attention to it. It makes explicit reference to the Spanish Government's objectives regarding sovereignty over Gibraltar. Sovereignty is a fundamental element of this Government's strategy concerning Gibraltar, as regards both the rock and the isthmus. On 1 November last, the chief minister of Gibraltar, Mr. Caruana, acknowledged to the territory's Legislative Assembly that issues of sovereignty have a prominent place in the Spanish Government's strategy. Specifically Mr. Caruana stated as follows – and I quote – 'It is our understanding that Spain has not renounced sovereignty, that it professes its resolve not to do so and that it will take care in the forthcoming cooperation process and in any process of dialogue to avoid taking any steps that might prejudice its demand of sovereignty'. And he added: 'It is our understanding that for Spain, even cooperation falls within the context of its objectives concerning sovereignty over Gibraltar. Spain is free to have and to pursue whatever objectives it may choose' – end of quote.

Subsequently, in an interview granted to the newspaper ABC on 8 November last, Mr. Caruana once again repeated – and again I quote – 'In a dialogue with an open agenda, Spain is perfectly free to raise any issue it wishes, including sovereignty, and we and the United Kingdom have the same freedom to raise other issues, and also to reply with regard to the Spanish objective, which is sovereignty.'

Therefore, when Gibraltar, no less, recognises that there is no renouncing our sovereignty . . . In short, I repeat for the Honourable Member that this Government has in no way renounced sovereignty over Gibraltar. What it is doing is to adopt a practical global approach to the question of Gibraltar, seeking to create the requisite atmosphere for satisfactory progress in the negotiation".

(*DSS-P*, VIII Leg., n. 21, pp. 949–950).

VIII. SEAS, WATERWAYS, SHIPS

1. Baselines

In reply to a parliamentary question in Congress regarding the baselines of the Canary Islands, the Government stated as follows:

"The straight baselines established in the Canary archipelago by the RD of 5 August 1977 comply entirely with the provisions both of the 1958 Convention on the Territorial Sea and the 1982 United Nations Convention on the Law of the Sea. They have never been challenged or protested by any other country. As to the perimeter of internal waters provided for in the sole article of the draft organic law of 5 May 2004, be it stressed that from a legal standpoint this provision conflicts with the international law currently in force. The express mention of 'internal' or 'archipelagic' waters has concrete legal implications, addressed in the 1982 Convention on the Law of the Sea, which could be got round by calling the waters lying within the perimeter 'inter.island waters'".

(*BOCG-Congreso.D*, VIII leg., n. 127, p. 250).

2. Internal Waters

Note: See VIII.1. Baselines

3. Territorial Sea

Note: See VIII.4. Continental Shelf; VIII.5. Exclusive Economic Zone

4. Continental Shelf

Note: See VIII.5. Exclusive Economic Zone

In reply to a parliamentary question tabled in the Senate regarding the measures proposed to prevent the oil companies Afresc (United Kingdom) and Pan-continental and Cooper Energy (Australia) from prospecting with the authorisation of the Moroccan authorities in Spanish waters close to Melilla, the Chafarinas archipelago and the isle of Alborán, the Government reported as follows:

> "As soon as it learned of the authorisations described as 'for oil prospecting' in the question of reference, the Government contacted the Moroccan authorities and received assurances that the Moroccan government proposed no action that would infringe Spanish rights. In General Principle 4 of the current Treaty of Friendship, Good Neighbourliness and Cooperation concluded with the Kingdom of Morocco in 1991, the two States renounce the use of force in their relations. The Common Declaration signed after the Prime Minister's visit to Casablanca on 24 April last clearly reiterates the currency of the wording and the spirit of the Treaty, as a basis for the clear political will and firm resolve of both countries to usher in a new era of profound understanding and bilateral cooperation based on mutual trust, solidarity and respect".
>
> (*BOCG-Senado.I*, VIII Leg., n. 128, p. 47).

In reply to a parliamentary question in the Senate regarding oil prospecting in the neighbourhood of the islands of Lanzarote and Fuente Ventura (Las Palmas), the Minister of Industry, Tourism and Trade, Mr. Montilla Aguillera, reported as follows:

> "On 21 December 2001 the Government issued a royal decree granting Canaries hydrocarbon prospecting permits 1 to 9 off the coasts of the islands of Fuerteventura and Lanzarote, in violation of various regulatory provisions and assuredly causing some social alarm. As the Honourable Member has pointed out, this prompted the lodging of two appeals, one by the Island Group of the Socialist Party of the Canaries and the other by the Island Council of Lanzarote. The Supreme Court delivered judgment on 24 February of this year, annulling that part of the royal decree that deals with the schedule of work and investment for the third and sixth years. The reason for this judgment is failure to comply with the need for the royal decree expressly to determine the environmental protection measures that the beneficiaries of the permits must take at the time of expiry or renunciation of these permits.

Since the judgment, the Ministry of Industry has been working to see that the company to which these rights were granted complies with its obligations and, obviously, hands over to the ministry the information referred to in the Supreme Court judgment. That is the situation at present, and as I have said, it is not legally mandatory. We intend to talk to the authorities involved, to the Government of the Canaries and to the councils, whom we shall keep informed with due regard for the terms of the law currently in force and for the Supreme Court judgment which guarantees that all aspects of prospecting for hydrocarbon deposits are conducted entirely in accordance with the terms of the laws currently in force and in defence of the general interest".

(*DSS-Pleno*, VIII Leg., n. 11, p. 459).

5. Exclusive Economic Zone

Note: See VIII.7. Ships

Replying to a parliamentary question in Congress regarding the present delimitation of marine zones between Spain and Morocco, the Government stated that:

"The establishment of maritime limits between Spain and Morocco requires a whole series of negotiations on various sectors of our coasts: delimitation of territorial sea in the Straits of Gibraltar, Ceuta, Melilla and Los Peñones; an exclusive economic zone in the maritime area off the Gulf of Cadiz; the continental shelf between the Spanish peninsular and the Moroccan coasts, and an exclusive economic zone between the coasts of the Canary Islands and continental Africa. So far, Spain has initiated negotiations regarding delimitation of Spanish and Moroccan economic zones in the maritime area of the Canary Islands. I might add that Spain at one time (1976) objected to the straight baselines drawn by Morocco on its Mediterranean coast inasmuch as they touched Spanish territory or sought to separate Spanish waters from the open sea or from maritime areas where freedom of navigation is the rule".

(*BOCG-Congreso.D*, VIII Leg., n. 127, p. 253).

Having regard to the question addressed to the Government in Congress on the delimitation between Spain and Morocco of the exclusive economic zone in the vicinity of Canary Islands, the Secretary of State for Relations with Congress, Mr. Caamaño Domínguez, replied:

"According to the 1982 United Nations Convention on the Law of the Sea, which is applicable in such matters, the delimitation of exclusive economic zones in cases like the one raised by the Honourable Member must be effected by agreement between the States concerned, as provided in International Law. Such delimitation is not allowable by means of unilateral acts. The negotiations commenced in January 2003, and the 7th meeting of the corresponding working group took place recently in a climate of mutual understanding".

(*BOCG-Congreso.D*, VIII Leg., n. 127, p. 252).

6. Fisheries

Appearing before the Congress Commission on Agriculture, Fisheries and Food to report on the general lines of Spanish fisheries policy, the Secretary-General of Sea Fisheries, Mr. Martín Fregueiro, stressed:

> "In the first place I should like to highlight the tremendous speed at which changes are taking place in the world fishery sector – changes which began with the creation of exclusive economic zones in 1977, continued with substantial modifications following the UN Convention on the Law of the Sea, prompted the creation of a code of conduct for responsible fishing and culminated in the drafting of various action plans by the FAO.
>
> All these actions which have been implemented in the last 25 years have aroused an extraordinary interest in everything to do with fishing, both on the part of international bodies – WTO, FAO, OECD – and on the part of organisations representing civil society – NGOs and environmentalists – and have focused attention primarily on two issues: subsidies and export of capacity. Subsidies have been called into question generally in all forums, and those that constitute social conquests, such as Social Security for fishermen, or those whose purpose is to improve working conditions on board fishing vessels, have even been considered negative subsidies. In the view of these organisations, the export of fleet capacity is likewise negative, regardless of whether it is achieved through joint ventures or on the basis of costly fishery agreements, and such agreements are questioned even although they are concluded with countries having large surpluses of resources in their waters. These two facts are of crucial importance for our country, since they bear strongly on EC fisheries policy and decisively affect both the introduction of new structural actions and maintenance of our fleets' activities in waters of third countries.
>
> The fleet fishing in grounds of third countries has its own peculiar features, and that brings us to an analysis of the policy that the fisheries administration wishes to pursue in the international sphere, in three distinct areas: fishery agreements, joint ventures and future partnership agreements that the Commission of the European Union seeks to develop. In this connection, the policy that is pursued by the Secretariat-General for Sea Fishing will be to defend the activity of approximately 600 Spanish vessels fishing under 17 international fishery agreements negotiated by the European Union. We shall also defend, support and participate in all agreements drawn up within the framework of regional fishery organisations. However, . . . there is international pressure from various fishery organisations in all forums to restrict access of Spanish fleets to the resources of developing countries, on the ground that these fleets are exhausting them. This utopian scheme, which has no basis in reality since it does not give these countries any means of profitably exploiting their resources and if applied would condemn them to underdevelopment of fisheries, daily receives support from more quarters. Having foreseen this development and the possibility of evolution away from traditional fishery agreements affording access to resources

in exchange for an economic consideration, the Commission of the European Union is designing a new kind of agreement based on fishery cooperation, called association or partnership agreements. This administration is bound to keep a close watch on any possibilities that the new fishery association agreements may offer; these agreements are much broader in their aims than traditional agreements, in that a key component in them is the offer of cooperation and assistance for integral development of the fisheries of the country with which they are concluded . . .

Mixed companies are an asset which no country in the world can afford to scorn, which the Spanish fisheries administration wishes to encourage and whose maintenance and development it seeks to support by creating various instruments which will make it possible to renovate fleets and will also allow entrepreneurs in third countries wishing to enlarge the scope of their operations to set up industries on land. Such enterprises, set up in third countries since 1977, are partly an outcome of the redistribution of capacities that this country was forced to carry out as a result of the creation of exclusive economic zones, and partly of the choice that our government was forced to make as a European Union member in 1992, between scrapping part of the fleet or exporting it. The mixed companies set up with Community funds currently number 174, are domiciled in 24 countries and run an aggregate of 308 vessels making up a total of 107.050 GRT.

In the context of international fisheries, I am bound to highlight those aspects that affect the fishery relations of Spain and the European Union with Canada in the NAFO area and with Morocco. As regards Canada, I would draw attention to the minister's defence, in the Council on 24 May 2004 and later in the Commission on 26 May 2004, of Spain's interests with regard to the intensification of that country's fishery surveillance to a point where it interferes with our vessels' fishing or entails abusive utilisation of the rules in the NAFO-approved inspection manual. Having regard to that defence, I wish to make it clear that it was the Spanish fisheries administration that I direct which, in constant contact with the Commission, managed to have the Commission present a verbal note demanding that Canada strictly observe the NAFO inspection zones, and it also managed to have this note accompanied by another in which the Commission intimated to Canada that if it did not back off, the European Union would be unable to keep up the Greenland halibut recovery plan and the attendant reduction in the TAC of that species, nor would it continue to apply the cross-control system which allows NAFO members States to inspect the vessels of other member States.

. . . this is what actually happened, and also for the first time the Commission's postures had the total support of the European Union's External Relations apparatus, which, as you know, deals with the European Union's external relations at the highest level. It is also a fact that we have been in contact with the autonomous communities at all times, particularly Galicia, and with the fishery sector concerned; they have been kept fully up to date with all

our representations and the outcome of these, and this has made it possible to resolve the problem posed by Canada. The Secretariat-General of Sea Fishing is preparing a recovery plan for the fleet operating in the NAFO ground, in agreement with the sector. . . .

As a clear demonstration of the interest our country has in maintaining excellent relations with Morocco, on 6 June, at our invitation, a meeting was held in Madrid between the secretary-general of Sea Fishing and his Moroccan counterpart. After that meeting, both expressed their common desire and their resolve to collaborate more closely so as to move forward in all aspects of fisheries, and particularly the following: Collaboration on a multilateral level to improve the monitoring of commercialisation in all ambits of commercialisation [sic], and absolute respect for the recommendations made by regional fishery organisations. Spain and Morocco expressed interest in continuing to progress in the fight against undeclared illegal fishing and unregulated fishing.

In the sphere of international cooperation, it has been agreed to work in various different areas, with particular stress on maritime training, by providing support for specialisation of trainers through sojourns and seminars in both countries for work in the spheres of quality control, fishery technology, promotion and prospecting of new markets, development of fish farming and an effort to expand knowledge of those areas that affect shipbuilding and improvement of safety conditions at sea. Also, in order to help expand knowledge of marine resources in their deep waters, the Moroccan secretary-general of Sea Fishing has asked the Ministry of Agriculture, Fisheries and Food to provide assistance via the oceanographic vessel *Vizconde de Eza*, Spain having confirmed its interest in assisting towards this objective by means of an oceanographic prospecting voyage, to take place between 14 November and 13 December 2004. Next week, Moroccan biologists will be travelling to Madrid to attend the first preparatory meeting for the prospecting.

In connection with fishery policy in the Mediterranean, Spain takes the view that, since in geostrategic terms it is a quasi-closed sea with considerable disparity in the dimensions of the jurisdictional waters of coastal States, a Community regulation ought to be laid down with rules which, as in the framework of regional fishery organisations, are also applicable to other riparian countries in the Mediterranean which do not belong to the European Union.

(. . .)".

(*DSC-C*, VIII Leg., n. 48, pp. 2–7).

a) Morocco

Appearing before the Senate in Full Session to reply to a parliamentary question regarding relations with Morocco in matters of fisheries, the Minister of Industry, Tourism and Trade reported thus:

"It is necessary to recover a climate of intercourse and collaboration with Morocco. With the Prime Minister's visit to that country, a framework of

relations has been reopened which, as you know, had deteriorated in the recent past – I imagine you will recall.

On that understanding we have had a number of meetings and conversations on the subject of fisheries. In this connection, I would note that on 4 June last the secretaries-general of fisheries of the two countries held a working meeting where they addressed a variety of issues relating to collaboration and cooperation on both a multilateral and a bilateral level. On the multilateral level, lines of action have been defined for better follow up of and compliance with the recommendations made by regional fishery organisations. Thus, Spain and Morocco have reiterated their commitment to absolute respect for international recommendations and expressed their interest in continuing to make progress in the fight against undeclared illegal fishing and unregulated fishing.

As regards the sphere of bilateral relations, it has been agreed to work together, with special emphasis on maritime training by means of support for specialisation of trainers through sojourns and seminars in both countries for work in the spheres of quality control, fishery technology, promotion and prospecting of new markets, development of fish farming and an effort to expand knowledge of those areas that affect shipbuilding and improvement of safety conditions at sea.

I would note further that we have been asked by Morocco to provide assistance in the form of an exploratory voyage in their waters by the oceanographic vessel *Vizconde de Eza* in order to gain more knowledge of their marine resources, particularly in deep waters, to which request I can say now we shall be acceding. The object of this effort to cooperate is to propitiate a climate of stability and trust in which we can lay aside past suspicions and progress together in business initiatives of a permanent nature which transcend the bounds of the extractive fishing. And to avoid any misunderstandings, let me make it quite clear that the Government of Spain, as is only natural, absolutely respects the competences of the Commission of the European Union in the negotiation of fishery agreements, and I have never referred to such fishery agreements but to the arrangements mentioned earlier, so under no circumstances will Spain overstep or violate that principle".

(*DSS-P*, VIII Leg., n. 9, p. 371).

b) North-West Atlantic

In reply to a parliamentary question tabled at a Full Session of the Senate regarding the Government's position on fishery inspections by Canadian patrol boats in waters of the Northwest Atlantic Fisheries Organisation (NAFO), the Minister of Agriculture, Fisheries and Food, Mrs. Espinosa Mangana, reported thus:

"In the first place I must tell you that the Spanish Government considers that Canada has made abusive use of the control and inspection systems agreed in the NAFO and has twisted, among others, the meaning of the principles of non-discrimination and non-interference in fishing activities in the regulated zone.

The Spanish Administration has pressed the European Commission strongly to straighten out this situation as a member of the NAFO. As a result, at the Council of Ministers of fisheries on 24 May and at the Commission meeting on 26 May, this minister defended Spanish interests in connection with the intensification of fishery surveillance by Canada, which has been interfering with our vessels' fishing activity and making abusive use of the rules of the NAFO inspection manual.

In that defence, I wish to make it quite clear to the Honourable Member that it was the Spanish fisheries administration, in coordination with the Autonomous Community of Galicia, the fishing industry and the representatives of the Commission, who succeeded in having the Commission present a note to Canada demanding that it adhere strictly to the NAFO rules of inspection. It also succeeded in having that note accompanied by another in which the Commission intimated to Canada that if it did not back off, the European Union would be unable to keep up the Greenland halibut recovery plan and the attendant reduction in the TAC of that species, nor would it continue to apply the cross-control system which allows NAFO members States to inspect the vessels of other member States.

I have consistently maintained in the Council that the Spanish Administration has been working for years to secure an improvement in bilateral fishery relations with Canada, a fact which the latter acknowledges. We also stressed that no other regional fisheries organisation has so outstanding a control and surveillance system as does the NAFO.

Spain's commitment to responsible, sustainable fishing was made plain by the approval last year of a recovery plan which is necessary for the preservation of Greenland halibut as a resource.

Finally, Spain made it very clear that Canada cannot violate NAFO agreements and rules and international law while claiming to force compliance with NAFO rules.

It is fair to say, then, that normality has returned to those fishing grounds and that at all times throughout this episode we were in contact with the fishery sector concerned, keeping them fully up to date with our representations and the outcome of these. At this moment the situation in the NAFO grounds is one of absolute normality".

(*DSS-P*, VIII Leg., n. 7, p. 259).

Replying to a parliamentary question tabled in Congress, the Minister of Agriculture, Fisheries and Food, Mrs. Espinosa Mangana, expressed the following opinion regarding the defence of the interests of the Spanish fishing fleet in NAFO waters during the annual meeting of the NAFO Scientific Council:

"The NAFO Scientific Council's brief as established in its Statutes is to assess the status of populations of fishery interest in the regulated area. The Council is composed of almost 30 researchers from the 17 Contracting Parties to the NAFO.

On behalf of Spain, the EC delegation included representatives from the Secretariat-General of Sea Fishing (Ministry of Agriculture, Fisheries and Food), the Spanish Institute of Oceanography (*IEO*), the Vigo Institute of Marine Research, a dependency of the *CSIC*, and the *AZTI* (Basque Institute of Fishery Research).

In view of the current status of the resources, the recommendation is to maintain exceptional measures in order to gradually tailor the intensity of fishing activity to the sustainability of these resources. We know from the scientific surveys undertaken by the *IEO* and Canadian scientists that they agree with this judgment.

On that basis, it was sought at all times to arrive at the best possible assessment with the information available.

In this context the scientific recommendations must be strict if the situation is not to deteriorate in future years.

At the same time, the plan for recovery of Greenland halibut populations approved at the 2003 Scientific Congress was validated and confirmed at the annual meeting of the NAFO held at Dartmouth on 13 to 17 September: that is, 19,000 MT for 2005, 18,500 for 2006 and 16,000 for 2007 (NAFO international waters).

As regards species under moratorium (cod, yellowtail flounder, witch flounder and red sea bream LN), we are told that populations have not recovered.

Nonetheless, the result of the annual meeting must be considered highly positive for the Spanish fishery sector. Among the successes achieved we would note the radical change in the share of species to be regulated in order to preserve the resource, for three years starting in 2005 . . .

What we have achieved, then, is recognition of the historic rights of fleets like the Spanish which have pioneered these fisheries, and prevention of the entry of new extra-European fleets thanks to the setting of total admissible captures (TAC)".

(*BOCG-Congreso.D,* VIII Leg., n. 89, pp. 392–393).

7. Ships

Replying to a parliamentary question in Congress regarding the arrest of the vessel *D.M. Spiridon* in the Spanish exclusive economic zone in compliance with the rules for prevention of pollution by shipping, the Government reported:

"The decision to make the *D.M. Spiridon* head for the Port of A Coruña was made by an organ competent to do so, namely the Maritime Captain of that province, . . .

I should further stress that, considering that the vessel was inside the exclusive economic zone (it was sailing 50 nautical miles from the Spanish coast), the action taken by the Spanish Administration is expressly provided for in the International Convention for the Prevention of Pollution from Shipping (MARPOL), which allows either the infringement to be reported to the country of the

vessel's flag or the vessel to be required to proceed to a designated port, which was done in the case here in point.

The actions of the Administration, and of the Government of the Nation, may not exceed the bounds imposed on them by law, given that the Spanish Constitution itself obliges them to act entirely within the bounds of the statutes and the law.

. . . administrative sanctioning proceedings were initiated, and the condition set for the vessel to be allowed to leave port was the payment of surety of 900,000 euros, which amount was reduced to a fine of 180,300 euros in the Decision issued in conclusion of the proceedings.

Finally, we would note that on 1 July 2004 a bank guarantee was deposited with the General Deposit Bank to cover liabilities arising from the sanctioning proceedings in connection with the vessel *D.M. Spiridon*".

(*BOCG-Congreso.D*, VIII Leg., n. 69, pp. 488–489).

In reply to a parliamentary question regarding the maritime traffic separation schemes in the Finisterre zone, the Government reported:

"In order to be considered as such, traffic organisation systems must be approved by the International Maritime Organisation following painstaking analysis. They are proposed, among other reasons, to minimise the risks inherent in maritime navigation. It was against this scenario that the Finisterre traffic separation scheme was designed and approved.

The introduction of a separation scheme simplifies the traffic flow, reduces the risks of collision and protects, facilitates and affords security to fishing by separating fishing grounds from navigation routes. Given the physical impossibility of preventing the intersection of maritime navigation courses, the International Maritime Organisation approved the 1972 International Convention to Prevent Collisions at Sea, whose provisions have been fully implemented and are mandatory.

Intersections of courses in north-south and south-north traffic in the Finisterre separation scheme were specially studied and analysed with Portugal and France within the framework of the procedure established for the design of such schemes by the International Maritime Organisation, under whose aegis the new configuration was approved".

(*BOCG-Congreso.D*, VIII Leg., n. 69, pp. 313–314).

Also, in reply to another parliamentary question put to the Government in Congress regarding maritime traffic separation schemes, the Secretary of State for Relations with the Cortes, Mr. Caamaño Domínguez, added:

"The existing schemes in place in Spain have been approved by the International Maritime Organisation. Spanish schemes regulate maritime traffic in waters of Finisterre, the Straits of Gibraltar, Cape Gata, Cape Palos and Cape La Nao. All were specifically designed and all share the common objective of improving maritime safety and preventing marine pollution from shipping.

Because of the lack of space in the Straits of Gibraltar, it is impossible to keep traffic well clear of the coast or to separate traffic carrying hazardous goods. The design of the Finisterre scheme took into account, among other factors, the specific nature of the Westerly gales which cause ships to drift in towards the coast. In the Mediterranean basin, the criteria applied to Capes Gata, Palos and La Nao are similar in view of the similarity of the particular conditions there".

(*BOCG-Congreso.D*, VIII Leg., n. 69, p. 313).

IX. INTERNATIONAL SPACES

Note: See VIII.6.b. North-West Atlantic

X. ENVIRONMENT

1. In General

On 16 January 2004, the Government replied to a question in the Senate regarding the steps being taken to ensure a high level of protection of the environment and to conform to the principle of sustainable development:

"Sustainable development first became a key issue with the Rio Declaration, adopted at the United Nations Conference on the Environment and Development at Rio de Janeiro in 1992.

This Declaration is a basic document for global strategy which, for the first time on an international scale, contemplates an integrated environment and development policy which takes account not only of the present inhabitants of the planet but also of generations to come.

In June 2001, the Government commenced implementation of a Spanish Strategy for Sustainable Development (*EEDS*) with a view to maintaining progress in the quality of life of Spanish citizens without endangering the development of future generations or the planet's natural equilibrium.

To do this, the Government decided to create an Interministerial Commission within the Government's Delegate Commission for Economic Affairs. This is the Interministerial Commission for Coordination of Sustainable Development Strategy (Sp. *CICEDS*), representing 11 ministries, which started work in July 2001.

The *EEDS* intends to lay the foundations for a new dimension in development on a nation-wide scale for traditional policies. Its primordial purpose is to bring the concept of sustainability into all spheres of public and private decision-making, so that everyone contributes to a more sustainable future. . . .

Briefly, the idea is to apply the three broad principles of sustainability to Spain's reality: namely, to accept the need to dissociate economic growth from environmental degradation, to pay more attention to the qualitative elements of

development, and to integrate and coordinate sectoral policies that will help improve the quality of life. . . .

The practical application on a local scale of Agenda 21, approved in chapter 28 of the Rio Declaration, is denominated 'Local Agenda 21', based on the principle 'Think globally, act locally' and on integration of the social, economic and environmental elements to achieve sustainable development at a local level.

As regards promoting Local Agenda 21, the Ministry of the Environment has adopted the following measures with a view to progressing towards the achievement of sustainable development:

1. The Ministry of the Environment and the Spanish Federation of Municipalities and Provinces (Sp. *FEMP*) plan to sign a collaboration agreement to encourage, promote and disseminate the implementation of Local Agenda 21s in towns where the process has not yet been initiated, and to devise working tools to enable those who have already embarked on them to progress further and assess their achievements periodically.

The agreement, as one of a number of initiatives, will promote the establishment of a Spanish network of sustainable towns, in which a series of lines of action will be pursued on the basis of a technical organisation coordinated by the Ministry of the Environment and the *FEMP*, including the following:

- Creation of a forum for the exchange of experiences.
- Creation of a Local Agenda 21 web page.

This network will serve not only as a quantitative register of the towns undertaking sustainability processes, but it will also have a qualitative dimension with the potential to become a forum for the exchange of experiences and continuous learning in order to carry on working and move on, as envisaged in the programme of the Rio World Summit (1992), from Agenda 21 to the Johannesburg mandate (2002) on implementation of Local Agenda 21.

2. Also, the Ministry of the Environment participates in training programmes such as the Seminar on Practical Application of Sustainability: Local Agenda 21, organised in conjunction with the Spanish International Cooperation Agency as part of the Azahar programme, which was implemented in Madrid from 9 to 13 June 2003.

3. Also, issue no. 225 of the Official State Gazette, of 19 September 2003, published the Ministry of the Environment's Resolution announcing an invitation to contractors to tender for project ES 302003, consisting in technical assistance for support and encouragement of Local Agenda 21s in Spain".

(*BOCG-Senado.I*, VII Leg., n. 799, pp. 13–14).

A question was tabled in Congress regarding the Government's plans with regard to the drafting of a new Act on the environmental impact of plans, programmes and projects. The Government replied on 24 June 2004, as follows:

"The regulated procedure for assessment of environmental impact as contemplated in the Environmental Impact Act, Law 6/2001 of 8 May, in the

amendment to Legislative Royal Decree 1302/1986, and in the Regulation implementing it, Royal Decree 1131/1988 of 30 September, is an instrument designed to guarantee environmental variables – a legal instrument which integrates assessment of environmental impact in the programming and implementation of projects by the leading economic sectors, with a view to fostering development that is sustainable and complies with EC Law, Council Directive 85/33/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March. A draft Plans and Programmes Bill is being drawn up and will go through the requisite procedures for approval as law. The draft will be submitted for consultation to interested sectors and organisations prior to approval as a bill, as is normal with regulations of this kind. In addition, the Ministry of the Environment is working to amend the transposition of Directive 97/11/EC in light of the European Commission's opening of an infringement procedure citing incorrect transposition of the cited Directive".

(*BOCG-Congreso.D*, VIII Leg., n. 42, p. 37).

Finally, in reply to a question tabled in Congress on 20 September 2004, the Government referred to the proposals defended at the World Conference on Renewable Energies in Bonn (June 2004):

"The Spanish delegation took a very active part in the conference, combining institutional actions . . . and dissemination and acquisition of bilateral commitments with other Governments for aspects in which policies coincide.

In general, the Spanish Government has opted to increase the role of renewable energies (and efficient energy technologies) in the energy structure of our country, both in view of the environmental advantages that this entails (particularly reduction of greenhouse gases as referred to in the Kyoto Protocol) and in order to help reduce our country's external dependence in the sphere of energy. Furthermore, it is recognised that energy production from renewable sources is a booming activity in which Spanish firms maintain leading positions, and that future growth in this field will be a source of development, wealth and employment.

The Spanish Government expressed its support for the premium payment system as a suitable mechanism for growth and consolidation of the sector, in that it allows environmental costs arising from the use of fossil fuels to be internalised and renewable fuels to be marketed in equal conditions. The development of renewable energies is considered crucial for compliance with the objectives of the Kyoto Protocol and of the European Directive on Emission Allowance Trading (2003/87/EC), which will commence on 1 January 2005.

Specifically, the following proposals were defended by the Government:

– Contribution to preparation of the political declaration, undertaken by the Director General of *IDAE*.

(. . .)

In general terms, Spain's contribution followed the same lines as those of the countries that are most active in the field of renewable energies, such as

Germany, Denmark and Austria, and sought to raise the real level of commitment that was being debated.

– Endorsement by the Government of Spain of an international initiative to foster thermoelectric solar energy (Global Market Initiative), led by Germany and also supported by Morocco and Algeria.

(. . .)

– Endorsement by the Government of Spain of an initiative to support the premium system as the best mechanism for growth of investment in renewable energies.

(. . .)

– Endorsement of the international initiative REEEP, launched by the United Kingdom during the Johannesburg World Summit, whose aim is to strengthen cooperative links between countries in the sphere of renewables, with special stress on the mobilisation of private-sector funds and the lowering of administrative and legal barriers which hamper growth of the sector in many countries. . . . During the Bonn Summit, the partnership (with headquarters in Vienna) was formally presented and its statutes, Governing Board and budget for the first two years were approved. The *IDAE*, one of the founding partners, has expressed interest in participating especially in the Latin American area, where Spain obviously has the strongest cultural and economic ties".

(*BOCG-Congreso.D*, VIII Leg., n. 69, pp. 365–366).

2. Protection of Biodiversity

In reply to a question tabled in Congress regarding the ecological impact of NATO military manoeuvres in Canary Islands waters on 22 November 2004, the Government stated:

"'Majestic Eagle 04' was a bilateral Morocco/USA air-sea exercise on which all NATO countries were invited and which took place in international waters of the Eastern Atlantic between the Madeira Islands and the Moroccan coast.

When an exercise is conducted in Spanish territory or waters, whether Spain is the organiser or the host country, the precautions adopted are always determined by Spain in exercise of its sovereignty and invariably take environmental protection regulations into account.

In exercises conducted in international waters in which Spain is not the host nation, the Government cannot exert direct control, and restrictions can only be imposed on foreign vessels by agreement among the parties.

Although Spain joined the exercise as a guest, in obedience to the commitments acquired by the Ministry of Defence in an Agreement concluded with the Government of the Canary Islands in March 2004 'to act with the utmost precaution to avoid causing harm to the biodiversity', the US naval authorities were informed by their Spanish counterparts from the outset of the special circumstances existing in Canary Islands waters as the habitat of certain cetacean species.

For that reason the exercises were moved 120 miles to the north of the Canary Islands, a distance that was then considered sufficient to protect the areas identified to date by scientists as a habitat of Cuvier's beaked whale (Fuerteventura and Hierro Banks). In addition, these zones were marked on the maps and charts of the units taking part in the exercise.

In view of the beaching of three Cuvier's beaked whales on the island coasts some days after the manoeuvres, the Permanent Investigative Committee created under the Agreement of March 2004 met, . . . and has not issued a definitive report, but according to the conclusions reached by the University of Las Palmas, the results of the sample analyses were similar to those run on beached Cuvier's beaked whales in 2002. However, it is not yet known what exactly causes these beachings (sonar frequency, transmission intensity . . .) and the Committee has said that it needs to investigate further".

(*BOCG-Congreso.D*, VIII Leg., n. 108, p. 184).

3. Maritime Safety

On 16 June 2004, in reply to a question tabled in Congress as to its plans regarding maintenance of the measure adopted by the previous Government to keep junk ships with hazardous cargoes away from the Finesterre area (A Coruña), the Government stated as follows:

"1. On the occasion of the Hispano-French Summit held in Malaga on 26 November 2002, the Governments of Spain and France agreed on the pressing need to take steps to prevent the future repetition of ecological disasters such as those caused by substandard tankers like the *Erika* on the French coast and the *Prestige* on the Spanish coast.

Both Governments therefore adopted certain measures with regard to single-hull vessels over fifteen years old carrying certain hazardous bulk goods.

In principle the Hispano-French bilateral agreement will remain in force until such time as objective circumstances make it advisable to terminate it (. . .)".

(*BOCG-Congreso.D*, VIII Leg., n. 37, pp. 22–23).

Having regard to the measures envisaged to foster renovation of the tanker fleet within the framework of the European Union, the Government replied in Congress on 22 July 2004:

"At the European Union level, the coming into force of Regulation (EC) No. 1726/2003 tends to speed up the progressive retirement of single-hull tankers and their replacement by vessels with double bottoms.

In addition, at an extraordinary meeting in December 2003 the International Maritime Organisation's Environmental Protection Committee passed a Resolution to speed up the retirement of single-hull tankers world-wide.

Both provisions have been adopted by institutions of which Spain is a

member – the European Union and the International Maritime Organisation – to reduce the risks of marine pollution from oil spills".

(*BOCG-Congreso.D*, VIII Leg., n. 59, p. 91).

In 2004 a number of questions were addressed to the Government in the Senate in connection with the action taken following the disaster produced by the wreck of the tanker *Prestige* (2002).

Therefore, replying on 29 July to a question regarding the actions taken and envisaged in connection with this disaster, the Government stated:

"The Government is acting in the following areas: payment of compensation, extraction of fuel oil from the wreck, surveillance and cleansing of the coastline and judicial proceedings.

Payment of Compensation

As regards the flat-rate procedure, to date 15,320 persons have signed transaction agreements and been paid a total of 70,176,671.80 euros. However, payment of part of the compensation due by this procedure to various individuals, associations and guilds is still outstanding.

Also outstanding are payments to natural or legal persons who come under the system of direct or expert appraisal and agreements that are concluded with Autonomous Communities and Local Authorities in due season. . . .

At the same time, the Spanish State has filed three claims with the IOPC (International Oil Pollution Compensation) Funds and a fourth is in preparation.

(. . .)

Also, the Government has proceeded to amend Royal Decree-Law 4/2003 in order to:

– Guarantee payment of outstanding compensation with the Budget, . . .

– Flexibilise conditions of payment of compensation by the ICO.

– Establish a system of compensation for economic losses that may be sustained in fishing, shellfish-gathering and fish-farming activities during the 2004 financial year as a clear and direct consequence of the oil spill caused by the wreck of the *Prestige*. The upper limit on funds available for such compensation has been set at three million euros.

Extraction of fuel oil from the wreck

The Spanish Administration is carrying on with the work of extracting the fuel oil remaining in the sunken wreck, through the firm REPSOL.

(. . .)

If the work goes according to plan, it could be completely finished next October.

Surveillance and cleansing

1. Actions at sea.

The plan of action has been adapted to the new situation, bearing in mind that since the end of 2003 no more fuel oil residue has been gathered from the

sea. If necessary, SASEMAR's units could be used, consisting of twelve vessels (Salvamar) which would be supported by other larger ships.

Also, airborne surveillance continues in the form of a weekly scheduled flight by an Air Force aircraft with the occasional support of helicopters from SASEMAR and the Autonomous Communities if necessary.

(. . .)

2. Actions on the coast.

(. . .)

2.1. Hydrocleaning and manual cleaning of pebble beaches.

(. . .)

2.2. Bioremediation.

(. . .)

2.3. Environmental restoration actions.

(. . .)

January saw the commencement of environmental restoration actions to remedy the effects of the spill in certain areas.

We would also note that: The National Parks Foundation engaged Technical Assistance for assessment and follow-up of damage from the *Prestige* spill in the Atlantic Islands National Park and other protected areas of European importance, with a budget of 1.2 million euros.

The object of the study was to analyse the impact of the *Prestige* spill on those affected ecosystems of greatest biological importance and to monitor developments there. The area addressed by the study is the Atlantic coast of Galicia and the Cantabrian coast. The time allowed for completion of this work is three years, and its conclusions will be presented in October 2006.

Judicial proceedings

1. Judicial actions in Corcubión. Preliminary Report number 960/02. Its purpose is to determine any liability that may attach both to the Master and other crew members of the *Prestige* and to any other subjects who may have intervened in the transport.

In addition, the said Preliminary Report maintains the charge against the Director General of the Merchant Marine.

2. Action in the United States against ABS. At the New York District Court on 16 May 2003, the Kingdom of Spain brought a civil action against the American Bureau of Shipping (ABS), the vessel's classification society, on a number of counts of negligence on the occasion of inspections conducted on the said vessel.

The case is currently at the preliminary stage.

(. . .)".

(*BOCG-Senado.I*, VIII Leg., n. 59, pp. 24–25).

On the same date, the Government also replied to a question regarding the position that would be adopted in the case of the wreck of the *Prestige* in the courts of the United States:

"The Kingdom of Spain brought an action against the American Bureau of Shipping (ABS), the society which classified the vessel *Prestige*, on a number of counts of negligence in inspecting the said vessel. These judicial actions are being pursued in the New York Southern District Court.

At this moment the proceedings are at the 'discovery' stage where the parties furnish information about their actions in connection with the vessel and the wreck. Thus, it would seem best for the defence of the State's interests to continue with this discovery stage, in which the next step is a 'confidentiality agreement' that the parties must sign in connection with the use of the documents submitted.

In bringing the action in the United States, the Kingdom of Spain seeks to secure a conviction against the classification society ABS which, without prejudging any other liabilities in respect of the catastrophic result of the shipwreck of the *Prestige*, will enable the Spanish State to recover the costs incurred in connection with the wreck. It is further hoped to secure abundant elements of proof for use in other suits to support demands for prosecution of liability of other enterprises and subjects implicated in the production of the environmental and economic damage caused by the *Prestige* disaster.

In any event the Solicitor-General's office has the responsibility of directing the judicial actions in defence of the interests of the State".

(*BOCG-Senado.I*, VIII Leg., n. 59, p. 26).

Referring again on 2 August to the appraisal of the damages produced by the *Prestige* disaster and the compensation outstanding, the Government noted the following:

"Following is a summary of the estimated amounts pending payment:

– Flat-rate procedure: Most applications have been dealt with; payment remains outstanding only in respect of 0.4m euros to a group of private individuals and the applications from the guilds of Vizcaya and Guipúzcoa. These amount to approximately 12 million euros, but the final sum will depend on the number of days' stoppage certified by the Autonomous Community of the Basque Country that is eventually accepted.

– Direct appraisal procedure: The applications amount to 170.7 million euros, which amount is necessarily subject to an expert appraisal of damages in comparable situations.

– Agreements with Local Authorities: In various Ministerial Orders the Ministry of the Presidency classified a total of 153 municipalities as affected Local Authorities, 67 of which have applied for compensation under the scheme provided by Royal Decree Law 4/2003, amounting to 37.6 million euros; the final quantification is pending analysis, which is currently in progress, of the documentation submitted.

– Agreements with Autonomous Communities: The Commissioner's Office has received lists of expenses sent in by the Autonomous Communities of the Basque Country, Cantabria, Galicia and Asturias, totalling 147.6 million euros . . .

(. . .)". (*BOCG-Senado.I*, VIII Leg., n. 61, p. 20).

4. Protection of the Marine Environment

On 2 January 2004, in reply to two questions tabled in the Senate regarding the means of control used by the Government in surveillance and prevention of toxic effluents from vessels sailing past the coasts of Almeria and Asturias respectively, the Government replied as follows:

"The Government's intervention in surveillance, control and combating of marine pollution embraces three kinds of action.

The first deals with the national and international norms regulating the design, construction, seaworthiness, maintenance, inspections, certifications and age of ships and the machinery, equipment and facilities on board. Spain is pressing strongly in the European Union and the International Maritime Organisation (IMO) for tougher international regulations. Spain has been the visible promoter of the EU Directive on the elimination of single-hull vessels for the transport of petroleum-based products and a bar on their entry to European Union ports, and likewise of the Resolution passed by the Marine Environment Protection Committee at its meeting in London on 1–14 December on phasing out of such vessels world-wide.

The second kind is intended to prevent the passage of vessels carrying hazardous goods through waters close to our coasts. Actions of this kind are enshrined in bilateral agreements such as the one concluded with France to restrict the passage of ships carrying hazardous goods within the 200-mile economic exclusion zone, or in multilateral agreements with nearby States under the auspices of the IMO, such as the one concluded with France, Portugal, the United Kingdom and Belgium for the establishment of an Especially Sensitive Zone in Atlantic Waters. Also under the auspices of the IMO, two new traffic separation schemes have been created off Cape Palos and Cape La Nao which, together with the new arrangement of the Finisterre scheme, will improve navigational safety, reducing the risks of collision and hence of loss of human lives and pollution.

The third kind of action deals with the human and material resources deployed in the fight against marine pollution. Since 1996, SASEMAR has increased its personnel by 33%, peripheral Coordination and Rescue Centres have grown from 12 to 20, rescue vessels from 10 to 12 and rapid intervention craft from 18 to 40. This increase in resources has been matched by a 40% increase in the State's contribution to the Society. Tenders were recently invited for two all-purpose rescue and anti-pollution vessels at a cost of 30 million euros. It is planned to put three more units out for tender in 2004, one specifically designed with capacity to collect and store 2000 cubic metres of hydrocarbons.

It is important to note that the resources controlled by the Maritime Rescue and Safety Society (SASEMAR) have no fixed geographic location. While units do have a regular operational base, they may be moved if circumstances so dictate in an emergency. We cannot therefore say that any given resources are intended specifically to deal with accidents at sea in a particular place.

Obviously the units whose regular base is in the zone nearest the emergency are likely to be the first to be called out if they are suitable for the characteristics of the emergency.

(. . .)". (*BOCG-Senado.I*, VII Leg., n. 795, pp. 68 and 90).

In reply to a question in the Senate on 15 September 2004 regarding the measures envisaged in connection with the agreement on minimums approved by the European Union in the matter of sanctions for marine pollution, the Government stated as follows:

"The classification of infringements with regard to marine pollution as minor, serious and very serious is set forth in chapter III of the State-owned Ports and Merchant Marine Act, Law 27/1992, as amended by Law 62/1997 on the same matter and by the Ports of General Interest (Economic and Service Provision Regime) Act, Law 48/2003.

The sanctions and other measures applicable to the classification of infringements mentioned in the foregoing paragraph are specified in chapter IV of the cited Law 27/1992.

The agreement on minimums that the question referred to will be embodied in a Directive on the matter, which will then have to be transposed to domestic law once it is approved by the European Parliament.

There can be no doubt that in those issues where the future Directive diverges from the provisions of Law 27/1992, the latter will have to be amended to fit in with the European norm, and therefore it will be necessary to wait for the Directive before introducing the requisite amendments.

For the moment, under Law 27/1992 the sanctions for pollution can vary from 60,100 euros (10,000,000 pesetas) for minor infringements to 3,000,000 euros (500,000,000 pesetas) for very serious infringements, with the possibility in the latter case of accessory measures consisting in arrest of the vessel, barring it from entry into port or barring it from loading or discharging, if the circumstances so dictate".

(*BOCG-Senado.I*, VIII Leg., n. 70, p. 42).

5. Climate Change

Spain's application of the terms of the Kyoto Protocol prompted numerous parliamentary questions in the Senate in the course of 2004.

Specifically, on 20 January the Government replied to a question regarding compliance with the environmental norms approved at the Kyoto summit and the initiation of the Spanish strategy for combating climate change:

" – The increase in emissions with respect to 1990 continues to cause concern and has even further strengthened the Government's resolve to move forward with policies and measures to address the problems of climate change. In the last few years the origin of this problem has lain in Spain's strong economic

growth, as reflected in sustained GDP growth at more than the EU average.... This has brought with it growing demand for energy and attendant emissions from both fixed and mobile sources. The challenge that the Spanish State is working to meet is how to maintain this positive economic growth while complying with the objectives of the Kyoto Protocol.

For some years now the Government has been developing various policies and measures to meet this challenge, including:

– Measures to liberalise the electric sector... with premiums and incentives to encourage renewable electricity production.

– Plan to Promote Renewable Energies (December/1999) with a target of 12% of primary energy and 29% of electric energy renewable by 2010....

– Promotion of the use of gas and policy in favour of combined-cycle technology and improvement of fuel quality...

– Improvement of transport infrastructures....

– National Waste Plan...

– Promotion of reafforestation activities...

In addition to these initiatives we would cite the positive effects to be expected from other measures now in progress, such as:

– Application of the Directive on integrated pollution control...

– Application of the Directives on national ceilings for emissions and large combustion facilities....

– Development of a European Climate Change Programme,...

– Forthcoming start-up of the European market for greenhouse gas emission allowances.

– The National Forestry Plan...

As well as these, there are other measures in progress such as the National Energy Efficiency Plan, currently at the drafting stage, or the Spanish strategy to combat climate change, which is being drawn up by the National Climate Council.

And not to mention the many and various measures being instituted by the Autonomous Communities and local authorities, and by private sector industries.

– The Strategy is being drawn up by the Standing Committee of the National Climate Council,... Once a draft is completed, the Committee must submit it to the Plenum of the National Climate Council for approval and recommendation to the Government, as it is the Plenum that is in charge of drawing up the Strategy. The working objective established in this context is that it be possible to draw up the Strategy in a short time".

(*BOCG-Senado.I*, VII Leg., n. 801, p. 7).

Some months later, on 29 September, the Government referred in the Senate to the measures to be adopted to comply with the Kyoto Protocol in view of the previous Executive's failure to so comply:

"As a legal instrument drawn up to ensure compliance with the objective of the United Nations Framework Convention on Climate Change, the Kyoto Protocol provides in its various articles for commitments regarding the limiting of net

greenhouse gas emissions, the institution of a national mechanism to control such emissions, the preparation of periodic reports on compliance with these commitments, cooperation with and aid for developing countries, etc. Nonetheless, these commitments would not be binding until such time as the Protocol enters into force . . .

In any event, regardless of the eventual date of entry into force of the Kyoto Protocol, in approving the Protocol by Council Decision of 25 April 2002, the European Union has taken on these commitments and is transposing them into Community legislation by means of the appropriate instruments. One of the first examples of this is Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

In the case of Spain, because the basic decisions to implement the National Allocation Plan (NAP) established in Annex III of the Directive and the Commission's guidelines for application of these criteria in preparation of the Allocation Plan were not taken in March 2004, publication and notification of a Plan to the European Commission had to be postponed.

In May 2004 an Inter-ministerial Climate Change Group (Sp. *GICC*) was set up and commissioned to draw up a draft National Allocation Plan. . . . The *GICC* is chaired by the Secretary of State for Economics of the Ministry of Economy and Finance . . . and all the competent ministerial departments are represented in the Group:

Ministry of Economy and Finance. . . .,
Economic Office of the Prime Minister . . .,
Ministry of Public Works . . .,
Ministry of Industry, Tourism and Trade . . .,
Ministry of Labour and Social Affairs . . .,
Ministry of Agriculture, Fisheries and Food . . .,
Ministry of the Environment . . .,
Ministry of Housing . . .,

The *GICC* has conducted an analysis of the working hypotheses devised by the experts on each section of the National Allocation Plan, . . .

Following the analysis of allocation methods by sectors and activities, a basic agreement and criteria were reached for drawing up the NAP, taking into account all the prior work entailed in integrating the data gathered, and the indicators from operators, competent departments and interest groups affected by the proposal.

On 27 August 2004 the Cabinet approved Royal Decree-Law 5/2004 transposing Directive 2003/87/EC, which regulates emission allowance trading. Also, on 6 September it approved a Royal Decree approving the National Allocation Plan for emission allowances 2005–2007 . . .

The Royal Decree-Law creates a Committee for the Coordination of climate change policies, as an organ of coordination and collaboration between the General State Administration and the Autonomous Communities in the sphere

of the emission allowance trading scheme and fulfilment of the international and EC obligations that the scheme includes with regard to reporting.

The decision taken by the Cabinet has made it possible to present the National Allocation Plan to the European Commission and thus meet the deadlines set by the European Union.

Parallel to this process, at the third plenary meeting of the National Climate Council on 20 July last, the Chairperson and Minister of the Environment advised of the Government's intention to implement a Spanish strategy to combat climate change by developing and executing various Sectoral Action Plans 2005–2007, which will deal with concrete measures and instruments to restrict net greenhouse gas emission and draw up targets, resources and quantified investment, and indicators for monitoring them".

(*BOCG-Senado.I*, VIII Leg., n. 80, pp. 23–24).

On 29 September, in reply to a question regarding the Government's assessment of the Memorandum of Understanding on Climate Change recently signed in Uruguay, the Minister of the Environment Ms. Narbona Ruíz stated as follows to the Senate in Full Session:

". . . This Memorandum, signed only a few days ago, marks the commencement of a specific avenue of cooperation between the two governments for reciprocal transmission of information and possibly of initiatives, public and private, in Uruguay by public or private Spanish enterprises operating in Uruguay, which will help to reduce greenhouse gases in that country, for example by increasing the use of renewable energies.

We have enterprises interested in this, Spanish companies which already operate in Uruguay, but also Spanish companies which did not do so hitherto. This therefore also signifies an opportunity to augment our presence in Latin America – and not only in Uruguay: at a meeting of all the climate change offices in Latin America, held the other day in Cartagena de Indias, we found that numerous Latin American countries also wish to sign memoranda like the one we have concluded with Uruguay. Moreover, at that meeting the Latin American countries clearly took a highly positive view of Spain's present position in this respect within the context of its European commitments, but also as it relates specifically to our interest in reinforcing economic ties with these Latin American countries and in helping them achieve technological progress in the context of a more sustainable model in every case.

(. . .)".

(*DSS-P*, VIII Leg., n. 13, pp. 548–549).

Replying to a question on 6 October regarding the repercussions of application of the Kyoto Protocol on industrial costs, the Minister of the Environment Ms. Narbona Ruíz stated:

"The economic memorandum that accompanied the decree-law establishing the scheme for emission allowance trading – which was unanimously approved by the parliament – sets forth the Government's calculation on the basis of current

and foreseeable prices of emission allowances. According to that calculation, the annual cost to the enterprises concerned which take part in the emission allowances market would be 85 million euros. Let me say to the Honourable Member that 85 million euros is equivalent to 0.015 per cent of the total added value declared by these enterprises, and we therefore believe that it is a very reasonable cost for the period 2005–2007 . . .

(. . .)

. . . The National Allocation Plan for Emission Allowances is only a first stage, if a very important one in that it establishes an economic instrument whose purpose is precisely to ensure that the reduction of emissions is achieved at the smallest possible cost. The European Commission estimated that for the enterprises concerned this would mean that the cost would be approximately 23 per cent less than if there were no emissions market.

. . . In addition to the National Plan, the Government must work – and is now working – to further promote renewable energies in our country and the existing strategy for energy saving and efficiency. The Government plans to complete the transposition of some extremely important European Directives, for instance the one on co-generating or the one on energy efficiency of buildings. All this will help us along in the direction we have taken.

(. . .)".

(*DSS-P*, VIII Leg., n. 15, pp. 612–613).

Also, the economic and labour costs of compliance with the Kyoto Protocol prompted a parliamentary question, which Government answered in the following terms:

"The Government's most recent action as regards compliance with the Kyoto Protocol is embodied in Royal Decree Law 5/2004 of 27 August (*BOE* number 208 of 28 August 2004) which regulates the greenhouse gas emission allowance trading scheme, and in Royal Decree 1866/2004 of 6 September (*BOE* number 216 of 7 September 2004) approving the National Allocation Plan for emission allowances.

These documents are essentially the fruit of the work of the Interministerial Climate Change Group (Sp. *GICC*), which was created for this purpose by the Government's Delegate Commission for Economic Affairs. . . .

With all the information and proposals gathered in this process, along with any internal analyses that the *GICC* has been able to conduct on the basis of the information furnished by the various organisations represented in that Group, the economic and social repercussions of the norms referred to have been assessed as perfectly acceptable and on the whole not prejudicial to competitiveness or employment

In particular it is estimated that the net cost to enterprises for the period 2005–2007 is unlikely to exceed 85 million euros per annum – that is 0.015 per cent of the added value declared by the sectors affected by the Directive.

In addition, we would note that according to the Royal Decree Law, forums for social dialogue will be constituted to ensure that union and employers' organisations take part in the preparation and follow-up of the National

Allocation Plan as regards its effects on competitiveness, employment stability and social cohesion".

(*BOCG-Senado.I*, VIII Leg., n. 91, p. 66).

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

1. Development Cooperation

a) General Lines

The Minister of Foreign Affairs and Cooperation, Mr. Moratinos Cuyaubé, in an appearance before the Congress International Development Cooperation Commission, informed of the general lines of his department regarding matters of development cooperation:

"... The first and foremost reason is solidarity with the world's poor, excluded and marginalised population. Today's level of poverty affecting 3 billion people, half of the world's population and 1.2 billion of which live in extreme poverty, is a cause for shame and desperation at least for any citizen who is minimally sensitive; levels of poverty which are also a source of political, social and economic instability. Poverty reduction is an ethical obligation for the most prosperous of the world's citizens and it is a political obligation for all governments around the globe. This has been the message at each United Nations summit in the 90's and very especially at the Millennium Summit held in the year 2000 in New York. There, 187 governments, including the Government of Spain, supported the Millennium Development Goals, i.e. poverty reduction, gender equality and defence of the environment.

(...)

The second reason for taking on the challenge of increasing our Official Development Assistance has to do not only with the interests of the developing world but also with those that we share with all of the citizens of the planet. We need to build a world which is more harmonious, fair and more respectful of the environment in order to make welfare and security available to all. People's welfare does not depend solely on the domestic cohesion and solidarity of our countries. Globalisation is producing a situation of interdependence such that no government is capable single-handedly of assuring the welfare of its population as was dramatically proven on 11 September 2001 and on 11 March of this year in our country. Global markets are imperfect and discriminatory with the weakest nations ...

... Global public interests may be best represented by peace and environmental quality. Together with fair development, security, international justice, respect for human rights, health or economic and financial stability on a global scale, their provision is the responsibility of all members of the international

community but especially of public authorities, i.e. governments and multilateral organisations. Defence and provision of these global public goods is therefore closely linked to the external action of the State. Our seeking of legitimate short and medium-term interests, i.e. our current well-being, must coincide, and this is essential, with the search for global cohesion and solidarity, i.e. with our future well-being, with the interests of humanity and our own over the long-term. These are the ideas addressed in the preamble to the International Development Cooperation Act approved by the *Cortes* in 1998. . . . a policy that this Government desires and is offering with the following principle lines of action.

First of all it must be by consensus, the fruit of dialogue with the different agents of international development and cooperation. In the 21st century the external action of nations is not limited to the central government. The citizens, NGOs, local and regional administrations and enterprises have a legitimate vested interest in the goings on of the external world, interact and intervene in their evolution and have a vision of the problems and their solutions which must be borne in mind . . .

Secondly, we are going to make a concerted effort in the design and planning of cooperation in order to make headway in terms of efficacy and to have the required impact, a process beginning now with the drafting of the upcoming Spanish Cooperation Master Plan which will serve as the framework for action over the next four years; a plan which will be developed in a participatory manner as a joint effort among a team of officials and technicians from the administration, the university and the civil society working side by side.

Third of all, a further three-tiered concerted effort must be made in the coordination of our cooperation system: first within the central state administration, the management of Official Development Assistance instruments in our country and, although legally under the auspices of the Ministry of Foreign Affairs and Cooperation, it is distributed among different departments.

Allow me to now say a few words about cooperation policy within the European Union. Spanish cooperation should also return to the European context. As you know, Spanish policy is making its return but, as the Chinese would say, a step forward needs to be taken assuming a multilateral approach. We must not lose sight of the fact that the European Union is by far the world's number one donor and that Spain's contribution through the Community budget and the European Development Fund accounts for over a quarter of our total national contribution to development cooperation.

(. . .)

I would now like to move on to the Government's geographical and sectoral cooperation priorities having regard to that which is laid down in the law itself. Article 6 . . . establishes Latin America, North Africa and the Middle East and other less developed nations with which Spain has special historical and cultural ties as areas of preferred action. The fact is that the majority of Spanish bilateral ODA has gone to Latin America. In 2003, North Africa and the Middle East will only receive 15 percent of our bilateral Official Development

Assistance, a figure below the ODA earmarked for Asia. This situation needs to be remedied. If the world's great challenge today is the Arab and Mediterranean world, these budget allocations will need to be modified and our relations with the Arab and Islamic world reinforced.

The Government has the firm will to exceed the traditional aid policy and design a veritable international development policy on two levels. On the one hand we have to contribute to the development of a level playing field in terms of the international economy, goal eight of the Millennium programme.

In this context special mention must be made of Spanish economic operators with a very significant economic presence in some developing regions such as Latin America where Spain has become the second largest investor and in some countries such as Argentina, where it is number one. They can play a significant role in boosting development over the middle and long term.

And lastly, if we expect to develop a veritable international development policy, we must support the improvement of public policies in developing countries and provide technical assistance in the area of institutional strengthening. According to data furnished by ECLAC, in 2003 poverty affected 44 percent of the Latin American population, i.e. approximately 225 million people. In seven countries the proportion of the poverty-ridden exceeded 50 percent of the population. These elevated poverty figures, in a region of intermediate development, are linked with the high degree of inequality prevalent in a large proportion of the region's countries. Of the 18 Latin American nations, 16 can be considered as highly unequal. As pointed out by the IADB, if income distribution in Latin America were comparable to that of Southeast Asia, poverty would be only one-fifth of what it is today. The third summit of heads of State and Government of the European Union, Latin America and the Caribbean recently held in Guadalajara took up the priority of reinforcing social cohesion and effective multilateralism. Spain, along with the European Union, will decidedly cooperate to that end in all fields.

In summary, we first seek to take international cooperation policy further not only by doubling Official Development Assistance in this term of office but also by giving our firm support to integral international development policies the purpose of which is to modify the underlying causes perpetuating inequality within and among nations and individuals and to foster the capabilities and opportunities of disadvantaged regions and persons. Secondly, we defend the bolstering of multilateralism in this world of global challenges and renew our commitment to sustainable human development and the United Nations millennium development goals. The master plan should, therefore, also include a significant increase in ODA focusing on multilateral organisations. Thirdly, we shall develop in a coherent fashion and in a single development policy our contribution to multilateral organisations, our contribution and participation in EU cooperation policy and Spanish bilateral policy; a bilateral policy rooted in the democratic and supportive values of our civil society, mobilisation of NGOs and the exem-

plary effort of town halls and regional governments with a view to, together with the government-backed development policy, creating an effective and participatory programme. And to finish, we are not starting from ground zero. Now is a promising time to take a stand against poverty. There is a new wide-ranging global commitment to reduce by half the proportion of people in situations of extreme poverty and hunger by the year 2015. Developing countries are setting up and executing strategies to achieve this objective and the international development community is drawing up and coordinating a response in this connection and is calling on political will and creating the frameworks and mechanisms by which to undertake a more effective attack against poverty and in favour of effective human development.

(. . .)".

(*DSC-C*, VIII Leg., n. 41, pp. 3–8).

Also, the Secretary of State for Foreign Affairs and Latin America, Mr. León Gross, in an appearance before the Senate Latin American Affairs Commission to report on Government policy in Latin America after the III Summit of Heads of State and Government of the European Union, Latin America and the Caribbean stated that:

"Naturally, Latin America is one the priorities of the new Government's external policy. This is so because Latin America is part of Spain's identity . . .

We are not starting from ground zero, far from it. The previous governments, Socialist and People's Party, have developed all sorts of initiatives bestowing privileged status upon relations between Spain and Latin America. However, it is plain to see that our relations with Latin America need a new boost, they need to be renewed.

The new Government's Latin American policy is an expression of the will to combine the defence of our interests with the needs and aspirations of the region's nations and peoples. These are one in the same given that better defence of Spanish interests in Latin America is clearly tantamount to supporting the consolidation of democratic institutions, reinforcing social cohesion and fostering development and well-being.

Our policy considers, first of all, that although the main ingredients of the relationship are the same as always (common identity and shared history), today it is expressed in new ways. I will focus on the two most notable: first of all, the spectacular development of Spanish investment in the region and, very especially, in the largest and most important countries. Today we are the number two investor in Latin America (according to some criteria we are number one) and we have a decisive presence in strategic sectors such as banking, communications, energy and public services in general.

We welcome this emigration not only because we need it and it contributes to our prosperity but also because it gives us a chance to pay back the welcome received by our emigrants at other times in history. It also provides an essential source of hard currency for the countries of origin.

Both factors indicate that Spain today has the economic capacity needed to make a substantial contribution to the development and prosperity of the peoples of Latin America and this is an important novelty.

Despite the great importance of the increase in economic ties, however, we should not succumb to the temptation of 'economising' all of our relations. Since 1996 and especially since the year 2000, Spain's Latin American policy has undergone a significant mutation which has shifted the conceptual background in place for the last twenty-five years. The change has been from lending political support to democratisation processes, institutional strengthening and integral development to a vision focusing on market openness and privatisations. Formerly support was provided for actions aimed at consolidating the State network and organising a civil society but now the focus is on prioritising relations with elite technocrats and over-emphasising the effects of private investment viewed as accomplishments attributable to the Spanish Government. There has, therefore, been a change in sensitivity and priorities but especially in style: the 'Latin Americanist' discourse, characteristic of a pan-Americanist policy has been replaced by a 'hyper-Atlanticism' instituted by the preceding Government.

(. . .)

We understand that today Latin America faces new challenges. Twenty years ago the challenge was the return to democratic, civilian and representative regimes and the resolution of armed conflicts in Central America. Spain made a decisive contribution both in terms of the restoration of democracy in the Southern Cone as well as the Central American peace processes.

Today, with the exception of Cuba, the rest of the region has civilian and democratically elected governments and, with the exception of Colombia, armed conflicts are now a phenomenon of the past. But democracy is far from consolidated and this is probably due to failure to integrate ethnic minorities into the system – and sometimes majorities – which have always been marginalised and also because the restoration of democracy has not met the expectations of the people in terms of economic development and well-being and reduction of inequalities. The challenges which still need to be addressed today are social cohesion and fair development.

The first few months of the new Government have also witnessed the deployment of an ambitious policy of presence in all the Latin American countries accompanied by intensification of contacts at all levels and the creation of shared approaches and teamwork.

(. . .)

Stability also calls for a significant reduction in poverty and inequality which is at its worst in Latin America.

(. . .)

With regard to contribution with own resources, the development cooperation policy is one of the fundamental instruments of our Latin American policy. In fact, Latin America receives 45 percent of Spain's Official Development

Assistance most of which, in accordance with our diagnosis of the situation throughout the region, is earmarked for programmes addressing institutional strengthening and the fight on poverty and inequality by meeting basic needs. The Government proposes strengthening the cooperation policy by providing more resources.

The Government shall also stress how important it is for Spanish investors to delve further into the concept of social responsibility – one must recognise that almost all are implementing some sort of project in this area – convinced that the best guarantee for their interests is the stability and development of the countries in which they are present. As for the rest, it is the Government's intention to further enhance bilateral mechanisms which not only guarantee better protection of the interests of Spanish companies but also make a more effective contribution to the development of the countries in which they operate.

It is no secret that the Government believes that the best response to globalisation is multilateralism and integration. This, of course, is also applicable to the reality today in Latin America and to our relationship with the region. We have supported in the past and will continue to support the different economic and commercial processes on the subregional level: Mercosur, the Andean Community and the Central American integration process. We have also fostered (the last time was in Guadalajara) the conclusion of association agreements between the European Union and the different Latin American integration mechanisms. In Guadalajara we contributed to what we hope is the last push needed to conclude the agreement between the European Union and Mercosur and also promoted the opening of negotiations with a view to concluding similar agreements with the Andean Community and Central America.

Following the results of the Guadalajara summit which were not very encouraging, we initiated a reflection process to update and improve the mechanism. We cannot forget that Europe and Latin America, especially the Southern Cone, share the same values and characteristics and this common background should serve to intensify our relations and reinforce the conclusion of agreements at all levels, including ones taken at the international policy level.

And lastly, we believe that Latin America has a role to play in a world that we hope will become multipolar and in which multilateralism takes the place of unilateral action. . . . To date, not a lot of agreement has taken place at the summit processes. A cooperation mechanism has been created, the Secretariat for Cooperation with Latin America with headquarters in Madrid . . .

We need to make a consistent effort to reinforce the concept of the Latin American summit as an instrument by which to achieve a greater degree of political agreement in all of these countries.

(. . .)

. . . I would like to conclude with a reference to some specific special interest issues.

First of all, an effort must be made to establish – and we are already involved in this process – strategic associations with the larger countries with

greater regional leadership capacity – Brazil and Mexico –, also Argentina – and it suffices to recall that the Foreign Affairs Minister just paid a visit to that country last Friday and Saturday – and with Chile because they are key to success throughout the region and are probably the countries with which we share the greatest similarities.

Special attention needs to be paid to the countries in greatest risk of destabilisation, the Andean nations mostly, or armed conflict and we must lend a hand to help overcome these difficulties, as is the case with Colombia, and likewise political conflicts that could give rise to armed violence as in Venezuela, for instance. In the case of Cuba we must remain firm on human rights issues but must also re-establish normal channels of communication and the instruments by which to contribute to the improvement of the situation facing the Cuban people, development cooperation and paving the way to peaceful transition.

And finally, the energy issue should be given special attention. Not only is this a sector in which our investors are very active but it is also a factor which could lead to destabilisation and domestic and regional conflicts while at the same time representing – as it should – hope of progress and prosperity".

(*DSC-C*, VIII Leg., n. 44, pp. 2–5).

b) Alliance Against Hunger

The Secretary of State for International Cooperation, Mrs. Pajín Iraola, appearing before the Congress International Development Cooperation Commission to inform regarding Spain's participation in the so called Alliance Against Hunger stated that:

"... The fight against poverty is contingent upon political will, the democratisation of a number of different institutions and, of course, at least a minimum degree of solidarity on the part of the most developed countries. The developed world holds the key to hope for millions of human beings of being able to improve their lot and live with dignity. ...

On the 20th of September the President of the Government announced, at the New York summit meeting against hunger and poverty held in New York before more than 50 heads of State and Government and 117 nations, that our country has decided to increase its Official Development Assistance over the upcoming years until doubling its current amount and reaching 0.5 percent of GDP by the end of his term thus moving as quickly as possible towards 0.7 percent of GDP. In this political context one may ask what the fight against hunger and poverty actually means. This initiative emerged from the Geneva Declaration of January of this year on the initiative of the presidents of Brazil, France and Chile together with the Secretary-General of the United Nations Kofi Annan forming a group which our country joined three months later. The essential message coming out of Geneva was to put the fight against hunger and poverty as a priority on the international agenda. ...

This declaration led to the creation of a technical group with the mandate of exploring innovative financial mechanisms. Its objective is to drum up political support with a view to trying to put into action the general consensus concerning the urgent need to eradicate poverty and foster development through concrete, feasible and focused actions. I wanted to point out that this initiative contributes to an open and dynamic process seeking new ways to fight hunger and poverty. The clearest example of this is that at the outset we were a fledgling group of four countries and the Secretary-General of the United Nations and today we have the solid political support of over 50 heads of State and Government and 117 nations which subscribed to the declaration on 20 September. In conjunction with this there is an urgent need to develop a new approach to Official Development Assistance . . .

Assistance commitments are contingent upon domestic budgetary decisions which, in turn, are conditioned by changing political circumstances. Rapid change in the flow of resources has a very negative consequence on the effectiveness of the assistance. Just what are these new mechanisms and the results of these technical groups? The group has analysed a series of mechanisms designed to increase the flow of assistance ranging from relatively simple application instruments such as voluntary donation schemes to other tools that would need persistent and concerted political action. Many of the proposed mechanisms call for solid political agreements. The mechanisms also differ substantially from one another in terms of their operation ranging from simple donation agreements using credit cards to complex financial or tax instruments, some being compulsory while others are voluntary. The characteristic common to all, however, is the economic rationality principle. . . . The general characteristics of the proposal are as follows: first of all, all of the mechanisms were conceived as ways to increase current assistance flows and not to replace them with others. This is based on the premise that the resources obtained will actually be new and in addition to those already committed to at the Monterrey Conference. Secondly, the instruments are designed to provide stable and predictable assistance to developing countries because interruptions in the flow of assistance greatly reduce effectiveness. The fight against poverty and the fostering of economic development should be viewed as long-term processes that require continuous and systematic flows of assistance. Third, the essential idea is to use the bilateral and multilateral channels already in operation for the disbursement of resources thus avoiding the creation of further layers of bureaucracy. Fourth, financing should be made available, preferably in the form of donations given that many developing nations have subscribed to austere fiscal adjustment programmes in order to deal with public debt in an effort to create the basic economic conditions for growth. Fifth, resources obtained should be handled in a transparent manner allowing for the proper rendering of accounts in respect of the use made of such funds given that many mechanisms take decided and coordinated political action for granted and transparency and rendering of accounts are essential in maintaining the support of public opinion.

Let us now turn to the concrete proposals . . . The first is a tax on financial transactions . . . The proposal to tax financial transactions at a very low rate would contribute to the stable and predictable collection of a considerable volume of funds for development without interfering with the normal operation of the market. The second proposal is related to a tax on the arms trade. This proposal was tabled at the G-8 meeting held in 2003 where the President of Brazil, Lula da Silva, proposed a tax on arms sales as a way to collect funds for the eradication of hunger and poverty. The benefits of this tax would be economic as well as ethical. The third proposal is the International Financing Facility. The IFF is a development financing mechanism proposed by the Government of the United Kingdom which envisages prefinancing the disbursement of the assistance thanks to a guaranteed indebtedness plan by the participating nations . . .

The fourth proposal concerns special drawing rights to finance development. Special drawing rights are international reserve assets issued by the International Monetary Fund to supplement the existing official reserves of the member countries; they are assigned in proportion to the quotas of each Fund member . . . The fifth proposal is tax evasion and tax havens. The volume of taxable income evaded each year throughout the world is considerably higher than the sum needed to finance the Millennium Development Goals. . . . Reduction of tax evasion and an increase in the transparency of financial operations are an international public service and there is international consensus to fight against tax evasion and the lack of transparency in financial activities . . .

Another characteristic of globalisation that should be highlighted in this sense is the existence of important flows of workers. According to a number of different sources, the sum total of funds remitted by emigrants from developing countries is approximately $80 billion per year, a figure which far surpasses Official Development Assistance flows . . .

And why are these remitted funds important in the fight against poverty and hunger? First of all because they tend to be much more stable than other funds and therefore represent a source of funding which is more stable and predictable. . . . Secondly, income from remittances sent from abroad is usually spent on basic needs such as food, housing and basic services and is therefore an alternative safety net for developing countries. And thirdly, the costs incurred in the transfer of funds or intermediation are quite considerable. Therefore, any significant reduction in the transfer cost of monies sent from abroad from emigrant workers will have a direct effect on the fight against poverty.

The seventh proposal concerns voluntary donations via credit cards. Voluntary donations also account for a significant portion of the funds collected to fight poverty and hunger, specifically donations from credit card debits given that this method is employed in many countries around the world. The eighth proposal is socially responsible investment or the so-called ethical funds. The private sector plays a fundamental role in the world economy. Socially responsible investment encompasses decision-taking processes in respect of investments basically referring to the approach taken by investors in selecting, as the

object of investment, those companies which bear factors such as social and business responsibility in mind in their operations.

By way of final observations I should mention that the list of innovative mechanisms is not exhaustive nor is it regulatory. The aim of this initiative is to present a panoramic view of the principal aspects of each one of the mechanisms analysed. The group has not, for example, analysed the possibility of establishing a tax on CO2 emissions to finance development, an issue left for future debate. . . .

(. . .)

As for modes of participation, it should be borne in mind that some mechanisms are compatible with other modalities which are already being implemented . . .

And lastly, as I said a couple of weeks ago when I was explaining the General State Budget, our country reiterates its commitment to reach the 0.30 percent of GDP level by next year. Along with this bit of good news, which I am told all parliamentary groups – within the framework of the initiative that I presented to you today – are going to support, I would like to present three practical results. The International Monetary Fund and the World Bank have expressed their support for this initiative and called on the four countries to submit a progress report at the joint meeting of these two organisations which is to be held in April 2005. The four countries have agreed to meet before that time and before the G-8 meetings to study the specific proposals for each case. And, as the President of the Government has already announced, our country will implement initiatives focusing on a debt for basic social services swap, especially regarding education".

(*DSC-C*, VIII Leg., n. 128, pp. 5–8).

2. Assistance to Developing Countries

Note: See XI.1.General lines and XI.3.Terrorism

a) Latin America

The Secretary-General of the Spanish International Cooperation Agency, Mr. De Laiglesia y González de Peredo, appearing before the Congress International Development Cooperation Commission in response to a question regarding cooperation projects with Cuba informed that:

"The legal framework governing bilateral cooperation with Cuba is the basic scientific-technical collaboration agreement of September 1978, the cooperation agreement on culture and sport of May 1982 and the final act of the VII meeting of the Spanish-Cuban joint cooperation committee held in Havana on 25 January 2002 in force for a period of three years. This is the legal and conventional framework governing the development of our collaboration.

However, on 27 August 2003 the Cuban authorities sent a communiqué to our Embassy in Havana announcing the interruption of all negotiations on

Official Development Assistance either in progress or at the planning stage with Spanish Government representatives, their official agencies or the embassy itself with regard to new projects or other collaboration actions financed by our Government and managed by the aforementioned entities or their representatives. . . . Cooperation with the autonomous communities was not included in this measure. This is decentralised cooperation channelled through NGOs or bodies of the United Nations. Therefore, as of that date, cooperation from the Spanish International Cooperation Agency to Cuba is channelled exclusively through multilateral bodies and non-governmental organisations".

(*DSC-C*, VIII Leg., n. 158, p. 22).

The Secretary-General of the Spanish International Cooperation Agency, Mr. De Laiglesia y González de Peredo, appearing before the Congress International Development Cooperation Commission in response to a question regarding Spanish cooperation with Haiti informed that:

"The Secretary of State for International Cooperation did indeed travel to Haiti on 11–12 July when that country sent out a desperate call to the international community to help it out of a catastrophic situation caused as much by the political conflict of the previous months as by the devastating effects of the torrential rains that destroyed much of the country's south-eastern region. The fundamental aim of Spanish cooperation is the fight against poverty and it is within this context that we are seeking to intensify cooperation with the poorest nation of the entire western hemisphere, one of the world's 25 poorest countries according to the UNDP and, to date, unfairly abandoned by Spanish cooperation. Moreover, from a geographical standpoint, Haiti is located in a Spanish cooperation priority region (Latin America) but until now it had not been considered a priority and the circumstances call for our putting an end to this anomaly. Reacting to emergency situations is among the priorities of our development cooperation and Haiti, as you well know, has unfortunately been undergoing recurring catastrophes and its baseline situation is extraordinarily precarious.

And finally, all of the reports, that of the OAS, the United Nations and our own evaluation, coincide in indicating that the origin of today's terrible humanitarian situation that the Haitian people are suffering is the precariousness of the democratic system and it is therefore essential to reconstruct the Haitian democracy from an institutional, political and social standpoint, this also being one of the priorities of our cooperation. All of these reasons called for greater attention to be paid by Spanish Cooperation and, bearing in mind the upcoming International Donors Conference for Haiti that was scheduled for 20–21 July, led to the visit made by the Secretary of State a few weeks prior with a view to establishing contact with the Haitian authorities in order to identify the content of a cooperation programme with Haiti and prepare the Spanish position in view of the said Donors Conference.

(. . .)". (*DSC-C*, VIII Leg., n. 96, pp. 18–19).

b) The Mediterranean

In response to the parliamentary question regarding measures to foster trade relations with the countries forming the Mediterranean Arc, the Government informed as follows:

"The Ministry of the Economy prioritises bilateral economic and commercial relations with the Mediterranean Arc countries.

The principal North African and Middle Eastern Mediterranean Arc countries (Morocco, Algeria, Libya, Tunisia, Egypt, Israel and Lebanon) account for approximately 5% of our foreign trade, practically double the average participation of these countries in EU trade relations.

In these countries special mention should be made of the wide use of ICEX promotion instruments.

Spain has a deficit coverage vis-à-vis these countries with a coverage rate in the vicinity of 75%.

The latest foreign trade data available (up to August 2003) show that during the first eight months of 2003 our exports to these countries grew by 4.2% in contrast with average growth of 5.4% of total Spanish exports.

During these same eight months of 2003, imports from this area grew by 10.9%, above the average 8.0% growth of Spanish imports as a whole.

For historical reasons and geographical proximity, Spain is traditionally one of the main supporters within the EU of trade relations with the Mediterranean Arc countries.

As of 1995, the Community's Mediterranean policy guidelines have been developed within the framework of the so-called Euro-Mediterranean Process or the Barcelona Process within which Spain has been one of the especially active Member States and the objective of which is the creation of a free trade area in the region by 2010.

Within the scope of economic and trade matters, at the II Euro-Mediterranean Meeting of Trade Ministers which was held in Toledo on 19 March 2002, concrete measures and specific actions were adopted contributing to the finalisation of a Euro-Mediterranean free trade area which have subsequently been developed. The subsequent presidencies (Danish, Greek and Italian) have backed these agreed actions. These measures are:

Integration of the Mediterranean partners in the Pan-Euro-Mediterranean cumulation of origin; drafting of a new protocol which incorporates the association agreements with these Mediterranean partner countries regarding rules of origin allowing for the spread of the Pan-Euro-Mediterranean system of origin to the Mediterranean countries.

Drafting of a services liberalisation protocol or model to be accompanied by different specific commitments with each country.

Adoption of a set of recommendations with a view to simplifying customs procedures; approval to carry out studies and work with the aim of harmonising laws as regards regulations and technical rules.

Outside of the framework of the Euro-Mediterranean Process or the Barcelona Process, at the initiative of the United Kingdom and Sweden, in the first quarter of 2002 a new neighbour policy emerged: the Wider Europe – Neighbourhood Initiative. Although in principle this initiative exclusively addressed the Eastern countries of the enlarged Union, Spain has played a very relevant role in the following aspects which in the end were highlighted in the Thessaloniki Council Declaration:

1. Maintaining a global perspective in the Wider Europe – Neighbourhood initiative also incorporating neighbours from the South.

2. The principle of differentiation by countries and regions so that each country is provided with an individualised programme which can be evaluated separately according to advances made in compliance with the different objectives. A total of approximately 16 million in goods each year is affected by the measure".

(*BOCG-Congreso.D*, VII Leg., n. 650, pp. 298–299).

The Secretary-General of the International Cooperation Agency, Mr. De Laiglesia y González de Peredo, appearing before the Congress International Development Cooperation Commission in response to a question regarding Spanish cooperation with Morocco informed that:

"The key to the future for Morocco and for cooperation relations with Morocco, not only for the year 2005 but also for years to come and even beyond the period during which the current joint committee covering up to 2005 is in force, lies in the imminent conclusion of the strategic association agreement. Negotiations in this regard have been boosted by the support shown during the latest visits to Morocco by the President of the Government, the Minister of Foreign Affairs and Cooperation and the Secretary of State for International Cooperation. Within the framework of this qualitative leap, the achievement of this new agreement which will override those currently in force as part of our commitment to improve our cooperation not only in terms of volume but also quality, is the re-launching and revitalisation of the Averroes Committee, virtually void of any recent activity.

In terms of specific projects there are a series of elements which are going to change. First of all, the work methodology which we are going to apply from this point forward will consist of delving deeper into the concept of partnership, of association, so that the projects carried out are not an imposition by one of the parties but rather are implemented subsequent to an exercise of joint identification, prioritising the sectoral concentration approach to prevent the current dispersion of efforts and emphasising the viewpoint of the receiving party, i.e. the Moroccan side, with the initiation of possible new cooperation instruments such as budgetary support or the sectoral approach in addition to the recently initiated microcredits as complements to cooperation which are being implemented in fulfilment of the commitments of the joint committee . . .

(. . .)

These new actions and the continuation of negotiations to finalise and sign a strategic association agreement is currently the focus of the Cooperation Agency's efforts as concerns Morocco to give new impetus within the framework of this new methodology that I explained at the beginning of my presentation".

(*DSC-C*, VIII Leg., n. 158, pp. 5–6).

c) Europe

The Secretary-General of the Spanish International Cooperation Agency, Mr. De Laiglesia y González de Peredo, appearing before the Congress Development Cooperation Commission in response to a question regarding Spanish cooperation in Mostar informed that:

"The war in Bosnia and Herzegovina between 1992 and 1995 produced approximately two million refugees and internally displaced persons. In addition to its grave humanitarian consequences, the war caused material damage which, if left unmended, make it impossible to normalise living conditions for the inhabitants of Mostar. From the very beginning and as of the end of the aforementioned conflict, Spanish cooperation has concentrated on palliating human casualties and subsequently on promoting the creation of necessary infrastructures for the normalisation of living conditions in the country in general and in the city of Mostar in specific reference to the question posed. As an historical example of projects with a distinct humanitarian character, you should be reminded of the rehabilitation project of the primary health-care centre carried out in 1996 in collaboration with the non-governmental development organisation Architects without Borders; the offer of psycho-social care for children affected by armed conflicts, a project approved in 1999 and implemented by the Spanish Red Cross; or the series of micro-projects supporting the return of refugees who were identified in collaboration with the SFOR.

Since 2003 projects have been carried out focusing on the creation of infrastructures to help normalise the situation in the city. It is within this sphere of events that we have, first of all, the project supporting the return and integration.

(. . .)

We can thus conclude that Spanish cooperation, in accordance with the positions taken by international organisations with jurisdiction in the area, has effectively met the population's basic needs. In terms of results of our cooperation, mention may be made of the important number of displaced persons who have been able to return home and the degree to which this has contributed to social and economic reactivation of the Mostar city centre. For all of the above, our assessment of the action carried out in Mostar is positive and we feel that it has effectively contributed to the fulfilment of the objectives established by the international donor community".

(*DSC-C*, VIII Leg., n. 158, pp. 3–4).

d) Africa

The Secretary-General of the Spanish International Cooperation Agency, Mr. De Laiglesia y González Peredo, in response to a question posed to the Government in the International Development Cooperation Commission regarding the crisis in Sudan, informed that:

"The commencement of Spanish cooperation in Sudan in the context of the humanitarian crisis in the Darfur region in the western part of the country which, as has already been mentioned, has caused over 1,500,000 internally displaced persons and over 200,000 Sudanese refugees in Chad, actually goes back to May of this year. It was at that time that Spain, sharing the concern of the international community over the seriousness of the situation, decided to take part in the collective effort of the international community and respond in solidarity to contribute to the alleviation of this humanitarian crisis and the Spanish Government began to take decisions to channel contributions through the Spanish International Cooperation Agency. The first of such contributions was made in May in the amount of 500,000 to the World Food Programme and a subsequent contribution was made to the same programme in July for 400,000. These funds are used by the WFP to lend direct support to the purchase of vegetable oil and leguminous vegetables with a view to meeting the nutritional needs of the refugees.

At the same time it was also decided to support the efforts being made by Spanish non-governmental organisations working in the area. First of all, that of the Spanish Red Cross which received a total contribution of 780,386 broken down into various actions one of which was to support the overall logistical organisation, together with the Sudanese Red Crescent, of the two displaced persons camps in the vicinity of the city of Al Fashir. The *AECI* contributed to this logistical organisation with financing on the order of 338,000. In addition to the Spanish Red Cross, the Spanish Doctors without Borders is working in the Zam Zam and Abu Shouk camps mostly in support of nutritional needs with a 300,000 subsidy from the *AECI*. And finally Intermon Oxfam, which works on a food security project with the refugees at the Tulum, Forchanay and Cunungu camps, also has *AECI* funding in the amount of 200,000. . . . I should point out, as you may already know, that Sudan has never been considered a priority country for Spanish cooperation and this means that no provision whatsoever has been made for that country in our 2004 budget.

In addition to these direct actions, the regional governments, coordinated under the Secretary of State for International Cooperation, have made a concerted effort to contribute to the financing of the projects that other NGOs and multilateral organisations are implementing in Darfur . . .

As concerns the political aspect of the crisis, . . . Spain supports a political solution to the crisis. The Naivasha negotiations regarding the conflict in the South and the Abuya negotiations concerning the Darfu conflict must be reinitiated. Spain hopes that all parties come to the negotiating table with a con-

structive mindset giving rise to the signing of global peace agreements. Secondly, those responsible for war crimes and human rights violations must be brought to justice and with that aim in mind Spain lent its support to the creation of the international investigation commission called for in Resolution 1564 designed to identify the guilty parties and determine whether genocide has been committed or not. And the third element in respect of the crisis from our point of view is that the African Union should take a leadership role in its resolution. The international community in general and the European Union in particular are willing to lend the financial and logistical support that the aforementioned organisation requires to properly carry out its functions.

These are the policy lines along which we will continue to work, especially in the Security Council and other forums focusing on this crisis".

(*DSC-C*, VIII Leg., n. 96, pp. 4–5).

e) Asia

In response to the parliamentary question posed in Congress regarding the aid channelled through the Spanish International Cooperation Agency (*AECI*) and non-governmental organisations (NGOs) in Iraq, the Government informed that:

"The amount of funds provided for non-governmental organisations to carry out humanitarian aid and development actions in Iraq has surpassed the 5 million initially earmarked for this year and is close to 7 million.... Practically all of the NGDOs requesting aid from the Spanish International Cooperation Agency (*AECI*)... have been funded....

(...)". (*BOCG-Congreso.D*, VII Leg., n. 650, p. 322).

3. Terrorism

The Secretary of State for Foreign Affairs and Latin America, Mr. León Gross, in an appearance before the Congress International Development Cooperation Commission, informed of the efforts which the Government is planning to carry out in the international fight against terrorism:

"There is no doubt that the September 11th 2001 attack marked the beginning of a new era in the way collective security and international order must be approached. Terrorism, which has been with us throughout the last century, showed us just how lethal and indiscriminate it can be. The old strategy of terror made a quantum leap in terms of blind violence showing utter disregard for all moral taboos regarding respect for life and human dignity. However, despite this qualitative change, unfortunately terrorism is nothing new to us. In Spain we understand only too well the meaning of terrorism having suffered this curse for 30 years and we have learned some valuable lessons. In this context, 11 March made us think long and hard about the nature of this new terrorism and evaluate all the measures and actions developed over the last several years in order to decide which are sufficient and which need to be improved and based

on these reflections we must build a new consensus and response from a joint perspective and political vision in Spain and along with our European partners, with our Arab and Muslim neighbours and within the framework of the United Nations. This is the priority political objective which this Government has set.

These years spent fighting ETA terrorists have taught us some valuable lessons. They have taught us that the unity and consensus of all political and social forces and the active participation of citizens are our best weapon in combating and delegitimising the perpetrators of violence.

They have taught us that the terrorists' greatest victory is when democracy, under the guise of security, sacrifices the irrenounceable freedom, rights and liberties of its citizens. They have taught us that terrorism can only be vanquished with the self-sacrificing and constant action of the state police and security forces and intelligence services; only with more and higher quality information and intelligence will we be able to take effective action in detecting, pursuing and putting an end to terrorist action. They have taught us that terrorism can only be vanquished by means of close and loyal international cooperation and collaboration with our partners both on the bilateral level and as participants in all of the international forums and organisations. Terrorism poses a threat to our security and to the security of all people. No country can single-handedly face this threat and therefore a concerted effort needs to be made by the international community which means more cooperation and more dialogue.

(. . .)

Within the multilateral framework, by way of example, a binding international legal framework with regard to terrorism has been developed and strengthened with the adoption of resolution 1373 of the Security Council urging the ratification and enforcement of all international conventions on matters of terrorism; frameworks concerning criminals have been strengthened on the national level; the legal framework by which to control and make the financial transactions of our banking systems more transparent with a view to preventing abuse by terrorist networks has likewise been bolstered; mechanisms and instruments designed to foster the better flow of information and international cooperation have been created, especially through the Security Council's Anti-Terrorism Committee and the G-8 Counter-Terrorism Action Group with the mandate to promote and coordinate the provision of technical assistance to countries which are most vulnerable in the fight against terrorism; the legal and operational framework by which to prevent terrorists' gaining access to weapons of mass destruction is under development at the disarmament and non-proliferation forums with the recent adoption of resolution 1540 by the Security Council; initiatives to improve the security of different modes of transport, travel documents border control and civil protection are being developed.

Within the framework of the European Union, the definition of new instruments to fight terrorism, as of the approval in December 2001 of the first action plan of the Union to combat terrorism, has progressed in tandem with the cre-

ation and consolidation of the area of freedom, security and justice. Special mention should first of all be made of the framework decision regarding the fight against terrorism setting the stage for the harmonisation of our criminal systems with the definition and description of crimes of terrorism; the drafting of the European terrorist list; the framework decision regarding the European Arrest Warrant which replaces the traditional extradition procedure in the case of crimes of terror based on the principle of mutual trust and cooperation between judicial authorities; the creation of instruments of reinforced cooperation to improve the flow of information and cooperation between the judicial authorities of the Member States with the advent of Eurojust and between the state police and security forces and with the creation of Europol and the reactivation of its anti-terrorist operational unit; greater coordination and information between our intelligence services for a better shared analysis of terrorist threats; a conceptual framework has been developed for the comprehension and formulation of responses to new threats to our security with a priority on terrorist threats with the adoption of the European security strategy . . .

Spain has been and always will be in the vanguard of the fight against terrorism. . . . Just a few short weeks following the terrorist attack of 11 September, the international community mobilised, with the backing of the Security Council which unanimously passed Resolution 1368, to issue a military blow to the terrorists of Al Qaeda and the Taliban political regime that protected them, provided them with training bases and logistical support from which to prepare and carry out their terrorist attacks. Spain wholeheartedly supported this operation to fight terrorism in which we participated and continue to be committed with the presence of military personnel in Afghanistan under the United Nations mandate and NATO administration. However, we strongly feel that the terrorist threat is not a military threat which can be conquered militarily with the use of force or conventional armies. We rejected and it is with conviction that we continue to reject preventive war. Our rejection of the war in Iraq was and is founded on this conviction that not only was it not useful but it was actually counterproductive in combating terrorism . . .

. . . Defensive measures aimed at improving our operational capacity or reducing our vulnerability, while of fundamental importance, are not enough. It is necessary to go further, to address the structural factors, the conflicts and inequalities which breed terrorism, which foster and encourage it. . . . terrorist are not born, they are made, they become killing machines within a given context. Although in essence terrorism always comes down to the same injustice, terrorist groups, terrorisms in general, emerge and develop their messianic visions and their alleged legitimising discourse in different cultural, religious, social and political contexts. These contexts provide the categories within which projects are defined and are powerful in manipulating and exerting their influence on the reasons for which some of these groups receive the social support they need to recruit their members and obtain all sorts of logistical support. It is our obligation and interest to gain insight into the contexts in which

terrorists emerge, which they feed on, how they operate, how they construct and disseminate their messages, and it is our obligation to act with energy and determination in respect of these contexts.

Terrorism has launched attacks on New York, Madrid, Bali, Casablanca and Moscow. It has been effective in posing a global threat, a strategic problem which has radically transformed the traditional notions which served as the basis for our concept of security. . . . what we are dealing with is a group of terrorists whose declared aim is to act under the guise of Islam and perpetrate their criminal violence as the ultimate expression of an unavoidable cultural conflict; terrorist who pass themselves off as spokespersons of the faith of hundreds of millions of citizens from a host of nations while at the same time seeking to promote the distorted image of the West as the unjust aggressor. All of this gives rise to a new phenomenon, a strategic threat given its magnitude, ferociousness and its urgency. These specific characteristics of the new terrorism, this evil known as Islamic terrorism given the terrorists' determination to claim as their own the identity of that religion, require new approaches and new ambitions on our part. As a strategic threat, it requires a collective strategic response using all means at its disposal and approaching all the problems which underlie and contribute to facilitating terrorist actions. As a global threat it requires a global response delving deeper into truly effective multilateralism calling for concerted international efforts. Together with the indispensable action in the field of security, the fight on terrorism should also incorporate and approach the myriad of political, economic, social or cultural dimensions from the definition of a global strategy.

. . . Over the last few months, since 11 March, new measures and new devices have been implemented and need to be reinforced. Ranging from the strengthening of the Security Council's Anti-Terrorism Committee, a reform which Spain enthusiastically encouraged with Ambassador Ruperez at the helm as executive director, to the adoption of a regulatory framework for the fight against the proliferation of weapons of mass destruction and their eventual use by terrorists with the very recent passing of Security Council Resolution 1540.

Spain will put its full weight behind the work being carried out by these bodies. The Government of Spain will do everything in its power to preserve and reinforce the central role of the United Nations as the driving force behind the fight against terrorism. The United Nations, a body endowed with international legality and legitimacy, should be capable of defining the framework and achieving consensus in the fight against terrorism, guaranteeing maximum respect for human rights and advocating the sort of multilateralism based on the efficacy and credibility of international institutions. Within the scope of the European Union we have recently witnessed the creation of the first joint investigation team between France and Spain in the fight against ETA terrorism, mechanisms which we will likewise use against other forms of terrorism, and the creation of the post of anti-terrorist coordinator held by Mr. Gijs de Vries from the Netherlands with whom this Government has already had a number of meetings . . .

Collectively we must strip terrorists of any ideological or religious alibi. Terrorism is a strategic problem and a political problem as well but it is not a cultural problem or some alleged war between religions. We must learn more about the Islamic world with the creation of a common area of mutual understanding within the Muslim Arab world, a new strategic alliance with the nations comprising it which feel as threatened as we do or even more and which are determined to fight against this threat.

We must take a decided stand in the settlement of extremely serious regional disputes which prevent or hinder the normalisation of peaceful coexistence on the regional level and generate tension and instability and this must be done by way of multilateral efforts based on respect of legality and international legitimacy, without exception, in the consistent application of the Security Council resolutions and support for the political will of the parties, from the conflict in the Middle East which should be given renewed impetus, to the emergence of a stable, sovereign and democratic Iraq and the pacification and democratisation of Afghanistan and others . . .

We must foster the creation of a culture of human rights and strict respect for the law and international legality in the fight against terrorism. Rather than a limit, human rights should be the basis of all action taken against terrorism. These are the convictions behind the initiative launched by the President of the Government in his speech on a strategic alliance among civilisations. This initiative seeks to spark international awareness, from the central role played by the United Nations and with the active participation of the governments and civil society, in respect of the risks we are facing if we begin to put up a new wall of incomprehension and misunderstanding between the West and the Muslim Arab world. The aim is to reject the inevitability of an alleged clash of civilisations by highlighting the numerous positive aspects of our mutual relations and not permitting the current drifting apart of the Western and Islamic Arab worlds to continue affecting world peace and stability. The aim is to formulate responses from the perspective of multilateralism, abandoning unilateral solutions, for the resolution of the grave conflicts which are devastating us and to foster cooperation among all actors by means of actions that have an effect in the contexts which serve as the breeding grounds for radicalism and violence. The aim is for governments and civil societies to adopt models of peaceful coexistence based on diversity, respect for cultural identity, immigration policies for immigrants and the adoption of new models in the fields of education and communication. With this vision in mind the President of the Government suggested to the Secretary-General of the United Nations the possibility of putting together a high-level group comprised of eminent personalities from government and civil society whose task it would be to develop their work in two fundamental areas: in the field of politics or security and in the cultural sphere. Over the last several days this Government has taken the first steps with the Secretary-General of the United Nations, Mr. Kofi Annan, who has received the initiative with great interest, with several Muslim Arab states and

the international community and has met with a positive response. Based on this same conviction regarding the need to develop an all-encompassing strategic political response, it is the will of the Minister of Foreign Affairs and Cooperation to promote a profound reflection and debate process in the context of the European Union addressing the causes of terrorism and fostering cooperation policies and dispute settlement.

The Mediterranean dimension is essential to our external policy. The construction of an area of shared prosperity and stability in the Mediterranean means paying greater attention to the fight against terrorism in this area . . .

. . . Spain is making headway on new initiatives with our neighbours from the South within the framework of the Mediterranean dialogue forums focusing, first of all, on improving the flow of information and intelligence among security forces . . . Spain was the pioneer in the launching of the Barcelona Process in 1995 as a common area uniting the European Union nations and the Mediterranean basin countries and it is from this forum that we must jointly foster an area of shared prosperity, stability and security. Ten years following its creation, the Spanish Government is tabling a proposal to revitalise and strengthen the Barcelona Process which will celebrate its tenth anniversary in November of 2005 and from the perspective of which we should also address the phenomenon of terrorism to jointly construct new responses.

And lastly, I would also like to emphasise the importance that this Government places on relations with the United States in the fight against terrorism. We are fighting the same fight, we have developed an intense relationship of collaboration with them and we will remain on this course in the future. As stated earlier, the threat of terrorism shatters the traditional concepts of domestic and external security. Domestic security must go hand-in-hand with external action and, together with the efforts of the security forces, further action is needed in the diplomatic, economic, political and cultural arenas if we are to articulate a structured and global response capable of meeting this threat head on. All of these elements that I have just glossed over with no intention of analysing in great depth at this time, constitute the main lines of action that should be included in the global vision of the State's external action in this matter and are the focus of reflection in the Ministry of Foreign Affairs and Cooperation for the drafting of a framework or action plan for action abroad.

In short, we seek to put external policy as a whole at the service of the fight against terrorism from the new perspective imposed on us by 11 March and which should contribute to our resolve to protect our land and our citizens from any further terrorist attack. We are convinced that from the perspective of this approach, based on multilateralism, cooperation and respect for international legality, we will be more effective. This effort can only be undertaken if there is unity and consensus among all political groups; this has been the case to present and we trust that we can count on the support and help of all parliamentary groups in the future".

(*DSC-C*, VIII Leg., n. 85, pp. 15–20).

a) Alliance of Civilisations

Note: See XI.3.Terrorism

In response to a parliamentary question posed at the Senate plenum regarding the proposal made by the President of the Government to the United Nations General Assembly on 21 September 2004 regarding an alliance between the Western world and the Arab world as a response to international terrorism and to prevent a clash of civilisations and war, Mr. Moratinos Cuyaubé, Minister of Foreign Affairs, stated that:

> "The aim of the Government, and therefore of the President of the Government, was to respond to an enormous challenge . . . affirming that in contrast to the temptation of building a wall of hatred and incomprehension, the Spanish Government considered it both urgent and necessary to tear down that wall and in its place build a political and diplomatic strategy designed to bring us closer, increase understanding, encourage dialogue and foster comprehension.
>
> Thus, not only was the proposal received with enormous enthusiasm and satisfaction by the Secretary-General of the United Nations himself and therefore a formal agreed proposal is pending with the main international actors to formulate a request to the Secretary-General for the creation of a high-level group, but it has also been well received by the Arab and Muslim world in general as would be expected and was our intention.
>
> The reaction from all of the capitals of the Muslim world, of the 22 Arab States in which Spain has an embassy, was immediate and affirmative expressing unequivocal support to such a degree that not only was a favourable response received from the capitals, but also the Secretary-General of the Arab League wrote me a letter to invite me to submit the proposal and initiative at a formal session of the Arab League. This was also the response received from other nations very close to that Muslim world such as Iran where President Jatami himself, in an interview with the Spanish Ambassador, expressed his acceptance and interest in participating in this dialogue among civilisations.
>
> The positive reaction was not limited to the Arab and Muslim world, however. In Europe, Asia and Africa we also met with unanimous support to jointly go about building a better world and that better world is built on alliances against hunger and misery and alliances between civilisations".
>
> (*DSS-P*, VIII Leg., n. 17, pp. 734–735).

b) Asia

In an appearance before the Congressional Plenum and in response to the question regarding the tragedy in Beslan, North Ossetia, the Minister of Foreign Affairs and Cooperation informed that:

> "The Spanish Government firmly and unconditionally condemned the occurrences that took place in Beslan in North Ossetia and expressed its maximum

condemnation of these criminal and unjustifiable acts. We also expressed this view within the European Union and from the Security Council which Spain is currently presiding. On behalf of the United Nations Council, and therefore of the international community, our permanent representative expressed his contempt and condemnation of these acts. The Spanish Government also expressed its solidarity with family members, the victims, the town of North Ossetia, the Russian authorities and the Russian Government and as a proof of that solidarity it offered specialised medical treatment through the network of public Spanish hospitals to those injured in that tragedy. We also offered, and to that end are in contact with the different autonomous communities, to transfer students and children who suffered that tragedy to come to Spain to receive needed human warmth and psychological treatment. But as you correctly stated in your question, the issue that the events in North Ossetia pose is how we should respond to terrorism. There is nothing that can justify terrorism and this must be made perfectly clear and be firmly stated here in this chamber. There are, however, elements that need to be combated to prevent the sort of environment that could breed future terrorist actions. No cause can justify terrorism but there are political, economic and social factors which require global strategic reflection on the part of the international community and that logically includes Spain, Europe and the United Nations. Therefore our Government is going to be very active on the European level within the European Council in initiating a strategic reflection process of how we should combat and defeat terrorism and also within the Mediterranean framework where we must initiate a strategic alliance with the moderate Muslim Arab countries. And lastly, we must work within the United Nations so that the international community remains unanimous and united in combating and defeating this plague".

(*DSC-P*, VIII Leg., n. 29, pp. 1229–1230).

XII. INTERNATIONAL ORGANISATIONS

1. United Nations

a) Spain's Participation in the Security Council

On 15 October 2004, in response to a parliamentary question, the Government explained the objectives Spain has set as a non-permanent member of the Security Council, in particular during its presidency:

"In his role as President in the system of rotation, the Permanent Resident Ambassador of Spain is authorized to direct and organize the work of the Security Council. One of his main duties is to convene and preside over open public and closed sessions of the Council, as well as holding informal consultations with members.

In addition, in collaboration with the Secretary, he prepares the Council Agenda, conveying to the Secretary General on behalf of the Council the appropriate written communications, distributing to members the documentation received from the Secretary General and from other Member States addressed to the Council, and issuing Press Statements agreed on by the Council for this purpose, and, apart from the official Council Sessions, the Permanent Spanish Representative holds regular consultations with all members, both permanent and elected, so as to achieve greater consensus on the various questions on the agenda, with a view to their prompt consideration and, if appropriate, the adoption of any decisions agreed.

However, in addition to these management tasks, which are essential for efficient organisation of the work of this forum, the Government is also aware of the significance of being an elected member of the Security Council, the main body of the UN, which has the fundamental task of maintaining international peace and security. Since becoming a member of the Council, our participation has been constantly guided by three basic principles:

– Consensus, which is a permanent objective for reinforcing unity of opinion and action among Council members, which can only have benefits for its authority, the implementation of its recommendations and the obligatory fulfilment of its decisions.

– Transparency, encouraging as far as possible public and, when appropriate, open sessions to enable the attendance and, if appropriate, active participation in Council tasks of other Member States, and if possible other participants from international society, thus reinforcing the representativeness of this body.

– Efficiency, in an effort to give speedy and effective consideration to the various questions addressed to the Council, in order to guarantee that it fulfils its special responsibilities of maintaining international peace and security.

The Security Council's Agenda is a mirror image of the 'hottest' conflicts on the planet. Unfortunately, many of them exceed the monthly scope of the Council Presidencies and in this respect our Presidency is no exception. In addition to the crisis that the previous Presidency was obliged to include on the Agenda, there are other matters which the Council has decided to look at during this period, as well as any questions arising during this term, which require urgent consideration, or which the Council members decide should have priority. Spain will spare no efforts to seek commitments from Member States to facilitate possible channels for resolving complex and burning issues, in particular those of the Sudan . . ., Democratic Republic of the Congo . . ., Iraq . . ., the Middle East . . ., Haiti . . .

In addition to the countries mentioned, the Council is currently adopting resolutions for the renewal or consideration of Peacekeeping Operations mandates in countries scourged by conflict such as Liberia, Sierra Leone, Bougainville, Guinea-Bissau, Ethiopia and Eritrea. During the Spanish Presidency it was also decided to hold meetings to assess the situation in Cyprus and Kosovo, and to discuss anti-terrorist organisations such as the Al-Qaeda Committee (res. 1267).

Afghanistan needs particular consideration, as the approval of an extension of the International Security Assistance Force (ISAF) seeks to create adequate conditions of stability and normality required for the correct development of the first democratic electoral process in the country's history.

These and other top priority issues for our foreign policy, such as the fight against poverty and hunger, or the reform of the United Nations, will be matters for discussion in various meetings to be held with both the President of the Government and the Ministry of Foreign Affairs and Cooperation scheduled in New York with the main world leaders.

Making the most of the fortuitous presence of so many world leaders at the same time, Spain decided to organize on 22 September a Special Session of the Council with the Minister of Foreign Affairs and Cooperation, focused on a particularly relevant current issue, of vital importance, namely, civilian aspects of conflict management and peace-building".

(*BOCG-Senado*, VIII Leg., n. 95, pp. 105–106).

b) Reform of the United Nations System

On 19 October 2004, the Minister for Foreign Affairs and Cooperation, Mr. Moratinos Cuyaubé, appearing before the Committee for Foreign Affairs, explained the Spanish position on the reform process, emphasizing the fact that the question is not solely a matter of reforming the Security Council, but in fact the whole United Nations system:

"The Spanish Government considers that we only have one opportunity to carry out a reform which would strengthen the mechanisms of multilateral action and renew and reinforce the United Nations system.

... The reform of the United Nations system should seek to democratize its institutions, renew its sectorial programmes and agencies, and create new organisational structures which respond to current challenges, and to obtain the financial and human resources which will guarantee coordinated and efficient functioning of the complete system. In this respect, as expressed by the President of the Government and the General Assembly on 21 September, the Spanish Government supported the reform process and the institutional strengthening of the United Nations enshrined in the Millennium Declaration, and therefore supports the General Secretary's initiatives in this respect.

It is without doubt an essential aspect of the Security Council. The Spanish position on this question is the result of various years' consideration, and is not in any way a defensive position nor is it directed against any specific country. Spain aspires to ensure that the reform of the Security Council will genuinely serve the interests of the organisation and the international community, and not a small group of States. In this respect we favour the enlargement of the number of members, in order to increase their representativeness, and we are prepared to debate on proposals which merit a broad consensus on the increase in the number of non-permanent members, as well as the possible regulation – and

this is important – of the right to veto. We consider that there is a need to tackle these two questions in order to augment the democratization and efficiency of the Council, which in our opinion is badly needed if it is to be seen as a credible body whose decisions are not only respected, but more importantly, implemented and enforced.

We consider that the reform of the Security Council should not be restricted merely to the question of membership numbers. Its operation and work methods should also be improved by encouraging coordination between the Council, the General Assembly and the Ecosoc, as well as the regional organisations which play an increasingly important role in the prevention and management of conflicts. We believe this to be particularly important in ensuring continuity between the Council actions aimed at peacekeeping and those following situations of conflict, in order to consolidate peace by means of technical assistance, reconstruction and development assistance. We also consider it specially important to open up a more intense dialogue between the Council and civilian society, including the parliamentary sphere, as stated in the report of the Cardoso panel.

With respect to the General Assembly, which is where the real sovereignty of the organisation lies, it is necessary to rationalize its work and to encourage interactive relations with other major organisations so that it recovers its authority and significant role. At the same time, as a Spanish initiative, we consider it essential to reinforce the figure and the authority of the Secretary General, who could be given a more significant role, both in questions affecting conflict prevention and management and in those initiatives designed to palliate and resolve serious social and economic problems. Article 99 of the United Nations Charter has already conferred on the Secretary the ability to indicate to the Security Committee any issue which jeopardizes peace or international security, but perhaps his opinions and recommendations should be given more specific weight, in consonance with his moral authority and with the knowledge accumulated in the Secretariat of which he is head on matters arising in the organisation's agenda.

The reform of the Economic and Social Council is particularly complex. It is a body which was originally enlarged to strengthen its representativeness; however, if we are truthful, these days it seems to carry out a function which has little to do with its initial role of assessment and coordination of United Nations special, social and economic activities, particularly those concerned with development. It would, therefore, be appropriate to conduct an in-depth and realistic analysis of its present tasks and revitalize its operations.

Finally, but no less important, there is the President of the Government's initiative to establish a permanent dialogue with civilizations leading to an alliance aimed at combating phenomena which threaten the everyday existence of our peoples, such as terrorism, intolerance, religious fanaticism, xenophobia and cultural incomprehension.

In short, and to conclude, Spain has a legitimate interest in all these questions which it proposes to defend, and it hopes to do so in coordination with

our fellow members of the European Union and with those countries which share similar concerns and goals".

(*DSC-C*, VIII Leg., n. 114, pp. 4–5).

c) Action Programme for Renewed Multilateralism

On 1 July 2004, in reply to a parliamentary question, the Government referred to initiatives planned for encouraging coordination within the United Nations in the framework of the Action Programme for Renewed Multilateralism:

"The relaunch of multilateralism and the reform of the United Nations system may only be achieved through consensus. The search for consensus is one of the pillars of foreign policy in Spain. Therefore, Government actions promoted within the scope of the United Nations aim to be coordinated with our fellow members of the European Union and other allies, both in the Security Council and in the General Assembly, and seek to consolidate a stronger international society with more efficient international institutions, based on the rule of international law within the vital framework of the United Nations. Our principal goal is to construct a fluid and flexible United Nations system, able to adapt to changing circumstances in a world in transformation, and able to provide effective solutions to the crises and challenges it faces.

The Government considers that the best way to contribute to renewed multilateralism is to fulfil and ensure the fulfilment of the commitments entered into, not only in the Millennium declaration but within other forums such as the International Conference on Development Funding, the World Summit on Sustainable Development and the Doha Ministerial Declaration. The Millennium Declaration's follow-up conference next year may be the ideal occasion to assess progress and provide greater impetus to the renewed multilateralism supported by this Government.

It is considered that greater cooperation is needed in the United Nations between its peacekeeping aspect and international security (Security Council) and the promotion of peace and development as well as reconstruction (General Assembly, ECOSOC) through a coordination mechanism whereby the main bodies of the United Nations, as well as the Funds, Programmes and other subsidiary organisations will be connected, in addition to other international bodies involved (financial institutions, NGOs), and this will permit the optimization of resources and a coordinated response to international society vis-à-vis the crises which affect peace and international security".

(*BOCG-Congreso.D*, VIII Leg., n. 47, p. 51).

On the same date, the Government also referred to the need to democratize the United Nations Security Council to make it more representative of the international community, within the Action Programme for Renewed Multilateralism:

"The Security Council, the main body of the United Nations, has demonstrated during recent years both its essential nature for the tasks entrusted to it by the

United Nations Charter as well as the conditioning factors imposed on its composition and Regulation. If it is to be modified, this should be done with infinite care. On several occasions Spain has presented its position on the reform of the Security Council of the United Nations . . . pursuant to the recognized principles of representativeness, efficiency, democracy and transparency. However, above all, consensus. None of the challenges we need to face can be resolved unilaterally, they require political, legal and economic instruments such as security and close cooperation with the countries and other actors in international society. Nevertheless, the more functions accorded to the Security Council, the more necessary it becomes to ensure its legitimacy. The Council needs an agenda for real threats, some of which have not been sufficiently considered in the past. The preventive aspect needs to be improved by means of some early warning mechanism either of its own or in coordination with other institutions. The Counterterrorism Committee presided over until now by Spain and, in general, the fight against terrorism are positive examples of what the Council is able to do".

(*BOCG-Congreso.D*, VIII Leg., n. 47, p. 52).

d) Terrorism

On 10 June 2004 the Minister of Foreign Affairs, Mr. Moratinos Cuayubé, reporting in general terms on his Department's policy, made special reference to the importance of the fight against terrorism for Spain:

"We shall mobilize our efforts and resources to promote the development of this European Union anti-terrorist strategy and to encourage the responsive capacity of the United Nations, an objective in which we have already collaborated significantly by promoting the revitalization of the Security Council Counterterrorism Committee – and where we have also achieved the important appointment of Javier Rupérez – and to build universal consensus in the face of terrorism by means of dialogue and cooperation in bilateral and regional areas. The objective should be twofold; on one hand, to contribute to preventing the threat of terrorism by examining the factors and regional conflicts which may exacerbate it or serve as a pretext for it, and on the other, to contribute to fighting it by helping to strengthen commitment and operational and legislative capacities of the countries where terrorism occurs".

(*DSC-C*, VIII Leg., n. 6, p. 5).

2. North Atlantic Treaty Organisation

a) NATO Response Forces (NRF)

On 15 December 2004, the Minister of Defence, Mr. Bono Martínez, appeared before the Congress Defence Committee to report on the international commitments assumed by Spain in this area, referring in this respect to Spain's participation in the NRF:

"The so called Response Force or NRF is a joint force which includes land, naval and air contingents under a sole command, available to intervene rapidly wherever necessary and acting on decisions of the Atlantic Council; it is a force which can be deployed in just five days, following its initial requirement, and is able to remain in the theatre of operations for up to thirty days with its own resources, for which it needs to be fully trained and qualified in the event of possible occurrences. For what purpose was the NRF conceived? Well, for operations involving the evacuation of non-combative personnel, to respond to humanitarian crises, and also crises which include peacekeeping, anti-terrorist actions, including embargo operations, and also honourable members – as has been specified – if necessary, the NRF can act as a rapid entry force in a conflict.

The NRF, under Spanish leadership, should carry out its training and qualification phase in the first six months of 2005, and must be available by the second half of the year. Spain's next turn on the rota of land forces will be in 2009. This is according to the established rota; however, due to problems raised by France, it will probably be in 2008, although it should be remembered that between July and December 2006 the land component of the NRF will fall to the Eurocorps and therefore, Spain will in principle be required to contribute 21 percent of the forces for its general headquarters, amounting to a contingent of approximately 70 soldiers. The military concept of these groups was devised in 2003 and a short time later, in July 2003, a rotation system was established which includes Spain as one of the leaders of these groups, and which will include contingents from twelve other countries".

(*DSC-C*, VIII Leg., n. 171, p. 5).

XIII. EUROPEAN UNION

1. Intergovernmental Conference on the European Constitution

In his appearance before the Joint Committee for the European Union, on 10 June 2004, the Minister of Foreign Affairs, Mr. Moratinos Cuayubé, reported on Spain's position regarding the Intergovernmental Conference on the European Constitution:

"With respect to institutional questions, Spain considers that it should be compensated with an increase in its number of Euro MPs in the new European Parliament within the framework of the institutional package reached. As you are aware, Spain's number of deputies was reduced to 14 with the Nice Treaty; it is now a question of recovering as many as possible. Regarding the Commission, the formulas currently being discussed at the Intergovernmental Conference are based on a large Commission until 2014, when the Commission will be reduced to 18 or 20 commissioners with equal rotation. With respect to the Council voting system, Spain accepts the principle of double majority of States and population but does not consider the thresholds proposed in the Convention to be

acceptable: a qualified majority of 50 percent of the States representing 60 percent of the population. This formula concentrates power in the four most populated States of the European Union, and is therefore not balanced. The Government proposes that the qualified majority be obtained with the support of half the States, or even half plus one, and that these States should represent a qualified majority of the citizens of the Union. Decisions should not be made contrary to the opinion of a third of the Union's citizens, that is, more than 160 million people; a decision should be legitimate as well as legal. The Government also proposes introducing corrective factors in the voting system to avoid the possibility of *de facto* control of the Union by a triumvirate – a possibility which does actually exist in the Nice Treaty, to the detriment of Spain – by requiring a minimum of four States to block a measure and increase the effectiveness of the decision making process, and proposing that abstentions should no longer count as a negative vote. Our objective is, therefore, to achieve overall balance and to maintain the influence of Spain in community institutions as a whole; that is, in the Council, the Parliament and the Commission.

The second important issue concerns the broadening of the scope of application of the qualified majority. On this point there are some issues on which there is disagreement regarding decision making by qualified majority. Nevertheless, Spain fully supports the proposals of the European Convention in this area. The third section deals with non-institutional questions which occupy and concern Spain in particular; we have managed to introduce into the constitutional treaty a declaration condemning violence against women, and protection of victims, which we consider to be particularly important and which reflects Spanish society's sensitivity towards this serious problem.

Another top priority matter for the Government is the treatment of outermost regions. Spain will continue working to achieve special treatment so that the Canary Islands, as an outermost region, will obtain a stronger partnership. The first objective has already been achieved, as on 26 May the Commission approved the outermost regions report which presented the innovative proposal for the adoption of a specific programme for all outermost regions. In addition, we hope to include the Canary Islands in the new European Union Neighbourhood Policy. In this respect we shall be intervening in the next European Council, which will encourage economic and social development of border regions, to encourage its action in areas such as the environment, the fight against organized crime, border controls and promotion of economic activity, with a proposed annual allocation of 800 million euros from 2007 onwards.

Finally, the Irish Presidency has grouped together a series of proposals on which the various positions are already very close. However, there are two matters on which the Government would like to have seen more ambitious proposals: those relative to social Europe, with a greater use of qualified majority voting; and, secondly, economic governance of the Union, with a more active institutional intervention of the Commission, and greater coordination of the economic policies of the Member States.

Within the framework of the Intergovernmental Conference, there is another matter which I would like to underline: recognition of and respect for our country's linguistic variety. In the Union we are working to obtain adequate legal recognition for languages which, alongside Spanish , are official in some of our autonomous regions. I will not deny that this is a difficult task. By exercising reasonable ambition in this matter, the Government has acted in a realistic manner and has formulated two proposals: one, the possibility of official translations of the constitutional treaty into the official languages in those areas of the Member States which request this; and on the other hand, the possibility that citizens may address Community institutions and bodies in those languages, in addition to receiving a response in the language in question. The first proposal has been practically accepted, the second, conversely, is encountering serious difficulties and we are still working on it".

(*DSCG-Comisiones Mixtai*, VIII Leg., n. 6, pp. 3–4).

2. Ratification of the Treaty Establishing a Constitution for Europe

a) Prior Control of Constitutionality

On 10 June 2004, the Heads of State and Government of the 25 Member States of the European Union unanimously adopted the Draft Treaty Establishing a Constitution for Europe. On 29 October 2004, the Treaty was signed in Rome together with the Final Act of the Intergovernmental Conference, thus opening the channels for the Member States to ratify the Treaty.

On 2 November 2004, the Secretary of State for the European Union, Mr. Navarro González, announced the Government's intention to demand from the Constitutional Court a Declaration on the compatibility of the Constitutional Treaty with the Spanish Constitution:

"I am convinced that there is no incompatibility between the draft constitutional treaty and the Spanish Constitution. This treaty is fully constitutional from a Spanish perspective and in this respect the Minister of Foreign Affairs has issued a report which was authorized and signed and sent to the Council of Ministers last week. The Council of State has issued a report in which it also declares the compatibility and constitutional nature of the various questions analysed, which are an innovation in this treaty, as well as the legal personality of the Union, the charter of fundamental rights and the primacy of community law.

It suggests, however, that the Government make use of its powers, enshrined in the Spanish Constitution, and request that the Constitutional Court issue a binding declaration for the Government.

(. . .)

In this regard, later this morning, the Government will request an appropriate declaration from the Constitutional Court in a spirit of consensus and understanding with all the political powers, because I consider that neither Europe

nor the Spanish Constitution should be treated lightly. The Government therefore understands the importance of this question and, as I have said, in the next few hours the main opposition party will make public its consensus and agreement so that this request of the Council of Ministers shall be made to the Constitutional Court this Friday, and we shall know whether it is possible, before the end of the year prior to 31 December, for the Court to issue a declaration. I firmly believe that full compatibility is possible; if you read article 1.6 of the European Constitution it states that the Constitution and law of institutions in the exercise of the competences attributed to them shall prevail over national laws. Therefore it clearly states 'in exercising of the competences attributed to it' – the same terms used by the Spanish Constitution of 1978, which envisaged our joining the European communities, and in which article 93 establishes the possibility that the exercise of the competences of the Spanish Constitution be transferred to international bodies by means of a treaty; the European Union or the European Communities are not mentioned, and it would perhaps be advisable to include this reference in article 93 in order to Europeanize our Constitution a little, but I believe that there is no incompatibility; nevertheless, obviously, it is the task of our highest constitutional body, the Constitutional Court, to issue an opinion in this respect, and in January a referendum will be called with full knowledge of its purpose so that Spanish citizens will know what their vote means in this referendum".

(*DSCG-Comisiones Mixtai*, VIII Leg., n. 16, pp. 19–20).

b) Call for a Consultative Referendum

On 27 December 2004, having submitted a request to the Council of Ministers, Congress authorized a referendum to consult the people on the ratification of the Treaty Establishing a Constitution for Europe:

"Despite the fact that Spain's ratification could have been implemented through the procedure envisaged in article 93 of the Spanish Constitution, that is, by approval of the Organic Law of the *Cortes Generales*, without further procedure, the Government considers that, given the political importance of the Treaty establishing a European Constitution, in addition to the need to ensure that society participates in that process, it would also be advisable to consult the citizens, so that they may freely express their opinion on the approval of the Treaty prior to its ratification by the *Cortes Generales*.

Among the direct democratic institutions provided by our legal system as channels for adapting the exercise of citizens' fundamental right to participate in politics in its non-representative aspect, a right which is recognized in article 23.1 of the Constitution, a consultative referendum, pursuant to article 92 of the Spanish Constitution and Organic Law 2/1980, of 18 January, on the regulation of various referendum models, appears to be the appropriate channel for proceeding to the aforementioned consultation.

In virtue of which, at the request of the President of the Government . . .

I Hereby State:

Article 1. Government Decision.

All Spanish citizens shall be subject to a consultative referendum with the right of active vote on the following question:

'Do you approve of the Treaty establishing a European Constitution?'

In the autonomous regions with co-official languages this question will be asked in both languages.

Article 2. Date of the referendum.

Voting will take place on Sunday, 20 February 2005.

Article 3. Institutional campaign

Pursuant to the terms of article 50.1 of Organic Law 5/1985, of 19 June, on the General Electoral system, for the purpose of the referendum called in this Royal Decree, the General State Administration shall carry out an institutional campaign for the purpose of informing citizens of the date of the referendum, the voting procedure and the requirements and procedure for postal voting. The government will make public the provisional result of the referendum pursuant to the provisions of article 98.2 of Organic Law 5/1985, of 19 June, on the General Electoral System.

Article 4. Electoral Campaign.

In compliance with the terms of article 15 of Organic Law 2/1980, of 18 January, the electoral campaign shall take place over a period of 15 days.

The electoral campaign will begin at 00:00 hours on 4 February and end at 24:00 hours on 18 February.

Article 5. General scrutiny.

1. The general scrutiny will be carried out according to the terms of article 17 of Organic Law 2/1980, of 18 January, and also the following articles of Organic Law 5/1985, of 19 June, on the General Electoral System: article 75.4 and 5 and articles 103 to 108.

2. The General Scrutiny shall be concluded by 27 February.

3. In compliance with article 18 of Organic Law 2/1980, of 18 January, the Central Electoral Board, through its President, shall officially declare the results of the referendum, and will immediately notify the Presidents of the Government, the Congress, and the Senate.

Article 6. Procedure.

Pursuant to the terms of the second final provision of Organic Law of 18 January, the Government will issue the necessary provisions for holding the referendum called in this Royal Decree.

Article 7. Regulations governing this referendum

The referendum called in this Royal Decree shall be governed by the following regulations:

a) Organic Law 2/1980, of 18 January, on regulation of various types of referendum and their amendments.

b) Organic Law 5/1985, of 19 June, on the General Electoral System and its amendments.
c) Royal Decree 605/1999, of 16 April, on complementary regulations for electoral processes and their modifications.
d) The remaining regulatory provisions for electoral processes and those which are issued for the purposes of this referendum.

Final sole provision. Entry into force.

This Royal Decree shall enter into force on the same day of its publication in the *Boletín Oficial del Estado*".

3. Participation of the Autonomous Regions in European Questions

In reply to a parliamentary question, on 6 October 2004, the Government stated its objectives with regard to recognition in the multinational, multicultural and multi-linguistic reality of the State:

"The Government has undertaken to request a reform of the Regulation on the linguistic system of the European Union, which dates from 1958, in order to incorporate officially those languages which are territorially recognized as official in Spain. The Minister of Foreign Affairs already requested this on 13 September and it is of course a formal and serious proposal by the Government of Spain.

(. . .)

Secondly, the Government, prior to ending the current session, shall present a proposal which would enable representatives from the autonomous regions of Spain to act as representatives of those regions in Spain's permanent European Union delegation, participating in all committees which discuss the competences of the communities, including Correper. . . . In addition, it will also permit the presence of autonomous regional councillors in the Spanish delegation in the same sectorial Councils of Ministers, and we propose implementing this immediately, at least in the Councils for Agriculture and Fisheries, Environment, Social Affairs, Culture, Youth and Education. In addition, the Government considers that the autonomous regions should be able to have recourse to the European Court of Justice on questions within their competence, in all matters relating to the principle of subsidiarity established in the text of the draft Constitutional Treaty, as well as in the protocol on the application of principles of subsidiarity. This philosophy is a response, for example, to the fact that the Government had decided to incorporate autonomous regions into the bilateral summits with bordering countries as occurred in the case of Portugal and France".

(*DSC-P*, VIII Leg., n. 38, p. 1649).

In addition, on 23 June 2004, in response to various parliamentary questions, the Government referred respectively to the European treatment of co-official Spanish languages and participation of the Autonomous Regions in the community sphere:

"The Government has attempted to grant clear and explicit recognition of linguistic and cultural plurality in Europe and logically, to the co-official languages of Spain. In order to do so, the new section two of Article IV.10 of the Treaty literally states: This Treaty may also be translated into any other languages as determined by Member States among those which, in accordance with their constitutional order, enjoy official status in all or part of their territory. A certified copy of such translations shall be provided by the Member States concerned to be deposited in the archives of the Council. Also, since the Government was not completely satisfied with this statement, it proposed a supplementary declaration to the Treaty of the European Union, and it does so, precisely in explicit acknowledgement of the cultural diversity of Europe and with the specific intention that attention should be paid in future to these and other languages. In short, we left open the possibility of continuing to advocate greater recognition for Spain's co-official languages.

(. . .)

The Government has given considerable attention to the question of participation of the autonomous regions in the community sphere, particularly during negotiations for the European Union Constitutional Treaty. For this reason not only did it raise the question of co-official languages, but we were also concerned with strengthening the presence of the autonomous regions in the regional institutions of the Union. We therefore made use of article I.5 of the European Constitutional Treaty, which explicitly establishes not only the Union's respect for the identity of Member States, but also of the regional and local autonomous areas. Thus article 1.9.3, when explaining the principle of subsidiarity, introduces an innovative reference to the levels of regional and local activity. In the development of article 1.9, the protocol on the principles of subsidiarity and proportionality increases considerably the role of regions in the community regulatory process.

(. . .)

Finally, the Government proposes promoting and giving impetus to implementation mechanisms existing in legal practice and in our legal system for the participation of autonomous regions in community matters, such as the Conference for Matters relating to the European Communities (*CARCE*), sectorial conferences, the Reper Board of Economic Matters (Permanent Spanish Representation), and the participation of civil servants and agents of the autonomous regions".

(*DSS-P*, VIII Leg., n. 9, pp. 364 and 366–667).

4. Enlargement

a) Bulgaria and Romania

On 20 December 2004, the Secretary of State for the European Union, Mr. Navarro González, in his appearance before the Council of Europe in Brussels held on 16 and 17 December, referred to the accession of Bulgaria and Romania:

"With respect to Bulgaria and Romania, the European Council welcomes the conclusion of negotiations with these two countries and has recalled that both countries 2007 face important challenges of administrative and institutional consolidation between now and 1 January. The Council requests that work be expedited on the drafting of the accession treaty which, it is hoped, will be signed in April 2005. In addition, the Council of Europe also recalls the basic guarantees of the European Union to ensure adequate preparation for this accession, such as the safeguard clauses and the monitoring by the Commission so that periodical reports may be drafted on the manner in which both countries are incorporating the community acquis into their legislation up until their joining as full-fledged Member States on 1 January 2007.

(...)

We have extremely important political reasons for supporting this enlargement, but also economic reasons. With this fifth enlargement of the ten countries recently entering, along with Romania and Bulgaria, which will be doing so in a matter of months, we are extending the domestic market by over 100 million citizens. If we do this well, enlargement should also provide the impetus for economic growth and the creation of jobs.

(...)

Together with political and economic reasons, I have always stressed, from the Spanish point of view, the moral and ethical reasons for supporting enlargement, since the Spanish, more than anyone else, should not close the door to the European club on these young democracies, when we have seen, through our own experience, how Europe has consolidated our democracy and how we have now had several years, almost 19, which have been the best of our recent history".

(*DSCG-Comisiones Mixtai*, VIII Leg., n. 20, pp. 2 and 14).

b) Croatia

At the same time, the Secretary of State for the European Union also referred to the accession of Croatia:

"With respect to Croatia, the Council of Europe has invited the Commission to prepare the framework document for accession negotiations and has asked the Council of Ministers to approve this document for the purpose of formally opening negotiations for Croatia's accession on 17 March 2005, provided that Croatia fully collaborates with the International Criminal Court for the Former Yugoslavia. There is therefore a clear political condition with regard to negotiations with Croatia".

(*DSCG-Comisiones Mixtai*, VIII Leg., n. 20, p. 2).

c) Turkey

With respect to this country, on 20 October 2004, in reply to a parliamentary question, the Government explained its position on opening negotiations for Turkey's accession to the European Union:

"This Government, like various previous Spanish governments, is favourable to Turkey initiating its path to full integration in the European Union. The Government intends to maintain this position. I will not deny the difficulties arising in deciding the date for negotiations between Turkey and the European Union, but with the elements and requirements expressed in the document, and the reports of the Commission, we believe that we are on track to making Turkey's incorporation into the European Union a reality".

(*DSS-P*, VIII Leg., n. 17, p. 732).

In addition, on 20 December 2004, the Secretary of State for the European Union, Mr. Navarro González, when informing the European Council held in Brussels on 17 and 18 December, referred once more to the issue of Turkey:

"Decidedly the most important decision which has generated most debate in the European Council, is that of initiating accession negotiations with Turkey. There were basically three main questions, the first being to establish the date for initiating formal negotiations for Turkey's accession. The European Council has set a date for 3 October 2005. The second point was the nature of these negotiations and their final result. It is clear that the goal is Turkey's full membership of the European Union. And the third question, which took the most time, was the normalization of relations with Cyprus. Obviously, there is no sense in Turkey entering the European Union when it does not recognize one of its Member States.

(. . .)

Turkey has undertaken, prior to entering into negotiations for joining the Union, to sign a protocol adapting the Ankara Agreement to include the accession of the 10 new Member States by 3 October. There will therefore be some normalization with regard to Cyprus, and, at the same time, in the wording of the conclusions, where it speaks of Turkey's willingness to peacefully resolve territorial conflicts which are still outstanding; although it does not mention the Member State in question, it is obvious that we are talking about Greece and the question of sovereignty of the Aegean islands.

Therefore, I consider that we may all be pleased with this decision. . . .

As in other negotiations for joining the Union, the European Council recalls that these will take place within the framework of a diplomatic conference, an intergovernmental conference whose decision should be unanimously adopted. The European Council also recalls that the opening and closure of the chapters over which the whole community acquis is divided will be subject to unanimous decision and may even set some indicative criteria, objectives for the provisional closure of such chapters and for the opening of others.

Secondly, reference is made to the possibility of introducing extremely prolonged transitional periods, including repeals, specific provisions, permanent safeguard clauses, provided that their impact on the competition and operation of the domestic market is duly taken into account. The conclusions of the

European Council refer explicitly to three areas: the free movement of citizens, agriculture and structural policies.

And with respect to financial matters, the European Council established that when a country's accession has significant financial consequences – obviously, without mentioning that Turkey is the country in question – these must be particularly taken into account in the financial framework after 2014. That is, that financial perspectives from that year on – and in this way it indirectly indicates Turkey, which will not enter the Union until that date – will need to be taken into consideration in the negotiations.

There is also an important reference which should be mentioned in the conclusions, which establish that in the event of serious or persistent infringement of democratic principles or respect for human rights, the Council may, by a qualified majority, at the request of the Commission or a third of the Member States, suspend negotiations with a candidate country.

. . . regarding Turkey, I believe that a very important target has been set on opening negotiations for accession, however . . . there are some safeguards and a series of comments which have no precedent in other enlargement procedures. To speak of the possibility of prolonged transitional periods, exceptions, specific provisions or permanent safeguard clauses without mentioning other references such as democracy, human rights, or the possibility of suspending these negotiations at any time, plainly heightens the fact that this is an enlargement negotiation of a very specific and special nature, which will be the object of political control, and which will not simply follow the model of the most recent enlargements or that of the fourth, involving Austria, Sweden and Finland. I believe that it will be more inspired by the Spanish model . . . in some of its points, for example, the Spanish Accession Treaty in 1986 established a transitional period of 17 years in fishing matters or 10 years for the free movement of workers, although later some of these periods were shortened. Turkey is more likely to follow the Spanish model.

We need to monitor this process; it is not enough simply to consider that on 3 October negotiations will begin, and that the European Union will remain static, waiting to see what occurs. We have the obligation to promote greater knowledge of European and Turkish society, and to encourage exchange programmes, contacts with civil society. Turkey has to launch a real campaign of public diplomacy and sell itself better.

(. . .)

For although in Spain it is not a crucial question or a matter for great public debate, we are very well aware that other Member States are particularly sensitive to this question and opinion polls clearly reflect many Member States' opposition to this accession".

(*DSCG-Comisiones Mixtai*, VIII Leg., n. 20, pp. 2–3 and 14–15).

5. Common Fisheries Policy

On 30 January, in response to a parliamentary question on measures envisaged with the proposal of Commissioner Fishcler to reduce fishing in the community fishing grounds, which includes Galician waters, the Government replied:

"It should be pointed out that the Spanish Government did not at any time condone the drastic cuts in fish catches initially proposed by the Commission and that it maintained a position of supporting fishing possibilities compatible with sustainable management of resources, for which it constantly defended medium- and long-term proposals in the case of recovery of stocks acceptable to the fishing sector and scientific reports.

This objective was achieved following improvements introduced into the Commission proposal. The Council understood and acted in the light of the Spanish claims and this is reflected in the TACs approved for 2004, which will ensure that activity can be carried out without social and economic prejudice to the fleet. The criterion of designing multiyear management plans was followed, with the aim of bringing stocks up to safe levels, as proposed by Government, instead of the drastic immediate recovery measures originally planned by the Commission, which would seriously damage the sector without necessarily guaranteeing that fisheries resources would be recovered at the same speed".

(*BOCG-Congreso.D*, VII Leg., n. 661, p. 318).

6. Lisbon Process

On 27 December 2004, in response to a parliamentary question, the Government referred to the Lisbon process when outlining Spanish foreign policy in the light of the challenges of the European agenda:

"The 'Lisbon Process' is closely linked to the economic growth of the Union, and its social dimension. In recent years the European Union has reiterated its objective that by 2010 Europe should be the world's most competitive and dynamic knowledge-based economy, able to grow economically in a sustainable way, and with more and better jobs and greater social cohesion.

To make these goals a reality by 2010, the Union needs to make efforts in 4 specific and important areas:

– Modernization of the social model through education and a campaign to eliminate social exclusion.

– Maintenance of an average economic growth rate of around 3 percent annually.

– Achievement of a knowledge-based economy, with improved R&D (the target for 2010 is to allocate 3% of the GDP to R&D, a third of which will come from the private sector).

– To make growth compatible with sustainable development.

From the outset Spain has contributed to launching this process, and it is firmly committed to the halfway review to be carried out by the Spring

European Council and to provide new political impetus in order to maintain the objectives of the process".

(*BOCG-Senado.I*, VIII Leg., n. 146, p. 6).

In addition, on 2 November 2004, the Secretary of State for the European Union mentioned the Lisbon Agenda once more:

"With regard to the Lisbon Agenda, I would like to state that we should defend it and more, and I support what you said about being a reference, that Spain should be an example of how to put the goals of Lisbon into practice. A piece of information which fills me with pride, and which I believe should make all Spaniards proud, since it includes the work and efforts of the last Government too, aside from more economic questions, is the fact that Spain leads the twenty-five Member States in the statistics on transposition of directives to domestic law. Along with Denmark, we are the only two Member States to fulfil the two criteria established by the Commission: that we do not have any directives with a two-year transposition term which has already elapsed, and that we have achieved 98.5 per cent transposition of all the directives, which is four hundred and something legal instruments. This should make us very proud, the fact that Spain and Denmark are the only two Member States which fulfil these two criteria shows that we have worked well and that we need to continue at this pace and here the Congress and the Senate play an important role, because many of these transposition regulations are laws, and a decree or ministerial order is not sufficient to implement them".

(*DSCG-Comisiones Mixtai*, VIII Leg., n. 16, p. 19).

7. Financial Perspectives

At the same time the Government also explained its position with respect to financial perspectives:

"Negotiations relative to Financial Perspectives are extremely important, since they are the financial reflection of the Union's political priorities for the period 2007–2013.

The European Council of December 2004 will attempt to agree on 'principles and general guidelines'. At the end of Luxembourg's Presidency in June 2005, it is planned to reach a political conclusion to negotiations. Finally, during the British Presidency in the second six-monthly term of 2005, the whole legislative package will be approved. This will enable preparatory work to be channelled into new Community Programmes throughout 2006, so that they may be applied right from the start of the new Financial Perspectives in 2007.

The Spanish position is based on three main concepts. On the one hand, the need to provide sufficient resources for new priorities formulated in order to achieve the objectives of the various policies during the next seven years, closely related to the Lisbon commitments mentioned previously. On the other hand,

there is a need to emphasize the fact that the enlargement process should be funded in an equitable way. The recent accession of ten new States with a relative prosperity amounting to under 50 percent of the European average will only serve to increase regional disparity. Budgetary efforts should be distributed equitably between all the Member States. Finally, Spain aims to respect the principle of graduality as it passes from one financial situation to another.

The Government is confident that Spain's willingness to contribute to the effort to seek a permanent dialogue will also be shared by other Member States so that between all of them the negotiating process will be successfully concluded and consensus will be reached".

(*BOCG-Senado.I*, VIII Leg., n. 146, pp. 6–7).

In addition, on 21 December 2004, appearing before Congress to report on the Brussels European Council of 16 and 17 December, the Government evaluated the conclusions reached on financial perspectives:

". . . We have approved some conclusions which will allow negotiations on financial perspectives for the next six months to be begun, with a view to concluding them in June. It should be pointed out that the aim of this Council was not to negotiate figures yet, but to organize the debate. The report issued by the presidency achieves this aim and adequately reflects our approach. I would like to point out that it concludes that the new financial framework will require the means available to respond effectively and equitably to future challenges, including those deriving from the disparities in the level of development of an enlarged Union. This formulation has four very positive aspects for Spain: maintenance of the policy of cohesion, the conviction that any required changes should be made in an equitable manner, the consideration of new elements such as the technological gap, and the proposal that the agreement reached will be a balanced one.

Firstly, explicit mention of the enlarged European Union presupposes a reaffirmation of the principles which were valid for the European Union of Fifteen States, and which are still equally valid for the European Union of Twenty Seven States. In this respect, the Spanish argument is that although the special circumstances of new members must be considered, it does not mean that there should be any rupture in the basic community principle, which is that the cohesion policy is unique and should be applicable to all Member States. Secondly, the attention accorded to the challenges of an enlarged Europe should be paid in an equitable manner, taking up Spain's contention that enlargement affects us all, and therefore the sharing of the cost of enlargement should also be equitable for all. Thirdly, the text acknowledges the special care which will be required due to an increase in disparity of development levels, which will come with enlargement. This increase in disparity of income levels is an objective fact, just as is the existence of the technological gap between some countries and others. This last aspect is something that the European Union will need to address, and it is particularly pertinent for Spain. Finally, the agreement should

be satisfactory all round, which implies that discussion on costs should be linked to discussion on the system of each country's own resources which is also an important issue for Spain".

(*DSC-P*, VIII Leg., n. 60, pp. 2836–2837).

8. Area of Freedom, Security and Justice

On 10 November 2004, the Secretary of State for the European Union, when reporting on the informal European Council meeting held on 4 and 5 November in Brussels, appreciated the progress made in building an area of freedom, security and justice, drawing attention to achievements in various aspects of this area: fundamental rights, visas, asylum, immigration and borders, terrorism and judicial and police cooperation:

"(The) second point of the European Council Agenda dealt with achieving an area of freedom, security and justice, and the approval of the Hague Programme, which is linked to the conclusions of the European Council.

(. . .)

The European Council has approved this multi-year programme, known as the Hague Programme, establishing the bases for Union activity in these important matters over the next five years. There is no doubt that this is a new political impulse for achieving this area of freedom, security and justice after the important progress achieved in the last five years with the Tampere programme, and the Commission is invited next year to present a more detailed action plan with proposals, specific schedules so that the various initiatives of the Hague Programme will be adopted.

In a very general manner I propose to refer to the various points of the Hague Programme. Firstly, to all aspects of human rights, where the programme emphasizes that they are an essential goal as a safeguard against possible abuse, and for growing mutual confidence between the authorities of Members States in this important area of human rights. One result of this programme is the creation of a European Agency for the Protection of Human Rights. Secondly, in terms of visas, asylum immigrations and borders, in fulfilment of this passerelle clause of the Treaty of Amsterdam, matters of immigration, asylum and borders, which until the present have been unanimously decided on by the Council, will now be subject to a procedure of co-decision and approval by a qualified majority from 1 April 2005 onwards, with the sole exception of matters relating to legal immigration. Therefore, the provisions contained in the constitutional treaty have been brought forward, at the petition of the European Parliament. In the matter of visas, the programme also provides for the possibility of future common visa offices.

In asylum and immigration matters, there has been some progress towards the target of a common asylum policy, reinforcing the minimum regulations already in place following an assessment of their national application and through the creation of the European Refugee Fund. The creation by 2007 of a

European return fund is also planned, as well as the creation of the role of special Commission representative for this policy. In this global approach to questions of asylum and immigration, particularly in respect of country of origin and transit, attention should be drawn to the use of the new European neighbourhood instrument, particularly in the Mediterranean. I should point out that the programme also introduces a social aspect, referring to the importance of the integration of immigrants legally established in the various European societies. Finally, we should mention that next year it is proposed to create a European Borders Agency, and in 2006 a European fund for border management will be established, committed to the principle of solidarity between Member States, with a mid term goal of possibly establishing a European system of border guards.

Thirdly, terrorism is dealt with in a very significant manner within this new multiyear programme, which explicitly acknowledges that it poses a threat to the whole union of Member States, giving rise to the need to formulate a common response. Europol (you are well aware, honourable Members, that it was one of the Spanish priorities) will become a key player in assisting Member State operations in the fight against terrorism, while the Council Situation Centre, known as Sitcent, will be responsible for strategically analyzing the terrorist threat. Spain has also ensured that funding of terrorism has received the importance this issue deserves, and next December this aspect of the fight against terrorism will be incorporated in an anti-terrorist action plan. The Commission has recently published a substantial communication in this respect.

As regards the fight against terrorism, the Hague Programme also mentioned the need for stricter controls in storage and transport of explosives. This aspect constitutes one of the most relevant elements of the European Council Declaration against terrorism on 25 March, and it is furthermore one of our most important priorities. In terms of achieving greater security, the Hague programme aims to propose a common approach to the use of passenger data with regard to air security and domestic security. Politically, the Hague Programme provides for the Union to create a long-term strategy in respect of the factors leading to radicalization and recruitment by terrorist groups, which is an enormously important issue for Spain.

Fourthly, judicial and police cooperation is of particular importance, especially as regards the need for a greater exchange of information. In accordance with the Spanish points of view, the Hague Programme establishes the principle of availability of information, so that this principle will become reality in 2008, through the interconnection of national, police and judicial databases, and the inclusion in these databases of biometric data. The programme also plans to promote cooperation in a number of police investigation techniques, including forensic ballistic fingerprints and DNA etc. In this field the Hague Programme plans to create a European police school next year known as Cepol, in order to improve the training of security forces in the Member States.

Spain would have liked to go further in several areas, for example in the principle of mutual recognition of criminal judgments, although it should be recognized that the programme contains significant progress in improvements in the coordination of investigations, the establishment of the regulation of jurisdictional conflicts, the procurement and admissibility of evidence, and the connection of criminal record registers in the various Member States. On this last point I can state that the Commission has just presented to the Council a project for a framework decision which aims to extend to the 25 Member States what has already become a well advanced initiative between Spain, France and Germany, for the interconnection of criminal record databases. Although it is true that the Hague Programme does not mention the possible creation of a European public prosecutor, which is recognized in the constitutional treaty, it does propose a notable strengthening of Eurojust, which is an embryonic European public prosecution service. Finally, in the area of judicial civil cooperation, and with the prospect of mutual recognition of judicial decisions, it has been proposed that this objective be achieved by 2011, with special emphasis on full regulation, conflict of laws, judicial competence, recognition and enforcement of judicial decisions in questions of family and inheritance".

(*DSCG-Comisiones Mixtai*, VIII Leg., n. 18, pp. 3–4).

a) Visas

When questioned on the initiatives proposed in the European Union for putting into practice a Common Visa Information System, the Government replied on 22 July 2004:

"The establishment of a Common Visa Information System is based on a consideration of the European Council in Seville in June 2002, and a European Commission feasibility study submitted to the European Council which in June 2003, at Thessaloniki, considered it necessary to establish guidelines for planning the development of a VIS, its legal basis, and funding commitments.

The Commission currently has a Council decision proposal to establish the VIS, on which technical debates are taking place regarding the nature and procedure of the VIS Committee.

The Spanish Government shares the opinion of other Community Members concerning the development of the physical architecture of the system and a network of communications, and the establishment of technical aspects such as data protection, financial and technical repercussions that the VIS may have on our Administration and the requirements of the system in terms of security".

(*BOCG-Congreso.D*, VIII Leg., n. 59, p. 85).

b) External Borders (Schengen)

On 15 September 2004, the Government, in response to a parliamentary question on its position with regard to the request to declare Santa Cruz de la Palma (Santa

Cruz de Tenerife) an external border, according to the Schengen Agreement, referred to the possibility of opening new Schengen ports in Spain:

> "In Spain we have 31 Schengen ports, three of which are in the Canaries, which need to fulfil a series of requirements. The State needs to optimize available resources throughout the whole of Spain's territory in order to adequately guarantee the ministry's top priority, which is to ensure the security of all citizens and, of course, the citizens of the Canary Islands. I mention this because we shall make strenuous efforts within this framework of optimization and rationalization to consider the opening of the new Schengen ports. However, you will understand that what we cannot do is maintain an attitude which would be considered, and with good reason, irresponsible, in permitting the opening of new Schengen ports without the necessary and sufficient resources".
>
> (*DSS-P*, VIII Leg., n. 11, p. 461).

In addition, on 22 October 2004, in reply to a parliamentary question on the proposed Government Action to develop a policy of cooperation between Member States for border checks, he stated:

> "On the initiative of the Governments of Spain and Greece, the Council approved the creation of two Sea Border Cooperation Centres, one for the Eastern Mediterranean with a base in Greece, and the other for the remainder of the European Union seas, with its base in Madrid.
>
> In addition, a Land Border Cooperation Centre has been created, based in Germany, another for Air Borders with its base in Italy, and yet another for Risk Analysis in Finland, as well as a Training Centre for Border Police which will be located in Austria.
>
> Representatives of the National Police Force and the Civil Guard will actively participate in the activities of these Centres.
>
> In the case of the Sea Border Cooperation Centres, work has begun this year on improving cooperation between Member States under the guidance of the 'common unit of external borders practitioners' which is part of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA).
>
> Additionally, the Regulation for the creation of a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union will shortly be approved, and it is planned to be up and running in the first half of 2005. At present, it is planned to begin operating in the first half of 2005. Currently, new joint Ulysses-type operations are being developed, with dates yet to be set".
>
> (*BOCG-Senado.I*, VIII Leg., n. 103, p. 23).

c) Terrorism

The Secretary of State for the European Union, Mr. Navarro González, in his appearance on 20 December 2004 before the Joint Commission for the European

Union, in order to report on the Brussels European Council (16–17 December), once more reiterated the importance for Spain of the fight against terrorism:

"I would underline the European Council conclusions on the fight against the terrorist threat and terrorism. The Council insists, and this is a matter which is important for Spain, on the integration of non-community members in our societies, while it also calls for the fight against radicalization and recruitment of terrorists. It also asks that measures regarding improvements in the exchange of information proposed by the Hague Programme approved by the European Council of November be implemented without delay, which, as you are aware, is a top priority for Spain.

Several specific points are mentioned in the conclusions with a view to reviewing the action plan for the fight against terrorism, while it is requested that a new action plan should be ready by June next year. It specifically stresses stepping up police cooperation, particularly through Europol and the operating unit of police chiefs of the European Union. Secondly, in relation to judicial collaboration, there is talk of improved exchange of information on criminal records and of obtaining a European application for obtaining evidence, requesting in addition that the Commission – I believe what I say will be of particular satisfaction to Spaniards – present a proposal for a European programme for the support and protection of victims of terrorism. Thirdly, it also stresses border security, travel documents, the inclusion of biometric data in passports, and the creation of a European Borders Agency which will be operational as of May next year. In questions on the fight against funding for terrorism, for the first time, as Secretary General and senior representative, Javier Solana has provided a general and coherent focus, also with the support of the Commission and the all the Union policies. This strategic document includes a Spanish proposal for reaching an agreement on controlling the entry and exit of cash, as well as on the third directive relating to money laundering. In matters of civilian protection, the European Council also calls for reinforcement of all the prevention and response capabilities in the face of terrorist attacks, and the creation of a programme of solidarity vis-à-vis the consequences of terrorist threats and attacks. It is asked that all these questions be taken into account in the European Union's external relations, with an increase in cooperation in the fight against terrorism with priority third countries, and anti-terrorist clauses in the agreements signed by the Union with third countries".

(*DSCG-Comisiones Mixtai*, VIII Leg., n. 20, pp. 3–4).

9. Common Foreign and Security Policy (CFSP) European Security and Defence Policy (ESDP)

On 24 November 2004, the Director General of External Policy, Mr. Dezcallar de Mazarredo, explained to the Congress Foreign Affairs Committee the Government's position regarding the CFSP and the ESDP:

"Both the CFSP and the ESDP, but basically the ESDP, have made important progress in the text of the European Constitution. In the case of the CFSP, it has been decided to create a European Foreign Affairs Minister, who will cover the responsibilities which until now have been carried out separately by the high representative for the CFSP and the Commissioner for External Relations. It has also been decided to create a European foreign service which will be based on the existing services of the Commission and the General Secretariat of the Council, but also with important contributions from the Member States. What was not achieved in the Constitution was progress in the decision making process and further communitarization of this process. Decisions continue to be made unilaterally or in certain cases by consensus, a qualified majority not having been reached in any case. In the case of ESDP, progress in the Constitution has been much more spectacular than that of the CFSP. This is important because it is in the extremely sensitive field of security, and the concept that each State has of its own security.

Firstly, article 1.15 has established a future commitment by affirming that the competence of the Union in matters of external policy and common security will include all the areas of external policy and all the questions relating to the security of the Union, including the progressive shaping of a common defence policy which could lead to common defence. This means an important degree of ambition and that what was hitherto no more than a series of more or less specific instruments for crisis management and conflict prevention will now become something which aims to develop into a common policy in the future, like the single currency or the single market.

Secondly, the Constitution also establishes greater solidarity between Member States. On the one hand, it includes a solidarity clause which establishes the obligation of the Union and its Member States to act jointly, including with military resources, to assist a Member State which has been the victim of a terrorist attack, or a natural or manmade disaster. Naturally, you will recall that the European Council of March decided to apply this clause provisionally, precisely to the benefit of Spain following the terrorist attacks of 11 March. On the question of solidarity, the Constitution also establishes a mutual defence clause. In the event that a Member State is the object of armed aggression in its territory, the other Member States will assist with all the means in their power, pursuant to article 51 of the United Nations Charter. This cooperation will be provided pursuant to the commitments entered into within NATO, which continues to be the basis for collective defence. This collective defence clause is important. Firstly, in a way it also makes the European Union a military alliance, and secondly, it reflects a compromise between the sensibilities of defence and security between the Member States. On one hand, the most pro-Atlantic Alliance states are reassured by the mention of the fact that the Alliance continues to be the basis for collective defence, as the text states, which also reflects reality. No one wishes to change this state of affairs in the European Union at the present. And it also reflects a reality which is very con-

structive, for the progress made in the building of a more integrated European defence has been possible precisely thanks to the commitments of the Atlantic Alliance in the framework of the Berlin plus agreements, which allow the European Union to use the Alliance's military assets. The second commitment in this defence clause relates to neutral States. At first the clause was to be optional; nevertheless, an agreement was reached in the Convention to make it compulsory, though adding a reference to the effect that this mutual defence clause does not prejudice the specific nature of the security and defence policy of any State. This basically leaves the door open to neutral States to decide at any time whether or not they wish or feel obliged to apply defence methods to back any other State which is under attack. And finally, this defence clause has evident implications for the Western European Union, which is an extremely old institution in Europe, having been established in 1948. Until now it has been the only existing truly European mutual defence clause, and its future now undoubtedly depends on the development of the European Union in this direction.

Thirdly, the Constitution establishes what is known as structured cooperation mechanisms between States who are willing and able to progress more rapidly in the sphere of the ESDP. These States should be prepared to commit more intensely to the development of defence capabilities by increasing their national contributions and by participating in European equipment projects. The key idea when speaking of structured cooperation is flexibility. . . . It is important for this structured cooperation process to be decided on by a majority, and not unanimously, simply because if it were done so by a majority, States not wishing to go any further could prevent those who did wish to proceed. However, the development in practice of this structured cooperation, once its implementation, its practical application has been decided, must be decided on unanimously, precisely because it is a very sensitive issue and the other States, even if they do not participate in the cooperation, should be able to have some influence on decisions which ultimately will also affect them. In order to be implemented, structured cooperation depends on the NATO agreements, and the agreements established in the Berlin plus framework, which permit the European Union to use NATO military assets for strictly European operations, and not those of NATO. To make this possible, there has to be a degree of mutual trust between the European Union and NATO, which is of vital importance.

(. . .)

Two important aspects of this increased cooperation are the European Defence Agency, which establishes a permanent mechanism for integration and creation of common armaments policies between Member States. Up to now, what have been considerable, yet isolated endeavours, such as, for example, defence programmes involving the European fighter plane, will now become something which will have a permanent training and coordination base. There is also the rapid response capability provided by battle groups, which it is was specifically agreed to develop at the GAERC (General Affairs and External Relations Council).

(. . .)

Returning to the CFSP once more, its sphere of activity is global. The CFSP is designed to be global in scope. Terrorism, weapons of mass destruction and human rights are the three horizontal areas of permanent CFSP action. In the field of terrorism, for example, the European Union has developed external action based on reinforcement of multilateral actions, by striving to ensure that all United Nations agreements on terrorism will be signed and ratified by all countries, including that element in its bilateral policy towards countries which have not signed, by introducing the issue of terrorism into political dialogue with third States, particularly those which are considered to be risks, and by devising technical assistance programmes for those States needing assistance to fight terrorism more efficiently. In the case of weapons of mass destruction, the policy is a similar one. The aim is to strengthen the international system of non-proliferation, both in terms of regulations and also with the effectiveness of control systems, as well as introducing this matter in bilateral policies towards countries in which there has been a problem or suspicion of proliferation. For example, in the agreement being negotiated with Syria for some time, the problem which was blocking a deal was precisely the clause on weapons of mass destruction. An understanding was reached with Syria on this matter about a month ago, and the text has been agreed on. In agreements being negotiated on the European new neighbourhood policy, the weapons of mass destruction clause is also one of the main obstacles in the case of Israel. In the case of other countries where there may also be this type of problem, the issue of weapons of mass destruction will undoubtedly be one of the central topics of negotiation. I have mentioned this in order to stress the fact that this is not simply a declaratory policy, but that the European Union really is attempting to carry out and apply these negotiation principles to other countries. In the case of human rights, honourable Members, you are well aware that it is one of the defining elements of the international identity of the European Union and which has always been central to its foreign policy, as regards both the strengthening of multilateral instruments and the incorporation of clauses concerned with human rights, bilateral agreements with other countries and its relations with other countries. In the case of Iran, in addition to the problems of weapons of mass destruction, the issue of human rights is a permanent element of dialogue of the European Union with Iran and with many other countries in the world".

(*DSC-C*, VIII Leg., n. 143, pp. 19–21).

On 15 December 2004, the Minister of Defence, Mr. Bono Martínez, informed the Congressional Defence Committee of the commitment assumed:

"The other commitment I would like to inform you about is that of the European Union battle groups. They are also groups prepared for a rapid response, the concept of which was defined during the Irish presidency during the first half of this year. What are these? What are the essential features of the battle groups? These are units of 1,500 troops which may be increased to 2,500,

depending on the needs of each mission. There is a distinction between groups comprising an integrated unit from one or several countries and the contribution to others is not ruled out, and multinational groups. These groups are assigned to crisis management missions and the possibility of acting as rapid deployment forces in the theatre of operations. They have been conceived to act within an area of 6,000 kilometres extending concentrically from Brussels. If the European Union Council decides on an operation, within five days from approval of the general concept, the forces must be prepared to carry out their mission in ten days. That is, within fifteen days of approval of the mission, the battle group should be operational. Duration of the mission will be thirty days and if the groups then have further supplies and equipment they can be deployed for up to one hundred and twenty days. At the capabilities commitment conference on 22 November, development was specified in two phases: a period of initial operation including 2005 and 2006, and from 2007 full operation, with a system of thirteen battle groups in the European Union which will rotate on an approximately three-year basis. What did Spain offer the conference? During the initial period, a multinational framework battle group, based on the Spanish-Italian amphibious forces, SIAF, which will include Greek and Portuguese capabilities, as agreed at the last November meeting. During the phase of full operation, there will be a Spanish national framework battle group, which will include French and German forces, and in return for the incorporation of French and German troops into the Spanish battle group, Spain will participate in the Franco-German brigade, another battle group practically identical in terms of the number of French and German troops".

(*DSC-C*, VIII Leg., n. 171, p. 6).

10. Foreign Relations

a) Iraq

On 15 June 2004, when appearing before Congress to inform on Spain's position vis-à-vis the Brussels European Council (17–18 June), he referred to Iraq:

"With respect to Iraq, at the European Council Spain will defend the need to continue to contribute to the efforts of the international community to return full sovereignty to the Iraqi people at the earliest opportunity. It is hoped that the European Council will adopt yesterday's (Monday) conclusions of the General Affairs Council, which endorsed the joint communication of the Commission and the high representative, Javier Solana. As the honourable Members are aware, this document underlines the Union's decision to promote the central role of the United Nations, as well as the work of its representatives in this area, not to impose any measure without previous consultation with the legitimate Iraqi authorities and to support the process of normalization in Iraq in the short and medium term, by collaborating in democratic elections. Finally with

respect to Iran, the European Council will take note of the progress made in the field of nuclear proliferation and will urge the Iranian authorities to speed up their efforts".

(*DSC-P*, VIII Leg., n. 16, p. 588).

Also, on 10 November 2004, the Secretary of State for the European Union, Mr. Navarro González, when reporting on the European Council held in Brussels on 4 and 5 November, stated:

"In relation to Iraq, the debate with Prime Minister Alawi provided a general view of the difficult situation which Iraq is currently experiencing and the plans of the provisional Government. The Prime Minister also reported on the date of the Iraq elections set for 27 January, and the European Council approved the conclusions and a declaration on Iraq which includes the main elements of what the European Union's future relation with that country should entail. At the present time, the two clear priorities are security and preparation for the elections on 27 January. On this second point the European Union committed to substantial financial and logistic support for the elections. These elections are, without doubt, a basic link in the process of progressive legitimization of the Iraqi authorities, and a political event of considerable importance which requires our support. Secondly, financial support for the protective forces of the United Nations to enable the UN to play a role in these elections. Thirdly, an assignment for the Commission to prepare a future possible agreement between the European Union and Iraq, and to present to the Council a mandate to promote political and trade cooperation between the European Union and Iraq. And finally, an operation in support of the institutions necessary for the rule of law. This operation would commence following the election of 27 January with training activities in the judicial, penitential spheres etc. and all aspects of the rule of law. These measures reflect the European Union's global commitment to Iraq and its implementation obviously depends to a considerable degree on the security situation in the territory, which at this time is extremely precarious. An improvement in these security conditions is indubitably an indispensable condition and totally necessary if the process of political, economic and social reconstruction of Iraq is to progress".

(*DSCG-Comisiones Mixtai*, VIII Leg., n. 18, p. 5).

b) Iran

Following the revelations of the International Atomic Energy Agency on the existence of a nuclear programme for military purposes in Iran, the European Union, in the light of the clear violation of Iran's obligations under the terms of the non proliferation Treaty and the enormous risk to international stability, began negotiations with a view to avoiding international conflict.

In this respect, on 4 November 2004, the Director General of External Policy, Mr. Dezcallar de Mazarredo, explained the following to the Congress External Affairs Committee:

"The solution, which will be approved by the governors of the International Atomic Energy Agency, includes the Iranian commitments and steers the conflict towards channels of negotiation and dialogue. Following the conclusion of negotiations, the European Union has appeared on the world stage as a promoter of a dialogue-oriented approach that often produces results and which, although perhaps more laborious initially, will be more stable than other means in the long term. Naturally, not everything is achieved with this agreement. It is only a beginning, but if the agreement had not been achieved, the issue would have gone to the Security Council, and we would have immediately been drawn into a process of sanctions which would have generated opposing reactions, and we would probably have sparked a much more negative turn of development than that which could arise; it may open up or it may close, depending naturally on how the agreement is applied. This is the fundamental issue. The Iranian authorities have to understand that agreements, and this one in particular, must be applied without reservation, and with total transparency; otherwise, the negative side of the matter would probably come to the fore again".

(*DSCG-Comisiones Mixtai*, VIII Leg., n. 143, p. 31).

A month later, on 20 December 2004, the Secretary of State for the European Union, Mr. Navarro González, informing on the Brussels European Council of 16 and 17 December, stated in this respect:

"With respect to Iran, the European Council has welcomed the agreement reached on nuclear issues and weapons of mass destruction and is committed to future cooperation, and is in favour of resuming talks on a trade and cooperation agreement with Iran following the recent verification of suspension of activities relating to uranium enrichment".

(*DSCG-Comisiones Mixtai*, VIII Leg., n. 20, pp. 4–5).

c) Middle East

On 24 November 2004, the Director General of Foreign Policy, Mr. Dezcallar de Mazarredo, explaining the Government's position on the Common Foreign and Security Policy, referred to the peace process in the Middle East:

"The European Union believes that at the present moment there may be opportunities for progress in the peace process which has been going on for so long now. The ultimate goal of the European Union is obviously to achieve two States, an Israeli and a Palestinian State, living side by side in peace, with safe, internationally recognized borders. The plan to withdraw from Gaza and the succession to President Arafat open up new perspectives in this respect, and the European Union plans to take advantage of them. In an attempt to do so, it approved an action plan at the GAERC in early November with a series of short-term measures in areas such as the elections, the reform of the Palestinian Authority, economic assistance and security. A number of specific actions aimed

at each of these areas and their chief actors have been defined: Israel, the Palestinian Authorities and neighbouring countries involved in the issues.

Reference was also made to the long-term solution, but at the moment top priority is accorded to short-term actions, taking advantage of the situation which has been created. It is currently important to generate a dynamic which in recent years has been non-existent, and which may now begin to take shape. It is evident that this plan is included in the Road Map; it is a short-term plan but it does not end there, but is part of a process which can ultimately only by shaped in the Road Map in order to achieve a solution to the problem".

(*DSC-C*, VIII Leg., n. 143, p. 32).

d) Barcelona Process

On 24 November 2004, the Director General of Foreign Policy, Mr. Dezcallar de Mazarredo, reporting on the position of the Government in respect of the European Union's Common Foreign and Security Policy, commented on the Barcelona Process:

"Next year will be the tenth anniversary of the process, and the Government wishes to celebrate it with a summit to preserve the significance of this process and its importance for the European Union Mediterranean members, strategic members for a number of reasons. We consider that if other countries which are important to the European Union, such as Canada or India, but which are perhaps considerably distant in geographical terms, can hold summits with the European Union it would also be productive for the Mediterranean countries to have a summit process, or at least on this tenth anniversary we should take the opportunity to mark the importance we attach to relations with these countries by holding a summit. . . .

(. . .)

We consider that the Barcelona Process is the forerunner of a series of projects being developed in other areas. The European Union began with Barcelona and NATO followed suit with its Mediterranean dialogue. The first ministerial meeting between NATO and the Mediterranean countries will take place in ten days' time . . . G-8 has also generated the idea of a broader Middle East and North Africa, which will have its first meeting in the future Forum in Morocco at the beginning of December. The European Union has therefore paved the way in this respect. We need to motivate this process, which took root ten years ago, and to give it a content which is more in accordance with current needs, and therefore we need this meeting next year in Barcelona. What will it entail? It may deal with multiple issues, both in the field of political dialogue and also judicial and domestic matters, or also the integration of the Barcelona Process into the new neighbourhood policies, which currently are the most promising instrument around for the economic integration of the Mediterranean countries in community policies, and Spain of course has been a key nation in integrating Mediterranean countries into the sphere of the new neighbourhood policy".

e) Latin America-Caribbean

On 20 December 2004, the Secretary of State, Mr. Navarro González, reporting on the European Council held on 16 and 17 December in Brussels, stated:

> "Also, on the initiative of Spain, the conclusions acknowledge the European Union's commitment to the strategic and regional association with Latin America and the Caribbean, which is translated into the Union's desire to progress towards concluding negotiations on the association agreement with Mercosur, and to launch early next year a joint assessment of the integration processes with Central America and the Andean Community, which should also permit progress in free trade agreements with these two Latin American areas".
>
> (*DSCG-Comisiones Mixtai*, VIII Leg., n. 20, p. 5).

11. Appointments

On 15 June 2004, the President of the Government, Mr. Rodríguez Zapatero, reporting to Congress on Spain's position at the Brussels European Council (17–18 June 2004), referred expressly to the appointment of the President of the Commission and of the General Secretary and high representative for Foreign Policy and Common Security:

> "With regard to the President of the Commission, Spain will keep an open mind, without losing sight of the ultimate goal of a strong Commission. However, what is clear is this: we want the new President of the Commission to be a committed Europeanist. With respect to the high representative, Spain will express its strongest support for the candidature of Javier Solana, to whose tremendous efforts and commitment we owe the strengthening of foreign policy and common security in recent years; in addition Spain is hoping for – and will work towards this – the European Council's announcement that he will become the European Union Minister of Foreign Affairs on the day that the Constitution comes into force".
>
> (*DSC-P*, VIII Leg., n. 16, p. 586).

XIV. RESPONSIBILITY

XV. PACIFIC SETTLEMENT OF DISPUTES

XVI. COERCION AND USE OF FORCE SHORT OF WAR

1. Iraq

On 7 January 2004 in response to a parliamentary question, the Spanish Government reaffirmed the statement made by its President who affirmed the existence of weapons of mass destruction and chemical arms in Iraq:

> "Time and again Saddam Hussein has refused to completely, immediately and unconditionally collaborate with the United Nations inspectors in revealing the whereabouts of the arms, materials and components liable to be used for the manufacture of weapons of mass destruction catalogued by the United Nations inspectors and which were not verifiably destroyed.
>
> The regime of Saddam Hussein had weapons of mass destruction and used them in the war against Iran and also to exterminate part of his own people. He invaded neighbouring Kuwait, attacked Israel with long-range missiles and, after suffering defeat in 1991 at the hands of an international coalition, continued to conceal a large proportion of his non-conventional weapons programme from the United Nations, especially chemical and bacteriological arms, despite the severe sanction and inspection scheme which was imposed. This concealment lasted until 1995 when the inspectors managed to discover, thanks to revelations from distinguished members of the Iraqi regime in exile, the true dimension of the Iraqi arms programme.
>
> Following years of inspection, the final report of the United Nations Special Commission, UNSCOM (S/1999/94), the so-called Amorim Report (S/1999/356), the working document of the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) of 6 March 2003 and Annexes I and II of the UNMOVIC work programme of 17 March 2003 continued to indicate that the whereabouts of a considerable proportion of the materials and components used in the manufacture of chemical and biological weapons remained unknown and the Iraqi regime failed to express its will to actively collaborate in revealing these whereabouts. The new and last opportunity that the international community granted to the former Iraqi regime in Security Council Resolution 1441 was scorned by Saddam Hussein's regime which once again refused to collaborate in the active, immediate and unconditional manner required by the Security Council.
>
> Following the intervention by the international coalition, Security Council Resolution 1483 of 22 May 2003 reaffirmed, in preamble paragraph three 'the importance of the disarmament of Iraqi weapons of mass destruction and of eventual confirmation of the disarmament of Iraq'. Moreover, enacting paragraph eleven reaffirms that Iraq must meet its disarmament obligations, encourages the United Kingdom of Great Britain and Northern Ireland and the United States of America to keep the Council informed of their activities in this regard.
>
> In accordance with this resolution, the coalition forces took up the work of the inspectors of the International Atomic Energy Agency (IAEA) and of the UNMOVIC creating for that purpose a Survey Group which commenced work in June of this year shortly following the adoption of resolution 1483. Since

that time the United States and United Kingdom have furnished information to the Security Council regarding the makeup of the different tasks assigned to the Survey Group and at the information meeting held on 21 November by virtue of resolution 1483, the US informed on the preliminary results of the work carried out by the said Group.

(. . .)

The Spanish Government has taken due note of this provisional information and is awaiting the definitive information from the Coalition Survey Group once its work is complete which will still take quite some time".

(*BOCG-Congreso.D*, VII Leg., n. 650, pp. 299–300).

On 2 June 2004 the new Minister of Defence of the Socialist Government elected on 14 March 2004, Mr. Bono Martínez, explained Spain's position regarding the Iraq conflict and specifically in respect of the decision to withdraw Spanish troops:

"The Spanish Government's assessment is positive and is based on three aspects: it was expedient, it was safe and it was coherent. It was expedient because it was the first decision adopted by the Government of President Rodríguez Zapatero on the very day the Government was constituted and in less than a month 1,300 soldiers returned and also in less than a month all of the Spanish forces and material were out of Iraq. It was safe because, despite the difficulty of that operation, there were only four minor injuries although we do still lament the thirteen Spaniards who lost their lives in Iraq, 11 military personnel and the journalists Couso and Anguita. It was coherent because it fulfilled the promise made by the President of the Government one year ago in February 2003 and it was coherent also because, irregardless of the outcome of the elections, the overwhelming majority of the citizens wanted the troops back home. Those that never should have been sent in the first place are now back home and they returned having fulfilled their duties and the Government has kept its word which is no small accomplishment.

And lastly, a small detail . . . this cost us $369 million, in other words, 61 billion pesetas which is the amount needed to build 10 regional hospitals, provide 60,000 students with scholarships or 60 residence homes for the elderly".

(*DSC-P*, VIII Leg., n. 14, p. 542).

On 16 June 2004 the Spanish Government responded to a parliamentary question regarding its assessment of United Nations Security Council Resolution 1546 at the session held on 8 June regarding the situation in Iraq:

". . . the Government make a positive assessment of Resolution 1546. It is true, as the Government has stated on a number of occasions, that it is not perfect. It is not the Resolution that we would have chosen or that would have shown that the United Nations could take control of the entire process including military and political administration. Therefore, the approval of this resolution proved that the decision taken by the President of the Government to withdraw the troops was the correct one because, unfortunately, the United Nations

has not, as we all would have liked, been able to take over the political and military control of the Iraqi stabilisation, democratisation and reconstruction process.

However, the resolution has given rise to debate and has got this process on track and given it a new opportunity and the Iraqis will have to deal with this situation over the upcoming weeks and months.

First of all I can say that thanks to this resolution, unity and consensus has been recuperated first in Europe. For the first time the countries taking part in the Security Council, the European countries, have voted unanimously and jointly.

Secondly, consensus has been revived in the United Nations. We have given multilateralism a new opportunity and this was accomplished with the active participation and decided, open and constructive action taken by the Spanish Government's permanent representative to the United Nations.

Thanks to this resolution, two days ago in Brussels the European nations, the 25 Foreign Affairs Ministers approved a declaration in which we agreed to back the political process which will emerge as of 30 June. However, we are aware of the enormous difficulties that must be taken stock of and confronted by the Iraqi people themselves. Therefore, in this resolution the Spanish Government strongly emphasised that a deadline date be established for the presence of the multinational forces and it achieved its aim; this deadline date will mark the end of the political process, i.e. the end of 2005.

Furthermore, thanks to Spanish intervention at the Security Council, respect for international humanitarian law was renewed so that incidents and actions like the ones that occurred at Abu Ghraib are never repeated. Likewise the multinational forces were called upon to inform the Security Council every three months and as of 30 June sovereignty will formally be transferred to the new Iraqi executive.

(*DSS-P*, VIII Leg., n. 7, pp. 250–251).

On 26 November 2004 in response to a parliamentary question, the Spanish Government stated its position regarding the occupation of Iraq and its consequences:

"It is the Spanish Government's desire that Iraq become a safe, stable, united, prosperous and democratic state within safe borders and that it contribute to regional stability. Spain is willing to take part in the reconstruction of Iraq by contributing the funds promised at the Madrid Donors' Conference and supporting the political process, especially the holding of free elections scheduled for January of 2005.

All of the members of the UN Security Council, including those who most vehemently opposed the war such as France, passed Resolution 1546 on 8 June. That Resolution reaffirms the Iraqi peoples' right to freely determine their own political future and to exercise full authority and control over their financial and natural resources.

It likewise highlights the need to hold direct democratic elections, if possible by 31 December 2004 and at the latest by 31 January 2005, for a Transitional National Assembly which, *inter alia*, will be responsible for establishing a transitional Iraqi Government and for drafting a permanent constitution for Iraq which will lead to a constitutionally elected government by 11 December 2005.

This election, organised with the active support of the UN, will give Iraq a fully legitimate government with the popular support needed to confront the worrisome situation in terms of security with an inordinately high number of Iraqi civilian casualties and in terms of national reconstruction. Therefore all of the nations of the International Community, Spain among them, support the holding of elections in which the Iraqi people can express their political will. Among the objectives of the international conference set for the end of November in Egypt bringing together neighbouring countries and others is to support these elections.

The Spanish Government trusts that a fully sovereign Iraqi people can attain the degree of stability and prosperity to which they are entitled and is ready to do all that is in its power to help them achieve this goal. The Government therefore supports the UN and the Commission charged with the organisation of elections and trusts that everyone will make an effort to contain the situation so that the security aspect does not become an obstacle to the elections.

As laid down in Resolution 1546 itself, the mandate of the multinational forces will be reviewed upon request from the Government of Iraq or within a period of twelve months from the date of the said Resolution. Said mandate shall expire upon conclusion of the political process (December 2005) or at an earlier date if so requested by the Government of Iraq. It is the desire of the Spanish Government that the Iraqi people progressively assume all of the responsibilities inherent to sovereignty, including those that affect security and public order".

(*BOCG-Congreso.D*, VIII Leg., n. 111, p. 301).

2. Afghanistan

On 1 July 2004 the Ministry of Foreign Affairs and Cooperation, Mr. Moratinos Cuyaubé, and the Minister of Defence, Mr. Bono Martínez, in a joint parliamentary appearance informed on the participation of Spain in the International Security Assistance Force in Afghanistan:

"... The participation of Spanish forces is as follows: a total of 475 soldiers if we count the 115 serving in Strasbourg in the Eurocorps which will be deployed to Afghanistan on 10 August. 26 soldiers at the Kabul airport, 40 in the multinational brigade, 69 in the support unit, 2 at ISAF headquarters, the 115 already mentioned at headquarters, 6 civil guards performing personnel protection duties and 217 soldiers on the frigate that Spain has as part of operation *Enduring Freedom* also directly linked with Afghanistan. As I said, a total of 475 forces.

The purpose of that mission is the same as it was under the former Government, i.e. peace and reconstruction, and Spain has the internationally renowned means called upon to complete this mission. The Government would like to hear your opinion before taking a decision and would like to give you information regarding military criteria. The first criteria is to maintain the entity of our current troops. Secondly, I would like to inform you that it is our opinion, without prejudice to listening to Parliament and taking a decision, to withdraw the Spanish contingent forming part of *Enduring Freedom*. Third, to increase our presence in the purely humanitarian sector by setting up a hospital. And fourth, to be effective in helping maintain public order thus allowing the electoral process to follow its course making elections a possibility. The proposal that we submit to you, members of Parliament, so that we can listen to your criteria consists of health-care assistance with transport facilities for evacuation and sufficient air support, aid to maintain public order during the course of the electoral process, withdrawal of the support contingent upon conclusion of the elections – we calculate approximately 80 or 90 days – and we expect the presence of Spanish volunteers together with the military contingent.

In short, the total is as follows: 475 Spanish troops currently stationed in Afghanistan; proposal to increase troops: a health-care team and a battalion of approximately between 793 and 893 troops and exactly 328 troops will be withdrawn in accordance with the following breakdown: ISAF headquarters, 2; *Enduring Freedom* 217, multinational brigade 40 and support unit 69. Troops present according to this proposal in the month of September in Afghanistan between 940 and 1,040; troops at the end of 2004 – once elections have been held – 540, i.e. more or less the same number of troops that Spain has today. The economic cost of the proposal which will be submitted to the Cabinet . . . 54 million. With respect to the possibility of activating the NRF (NATO Response Force) I would like to inform you that the Spanish Government announced at the Istanbul summit that it fully opposed the activation of the NRF. We hold the view that the presence of a Spanish battalion and the forces present from the nations that I mentioned are arguments against the deployment of the NRF and, if it is activated, Spain would veto its own participation because the numbers that I have just given you are maximum figures and are not cumulative as far as the NRF is concerned".

(*DSC-C*, VIII Leg., n. 61, pp. 6–7).

3. Haiti

On 1 July 2004 the Ministry of Foreign Affairs and Cooperation, Mr. Moratinos Cuyaubé, and the Minister of Defence, Mr. Bono Martínez, in a joint parliamentary appearance informed on the participation of Spain in the United Nations Stabilisation Mission in Haiti (MINUSTAH):

"With regard to Haiti . . ., the situation is of concern for two reasons: the political instability and the natural catastrophe that the international community has

responded to. Yesterday marked the end of the provisional multinational force led by France and today, as you are aware, deployment of the stabilisation force began under the authorisation of the United Nations and consisting of 6,700 military troops and 1,162 civilians. To date only 3,800 troops have been deployed. What is Spain's proposal for participation? Spain would like to present to you, members of Parliament, the possibility of making our presence in Haiti contingent upon the autonomous, tactical recognition of the unit we plan to send which would be comprised of a 110-member Civil Guard company.

(. . .)

Haiti is teetering on the edge of disaster as a nation state and therefore we all have a certain historic responsibility to contribute to upholding Rule of Law and the consolidation of that country and that regime.

. . . Spain, as a non-permanent member of the Security Council, voted in favour of Resolutions 1529 and 1542 and has remained in permanent contact with the Secretary-General of the United Nations and with his special advisor for Haiti, John Reginald Dumas and likewise with the Brazilian Government. At the Summit meeting in Guadalajara President Lula himself expressed to the President of the Government his wish for Spain to participate in this stabilisation force, as have a number of Latin American governments including the Government of Chile and the Chancellors of Argentina and Uruguay, who expressed their desire for Spain to also take part in this stabilisation force. As you are aware, the stabilisation force has a dual component, civil and military. Therefore, together with that future contribution with a Civil Guard company, the Foreign Affairs Minister has held meetings with a number of different ministries with a view to combining and complementing the Spanish contribution within Minustha and the consolidation of Rule of Law. To this end we have sought to improve State management by training administrative executives of key ministries such as the Ministry of Agriculture, Planning and Cooperation and likewise by supporting the electoral process and judicial cooperation. Spain will also participate in the review of Haiti's foreign debt and will look kindly upon the possible consideration of the entire volume of debt which now stands at $2.068 billion. The Ministry of Health is also willing to make a contribution by organising all efforts regarding matters of public health care, family medicine and infectious disease experts. To date a health-care organisation advisor, five family physicians for basic care, five advisors for infectious diseases such as AIDS, malaria and tuberculosis and a potable water advisor have been appointed. The Ministry of Labour and Social Affairs has also come on board to contribute on gender issues. Furthermore, as I mentioned earlier, the Spanish Government would like to participate in the electoral system, specifically in the electoral census and two or three experts will be travelling to Haiti for between seven and fifteen days. Thus, the Ministry of the Interior will also be taking part in organising Haiti's electoral process. The Public Administration Ministry has also offered its cooperation by assigning a central administration advisor, a regional administration advisor and a local administration advisor to the Haitian

Government. In short, an array of interventions to consolidate Rule of Law and the recovery of Haiti's institutional framework".

(*DSC-C*, VIII Leg., n. 61, pp. 7–8).

4. Ivory Coast

On 30 December 2004 the Spanish Government responded to a parliamentary question regarding actions envisaged by the Government in addition to assistance lent to Spanish citizens in that Republic in light of the conflict in the Ivory Coast:

"On 4 November hostilities once again broke out in the Ivory Coast. The Ivorian armed forces launched air attacks against the positions of the ex rebels of the so-called *Forces Nouvelles* in the northern part of the country and especially in the city of Bouake. During the course of these bombing attacks, a military base of the French peace mission LICORNE was also attacked and 9 French soldiers were killed. France responded by destroying Ivorian air force aircraft.

These events were the end to the cease-fire signed on 3 May 2003 within the framework of the Linas-Marcoussis Agreement intended to put an end to the civil war and which marked the commencement of a transitional period run by a National Reconciliation Government.

During the days subsequent to these events, groups of armed youths ('young patriots') performed acts of vandalism and pillage in the main cities mostly against French interests and, in certain cases, against Western interests in general.

During these days of crisis, the main concern of the Spanish Government was to offer assistance to our citizens. In so doing our embassy, in contrast to others, remained open at all times and was in permanent contact with Spanish residents in the Ivory Coast. Faced with a situation of deteriorating security, the Government decided to send two Air Force planes for the voluntary evacuation of 63 Spanish nationals and also persons of other nationalities such as, for example, 37 North Americans.

On the diplomatic front Spain, as a non-permanent member of the Security Council, is co-sponsor of Resolution 1572 passed by unanimous decision on 15 November. That Resolution envisages a sanctions scheme which includes an arms embargo against the parties to the conflict which has come immediately into force for an initial period of 13 months and further measures against individuals – in accordance with a list that needs to be drawn up – which shall be applied as of 15 December if the parties fail to comply with the Linas-Marcoussis and Accra III Agreements.

Moreover, from the vantage point of the European Union, Spain has contributed to the development of the stance taken and reflected in the Conclusions of the General Affairs and External Relations Council held on 22 and 23 November. These Conclusions express the EU's support for the activities of the African Union and of ECOWAS in seeking a peaceful solution to the crisis and

highlight the importance of enforcing the sanctions laid down in Resolution 1572 of the UN Security Council.

Looking towards the future, the main objective of the Spanish Government is to work along with our partners in the international community to maintain the cease-fire and foster the peace process so that elections scheduled for 2005 can be held throughout the entire country as established in the commitments made in the Linas-Marcoussis and Accra III Agreements. In this context the sanctions regime laid down in Security Council Resolution 1572 is an instrument both useful and necessary. And lastly, Spain has also expressed its support of the UN operation in the Ivory Coast (UNOCI) and of the French troops deployed in that country (LICORNE) that, under the command of UN Charter Chapter VII, are there to guarantee peace and security throughout Ivorian territory.

(*BOCG-Senate.I*, VIII Leg., n. 48, p. 118).

XVII. WAR AND NEUTRALITY

1. Humanitarian Law

Note: See XI.2.*c) Europe*

On 1 July 2004 the Spanish Government replied to a parliamentary question regarding awareness on the part of Spanish troops stationed in Iraq of the abuse and torture committed by US troops:

"The different Spanish contingents have complied strictly with the missions assigned to them, showing the utmost respect for international law and thus bear no responsibility in respect of the treatment received by Iraqi prisoners.

As part of the humanitarian aid operation in Iraq, the Spanish Armed Forces made arrangements for a contingent to be sent to the port of Umm Qasar in Iraq. On 11 April 2003 the Advanced Medical Services Unit (EMAT) was deployed at the BUCCA prisoner camp.

According to the information received by the Head of EMAT, a total of 4,101 persons were treated at that hospital. Hospital patients made no reference to having been mistreated. The psychological unit treated approximately 100 persons but made no reference whatsoever to 'mistreatment'.

During the entire time that the Unit was at Camp BUCCA the team from the International Red Cross Committee in charge of monitoring compliance with the conventions on the treatment of prisoners of war was also there and the Head of the Spanish Unit had several meetings with Red Cross officials and did not receive any complaints whatsoever.

No written reports or notice of incidents have been received regarding violation of international law on the treatment of prisoners of war and neither have Spanish troops been informed or made aware at any time of the practices of American and British troops with Iraqi prisoners.

Neither has it been brought to our attention that any NGO has contacted the Advanced Medical Services Unit (EMAT) to report the use of torture.

Moreover, the Ministry of Foreign Affairs and Cooperation has expressed its firm condemnation of the said torture which is a violation of international law and it is counting on the affected Governments to comply with the commitment they have made to bring those responsible for the said acts to justice. The European Union has expressed itself in these same terms in the Conclusions of the General Affairs and External Relations Council (GAERC) of 17 May 2004".

(*BOCG-Congreso.D*, VIII Leg., n. 47, pp. 87–88).

2. Disarmament

On 10 December 2004 in response to a parliamentary question, the Spanish Government set out the position it will take at the upcoming Nairobi Conference, the purpose of which is to study the enforcement of the 1997 Ottawa Treaty:

"Spain has taken a proactive stance in respect of the problem of anti-personnel mines and its position concerning the Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction is based on the following elements:

- As party to the Convention, Spain is firmly committed to the enforcement of its provisions and advocates is universal application;
- Spain was one of the first States to ratify it and also one of the first to destroy its arsenal of anti-personnel mines and to adopt domestic legislation prohibiting the manufacture, stockpiling and use of these mines;
- Spain has been an important 'donor' country in the fight against these mines and their effects: it created an International Demining Centre to meet the training needs of humanitarian deminers from all requesting countries; it has contributed to the implementation of demining efforts through the use of UN and OAS trust funds and it has financed programmes addressing the needs of mine victims.

This commitment will be renewed and reflected during the First Convention Review Conference to be held in Nairobi from 29 November to 3 December 2004.

Spain is taking part in the forums leading up to this Review Conference and is co-sponsoring a draft resolution in this regard with the main sponsor Thailand which will be submitted to the First Commission of the 59th United Nations General Assembly.

This draft resolution contains the following elements:

- The expressed desire for all States to adhere to the Convention and the determination to work in favour of its universal enforcement;
- It highlights the importance of enforcement;
- It urges the promotion of transparency measures and the undertaking of more effective efforts focusing on anti-mine actions through the exchange of information;

- It invites States and other organisations to join forces in lending support to programmes addressing rehabilitation and social and economic reintegration for victims, education on the risks of mines and demining;
- It reiterates the interconnectivity between demining initiatives and development and the need to integrate anti-mine efforts into national programmes and development strategies;
- It proposes interaction between this action and regional and international financial institutions (welcoming possible synergies between the initiatives implemented by the anti-mine community and the World Bank); and
- It stresses the need to improve cooperation and promote synergies on the regional level in order to take on the challenge of anti-personnel mines.

Spain, as a European Union member and prime contributor to anti-mine initiatives, is also co-author of the EU Strategy 2005–2007 entitled 'European Roadmap to a Zero Victim Target' created with a view to providing assistance to countries suffering the consequences of mines and explosive remains, reestablishing the necessary conditions of security for their citizens and assuring social and economic development.

The Review Conference will feature a presentation by the EU, on behalf of all of the partners, to reaffirm its commitment to the fight against landmines and in support of the countries which have fallen victim and to present this Strategy for which $60 million have been allocated.

Spain will also make a national declaration stating its commitment to continue and, if possible, to increase funding for programmes promoting the rehabilitation and reintegration of mine victims and demining projects and likewise to inform of the availability of our International Demining Centre to meet the training needs of humanitarian deminers from all requesting countries".

(*BOCG-Congreso.D*, VIII Leg., n. 19, p. 256).

On 20 September 2004 in response to a parliamentary question, the Spanish Government informed as to the criteria that it is going to defend in the ongoing process of updating and reviewing the European Union Code of Conduct on the international arms trade:

"Spain has actively participated in the discussions regarding a series of initiatives based on the possible review of the eight criteria as well as the operational provisions of the EU Code of Conduct. From among the contributions made by the Spanish delegation, special mention should be made of two: the application of the eight criteria of the Code to transit through European territory and the drafting of a Common Position paper with the commitment of the Fifteen to establish registries and making mediation operations in arms trading in the said territory subject to prior authorisation.

Moreover, it is worth mentioning that a possible review of criteria 1, 6 and 8 of the Code has been suggested. As for criteria 1, the proposal is to introduce a commitment on the part of the States to supply small arms and light weapons especially designed for military use only to Governments or authorised public

agencies. Hunting and sporting arms shall be excluded from this commitment. Criteria 6 would include a reference whereby notification made by a country of its arms exports to the United Nations Registry must be borne in mind as an additional element in the analysis of the behaviour of the receiving country vis-à-vis the international community. Another subject which continues under study is the interpretation made by the States of criteria 8 of the Code and the possible use of economic development indicators in assessing, in economic terms, the compatibility of an export with a specific destination. Spain supports these three proposals and, regarding the export of small and light arms, the Inter-Ministerial Regulatory Board on Foreign Trade in Defence or Dual-Use Material (Spanish acronym: JIMDDU) took the decision in 2001 to make authorisation of exports of these arms, in the case of especially sensitive countries or when there is a risk of diverting final use, contingent upon the final user being a public entity (Armed Forces and Police Forces).

(*BOCG-Congreso.D*, VIII Leg., n. 69, p. 349).

Treaties to Which Spain is a Party Concerning Matters of Public International Law, 2004

This material has been selected, compiled and commented on by a team from the Department of Public International Law of the University of Málaga, which includes Dr. Alejandro Rodríguez Carrión, Professor of Public International Law, Dr. Elena del Mar García Rico, Dr. Magdalena Mª. Martín Martínez, Dr. Eloy Ruiloba García, Dr. Ana M. Salinas de Frías and Dr. María Isabel Torres Cazorla, Lecturers in Public International Law.

This survey includes the treaties covered by art. 2.1a) of the Vienna Convention on the Law of Treaties, published in the *Boletín Oficial del Estado* (Official Journal of the State). Its purpose is to record the legal effects of these instruments, such as ratification or accession, municipal entry into force, provisional application, reservations or declarations, territorial application, termination and abrogation. In a few instances some relevant articles or references will be reproduced in an unofficial translation.

I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

III. RELATIONSHIP BETWEEN INTERNATIONAL AND MUNICIPAL LAW

IV. SUBJECTS OF INTERNATIONAL LAW

V. THE INDIVIDUAL AND INTERNATIONAL LAW

1. Aliens

– Protocol between the Government of Spain and the Government of People's Democratic Republic of Algeria on free movement of persons, done *ad referendum* at Algiers on 31 July 2002.
Entry into force: 18 February 2004 (*BOE* 37, 12.02.04).

Exchange of Notes between the Ministries of Foreign Affairs of the Kingdom of Spain and the Republic of Bosnia-Herzegovina establishing the succession to bilateral treaties concluded between the former Yugoslavian Federative Socialist Republic and the Kingdom of Spain (*BOE* 68, 19.03.04 and 97, 21.04.04).

Spanish Yearbook of International Law, Volume X, 2006

Note: Both States undertake to readmit their nationals who are in an irregular situation in the territory of the other without any formalities, provided that it is proved or may be validly established that they are nationals of the requested State. All costs incurred shall be borne by the requesting State.

– Agreement between the Kingdom of Spain and the Republic of Poland on the readmission of persons in an irregular situation, done at Warsaw on 21 May 2002.
Entry into force: 23 June 2004 (*BOE* 176, 22.07.04).

– Guidelines for the work of the bilateral committees provided under Decision 123 of the Governing Council of the United Nations Compensation Commission, done in Geneva on 15 March 2001.
Entry into force: 7 July 2003 (*BOE* 150, 22.06.04 and 224, 16.09.04).

– Exchange of Notes constituting an Agreement between Spain and Portugal on the establishment of an Arbitration Commission to assess compensation for Spaniards whose assets were seized in the 1974 Revolution, done at Lisbon on 8 and 9 October 2002.
Entry into force: 22 July 2004 (*BOE* 198, 17.08.04).

VI. ORGANS OF THE STATE

1. Diplomatic Relations

– Agreement between the Kingdom of Spain and the Republic of Ecuador on exemption of visas for diplomatic and official service passport holders, done at Quito on 20 November 2003.
Provisional application: 20 December 2003 (*BOE* 32, 6.02.04).

– Agreement between the Kingdom of Spain and the Republic of Costa Rica on the free exercise of remunerated employment for dependants of diplomatic, consular, administrative and technical personnel of Diplomatic and Consular Missions, done at Madrid on 7 March 2000.
Entry into force: 23 August 2004 (*BOE* 225, 17.09.04).

– Agreement between the Kingdom of Spain and the Republic of Bolivia on the free exercise of remunerated employment for dependants of diplomatic, consular, administrative and technical personnel of diplomatic and consular missions, done at Madrid, on 26 June 2002.
Entry into force: 8 November 2004 (*BOE* 248, 14.10.04).

2. Relations with International Organizations

– Agreement between Spain and the United Nations Organization concerning the meeting of States Parties to the Convention on the Protection and Use of Cross-Border Waterways and International Lakes, to be held on Madrid on 26 to 28 November

2003, done at Geneva on 18 November 2003.
Provisional application: 18 November 2004 (*BOE* 8, 9.01.04).

– Annexes XV, XVI and XVII to the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, done at New York on 21 November 1947.
Instrument of acceptance: 27 November 2003 (*BOE* 35, 10.02.04).

– Exchange of Notes constituting an Agreement between the Kingdom of Spain and the Kingdom of the Netherlands, regulating the privileges and immunities of Europol liaison officers, done at Madrid on 27 January 1999.
Definitive entry into force: 1 August 1999 (*BOE* 46, 23.02.04).
Note: It was in provisional application as from 11 February 1999 (*BOE* 49, 26.02.99).

– Convention on the responsibilities to be assumed by the Kingdom of Spain and the United Nations Food and Agricultural Organization in respect of the third meeting of the intergovernmental group on bananas and tropical fruit, done at Rome on 9 February 2004.
Provisional application: 9 February 2004 (*BOE* 134, 3.06.04).

– Headquarters Agreement between the Kingdom of Spain and the High Council of European Schools, done on 13 August 2002.
Definitive entry into force: 12 January 2004 (*BOE* 20, 23.01.04).
Note: It was in provisional application as from 13 August 2002 (*BOE* 251, 19.10.02).

– Site Agreement between the Kingdom of Spain and the Organization of Ibero-American States for Education, Science and Culture (*OEI*), done at Madrid on 24 June 2004.
Provisional application: 24 June 2004 (*BOE* 198, 17.08.04).

VII. TERRITORY

VIII. SEAS, WATERWAYS AND SHIPS

1. Fisheries

– Amendments to the Schedule to the International Convention for the Regulation of Whaling, adopted at the 55 Session of the International Whaling Commission, held at Berlin on 19 June 2003.
Entry into force: 30 September 2003 (*BOE* 41, 17.02.04).

– 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, done at New York on 4 August 1995.
Instrument of ratification: 24 November 2003.

Entry into force: 18 January 2004 (*BOE* 175, 21.07.04).
Note: The Spanish ratification contains the following Declaration:

Spain, as a member of the European Community, points out that it has transferred competence to the Community with regard to a number of matters regulated by the Fish Stocks Convention. Spain hereby reaffirms the declarations made by the European Community upon ratifying 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.

Interpretative declarations:

1. Spain understands that the terms "geographical particularities", "specific characteristics of the subregion or region", "socio-economic, geographical and environmental factors", "natural characteristics of that sea" or any other similar terms employed in reference to a geographical region do not prejudice the rights and duties of States under international law.

2. Spain understands that no provision of this Agreement may be interpreted in such a way as to conflict with the principle of freedom of the high seas, recognized by international law.
3. Spain understand that the term "States whose nationals fish on the high seas" shall not provide any new grounds for jurisdiction based on the nationality of persons involved in fishing on the high seas rather than on the principle of flag State jurisdiction.
4. The Agreement does not grant any State the right to maintain or apply unilateral measures during the transitional period as referred to in article 21, paragraph 3. Thereafter, if no agreement has been reached, States shall act only in accordance with the provisions provided for in articles 21 and 22 of the Agreement.
5. Regarding the application of article 21, Spain understands that, when a flag State declares that it intends to exercise its authority, in accordance with the provisions of article 19, over a fishing vessel flying its flag, the authorities of the inspecting State shall not purport to exercise any further authority under the provisions of article 21 over such a vessel.
Any dispute related to this issue shall be settled in accordance with the procedures provided for in part VIII of the Agreement. No State may invoke this type of dispute to remain in control of a vessel which does not fly its flag.
In addition, Spain considers that the word "unlawful" in article 21, paragraph 18 of the Agreement should be interpreted in the light of the whole Agreement, particularly, articles 4 and 35 thereof.
6. Spain reiterates that all States shall refrain in their relations from the threat or use of force in accordance with general principles of international law, the United Nations Charter and the United Nations Convention on the Law of the Sea.

In addition, Spain underlines that the use of force as referred to in article 22 constitutes an exceptional measure which must be based upon the strictest compliance with the principle of proportionality and that any abuse thereof shall imply the international liability of the inspecting State. Any case of non-compliance shall be resolved by peaceful means and in accordance with the applicable dispute-settlement procedures.

Furthermore, Spain considers that the relevant terms and conditions for boarding and inspection should be further elaborated in accordance with the relevant principles of international law in the framework of the appropriate regional and subregional fisheries management organizations and arrangements.

7. Spain understands that in the application of the provisions of article 21, paragraphs 6, 7 and 8, the flag State may rely on the requirements of its legal system under which the prosecuting authorities enjoy a discretion to decide whether or not to prosecute in the light of all the facts of a case. Decisions of the flag State based on such requirements shall not be interpreted as failure to respond or to take action.

8. Spain is of the view that the constituent conventions of regional fisheries management organizations such as the Northwest Atlantic Fisheries Organization, the North-East Atlantic Fisheries Commission and the International Commission for the Conservation of Atlantic Tunas, given their status as special international agreements, have legal precedence over the New York Agreement, which sets forth general rules on the conservation and management of straddling fish stocks and highly migratory fish stocks. Part VI of the Agreement, "Compliance and enforcement", laying down boarding and inspection procedures, is therefore to be regarded as a regulation subordinate to alternative mechanisms established by subregional or regional fisheries management organizations which effectively discharge the obligations under the New York Agreement of their members or participants to ensure compliance with the conservation and management measures established by such organizations or arrangements.

9. Spain understands that in article 8, paragraph 3, of the Agreement the term "a real interest" used with reference to States which may be members of a regional fisheries management organization shall be regarded as meaning that a regional fisheries management organization must in all circumstances be open to any State whose fleet fishes or has fished in the area covered by the constituent convention of such organization, in respect of which fleet the flag State has the authority to ensure compliance and enforcement. Participation in such organizations by the States in question shall indicate their real interest in the fisheries.

IX. INTERNATIONAL SPACES

X. ENVIRONMENT

1. General

– Stockholm Convention on Persistent Organic Pollutants, done at Stockholm on 22 May 2001.
Instrument of ratification: 18 May 2004.
Entry into force: 26 August 2004 (*BOE* 151, 23.06.04).
Note: The ratification was made with the following declaration:

> "Any amendment to Annex A, B, or C shall enter into force for Spain only after it has deposited its instrument of ratification, acceptance, approval or accession with respect thereto".
> However, in the Status of Multilateral Treaties Deposited with the Secretary-General of the United Nations there is no notice of the Spanish Declaration.

– Exchange of Notes extending the application of the Agreement between the Kingdom of Spain and the Principality of Andorra on the movement and management of waste, done at Madrid on 27 January 2000.
Extension until 10 July 2006 (*BOE* 221, 13.09.04).

2. Seas

– Amendments to the Convention for the protection of the Mediterranean Sea against pollution, done at Barcelona on 10 June 1995.
Entry into force: 9 July 2004 (*BOE* 173, 19.07.04).

– Protocol of 1997, amending the International Convention for the Prevention of Pollution from Ships, 1973, modified by the 1978 Protocol, done at London on 26 September 1997.
Instrument of accession: 24 July 2003.
Entry into force: 19 May 2005 (*BOE* 251, 18.10.04).

3. Fauna and Flora

– Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade, done at Rotterdam on 10 September 1998.
Instrument of ratification: 18 February 2004.
Entry into force: 31 May 2004 (*BOE* 73, 25.03.04).

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

1. General treaties

– General Treaty of Co-operation and Friendship between the Kingdom of Spain and the Republic of Ecuador, done *ad referendum* at San Francisco de Quito on 33 June 1999.
Entry into force: 23 March 2004 (*BOE* 97, 21.04.04).

2. Military and Defence Cooperation

– Exchange of Notes 13 and 14 April 2003 between the Kingdom of Spain and the State of Kuwait constituting an Agreement on the statute of the Spanish Armed Forces in Kuwait.
Definitive entry into force: 16 February 2004 (*BOE* 67, 18.03.04).
Note: It was in provisional application as from 15 April 2003 (*BOE* 140, 12.06.03).

3. Scientific and Technical Cooperation

– International Agreement agreeing to the establishment of an Iberian Electrical Energy Market between the Kingdom of Spain and the Portuguese Republic, done in Lisbon on 20 January 2004.
Provisional application: 22 April 2004 (*BOE* 132, 1.06.04).

– Agreement relating to the construction and use of a European Synchrotron Radiation facility, done in Paris on 16 December 1988.
Definitive entry into force: 26 July 2004 (*BOE* 195, 13.08.04).
Note: Applied provisionally since 1 January 1989 (*BOE* 86, 11.04.89 and 132, 3.06.89).

– Framework Agreement on Technical, Cultural and Scientific Cooperation between the Kingdom of Spain and the Republic of Trinidad and Tobago, done *ad referendum* at Port Spain on 3 July 1999.
Entry into force: 20 July 2004 (*BOE* 223, 15.09.04).

4. Cultural Cooperation

– Agreement between the Kingdom of Spain and the Republic of Turkey relating to the creation and operation of cultural centres, done in Ankara on 26 April 2002.
Entry into force: 12 December 2003 (*BOE* 28, 2.02.04).

– Agreement on Cinematography Co-Production between the Kingdom of Spain and the United States of Mexico, done at Madrid on 8 April 2003.
Entry into force: 30 January 2004 (*BOE* 60, 10.03.04).

– Convention between the Kingdom of Spain and the Principality of Andorra on Educational Matters, done at Madrid on 22 December 2003.
Provisional application: 22 December 2003 (*BOE* 132, 1.06.04 and 151, 23.06.04).

– Exchange of Notes on 20 January and 2 February 2004, constituting an Agreement extending the Agreement between the Kingdom of Spain and the United States of America on Educational, Cultural and Scientific Cooperation, done on 27 October 1994.
Provisional application: 2 September 2003 (*BOE* 134, 3.06.04 and 159, 2.07.04).

– Agreement on Cultural, Educational and Scientific Cooperation between the Kingdom of Spain and the Republic of Serbia and Montenegro, done at Madrid on 24 September 2003.
Entry into force: 6 May 2004 (*BOE* 146, 17.06.04).

– Exchange of Notes constituting an Agreement between the Kingdom of Spain and the French Republic on the tax regime of educational and cultural institutions amending the Agreement of 28 February 1974 currently in force, done in Malaga on 26 November 2002.
Entry into force: 16 July 2004 (*BOE* 196, 14.08.04).

5. Economic Cooperation

– Agreement between the Kingdom of Spain and the Republic of Equatorial Guinea for the Promotion and Protection of Investments, done at Malabo on 22 November 2003.
Provisional application: 22 November 2003 (*BOE* 10, 12.01.04).

– Agreement between the Kingdom of Spain and the Republic of Albania for the Promotion and Protection of Investments, done at Madrid on 5 June 2003.
Entry into force: 14 January 2004 (*BOE* 38, 13.02.04 and 83, 6.04.04).

– Agreement between the Kingdom of Spain and the Republic of Colombia on cooperation in the prevention of the consumption of, and trafficking in narcotic drugs and psychotropic substances, done *ad referendum* at Bogota on 14 September 1998.
Entry into force: 5 March 2004 (*BOE* 40, 16.02.04).

– Agreement for the Promotion and Protection of Investments, between the Kingdom of Spain and the Republic of Uzbekistan, done at Madrid on 28 January 2003.
Entry into force: 3 December 2003 (*BOE* 78, 31.03.04).

– Agreement between the Kingdom of Spain and the Federal Republic of Yugoslavia for the Promotion and Protection of Investments, done *ad referendum* at Madrid on 25 June 2002.
Entry into force: 31 March 2004 (*BOE* 135, 4.06.04).

– Agreement between the Kingdom of Spain and the Republic of Guatemala for the Promotion and Protection of Investments, done at Guatemala on 9 December 2002.
Entry into force: 21 May 2004 (*BOE* 146, 17.06.04).

– Agreement for the Promotion and Protection of Investments between the Kingdom of Spain and the Islamic Republic of Iran, done at Madrid on 29 October 2002.
Entry into force: 13 July 2004 (*BOE* 192, 10.08.04).

– Agreement between the Kingdom of Spain and the Republic of Namibia for the Promotion and Protection of Investments, done at Windhoek on 21 February 2003.
Entry into force: 28 June 2004 (*BOE* 199, 18.08.04).

– Agreement for the Promotion and Protection of Investments between the Kingdom of Spain and the Republic of Trinidad and Tobago, done *ad referendum* at Port Spain on 3 July 1999.
Entry into force: 17 September 2004 (*BOE* 252, 19.10.04).

6. Financial and Tax Cooperation

– Convention between the Kingdom of Spain and the Republic of Turkey for the avoidance of double taxation and the prevention of tax evasion and fraud in relation to taxes on income, done at Madrid on 5 July 2002.
Entry into force: 18 December 2004 (*BOE* 16, 19.01.04, 60, 10.03.04 and 85, 8.04.04).

– Convention between the Kingdom of Spain and the Republic of Chile for the avoidance of double taxation and the prevention of tax evasion and fraud in relation to taxes on income and capital, and Protocol, done at Madrid on 7 July 2003.
Entry into force: 23 December 2003 (*BOE* 28, 2.02.04).

– Convention between the Kingdom of Spain and the Republic of Latvia for the avoidance of double taxation and the prevention of tax evasion and fraud in relation to taxes on income and capital, and Protocol, done at Madrid on 22 July 2003.
Entry into force: 26 December 2003 (*BOE* 28, 2.02.04 and 76, 29.03.04).

– Convention between the Kingdom of Spain and the Bolivarian Republic of Venezuela for the avoidance of double taxation and the prevention of tax evasion and fraud in relation to taxes on income and capital, done at Madrid on 8 April 2003.
Entry into force: 29 April 2004 (*BOE* 144, 15.06.04).

7. Radio and Telecommunications Cooperation

– Final Acts of the World Radio Communications Conference (WRC-97), done at Geneva on 21 November 1997.
Entry into force: 10 February 2004 (*BOE* 90, 14.04.04).

– Final Acts of the World Radio Communications Conference (WRC-2000), done at Istanbul on 2 June 2000.
Entry into force: 10 February 2004 (*BOE* 91, 15.04.04).

8. Road Traffic and Transport

– Exchange of Notes constituting an Agreement between the Kingdom of Spain and the Republic of Colombia on the mutual recognition and exchange of national driving licences, done at Madrid on 30 and 31 July 2003.
Definitive entry into force: 28 November 2004 (*BOE* 17, 20.01.04).
Note: It was in provisional application as from 31 July 2004 (*BOE* 240, 7.10.03).

– M-136 Multilateral Agreement under paragraph 1.5.1 of the ADR, relating to the transport of red fuming nitric acid (UN 2032) in packaging consisting of a plastic container inside a plastic drum (6HH1), done in Madrid on 5 June 2003 (*BOE* 42, 18.02.04).

– M-133 Multilateral Agreement under paragraph 1.5.1 of the ADR, relating to derogations regarding the name and description of refrigerating devices (UN2857), done in Madrid on 5 June 2003 (*BOE* 43, 19.02.04).

– M-135 Multilateral Agreement under paragraph 1.5.1 of the ADR, relating to transport of liquid ammonium nitrate (ONU2426) in dedicated tanks, done in Madrid on 5 June 2003 (*BOE* 43, 19.02.04).

– Exchange of Notes on 8 March 2003, constituting an Agreement between the Kingdom of Spain and the Kingdom of Morocco on the mutual recognition and exchange of national driving licences.
Provisional application: 8 June 2004 (*BOE* 133, 2.06.04 and 167, 12.07.04).

– Exchange of Notes on 22 December 2003, constituting an Agreement between the Kingdom of Spain and the Republic of Peru on the mutual recognition and exchange of national driving licences.
Provisional application: 28 January 2004 (*BOE* 133, 2.06.04).

– Agreement between the Kingdom of Spain and the Islamic Republic of Iran concerning international carriage by road, done at Teheran on 7 February 1999.
Entry into force: 12 April 2004 (*BOE* 147, 18.06.04).

– Agreement between the Kingdom of Spain and the Democratic and Popular Republic of Algeria on international transports by road and transit of passengers and cargo, done *ad referendum* at Madrid on 7 October 2002.
Entry into force: 18 June 2004 (*BOE* 159, 2.07.04).

– Multilateral Agreement M-143 according to Section 1.5.1 of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR), on carriage of diagnostic specimens, done at Madrid on 1 March 2004 (*BOE* 170, 15.07.04).

– M-150 Multilateral Agreement under Section 1.5.1 of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) relating to the classification of water pollutants, their solutions and mixtures (such as preparations and waste) that cannot be assigned to entries under classes 1 to 8 o others under class 9, done in Madrid on 26 April 2004 (*BOE* 171, 16.07.04).

– Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention), done at Geneva on 14 November 1975, Amendments to paragraph 1 of Article 26 of the TIR Convention, adopted by the Administrative Committee on 26 October 2001, circulated by the Secretary-General of the United Nations on 19 June 2003.
Entry into force: 19 September 2004 (*BOE* 179, 26.07.04).

– Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention), done at Geneva on 14 November 1975, Amendments to Annex 6 relating to Article 38, paragraph 1 of the TIR Convention, adopted by the Administrative Committee on 25 October 2002, circulated by the Secretary- General

of the United Nations on 20 June 2003.
Entry into force: 7 November 2003 (*BOE* 180, 27.07.04).

– Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention), done at Geneva on 14 November 1975, Amendments to Annex 6 relating to Article 2, paragraph 1(B) if Annex 2 of the TIR Convention, adopted by the Administrative Committee on 7 February 2003, and circulated by the Secretary-General of the United Nations on 23 June 2003.
Entry into force: 7 November 2003 (*BOE* 181, 28.07.04).

– Agreement between the Government of the Kingdom of Spain and the Government of the Republic of Albania on international transport of passengers and cargo by road, done at Tirana on 10 April 2003.
Entry into force: 25 June 2004 (*BOE* 193, 11.08.04).

– Exchange of Notes constituting an Agreement between the Kingdom of Spain and Republic of Uruguay on the mutual recognition and exchange of national driving licences, done at Madrid on 5 November 2003.
Definitive entry into force: 5 August 2004 (*BOE* 231, 24.09.04).
Note: Provisionally applied since 5 November 2003 (*BOE* 300, 16.12.03).

– Amendments to Annexes 1 and 3 to the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP), done at Geneva on 1 September 1970, entered into circulation by the Secretary General of the United Nations on 12 March 2003.
Entry into force: 12 December 2004 (*BOE* 239, 4.10.04 and 276, 4.10.04).

– Exchange of Notes constituting an Agreement between the Kingdom of Spain and the Republic of Peru on the mutual recognition and exchange of national driving licences, done at Madrid on 22 December 2003.
Definitive entry into force: 3 September 2004 (*BOE* 248, 14.10.04).

– M-159 Multilateral Agreement under Section 1.5.1 of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) relating to technical provisions regarding lateral stability of tank vehicles, done in Madrid on 22 July 2004 (*BOE* 260, 28.10.04).

– Exchange of Notes on 25 September 2003 constituting an Agreement between the Kingdom of Spain and the Republic of Ecuador on the mutual recognition and exchange of national driving licences.
Definitive entry into force: 8 September 2004 (*BOE* 261, 29.10.04).

– Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP), done at Geneva on 1 September 1970, with modifications included on 7 November 2003 (*BOE* 285, 24.11.04).

9. Rail Traffic and Transport

– Amendments of the Statutes of "EUROFIMA", European Company for the financing of railway equipment. Admission of the Hungarian State Railways Ltd. (MAV) as shareholders of Eurofima. Transformation of the Slovenske Zeleznice d.o.o. (SZ) Holding Company and modification of Article 5 of the Statutes, adopted in Bern on 12 December 2003. (*BOE* 61, 11.03.04).

– Multilateral Agreement RID 9/2003 according to Section 1.5.1 of the Regulation concerning the international carriage of dangerous goods by rail (RID) relating to the classification of water pollutants and their solutions and mixtures (such as preparations and waste), which cannot be assigned to entries in classes 1 to 8 or others in class 9, done in Madrid on 7 April 2004 (*BOE* 162, 6.07.04).

– Multilateral Agreement RID 2/2004 according to Section 1.5.1 of the Regulation concerning the international carriage of dangerous goods by rail (RID) and Article 6.12 of Directive 96/49 CE, relating to transport of hydrogen peroxide in stabilized water solution containing over 60 % hydrogen peroxide (UN 2015) in portable tanks whose characteristics follow the T9 transport instruction, done in Madrid on 7 April 2004.
Applicability until 31 December 2006 (*BOE* 240, 5.10.04).

– Modification of the Statutes of "EUROFIMA," the European Company for the Financing of Railroad Rolling Stock (published in the *BOE* of 30 November 1984). Enlargement of the Czech Railways JSC (CD) stake in the share capital of Eurofima, and modification of Article 5 of the Statutes, adopted in Vienna on 18 June 2004 (*BOE* 241, 6.10.04).

10. Sea Traffic and Transport

– 2002 Amendments to the Annex to the International Convention for the Safety of Life at Sea, 1974, adopted on 12 December 2002 by Resolution 1 of the Conference of States Parties to the International Convention for the Safety of Life at Sea, 1974.
Entry into force: 1 July 2004 (*BOE* 98, 22.04.04).

– International Convention on Maritime Liens and Mortgages, 1993, done at Geneva on 6 May 1993.
Instrument of accession: 31 May 2004.
Entry into force: 5 September 2004 (*BOE* 99, 23.04.04).

– International Ship and Port Facility Security Code (ISPS Code), adopted on 12 December 2002 by means of Resolution 2 of the Conference of contracting Governments of the International Convention for the Safety of Life at Sea, 1974.
Entry into force: 1 July 2004 (*BOE* 202, 21.08.04).

– 2001 Amendments to the International Convention for the Safety of Life at Sea,

1974, to the 1994 HSC Code [Resolution 36(63)], adopted on 6 June 2001 by Resolution MSC. 119(74).
Entry into force: 1 January 2003 (*BOE* 224, 16.09.04).

– 2002 Amendments to the International Convention for the Safety of Life at Sea, 1974, amended, adopted on 24 May 2002, by Resolution MSC 123 (75).
Entry into force: 1 January 2004 (*BOE* 227, 20.09.04).

– 2001 Amendments to the International Convention for the Safety of Life at Sea, 1974, amended, adopted on 6 June 2001 by Resolution MSC 117(74).
Entry into force: 1 January 2003 (*BOE* 229, 22.09.04).

– International Convention on Maritime Liens and Mortgages, done at Brussels on 10 April 1926.
Denounce: 27 May 2005 (*BOE* 242, 7.10.04).

11. Air Traffic and Transport

– Convention for the unification of certain rules for international carriage by air, done at Montreal on 28 May 1999.
Instrument of ratification: 4 June 2002.
Entry into force: 28 June 2004 (*BOE* 122, 20.05.04).
Note: The instrument of ratification by Spain contains the following declarations: "The Kingdom of Spain, Member State of the European Community, declares that in accordance with the Treaty establishing the European Community, the Community has competence to take actions in certain matters governed by the Convention." "In accordance with the pro-visions of Article 57, the Convention shall not apply to:

a) international carriage by air performed and operated directly by Spain for non-commercial purposes in respect to its functions and duties as a sovereign State;
b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by Spain, the whole capacity of which has been reserved by or on behalf of such authorities."

– Agreement between the Governments of the French Republic, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Belgian Kingdom regarding Airbus A330/ A340, done at Madrid on 26 July 1995.
Entry into force: 2 July 2004 (*BOE* 220, 11.09.04).

12. Labour, Social Security and Immigration

– ILO Convention concerning Seafarers' Hours of Work and the Manning of Ships, done at Geneva on 22 October 1996.
Instrument of ratification: 27 November 2003.
Entry into force: 7 July 2004 (*BOE* 31, 5.02.04).

– Complementary Convention to the Social Security Convention between the Kingdom of Spain and the United States of Mexico, of 25 April 1994, done *ad referendum* at Madrid on 8 April 2003.
Definitive entry into force: 1 April 2004 (*BOE* 56, 5.03.04).
Note: It was in provisional application as from 6 June 2003 (*BOE* 168, 15.07.03).

– Administrative Agreement for the implementation of the Convention on Social Security between the Kingdom of Spain and the Republic of Bulgaria, done at Madrid on 28 October 2003.
Entry into force: 1 November 2003 (*BOE* 72, 24.03.04).
Note: The entry into force of the Administrative Agreement is the same as the entry into force of the Convention on Social Security, signed on 13 May 2002. (*BOE* 266, 6.11.03).

– Complementary Agreement to the Spanish-Peruvian Administrative Agreement on Social Security of 24 November 1978, done at Valencia on 14 May 2002.
Instrument of ratification: 3 October 2003.
Entry into force: 24 February 2004 (*BOE* 79, 1.04.04).

– Agreement between the Kingdom of Spain and the Republic of Poland on the regulation and planning of migratory labour flows, done at Warsaw on 21 May 2002.
Definitive entry into force: 13 February 2004 (*BOE* 85, 8.04.04).
Note: It was in provisional application as from 20 June 2002 (*BOE* 226, 20.09.02).

– Convention on Social Security between the Kingdom of Spain and the Czech Republic, done at Valencia on 13 May 2002.
Instrument of ratification: 15 September 2003.
Entry into force: 1 May 2004 (*BOE* 107, 3.05.04).

– Agreement between the Kingdom of Spain and the Republic of Peru on cooperation on immigration, done at Madrid on 6 July 2004.
Provisional application: 5 August 2004 (*BOE* 237, 1.10.04).

– Convention on Social Security between the Kingdom of Spain and the Republic of Argentine, done at Madrid on 28 January 1997 Administrative Agreement for the implementation of the Convention, done at Buenos Aires on 3 December 1997.
Instrument of ratification: 8 September 2004.
Entry into force: 1 December 2004 (*BOE* 297, 10.12.04).

13. Industrial and Intellectual Property

– International Treaty on Plant Genetic Resources for Food and Agriculture, done at Rome on 3 November 2001.
Instrument of ratification: 17 March 2004.
Entry into force: 29 June 2004 (*BOE* 109, 5.05.04).

– Changes in the Implementation Regulation of the Patent Cooperation Treaty (PCT), adopted at the 27 session of the Assembly of the International Patent Cooperation Union, on 29 September.
Entry into force: 1 January 2000 (*BOE* 167, 12.07.04).

– Changes in the Implementation Regulation of the Patent Cooperation Treaty (PCT), adopted at the 28 session of the Assembly of the International Patent Cooperation Union, on 17 March 2000.
Entry into force: 1 March 2001 (*BOE* 168, 13.07.04).

– Changes in article 22 of the Patent Cooperation Treaty (PCT), Changes in the Implementation Regulation of the PCT, Decisions regarding enter into force, transitional arrangements and changes of the schedule of fees annexes to the Implementation Regulation of the PCT, adopted at the 30 session of the Assembly of the International Patent Cooperation Union, on 3 October 2001.
Entry into force: 1 April 2002 (*BOE* 169, 14.07.04).

14. Narcotics

– Agreement between the Kingdom of Spain and the Federative Republic of Brazil on cooperation in the prevention of the consumption of, and trafficking in narcotic drugs and psychotropic substances, done *ad referendum* at Madrid on 11 November 1999.
Entry into force: 13 July 2004 (*BOE* 182, 29.07.04).

15. Civil and Criminal Cooperation

– Agreement between the Kingdom of Spain and the Republic of Latvia on cooperation in the fight against terrorism, organized crime, the illicit trafficking in narcotic drugs and psychotropic substances and precursors, and other crimes, done at Madrid on 24 November 2003.
Provisional application: 24 December 2003 (*BOE* 32, 6.02.04).

– Convention on the issue of a life certificate (n. 27 of the ICCS), done at Paris on 10 September 1998.
Instrument of ratification: 2 February 2001.
Entry into force: 1 September 2004 (*BOE* 194, 12.08.04).
Note: "With the following declaration:

In accordance with Article 4.1 of the this Convention, the Competent Authorities to issue the life certificate are:

a) Notary Publics
b) Judges or Consuls in charge of the Civil Registry in the interested party's place of residence".

XII. INTERNATIONAL ORGANIZATIONS

– Agreement for the conversion of the International Vine and Wine Office into the International Organisation of Vine and Wine, done at Paris on 3 April 2001.
Instrument of ratification: 2 August 2002.
Entry into force: 1 January 2004 (*BOE* 31, 5.02.04).

– Protocols of Accession to the North Atlantic Treaty by the Republic of Bulgaria, the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Romania, the Republic of Slovakia and the Republic of Slovenia, done at Brussels on 26 March 2003.
Entry into force: 27 February 2004 (*BOE* 76, 29.03.04 and 122, 20.05.04).

XIII. EUROPEAN UNION

– Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, done at Luxembourg on 9 April 2001.
Entry into force: 1 April 2004 (*BOE* 88, 12.04.04).

– Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, done at Athens on 16 April 2003.
Instrument of ratification: 10 November 2003.
Entry into force: 1 May 2004 (*BOE* 106, 1.05.04).

– Protocol to the Agreement on Cooperation and Customs Union between the European Economic Community and the Republic of San Marino consequent upon the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union, done at Brussels on 30 October 1997.
Entry into force: 1 April 2004 (*BOE* 108, 4.05.04)

– Convention defining the Statute of the European Schools, signed at Luxemburg on 21 June 1994.
Entry into force: 1 March 2004 (*BOE* 110, 6.05.04).

– Euro-Mediterranean Agreement creating an Association between the European Communities and its Member States, on the one hand, and the Hashemite Kingdom of Jordan on the other, done in Brussels on 24 November 1997.
Entry into force: 25 March 2004 (*BOE* 111, 7.05.04).

– Euro-Mediterranean Agreement creating an Association between the European Communities and its Member States, on the one hand, and the Arab Republic of Egypt on the other, done in Brussels on 26 January 2001.
Entry into force: 1 June 2004 (*BOE* 141, 11.06.04).

XIV. INTERNATIONAL RESPONSIBILITY

XV. PACIFIC SETTLEMENT OF DISPUTES

XVI. COERCION AND USE OF FORCE SHORT OF WAR

XVII. WAR AND NEUTRALITY

– Agreement between Spain and the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO Preparatory Commission) on performance of activities relating to facilities pertaining to the international system of surveillance of the Comprehensive Nuclear-Test Ban Treaty, including activities subsequent to homologation, and Protocol, done in Vienna on 14 September 2000.
Definitive entry into force: 12 December 2003 (*BOE* 1, 1.01.04).
Note: It was in provisional application as from the signature date (*BOE* 286, 29.12.00).

– Amendment to article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 10 October 1980, done at Geneva on 21 December 2001.
Instrument of ratification: 2 February 2004.
Entry into force: 9 August 2004 (*BOE* 65, 16.03.04 and 99, 23.04.04).

– Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, done at The Hague on 26 March 1999.
Instrument of ratification: 21 June 2001.
Entry into force: 9 March 2004 (*BOE* 77, 30.03.04).

– Additional Protocol to the Agreement between the Republic of Austria, the Kingdom of Belgium, the Kingdom of Denmark, the Republic of Finland, the Federal Republic of Germany, the Helenic Republic, Ireland, The Italian Republic, the Grand Duchy

of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic, the Kingdom of Spain, the Kingdom of Sweden, the European Atomic Energy Community and the International Atomic Energy Organization in application of paragraphs 1) and 4) of Article III of the Nuclear Non-Proliferation Treaty (Safeguards), done in Vienna on 22 September 1998 (*BOE* 104, 29.04.04).
Entry into force: 30 April 2004 (*BOE* 195, 13.08.04).

Treaties to Which Spain is a Party Concerning Matters of Private International Law, 2004

This survey, prepared and compiled by Dr. M. Guzmán Peces and J. I. Paredes Pérez (Associated Lecturers in Private International Law), under the direction of Dr. I. García Rodríguez (Lecturer in Private International Law), covers the treaties and other international agreements published in the *Boletín Oficial del Estado* (Official Journal of the State) during 2004. Its purpose is to record the legal consequences of such agreements and instruments for Spain, such as signature, ratification or accession, entry into force, provisional application, reservations or declarations, territorial application, personal sphere of application, material scope, termination, abrogation and relationship with other treaties or agreements.

I. SOURCES OF PRIVATE INTERNATIONAL LAW

II. INTERNATIONAL JURISDICTION

– Resolution of 7 January 2004, by the General Technical Secretariat, on the Accession of Ukraine to the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, done in The Hague on 5 October 1961 (published in the *Boletín Oficial del Estado*, on 25 September 1978, 17 October 1978, 19 January 1979 and 20 September 1984) (*BOE* 20.01.04).
Entry into force: 22 December 2003.
Note: "Ukraine – 2 April 2003 – Accession, entry into force 22 December 2003 between Ukraine and Contracting States of the Convention that did not formulate objections, with the exception of Belgium and Germany."

III. PROCEDURE AND JUDICIAL ASSISTANCE

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND DECISIONS

V. INTERNATIONAL COMMERCIAL ARBITRATION

VI. CHOICE OF LAW/SOME GENERAL PROBLEMS

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VII. ALIENS, REFUGEES AND CITIZENS OF THE EUROPEAN COMMUNITY

– Entry into force of the Exchange of Notes of 25 September 2003 constituting an Agreement between the Kingdom of Spain and the Republic of Colombia on reciprocal recognition and exchange of national drivers licences, done in Madrid on 30 and 31 July 2003 (*BOE* 17, 20.01.04).
Entry into force: 28 November 2003.

– Correction of errors in the Agreement between the French Republic and the Kingdom of Spain on the readmission of persons with irregular status, done in Malaga on 26 November 2002 (*BOE* 26.12.03, *BOE* 30.01.04).

– Correction of errors in the Exchange of Notes constituting Agreement between the Kingdom of Spain and the Republic of Uruguay on reciprocal recognition and exchange of national drivers licences (*BOE* 300 16.12.03, *BOE* 32 6.02.04).

– Protocol between the Government of Spain and the Government of the People's Democratic Republic of Algeria on the circulation of persons, done *ad referendum* in Algiers on 31 July 2002 (*BOE* 37, 12.02.04).
Entry into force: 18 February 2004.

– Entry into force of the Agreement between the Kingdom of Spain and the Republic of Poland on the Regulation and Organization of Migratory Flows between the two States, done in Warsaw on 21 May 2002, the provisional application of which was published in *Boletín Oficial del Estado* n. 226, of 20 September 2002 (*BOE* 85, 8.04.04).
Entry into force: 13 February 2004.

– Provisional application of the Exchange of Notes of 8 March 2003, constituting an Agreement between the Kingdom of Spain and the Kingdom of Morocco on the reciprocal recognition and exchange of national drivers licences (*BOE* 133, 2.06.04).
Provisional applications: from 8 June 2004.

– Provisional application of the Exchange of Notes of 22 December 2003, constituting an Agreement between the Kingdom of Spain and the Republic of Peru on the reciprocal recognition and exchange of drivers licences (*BOE* 133, 2.06.04).
Entry into force: 28 January 2004.

– Correction of errors in the provisional application of the Exchange of Notes of 8 March 2004, constituting an Agreement between the Kingdom of Spain and the Kingdom of Morocco on the reciprocal recognition and exchange of national drivers licences (*BOE* 167, 12.07.04).

– Agreement between the Kingdom of Spain and the Republic of Poland regarding the readmission of persons with irregular status, done in Warsaw on 21 May 2002 (*BOE* 176, 22.07.04).
Entry into force: 23 June 2004.
Note: "Article 1. *Definitions*

For the purposes of this Agreement the following definitions will be applied:

1. "Foreigner" will be understood to be any person who is neither a Spanish or Polish national.
2. "Entry or residence permit" will be understood to be any visa, residence permit or other type of document by which a foreigner is authorized to enter or stay in the territory of the Contracting Parties.
3. "Requested Party" will be understood to be the Contracting Party that is to readmit any person who does not meet the legal requirements for entering or staying in the territory of the other Party, or that should allow such person to re-enter its territory at the request of the other Party.
4. "Requesting Party" will be understood to be any Party that requests the other Party to readmit persons who do not meet with the legal requirements for entering or staying in its territory.

Article 2. *Readmission of Contracting Party nationals*

1. Each Contracting Party shall readmit, at the request of the other Contracting Party and without formalities, any person who in the territory of the requesting Party does not meet with or no longer meets with the requirements in force for entering or residing therein provided that there is proof or credible presumption that the person in question possesses the nationality of the requested Party.
2. The requesting Party shall readmit the person in question, without formalities of any type, provided it has been demonstrated that he/she did not hold the nationality of the requested Party when he/she left the territory of the requesting Party.

(. . .)

Article 4. *Readmission of foreigners*

1. Each Contracting Party shall readmit, at the request of the other Contracting Party and without formalities, any foreigner who does not meet or no longer meets conditions in force for entering or staying in the other Contracting Party, provided it is proven or presumed that said foreigner entered directly from the territory of the requested Contracting Party.
2. The obligation to proceed with readmission provided in the previous paragraph shall not be applied to the foreigner who, upon entry into the territory of the requesting Contracting Party, holds a valid residence permit issued by said Contracting Party or was issued a residence permit after entry."

– Exchange of Notes constituting Agreement between Spain and Portugal on the creation of an arbitration commission to evaluate compensation owed to Spaniards whose property was confiscated in the 1974 Revolution, done in Lisbon on 8 and 9 October 2002 (*BOE* 198, 17.08.04).
Entry into force: 22 July 2004.

– Agreement between the Kingdom of Spain and the Republic of Costa Rica on the Free Pursuit of Gainful Employment by Dependents of Diplomatic, Consular Administrative and Technical Employees of Diplomatic Missions and Consular Offices (*BOE* 225, 17.09.04).
Entry into force: 23 August 2004.

– Entry into force of the Exchange of Notes of 25 September 2003 constituting Agreement between the Kingdom of Spain and the Republic of Uruguay on reciprocal recognition and exchange of national drivers licences, done in Madrid on 5 November 2003 (*BOE* 231, 24.09.04).
Entry into force: 5 August 2004.

– Provisional application of the Agreement between the Kingdom of Spain and the Republic of Peru on Cooperation in Immigration, done in Madrid on 6 July 2004 (*BOE* 237, 1.10.04).
Provisional applications: from 5 August 2004.

– Entry into force of the Exchange of Notes of 25 September 2003 constituting an Agreement between the Kingdom of Spain and the Republic of Peru on reciprocal recognition and exchange of national drivers licences, done in Madrid on 22 December 2003 (*BOE* 248, 14.10.04).
Entry into force: 3 September 2004.

– Agreement between the Kingdom of Spain and the Republic of Bolivia on the Free Pursuit of Gainful Employment by Dependents of Diplomatic, Consular Administrative and Technical Employees of Diplomatic Missions and Consular Offices, done in Madrid on 26 June 2002 (*BOE* 248 14.10.04).
Entry into force: 8 November 2004.

– Entry into force of the Exchange of Notes of 25 September 2003 constituting an Agreement between the Kingdom of Spain and the Republic of Ecuador on reciprocal recognition and exchange of national drivers licences (*BOE* 261, 29.10.04).
Entry into force: 8 September 2004.

VIII. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

– Ratification Instrument of the Convention on the Issue of a Life Certificate (number 27 CIEC), done in Paris on 10 September 1998 (*BOE* 194, 12.08.04).
Entry into force: 1 September 2004.
Note: "The Spanish authorities set forth in Article 4.1 of the Convention to issue a the life certificate, and as contained in Spain's Ratification Instrument, deposited on 26 February 2001 with the Swiss Federal Council were subsequently modified and reported on 26 June 2003 to the Swiss Federal Council for the purposes of Article 4.2 of the Convention.

The authorities designated by Spain under Article 4.1 of the Convention to issue the life certificate are:

"In Spain: Notaries, Persons in charge of Municipal Civil Registries and their delegates.

Outside Spain: Persons in charge of Consular Civil Registries."

With regard to the Declaration provided under Article 10 of the Convention, relating to the designation of the authorities empowered to translate the coded entries that appear on the life certificate or to undertake to decode them by translating the certificate into the official language of the State in which it will be used, Spain designates:

"Notaries, Persons in charge of Municipal Civil Registries and the Directorate General for Registries and Notaries of the Ministry of Justice."

(. . .)

Article 1.

1. The Contracting States undertake to issue a life certificate when the existence of a person has to be proved in a Contracting State other than the one in which he or she is resident.
2. The certificate shall be issued by the competent authority of the State of residence of the person applying for it, regardless of his or her nationality.

Article 2.

1. Certificates drawn up in conformity with this Convention shall be recognised in all the Contracting States.
2. Such certificates must be accepted if they are presented within the time-limit prescribed by the law or the practice in force in the country where they are to be used.
3. Such certificates shall be accepted as correct unless and until the contrary is proved.

Article 3.

The competent authority shall issue the life certificate in accordance with the provisions of its domestic law.

Article 4

1. At the time of signature, ratification, acceptance, approval or accession, each State shall designate the authorities empowered to issue the certificate provided for in this Convention.
2. Any subsequent modification of such designation shall be notified to the Swiss Federal Council.
3. Diplomatic or consular authorities shall also be empowered to issue a life certificate to a national of their State residing in the State where they are performing their duties. They shall also be empowered to issue a certificate regardless of the nationality of the person concerned, if this is not precluded by the law of their State of residence and if the certificate is to be used in the territory of the State which they represent.

Article 5.

1. The certificate shall be drawn up in conformity with the model appearing in Appendix 1 to this Convention and shall be written in the language of the issuing authority and the French language.
(. . .)

Article 11.

1. Certificates shall indicate the name and capacity of the person issuing them. They shall be dated and signed and bear the requisite seal.
2. Certificates shall be exempt from translation and from legalisation or any equivalent formality in the territory of the Contracting States. However the authority or agency to which a certificate is presented may, in case of serious doubt as to the authenticity of the signature, the identity of the seal or stamp or the capacity of the signatory, have it verified by the authority that issued the certificate, in accordance with the procedure laid down by the Convention on the exemption from legalisation of certain records and documents, signed at Athens on 15 September 1977."

IX. FAMILY LAW

– Statement of acceptance by Spain of the Accession of Guatemala to the Convention on the Civil Aspects of International Child Abduction, done in The Hague on 25 October 1980 (*BOE* 67, 18.03.04).
Entry into force: 1 April 2004.
Note: "In accordance with Article 38.4 of the Convention on the Civil Aspects of International Child Abduction, done in The Hague on 25 October 1980, Spain states its acceptance of the accession of the Republic of Guatemala to said Convention.

At the time of its accession Guatemala made the following statements and reservations:

"1.The Central Authority for Guatemala is the *Procuraduría General de la Nación*, address 15 Avenida 9.69 Zona 13, Ciudad de Guatemala, Código Postal 01013, telephone nos.: (502) 331 0006–8. Fax: (502) 3321804.

2. The Republic of Guatemala makes the following reservations under Article 42 of the Convention:

I. The Republic of Guatemala objects to the use of French for any application, communication or other document sent to the Central Authority on the basis of Article 24.2 of the Convention (as the case may be).

II. The Republic of Guatemala is not obliged to bear any of the costs referred to in Article 26.2 of the Convention resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice."

X. SUCCESSION

XI. CONTRACTS

– First Protocol on the Interpretation by the Court of Justice of the European Communities of the Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, done in Brussels on 19 December 1988 (*BOE* 243, 8.10.04).
Entry into force: 1 August 2004.
Note: "Article 1.

The Court of Justice of the European Communities shall have jurisdiction to give rulings on the interpretation of:

a) the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, hereinafter referred to as "the Rome Convention";
b) the Convention on accession to the Rome Convention by the States which have become Members of the European Communities since the date on which is was opened for signature;
c) this Protocol.

Article 2.

Any of the courts referred to below may request the court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning interpretation of the provisions container in the instruments referred to in Article 1 if that court considers that a decision on the question is necessary to enable it to give judgment:

(. . .)
in Spain: the Supreme Court,
(. . .)

Article 3.

1. The competent authority of a Contracting State may request the Court of Justice to give a ruling on a question of interpretation of the provisions contained in the instruments referred to in Article 1 if judgments given by court of that State conflict with the interpretation given Esther by the Court of Justice or in a judgment of one of the courts of another contracting State referred to in Article 2. The provisions of this paragraph shall apply only to judgments which have become *res judicata.*
2. The interpretation given by the Court of Justice in response to such a request shall not affect the judgments which gave rise to the request for interpretation.
3. The Procurators-General of the Supreme Court of Appeals of the Contracting States, or any other authority designated by a Contracting State, shall be entitled to request the Court of Justice for a ruling on interpretation in accordance with paragraph 1.
4. The Registrar of the Court of Justice shall give notice of the request to the Contracting States, to the Commission and to the Council of the European Communities; they shall then be entitled within two months of the notification to submit statements of case or written observations to the Court.
5. No fees shall be levied or any costs or expenses awarded in respect of the proceedings provided for in this Article.

Article 4.

1. Except where this Protocol otherwise provides, the provisions of the Treaty establishing the European Economic Community and those of the Protocol on the Statute of the Court of Justice annexed thereto, which are applicable when the Court is requested to give a preliminary ruling, shall also apply to any proceedings for the interpretation of the instruments referred to in Article 1.
2. The Rules of Procedure of the Court of Justice shall, if necessary, be adjusted and supplemented in accordance with Article 188 of the Treaty establishing the European Economic Community."

– Second Protocol conferring on the Court of Justice of the European Communities Certain Powers to interpret the Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, done in Brussels on 19 December 1988 (*BOE* 243, 8.10.04).
Entry into force: 1 August 2004.
Note: "Article 1.

1. The Court of Justice of the European Communities shall, with respect to the Rome Convention, have the jurisdiction conferred upon it by the First

Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on the Law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, concluded in Brussels on 19 December 1988. The Protocol on the Statute of the Court of Justice of the European Communities and the Rules of Procedure of the Court of Justice shall apply.

2. The Rules of Procedure of the Court of Justice shall be adapted and supplemented as necessary in accordance with Article 188 of the Treaty establishing the European Economic Community."

XII. TORTS

– Instrument of Accession of Spain to the Protocol of 1997 that amends the International Convention for the Prevention of Pollution from Ships, 1973, amended by the Protocol of 1978, concluded in London on 26 September 1997 (*BOE* 251, 18.10.04).
Entry into force: 19 May 2004.

XIII. PROPERTY

– Agreement on Cinematographic Co-Production between the Kingdom of Spain and the United Mexican States, concluded in Madrid on 8 April 2003 (*BOE* 60, 10.03.04).
Entry into force: 30 January 2004.

– Ratification Instrument of the Second Protocol of The Hague Convention of 1954 on the Protection of Cultural Assets in the Event of Armed Conflict, done in The Hague on 26 March 1999 (*BOE* 77, 30.03.04).
Entry into force: 30 March 2004.

– Amendments to the Regulations under the Patent Cooperation Treaty (PCT) (published in the *Boletín Oficial del Estado*, 7 November 1989), adopted at the 27th Session of the International Patent Cooperation Union Assembly, on 29 September 1999 (*BOE* 167, 12.07.04).
Entry into force: 1 January 2001.

– Amendments to the Regulations under the Patent Cooperation Treaty (PCT) (published in the *Boletín Oficial del Estado* on 7 November 1989), adopted at the 28th Session of the International Patent Cooperation Union Assembly, on 17 March 2000 (*BOE* 168, 13.07.04).
Entry into force: 1 March 2001.

– Amendments to Article 22 of the Patent Cooperation Treaty (PCT), amendments to the Regulations under the PCT (published in the *Boletín Oficial del Estado* on

7 November 1989), decisions on the entry into force and transitory provisions and amendments to rate tables outside the Regulations of the PCT, adopted at the 30th Session of the International Patent Cooperation Union Assembly, on 3 October 2001 (*BOE* 169, 14.07.04).
Entry into force: 1 April 2002.

– Denunciation by Spain of the International Convention for the unification of certain rules relating to Maritime Liens and Mortgages, concluded in Brussels on 10 April 1926 (*BOE* 242, 7.10.04).
Entry into force: 27 May 2005.
Note: "By Note Verbale dated 25 May 2004, sent by the Embassy of Spain in Brussels to the Belgian Federal Public Service, Foreign Affairs, Foreign Trade and Cooperation for Development, Spain denounced the International Convention for the unification of certain rules relating to Maritime Liens and Mortgages, done in Brussels on 10 April 1926".

XIV. COMPETITION LAW

XV. INVESTMENT AND FOREIGN EXCHANGE

– Provisional application of the Agreement between the Kingdom of Spain and the Republic of Equatorial Guinea on Reciprocal Investment Promotion and Protection, concluded in Malabo on 22 November 2003 (*BOE* 10, 12.01.04).
Provisional application: from 22 November 2003.
Entry into force:

"Article 12. *Entry into force, duration and termination*

1. This Agreement shall enter into force one month after receipt through diplomatic channels of the last notification by which the Contracting Parties inform each other of having complied with their internal constitutional requirements for entry into force.

(. . .)"

Note:

"Article 1. *Definitions*

For the purposes of this Agreement,

1. "Investor" shall be any national or any company of one of the Contracting Parties that invests in the territory of the other Contracting Party:

a) "National" shall be any individual who holds the nationality of one of the Contracting Parties in accordance with its legislation;

b) "Company" shall be understood to be any legal entity constituted or duly organized under the laws of that Contracting Party that has its headquarters

in that same Contracting Party, such as corporations, general partnerships or business associations.

(. . .)

Investments made in the territory of one Contracting Party by a company from that same Contracting Party, that is owned or effectively controlled by investors of the other Contracting Party, shall also be considered investments made by the such investors, provided they are in accordance with the legal provisions of the first Contracting Party.

No modification in the way the assets are invested or reinvested shall affect their investment status, provided such modification is done in accordance with the legislation of the Contracting Party that receives the investment.

(. . .)

Article 11. *Conflict between one Contracting Party and Investors of the other Contracting Party*

1. Any investment-related conflict that may arise between one of the Contracting Parties and an investor from the other Contracting Party, regarding issues regulated by this Agreement, shall be notified in writing by the investor to the Contracting Party receiving the investment. To the extent possible, the parties in conflict shall attempt to resolve their differences by friendly agreement.
2. If the conflict cannot be resolved in this way, after a period of six months from the date of written notification mentioned in Paragraph 1, the conflict may be submitted, at the investor's option, to:

– the competent courts of the Contracting Party on whose territory the investment was made; or

– an *ad hoc* arbitration panel established in accordance with the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL); or

– the International Centre for Settlement of Investment Disputes (ICSID) created by the "Convention for the Settlement of Investment Disputes between States and Nationals of Other States" opened for signature in Washington on 18 March 1965, when every State party to this Agreement has acceded to it. In the event one of the Contracting Parties is not a Contracting State to this Agreement, the dispute can be resolved through the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings by the ISCID Secretariat; or

– an arbitration panel established in accordance with the arbitration rules of the Organisation for the Harmonisation of African Business Law (OHADA).

3. Arbitration shall be based upon the provisions of this Agreement, the domestic law of the Contracting Party in whose territory the investment was made, including rules relating to legal conflicts, and any applicable rules and principles of international law.

4. The Contracting Party that is involved in the dispute may not invoke in its defence the fact that the investor, by virtue of an insurance or guarantee agreement has received or is going to receive damages or any other compensation for all or part of the damages suffered.
5. The arbitration decisions shall be final and binding on the parties in dispute. Each Contracting Party commits itself to execute the decisions in accordance with its national legislation."

– Agreement between the Kingdom of Spain and the Republic of Albania on Investment Promotion and Protection, concluded in Madrid on 5 June 2003 (*BOE* 38, 13.02.04).
Entry into force: 14 January 2004.
Note: We refer only to differences from the Agreement cited above.

"Article 11. *Disputes between one Party and investors of the other Party.*

1. Any dispute that arises between an investor from one of the Parties and the other Party in regard to an investment in the context of this Agreement shall be notified in writing by the investor to the second Party. To the extent possible, the interested Parties shall make efforts to resolve such disputes in a friendly manner.
2. If the dispute cannot be resolved in a friendly manner within six months from the date of written notification referred to in Paragraph 1, it may be submitted, at the option of the investor, to:
   – the competent court of the Party in whose territory the investment was made; or
   – an *ad hoc* arbitration panel established in accordance with the Regulation of the United Nations Commission on International Trade Law; or
   – the International Centre for Settlement of Investment Disputes (ICSID) created by the "Convention for the Settlement of Investment Disputes between States and Nationals of Other States" opened for signature in Washington on 18 March 1965, when every State party to this Agreement has acceded to it. In the event one of the Contracting Parties is not a Contracting State to this Agreement, the dispute can be resolved through the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings by the ISCID Secretariat.
3. Arbitration shall be based upon the provisions of this Agreement, the domestic law of the Contracting Party in whose territory the investment was made, including rules relating to legal conflicts, and any applicable rules and principles of international law."

– Agreement on Reciprocal Investment Promotion and Protection between the Kingdom of Spain and the Republic of Uzbekistan, concluded in Madrid on 28 January 2003 (*BOE* 78, 31.03.04).
Entry in force: 3 December 2003.
Note: We indicate only the differences from the Agreement cited first in this section.

"Article 11. Disputes between a Contracting Party and investors of the other Contracting Party

1. Disputes that arise between a Contracting Party and an investor of the other Contracting Party with regard to an investment, in the context of this Agreement, shall be notified in writing with detailed information by the investor to the first Contracting Party. To the extent possible, the interested parties shall make efforts to resolve the dispute in a friendly manner.
2. If such disputes cannot be resolved in a friendly manner within six months from the date of written notification referred to in Paragraph 1, they can be submitted, at the option of the investor to:
   – the competent court of the Contracting Party in whose territory the investment was made; or
   – an *ad hoc* arbitration established under the Regulations on Arbitration of the United Nations Commission on International Trade Law; or
   – the International Centre for Settlement of Investment Disputes (ICSID) created by the "Convention for the Settlement of Investment Disputes between States and Nationals of Other States" opened for signature in Washington on 18 March 1965.
3. Arbitration shall be based on:
   – the provisions of this Agreement;
   – the domestic legislation of the Contracting Party in whose territory the investment was made, including rules relating to Legal conflicts; and
   – generally accepted rules and principles of international law."

– Agreement between the Kingdom of Spain and the Federal Republic of Yugoslavia for Reciprocal Investment Promotion y Protection, concluded *ad referendum* in Madrid on 25 June 2002 (*BOE* 146, 4.06.04).
Entry into force: 31 March 2003.
Note: The text of the Agreement is quite similar, with only minor differences, to the text cited first.

– Agreement between the Kingdom of Spain and the Republic of Guatemala on Reciprocal Investment Promotion and Protection, concluded in Guatemala on 9 December 2003 (*BOE* 146, 17.06.04).
Entry into force: 21 May 2004.
Note: The text of the Agreement is quite similar, with only minor differences, to the text cited first.

– Agreement between the Kingdom of Spain and the Islamic Republic of Iran on Reciprocal Investment Promotion and Protection, concluded in Madrid on 29 October 2002 (*BOE* 192, 10.08.04).
Entry into force: 13 July 2004.
Note: The text of the Agreement is quite similar, with only minor differences, to the text cited first.

– Agreement between the Kingdom of Spain and the Republic of Namibia on Reciprocal Investment Promotion and Protection, concluded in Windhoek on 21 February 2003 (*BOE* 199, 18.08.04)
Entry into force: 28 June 2004.
Note: The text of the Agreement is quite similar, with only minor differences, to the text cited first.

– Agreement between the Kingdom of Spain and the Government of the Republic of Trinidad and Tobago on Reciprocal Investment Promotion and Protection, concluded *ad referendum* in Port of Spain on 3 July 1989 (*BOE* 252, 19.10.04).
Entry into force: 17 September 2004.
Note: The text of the Agreement is quite similar, with only minor differences, to the text cited first.

XVI. FOREIGN TRADE LAW

– Resolution of 6 April 2004, by the General Technical Secretariat, on the correction of an error in substance in the language of Article 6 of the Protocol of Amendment to the European Convention on Transborder Television, concluded in Strasbourg on 9 December 1998 (*BOE* 92, 17.04.02, *BOE* 158, 3.07.02, *BOE* 97, 21.04.04).

– Provisional application of the International Convention agreeing to establish an Iberian Electrical Energy Market between the Kingdom of Spain and the Portuguese Republic, concluded in Lisbon on 20 January 2004. (*BOE* 132, 1.06.04).
Provisional applications: from 22 April 2004.

XVII. BUSINESS ASSOCIATION/CORPORATION

XVIII. BANKRUPTCY

XIX. TRANSPORT LAW

– Ratification instrument of the Convention to Unify Certain International Air Transport Rules, concluded in Montreal on 28 May 1999 (*BOE* 122, 20.05.04).
Entry into force: 28 June 2004.

– Agreement between the Kingdom of Spain and the Islamic Republic of Iran on international road transport, concluded in Teheran on 7 February 1999 (*BOE* 147, 18.06.04).
Entry into force: 12 April 2004
Note: "Article 2. Scope of Application.

1. Carriers of the Contracting Parties using vehicles registered in the territory of the Contracting Party in which they have their headquarters are authorized to engage in international road transport between the territories of the two Contracting Parties and in transit therein, pursuant to the terms established in this Agreement.
2. Similarly, and subject to the conditions established in this Agreement, transport operations may be authorized with destination or origin in third countries, as well as unoccupied entry.
3. Nothing in this Agreement is to be interpreted as authorizing carriers from one Contracting Party to perform transport services between two points located inside the territory of the other Contracting Party."

– Agreement between the Kingdom of Spain and the Democratic and Popular Republic of Algeria regarding International Road Transport and Transit of Passengers and Goods, concluded *ad referendum* in Madrid on 7 October 2002 (*BOE* 159, 2.07.04).
Entry into force: 18 June 2004.
Note: "Article 2. Scope of Application

1. Carriers of each of the Contracting Parties shall be entitled to transport passengers and goods to or in transit in one of the two territories with vehicles registered in one of the Contracting Parties in which the transport operator has its corporate headquarters, in accordance with the modalities set forth by this Agreement.
2. Within the framework of this Agreement, transport operations whose destinations are third countries and unoccupied entry of vehicles are authorized. The Joint Commission provided under Article 17 of this Agreement may authorize operations with destinations in third countries (triangular operations).
3. Carriers of one Contracting Party may not provide transportation services between two points located in the territory of the other Contracting Party (cabotage)".

– Multilateral RID Agreement 9/2003 under Section 1.5.1 of the Regulations on International Transport of Hazardous Goods by Rail (RID) (published in *Boletín Oficial del Estado* n. 42, of 18 February 2003), regarding the classification of water pollutants and their solutions and mixtures (such as preparations and waste) that cannot be assigned to entries in classes 1 to 9 or others in class 9, concluded in Madrid on 7 April 2004 (*BOE* 162, 6.07.04).

> "This Multilateral RID Agreement 9/2003 will enter into in force on 31 December 2004 for transport carried out in the territory of the member states of COTIF that have signed it."

– Multilateral Agreement M-150 under Section 1.5.1 of the European Agreement on International Transport of Hazardous Goods by Road (ADR) (published in the *Boletín Oficial del Estado* n. 33, of 7 February 2003), regarding the classification

of water pollutants and their solutions and mixtures (such as preparations and waste) that cannot be assigned to entries in classes 1 to 8 or to others in class 9, concluded in Madrid on 26 April 2004 (*BOE* 171, 16.07.04).

> "This Agreement will be in force until 31 December 2004 to carry out transport between the territories of the Contracting Parties of the ADR that have signed it, except where revoked by one of the signatory, in which case, it will continue to be applicable solely to transport between the territories of the ADR Contracting Parties that have signed it and not revoked it."

– Customs Agreement relating to the International Transport of Goods under the TIR Handbooks concluded in Geneva on 14 November 1975 (published in the *Boletín Oficial del Estado,* on 9 February 1983), Amendments to Article 26.1 of the TIR Agreement, adopted by the Administrative Committee on 26 October 2001, circulated by the Secretary General of the United Nations on 19 June 2003 (*BOE* 179, 26.07.04).
Entry into force: 19 September 2004.

– Customs Agreement relating to the International Transport of Goods under the TIR Handbooks concluded in Geneva on 14 November 1975 (published in the *Boletín Oficial del Estado,* on 9 February 1983), Amendments to Annex 6, relating to Article 2.1(B) of Annex 2 of the TIR Agreement, adopted by the Administrative Committee on 7 February 2003, circulated by the Secretary General of the United Nations on 23 June 2003 (*BOE* 181, 28.07.04).
Entry into force: 7 November 2003.

– Agreement between the Kingdom of Spain and the Government of the Republic of Albania on international transport of passengers and goods by road, concluded in Tirana on 10 April 2003 (*BOE* 193, 11.08.04).
Entry into force: 25 June 2004.

– Correction of errors in the Resolution of 5 July 2004, of the General Technical Secretariat, relating to Multilateral Agreement M-143, under Section 1.5.1 of the European Agreement on International Transport of Hazardous Goods by Road (ADR) (published in the *Boletín Oficial del Estado*, n. 33, of 7 February 2003), relating to the transport of diagnostic samples, done in Madrid on 1 March 2004 (*BOE* 221, 13.09.04).

– Exchange of Notes extending the validity of the Agreement between the Kingdom of Spain and the Principality of Andorra on the transport and management of waste, done in Madrid on 27 January 2000 (*BOE* 13.09.04).
In force until 10 July 2006.

– Multilateral RID Agreement 2/2004, under Section 1.5. of the Regulations on International Transport of Hazardous Goods by Rail (RID) (published in the

Boletín Oficial del Estado n. 42, of 18 February 2003), and Articles 6–12 of Directive 96/49 EC, regarding the carriage of hydrogen peroxide in stabilized water solution containing over 60% of hydrogen peroxide (UN 2015) in portable tanks whose characteristics follow the T9 transport instruction, done in Madrid on 7 April 2004 (*BOE* 240, 5.10.04).
In force until 31 December 2006.

– M-159 Multilateral Agreement under Section 1.5.1 of the European Agreement concerning the International Transport of Dangerous Goods by Road (ADR) (published in the *Boletín Oficial del Estado,* n. 33, of 7 February 2003), relating to the technical provisions on lateral stability of tank vehicles, done in Madrid on 22 July 2004 (*BOE* 250, 28.10.04).
In force until 31 December 2004.

XX. LABOUR LAW AND SOCIAL SECURITY

– Ratification instrument of the ILO Convention n. 180 regarding Seafarers' Hours of Work and Manning of Ships, done in Geneva on 22 October 1996 (*BOE* 31, 5.02.04)
Entry into force: 7 July 2004.

– Ratification instrument complementary to the Administrative Agreement between Spain and Peru on Social Security of 24 November 1978, done in Valencia on 14 May 2002, the provisional application of which was published in *Boletín Oficial del Estado* n. 225, of 19 September 2002 (*BOE* 79, 1.04.04).
Entry into force: 24 February 2004.

– Entry into force of the Complementary Convention to the Social Security Convention between the Kingdom of Spain and the United Mexican States of 25 April 1994, done *ad referendum* in Madrid, on 8 April 2003 (*BOE* 56, 5.03.04)
Entry into force: 1 April 2004.

– Resolution of 2 December 2003, of the General Technical Secretariat, providing for the publication of the Administrative Agreement for the application of the Social Security Agreement between the Kingdom of Spain and the Republic of Bulgaria, done in on 28 October 2003 (*BOE* 72, 24.03.04).
Entry into force: 1 November 2003.
Note: "Article 5. *Processing of exceptions under applicable legislation.*

1) In the cases referred to in Article 7.1), subparagraphs 1, 3, 5,11 and 12 of the Convention, the Competent Institution of the Contracting Party whose legislation continues to be applicable shall issue, at the request of an employer or of a self-employed person, a form accrediting the period during which the employee or self-employed person continues to be subject to the

legislation of that Contracting Party. A copy of such form shall be sent to the Competent Institution of the other Contracting Party, and another copy shall remain in the possession of the interested party to accredit that the other Contracting Party's provisions on obligatory insurance are not applicable to such party.

2) The extension set forth in Article 7.1), subparagraphs 2 and 4 of the Convention must be requested by the employer or the self-employed person three months in advance of the end of the two-year period referred to in Article 7. 1), subparagraphs 1 and 3 of the Convention. The request should be addressed to the Competent Institution of the Contracting Party under whose legislation the employee or self-employed person is insured. Such Institution shall reach agreement on the extension with the Competent Institution of the other Contracting Party.
3) If an employer-employee relationship ceases to exist between the employee and the employer before the end of the period of time for which the employee was sent, the employer must notify the Competent Institution of the Contracting Party to whose legislation the employee is subject, and such Party must immediately notify the Competent Institution of the other Contracting Party. This will also apply when an employee returns ahead of time to the territory of the Contracting Party to whose legislation he/she is subject.
4) If the self-employed person ceases to work before the end of the period indicated in the form, he/she must notify this situation to the Competent Institution of the Contracting Party to whose legislation he/she is subject, which will immediately inform the Competent Institution of the other Contracting Party. This will also apply when such person returns ahead of time to the territory of the Contracting Party to whose legislation he/she is subject.
5) When an employee referred to in Article 7.1), subparagraphs 9 and 10 of the Convention exercises the option set forth therein, he/she shall report same, through his/her employer, to the Competent Institution of the Contracting Party whose legislation he/she has chosen. This Competent Institution shall report this to the Competent Institution of the other Contracting Party by means of the appropriate form. A copy of this form shall remain in the possession of the interested party to accredit that this Contracting Party's obligatory insurance provisions are not applicable to him/her.

(. . .)

Article 7. *Determination of the Competent Institution to initiate the procedure.*

The initiation of processing a benefit request shall correspond to a single Competent Institution, to be determined in accordance with the following rules:

1. If the interested party resides in the territory of one of the Contracting Parties it will be the Competent Institution of the place of residence.

2. If the interested party resides in a third country, it will be the Competent Institution of the Contracting Party under whose legislation such party or the principal was last insured..
3. When in the benefit request reference is only made to insurance periods in one of the Contracting Parties, it will be the Competent Institution of that Contracting Party."

– Ratification instrument of the Agreement on Social Security between the Kingdom of Spain and the Republic of Argentina, done in Madrid on 28 January 1992 and the Administrative Agreement for the application of the Convention, done in Buenos Aires on 3 December 1997 (*BOE* 297, 10.12.04).
Entry into force: 1 December 2004.

XXI. CRIMINAL LAW

– Provisional application of the Agreement between the Kingdom of Spain and the Republic of Latvia on Cooperation in the Fight against Terrorism, Organised Crime, Illegal Trafficking in narcotic drugs, psychotropic substances and their precursors, and other offences, done in Madrid on 24 November 2003 (*BOE* 32, 6.02.04).
Provisional applications: from 24 December 2003.
Entry into force:

Article 13: "The last day of the month following the date of receipt of the last notification in writing between the Parties (. . .)".

– Agreement between the Kingdom of Spain and the Republic of Colombia on cooperation to Prevent the Use of and to Control Illegal Narcotic Drugs and Psychotropic Substances, done *ad referendum* in Bogotá on 14 September 1998 (*BOE* 40, 16.02.04).
Entry into force: 5 March 2004.

– Agreement between the Kingdom of Spain and the Federative Republic of Brazil on Cooperation to Prevent the Use of and to Control Illegal Trafficking in Narcotic Drugs and Psychotropic Substances, done *ad referendum* in Madrid on 11 November 1999 (*BOE* 182, 29.07.04).
Entry into force: 13 July 2004.

XXII. TAX LAW

– Agreement between the Kingdom of Spain and the Republic of Turkey to Avoid Double Taxation and Prevent Income Tax Evasion (*BOE* 16, 19.01.04).
Entry into force: 18 December 2003.
Note: "Article 1. Persons included.

This Agreement is applicable to persons who are residents of one or the other Contracting States.

Article 2. Taxes included.

1. This Agreement is applicable to the income tax required by each of the Contracting States, their political subdivisions and local entities, whatever the system of collection may be.
2. Income tax is considered to be all taxes on all or part of income, including tax on earnings from the sale of movable property or real estate and taxes on the whole amount of wages or salary paid by employers.
3. The current taxes to which this Agreement applies are, in particular:

a) In Spain:
   i) the Tax on Personal Income;
   ii) the Tax on Corporate Income;
   iii) the Tax on Non-Resident Income, and
   iv) local Income taxes;

b) In Turkey:
   i) the Tax on Income (*Gelir Vergisi*);
   ii) the Tax on Corporations (*Kurumlar Vergisi*), and
   iii) the surcharge on the Tax on Income and on the Tax on Corporations (*Gelir Vergisi ve Kurumlar Vergisi Uzerinden Al nan Fon Pay*)
   (hereinafter "Turkish tax").

4. The Agreement shall apply equally to taxes identical or analogous in nature that may be established subsequent to its signature and added to current taxes or replacing them. The competent authorities of the Contracting States shall inform each other of any relevant modifications they have introduced in their respective tax legislations.

(. . .)

2. For the application of this Agreement at any time by a Contracting State, any term or expression that is not defined herein shall have, unless its context would indicate otherwise, the meaning given to it at that time by that State's legislation relating to taxes covered by this Agreement, with the meaning given to it under tax legislation prevailing over that given by other branches of Law in that State.

Article 4. Resident

1. For the purposes of this Agreement, the expression "resident of a Contracting State" means any person who, under that State's legislation, is subject to tax by reason of domicile, residence, corporate headquarters, place of management or any other analogous criteria, including also the State and its political subdivisions and local entities. This expression does not include, however, persons subject to tax in that State solely on income obtained from sources located outside said State.

2. When, under the provisions of paragraph 1, an individual is a resident of both Contracting States, the situation shall be resolved as follows:

a) such person shall be considered a resident solely of the State in which he/she has a permanent home at his/her disposal; if such individual has a permanent home at his/her disposal in both States, he/she will be considered a resident of the State with which he/she has closer personal and economic relations (centre of vital interests);

b) If the State in which such person has a centre of vital interests cannot be determined, or if he/she does not have a permanent home at his/her disposal in either State, he/she will be considered a resident solely of the State in which he/she habitually lives;

c) If the person lives habitually in both States, or in neither State, he/she will be considered a resident only of the State in which he/she is a national;

d) If the person is a national of both States, or of neither State, the competent authorities of the Contracting States shall resolve the issue by mutual agreement.

3. When, under the provisions of Paragraph 1, an entity that is not an individual is a resident of both Contracting States, it is considered a resident of the Contracting State in which its effective management is located. Nonetheless, when this entity has a site of effective management in one of the States and its corporate headquarters in another, the competent authorities of the two Contracting States shall hold consultations to determine by mutual agreement whether the corporate headquarters of the taxpayer should be considered its place of effective management or not.

Article 5. Permanent establishment

For the purposes of this Agreement, the expression "permanent establishment" means a fixed place of business through which a company does all or part of its business.

(. . .)

2. In Turkey double taxation shall be avoided in the following way:

a) Subject to the provisions of Turkish legislation relating to the possibility of deducting tax paid abroad from Turkish tax, Spanish tax payable under the legislation of Spain and pursuant to this Agreement on income from Spain (including profit and taxable earnings) obtained by a resident of Turkey may be deducted from the Turkish income tax. Nonetheless, such a deduction may not exceed the Turkish tax, calculated before the deduction, on such income.

b) When, pursuant to any provision of this Agreement, the income obtained by a resident of Turkey is exempt from tax in Turkey, Turkey may, nonetheless, take into consideration such income in calculating the tax on the remainder of such a resident's income.

Article 23. Non-Discrimination

1. The nationals of one Contracting State shall not be subject in the other Contracting State to any tax or tax-related obligation that is not required or is heavier than the other State's nationals are or may be subject to under the same conditions, in particular, with regard to residence. Notwithstanding the provisions of Article 1, this provision is also applicable to persons who are not residents of either of the Contracting States.
2. Subject to the provisions of Article 10.4, the permanent establishments that a company in a Contracting State has in the other Contracting State shall not be subject to tax in such State in such a way that is less favourable than the companies of that State that are in the same business are subject to.
3. Unless the provisions of Article 9.1, Article 11.6 and Article 12.6, are applied, the interest, royalties and other costs paid by a company of one Contracting State to a resident of the other Contracting State shall be deductible in determining the profit subject to tax of said company, under the same conditions as if they were paid to a resident of the first State.
4. The companies of a Contracting State whose capital is totally or partially held or directly or indirectly controlled, by one or various residents of another Contracting State, shall not be subject in the first State to any tax or obligation relating thereto that is not required or that is more burdensome than those to which other similar companies of the first State are subject.
5. These provisions should not be interpreted as obligating a Contracting State to grant residents of the other Contracting State personal deductions or tax reductions that it grants to its own residents in consideration of their civil status or family burdens.
6. Notwithstanding the provisions of Article 2, the provisions of this Article shall be applied to all taxes, whatever their nature or denomination.
(. . .)".

– Agreement between the Kingdom of Spain and the Republic of Lithuania to Avoid Double Taxation and Prevent Income and Property Tax Evasion (*BOE* 28, 2.02.04).
Entry into force: 26 December 2003.
Note: The text of this Agreement, with only slight differences, is similar to the Agreement with Turkey, set forth above in this report.

– Agreement between the Kingdom of Spain and the Republic of Chile to Avoid Double Taxation and Prevent Income and Property Tax Evasion, done in Madrid on 7 July 2003 (*BOE* 28, 2.02.04).
Entry into force: 23 December 2003.
Note: The text of this Agreement, with only slight differences, is similar to the Agreement with Turkey, set forth in this report.

– Correction of errors in the Agreement between the Kingdom of Spain and the Republic of Turkey to Avoid Double Taxation and Prevent Income Tax Evasion, done in Madrid on 5 July 2002 (*BOE* 60, 10.03.04).
Entry into force: 30 January 2004.

– Correction of errors in the Agreement between the Spanish State and the Government of the Kingdom of the Netherlands to Avoid Double Taxation in regard to Income and Property Tax, done in Madrid on 16 June 1971. (*BOE* 67, 18.03.04).

– Correction of errors in the Agreement between the Kingdom of Spain and the Republic of Turkey to Avoid Double Taxation and Prevent Income Tax Evasion, done in Madrid on 5 July 2002. (*BOE* 16, 19.01.04, *BOE* 60, 10.03.04).

– Correction of errors in the Agreement between Spain and Belgium to Avoid Double Taxation and Prevent Income and Property Tax Evasion and Fraud, done in Brussels on 14 June 1995 (*BOE* 98, 22.04.04).

– Agreement between the Kingdom of Spain and the Bolivarian Republic of Venezuela to Avoid Double Taxation and Prevent Income and Property Tax Evasion and Fraud, done in Madrid on 8 April 2003 (*BOE* 144, 15.06.04).
Entry into force: 29 April 2004.
Note: The text of this Agreement, with only slight differences, is similar to the Agreement with Turkey, set forth in this report.

Spanish Municipal Legislation Concerning Matters of Public International Law, 2004

This material has been selected, compiled and commented on by a team from the Department of Public International Law of the University of Málaga, which includes Dr. Alejandro J. Rodríguez Carrión, Professor of Public International Law, Dr. Elena del Mar García Rico, Dr. Magdalena Mª. Martín Martínez, Dr. Eloy Ruiloba García, Dr. Ana M. Salinas de Frías and Dr. María Isabel Torres Cazorla, Lecturers in Public International Law.

This survey includes the treaties covered by art. 2.1 a) of the Vienna Convention on the Law of Treaties, published in the *Boletín Oficial del Estado* (Official Journal of the State). Its purpose is to record the legal effects of these instruments, such as ratification or accession, municipal entry into force, provisional application, reservations or declarations, territorial application, termination and abrogation. In a few instances some relevant articles or references will be reproduced in an unofficial translation.

I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

– Resolution of 19 January 2004, passed by the Technical Secretariat-General of the Ministry of Foreign Affairs, on third States' actions regarding multilateral treaties to which Spain is a party (*BOE* 25, 29.1.04).
Note: This Resolution provides for publication, in the public interest, of communications regarding international treaties received by the Ministry of Foreign Affairs from 31 August to 31 December 2003.

– Resolution of 1 June 2004, passed by the Technical Secretariat-General for Foreign Affairs and Cooperation, on third States' actions regarding multilateral treaties to which Spain is a party (*BOE* 144, 15.6.04).
Note: This Resolution provides for publication, in the public interest, of communications regarding international treaties received by the Ministry of Foreign Affairs from 31 January to 3 April 2004.

– Resolution of 4 October 2004, passed by the Technical Secretariat-General for Foreign Affairs and Cooperation, on third States' actions regarding multilateral treaties to which Spain is a party (*BOE* 249, 15.10.04).
Note: This Resolution provides for publication, in the public interest, of communications regarding international treaties received by the Ministry of Foreign Affairs from 1 May to 31 August 2004.

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III. THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

IV. SUBJECTS OF INTERNATIONAL LAW

V. THE INDIVIDUAL AND INTERNATIONAL LAW

1. Aliens

– Royal Decree 2266/2004, of 3 December, modifying Regulations on aliens access to the military profession as soldiers and sailors, adopted by Royal Decree 1244/2002, of 29 November (*BOE* 292, 4/12/04).
Note: Article 3.1 of the Regulation approved by Royal Decree 1244/2002 is amended (See VIII SYIL (2001–2002), pp. 234–5) and now reads as follows:

> "The maximum contingent of aliens in the Armed Forces as professional soldiers and sailors, applicable for a period of three years, shall be seven per cent of the total number of professional soldiers and sailors referred to in article 19 section 1 of the Armed Forces (Personnel Regime) Act, Law 17/1999 of 18 May".

The contingent had hitherto been set at two per cent.

VI. STATE ORGANS

1. Central organs

– Royal Decree 553/2004, of 17 April, restructuring the ministerial departments (*BOE* 94, 18.4.04 and 96, 20.4.04).
Note: The name of the Ministry of Foreign Affairs is changed to Ministry of Foreign Affairs and Cooperation. Article 2 provides:

> "Ministry of Foreign Affairs and Cooperation.
>
> 1. The Ministry of Foreign Affairs and Cooperation is responsible for the direction of foreign policy and international development cooperation policy, in accordance with the guidelines laid down by the Government and in obedience to the principle of unity of action abroad, and also for the exercise of those other competences hitherto devolving upon the Ministry of Foreign Affairs.
> 2. The Ministry of Foreign Affairs and Cooperation now comprises the following senior organs:
>
> a) The Secretariat of State for Foreign Affairs and Iberoamerica, which shall be responsible for providing direct assistance to the Minister in the formulation and implementation of Spain's foreign policy.

b) The Secretariat of State for the European Union, which shall be responsible for providing direct assistance to the Minister in the formulation and implementation of Spain's policy in the European Union.
c) The Secretariat of State for International Cooperation, which shall take on those of the minister's competences in matters of international cooperation hitherto exercised by the Secretariat of State for Foreign Affairs and Ibero-America."

– Royal Decree 562/2004, of 19 April, sets out the basic structure of the higher and directive organs of the Ministry of Foreign Affairs and Cooperation (*BOE* 96, 20.4.04).

– Royal Decree 1416/2004, of 11 June, modifying and setting out the basic structure of the Ministry of Foreign Affairs and Cooperation (*BOE* 142, 12.6.04).
Note: This repeals article 1 of Royal Decree 562/2004, of 19 April, laying down the structure of the higher and directive organs of the Ministry of Foreign Affairs and Cooperation. Article 1.3 is amended to read as follows:

"The Ministry of Foreign Affairs and Cooperation, under the direction of the head of the department, is composed of the following higher and directive organs:

a) The Secretariat of State for Foreign Affairs and Iberoamerica, to which the following directive organs report

1. The Directorate-General of Foreign Policy.
2. The Directorate-General of Foreign Policy for Europe and North America.
3. The Directorate-General of Policy for Iberoamerica.
4. The Directorate-General of Foreign Policy for the Mediterranean, Near East and Africa.
5. The Directorate-General of Foreign Policy for Asia and the Pacific.
6. The Directorate-General of International Affairs relating to Terrorism, the United Nations and Multilateral Organisations.
7. The Directorate-General of International Economic Relations.

b) The Secretariat of State for the European Union, to which the following directive organs report:

1. The Secretariat-General for the European Union, with the rank of Under-Secretariat.
2. The Directorate-General for Integration and Coordination of European Union General and Economic Affairs.
3. The Directorate-General for Coordination of the Internal Market and other Community Policies.

c) The Secretariat of State for International Cooperation.
d) The Under-Secretariat of Foreign Affairs and Cooperation, to which the following directive organs report:

1. The General Technical Secretariat.
2. The Directorate-General of the Foreign Service.
3. The Directorate-General of Consular Affairs and Assistance.

e) It reports directly to the head of department of the Directorate-General of Exterior Communication.
f) As an organ providing immediate assistance to the Minister, there is an Office having the organic rank of a directorate-general, structured as laid down in article 17 of Royal Decree 562/2004 of 19 April.
g) The head of the Department is assisted by a Higher Council for Foreign Affairs, whose composition and functioning are regulated by specific provisions and whose head holds the organic rank of Deputy Director-General.

– Order PRE/2046/2004, of 25 June, publicising the Cabinet Resolution creating the Commission for Comprehensive Reform of the Foreign Service (*BOE* 154, 26.6.04). *Note*: Its purpose is to draw up a report analysing and assessing the situation of the foreign service and how well it is adapted to international political, economic and institutional realities, with proposals for reform in terms of organisation, regulation and resources with a view to their improvement and the efficient accomplishment of their purposes. These objectives are to be met within one year of its creation.

2. Diplomatic Relations

– Royal Decree 220/2004, of 6 February, establishing the Education Attaché at the Permanent Diplomatic Mission in the People's Republic of China (*BOE* 33, 7.2.04).

– Royal Decree 1719/2004, of 23 July, establishing the Defence Attaché at the Permanent Diplomatic Mission in Malaysia (*BOE* 190, 7.8.04).

– Royal Decree 1894/2004, of 10 September, establishing the Defence Attaché at the Permanent Diplomatic Mission in the State of Israel (*BOE* 229, 22.9.04).

– Royal Decree 1895/2004, of 10 September, establishing the Defence Attaché at the Permanent Diplomatic Mission in the Republic of Peru (*BOE* 229, 22.9.04).

3. Consular Relations

Orders creating the following Honorary Consular Offices:

France:
– Orleans, Papeete and Rennes (*BOE* 26, 30.1.04).

Maldives:
– Male (*BOE* 259, 27.10.04).

Panama:
- David (Panama) (*BOE* 264, 2.11.04).

- Order AEX/645/2004, of 11 February, establishing a Consular Office with the rank of Consulate-General at Monterrey (United States of Mexico) (*BOE* 62, 12.3.04).

- Order AEC/3714/2004, of 15 October, promoting the Consular Office of Bogota to the category of Consulate-General (*BOE* 276, 16.11.04).

- Order AEC/3715/2004, of 15 October, promoting the Consular Office of Quito to the category of Consulate-General (*BOE* 276, 16.11.04).

VII. TERRITORY

1. Frontiers

- Order PRE/1755/2001, of 11 June, publicising the Cabinet Resolution to temporarily close the Port of Tarifa as an authorised Post for crossing of the said frontier by persons (*BOE* 142, 12.6.04).

VIII. SEAS, WATERWAYS, SHIPS

1. Fisheries

- Order APA/6/2004, of 12 January, regulating trawling in Community waters in International Council for the Exploration of the Sea (ICES) Zone IX (*BOE* 12, 14.1.04).
Note: The waters of ICES Zone IX are subject to the sovereignty or jurisdiction of Portugal.

- Royal Decree 498/2004, of 1 April, modifying Royal Decree 137/2002, of 1 February, which introduced support measures for shipowners and crew members of the fishing fleet affected by termination of the Fishery Agreement between the European Union and the Kingdom of Morocco (*BOE* 80, 2.4.04).

IX. INTERNATIONAL SPACES

X. ENVIRONMENT

1. Seas

– Royal Decree 253/2004, of 13 February, introducing measures to prevent and combat pollution in hydrocarbon loading, discharge and handling operations at sea and in port (*BOE* 39, 14.2.04).

– Royal Decree-Law 4/2004, of 2 July, introducing certain measures in connection with the damage caused by the wreck of the vessel "Prestige" (*BOE* 160, 3.7.04).

– Royal Decree 1892/2004, of 10 September, establishing norms for implementation of the Convention on Civil Liability for Oil Pollution Damage (*BOE* 226, 18.9.04).

– Royal Decree 2182/2004, of 12 November, creating the Centre for the Prevention and Combating of Marine and Coastal Pollution (*BOE* 276, 16.11.04).

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

1. Cultural Cooperation

– Royal Decree 173/2004, of 30 January, restructuring the Spanish National Commission for Cooperation with UNESCO (*BOE* 33, 7.2.04).

– Royal Decree 284/2004, of 20 February, creating and regulating the functions of the Commissioner for Commemoration of the Fifth Centenary of the birth of Saint Francis Xavier (*BOE* 45, 21.2.04).

– Order ECD/493/2004, of 23 February, establishing a regime for sojourns and extensions for Technical Advisors and teaching personnel at centres and on programmes abroad (*BOE* 51, 28.2.04).

– Royal Decree 2018/2004, of 11 October, amending the Regulation of the *Instituto Cervantes* approved by Royal Decree 1526/1999 of 1 October which adapted the composition of its governing organs to the restructuring of the ministerial departments (*BOE* 247, 13.10.04).

2. Economic Cooperation

– Royal Decree 2124/2004, of 3 November, amending Royal Decree 22/2000, of 14 January, regulating the composition, competences, organisation and functions of the Interterritorial Commission for Development Cooperation (*BOE* 278, 18.11.04).

– Royal Decree 2217/2004, of 26 November, on competences, functions, composition and organisation of the Development Cooperation Council (*BOE* 286, 27.11.04).

3. Tariffs and Trade Cooperation

– Resolution of 14 January 2004, passed by the Spanish Customs and Excise Department of the State Agency for Tax Administration, updating the Applicable Integrated Tariff (TARIC) (*BOE* 19, 22.1.04).

– Resolution of 26 January 2004, passed by the Spanish Customs and Excise Department of the State Agency for Tax Administration, updating the Applicable Integrated Tariff (TARIC) (*BOE* 27, 31.1.04).

– Resolution of 24 February 2004, passed by the Spanish Customs and Excise Department of the State Agency for Tax Administration, updating the Applicable Integrated Tariff (TARIC) (*BOE* 59, 9.3.04).

– Resolution of 11 March 2004, passed by the Spanish Customs and Excise Department of the State Agency for Tax Administration, updating the Applicable Integrated Tariff (TARIC) (*BOE* 68, 19.3.04).

– Resolution of 24 March 2004, passed by the Spanish Customs and Excise Department of the State Agency for Tax Administration, updating the Applicable Integrated Tariff (TARIC) (*BOE* 83, 6.4.04).

– Resolution of 7 April 2004, passed by the Spanish Customs and Excise Department of the State Agency for Tax Administration, updating the Applicable Integrated Tariff (TARIC) (*BOE* 97, 21.4.04).

– Resolution of 19 April 2004, passed by the Spanish Customs and Excise Department of the State Agency for Tax Administration, amending Resolution of 15 December 2003, on Instructions for Implementation of the Single Administrative Document (SAD) (*BOE* 111, 7.5.04).

– Resolution of 11 May 2004, passed by the Spanish Customs and Excise Department of the State Agency for Tax Administration, updating the Applicable Integrated Tariff (TARIC) (*BOE* 126, 25.5.04).

– Resolution of 31 May 2004, passed by the Spanish Customs and Excise Department of the State Agency for Tax Administration, updating the Applicable Integrated Tariff (TARIC) (*BOE* 140, 10.6.04).

– Circular of 18 June 2004, from the Secretariat-General for Foreign Trade concerning the procedure and formalities for imports and introduction of goods and their commercial regimes (*BOE* 158, 1.7.04 and 163, 7.7.04).

– Resolution of 1 July 2004, passed by the Spanish Customs and Excise Department of the State Agency for Tax Administration, updating the Applicable Integrated Tariff (TARIC) (*BOE* 165, 9.7.04).

– Royal Decree 1717/2004, of 23 July, amending Royal Decree 786/1979, of 16 March, which laid down the norms regulating the General Statute of officially-recognised Spanish Chambers of Commerce abroad (*BOE* 207, 27.8.04).

– Resolution of 18 August 2004, passed by the Spanish Customs and Excise Department of the State Agency for Tax Administration, updating the Applicable Integrated Tariff (TARIC) (*BOE* 204, 24.8.04).

– Resolution of 23 September 2004, passed by the Spanish Customs and Excise Department of the State Agency for Tax Administration, updating the Applicable Integrated Tariff (TARIC) (*BOE* 236, 30.9.04).

– Resolution of 17 December 2004, passed by the Spanish Customs and Excise Department of the State Agency for Tax Administration, updating the Applicable Integrated Tariff (TARIC) (*BOE* 315, 31.12.04).

4. Air Traffic and Transport

– Order PRE/2220/2004, of 6 July, introducing amendments to the Air Traffic Regulation to adapt to technical innovations and updates resulting from regional air navigation agreements (*BOE* 163, 7.7.04).

– Order FOM/2476/2004, of 12 July, partially amending Annex 1 of Decree 1675/1972, of 26 June, on air navigation assistance tariffs (EUROCONTROL) (*BOE* 178, 24.7.04).

– Order FOM/3043/2004, of 21 September, partially amending Annex 1 of Decree 1675/1972, of 26 June, on air navigation assistance tariffs (EUROCONTROL) (*BOE* 232, 25.9.04).

– Order FOM/3278/2004 of 28 September partially amending Annex 1 of Decree 1675/1972, of 26 June, on air navigation assistance tariffs (EUROCONTROL) (*BOE* 247, 13.10.04).

5. Labour, Social Security and Emigration

– Royal Decree 1743/2003, of 19 December, creating a Spanish Coordinating Committee for the tenth anniversary of International Family Year (*BOE* 12, 14.1.04).

6. Health and Relief Cooperation

– Royal Decree 174/2004, of 30 January, extending the deadline set in article 9 of Royal Decree 211/2003, of 21 February, for creation of a National Commission for Organisation of the Bicentenary of the Royal Philanthropic Expedition of Francisco Xavier Balmis to carry the smallpox vaccine to America and the Philippines (*BOE* 33, 7.2.04).
Note: The deadline for performance of the scheduled activities is extended to 30 March 2007.

7. Recognition of Qualifications

– Royal Decree 285/2004, of 20 February, on conditions for recognition and equivalence of foreign university qualifications and studies (*BOE* 55, 4.3.04).

– Royal Decree 1830/2004, of 27 August, setting a new date for the entry into force of some articles of Royal Decree 285/2004, of 20 February, on conditions for recognition and equivalence of foreign university qualifications and studies (*BOE* 210, 31.8.04).

– Order ECI/3686/2004, of 3 November, establishing rules for the implementation of Royal Decree 285/2004, of 20 February, on conditions for recognition and equivalence of foreign university qualifications and studies (*BOE* 275, 15.11.04).

8. Civil and Criminal Cooperation

– Royal Decree 419/2004, of 11 March, declaring an official state of mourning in response to the terrorist attacks perpetrated in Madrid on 11 March 2004 (*BOE* 62, 12.3.04).

– Royal Decree 453/2004, of 18 March, on the granting of Spanish nationality to victims of the terrorist attacks of 11 March 2004 (*BOE* 70, 22.3.04).
Note: According to article 1, "victims" means "persons injured in the said attacks, and likewise the descendants and ancestors, both in the first degree of consanguinity, of those killed".

– Order AEC/4150/2004, of 15 December, publicising the Cabinet Resolution of 10 December 2004 establishing 27 January as Official Remembrance Day for the Holocaust and the Prevention of Crimes against Humanity (*BOE* 305, 20.12.04).

– Royal Decree 2317/2004, of 17 December, creating the position of High Commissioner for Support to the Victims of Terrorism (*BOE* 306, 21.12.04).
Note: According to article 2, his functions are:

"a) To follow up the actions of the competent organs of the General State Administration in respect of economic and any other kind of assistance and aid to the victims of terrorism.
b) To collaborate with any and all associations, foundations and other public or private institutions whose purpose is to care for the victims of terrorism.
c) To cooperate with the organs of other public Administrations having competences in such matters, in order to coordinate with them and thus ensure comprehensive protection of the victims of terrorism.
d) To continually assess the economic and social situation of the victims of terrorism.
e) To propose legislative, regulatory and material initiatives for the improvement of mechanisms of information, care and support for the victims of terrorism."

XII. INTERNATIONAL ORGANISATIONS

– Royal Decree 2269/2004, of 3 December, creating a Commission for the organisation and coordination of actions to celebrate the Fifteenth Iberoamerican Summit and the Tenth Anniversary of the Euro-Mediterranean Conference, on the 30th Anniversary of the Proclamation of H.M. the King Juan Carlos I (*BOE* 303, 17.12.04).

XIII. EUROPEAN UNION

XIV. RESPONSIBILITY

XV. PEACEFUL SETTLEMENT OF DISPUTES

XVI. COERCION AND THE USE OF FORCE SHORT OF WAR

– Royal Decree 2015/2004, of 11 October, creating an Army High-Readiness Land Headquarters (*BOE* 254, 21.10.04).
Note: This creates a national Army High-Readiness Land Headquarters, at the disposal of NATO in the terms laid down in the relevant agreement(s). It will be open to voluntary participation by personnel of the Armed Forces of other States parties to the North Atlantic Treaty.

– Royal Decree-Law 8/2004, of 5 November, on compensation to participants in international peace and security operations (*BOE* 271, 10.11.04, 280, 20.11.04 and 282, 23.11.04).
Note: This establishes a system of compensations when Spanish citizens are killed or suffer physical or mental injury as a result of their participation in a peace-keeping, humanitarian aid or other international operation that has been specifically approved by the Government for these purposes.
Ratified by the Congress of Deputies on 2 December 2004 (*BOE* 298, 11.12.04).

XVII. WAR AND NEUTRALITY

– Order ITC/2637/2004, of 21 July, on the application of certain provisions of Royal Decree 1206/2003, of 19 December, for implementation of the commitments acquired by Spain in the Additional Protocol to the Safeguards Agreement derived from the Treaty on Non-Proliferation of Nuclear Weapons, for commendation to the European Commission (*BOE* 187, 4.8.04).

– Royal Decree 1782/2004, of 30 July, approving the Regulation for control of foreign trade in defence material, other material and dual-use products and technologies (*BOE* 210, 31.8.04 and 248, 14.10.04).

Spanish Municipal Legislation Concerning Matters of Private International Law Published in 2004

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I. SOURCES OF PRIVATE INTERNATIONAL LAW

II. INTERNATIONAL JURISDICTION

III. PROCEDURE AND JUDICIAL ASSISTANCE

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS AND DECISIONS

V. INTERNATIONAL COMMERCIAL ARBITRATION

VI. CHOICE OF LAW: SOME GENERAL PROBLEMS

VII. NATIONALITY

– Royal Decree 453/2004, of March 18, on granting Spanish nationality to the victims of the terrorist attacks of 11 March 2004 (*BOE* 70, 22.3.04).

VIII. ALIENS, REFUGEES AND CITIZENS OF EUROPEAN COMMUNITY

– Correction of errors in the Resolution of 29 December 2003, by the Under Secretariat, providing for publication of the Council of Ministers Agreement of 19 December 2003, determining the quota for non-EU foreign workers in Spain for 2004 (*BOE* 69, 20.3.04).

Note: On the December 2003 Resolution, see Section VIII de of the 2003 Yearbook.

– Resolution of 22 January 2004, by the Under Secretariat, providing for publication of the Instructions for implementing the Council of Ministers Agreement of 19 December 2003, determining the quota for non-EU foreign workers in Spain for 2004 (*BOE* 25, 29.1.04).
Note: On the December 2003 Resolution see Section, VIII de of the 2003 Yearbook.

– Royal Decree 285/2004, of February 20, regulating conditions for homologation and validation of foreign higher education degrees and programmes of study (*BOE* 55, 4.3.04).
Note: See Order ECI/3686/2004, of 3 November, below.

– Order HAC/916/2004, of 23 March, establishing the conditions for obtaining a professional license as a Customs Agent (*BOE* 85, 8.4.04).
Note: Article 1.1.a) establishes that only individuals who, *inter alia*, hold Spanish or EU nationality and are residents of Spain are entitled to be licensed as Customs Agents.

– Royal Decree 1830/2004, of 27 August, establishing a new deadline for the entry into force of certain articles of Royal Decree 285/2004, of 20 February, regulating the conditions for homologation and validation of foreign higher education degrees and programmes of study (*BOE* 210, 31.8.04).
Note: See above in this Section.

– Order ECI/3686/2004, of 3 November, setting forth rules of application for Royal Decree 285/2004, of February 20, regulating the conditions for homologation and validation of foreign higher education degrees and programmes of study (*BOE* 275, 15.11.04).
Note: See Royal Decree 285/2004 above.

– Royal Decree 2266/2004, of 3 December, modifying the Regulations on the eligibility of foreign nationals to be professional military soldiers and seamen, as approved by Royal Decree 1244/2002, of 29 November (*BOE* 292, 4.12.04).
Note: This provision sets a 3-year maximum quota for foreign nationals in the Armed Forces.

IX. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

X. FAMILY LAW

XI. SUCCESSIONS

XII. CONTRACTS

– Legislative Royal Decree 7/2004, of 29 October, approving the consolidated text of the Legal Statute of the Insurance Clearing Syndicate (*BOE* 267, 5.11.04).
Note: The following provisions are noteworthy here: Art. 3.1 (in order to fulfil its purpose, the Syndicate may enter into coinsurance agreements, or grant or readmit in reinsurance part of the risks covered for Spanish or foreign insurers); Art. 6.1 (personal injury derived from extraordinary events that took place abroad can be compensated by the Syndicate when the policy holder's habitual residence is in Spain); Art. 7, p. 1st (types of insurance with mandatory surcharges to enable the Syndicate to compensate for losses resulting from personal injury occurring abroad when the policy holder's habitual residence is in Spain).

– Legislative Royal Decree 8/2004, of 29 October, by which consolidated text of the Law on Civil Liability and insurance for motor vehicles (*BOE* 267, 5.11.04) is adopted.
Note: For the purposes of this Report, the following sections are worthy of note: Art. 2.2, paragraph 3 (verification of mandatory liability insurance for certain vehicles by customs authorities), and Art. 11.1.f) (reimbursement by the Insurance Clearing Syndicate of claims settled by insurance entities to injured parties residing in other States of the European Economic Space).

– Law 2/2004, of 27 December, on the General State Budget for 2005 (*BOE* 312, 28.12.04).
Note: Additional provision number twenty establishes the coverage ceiling for export credit insurance, excluding open-type policies for export management (PAGEX) and type-100 policies, that the *Compañía Española de Seguros de Crédito a la Exportación, Sociedad Anónima* (CESCE, Spanish acronym for *Spanish Export Credit Insurance Company, Inc.*) may insure and distribute.

XIII. TORTS

– Royal Decree 299/2004, of February 20, modifying the Regulation on civil liability and insurance for motor vehicles, approved by Royal Decree 7/2001, of January 12 (*BOE* n. 47, 24.2.04).
Note: The purpose of this provision is to adapt the Regulation on civil liability and insurance for motor vehicles to the Law it implements. The law was amended to adapt it to the Fourth Directive on Automobile Insurance, by means of Law 44/2002 (regarding this provision sea Section XIII of the 2001–2002 Yearbook). The consolidated text of the Law on civil liability and insurance for motor vehicles was approved by Legislative Royal Decree 8/2004 (see Section XII and this same Section).

– Royal Decree 1892/2004, of 10 September, setting forth rules for the execution of the International Convention on civil liability as a result of damage owing to sea pollution caused by hydrocarbons (*BOE* 226, 18.9.04).

– Legislative Royal Decree 8/2004, of 29 October, by which the consolidated text of the Law on civil liability and insurance for motor vehicles (*BOE* 267, 5.11.04) is approved.
Note: Among others, Arts. 20 to 31 (claims arising in a State other than the policyholder's State of residence, in relation to mandatory insurance.).

XIV. PROPERTY

– Royal Decree 1937/2004, of 27 September, by which the Implementing Regulations of Law 20/2003, of 7 July, on legal protection of industrial designs (*BOE* 250, 16.10.04) are approved.
Note: This provision contains repeated references to the international classification of industrial drawings and models ("Locarno Classification", as per the Annex to the Locarno Arrangement of 8 October 1968): Art. 1.2, c), Art. 3.1, Art. 14.2, Art. 16.1, Art. 20.1, i), Art. 23, e), and Art. 50.1, f). On Law 20/2003 see sections II and XIV of the 2003 Report.

XV. COMPETITION LAW

– Royal Decree 2295/2004, of 10 December, on the application in Spain of the Community competition rules (*BOE* 308, 23.12.04).
Note: The purpose of this provision is to update the provisions contained in Royal Decree 295/1998 to include recent modifications in Community competition rules.

XVI. INVESTMENTS AND FOREIGN EXCHANGE

– Circular 5/2004, of December 22, to lending institutions, on the derogation of Bank of Spain Circulars 22/1992, 1/1993, 2/1997 and 12/1998 (*BOE* 314, 30.12.04).
Note: The purpose of this provision is to derogate a number of Bank of Spain Circulars on foreign currency that became obsolete when Spain joined the Economic and Monetary Union. This represents a radical change in the currency market, which went from being local to being European in scope.

XVII. FOREIGN TRADE LAW

– Resolution of 5 February 2004, of the Department of Customs and Excise Taxes of the State Tax Administration Agency, approving the form for the surety bond insurance certificate to insure payment of customs and tax on imports (*BOE* 38, 13.2.04).

– Order APA/400/2004, of 18 February, amending certain annexes of Royal Decree 2071/1993, of November 26, relating to measures to protect against the introduction and dissemination in national and European Economic Community territory of organisms harmful to plants or plant products, as well as their export and transit to third countries (*BOE* 46, 23.2.04).

– Instruction 1/2004, of 27 February, by the General Directorate of the State Tax Administration Agency, on customs appraisal of goods (*BOE* 63, 13.3.04).

– Resolution of 19 April 2004, by the Department of Customs and Excise Taxes. State Agency for Tax Administration, modifying the resolution of 15 December 2003 on Instructions for completion of the Single Administrative Document (SAD) (*BOE* n. 111, 7.5.04).
Note: Regarding the Resolution of 15 December 2003, see Section XVII of the 2003 Yearbook.

– Order APA/1075/2004, of 22 April, modifying certain annexes of Royal Decree 2071/1993, of 26 November, relating to measures to protect against the introduction and dissemination in national and European Economic Community territory of organisms harmful to plants or plant products, as well as their export and transit to third countries (*BOE* 99, 23.4.04).

– Order EHA/1703/2004, of 31 May, derogating Rules Three and Four of the Order of 22 March 2000, approving the new forms for recapitulation lists and the magnetic formats for supporting documents issued and for supporting documents received through intracommunity traffic, including simplified documents (*BOE* n. 139, 9.6.04).

– Circular of 18 June 2004, from the Secretariat General for Foreign Trade, on procedures for and processing of imports and entering goods and their trade regimes (*BOE* n. 158, 1.7.04; correction of errors *BOE* n. 163, 7.7.04).

– Order EHA/2376/2004, of 8 July, modifying the Order of 21 December 1998 which implemented Council Regulation (EEC) n. 2913/92, of 12 October 1992, establishing the Community Customs Code and Commission Regulation (EEC) 2454/93, of 2 July 1993, that establishes certain provisions to be implemented in relation to the simplified domiciliation procedure (*BOE* n. 172, 17.7.04).

– Royal Decree 1782/2004, of 30 July, approving Regulations for control of foreign trade in defence materiel and other dual use material, products and technology (*BOE* n. 210, 31.8.04; correction of errors *BOE* n. 248, 14.10.04).

– Resolution of 17 December 2004, of the Department of Customs and Excise Taxes, State Agency for Tax Administration, modifying the Resolution of 15 December

2003, on Instructions for completing the Single Administrative Document (SAD) (*BOE* n. 313, 29.12.04).

– Resolution of 17 December 2004, of the Department of Customs and Excise Taxes, State Agency for Tax Administration, updating the Integrated Tariff of Application (TARIC) (*BOE* n. 315, 31.12.04).

Also see Section XXIII (Tax Law) in this chronicle on Private International Law.

– Order EHA/4246/2004, of 27 December, setting thresholds relating to statistics on trade in goods between member states of the European Union for 2005 (*BOE* n. 313, 29.12.04).

XVIII. BUSINESS ASSOCIATION/CORPORATIONS

– Circular 3/2003, of 29 December, of the National Commission of the Securities Market, on information from foreign Collective Investment Institutions registered in the Registries of the National Commission of the Securities Market (*BOE* n. 11, 13.1.04; correction of errors *BOE* n. 24, 28.1.04).

– Royal Decree 297/2004, of 20 February, amending the Regulation on Organization and Supervision of private insurance, approved by Royal Decree 2486/1998, of 20 November (*BOE* n. 45, 21.2.04).
Note: This provision is to make the necessary amendments in the Regulation on organization and supervision of private insurance to adapt it to the various Community Directives regulating the solvency demands and requirements of insuring entities. Legislative Royal Decree 6/2004 approved the consolidated text of the Law on the organization supervision of private insurance (see below in this Section).

– Circular 1/2004, of 17 March, from the National Commission of the Securities Market, on the annual corporate governance report of listed companies and other entities issuing securities that are negotiable in official securities secondary markets, and other information instruments of listed companies (*BOE* n. 76, 29.3.04). Note: This provision contains specific rules for foreign entities.

– Royal Decree 1717/2004, of 23 July, amending Royal Decree 786/1979, of 16 March, which establishes regulations under the General Statute of Spanish Chambers of Commerce Officially Recognized Abroad (*BOE* n. 207, 27.8.04).
Note: This Royal Decree includes in Royal Decree 786/1979 the possibility of official recognition of new forms of associations that are supranational in nature.

– Legislative Royal Decree 6/2004, of 29 October, approving the consolidated text of the Law on the organization and supervision of private insurance (*BOE* n. 267, 5.11.04; correction of errors *BOE* n. 28, 2.2.05).

Note: For the purposes of this report, the following provisions are highlighted: Art. 5.2, g), and 5.8, Art. 20.3, e), Art. 25.2, Art. 26.2, Art. 30.2, Art. 39.2, d), 4°, Art. 57.1, subparagraphs c) and d), Art. 76.1, Art. 77.6, along with Arts. 78 to 90 (on the activities of foreign insurance entities in Spain).

– Royal Decree 2387/2004, of 30 December, by which the Regulation of the Railroad Sector (*BOE* n. 315, 31.12.04) is approved.
Note: It is of interest in this report to cite Art. 65.4 (reporting to the Administration when the entity seeking a license as a railroad company is part of an international corporate group), along with Art. 78.3, m) (obligation of railroad company license-holders to comply with the applicable agreements on international rail transport and abide by customs and tax provisions).

XIX. BANKRUPTCY

XX. TRANSPORT LAW

XXI. LABOUR LAW AND SOCIAL SECURITY

XXII. CRIMINAL LAW

– Royal Decree 1774/2004, of 30 July, by which the Regulations for Organic Law 5/2000, of 12 January, regulating the criminal liability of minors (*BOE* n. 209, 30.8.04) are approved.
Note: These regulations contain several specific provisions affecting cases involving foreign minors. See Art. 3.1, Art. 32.3, Art. 41.3, and Art. 72.2 c).

XXIII. TAX LAW

– Legislative Royal Decree 3/2004, of 5 March, by which the consolidated text of the Law on Personal Income Tax (*BOE* n. 60, 10.3.04; correction of errors *BOE* n. 61, 11.3.04) is approved.
Note: Of interest in this chronicle are Articles 8 (taxpayers), 9 (customary residence in Spanish territory), 66 (rate applicable to foreign residents), 82 (deduction for international double taxation) and 92 (recording of income under the international transparency system).

– Legislative Royal Decree 4/2004, of 5 March, by which the consolidated text of the Law on Corporate Tax (*BOE* n. 61, 11.3.04; correction of errors *BOE* n. 73, 25.3.04) is approved.
Note: For the purposes of this chronicle we would highlight: Articles 3 (effect of international treaties and agreements), 21 (exemption to avoid international double economic taxation of foreign-source dividends and income derived from the

transmission of securities representing the equity of entities that are non-residents of Spanish territory), 22 (exemption of certain income earned abroad through a permanent establishment), 23 (deduction of investments for setting up a company abroad), 31 and 32 (deductions to prevent international double taxation), 37 (deduction for export activities), 49 (European Groups of Economic Interest), 107 (inclusion of certain positive income obtained by non-resident entities in taxable income) and 116 to 119 (system for entities holding foreign securities).

– Legislative Royal Decree 5/2004, of 5 March, by which the consolidated text of the Law on Income Tax of Non-Residents (*BOE* n. 62, 12.3.04) is approved.

– Order HAC/665/2004, of 9 March, regulating certain aspects of the management of VAT income collections from extra-community operators who provide services through electronic means to final consumers and modifying the Order of 27 December 1991, issuing instructions regarding the financial and economic system of the State Agency for Tax Administration (*BOE* n. 64, 15.3.04).

– Royal Decree 1775/2004, of 30 July, by which the Regulations for the Personal Income Tax (*BOE* n. 187, 4.8.04) is approved.
Note: For the purposes of this chronicle, the following provisions are highlighted: Art. 2.2, paragraphs 3 and 4 (exemption of international awards), Art. 4 (exemption for participation in peacekeeping or humanitarian missions), Art. 5 (exemption of income from work performed abroad), Art. 8 (*per diem* for travel abroad as income), Art. 61 (obligation to report and international double taxation), Art. 64 (request for reimbursement owing to international double taxation), Art. 69.1, paragraphs. a) and b) (reporting obligation of entities under system of assignment of income earned abroad), Art. 73.3, d) (income subject to withholding and withheld by permanent establishments abroad), Art. 74 (obligation to withhold or make interim payments for foreign depositors), Art. 87.5 (withholding and interim payment owing to change of residence).

– Royal Decree 1776/2004, of 30 July, by which the Regulations on the Tax on the Income of Non-Residents (*BOE* n. 188, 5.8.04), is approved.

– Royal Decree 1777/2004, of 30 July, approving the Regulations for Corporate Tax (*BOE* n. 189, 6.8.04).
Note: Of interest in this chronicle are the following provisions: Art. 41 (foreign securities-holding entities), Arts. 46 to 48 (Spanish and European special economic interest groups, temporary unions of companies), Art. 59, paragraph c) and l) (exceptions to mandatory withholding and interim deposit by foreign entities), Art. 60.2 and 60.6, paragraph 2 (entities subject to mandatory withholding and interim deposit).

– Royal Decree 1778/2004, of 30 July, establishing reporting obligations regarding

preferential shares and other debt instruments and on certain income earned by individuals who are residents in the European Union (*BOE* n. 190, 7.8.04).

– Resolution of 16 September 2004, by the Department of Customs and Excise Taxes of the State Tax Administration Agency, establishing the rules for filling out the supporting documents providing for the circulation of products subject to product excise taxes, the system for electronic transmission of such documents and statements used in the management of excise taxes and approving form 511 (*BOE* n. 245, 11.10.04).

– Order PRE/3297/2004, of 13 October, including new Annexes in Royal Decree 2163/1994, of 4 November, by which the Harmonized Community system of Authorisation for marketing and using plant health products (*BOE* n. 248, 14.10.04) is approved.

Also see above Section XVII (Foreign Trade Law) in this chronicle on Private International Law.

XXIV. INTERLOCAL CONFLICT OF LAWS

Spanish Judicial Decisions in Public International Law, 2004

The team which selected these cases was directed by Professor Fernando Mariño (*Universidad Carlos III*) and includes the following lecturers from that university: A. Alcoceba Gallego. A. Cebada Romero, A. Díaz Narváez, L. Jerez, A. Manero Salvador, B. Olmos Giupponi, R. Rodríguez Arribas, F. Vacas Fernández and P. Zapatero Miguel.

I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

III. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

– *DTC* 1/2004, of 13 December.

In response to the request (matter n. 6603/2004) submitted by the State Attorney on behalf of the Government of the Nation, concerning the existence or non-existence of a contradiction between the Spanish Constitution and articles I–6, II–111 and II–112 of the Treaty Establishing a Constitution for Europe, signed in Rome on 29 October 2004.

Reporting judge: Mr. Vicente Conde Martín de Hijas

Facts:

The State Attorney wishes that, his petition having been accepted, a request be considered to have been formulated on behalf of the Government for this Court, pursuant to arts. 95.2 *CE* and 78.1 *LOTC*, following the relevant procedure, to issue a binding Declaration on the following points:

1) The existence or non-existence of a contradiction between the Spanish Constitution and article I-6 of the Treaty Establishing a Constitution for Europe.
2) In view of the provisions laid down in article 10.2 of the Spanish Constitution, the existence or non-existence of a contradiction between the Spanish Constitution and articles II-111 and II-112 of the Treaty Establishing a Constitution for Europe, which are part of the European Union Charter of Fundamental Rights.
3) Whether or not article 93 of the Spanish Constitution is sufficient for the purpose of State authorization of the Treaty Establishing a Constitution for Europe.

4) If necessary, the type of constitutional reform that should be made to adapt the text of the Spanish Constitution to the Treaty Establishing a Constitution for Europe.

"Legal Grounds:

First: This is the second occasion on which this Court has been requested to issue a declaration on whether an international treaty to be integrated into Spanish law, in this case the Treaty Establishing a Constitution for Europe, conforms to the Constitution. This request must be substantiated through the specific procedural channels laid down in art. 95.2 of the Constitution and regulated in art. 78 of the Organic Law of this Court, on whose nature and meaning we made a number of considerations in Declaration 1/1992, of 1 July (hereinafter *DTC* 1/1992), which are appropriate to recall.

On that occasion it was stated that, with the procedure established in art. 95.2 of the Constitution, this Court is entrusted with a twofold mission, for to the general or common function, consisting of the jurisdictional defence of the Constitution, is added that of guaranteeing the security and stability of the international commitments into which Spain may enter. If preferred, to the jurisdictional mission of this Court is added, by dint of its preventive exercise, a precautionary facet of safeguarding the international responsibility of the State. In short, the purpose is to ensure the supremacy of the Constitution without prejudice to those commitments, endeavouring to prevent any possible contradictions between the two from having to be settled once the agreed rules have been incorporated into the legal system; that is, when consequences incompatible with the logic of respect for what is agreed internationally could derive from the logic of the supremacy of the Constitution. Art. 95.2 *CE* allows doubts that a treaty may raise as to constitutionality to be settled before its ratification in order that, should they be confirmed, ratification is not possible unless the constitutional text is revised or the treaty renegotiated in terms that make it compatible with the Constitution. Basically, the aim is to prevent a contradiction found between the supreme Rule, on the one hand, and a rule not yet integrated into the system governed by the latter, on the other hand, from becoming a contradiction between the Constitution and an international rule incorporated into Spanish law.

With this advanced jurisdictional defence the Constitution ensures its supremacy over international rules from the moment they become integrated into national law, attempting to obviate "the disturbance that the possible declaration of unconstitutionality of an agreed rule would imply for foreign policy and international relations of the State" (*DTC* 1/1992, LG. 1) if the judgment of contraction were made only after it had been incorporated into internal law. The contradiction is therefore settled by preventing it at source and not simply when it has already arisen and the only measure that can be taken is to activate two guarantee systems, international and internal [*ex* art. 27.2.c) *LOTC*], which can lead to mutually disturbing consequences.

Therefore, given the strictly jurisdictional nature of the preventive procedure envisaged in art. 95.2 of the Constitution, we stated in the aforementioned Declaration 1/1992 that "what can be requested from us is a declaration, not a ruling; a decision, not merely an opinion based on law, [for] this Court does not cease to be what it is when it is occasionally transformed, by dint of a request, into an advisory body. What the request entails is, as occurs in questions of unconstitutionality, the exposition of a reasonable doubt, but what is requested from us is not a reasoning that settles it but a binding decision" (*DTC* 1/1992, LG. 1). And it is this jurisdictional nature that establishes that our pronouncement can only be based on legal-constitutional arguments – whether or not they are suggested by the requester or by anyone appearing in the proceedings – and "be limited . . . to the contrast between the Constitution, in any of its statements and the treaty stipulation or stipulations that have been previously monitored, since art. 95.1 of the Constitution exclusively grants the Government and either of the Houses the power to formulate this doubt of constitutionality, the raising and clarification of which is therefore not incumbent *ex officio* on the Court, which, as in other proceedings, lacks initiative and is bound to the constitutional principle of congruency. This does not preclude the possibility of this Court requesting further information and clarifications or extensions pursuant to art. 78.3 *LOTC*".

Second: The doubt of constitutionality raised by the Government of the Nation relates to three precepts of the Treaty Establishing a Constitution for Europe, signed at Rome on 29 October 2004, articles I-6, II-111 and II-112. The Government furthermore requires this Court to issue an opinion as to whether art. 93 *CE* is sufficient to enable the Treaty to be incorporated into national law or, if applicable, as to the appropriate constitutional revision procedure to adapt the Constitution to the Treaty before the integration of the latter.

Before giving a detailed reply to the questions raised, it is necessary to comment on the scope and content of art. 93 *CE*. Bringing up this article in itself constitutes application of the Constitution which, in turn, signifies an unequivocal act of exercise of Spanish sovereignty.

As can be inferred from the work of the constituent *Cortes*, art. 93 was conceived as the constitutional means of integrating Spain into the European Communities, an integration phenomenon that extends beyond the simply procedural aspect and entails the consequences of joining a different supranational body capable of creating a law of its own endowed with its own principles governing the efficiency and the requirements and limits of the applicability of its rules. This was a long yearned for and, without a doubt, constitutionally desired integration that was accordingly facilitated by the aforementioned art. 93 *CE*.

The accession of the Kingdom of Spain to what is now the European Union has effectively been implemented through art. 93 of our Constitution, which is therefore a key precept and which this Tribunal has already proceeded to classify in its case-law and in its previous *DTC* 1/1992, and whose complexity, which, as we pointed out in the aforementioned Declaration, "is not slight"

(LG. 4), we must go on to examine the question in greater depth in order to provide a response to the present request.

Of art. 93 *CE*, the "ultimate basis" of our incorporation to the process of European integration and of becoming bound by community law, we have said that it is a precept that is "procedural in nature" (*STC* 28/1991, of 14 February, LG. 4, and *DTC* 1/1992, LG. 4) and allows the exercise of competences deriving from the Constitution to be attributed to international organizations or institutions. This was the only dimension considered in the aforementioned Declaration with the sole purpose of determining, in response to the doubt raised at the time, whether art. 93 *CE* was the appropriate mechanism for making exceptions to the limit which art. 13.2 *CE* established for extending to foreign citizens, by treaty or by law, the right of passive suffrage in municipal elections; it being concluded, given the contradiction pertaining to the text of a substantive constitutional rule, that the aforesaid precept does not incorporate a revisionary procedure equivalent to the constitutional reform procedures regulated in Title X *CE*. But it is the means envisaged by the Constitution for transferring or attributing to international organizations or institutions the exercise of competences deriving therefrom, and therefore, as we recognized in that Declaration, the scope of application and regulation of the exercise of the competences transferred is thus adapted (LG. 4).

However, what we stated in *DTC* 1/1992 was in connection with a set of precise coordinates, the existence of a contradiction between art. 8.B of the Treaty Establishing the European Community and art. 13.2 of the text of the Spanish Constitution, and it is with reference to those coordinates that the scope of some of the contents of that Declaration should be understood when issuing the current one, which relates to a very different framework in which, as we shall argue, such a contradiction with the text does not arise.

Art. 93 *CE* is undoubtedly the basic constitutional backbone for integrating other legal systems with ours, by transferring the exercise of competences derived from the Constitutions; these legal systems are intended to coexist with internal law insofar as they are autonomous systems owing to their origin. In metaphorical terms, it could be said that art. 93 *CE* acts as a hinge whereby the Constitution incorporates into our constitutional system other legal systems by transferring the exercise of competences. Art. 93 *CE* is thus endowed with a substantive or material dimension that should not be ignored.

Once integration has been carried out it should be stressed that the framework for the validity of community rules is no longer the Constitution but the Treaty itself whose conclusion implements the sovereign operation of transfer of the exercise of competences derived from the latter, although the Constitution requires that the legal system accepted as a result of the transfer be compatible with its basic principles and values.

As is inferred from the mechanism contained in the constitutional precept itself, nor can we ignore the need to provide the international organizations to which the exercise of competences has been transferred with the instruments essential for guaranteeing compliance with the law they have created; this func-

tion can only be impaired by an inappropriate understanding of the aforementioned constitutional precept and of its integrating substance. It is therefore essential for an interpretation to embrace the unavoidable dimension of community integration that the constitutional precept entails.

This interpretation should be based on recognition that the operation of transfer of competences to the European Union and the consequent integration of community law into our own law impose unavoidable limits on the sovereign powers of the State, which are acceptable only insofar as European law is compatible with the fundamental principles of the social and democratic State established by the national Constitution. Therefore, the constitutional transfer that art. 93 *CE* allows for has its material limits that are imposed on the transfer. Those material limits, which are not expressly stated in the constitutional precept but implicitly derive from the Constitution and the essential sense of the very precept, translate into respect for State sovereignty, for our basic constitutional structures and for the system of fundamental values and principles enshrined in our Constitution, in which fundamental rights acquire a substantiveness of their own (art. 10.1 *CE*); as we shall see, these limits are scrupulously respected in the Treaty we are analysing.

Having made these considerations, we will now go on to reply directly to the questions raised by the Government.

Third: The first question relates to article I-6 of the Treaty, which literally states:

"The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States".

This provision of the Treaty, as formally stated by the Conference of Representatives of the Governments of the Member States in a Declaration appended to the Treaty (Declaration on art. I-6), "reflects existing case-law of the Court of Justice of the European Communities and of the Court of First Instance" and expressly limits the primacy of the law of the Union to the exercise of the competences conferred on the European institutions. This primacy is not affirmed as a hierarchical superiority but as an "existential requirement" of this law, in order to achieve in practice direct effect and uniform application in all states. The coordinates established in this case for defining the scope of validity of this principle are, as we shall see, determining factors in understanding it in the light of the constitutional categories.

The first aspect to stress, in order to interpret correctly the proclaimed primacy and the framework in which it operates, is that the Treaty Establishing a Constitution for Europe is underpinned by respect for the identity of the states that make it up and for their basic constitutional structures and is based on the values that are the backbone of the Constitutions of those states.

Art. I-5.1 is sufficiently explicit in this respect when it states that:

"The Union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security".

At the same time, as regards the values on which the Union is based, art. I-2 states categorically that:

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

This is further developed in the Charter of Fundamental Rights of the Union contained in the second part of the Treaty, the preamble to which states that it "is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity", and that nothing in this Charter "shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized . . . by the Member States' constitutions" (art. II-113 of the Treaty).

These precepts, among others, enshrine the guarantee of the existence of the States and their basic structures, and of their fundamental values, principles and rights, which under no circumstances could become unrecognizable following the phenomenon of transfer of the exercise of competences to the supra-state organization – a guarantee whose absence or lack of explicit proclamation justified, in previous periods, the reservations regarding the primacy of community law over the different constitutions in known decisions of the constitutional jurisdictions of some States in what doctrine has come to call the dialogue between the constitutional courts and the European Court of Justice. Put another way, the limits to which the reservations of those constitutional jurisdictions referred are now proclaimed unequivocally by the very Treaty that is submitted to our consideration, which has adapted its provisions to the requirements of the Member States' constitutions.

The primacy proclaimed in the Treaty Establishing a Constitution for Europe thus operates in respect of a legal system built on the common values of the constitutions of the States that make up the Union and their constitutional traditions.

On the basis of these guarantees, it should furthermore be stressed that the primacy established for the Treaty and its law in the questioned art. I-6 is expressly limited to the exercise of competences conferred on the European Union. It is not, therefore, a primacy that is general in scope; rather, it relates exclusively to the competences of the Union. The limits of these competences are defined by the principle of conferral (art. I-11.1 of the Treaty), pursuant to which "the Union shall act within the limits of the competences conferred upon it by the Member States in the [European] Constitution to attain the objectives set out in the Constitution" (art. I-11.2). This primacy therefore operates in respect of competences that are transferred to the Union by sovereign will of the State and are also recoverable through the "voluntary withdrawal" procedure envisaged in article I-60 of the Treaty.

At the same time, it should be stressed that the Union should exercise its non-exclusive competences in accordance with the principles of subsidiarity and proportionality (art. I-11.3 and 4), so that the phenomenon of expanding competences previously fostered by the functional and dynamic nature of community law is rationalized and limited, since henceforth, pursuant to the "flexibility clause" as currently worded in article I-18 of the Treaty, in the absence of specific powers to undertake actions necessary for the achievement of its objectives, the Union may only act through measures adopted by the Council of Ministers acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, and the participation of the national parliaments is envisaged in the framework of the procedure for controlling the principle of subsidiarity mentioned in article I-11.3 of the Treaty.

As for the distribution of competences between the European Union and the Member States, articles I-12 to I-17 of the Treaty define with greater precision the areas of competence of the Union. Therefore, the new Treaty does not substantially alter the situation arising from our accession to the Community; if anything, it simplifies and reorganizes it in terms that make the scope of the conferral of the exercise of competences more precise. But, above all, it should be noted that the competences whose exercise is conferred to the European Union could not, without breach of the Treaty, serve as a basis for the production of community rules contrary in content to fundamental values, principles or rights of our Constitution.

Fourth: Having defined the essential elements of the regulatory framework of the precept to which the Government's doubts are related, it should be stressed that the Government takes up the doubts expressed by the Council of State in its opinion of 21 October 2004 on the compatibility of this article with the Constitution, identifying as a possible contradicted constitutional precept art. 9.1, which would appear to proclaim the principle of supremacy of the Constitution over that which is enshrined in title IX of the basic Rule ("Concerning the Constitutional Court") and whose guarantee is provided in title X ("Concerning Constitutional Reform"). In actual fact, having examined the terms in which the question is posed, the contradiction observed could not fail to extend to art. 1.2. of the Constitution, as the supremacy presumed to be placed at risk by the Treaty stems from a rule that enjoys it as a expression of the exercise of the constituent will of the State by the Spanish people, in whom national sovereignty resides.

However, we will see at once that such a contradiction does not exist.

That the Constitution is the supreme rule of Spanish law is a question that, even if not expressly proclaimed in any of its precepts, undoubtedly derives from the wording of many of them, among others from its arts. 1.2, 9.1, 95, 161, 163, 167, 168 and repeal provision, and is consubstantial to its condition of basic Rule; this supremacy or higher rank of the Constitution vis-à-vis any other rule and, specifically, international treaties, was affirmed in Declaration 1/1992 (LG. 1). Now, the proclamation of the primacy of the law

of the Union by art. I-6 of the Treaty does not contradict the supremacy of the Constitution.

Primacy and supremacy are categories that operate in differentiated areas. The former, in the application of valid rules; the latter in that of rule making procedures. Supremacy is based on the higher hierarchical nature of a rule and, therefore, affords validity to those that rank below it, which are consequently invalid if they contravene something that is laid down imperatively in the higher rule. Primacy, in contrast, is not necessarily based on hierarchy but on the distinction between areas of application of different rules which in principle are valid; however one or several of them have the capacity to displace others by dint of their preferential or prevalent application stemming from different reasons. Any supremacy implies, in principle, primacy (hence their use as equivalent terms on occasions, such as in our Declaration 1/1992, LG. 1), except when the supreme rule has provided for its own displacement or non-application in some area. The supremacy of the Constitution is therefore compatible with systems of application that grant applicational preference to the rules of a legal system other than the national system as long as this is provided for in the Constitution, which is exactly what occurs with the provision contained in art. 93, according to which competences derived from the Constitution may be conferred on an international institution constitutionally empowered to regulate matters hitherto reserved to the internal powers and to apply them to the latter. In short, the Constitution has accepted, pursuant to art. 93, the primacy of the law of the Union in the area pertaining to this law, as art. I-6 of the Treaty now expressly recognizes.

And this has been the case since Spain's accession to the European Communities in 1986. That year an autonomous regulatory system endowed with a specific regime of applicability became integrated into Spanish law based on the principle of prevalence of its own rules over any internal rules which it might contradict. This principle of primacy, of jurisprudential construction, was part of the *acquis communautaire* incorporated pursuant to Organic Law 10/1985, of 2 August, authorizing Spain's accession to the European Community, as it dates back to the doctrine first established by the European Court of Justice with the Judgment of 15 July 1964 (*Costa v. ENEL*).

Otherwise, our case-law has pacifically recognized the primacy of European Community law over national law in the field of "competences derived from the Constitution", whose exercise Spain has conferred upon the community institutions on the basis, as we have stated, of art. 93 *CE*.

We referred expressly to the primacy of community law as a technique or regulatory principle designed to ensure its effectiveness in our *STC* 28/1991, of 14 February, LG. 6, which partially reproduces the *Simmenthal* Judgment passed by the Court of Justice, and in the later *STC* 64/1991, of 22 March, LG. 4 a). In our subsequent *SSTC* 130/1995, of 11 September, LG. 4, 120/1998, of 15 June, LG. 4, and 58/2004, of 19 April, LG. 10, we reiterate the recognition of this primacy of the rules of community law, both primary and secondary,

over internal law, and its direct effect for citizens, adopting the definition of this primacy and effectiveness made by the Court of Justice, among others, in its known, now old, *Vand Gend en Loos* Judgment of 5 February 1963, and *Costa v. ENEL* Judgment of 15 July 1964 which we have previously quoted.

Therefore, in view of the foregoing, it must be concluded that, on the basis of art. 93 *CE*, correctly understood, and given the specific provisions of the Treaty pointed out in the previous legal ground, this Court finds no contradiction between art. I-6 of the Treaty and art. 9.1 *CE*, and the circumstance envisaged in art. 95.1 *CE* does not apply.

In highly unlikely event that, as a result of subsequent development, European Union law should become irreconcilable with the Spanish Constitution, and the hypothetical excesses of European Law with respect to the European Constitution were not remedied using the ordinary channels provided for in the latter, preservation of the sovereignty of the Spanish people and of the supremacy they have vested in the Constitution could ultimately lead this Court to address problems arising from such a circumstance which, from the current perspective, are considered to be non-existent, through the appropriate constitutional procedures, apart from the fact that the safeguard of the aforementioned sovereignty is always ultimately ensured by art. I-60 of the Treaty, which provides a genuine counterpoint to art. I-6, and allows a definition of the real dimension of the primacy proclaimed in the latter, which is incapable of overruling the exercise of renunciation, which is reserved for the supreme, sovereign will of the Member States.

Fifth: The Government also requires a declaration on the possible contradiction with the Constitution of two Treaty stipulations included in title VII of part II and referring to the field of application and scope and interpretation of the rights and principles of the Charter of Fundamental Rights of the Union, proclaimed at Nice on 7 December 2000 and now incorporated into the Treaty. The first of the precepts about which the Government enquires is art. II-111, according to which:

"1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution.
2. This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution".

The second of the stipulations pointed out by the Government, article II-112, determines that:

"1. Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.
2. Rights recognized by this Charter for which provision is made in other Parts of the Constitution shall be exercised under the conditions and within the limits defined by these relevant Parts.
3. Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
4. Insofar as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality.
6. Full account shall be taken of national laws and practices as specified in this Charter.
7. The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States".

The Government, also adopting the opinion of the Council of State as its own, understands that the stipulations of the Charter do not clash with the constitutional configuration of rights and freedoms, especially bearing in mind the invocation of the European Convention for the protection of human rights and fundamental freedoms made by article II-112.3 of the Treaty, for the reference made by the Treaty and by art. 10.2 of the Constitution to this Convention means that part II of the Treaty is substantially in compliance with the system of values, rights and principles guaranteed by the Spanish Constitution. If any difficulty is detected by the Government, it would stem from the coexistence of three systems of protection of fundamental rights (Constitution, European Convention and Charter), which will necessarily determine a process of mutual influence that is not without difficulties. In particular, the Council of State points out in its opinion that it shall fall to this Constitutional Court "to clarify the sense in which the Spanish authorities are bound by the Charter, the relationship between the latter and our constitutional system of rights and freedoms, and the manner of refining regulations that contradict it".

In the Agreement of the Council of Ministers on the decision to submit this request, the previous consideration of the Council of State appears to be interpreted in the sense that it is precisely within the framework of this procedure of art. 95.2 *CE* that this Court should provide a response to the problems resulting from the coexistence of three systems for guaranteeing fundamental rights and freedoms. However, the specific question raised by the Government is confined to the compatibility of articles II-111 and II-112 of the Treaty with the Constitution "in view of the stipulations of article 10.2 of the Spanish Constitution". On the basis of all this the governmental doubt to which a reply can be given here solely concerns the compatibility with the Constitution of a system of rights which, on account of the reference contained in art. 10.2 of the Constitution, would become, following its integration, a parameter that determines the configuration of rights and freedoms, not only within the field of European law but, owing to its inherent expansiveness, also in purely internal law.

Sixth: The problems of coordinating guarantee systems are characteristic of our system of fundamental rights, and it falls to this Constitutional Court to define the specific content of the rights and freedoms protected by the Spanish public power on the basis of the concurrence, by its definition, of international rules and strictly internal rules, the former endowed with their own protection mechanism and, therefore, with an authorized definition of their content and scope. The specific problems of coordination that may arise with the integration of the Treaty cannot be dealt with in an advance and abstract decision. As occurs with those that the integration of the Convention of Rome has posed from the outset, their solution can only be sought in the framework of the constitutional procedures attributed to the cognizance of this Court, that is, weighing up for each concrete right and in its specific circumstances the most relevant formulas for coordination and definition, in constant dialogue with the authorized jurisdictional bodies, if necessary, for the authentic interpretation of the international conventions containing statements on rights that coincide with those proclaimed by the Spanish Constitution.

Therefore, the doubt that can be examined here relates to the possible contradiction with the Constitution of a Charter of Rights which, according to art. 10.2 *CE*, following its integration into Spanish law, should become a standard for the interpretation of "the principles relating to the fundamental rights and liberties recognized by the Constitution"; this is, of course, without prejudice to its value as Law of the Union integrated into ours *ex* art. 93 *CE*. No other sense can be attributed to the reference to articles II-111 and II-112 of the Treaty, which respectively define the field of application of the rights enshrined in the Charter, on the one hand, and the criteria defining their interpretation and scope, on the other. In the case of the former, the Treaty states that the Charter is addressed to the "institutions, bodies, offices and agencies of the Union", and to Member States "only when they are implementing Union law", and expressly mentions that the Charter does not alter by extension the powers of the European Union. This reduction of the field of application of the Charter – and

accordingly of the criteria for interpretation mentioned in article II-112 – could not prevent, if authorization were granted to become bound by the Treaty (insofar as it is a convention on rights ratified by Spain through the procedure laid down in art. 93 *CE*), its interpretative efficiency in respect of the rights and freedoms proclaimed by the Constitution from having the general scope envisaged in art. 10.2 *CE*.

The doubt is therefore whether or not the inevitable extension of the interpretative criteria of the Charter beyond the boundaries defined by article II-111 is compatible with the system of rights and freedoms guaranteed by the Constitution. In other words, whether or not the criteria established by the Treaty for the bodies of the Union and for the Member States when implementing European law can be reconciled with the fundamental rights of the Constitution and, accordingly, whether or not they can also be imposed upon the Spanish public authorities when they act outside the scope of Union law, that is, also in circumstances that are in no way connected with that law. And finally, we should not forget that it is completely clear that the application by the national judge, as a European judge, of the fundamental rights enshrined in the Charter must entail, almost without exception, the simultaneous application of the correlative national fundamental right; in view of this hypothesis it is worth asking whether the interpretation of constitutional rights in the light of the Charter (art. 10.2 *CE*) can in turn be reconciled with the definition of them that can be inferred from our case-law, which, as we have pointed out, has always taken into consideration the treaties and conventions on this matter.

The doctrine of this Court has repeatedly stressed that the international treaties and agreements referred to in art. 10.2 of the Constitution "constitute valuable hermeneutic criteria on the sense and scope of the rights and freedoms recognized by the Constitution", so that they must be taken into consideration "to corroborate the sense and scope of the specific fundamental right which . . . our Constitution has recognized" [*STC* 292/2000, of 30 November, LG. 8, with reference, precisely, to the Charter of Nice, also *STC* 53/2002, of 27 February, LG. 3 b)]. The interpretative value that the Charter would have in matters of fundamental rights with this scope would not cause greater difficulties in our legal system than those already stemming from the Rome Convention of 1950, basically because both our own constitutional doctrine (on the basis of art. 10.2 *CE*) and article II-112 (as shown by the "explanations" which are incorporated into the Treaty through paragraph 7 of the same article as a way of providing guidance in its interpretation) operate with a set of references to the European convention that end by establishing the case-law of the Strasbourg court as common denominator for establishing the minimum shared content of interpretative elements. Even more so since art. I-9.2 states authoritatively that "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms".

This reduction in the complexity inherent in the concurrence of criteria for interpretation says nothing new about the value that the case-law of the courts

of the European Union should be attributed in defining each right. In other words, it does not mark a qualitative change in the significance of the doctrine in the ultimate configuration of the fundamental rights by this Constitutional Court. It simply means that the Treaty adopts as its own the case-law of a Court whose doctrine is already integrated into our law by means of art. 10.2 *CE*, so that no new or greater difficulties for the ordered structuring of our system of rights are to be found. And any that emerge, as has been stated, may only be grasped and settled using the constitutional proceedings we may conduct.

In other respects, we cannot fail to stress that article II-113 of the Treaty establishes that "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions", meaning that in addition to the fact that the Charter of Fundamental Rights is based on values in common with the constitutions of the Member States, it is clearly conceived as a guarantee of a minimum from which the content of each right and freedom can be developed until it attains the density that is protected in each case by internal law.

It must therefore be concluded, in reply to the second of the Government's questions, that there is no contradiction between the European Constitution and arts. II-111 and II-112 of the Treaty Establishing a Constitution for Europe.

Seventh: As for the third of the points on which the Government has requested a declaration from this Tribunal, that is, whether art. 93 of the Constitution is sufficient to integrate the Treaty into Spanish law, its sufficiency has practically been confirmed in the previous legal grounds, and it is therefore senseless to repeat what has already been stated. It is sufficient merely to refer to what has been expressed.

Other issues which, following the indications of the Council of State, the Government has raised on the possible advisability of modifying the current wording of art. 93 *CE* in order to refer expressly to the process of European integration and even to make allowances for subsequent developments in this process, are questions of appropriateness on which we obviously cannot give an opinion, since our jurisdiction – and its exercise is also dealt with in this proceedings, as mentioned at the beginning – only authorizes us to issue decisions on that which is constitutionally necessary. From this perspective art. 93 *CE* as currently worded is sufficient for the integration of a Treaty such as the one being analyzed.

Eighth: Finally, as for the fourth of the questions posed by the Government, the presupposition is not mentioned, which is the need for a reform of the Constitution – which is not the case, as no contradiction is found between the precepts of the Treaty in question and the Spanish Constitution, and it is therefore irrelevant to give an opinion.

In view of the foregoing, the Constitutional Court, by the authority vested in it by the Constitution of the Spanish nation,

Declares

1. That there is no contradiction between the Spanish Constitution and article I-6 of the Treaty Establishing a Constitution for Europe, signed at Rome on 29 October 2004.
2. That there is no contradiction between the Spanish Constitution and arts. II–111 and II–112 of the said Treaty.
3. That art. 93 of the Spanish Constitution is sufficient for the purpose of State authorization of the Treaty in question.
4. That it is not appropriate to issue any declaration on the fourth of the Government's questions".

– *STSJ* Catalonia, 1 June 2004. Contentious-Administrative Division. Jurisdiction for suits under administrative law. Appeal n. 741/2004.

The Division of Contentious Administrative Proceedings of the Superior Court of Justice (TSJ) of Catalonia (Fifth Section) issued the following Decision in the aforementioned appeal lodged by the Government Office in Catalonia, represented by the counsel for the state, against the Town Council of La Jonquera, on 22 February 2001. The appeal lodged by the Government Office in Catalonia against the Agreement of the Plenary of La Jonquera Council refusing to take part in the annual inspection of the boundary marks at the French-Spanish border, considered that this act infringed the Treaty of Bayonne and the Additional Act to that treaty, in addition to impinging on the field of competence of the State as it concerns foreign policy.

"Legal Grounds:

(. . .)

Fourth: Having defined the dispute in the aforementioned terms, we should now examine the first of the Government Office's claims that the contested Agreement infringes articles 1 to 3 of the Additional Act to the Treaty of Bayonne of 1866, which is part of Spanish national law.

Article 96.1 of the Constitution (*RCL* 1978/2836) and, in consonance therewith, article 1.5 of the Civil Code (*LEG* 1889/27), states that validly concluded international treaties, once officially published in Spain, shall form part of the internal legal system and their provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law.

According to article 94.c) of the Constitution, the amendment of the questioned Treaty of Bayonne shall be carried out by the *Cortes Generales*, which, according to article 66 of the Constitution, represent the Spanish people, in whom, as stated in article 1.2 of the Constitution, national sovereignty is vested and from whom emanate the powers of the State.

In short, the 1866 Treaty of Bayonne is part of the Spanish legal system provided that the *Cortes Generales* do not deem it to be obsolete, a question that does not fall within the area of responsibility of the authority against which the appeal has been filed, despite its claims based on the spirit of later treaties.

Article 17 of the Treaty states that "As a precaution against any doubts and pleadings, whether between individuals or between the public utilities of both countries concerning the international border, which is summarily indicated in the previous articles, it shall be demarcated at the earliest possible date with lasting, conveniently placed boundary marks.

This operation will be performed by Spanish and French officials, in the presence of delegates from the municipalities concerned who are able to provide local advice, and with no other mission than that of remaining informed of the placing of boundary marks between their respective territories and bearing witness thereto.

A general record shall be drawn up of the marking of the boundaries, the provisions of which shall all have the same force and value as if an essential part of this Treaty".

For their part, articles 1 to 3 of the Additional Act to the Treaty, concerning "Preservation of the international boundary marks", state that:

"Article 1. Every year, in the month of August, the highest administrative authorities of the bordering provinces and departments shall reach an agreement to prepare the Councils concerned to appoint delegates who, in each municipal district and in conjunction with those of the adjoining territory of the other States, must conduct without delay a scrupulous visit to the boundary marks at their border, and each shall file a record of this visit with the said highest Authorities for the appropriate purposes.

Article 2. Without prejudice to the previous article, and in order to ensure the preservation of the boundary marks throughout the international border in a more effective manner than has hitherto been established, the civil Governors and Prefects shall reach an agreement, each with respect to their province or department, with the heads of the various branches of public Administration in order for the latter to issue instructions to their personnel at the border to carry out surveillance, in full understanding with the municipal officers, who will be particularly and directly entrusted with this care, in order that no harm is inflicted on the said boundary marks, to report deterioration, to attempt to discover those responsible and to inform the relevant Authorities of all related matters.

Article 3. The civil Governors and Prefects shall work in conjunction to replace any damaged or missing boundary marks and the two Governments shall equally share all the expenses arising therefrom, except the allowances of the Engineers, which will be paid respectively by each State, unless it is agreed to appoint only one Engineer, whose allowances shall then be borne by both countries. If the persons who caused the damage were discovered, they shall be held personally responsible".

In conclusion, it can be inferred from the foregoing that point one of the contested Agreement, whereby the Council against which the action is brought agreed not to take part in the inspection of the boundary marks, is contrary to the Treaty of Bayonne in the terms laid down, and this is not invalidated by the claim that the members of the Council of La Jonquera were unaware, when adopting the contested Agreement, that the preservation of the boundary marks was part of the Treaty of Bayonne, for according to article 6.1 of the Civil Code lack of knowledge of laws is not a valid justification for not abiding by them; this leads us to partially allow the claim set out in the suit and, accordingly, the petition.

Fifth: As for the rest of the claims made by the Authority against which the action is brought, it is appropriate to dismiss the claim relating to the non-impingement on the area of responsibility of the State, since although the challenged Decision neither establishes nor modifies an international treaty as is claimed, it does fail to abide by the legal obligations incumbent upon it emanating from the Treaty of Bayonne, responsibility of the State pursuant to article 149.1.3 and in accordance with the Constitution (*RCL* 1978/2836).

The claim relating to failure by the State to comply with the Treaty on account of the month in which the boundary marks are usually inspected cannot be taken into consideration as it is not the subject of the case in hand; if necessary, the Authority against which the action is brought can act in accordance with the law provided it considers that a violation of the legal system has been committed, including the one alleged.

Finally, the claim that the challenged Agreement is merely a declaration of intent based on the autonomy of the municipal authority can be stated of the second point, but does not apply to the first, for the limit of the right to freedom of expression does not encompass an agreement to breach the legal system, under the terms previously mentioned.

In conclusion, it is appropriate to allow partially the petition and annul, as it does not comply with the law, point one of the Agreement of the Plenary of La Jonquera Council, dated 22 February 2001".

IV. SUBJECTS OF INTERNATIONAL LAW

1. Diplomatic Immunity

– *STSJ* Madrid, 29 June 2004. Social Affairs Division. Appeal n. 661/2004.

The TSJ allows an appeal lodged against a Decision of Madrid Social Affairs Court n. 7 on 3–11–2003 enforcing a judgment on dismissal against the Embassy of Greece, which is overturned as indicated in the legal grounds.

"Legal Grounds

Sole Ground ". . . what is decided in the contested decision is precisely not to enforce the judgment, contradicting the enforcement action, by agreeing to

return the sum which, in compliance with the judgment, was made available to the employee; this decision is linked to article 189.2 of the Employment Law . . .".

Now, the contested decision states in the second legal ground that "the crux of the matter is to determine whether or not the current accounts of foreign embassies are exempt from attachment pursuant to art. 22.3 of the Vienna Convention on diplomatic relations" and concludes, in the third legal ground, that "this Court, in compliance with the constitutional mandate, previously attempted to ascertain whether there was property liable to attachment; it resulted that there were current accounts which, according to a judgment of the *TC*, cannot be liable to attachment and it cannot be forgotten that if at the time the attachment was not lifted it was owing more to reasons of form than of substance, and proof of this is that the *TSJ* agreed to ratify the attachment without studying the proceedings in detail, as the Court intended, since the procedural means of contesting it was not properly considered and the agreement of the Court was thus ratified by a defect of form, not of substance". And having stated this it concludes in the fourth legal ground that ". . . it is clear that the proposed award whose return is requested must be returned given that, since there is an attachment on unattachable property, it is impossible for enforcement to be carried out against unenforceable property, and therefore the appeal is allowed . . . likewise declaring the nullity not of the decision of 26–2–2002, because it is one thing to issue an attachment and enforcement order that the *TC* does not proscribe in the aforementioned judgments and a very different matter for an attachment to be made of property that is unattachable, and subsequently or over time for a warrant for payment to be issued in respect of unattachable property. Enforcement must be carried out completely, but provided that the property in question can be attached; what cannot be done is not declare that it is not possible to go ahead with the enforcement because before proceeding to do so it is not possible to know whether or not there is attachable propert". That is, the Court argues that it does not declare null and void the decision of 26–2–2002 on the attachment of property, including the Embassy's account with the *BBVA*, but rather the attachment, which is, at the least, extravagant, for the following reasons . . .

Moreover, given that, even at an inappropriate point in the proceedings, the Court examines *a quo* the legitimacy of attaching the Embassy's account, we must abide by the doctrine of the Constitutional Court, Division 2, *S.* 17–9–2001, n. 176/2001 (*RTC* 2001/176), *BOE* 251/2001, of 19 October 2001, which sums up the doctrine concerning the attachability of embassy accounts, as follows:

"We have indeed stated that, even if the immunity from enforcement of foreign States does not contradict in principle the aforementioned fundamental right, an undue extension of its scope by the ordinary Courts would lead to a violation of that right. As this Court has stated in the past, art. 21.2 *LOPJ* (*RCL* 1985/1578 and 2635) and the rules of public international law to which this precept refers do not impose a rule of absolute immunity from enforcement for

foreign States; rather, they allow us to affirm the relativity of that immunity, a conclusion that is reinforced by the very requirement of effectiveness of the rights contained in art. 24 *CE* (*RCL* 1978/2836) and by the reason of immunity, which is not to grant States indiscriminate protection but to safeguard their equality and independence. Therefore, a delimitation of the scope of this immunity must be based on the premise that, generally, when the sovereignty of the foreign State is not involved in a specific activity or in the attachment of certain property, both international law, and by extension, national law disavow the non-enforcement of a Judgment; consequently, a decision of non-enforcement would in such cases amount to a breach of art. 24.1 *CE* (*SSTC* 107/1992, of 1 July [*RTC* 1992/107], LG. 4; 292/1994, of 27 October [*RTC* 1994/292], LG. 3; and 18/1997, of 10 February [*RTC* 1997/18], LG. 6). Therefore, the relativity of the immunity from enforcement of foreign States is based on the distinction between property used for activities performed "iure imperii" (that is, those involving the sovereignty of the State) and property used for activities performed "iure gestionis" (in other words, activities in which the State does not make use of its adjudicative powers and acts in the same way as an individual).

Notwithstanding the foregoing, as this Court stated in *STC* 107/1992, of 1 July, LG. 5 (and, subsequently, in *SSTC* 292/1994, of 27 October, LG. 3; and 18/1997, of 10 February, LG. 6), irrespective of the aforementioned "relative" immunity from enforcement of the property of foreign States on the basis of whether they are used for activities performed "iure imperii" or "iure gestionis", the property of Diplomatic and Consular Missions is absolutely immune from enforcement, pursuant to art. 22.3 of the Vienna Convention of 18 April 1961 (*RCL* 1968/155, 641) on diplomatic relations (which provides that "The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution") and art. 31–4 of the Vienna Convention of 24 April 1963 (*RCL* 1970/395) on consular relations (which establishes that "The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility").

Three: Even though, in principle, the attachable property of the Consulate enjoys the privilege of immunity, as certified by the Ministry of Foreign Affairs to the Judge of Social Affairs Court n. 2 of Vizcaya on 15 November 1995, as it is linked to the activity of the Consulate, the petitioner merely wishes this Court to reclassify the legal nature of the attached property as property used for acts performed "ius gestionis" and not "ius imperii", in order to remove this privilege and achieve their attachment and execution.

We are therefore dealing with a mere question of legality that can only be settled by Judges and Courts in the exercise of their judicial authority, by passing and enforcing judgments, as conferred on them exclusively by art. 117.3 *CE* (*RCL* 1978/2836), and can only be examined in this Court in the event of insufficient

grounds or of manifest arbitrariness, unreasonableness or patent error (S*STC* 111/2000, of 5 May [*RTC* 2000/111], LG. 8; and 161/2000, of 12 June [*RTC* 2000/161], LG. 4). We are dealing with, all things considered, a mere disagreement with a court decision, and right to effective protection of the court in the enforcement phase of judgments has in no way been harmed, since the challenged Decision has not prevented the enforcement of the Decision but has simply declared in a reasonable and reasoned manner that it has been passed on certain property not liable to attachment as, according to current legislation, it enjoys the privilege of immunity, which certainly does not prevent, as we stated in *STC* 107/1992, of 1 July (*RTC* 1992/107), delivered subsequently, the attachment from being carried out on other property or rights not protected by international law".

Property or rights including the funds deposited in current accounts, for the running of the Embassy, which in this case are correctly attached.

From the foregoing it follows that the appeal must be allowed.

In view of the foregoing,

Ruling:

We allow the appeal lodged by Julieta, against the decision of Madrid Social Affairs Court n. 7 on 3 November 2003, in proceedings n. 303/00, enforcement n. 20/02, in a dismissal proceedings against the Embassy of Greece and, consequently, we reverse the decision and confirm the award given by the Court on 1 September 2003, and order that the deposited amount of 23,401.68 euros must be made available to the petitioner in compliance with the final judgment passed in this proceedings".

2. Universal criminal jurisdiction of the state

– *STS* 8 March 2004. Criminal Division. Appeal n. 319/2004.

The decision of the National Court (Section 3) of 31–5–2002, rendered ineffective a decision of the Central Magistrates' Court n. 5 of 30–5–2002 allowing a suit against the Chilean general Cornelio, former Defence Minister of that country, on the charges of genocide, terrorism and torture. Angelina, the political party Izquierda Unida and others lodged an appeal for annulment against the National Court decision on the basis of the claims examined in the legal grounds. The TS gives leave to the appeal and renders ineffective the contested decision, and the suit against the Chilean general, Cornelio, is allowed.

Reporting Judge: Mr. Ignacio Moreno González

"Legal Grounds:

(. . .)

Third: The decision delivered by the Plenary of the Second Chamber of the Supreme Court in the so-called "Guatemala case" (*RJ* 2003/2147) examined the issues relating to the principles of universal jurisdiction and subsidiarity, particularly from the perspective of the crimes of genocide and torture, with specific reference to the related international treaties: the Geneva Convention on

the Prevention and Punishment of the Crime of Genocide, of 9 December 1948 (*BOE* of 8 February 1969 [*RCL* 1969/248]) and the Convention against Torture, of 10 December 1984 (*BOE* of 9 November 1987 [*RCL* 1987/2405]).

The basic argument of the aforementioned decision as to whether Spanish courts have jurisdiction to prosecute acts committed outside national territory that allegedly constitute certain types of crimes under international treaties or conventions (art. 23.4 *LOPJ* [*RCL* 1985/1578 and 2635]) may be summed up as follows:

1) That "nowadays doctrine significantly backs the idea that it befalls no State in particular to engage unilaterally in stabilizing order by resorting to criminal law against all and worldwide, but rather that a link is necessary to legitimate the extraterritorial extension of its jurisdiction" (LG. 9).
2) That article VIII of the Convention against Genocide establishes that any contracting party may "call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide", as has occurred with the setting up of the International Tribunals for the former Yugoslavia and for Rwanda (LG. 9).
3) That "the principle of non-interference in the affairs of other States (article 27 of the Charter of the United Nations [*RCL* 1990/2336 and 2473]) allows limitations as to facts that affect human rights, but these limitations are only non-objectable when the possibility of intervention is accepted by means of agreements between States or decided by the international community"; and, in this connection, the provisions of the Statute of Rome of the International Criminal Court are expressly cited (LG. 9). And,
4) That International Treaties on these matters lay down "the criteria for the attribution of jurisdiction based generally on territory or on active or passive personality, and to these is added the commitment of each State to prosecute the crimes, wherever they may have been committed, when the alleged perpetrator is located on his own territory and extradition is not granted, thus providing for an ordered reaction against impunity and avoiding the possibility of certain States being used as havens. But none of these treaties has expressly established that each State party may prosecute, without limitation and on the sole basis of its internal law, acts committed in the territory of another State" (LG. 9).

Similarly, the aforementioned judgment stressed that, as established in art. 23.4. g) of the *LOPJ*, Spanish jurisdiction shall be competent to try acts committed outside Spanish territory that may be classified under Spanish criminal law, when "according to the international treaties or conventions, they should be prosecuted in Spain" (LG. 10). And, in this connection, express mention is made of article 27 of the Vienna Convention on the Law of Treaties (*RCL* 1980/1295), which states that a "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (LG. 10).

Corroborating these principles, the judgment passed by the Plenary of this court makes particular reference – without intending to be exhaustive – to the related provisions of the following treaties and conventions: a) The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, of 14 December 1973 (*BOE* of 7 February 1986 [*RCL* 1986/381]); b) the Convention for the Suppression of Unlawful Seizure of Aircraft, of 16 December 1970 (*BOE* of 15 January 1973 [*RCL* 1973/48]); c) the Convention for the Suppression of Unlawful Acts against the Safety of International Civil Aviation, of 23 September 1971 (*BOE* of 10 January 1974 [*RCL* 1974/71]); d) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 10 December 1984 (*BOE* of 9 November 1987 [*RCL* 1987/2405]): e) the Convention against the Taking of Hostages, of 17 December 1979 (*BOE* of 7 July 1984 [*RCL* 1984/1792]); f) the European Convention on the Suppression of Terrorism, of 21 January 1977 (*BOE* of 28 October 1980); g) the International Convention for the Suppression of the Financing of Terrorism, of 9 December 1999 (*BOE* of 23 May 2002 [*RCL* 2002/1325 and 1501]); and, h) the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, of 20 December 1988 (*BOE* of 10 November 1990 [*RCL* 1990/2309]) (LG. 10).

In view of the foregoing, the judgment underlines that "although the attribution criteria used (in the aforementioned international treaties and conventions) display certain variations depending on the characteristics and nature of the crime, in none of these Treaties is universal jurisdiction expressly established" (LG. 10).

"Going beyond the effects of the principles of territoriality, defence and active or passive personality", the judgment states, "the established means of cooperation between each State for the prosecution of the crimes specified in each Treaty is the obligation to prosecute persons who have allegedly committed a crime when they are in a State's territory and it has not agreed to the extradition requested by one of the other States with jurisdiction under the respective Convention" (LG. 10).

Finally, as a complement to the previous principles, the aforementioned judgment recognizes that "part of doctrine and some national courts have been inclined to recognize the significance for these purposes of the existence of a connection with a national interest as a legitimizing element in the framework of the principle of universal justice, modifying its scope pursuant to criteria of rationality and with respect to the principle of non-intervention" (LG. 10). In this connection, the Plenary of this Court considered, in the decision in question, that "in the cases of the . . . Spanish priests, and in the case of the attack on the Spanish Embassy in Guatemala, in respect of the victims of Spanish nationality, having duly verified the points required by article 5 of the Convention against torture, the Spanish courts have jurisdiction to investigate and try the suspected offenders" (LG. 11).

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. Human Rights and Fundamental Freedoms

a) Non discrimination by reason of gender

– *STC* 253/2004, of 22 December 2004.
On question of unconstitutionality n. 2045/98, filed by Pontevedra Social Affairs Court n. 1 regarding the second paragraph of art. 12.4 of the Law on the Status of Workers, as amended on 24 March 1995. The public prosecutor and counsel for the state appeared, the latter by virtue of his office.
Reporting Judge: Mr. Jorge Rodríguez-Zapata Pérez

"I. Background

1. On 8 May 1998 the General Register of this Court received an application from Pontevedra Social Affairs Court n. 1 accompanied, together with a record of the proceedings n. 809/97, by a Decision of the aforementioned Court of 27 April 1998 raising the question of unconstitutionality of the second paragraph of art. 12.4 of the Law on the Status of Workers (hereinafter *ET*) as amended by Legislative Royal Decree 1/1995, of 24 March, denouncing its possible contradiction with the principle of equality and prohibition of indirect discrimination on the grounds of gender contained in art. 14 *CE*.
2. The question arises in the proceedings of the suit brought by Mrs. Rosalía Falcón Roma against the National Institute of Social Security concerning recognition of entitlement to an allowance for permanent total disability on account of ailments that make her unfit to render her services as a cleaner. The application had been refused by a Resolution of the provincial authorities of the National Institute of Social Security on 8 September 1997; this was confirmed by a Resolution of the following 6 October dismissing the previous claim as the worker had not been paying Social Security contributions for the minimum qualifying period at the date of the occurrence of the event according to art. 138.2.b) of the General Law on Social Security (*LGSS*), as a minimum qualifying period of 4,045 days was required for entitlement to the allowance, whereas she proved to have contributed for a total of 4,024 days.

After the proceedings, the Social Affairs Court, in a decision of 7 April 1998, agreed to hear the parties and the public prosecutor (*ex* article 35.2 *LOTC*) on the appropriateness of filing a question of unconstitutionality concerning the second paragraph of art. 12.4 *ET* owing to its possible contradiction with art. 14 *CE*.

3. The application for a referral of a question of unconstitutionality is based on the following considerations:

a) Mrs. Rosalía Falcón Roma was denied an allowance for permanent disability by the National Institute of Social Security for the sole reason that she had not paid contributions for the legally established qualifying period at the date of the occurrence of the event giving rise to the application for the allowance, which was 4,045 days, whereas the claimant had only paid contributions for 4,024 days (including bonuses and the period of temporary incapacity from which the disability derives).

The second paragraph of art. 12.4 *ET* furthermore contains indirect discrimination on the grounds of gender, according to the application for referral. Indeed, statistical evidence, as provided, showing that part-time workers are mainly women, allows us to affirm the existence of an adverse impact which, as it is not justified by objective circumstances not related to gender, leads us to conclude that the law contains indirect discrimination on the grounds of sex, a concept defined by *STC* 145/1991, of 1 July and *STC* 22/1994, of 27 January. To this should be added, as the application states, that it has been recognized that the rules of community law integrate internal constitutional rules on fundamental rights (art. 10.2 *CE*), and it is therefore appropriate to recall the definition of indirect discrimination on the grounds of gender contained in art. 2.2 of Council Directive 97/80/EC, of 15 December 1997, which is based on an established doctrine of the European Court of Justice. The Court also considers that it is appropriate to examine the prohibition on discriminating against part-time workers inspired by Directive 97/81/CE, of 15 December, although this Directive does not contemplate Social Security aspects.

Legal Grounds:

(. . .)

Seventh: The previous conclusions call for a declaration of unconstitutionality of the questioned law as it breaches the principle of equality before the law (art. 14 *CE*), from the perspective of proportionality between the measure adopted, the result and the intended aim. They are decisively reinforced when we address the other doubt of constitutionality raised by the Court concerning paragraph 2 of art. 12.4 *ET*, that is, the breach of art. 14 *CE* from the perspective of a possible indirect discrimination on the grounds of gender.

The concept of indirect discrimination on the grounds of gender has been formulated by the case-law of the European Court of Justice, precisely on the occasion of the judgment of certain cases of part-time work in the light of the prohibition of discrimination on the grounds of gender laid down in art. 119 of the Treaty Establishing the European Economic Community (now art. 141 of the EC Treaty) and the daughter directives. It can be summed up in a formula that has been reiterated by the European Court of Justice in many of its rulings (among many others, ECJ Judgments of 27 June 1990, *Kowalska* case; of 7 February 1991, *Nimz* case; of 4 June 1992, *Bötel* case; and 9 February 1999, *Seymour-Smith and Laura Pérez* case), namely "As the Court has consistently held, community law precludes the application of a national measure which, although formulated in neutral terms, works to the disadvantage of far more

women than men, unless that measure is based on objective factors unrelated to any discrimination on grounds of sex".

Council Directive 76/207/EEC of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and career advancement, and working conditions, does not define the concepts of direct or indirect discrimination. On the basis of article 13 of the EC Treaty, the Council adopted Directive 2000/43/EC, of 29 June 2000 on the implementation of the principle of equal treatment of persons irrespective of racial or ethnic origin, and Directive 2000/78/EC, of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, which define direct and indirect discrimination. The incorporation of Directives 2000/43/EC and 2000/78/EC into Spanish law was confirmed by Laws 51/2003, of 2 December, on equal opportunities, non discrimination and universal access for persons with disabilities, and 62/2003, of 30 December, on fiscal, administrative and social measures. Subsequently, in the framework of art. 141.3 of the Treaty establishing the European Community, European Parliament and Council Directive 2002/73/EC, of 23 September 2002 was adopted, which amends Directive 76/207/EEC, including the definitions of direct and indirect discrimination on grounds of sex, in line with the definitions contained in the quoted Directives of 2000.

Therefore, pursuant to art. 2.1 of Directive 76/207/EEC, amended by Directive 2002/73/EC, "the principle *of equal treatment* shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status". "Direct discrimination" is defined as "where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation", while "indirect discrimination" is "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary" (art. 2.2). The prohibition of direct or indirect discrimination on grounds of sex in access to work or during employment is currently expressly laid down in arts. 4.2.c) and 17.1 *ET*, worded according to art. 37 of the aforementioned Law 62/2003, of 30 December, on fiscal, administrative and social measures.

This concept of indirect discrimination on grounds of sex was already enshrined in art. 2 of Council Directive 97/80/EC, of 15 December 1997, which the State Attorney invoked in his allegations, on the burden of proof in cases of discrimination based on sex. It defines indirect discrimination as follows: "where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex". The European Court of Justice considered there to be no indirect discrimination on grounds of sex, as the differences in treat-

ment were justified for social-policy reasons, in measures such as not including part-time workers in any of the Social Security schemes (ECJ Judgment of 14 December 1995, *Megner and Scheffel* case) or lack of cover of certain Social Security allowances (ECJ Judgment of 14 December 1995, *Nolte* case).

This case-law of the European Court of Justice on indirect discrimination on grounds of sex has been adopted by the doctrine of the Constitutional Court and, as pointed out in *STC* 22/1994, of 27 January (LG. 4), "an abundant case-law of this Court has dismissed as inadequate differences based solely and exclusively on a smaller number of hours worked because, on the sole basis of this differential factor, the lesser contractual power of these atypical workers is not known and the statistic, proven by experience, that these female workers account for a high percentage of these groups, and the unreasonability of the differential factor is therefore accentuated when the prohibition of discriminations comes into the picture (Judgments of the European Court of Justice, *Bilka Kaufhaus* case, 13 May 1986, and *Kowalska* case, 27 June 1990, among others), and a more careful justification of inequalities is therefore required in this field by providing other concomitant factors that explain them apart from only less time worked".

Similarly, *STC* 240/1999, of 20 December (LG. 6), recalls and sums up this doctrine, pointing out that "this Court has reiterated in several decisions that the specific prohibition of discrimination on grounds of sex enshrined in art. 14 *CE*, which contains a right and an anti-discriminatory mandate (*STC* 41/1999), not only encompasses direct discrimination, that is, a different legal and unfavourable treatment of a person on grounds of their sex, but also indirect discrimination, that is, a formally neutral or non-discriminatory treatment from which stems, owing to diverse conditions arising between workers of both sexes, an adverse impact on the members of a particular sex (*STC* 198/1996, LG. 2; equally, *SSTC* 145/1991, 286/1994 and 147/1995)". This has also been stated by the European Court of Justice in many Judgments, when interpreting the content of the right to non-discrimination on grounds of sex in relation to workers' wages (in particular, the previously quoted ECJ Judgments of 27 June 1990, *Kowalska* case; of 7 February 1991, *Nimz* case; of 4 June 1992, *Bötel* case; and of 9 February 1999, *Seymour-Smith and Laura Pérez* case).

It should be noted that, as scientific doctrine and this Court have stressed, just as the European Court of Justice has declared in many Judgments, when the right claimed to have been breached is not the right to equality *in genere* but rather its materialization in the right not to suffer discrimination on any of the grounds expressively prohibited in art. 14 *CE*, it is not necessary to provide in each case a *tertium comparationis* to justify the existence of discriminatory and adverse treatment, particularly in cases where an indirect discrimination is claimed. Indeed, in these cases what is compared "is not the individuals" but social groups in which their diverse individual components are considered statistically; that is, groups of which some are formed mainly by persons belonging to one of the categories especially protected by art. 14 *CE*, in this case women.

As is logical, in these cases, when a complaint is brought against indirect discrimination, it is not required to provide as a comparison the existence of a more beneficial treatment attributed solely and exclusively to men; it is sufficient, as both this Court and the European Court of Justice have stated, for there to exist, first, a rule or interpretation or application thereof that works to the disadvantage of a group formed mainly, though not necessarily exclusively, by female workers (part-time workers – ECJ Judgment of 27 June 1990-workers who have held their post for less than two years – ECJ Judgment of 9 February 1999-workers with less physical strength – *STC* 149/1991, etc.). In these cases it is evident that when, for example, a specific treatment of part-time workers discriminates against women, it is not being stated that men are receiving better treatment than men in the same situation. And second, it is required that the authorities be unable to prove that the rule according different treatment stems from a measure of social policy, justified by objective reasons and unrelated to any discrimination on grounds of sex (above all, ECJ Judgment of 14 December 1995, *The Queen v. Secretary of State for Health* case; of 20 March 2003, *Jorgensen* case, and of 11 September 2003, *Steinicke* case).

In short, in these cases, in order for the anti-discriminatory right and mandate enshrined in art. 14 *CE* to be considered breached, there must be a distinct and adverse treatment of a social group that is clearly formed mainly by women, in respect of significant assets, and there must be insufficient constitutional justification of a possible limit to the right in question.

Finally, it should be noted that the incorporation of indirect discrimination as a content prohibited by art. 14 *CE* has repercussions on the form in which the interpreter and enforcer of law must approach the analysis of this type of discrimination, as it implies that "when difference in treatment is invoked before a court . . . and this invocation is made precisely by a person belonging to the group traditionally affected by this discrimination – in this case, women – the court cannot merely judge whether the different treatment has, in an abstract manner, an objective and reasonable justification; rather, it must analyze specifically whether what appears to be a formally reasonable differentiation conceals or allows the concealment of a discrimination that is contrary to art. 14 *CE*" (*STC* 145/1991, of 1 July, LG. 2). For this purpose it should necessarily take into account the data provided by statistics (*STC* 128/1987, of 14 July, LG. 6). A similar opinion has been reiterated by the European Court of Justice (above all, Judgment of 9 February 1999, previously quoted).

Ninth: The foregoing leads us to allow the claim of unconstitutionality with respect to the second paragraph of art. 12.4 *ET*, as worded according to Legislative Royal Decree 1/1995, of 24 March, which establishes that qualifying periods for Social Security allowances, including unemployment benefit, shall be calculated exclusively on the basis of hours worked. It merely remains for us to point out that it is not to this Constitutional Court but to the judicial bodies to which it falls to fill, by the means provided by law, the possible gap that annulling the questioned precept could cause in the calculation of qualifying

periods for entitlement to Social Security benefits in the case of part-time workers.

Ruling

To allow the present claim of unconstitutionality and, accordingly, declare unconstitutional and null and void the second paragraph of art. 12.4 of the Law on the Status of Workers, as amended by Legislative Royal Decree 1/1995, of 24 March, which establishes that the qualifying periods for Social Security benefits, including unemployment benefit, shall be calculated solely on the basis of hours worked".

b) Principle of non refoulement

– *STC* 181/2004, of 2 November. Application for a declaration of fundamental rights n. 3134/99.

In appeal for legal protection n. 3134/99, lodged by Mr. José Bouza Izquierdo, represented by the procurador Mr. Tomás Alonso Ballesteros and assisted by the counsel Mr. Luis Martí Mingarro, against Decision 37/1999 of the Plenary of the Criminal Division of the National Court, of 17 June 1999, dismissing the request for review filed against Decision n. 2/1999 of the Second Section of the Criminal Division of the National Court, on 1 February 1999, which declared admissible the extradition of the claimant to Venezuela as per extradition file 7/98. The public prosecutor intervened. The Republic of Venezuela was represented by the procurador Mr. Fernando Bermúdez de Castro Rosillo, under the guidance of the counsels Mr. Joaquín Ruiz Giménez Cortés and Mr. Joaquín Ruiz Giménez Aguilar.

Reporting Judge: Ms. María Emilia Casas Baamonde

Facts:

a) The appellant was born in Madrid on 25 May 1944, to a Spanish father and Venezuelan mother, studied in Venezuela, married and recognized his children in that country, and held positions in companies in that country.

b) During 1993 and the first half of 1994, Mr. Bouza Izquierdo came to be appointed president of the *Banco de Venezuela SACA*, and of other companies belonging to that financial group. During that period the Banco de Venezuela granted loans to one of these companies (*Banco de Venezuela N.V. Curazao*, based in the Dutch Antilles), amounting to the loan of 95 percent of the funds of the *Banco de Venezuela SACA*; these operations were not recorded in the relevant accounts, even though Mr. Bouza was aware of the financial situation of the latter bank. Various public companies signed contracts as trustees with the *Banco de Venezuela SACA*, whereby the latter received sizeable funds (over 23 billion bolivars), which were administered by Mr. Bouza; part of these funds was used in risk operations, as loans that were granted to companies that turned out to be insolvent and had to be declared unrecoverable. As a result, the *Banco de Venezuela SACA* had to be "statized" on 8 August 1994, and a "Financial Emergency Board" undertook to transfer 48,391,389 bolivars worth of investments. In December 1994 the *Banco de*

Venezuela SACA recorded losses of 778,935,647 bolivars, at which point it was taken over by the Guarantee Fund for the Protection of Depositors (*FOGADE*), basically causing the Venezuelan state a loss of wealth as it was forced to make contributions of public funds that were eventually also absorbed by the debts.

c) In mid-1994, the appellant moved to Spain, where he took up residence. In October that year he was issued with a Spanish national identity document and the following December a Spanish passport.

d) By means of note verbale n. 227, of 7 March 1997, the Embassy of Venezuela in Spain formally requested the extradition of Mr. Bouza Izquierdo, in order that he be tried in the Republic of Venezuela. By means of note verbale n. 1019, of 22 October 1997, that same Embassy based its request on a warrant issued on 24 May 1996 by the Caracas Fifth Court of First Instance for criminal and banking matters and protection of public heritage, and on three writs of arrest issued by the same court against Mr. Bouza on 26 April, 15 May and 5 June 1996. The application for extradition requests that Mr. Bouza be handed over to the authorities to be tried for the following charges: preparation of balance sheets that failed to reflect the true situation of the *Banco de Venezuela SACA* and appropriation of bank funds for the benefit of third parties; illegal financial intermediation and unlawful association; and, finally, failure to meet the obligations arising from the trust.

(. . .)

On the right not to be subjected to torture or to inhuman or degrading punishment or treatment (art. 15 *CE*). The situation in Venezuelan prisons is appalling, so much so that this has even been recognized by that country's justice ministers, who state that they are the worst in the world. The decision of the plenary, on the one hand, recognizes that the Venezuelan government is not in control of the situation in prisons; but, on the other, it makes extradition subject to the condition that the Venezuelan state provide sufficient guarantees that, in the event that Mr. Bouza is imprisoned on the charges he faces, the human-rights requirements be met during his imprisonment. There is therefore a contradiction between these two statements, for if it is generally affirmed that the State does not control penitentiary establishments, how then can it be guaranteed in the specific case of Mr. Bouza that he will receive proper treatment in accordance with human-rights requirements if sentenced to imprisonment?

(. . .)

"Legal grounds:

First: The appellant, Mr. José Bouza Izquierdo, seeks the annulment of the decisions of the Criminal Division of the National Court declaring he be extradited to Venezuela on the grounds that they violate, in the first place, his right to equality before the law enshrined in art. 14 *CE* because they allegedly draw a discriminatory distinction between Spanish nationals and Spanish nationals also possessing another nationality, as extradition is only granted in respect of

the latter. Secondly, his right to personal freedom (art. 17.1 and 4 *CE*) insofar as pre-trial custody is automatically established in Venezuela for any offence and cannot be avoided by paying bail, which is contrary to the exceptional circumstances and proportional nature of this precautionary measure according to Spanish law. Thirdly, his right of access to an ordinary judge predetermined by law and to an impartial judge, laid down in art. 24.1 and 2 *CE*, as the judicial body designated to hear his case in the requesting State is special, established after the cause of action, and is assigned the tasks of investigation and passing judgment. Fourthly, the appellant complains that these decisions violate art. 15 *CE*, which recognizes the rights not to be subjected to torture or inhuman or degrading punishments or treatment, because they allow extradition even though Venezuela has not provided guarantees that the aforementioned rights of Mr. Bouza Izquierdo will not be affected in the event he is imprisoned, when it is known that Venezuelan prisons do not respect such rights. Finally, the appellant complains that his rights to the effective protection of the court and not to go undefended (art. 24.1 *CE*) and to a trial with full guarantees (art. 24.2 *CE*) have been breached, since various irregularities have occurred in the extradition process.

The appellant, who came to hold, among other positions, the post of President of the *Banco de Venezuela* in 1993 and 1994, has witnessed how the Republic of Venezuela requested his extradition from Spain to try him for financial offences which he allegedly committed when holding that post. The National Court declared the extradition to be legitimate, except for certain charges that do not constitute offences according to Spanish legislation and conditioned his surrender to the provision by the State of Venezuela of sufficient guarantees that Mr. Bouza's rights would be effectively respected during his internment were he imprisoned (. . .).

Twelfth: The appellant's last complaint that remains to be examined claims that the decisions of the National Court have violated art. 15 *CE*, which states that nobody must be subjected to torture or to inhuman or degrading punishment or treatments, insofar as they allow him to be turned over in the knowledge that the situation in Venezuelan prisons is appalling, so that if the appellant were placed in pre-trial custody or sentenced to imprisonment that fundamental right would run a serious risk of being violated. In the appellant's opinion, both the decision of the Second Section and that of the Plenary of the Criminal Division of the National Court recognize this risk and admit that the Venezuelan prison system is largely beyond the control of the Administration of Justice. The appellant argues that despite this, and in a contradictory manner, these decisions require the Venezuelan State to provide sufficient guarantees that should the appellant be imprisoned on these charges the human rights requirements will be effectively met during his imprisonment. According to the appellant, the contradiction lies in the fact that if the Venezuelan State does not control its own prisons it is not possible for it to guarantee that Mr. Bouza's right not to be subjected to torture or inhuman o degrading punishments or

treatment will be respected. The appellant ends his claims by explaining that Venezuela has neither provided the required guarantees, as a statement to that effect by the counsel or *procurador* of the Republic of Venezuela contained in the plea challenging the appeal for reversal submitted as part of the extradition proceedings cannot be regarded as such, nor is it able to offer such guarantees, since, as has been proven, the Venezuelan authorities do not exercise control over penitentiary centres.

For his part, the prosecutor agrees with the appellant that protection should be granted in this case, because despite the sincere intentions of the Venezuelan penitentiary authorities to ensure the guarantees are fulfilled, it is still possible they are unable to do so. On the contrary, Venezuela opposes this claim for protection.

As has already been stated in the precedents, the judicial decisions of the National Court have required Venezuela to provide guarantees that the appellant's rights not to suffer inhuman or degrading treatment will be respected, on the basis of art. 11 of the extradition treaty between Spain and Venezuela, which reads as follows:

"1. Extradition shall not be granted when the offence for which it is requested is punishable with the death penalty, with life imprisonment, or with punishments or security measures that would be damaging to the physical integrity of the person sought or would subject the person sought to inhuman or degrading treatment.
2. However, extradition may be granted if the requesting Party were to provide sufficient assurance that the person sought will not be executed and that the maximum punishment served will be that which is immediately lower than life imprisonment or that he will not be subjected to punishment damaging to his physical integrity or to inhuman or degrading treatment".

In this appeal for constitutional protection, this Court required the Second Section of the Criminal Division of the National Court to prove whether the Republic of Venezuela had provided the guarantees required in the decisions that found the extradition of Mr. Bouza Izquierdo to be admissible and, if so, to send a copy of the document. The full reply from the Second Section was as follows:

"In connection with your request dated 5–10–2000, appeal for legal protection n. 3134/1999, lodged by José Bouza Izquierdo against a decision of the Plenary of the Criminal Division of the National Court, the records show that in the plea challenging the appeal for reversal of the decision declaring the extradition to be admissible, the Venezuelan State affirmed that Mr. Bouza will be given a fair trial with full procedural guarantees and without undue delay and that, if he has to be placed in pre-trial custody, he will be sent to *El Junquito* in Caracas, which displays the best conditions of establishments of this kind and where other prominent persons have been imprisoned such as Mr. Carlos Andrés Pérez, twice president of the Republic of Venezuela and Mr. Claudio Fermín, twice candidate for president of the State.

There is no record of a formal commitment to ensuring the guarantees are met, though it should be noted that the government has not yet issued a decision on the surrender of Mr. Bouza, nor that the express guarantees imposed on the Venezuelan State have been requested".

Focusing on the most significant details of the complaint and the parties' positions thereon, we should consider whether we are dealing with a case which falls within the scope of application of art. 15 of the Constitution.

Thirteenth: The first paragraph of art. 15 of the Constitution states that "everyone has the right to life and to physical and moral integrity, and under no circumstances may be subjected to torture or to inhuman or degrading punishment or treatment". The constitutional prohibition of torture and of inhuman or degrading punishment or treatment must be interpreted, as laid down by art. 10.2 *CE*, in accordance with the Universal Declaration of Human Rights and with other international treaties or agreements on the same matters and that is what this Court has done since its first decision on this point (*STC* 65/1986, of 22 May). The prohibition, under the same or similar terms, is also contained in art. 5 of the aforementioned Universal Declaration and in other conventions Spain has ratified, such as art. 7 of the International Covenant on Civil and Political Rights; art. 3 of the European Convention for the protection of human rights and fundamental freedoms), a precept which, as was recognized by *ATC* 333/1997, of 13 October, clearly influenced the wording of art. 15 *CE*; the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment, of 1984; and the European Convention for the prevention of torture and inhuman or degrading punishment or treatment, of 1987, among other international instruments.

Of all these texts the International Covenant on Civil and Political Rights of 1966 and the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment of 1984 are particularly relevant to this appeal for constitutional protection since both have been ratified by both Spain and Venezuela. Art. 3 of the aforementioned Convention states the following:

"1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights".

Similarly, art. 16.1 of the same Convention provides that each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by, or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity.

The constitutional prohibition of art. 15 *CE* holds a double meaning. On the one hand, it constitutes a fundamental value of democratic societies (*STC* 91/2000, of 30 March, LG. 8, and *SSTEDH* of 7 July 1989, *Soering v. United Kingdom*, § 88; of 30 October 1991, *Vilvarajah et al v. United Kingdom*, § 108; of 15 November 1996, *Chahal v. United Kingdom*, § 79; of 17 December 1996, *Ahmed v. Austria*, § 40; of 29 April 1997, *H.L.R. v. France*, § 35; of 28 July 1999, *Selmouni v. France*, § 95) which is connected with respect for the most basic fundamental rights of the individual in his relations with the State. On the other, it is closely linked to human dignity which, according to art. 10.1 *CE*, is one of the foundations of political order and social peace (*SSTC* 53/1985, of 11 April, LG. 8; 120/1990, of 27 June, LG. 4; 57/1994, of 28 February, LG. 4; 337/1994, of 23 December, LG. 12; 91/2000, of 30 March, LG. 7; *ATC* 238/1985, of 10 April). Indeed, human dignity is an intrinsic quality thereof to which all humans irrespective of their specific characteristics are therefore entitled, and with which the conducts prohibited in art. 15 *CE* clash head-on and radically, either because they demean the individual, reducing him to material or animal level, or because they constrain or instrumentalize him, forgetting that all people are an end in themselves. Our aforementioned *STC* 120/1990, of 27 June, LG. 4, has established the criterion – subsequently repeated in later decisions – that dignity must remain unaltered whatever situation the person is in and thus constitutes an invulnerable minimum that any legal status must ensure, so that any limitations imposed on the enjoyment of fundamental rights do not amount to contempt for the esteem which the person deserves as a human being.

Fourteenth: In consonance with the foregoing, only recently (*STC* 32/2003, of 13 February, LG. 2), on the basis of our doctrine on extradition matters, we reiterated that "the special nature of the extradition procedure determines that if the Spanish judicial bodies, being aware of the possible violation of the appellant's fundamental rights in the country of destination, do not prevent it using the means at their disposal, then these bodies must be held responsible for the possible violation of the appellant's fundamental rights. Indeed, insofar as the extradition proceedings weave a close-knit web of actions in the requesting and requested States, the future of the person extradited in the former not only cannot be of no concern to the authorities of the latter, but they are obliged to prevent the expected violation of fundamental rights by the foreign authorities".

Furthermore, this judicial obligation becomes more marked the more significant the rights and interests of the appellant which are at stake, "so that the requirement is great when fundamental rights enshrined in the Constitution are concerned, which bind them as objective bases of our law (above all, *SSTC* 13/1994, LG. 4, and 91/2000, LG. 7), and which enjoy a particular significance and position in our system (above all, *STC* 5/2002, of 14 January, LG. 4) and, even, such a high requirement must be graded in accordance with the fundamental right or rights that can be affected, so that it would necessarily reach particular intensity when the situation applies to those recognized in art. 15 *CE*

or, from another perspective, when what is affected is what we refer to in *STC* 91/2000 as the absolute content of fundamental rights".

Furthermore, we maintain in the said decision (on the basis of the doctrine of the European Court of Human Rights, Judgment of 28 March 2000, *Mahmut Kaya v. Turkey*, §§ 85 and 115) that all States must take appropriate measures to safeguard the lives of persons under their jurisdiction, and to ensure they are not subjected to torture or inhuman or degrading treatment, and must adopt reasonable measures to avert the risk of ill-treatment they know or should know of; the related positive obligation of the State arises from the circumstance that the authorities knew or should have known of the existence of a real and immediate risk to the life of the individual, as we have stated, with reference to the doctrine established by that same Court in the *Soering* case (we have applied this doctrine since *STC* 13/1994, of 17 January, mentioned earlier and quoted subsequently in *STC* 91/2000, of 30 March).

The foregoing does not entail the requirement, as both this Constitutional Court and the European Court of Human Rights have established, that the "person prove fully and absolutely the violation of his rights abroad, which will have adverse consequences for that person, or that this violation is going to take place in the future, as this . . . would normally be an excessive burden for the person in question" (*STC* 32/2003, of 13 February, LG. 3). We reiterated in the said *STC* 32/2003 (LG. 3), so often quoted, that protection of the right claimed by the appellant would have to be granted if there were a rational and grounded fear that it would be violated (*STC* 13/1994, of 17 January, LG. 5), and in *STC* 91/2000, of 30 March (LG. 6), we referred to the significant risk of violation of the rights by the courts of a foreign State and to the foreseeable consequences entailed by an extradition outside the jurisdiction of the State, stressing in *ATC* 23/1997, of 27 January (LG. 1), the need to exclude the surrender of subjects who, presumably, with some degree of certainty may suffer significant violations owing to the existence of a reasonable and grounded fear. For its part, the European Court of Human Rights, in relation to the rights to life and not to be subjected to torture or inhuman or degrading treatment, taking into consideration the specific circumstances that can lead to a difficulty of evidence, has referred to the existence of serious and proven motives for believing that if the person in question is surrendered to the requesting state he runs a real risk of being subjected to torture or to inhuman or degrading treatment (*Soering, Ahmed v. Austria*, § 39; Judgment of 11 July 2000, *G.H.H. et al. v. Turkey*, § 35).

Therefore, we should take into account the specific characteristics of the case when dealing with proceedings that may end with the compulsory expulsion from the territory of one of the contracting States, by requiring not proof that the breach has occurred or is going to occur, as it is necessary to weigh up the specific circumstances that could entail difficulty of furnishing proof, but rather the existence of a reasonable and grounded fear that the courts of the requesting State may subject the extradited person to such breaches of his fundamental

rights, as otherwise the remedy would have a precautionary focus that is not appropriate.

Applying these guidelines required by the doctrine of the European Court of Human Rights, we stated in the so often quoted judgment that the courts, when conducting extradition proceedings, must weigh up the specific circumstances of the case in question, taking into account the significance of the rights and interests considered to be breached or at risk of being breached, the consequences that may stem from surrendering the person to the requesting State in relation to the impossibility of repairing the damage, the argument of the person subject to the procedure and the elements of proof on which he attempts to base it and, in connection with the latter, the difficulty of furnishing such proof precisely because he is in a different State from the one in which the violations were allegedly committed or could be committed. And once the alleged circumstances have been clarified and proven or even, given the existence of elements, fears or reasonable risks that they have indeed occurred, exist, or may occur, and have not been distorted by the information and documentation held by the court, the surrender of the person involved in the extradition proceedings should be declared inadmissible, thereby preventing the damaging consequences that could stem from the opposite decision.

As we have recently reiterated, in order to activate this specific protective duty that is incumbent on the judicial bodies competent in extradition matters, it is not sufficient to claim the existence of a risk; rather, it is necessary for the "alleged fear or risks to be grounded, in the sense that they be minimally proven by the person sought". Furthermore, it is not sufficient to make "generic" references or claims regarding the situation of the country; rather, the person sought must make specific claims regarding himself and his rights (*STC* 148/2004, of 13 September, LG. 8).

Fifteenth: Applying the previous doctrine to the case in hand, we must dismiss the claim for protection. For this purpose, we must bear in mind that the person sought refers to a generic risk and, furthermore, that the Decision of Section Two of the Criminal Division of the National Court of 1 February 1999 establishes that in order for extradition to be admissible the Venezuelan State must provide guarantees of respect for the person's human rights.

Indeed, the risk of being subjected to inhuman or degrading treatment deriving from the appellant's internment in Venezuelan prisons is generic in nature. The appellant provided the courts with various data relating to the general situation of prisons in Venezuela, without making any reference whatsoever to any concrete and specific circumstances of his case constituting reasonable proof that, were he surrendered to Venezuela, his right not to be subjected to inhuman or degrading treatment could be specifically breached.

Furthermore, the court has required a guarantee from the Venezuelan authorities deriving from that generic situation invoked, that, in the event that the appellant is imprisoned, the requirements of "respect for human rights" be effectively met during his imprisonment, expressly stating that, when the time

comes, it will have to examine the guarantees, if appropriate, and decide on his surrender, though, it adds, this does not preclude the possibility of the Executive examining these reasons and refusing the surrender if it doubted that the Venezuelan State would comply with the treaties on the protection of human rights.

Consequently we are not dealing with a case comparable to those ruled on in *SSTC* 32/2003, of 13 February and 148/2004, of 13 September, as unlike the judicial decisions contested in the aforementioned cases, those challenged in this appeal for protection consider that the alleged generic risk is possible, as they recognize that "people serving sentences in the prisons of that country may experience harsh situations and conditions that are incompatible with the international rules on the protection of human rights" and that "there is indeed a risk, which we are not going to question, that the person sought may be subjected to inhuman and degrading treatment". However, both decisions maintain that it is precisely the acceptance of this as a possible hypothesis which leads them to require the Venezuelan state to provide "sufficient guarantees that if José Bouza Izquierdo were imprisoned on the charges the requirements of respect for human rights would be effectively met during his imprisonment".

In view of the foregoing, we are not dealing with the hypothesis of a lack of court protection due to failure to consider proven a risk of breach of the appellant's fundamental rights without taking any or sufficient action to clarify whether or not the alleged risk is grounded (*SSTC* 32/2003 and 148/2004). On the contrary, we are examining whether, the hypothesis of the existence of a generic risk of breach of the right not to be subjected to inhuman or degrading treatment having been considered possible, the guarantee required by the National Court, laid down in art. 11 of the Spanish-Venezuelan Treaty, constitutes sufficient court protection of this right in extradition proceedings. The appellant maintains that it is not, as it neither implies a formal commitment on the part of the Venezuelan state nor can it be effectively provided as it is recognized that the prisons are beyond the control of the State.

Sixteenth: However, in the light of the characteristics of the extradition proceedings, of this Court's decisions in similar cases, and of the provision made for this guarantee in the Spanish-Venezuelan extradition Treaty, we cannot consider that making the admissibility of the extradition proceedings conditional upon the guarantees mentioned in this case constitutes a lack of court protection or indirect breach of the appellant's right not to be subjected to inhuman or degrading treatment.

Firstly, Spanish extradition proceedings are of a combined nature, with a judicial phase of limited competences and a government one; art. 6, paragraph three, of the Law on passive extradition states that "there shall be no remedy against the Government decision". The object of this appeal for protection is delimited exclusively by the judicial decisions, and their examination must therefore be limited to the constitutional appropriateness of the exercise of their competence in the framework of their jurisdictional powers.

Therefore, in relation to appeals for protection lodged against judicial decisions declaring admissible extradition proceedings that enforce sentences passed in trials from which the defendant is absent, subjecting them to the guarantee of a new trial, we declare that "it having been found that the National Court expressly requires a new trial to be held with the presence of the defendant and allowing him a defence, it cannot be claimed that the appellant's right to a fair trial has been indirectly breached, as, on the one hand, it is recognizing that his right to defence was breached in the original proceedings since otherwise it would not be necessary to make the extradition conditional – art. 2.3 *LEP* – and, on the other, it is attempting, to the best of its abilities, to repair this breach. On the basis of this it falls to the Spanish government to require the fulfilment of this guarantee, and the consultation made by the National Court to the prosecuting authorities of Milan in connection with the extradition proceedings on the possibilities of providing that guarantee is not relevant, as it is not an official notification to guarantee the new trial which can only be held once the extradition has been authorized by the court" (*ATC* 177/2000, of 12 July, LG. 3).

To this we should add that, despite recognizing that the imposition of a life sentence may breach the prohibition on inhuman or degrading punishments laid down in art. 15 *CE*, for the purposes of determining whether judicial decisions allowing a person to be extradited in order to serve life imprisonment or be tried for a crime for which he will foreseeably be sentenced to this punishnent, this Court has declared that it is sufficient guarantee if the judicial decisions make the admissibility of the extradition conditional upon the fact that if such punishment were imposed, its enforcement would not be indefectibly for life (*STC* 148/2004, of 13 September, LG. 9, quoting ECHR judgment of 7 July 1989, *Soering v. United Kingdom*; of 16 November 1999, *T. and V. v. United Kingdom*).

Secondly, it cannot be forgotten that the furnishing of this specific guarantee is provided for in art. 11.2 of the Spanish-Venezuelan extradition Treaty, and therefore the National Court is not acting without legal cover. Indeed, we should remember that art. 11 of the aforementioned Treaty establishes that:

"1. Extradition shall not be granted when the offence for which it is requested is punishable with the death penalty, with life imprisonment, or with punishments or security measures that would be damaging to the physical integrity of the person sought or would subject the person sought to inhuman or degrading treatment.
2. However, extradition may be granted if the requesting Party were to provide sufficient assurance that the person sought will not be executed and that the maximum punishment served will be that which is immediately lower than life imprisonment or that he will not be subjected to punishments damaging to his physical integrity or to inhuman or degrading treatments".

Furthermore, we are not dealing with a case of specific risk of being subjected to torture, in which case we could consider whether the rights of the person sought would be safeguarded by the mere requirement of guarantees such as those provided or whether it would necessarily require extradition to be refused; rather, as we have reiterated, we are dealing with a generic risk of being subjected to inhuman or degrading treatment owing to the situation of the prisons of the requesting State.

Consequently, we must dismiss the appeal for protection since, within the scope of its powers, the National Court has subjected the extradition proceedings to the condition provided for in art. 11.2 of the Treaty, which does not preclude the Government, should extradition be definitively agreed, from formally requesting the Venezuelan State to furnish the guarantees provided for in the Decision of the Second Section of the Criminal Division of the National Court of 1 February 1999 and their effective enforcement.

Ruling

To dismiss the appeal for protection lodged by Mr. José Bouza Izquierdo".

c) Freedom of association

– *STSJ* Murcia, 12 July 2004. Social Affairs Division. Appeal n. 839/2004.

The TSJ partially allows the repeal for reversal lodged by the appellant against a Judgment of Murcia Social Affairs Court n. 2 dated 7–4–2004, which is overturned in the sense indicated in the legal grounds, in dismissal proceedings. Raquel was first employed by the Council of Las Torres de Cotillas with the professional status of lawyer. Trade union elections were held, the electoral process beginning on 7 July 2003. On 25 November 2003 the trade union UGT presented its list of candidates, which included the appellant, to the Council, and the final candidates were confirmed on 1 November 2003. On 5 December 2003, the Council informed the appellant of the discharge of her contract. On 11 December 2003 the appellant was elected a representative of the trade union UGT. Other remedies had been exhausted and the court ruled as follows: "Partially allowing the claim lodged by Raquel against the Council of Las Torres de Cotillas, I hereby declare the petitioner's dismissal of 5–12–2003 to be unfair, sentencing the aforesaid Council, within five days of notification (. . .) to pay the worker the sum of 2,571.75 euros compensation or to reinstate her to her post (. . .) whichever option is chosen, the Council shall pay the wages corresponding to the period from the date of dismissal to service of the judgment". An appeal for reversal was lodged by the counsel for the claimant, Mrs Dorleta Cutillas, and contested by the counsel for the Council Mrs María del Carmen Marqués.

"Legal Grounds:

Having examined the claims of both parties, the Court finds clear evidence that the complainant was dismissed on account of her trade union activity, as immediately beforehand she had stood for elections, as reflected in the facts declared to be proven, and was even elected by the trade union *UGT*.

In the face of such evidence the Council has failed to prove that the measure adopted is justified (article 178 of the *LPL*). Under such circumstances we should follow the reasoning of our judgment n. 1079/03, of 22 September (*JUR* 2003/251071), which states that: "It is clear from the foregoing that, more than indications, there is evidence that the action of the employer is incompatible with article 28 of the Spanish Constitution (*RCL* 1978/2836), with national regulations, and with various related international treaties signed by Spain, such as the International Covenant on Economic, Social and Cultural Rights, of 16–12–1966 (*BOE* n. 103, of 30–4–1977 [*RCL* 1977/894]; particularly article 8); ILO Convention n. 87 (*RCL* 1977/997) concerning Freedom of Association and Protection of the Right to Organize, of 9–7–1948 (*BOE* n. 112, of 11–5–1977), ILO Convention n. 98, concerning the Application of the Principles of the Right to Organize and Collective Bargaining, of 1–7–1949 (*BOE* n. 111, of 10–5–1977 [*RCL* 1977/989]), particularly articles 1 and 2 which state literally: article 1. 1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment . . ."; "2. Such protection shall apply more particularly in respect of acts calculated to: (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours"; "art. 2. 1. Workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration"; "2. In particular, acts which are designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations, or to support workers' organizations by financial or other means, with the object of placing such organizations under the control of employers or employers' organizations, shall be deemed to constitute acts of interference within the meaning of this Article".

It specifically grants an imperative mandate and metaphorically imposes an obligation for Spanish Jurisdiction, deriving from the previously transcribed article 1.2.b), in that it must provide special protection against any acts intended to "cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours". In this case, the same protection should be guaranteed, *in extenso*, when we are dealing with the enjoyment of trade union or representative hours, by fiction or compensatory, bearing in mind the criterion of protection according to a canon of constitutionality of fundamental rights (*STC* 422/2002) which implies the interpretation that is most favourable to its effectiveness.

Therefore, since there are indications of a breach of freedom of association (article 179 of the Law on Employment Procedure [*RCL* 1995/1144 and 1563]) and charges of misconducts not sufficiently serious as to justify dismissal, it

should be considered, in this context, as a cover concealing this anti-trade union attitude that it implicitly entails insofar as a member of *CC OO* is affected by a violation of article 14 of the Spanish Constitution, this determines that the ground for appeal should be dismissed, since given the anti-trade-union tendency or purpose detected, that is the legal consequence. In view of this evident fact, the conciliation act of 3 July 2003 concerning other facts in no way affects the foregoing".

Now, having found evident indications of anti-trade union action, as there is no proof that justifies the conduct of the employer, this confirms the existence of a violation of articles 12 of the *LOLS* (*RCL* 1985/1980), 28 of the Spanish Constitution and implicitly article 14 thereof, since the aforementioned judgments of Social Affairs Court n. 1 and those of this Court, should act as such. Furthermore, article 1.2.b) of ILO Convention n. 98 concerning the application of the Principles of the Right to Organize and Collective Bargaining, imposes "a special protection" and concealing a dismissal that involves an absence of misconduct or lack of sufficient misconduct cannot operate to prevent this classification, as this cannot obviate the effectiveness of the fundamental rights, given the radicality with which they operate, according to the canon of constitutionality.

Therefore, the dismissal must be declared null and void (art. 55.5 of the Workers' Statute [*RCL* 1995/997]). It is not appropriate to grant the compensation requested since, as we stated in our judgment n. 1079/03 (*JUR* 2003/251071): "Having examined the claims, in relation to the aforementioned judgments, the Court, pursuant to the Law, must point out that article 180.1 of the Employment Law (*RCL* 1995/1144 and 1563), among the consequences of violation of the fundamental facts, refers to "appropriate compensation" and this assumes that such compensation is linked to damage and prejudicial consequences that are assessable and would justify an additional compensation and must therefore be proved".

In the previous conditions, the Court has not found proof of any specific damage or prejudicial consequences for which compensation should be provided other than that of the dismissal itself, and therefore, this ground for appeal is allowed.

The solution reached on this point reflects the decisions of the highest European court in the interpretation of the European Convention on Human Rights (*RCL* 1979/2421), the European Court of Human Rights which, in judgments of 28–10–1998 (*ECHR* 1998/52) (*Pérez de Rada Cavanilles v. Spain*) (116/1997/900/1112), has established that the judgment constitutes in itself sufficient just satisfaction as far as the alleged non-pecuniary damage is concerned.

There is a similar judgment by the European Court of Human Rights of 28–10–1998 (*ECHR* 1998/51) (*Castillo Algar v. Spain*) (8/193/403/481).

Ruling

In view of the foregoing, the Social Affairs Chamber of this Court, by the authority vested in it by the Constitution, holds:

We allow the appeal for reversal; and we declare the dismissal of the complainant, Raquel, to be void, and sentence the Council of Las Torres de Cotillas to reinstate the complainant immediately and pay her the wages she has ceased to receive. The Council is absolved from paying the compensation requested".

d) Right of appeal to a higher court

– *STS* 9 July 2004. Criminal Division. Appeal n. 889/2004.

On 26–06–2003 the Criminal Division of the National Court delivered a Judgment convicting various defendants on charges of drug trafficking. Various appeals for annulment were lodged against this decision. The Second Chamber of the Supreme Court dismisses the appeals and confirms the Judgment.

Reporting judge: Mr. Carlos Granados Pérez

"Legal grounds:

First: The first ground for appeal pursuant to article 849.1 of the Code of Criminal Procedure (*LEG* 1882/16) and in accordance with article 5.4 of the Organic Law of the Judiciary (*RCL* 1985/1578, 2635) invokes violation of the right to be presumed innocent enshrined in article 24.2 of the Constitution (*RCL* 1978/2836).

The possible unconstitutionality of the appeal for annulment is affirmed when the violation of the fundamental right to be presumed innocent is invoked and related to a decision of the Human Rights Committee as there is no Higher Court to review the judgment, as required by the International Covenant on Civil and Political Rights (*RCL* 1977/893), as the evidence is not newly assessed in an appeal for annulment.

The ground for appeal cannot be upheld.

This Court has dismissed similar invocations, such as in its Judgments 297/2003, of 8 September (*RJ* 2004/2103), 1860/2000, of 4 December (*RJ* 2000/10177) and of 30 April 2001 (*RJ* 2001/10297), in which it declares that given the diversity of legal systems in the territory in which the Covenant is in force, the possibility of access to a higher court is determined by the characteristics of the procedural laws of each country and although this review should be as broad as possible in scope, we cannot rule out the possibility of there being other channels for contesting judgments of conviction, provided it is done through a higher court empowered to overrule the decisions of the lower one. Therefore our Constitutional Court has declared that although an appeal for annulment of a criminal conviction is of a special nature and limited in scope, it meets sufficiently and appropriately the expectations of the aforementioned International Covenant and "meets the obligation assumed by the Spanish State when incorporating its provisions into national law through article 96 of our Constitution (*RCL* 1978/2836)".

Some international treaties Spain has signed refer expressly to the two-tiered system. Specifically the International Covenant on Civil and Political Rights and Protocol n. 7 of the European Convention on Human Rights (*RCL* 1979/2421)

state that everyone convicted of a criminal offence by a tribunal shall have the right to have conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

The need for the conviction to be reviewed by a higher court may be interpreted differently. A strict reading is possible, in the sense that review by a higher tribunal is not necessarily imposed but simply that the conviction and sentence should be reviewed by another court. Interpreted more broadly, it could be taken to mean that a full review of the trial is necessary.

When examining the texts of the aforementioned international Treaties, we find that the International Covenant on Civil and Political Rights refers to "conviction and sentence". If we take conviction to mean, in addition to the part containing the verdict, the points of the judgment that examine the declaration of guilt, we would be dealing with an interpretation that extends beyond that which is mentioned as being strict, insofar as it exceeds the mere verdict, though it allows at least two readings, that which is identified with a full review, that is, a new trial with repetition of evidence, which would affect the facts on which the declaration of guilt is based; and another which, although not limited to the decision of verdict, nonetheless has as its limit a review of the trial in question carried out by the court of first instance, its rational structure and specifically whether it conforms to the rules of logic, experience and scientific knowledge.

Now, the text of the International Covenant on Civil and Political Rights, the only one out of those mentioned that has been ratified by Spain, does not call for a new trial with repetition of proof; rather, the requirement that the conviction and sentence be reviewed by a higher Tribunal is met by a mere review of the trial conducted by the court of first instance.

It is true that both covenants refer this right of review by a higher Tribunal to the law of each signatory State, and this leads us to examine whether the mandate of the International Covenant on Civil and Political Rights is fulfilled in Spanish procedural legislation with the scope we have just mentioned.

Since judgments 42/1982, of 5 July (*RTC* 1982/42), 76/1982, of 14 December (*RTC* 1982/76) and 60/1985, of 6 May (*RTC* 1985/60), the Constitutional Court has declared that article 14.5 of the International Covenant of Civil and Political Rights is not sufficient to create by itself non-existent remedies and that the Supreme Court, when hearing an appeal for annulment, meets this requirement of the intervention of a higher Tribunal although, when developing the right of remedy, its interpretation has been more favourable to the effectiveness of that right and with a broad interpretation with respect to the scope of examination of the appeal for annulment, as found in Judgments 133/2000, of 16 May (*RTC* 2000/133) and 190/1994, of 20 June (*RTC* 1994/190).

In order to comply better with article 14.5 of the so often cited International Covenant and in accordance with the declarations made by the Constitutional Court on this article, the Supreme Court has shaped a doctrine that has progressively broadened its examination to include a review of how the proof was assessed by the court of first instance.

Accordingly, this Court's Judgment of 25 April 2000 (*RJ* 2000/3720) states that when invoking the right to be presumed innocent this leads the Supreme Court to examine, among other issues, whether the evidence was obtained lawfully and whether the findings of the Court that issued the judgment go against the laws of logic, experience and science.

This Court's compliance with the International Covenant on Civil and Political Rights is maintained, with the scope of the appeal for annulment that has been expressed, following the decision of 20 July 2000 of the United Nations Human Rights Committee, though this decision, which settles a specific case and not whether or not Spanish appeals for annulment generally fall under article 14.5 of the Covenant, in no way requires a change of criterion. A very different question is the appropriateness of establishing access to a higher court in all types of proceedings and the sole function that resides in the Supreme Court is the essential task of unification in the application of the legal system.

This is the opinion expressed by the Plenary of this Court at the non-jurisdictional meeting held on 13 September 2000, in which it was stated that in the current developments in case-law in Spain the appeal for annulment provided for in the laws in force in our country, similar to that of other European Union Member States, already constitutes an effective remedy in the sense of article 14.5 of the International Covenant on Civil and Political Rights. However the appropriateness was also stressed of establishing a remedy of appeal prior preceding the appeal for annulment.

Finally, it is interesting to note that the European Court of Human Rights, in the *Loewenguth* and *Deperrois* cases, which were dismissed, respectively, on 30 May 2000 and 22 June 2000, considers that in article 2 of Protocol n. 7 the Member States retain the power to decide on the manners of exercising right of review and can restrict the scope of the latter; in addition, in many States the aforementioned review is equally limited to questions of law. Therefore, the European Court of Human Rights considers that the possibility of appealing to a higher court for annulment meets the requirements of article 2 of Protocol 7 of the Convention.

In view of the foregoing, the violations reported have not taken place and the ground for appeal must be dismissed".

VI. STATE ORGANS

VII. TERRITORY

VIII. SEAS, WATERWAYS, SHIPS

IX. INTERNATIONAL SPACES

X. ENVIRONMENT

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

XII. INTERNATIONAL ORGANISATIONS

XIII. EUROPEAN COMMUNITIES

XIV. RESPONSIBILITY

1. Diplomatic Protection

– *STS* 6 October 2004. Contentious-Administrative Division. Jurisdiction for suits under administrative law. Appeal n. 6164/2002.

The Division of Contentious-Administrative Proceedings of the National Court issued a judgment on 12–06–2002 dismissing the appeal brought by Bárbara against a Resolution of the Undersecretary for Foreign Affairs denying her diplomatic protection with respect to the return of real estate property. The claimant lodges an appeal for annulment with the TS, which dismisses the appeal.

Reporting Judge: Ms. Celsa Pico Lorenzo

"Legal Grounds:

First: Bárbara's representative before the court lodged an appeal for the annulment of a judgment delivered on 12 June 2002 (*RJCA* 2003/112) by Section Four of the National Court dismissing the Contentious-Administrative appeal filed against a decision of the Undersecretary for Foreign Affairs of 28 July 2000, by delegation of the Minister, dismissing the appeal for reversal lodged against an earlier decision of 25 April 2000. It was agreed not to allow the application for diplomatic protection filed by the claimant consisting of the return of the real estate property belonging to the conjugal partnership established with the husband of the claimant or, if applicable, compensation for the equivalent of that property plus the portion to which she is entitled of all the wages and remunerations owed to Isidro by the Public Administration of Equatorial Guinea. In her claim, she wished for her right to receive compensation from the Spanish Administration for the damages caused to be recognized as an individualized legal situation and for the damages to be quantified, subject to an appraisal, during the enforcement proceedings.

(. . .)

Sixth: A second ground for appeal under art. 88.1.d) of the *LJCA*/1998 (*RCL* 1998/1741) lies in the breach of art. 24.1 *CE* (*RCL* 1978/2836) inasmuch as the requirement that the claimant exhaust internal remedies would be tantamount to denying effective protection of the courts as it requires more than may be reasonably demanded.

To support her argument she maintains that the Human Rights Committee determined not only that the president of Equatorial Guinea controls the judiciary but that in the aforementioned country there is no independent and impartial court as laid down in art. 14.1 of the International Covenant on Civil and Political Rights.

As with the previous claim, in that it deals with them jointly, the Counsel for the State argues that the claims formulated to the contrary do not prove the reality of violation of legal rules.

The judgment in question settles the question by stating that "There is no evidence that the claimant has exercised any action to claim the rights of the conjugal partnership she understands to be infringed before the authorities of the Republic of Equatorial Guinea.

The fact that her husband has filed claims in this respect and has recorded in them his married status cannot exempt her from having to file such a claim, as it is the claimant who is requesting diplomatic protection and it is she should have exhausted the internal remedies in that country. However, it is not that she failed to exhaust those internal resources; rather, she did not have recourse to any remedy to claim the rights of the conjugal partnership she considers to have been infringed".

The decision of the Court in question cannot be considered contrary to law as regards access to the conditions necessary for being entitled to the so-called diplomatic protection of the Spanish State.

Indeed, the observations issued by the United Nations Human Rights Committee regarding the International Covenant on Civil and Political Rights of 10 November 1993, in connection with the complaint laid by the husband of the claimant in respect of his arrest and subsequent confiscation of the property referred to by the claimant, mention problems of impartiality concerning the complainant – who formerly held a political post – in the courts of Equatorial Guinea. It concludes by urging the State of Equatorial Guinea to return the confiscated property to him or grant him compensation.

However, the existence of the so-called principle or rule of international customary law (*Elsi case* in the judgment of 20 July 1989 of the International Court of Justice) which requires the remedies existing in internal law to have been previously exhausted cannot be ignored. The International Court of Justice (*Elsi case*) has stated that a diplomatic claim is admissible when the essence of the claim has been subjected to the competent courts and the claimant has continued, unsuccessfully, as far as is permissible by local laws and procedures. Doctrine understands that an exception would be if it were proved that internal

legislation does not provide for appropriate remedies, a fact which is not justified in this case.

Our legislation on administrative proceedings, *LJCA*/1998-surprisingly, like the previous *LJCA*/1956 (*RCL* 1956/1890), given the framework of the Civil Code (*LEG* 1889/27) then in force – has attributed unrestricted legal capacity to sue to married women, who do not need, nor did they previously need, the assistance of their husbands. Therefore, the claimant's allegations of her husband's actions with respect to the Republic of Guinea or the report of the Human Rights Committee on their result are not relevant grounds for exempting her from the requirement to exhaust the internal remedies of the State that has committed the internationally unlawful act.

We are dealing with a principle of respect for and sovereignty of states and their jurisdictional power. To exercise diplomatic protection prematurely without granting the respondent states the opportunity to do justice is internationally considered an affront to the aforementioned sovereignty. It is well known that the International Court of Justice of The Hague does not draw distinctions between claims and therefore the claimant cannot adopt the individual claims of her husband. Let us not forget that he, despite having the possibility of filing them jointly, did soon his own behalf as a national of the State from which they were claimed.

We therefore dismiss the claim . . . ."

Seventh: Pursuant to art. 135 *LJCA* (*RCL* 1998/1741), as the claim has been dismissed, the legal costs are to be paid by the claimant up to a limit of 1,800 euros; this does not preclude the possibility of the client claiming the amount she deems appropriate".

Spanish Judicial Decisions in Private International Law, 2004

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I. SOURCES OF PRIVATE INTERNATIONAL LAW

– *STS*, 18 November 2004. *Web Westlaw* JUR 2004/300854.

Transport by sea. Arrest of sea-going ships. Brussels Convention of 10 April 1926. Incorporation into domestic law. Scope. Spanish law.

"Legal Grounds:

In the first of its three grounds . . . a claim is filed for infraction of article 14 of the Brussels Convention of 10 April 1926 in relation with article 12.6 and 10.2 of the Civil Code and 96 of the Spanish Constitution.

The Provincial Court, erroneously basing its judgement on article 14 of the aforementioned Convention and on the judgement of this Chamber delivered on 18 June 1990 (RJ 1990/4791), is reproached for having come to the conclusion that there was no maritime lien in terms of encumbrance of the ship against the amount claimed despite the fact that the ship-owner is sentenced to pay the said sum.

It is argued that although the only requirement for application of article 14 of the Convention is that the ship be from a contracting country, it should actually be applied to all international instances just as Spanish national law drafted externally to avoid fraud, which could be the case of the sale of the ship to another ship-owner.

In order to determine whether this thesis is applicable . . . it suffices to bear in mind that the judgements delivered by this Chamber on 22 May 1989 (RJ 1989/3877) and 18 June 1990 (RJ 1990/4791) coincide in affirming that the 1926 Brussels Convention is only applicable when the ship "liable for payment" belongs to a contracting state pursuant to the spirit of article 14 of the said Convention.

Given that both parties acknowledge that the ship transporting the goods being contested was registered in Cyprus and the claimant has not proven that Cyprus had signed the said Convention, this ground must be dismissed.

The second ground alleges infraction of article 12.6 in relation to article 10.2, both of the Civil Code (LEG 1889/27) and article 96 of the Spanish Constitution (RCL 1978/2836), arguing that although the second of the said precepts establishes that the law applicable to ships is that of the country of its registration, article 12.6 requires the person who invokes foreign law to accredit its content and applicability.

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As a result, it is held that in the absence of proof of the national law of the country of the ship's registration, the Brussels 1926 Convention (RCL 1930/1104) is the only law in force, given that it is Spanish law, pursuant to article 96 of the Constitution.

This ground should also be dismissed for it must be assumed that the said Convention has been incorporated in its entirety into Spanish law by virtue of Spain being a party thereto and its publication in the Official State Gazette. In other words, each and every one of its precepts form part of Spanish law including article 14 defining the scope of the rules contained therein. This scope has been defined in such a way that the ship which is the object of the dispute – in this case the maritime lien – must belong to one of the contracting states which is not the case here.

The intended enforcement of the precepts allegedly violated means that the objective pursued by Spain when it signed the Convention (the establishment of a framework for reciprocity with the rest of the signatory countries) would be completely distorted and this is absolutely inadmissible.

The last ground of the appeal charges . . . violation of article 580(10) in relation with article 584, both of the commercial code (LEG 1885/21) and article 12(6) of the Civil Code (LEG 1889/27).

It is pointed out that in the claim the content of the commercial code was specifically cited as subsidiary law of the convention.

It was therefore added that if the said Convention were not be considered applicable, the provisions of the aforementioned Code would apply. Article 580(10) of the said Code provides for a lien covering the shipper's liability for the value of the goods on board which were not delivered to the consignees or for damages suffered for which the ship was responsible.

This ground should likewise be dismissed given that it is precisely article 12(6) of the Civil Code that orders the Courts to apply the conflict rules of Spanish law one of which – article 10(2) of that same Code – clearly establishes that the rights constituted in respect of ships shall be subject to the law of their country of license or registration. Adherence to this latter rule makes it impossible to apply the provisions of the Spanish commercial code to this debate given that, as the Provincial Court has affirmed, the claimant has proven that the ship, in respect of which the encumbrance was requested as collateral for the claim, is of Cypriot nationality".

– *STC*, 8 March 2004. *Web Westlaw*. RTC 2004/34

Article 14 of the Spanish Constitution. Right to equality before the law. Salary inequality. Being subject to different national laws in force.

"Legal Grounds:

As set out in the pleas of fact, the person filing the appeal for protection, of Spanish nationality, has been working since 1996 as an administrative assistant at the Spanish trade office in Belgrade. The salary paid to this worker, for the same work done by two other administrative assistants of Yugoslavian nationality

hired in 1984 and working in this same trade office, is substantially lower that that paid to the latter workers. This difference in the pay scale was justified by the contracting Administration first of all on the basis of the conditions and tax system of the Yugoslavian regime and the labour conditions at the time when those two workers were engaged and secondly on the diversity of the law applicable to each of the two cases.

The appellant asserts that two fundamental rights have been violated here: on the one hand, the right to effective protection of the courts (art. 24.1 *CE* [RCL 1978/2836]), holding the view that the judgment under appeal is incongruent in that it is not based on the contentions of the parties (sic) because it ruled on a new issue not addressed by the parties (legislation applicable to the labour relation of the claimant) and, on the other hand, the right to equality (article 14 Spanish Constitution) alleging that salary discrimination has no reasonable justification but is rather solely based on the nationality of the appellant.

. . .

Secondly, the appellant charges violation of the right to equality (art. 14 Spanish Constitution [RCL 1978/2836]), holding the view that he was the victim of unjustified salary discrimination based solely on the fact that he was not of Yugoslavian nationality. In this respect one must begin by noting that, as this court has pointed out on many occasions, not all unequal treatment denotes a violation of article 14 of the Spanish Constitution but rather such violation only occurs when the inequality in question differentiates between situations that can be considered on a par and lacks objective and reasonable justification. In other words, the principle of equality requires that the same legal consequences apply to the same de facto assumptions and two de facto assumptions should be considered equal when the use or introduction of differentiating factors is either arbitrary or lacks rational grounds.

Specifically, and in respect of the equality principle in remuneration matters, we have confirmed that article 14 of the Spanish Constitution, within the scope of labour relations, does not impose equal treatment in the strictest sense given that the efficacy of the autonomy of will principle in this regard foresees a margin of manoeuvrability by which a private agreement or unilateral decision taken by an entrepreneur in exercise of his organisational authority in the company, may freely remunerate workers while respecting legal minimums or conventions. In so far as the salary difference does not have discriminatory undertones, falling under one of the categories prohibited by the Constitution or the Workers Statute (RCL 1995/997), it cannot be considered a violation of the equality principle. Now, we have likewise said that when the employer is the public administration, the latter is not governed by the autonomy of will principle in its legal relationships but should rather act in full compliance with Law and Legality (article 103.1 Spanish Constitution), with expressed prohibition of arbitrariness (article 9.3 of the Spanish Constitution). As the public authority that it is, it is subject to the principle of equality under the law which provides individuals with the subjective right to receive equal treatment under equal circumstances from public authorities.

. . .

Applying this doctrine to the case at hand, we find that the complainant filing appeal, carrying out the functions of an administrative assistant at the Spanish trade office in Belgrade, receives a salary which is significantly lower than that paid to two other administrative assistants of Yugoslavian nationality performing similar duties and whose earnings, in contrast to those of the complainant, have been steadily increasing although it is also true that this has been taking place for longer than the time the petitioner has been working there. The functions and responsibilities of the aforementioned workers have not, at any point, been challenged by the defendant Ministry either at the first instance stage or during the appeal process. In justifying the salary difference the administration has employed two arguments:

a) In first instance the administration argued that the other two assistants of Yugoslavian nationality had been engaged at an earlier date in accordance with the rules of the corresponding Bureau and earnings were governed by the conditions laid down by the Yugoslavian regime while the petitioner's contract was signed after the social, political and labour characteristics in Yugoslavia had changed.

. . .

b) At the appeal for reversal stage the Administration, modifying the initial explanation offered regarding the difference in earnings, argued that the labour relations pertaining to the petitioner, on the one hand, and to the two Yugoslavian assistants on the other, were subject to different laws (Spanish and Yugoslavian, respectively) concluding that there was no standard term of comparison.

This was the view taken by the Social Affairs Court which declared that in light of the two legal systems – that of the complainant and that of the Yugoslavian workers – completely different in terms of the legislation applicable to each one, there are no identical terms of comparison meaning that the different applicable legislation justifies different salary scales introducing an objective, non-discriminatory difference.

Thus the contested Judgement (PROV 2001/96608) is based on the fact that the legal relationships being compared are subject to different legislations and this fact justifies the different wage scales.

It should first of all be stated that such an affirmation should have been properly reasoned given the tenor of the rules of the Agreement regarding the law applicable to contractual obligations done at Rome on 19 June 1980 (RCL 1993/2205, 2400) – article 6 – in force in Spain since 1 September 1993 especially considering that the labour contract of the petitioner is subject to the law and customs of the country and to a number of clauses of Yugoslavian labour law, adding in clause eight that the remaining labour conditions shall be governed by the labour legislation of the country or, failing that, by Spanish legislation.

Notwithstanding the above and delving into substantive terrain and in light

of the claim of alleged violation of Spanish Constitution article 14 (RCL 1978/2836), it must be mentioned that the public prosecutor correctly pointed out that the allegations put forth by the defendant Administration – different legislations applicable to the legal relations at stake – to justify salary differences, appearing in the same terms in the challenged judgement, were merely of a formal nature because they were not accompanied by any analysis of the Yugoslavian labour regime, of its concrete regulation or of the consequences that a different and unknown legal system could have on this case. No allegations whatsoever were made in respect of its content or applicability. This is despite the fact that the burden of proof, as has already been pointed out by this court (*STC* 33/2002, of 11 February [RTC 2002/33], F. 6) lies with the defendant which had invoked foreign law. Thus, it is up to the defendant and not the complainant to accredit the content and applicability of the law invoked pursuant to the then applicable article 12.6 of the Civil Code (LEG 1889/27) (today replaced by the rule laid down in article 281 of Law 1/2000, of 7 January [RCL 2000/34, 962 and RCL 2001, 1892], of civil procedure) – along the same lines, *STC* 155/2001, of 2 July (RTC 2001/155), F. 4–, a solution backed by the demands of the facility criteria. It was much easier for the Administration to claim Yugoslavian law because, according to its allegations, it was applying said law to the two workers of this nationality.

In summary, the salary difference claimed by the petitioner with respect to the other workers at the same public administration, of the same category and performing the exact same services, lacks objective and reasonable justification and therefore represents a violation of Spanish Constitution article 14 thus determining the appropriateness of the pronouncement foreseen in article 53 a) *LOTC* (RCL 1979/2383)".

II. INTERNATIONAL JURISDICTION

1. Family

– *SAP* Malaga, 31 March 2004. *Web Westlaw* JUR 2004/128865

Jurisdiction of the Spanish courts in separation matters.

See also, in the same sense, *AAP* Malaga, 10 March 2004. *Web Westlaw* Jur 2004/142502; *SAP* Malaga, 31 March 2004. *Web Westlaw* JUR 2004/128865.

"Legal Grounds:

(. . .) The claim filed by the appellant cannot be upheld. In view of the foregoing, it should first of all be pointed out that the Code of Civil Procedure regulates recognition of foreign judgements by virtue of which material *res judicata* may be invoked and based on this the corresponding exception, the Supreme Court having already declared that the divorce judgement delivered by the foreign court cannot serve as the basis for the *res judicata* exception without having obtained the *exequatur* which was not requested as was acknowledged by the petitioner himself when addressing the civil prejudiciality issue textually

affirming "this party hereby announces that it is studying the initiation of recognition proceedings of the divorce judgement in order to be able to enforce the decision taken in respect of visitation rights". Until which time the enforcement of the judgement delivered by the foreign court is ordered, it does not apply in Spain and therefore the exception requested cannot be upheld given that the divorce judgement delivered by the First Instance Court of Nador does not have the character of *res judicata.*

It should therefore be verified whether the Spanish courts have jurisdiction to hear the separation judgement initiated by Ms. Virginia and in this sense it must be stated that there is no doubt that jurisdiction constitutes an issue of sovereignty. The Spanish courts have jurisdiction over litigation arising in Spanish territory even between foreigners in accordance with the Organic Law of the Judiciary and international treaties and conventions to which Spain is party as laid down in the aforementioned law article 22, specifically paragraph 3, establishing the jurisdiction in civil matters of the Spanish courts and tribunals in matters of annulment, separation and divorce when both spouses habitually reside in Spain at the time the suit is filed; identical to the terms laid down in the First Additional Provision of Law 30/81. In this case it is clear that both spouses are residents, or at least were at the time the suit was filed, the place where the defendant was summoned".

- *AAP* Lerida, 20 May 2004. *Web Westlaw* JUR 2004/180706.
Jurisdiction of the Spanish courts in divorce matters. Regulation 1347/2000.

"Legal Grounds

(. . .) In these divorce proceedings both litigants are of Spanish nationality and are residents abroad in Andorra and despite having contracted matrimony in Cerdanyola del Vallés, the couple never resided in Spain. The defendant's last residence in Spain before her marriage was in Bellaterra, Municipality of Cerdanyola del Vallés, according to the information gathered from the marriage certificate and the Spanish family record book. Subsequent to the filing of the suit, the Judge a quo declared lack of jurisdiction of the said court and the defendant presented a writ of appearance after delivery of the decision declaring lack of jurisdiction of the court simply requesting to be notified of successive actions and subsequently when she was served notice of the remedy of appeal she challenged it. Clearly this case does not correspond to any of the conditions laid down in article 22.3 of the LOPJ as the Judge a quo argued in the challenged decision. This article only envisages the jurisdiction of the Spanish courts in marriage proceedings between Spaniards residing abroad when the request is filed by mutual accord or with the consent of the other party However, subsequent to the entry into force of Regulation EC No 1347/2000 of 29 May, the forum of international judicial jurisdiction of the *LOPJ* in matrimonial matters may only be applied in accordance with article 8.1 of said Regulation when in light of articles 2 to 6 thereof the jurisdiction of another jurisdictional body of a member state cannot be deduced. This is not

the case here given that article 1(b) of the aforementioned Regulation attributes jurisdiction for the resolution of divorce issues to the judicial bodies of the member state of the nationality of the two spouses. As a result, given that Spain is the member state of the nationality of the two litigating spouses, the Spanish judicial bodies have jurisdiction to hear the case".

- *SAP* Cuenca, 10 June 2004. *Web Westlaw* JUR 2004/179694.

Lack of jurisdiction of the Spanish courts in matters concerning the abduction of minors.

"Legal Grounds:

(. . .) Given that it has been established that the person whose restitution is requested by the petitioners is of legal age pursuant to article 315 of the Civil Code, action taken has no legal object. Allusions to the Minor Protection Law and to the United Nations Convention on the Rights of the Child are also without consequence and therefore the appeal process cannot go forward. (. . .) It should be pointed out that Spanish Courts and Tribunals do not have jurisdiction to hear issues such as the one submitted to this court based on the reasons serving as the basis for the claim".

- *SAP* Balearic Islands, 5 March 2004. *Web Westlaw* 2004/126300.

Lack of competence of the Spanish courts in custody and child support matters.

"Legal Grounds

(. . .) It has been established that the defendant, Ms. Esperanza, is of Dutch nationality and both she and the daughter of the litigants are officially registered and living in Holland. The daughter María Milagraos, born on 15 March 1966 in Algaida, is also of Dutch nationality and has been living in Holland since 1986. The request for nullity of proceedings filed by the legal representative of the appellant of the jurisdiction issue, Ms. María Milagros, cannot be interpreted as tacit submission to the Spanish courts. This is because Ms. María Milagros was summoned by means of a public notice in violation of due process and subsequently was not present at the small claims proceeding filed before Court of First Instance No 9. Her appearance before the said Court was for the purpose of defending herself from a judgement delivered *inaudita parte*. The proper time for the defendant to defend herself is at the beginning of the proceedings. The possibility of after the fact defence in respect of a resolution delivered in the defendant's absence and which has already become enforceable cannot be comparable to defending oneself prior to the delivery of the decision. In other words, tacit submission implies appearing before the competent judge and responding to the claim formulated or acceptance of the claim or even the filing of a counter-claim against the complainant. (. . .) The appeal should be admitted as should the declinatory plea declaring the lack of jurisdiction of the Spanish courts to hear the claim filed by Cesar against Esperanza. The parties are to be informed that the Dutch courts have jurisdiction to hear this claim given that Holland is the habitual place of residence of the minor and also in

accordance with article 1 of the Hague Agreement of 5 October 1961 on the protection of minors and article 1 of the Hague Convention of 2 October 1976 on alimony payments".

- *SAP* Santa Cruz de Tenerife, 14 May 2004. *Web Westlaw* JUR 2004/185790
Lack of jurisdiction of the Spanish courts in measures concerning minors.

"Legal Grounds:

(. . .) Considering that it was in 1998 that the mother moved to Italy with the children and that the father is aware of the legal proceeding taking place in Italy as of the year 2000 and the fact that the claim which led to these proceedings was filed in the month of November of the year 2001, it should be recognised that the claimant accepted the forum established by virtue of the residence of the mother and the children. This forum must be acknowledged by the Spanish courts not only because the Italian courts began to hear the case prior to the emergence of the litigious issues but also because this is the legal domicile of the minors and was not intentionally sought by the mother. It is also the most suitable forum for the resolution of disputes concerning minors because their proximity to the court is in their best interest, not only in terms of expenses but more importantly in terms of knowing the real situation of the minors which can be directly examined by the judges of that country. Given that the resolutions delivered in these matters should be guided by the best interests of the children, it should clearly be determined that the Spanish courts do not have jurisdiction to deliver judgements in respect of the measures requested by the father".

2. Contracts

- *AAP* Tarragona, 10 June 2004. *Web Westlaw* Jur 2004/204232.

Expressed submission to a foreign court under general purchasing conditions. Conditions unilaterally drafted by one of the co-defendants liable to go unnoticed due to their location in the contract. Execution of the contract in Spain.

"Legal Grounds:

(. . .) In the case under examination and in respect of determining whether conditions exist for the application of article 23 of Regulation EC 44/2001 and case law regarding article 17 of the Brussels Convention of 27 September 1968, the following observation need to be made: 1) all of the signers of the contract who figure as parties to this lawsuit have legal domicile in a European Union member country – Spain, and 2) the expressed submission clause is in favour of the courts of another member country – Germany. Having regard to the existence of an international situation in the litigious legal relationship, despite the fact that it is initially observed that all of the elements of the litigious legal situation are found in the same contracting state, Spain, the fact that one of the contracting parties (Lurgi) is an affiliate of a German company, has given rise to the incorporation of a number of clauses into the contract introducing foreign

elements and giving it international character (. . .) This court is unable to validate the expressed submission clause contained in clause 15.4 of the general purchase conditions because the said conditions were unilaterally drafted by one of the co-defendants and are included by way of an annex to a purchase order signed exclusively by Lurgi Española. This is despite the fact that the confirmation of the purchase order (where we do find the signature of Wanner y Vinyas S.A.) contains the words 'we acknowledge receipt of your purchase order and all of its annexes and we hereby accept the content thereof' because this does not imply that the expressed submission clause has been established in a clear, precise and explicit way by both parties or that it has been subscribed to by the party renouncing his own forum and designating the judge to hear the case (. . .) And lastly, it should be pointed out that the claimant as well as the defendants have their registered offices in Spain and that the contract giving rise to this litigation was executed exclusively in Tarragona (Spain). This leads us to consider that a hearing in a foreign court where there is a clear separation vis-à-vis the contract and the parties (despite the fact that one of the defendant companies is an affiliate of a German company) would make the practical defence of interests difficult which in turn would imply denial of their right to defence (. . .) Therefore the lack of international jurisdiction of the Spanish Courts and Tribunals filed by declinatory plea by both of the defendants is dismissed".

3. Non contractual obligations

– *AAP* Almeria, 31 May 2004. *Web Westlaw* JUR 2004/192811.

Brussels Convention of 10 May 1952 on the arrest of seagoing ships. Possibility for parties to come to a mutual accord agreement on the competent court to settle disputes. Article 58 *LECiv*/2000 not applicable. The court may not, *ex officio*, reject the claim based on an alleged lack of territorial jurisdiction.

"Legal Grounds

(. . .) An analysis should first of all be carried out in respect of the grounds for the appeal challenging the first instance resolution taking the view that the Court should not have questioned ex officio its own territorial jurisdiction given that the rules governing the designation of jurisdiction in accordance to the international treaty on the arrest of seagoing ships of 1952 are not imperative. The ground should be accepted although it is true, as indicated in the appealed resolution, that in principle the Brussels Convention provided for a series of alternative forums and it is up to the complainant to select one of them: a) the habitual place of residence of the defendant or the location of one his establishments; b) the place where the seizure of the accused ship took place or of another ship belonging to the same defendant or the place at which the seizure would have taken place if bail or some other form of guarantee had not been pledged and c) the place of arrest when the latter takes place at port, networks or internal waters. However, the establishment of such alternative elective

forums does not preclude the submission of the parties, either expressed or tacit, to a specific court in light of the fact that article 2 of the Convention specifically states that 'the provisions of article one shall not in any way prejudice the right of the parties to submit an action for reason of arrest to the jurisdiction agreed to by common accord nor shall they prejudice its submission to arbitration'.

Thus, the Convention expressly recognises the parties' right to, by mutual accord, to agree upon the competent court to resolve conflicts. This pact does not necessarily have to be made prior to the dispute (expressed submission) but can also be established following the filing of the claim given that the regulation does not foresee any restriction in that regard. The accused then submits to the forum designated by the complainant unless the latter, by means of a declinatory plea, prevents the Judge from performing an ex officio assessment of the lack of territorial jurisdiction, a faculty that may only be invoked in cases in which, by legal provision (or international treaty) expressed or tacit submission of the parties to a freely agreed forum or one selected by the complainant and accepted by the defendant is strictly prohibited. Thus article 58 of the *LECiv* is not applicable to the case at hand in which the Judge a quo inappropriately maintained her decision to declare the claim inadmissible due to lack of territorial jurisdiction given that the harmonic interpretation of articles 1 and 2 of the Brussels Convention of 10 May 1952 does not admit any other conclusion than that of considering that the elective forums enumerated in article 1.1 are subsidiary or additional and therefore only apply in the absence of expressed or tacit submission by the parties. This implies that the Court cannot ex officio reject the claim based on an alleged lack of territorial jurisdiction which, in the event of tacit submission (article 2 of the Convention considered jointly with article 56 of the Code of Civil Procedure), can only be agreed to upon request by either of the defendants once they have been summoned to respond to the claim (article 404 *LECiv*) by means of filing the requisite declinatory plea in accordance with article 59 considered jointly with articles 63, 64 and subsequent of the *LECiv*.

It is therefore not necessary to examine the remaining grounds put forth by the appellant in respect of the concurrence of one or several of the titles attributing jurisdiction laid down in article 1.1 of the Convention, an issue that must remain free of pre-judgement until a stand is taken by the defendant, the Order should be contested and the court should admit the claim and proceed in compliance with articles 404 *et. seq.* of the *LECiv* without prejudice to the pronouncement which could be made on its territorial competence if questioned by either of the defendants by means of a declinatory plea".

4. Lis pendens-related actions

– *AAP* Balearic Islands, 9 March 2004. *Web Westlaw* AC 2004/608.
Divorce case submitted to the German courts. Admission of the claim by the

Spanish court could give rise to contradictory resolutions in two lawsuits between the same parties and with the same purpose.

"Legal Grounds:

(. . .) According to the circumstances of this case, the Spanish courts should refrain from hearing this case due to lack of international jurisdiction. First of all, it must be reiterated that Council Regulation 1347/2000 of the Council of the European Union is not applicable to the case at hand because when the case was submitted to the German courts on 28 November 2000 the said Regulation was not yet in force bearing in mind that it envisages a period of *vacatio legis* until 28 February 2001 and article 42 thereof provides that it shall only be applicable to cases presented subsequent to its entry into force. Second of all, it must be acknowledged that the German court has jurisdiction to hear the divorce case submitted by Ms. María Inmaculada because the complainant has German nationality, resided there at the time that the claim was filed and lives with her son who has his habitual residence in that country. In this context, with the case having been declared admissible in Germany, a problem of international lis pendens arose because if the claim were declared admissible for hearing before a Spanish court, contradictory resolutions could be delivered in the two litigations between the same parties and focusing on the same issue. Quite clearly if the claim had not been filed in Germany (Mr. Cornelio being notified on 28 April 2003) a month before the claim was filed in Inca, the Spanish court would have had jurisdiction given that the party initiating the claim is of Spanish nationality and resides in Spain. Therefore there should be no doubt in the mind of the appellant: It is not that the Spanish court in and of itself lacks jurisdiction. It could have initially admitted the claim and been declared competent. The fact is that another element which was initially ignored has come into play and jurisdiction was therefore handed over to the German court given that the same claim was filed there at an earlier date. Therefore, when this circumstance became known, lack of international jurisdiction was acknowledged and the court refrained from hearing the claim".

III. PROCEDURE AND JUDICIAL ASSISTANCE

– *AAP* Barcelona, 16 July 2004. Web Westlaw JUR 2004/224117.

Bilateral agreement between Spain and the Union of Soviet Socialist Republics. Application of Spanish law to acts of procedural communication. Defencelessness.

"Legal Grounds:

Ms. Rocio and Ms. Carmen filed a claim before the Court a quo against Ms. Milagros calling for recognition and enforcement of a judgement delivered on 19 April 2002 by the Oktiabrski regional court (. . .) in request of compensation for material and moral damages in the amount of $US 635,937 for Ms. Rocio and $US 30,000 for Ms. Carmen.

(. . .) In dismissing the appeal for reversal the disputed ruling alluded to (in respect of notifications) the International Convention on the service abroad of

judicial and extrajudicial documents in civil or commercial matters concluded at the Hague on 15 November 1965. However, the rule of specification calls for compulsory application first of the bilateral agreement concluded between the Kingdom of Spain and the Union of Soviet Socialist Republics regarding judicial assistance in Civil matters signed on 26 October 1990. Article 27.4 of the said agreement indicates that the enforcement proceeding shall be governed by the law of the Contracting Party in whose territory said resolution shall be enforced. This implies the application of article 161.2 of Law 1/2000 of 7 January in conjunction with article 553.2 of that same law. From the first precept and the content of the proceeding dated 23 April 2003 the notification can be assumed as having been carried out. It should also be added that the documentation attached to the first Letter Rogatory shows no indication whatsoever that the defendant is unaware of this enforcement procedure".

– *AJ* 1ª I. Vizcaya, 5/2004, of 14 February. *Web Westlaw* AC 2004/823.

Acts of procedural communication. The need for international notification. Notification may not be made to the co-signer.

"Legal Grounds:

Article 155 of Law 1/2000 (RCL 2000, 34, 962 and RCL 2001, 1892) of the Code of Civil Procedure (*LECiv*) states that in the case of the first summons or citation, acts of communication shall be undertaken by means of delivery to the domicile of the litigants. Consequently, citation in the case of oral proceedings must be verified, an attempt being made to deliver the citation at the domicile of the defendant, the London Steam-Ship Owners Mutual Insurance Association Limited. In the case of oral proceedings the domicile should be provided by the claimant in the abbreviated claim (article 437.1 *LECiv*) or, if appropriate, in the ordinary claim (article 399.1)

This is the preferred legal formula for the delivery of a hearing citation. The other channels, i.e. delivery to a third party which was the intention of the claimant, consultation of the Civil Default Register or public notice, are clearly subsidiary from a legal standpoint, fruit of constitutional doctrine on judicial protection guaranteed under article 24 of the Constitution (RCL 1978, 2836), implying the responsibility of the court to see that acts of communication, especially those involving the possibility of taking part in the hearing, reach the addressee.

The interpretation made by the appellant that article 51.1 of the *LECiv* allows for the summons to oral proceedings to be served through the consignee entity in Bilbao is not valid because the said rule refers to an establishment open to the public, an establishment that does not exist, or an authorised representative in the place where the legal situation or relationship is to take effect.

We shall put aside the thorny subject of territorial jurisdiction for although the event took place at the Sopelana beach, judicial circumscription of Getxo, this court accepts jurisdiction in order to avoid the filing of a negative juris-

dictional conflict (article 60 *LECiv*) before our provincial court which is notorious for taking several years to sort out.

The fact is that the defendant, the London Steam-Ship Owners Mutual Insurance Association Limited, has a consignee agent in Bilbao by the name of Bereincua Hermanos, SA that the claimant considers an 'authorised representative' for the purpose of receiving a hearing citation. Something therefore needs to be said about the characteristic representation of consignees.

(. . .) Therefore, from a legal standpoint, the consignee represents the ship-owner but does so in the strict terms of article 73.2, i.e. for the purpose of the aforementioned Ports Law in dealing with claims from the port authority regarding tariffs or services generated by its ships.

(. . .) Indeed the claim here is based on article 1902 *CC* regarding charges filed by a surfer against the ship-owner and the ship *Prestige* for negligence for the oil stains sustained by his surfboard during the days that Cantabrian Sea was affected by an oil spill from that ship. In other words, no claim is being made for maritime transport or damaged goods. The ship in question does not have a Spanish owner, is not insured by a Spanish company, did not set sail from a Spanish port and did not dock in national territory. Moreover, the aforementioned consignee, Bereincua Hermanos, SA did not take part in the transport contract which could, in a certain sense, have justified its association with the ship-owner.

Having established that there are no grounds for serving the summons to a third party, when the complainant has the means to identify the registered office of the defendant, as was stated in the appealed decision, that does not mean that the defendant may not be summoned to take part in the oral proceedings. In light of the company name the defendant seems to be British and is therefore from a country forming part of the European Union thus making postal communication quite simple.

This means that the London Steam-Ship Owners Mutual Insurance Association Limited can be summoned at its registered office in Great Britain since on 10 December 1965 that country signed the 15 November 1965 Convention on the service abroad of judicial and extrajudicial documents on civil matters subscribed to by Spain as well as published in the Official State Gazette on 25 August 1987.

In light of all of this data the only conclusion that can be reached is that the defendant may not be summoned to take part in oral proceedings through the consignee company Bereincua Hermanos SA with registered office in this city of Bilbao. An attempt must be made to serve the summons at the defendant's registered office in the United Kingdom the address of which should be provided by the claimant and if the latter was able to consult the web page to show that the Bilbao company was the consignee, he should also be able to accomplish the simple task of identifying the company's registered office in Great Britain".

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS AND DECISIONS

1. Family

– *ATS*, 8 June 2004. *Web Westlaw* RJ 2004/3820.

Request for recognition of a foreign divorce judgement. Lack of jurisdiction of the Supreme Court. LO 19/2003. Jurisdiction of the first instance courts.

See also, in the same sense, *ATS*, 20 April 2004, RJ 2004/3449; *ATS*, 11 May 2004, RJ 2004/4715.

"Legal Grounds:

(. . .) In compliance with the provisions of sole article, paragraph eleven of Organic Law 19/2003 of 23 December (RCL 2003, 3008), amending Organic Law 6/1985, of 1 July (RCL 1985, 1578, 2635) of the Judiciary (Official State Gazette of 26 December 2003) in force as of 15 January 2004 and according to which 'in civil matters the first instance courts shall hear: 5. Request for recognition and enforcement of foreign judgements and other judicial and arbitration resolutions unless, in accordance with treaties and other international rules, these cases must be heard by another court or tribunal'. Therefore, it must be affirmed that this Court lacks jurisdiction to hear the request for *exequatur* of the judgement whose recognition is sought which was submitted to this Court on 19 February 2004 when the said Organic Law was in force".

– *ATS*, 2 March 2004. *Web Westlaw* RJ 2004/1321.

Exequatur of a divorce judgement delivered in Morocco. Objective lack of jurisdiction of the Supreme Court. Cooperation Agreement between Spain and Morocco signed in 1997. Jurisdiction of the Court of First Instance ex article 955 *LECiv*/1881.

"Legal Grounds:

(. . .) Article 25 of the Judicial Cooperation Agreement on Civil, Trade and Administrative Matters between the Kingdom of Spain and the Kingdom of Morocco signed at Madrid on 30 May 1997 (Official State Gazette issue 151 of 25 June) provisionally entering into force on 30 May 1997, the date of its signing, and definitively on 1 July 1999 (Official State Gazette 151 of 25 June 1999), establishes as the competent authority 'the court of first instance – sic – of each of the contracting states' thus granting the right of enforcement of the resolution, upon request of the interested party, in accordance with the law of the State in which the said enforcement is requested. Therefore, it must be affirmed that this Court lacks jurisdiction to hear the request for exequatur of the judgement whose recognition is sought which was submitted to this Court on 21 July 2003 when the Agreement was in force".

– *ATS*, 17 February 2004. *Web Westlaw* RJ 2004/1421.

Denial of *exequatur*. Divorce by mutual agreement. Notary writ issued in Cuba. Domicile of the spouses in Spain at the time the divorce was processed before the Cuban authorities.

"Legal Grounds:

(. . .) Given that there are no international instruments applicable to the case at hand, this request for recognition must be examined in light of the conditions laid down in *LECiv*/1881 (articles 951 and *et. seq.*) (. . .). The request for recognition cannot go forward due to an insurmountable obstacle standing in the way of the homologation pursued, i.e. the fact that both parties were officially residing in Spain at the time the divorce request was being processed in the State of origin. It should not be forgotten, for recognition purposes, that in verifying the concurrence of forums of international judicial jurisdiction the underlying purpose is to admit the said jurisdiction – always for the purpose of the homologation sought – based on a criteria of proximity to the object of the process allowing for the guarantee of procedural rights and guarantees, avoiding litigation before jurisdictional bodies that, due to their disconnection from the subject of the litigation, put the defendant in a position of defencelessness and preventing fraudulent behaviour by the parties who may be seeking forums of convenience which assure application of more favourable or advantageous material rules. In this *exequatur* proceeding the resolution whose recognition is sought shows that both spouses had domicile in Spain at the time their divorce was being processed by the Cuban authorities. In this context it is difficult to understand why the parties would turn to the Cuban authorities to request their divorce unless their real intention was to consciously and deliberately seek a forum of convenience allowing them to avoid the rigours imposed by applicable substantive law, subjecting the issue to the foreign forum in order to receive more favourable treatment than would have been received vis-à-vis the substantive law applicable in the said State in accordance with its laws. In light of these circumstances, any other links to Cuban jurisdiction such as the place where the marriage ceremony took place or the fact that the wife has Cuban nationality, which in principle are valid even when removed from the criteria of Spanish law, should be foregone given the facts of this case. In summary, the concurrence of circumstances justifying the jurisdiction of the foreign authority cannot be confirmed nor can the suspicion of fraudulently seeking a forum of convenience be reasonably excluded. Actually, it appears that submission to Cuban authorities is precisely due to reasons of this nature and this is even more evident when considering the short lapse of time between the date of the marriage and that of the divorce whose recognition is sought".

– *ATS*, 20 January 2004. *Web Westlaw* JUR 2004/54332.

Concession of *exequatur*. Danish judgment regarding the marriage separation between a Spanish woman and a Danish man recognised in Zaragoza. Articles 954 and et. seq. *LEC* 1881.

See also, in the same sense, *ATS*, 20 April 2004, RJ 2004/3450.

"Legal Grounds:

(. . .) Given that there is no treaty with Denmark nor any applicable international rules governing matters of recognition and enforcement of judgements,

the general regime of article 954 *LECiv* (of 3 February 1881 should apply – still in force in accordance with the provisions of Sole Repeal Provision, paragraph one, exception three of the *LECiv* 1/2000 of 7 January – since negative reciprocity has not been detected (article 953 of the aforementioned law of 1881). According to the law of the state of origin applicable to the case, resolutions are final. This is a prerequisite, regardless of the recognition regime, laid down in article 951 (of the aforementioned *LECiv*/1881 – in this regard it is not solely pertinent to the conventional regime if it is read jointly with the following precepts – and doctrine established by this court . . . Requisite No 1 of article 954 of the aforementioned Law of 1881 should be considered fulfilled in light of the personal nature of the action taken. As for requirement No 2 of the same article 954, it has been accredited that the proceeding was initiated by common accord of the spouses. As for requisite No 3 of article 954, there is full conformity with the Spanish legal system in an international sense: article 81 of the Civil Code envisages the possibility of separation regardless of the nature or duration of the marriage. As for the rest, the fact that a basically administrative and therefore not strictly jurisdictional character is attributable to the resolutions pending recognition (they are issued by an authority of that order) is not contrary to the Spanish legal system. The authority before which the petition was submitted acted with full "imperium" and was the competent body to authorise separations by mutual accord and other measures in respect of the children born of the couple in accordance with "lex fori". These circumstances lead this court to consider the case within the limits of the legal system in an international sense as has been done previously in similar cases. The authenticity of the resolutions as required by article 954(4) is guaranteed by the legalisation with which the case has been processed as verified in the court record. There is no reason to suspect that the jurisdiction of the Danish authorities was born of the parties' search for a fraudulent forum of convenience. Article 6(4) of the Civil Code and articles 22.2 and 3 of the *LOPJ* do not establish forums of exclusive jurisdiction as article 22.1 of the same Organic Law does but in this case circumstances in favour of the jurisdiction of the Spanish courts do not concur. Quite to the contrary, there are clear connections such as the Danish nationality of the husband and residence of the spouses in Denmark when the case was filed before the Danish authorities, reasons allowing for the exclusion of fraud in terms of the law applicable to the substance of the case, an issue linked to the former. There are no indications of contradiction or substantive incompatibility with judicial decisions delivered or cases pending in Spain".

– *ATS*, 15 de June 2004. *Web Westlaw* JUR 2004/207253.

Denial of *exequatur*. Article 954.3 *LEC*. Not reconcilable with due process in Spain.

"Legal Grounds:

(. . .) Given that there is no treaty with the Republic of Argentina nor any applicable international rules governing matters of recognition and enforcement

of judgements, the general regime of article 954 *LECiv* (of 3 February 1881 should apply – still in force in accordance with the provisions of Sole Repeal Provision, paragraph one, exception three of the *LECiv* 1/2000 of 7 January – since negative reciprocity has not been detected (article 953 of the aforementioned law of 1881). In light of the grounds for opposition articulated by the party against which the *exequatur* is aimed, examination of the concurrence of conditions for recognition, in accordance with the general regime of conditions of the *LECiv* of 1881, requires control of requirement 3 of article 954 (of the aforementioned *LECiv* of 1881) – conformity with the Spanish legal system in an international sense.

This Court, regardless of whether the different conventional rules regulating the conditions for the recognition of the effects of foreign decisions so require, has established as an essential condition for the *exequatur* of a foreign judgement (and which may form part of the concept of the legal system in an international sense) the fact that the said judgement must be reconcilable with a previous judgement delivered or recognised in Spain and that there be no case pending in Spain which could give rise to a judgement that is incompatible with the foreign judgement. In principle, the parties need not be identical nor must there be absolute coincidence between object and cause, nor is it a requirement that the proceeding taking place in Spain be initiated subsequent to the one carried out abroad. It should be recognised, however, that the concurrence of these circumstances would make an "a postiori" argument for denial of *exequatur*. Under these conditions, it must be recognised that Spanish proceeding No 792/02 of First Instance Court No 3 of San Sebastian delivered an order (confirmed by a superior court) which "denied the request for restitution to the Republic of Argentina of the minors Penelope and Eugenio". This constitutes a clear obstacle for the recognition sought in this case.

In this context, recognition in Spain of a foreign judgement in such a way that its effects under the legal system of origin can be implemented in our country, is in unavoidable conflict with the very efficacy of the national resolution and especially, with the res judicata produced, preventing the possibility of another pronouncement regarding the same issue between the same parties which eventually could be different, with the resulting risk of subverting the harmony that is an essential element between judicial decisions forming part of states' domestic legal systems, running the risk of causing irreparable damage to the legal security in relations between parties".

3. Contracts

– *AAP* Balearic Islands, 14 October 2004. *Web Westlaw* JUR 2004/285896.
Concession of *exequatur*. Article 27 of the Brussels Convention.

See also, in the same sense (articles 27 and 28 of the Lugano Convention), *AAP* Zaragoza, 30 March 2004, *Web Westlaw* JUR 2004/137114.

"Legal Grounds:

(. . .) In this context, upon examination of the documents attached to the

request for recognition including the enforcement order whose *exequatur* is requested and in light of the grounds for appeal against the ruling in favour of the said *exequatur*, it should be concluded that there is no reason whatsoever to believe that the circumstances of this case coincide with conditions laid down in article 27 of the Brussels Convention which would call for refusal of the *exequatur*. Therefore, the appeal should be dismissed regardless of the fact that the appellant, at the proper procedural moment, i.e. upon filing request for the enforcement of the resolution of 29 October 1993, made the corresponding allegations in that respect within the time frame afforded to oppose enforcement".

– *AAP* Las Palmas, 26 April 2004. *Web Westlaw* JUR 2004/150691.

Concession of *exequatur*. Article 27 of the Brussels Convention, defencelessness attributable to the defendant.

"Legal Grounds:

(. . .) The grounds for appeal alleged by Mr. German are based on article 27.2 taken in conjunction with article 46.2 both of the Brussels Convention of 27 September 1968 which is applicable to this case. In accordance with these precepts, the foreign resolution shall not be recognised when it is delivered in default and the defendant had not received the summons or some equivalent document in standard fashion and with sufficient time to defend himself (. . .). In light of the foregoing doctrine, this appeal focuses on determining whether the appellant, in the claim filed against him in an English court of law, had or did not have the same opportunities to defend himself afforded to all citizens by our Law (. . .). From this perspective it is obvious that the appellant's pretensions do not merit favourable treatment in this appeal. First of all, and as the appellant himself states, the attached documentation makes no mention of Mr. German being declared in contempt of court and that is because he never was, not in the strict formal or procedural sense and less still in the sense he is seeking. The certification attached to the request in this proceeding clearly shows that Mr. German was properly summoned by being served notice of the claim and the defendant himself actually signed the acknowledgement of receipt on 23 June 1998 and was informed in compliance at all times with English procedural rules. Annex 3 shows that Mr. German made two sworn statements before the English court in June of 1998. It is likewise clear that the appellant employed the assistance of a lawyer and once the condemnatory judgement was delivered he filed an appeal which was heard by the English appeals court. Under these circumstances, the only documents required are the authenticated copy of the resolution and any document accrediting that under the law of the State of origin the said resolution has been notified and is enforceable and this has been complied with here. It should be mentioned that in this case the documentation also indicates that the defendant was provided with the time and the means by which to defend himself and any defencelessness that could be contrived from his failure to attend the hearing held on 30 January 2002 is only attributable to the defendant himself. The situation on which the appellant bases

his argument is an individual sort of default devised for the convenience of the said appellant and has no constitutional ramification whatsoever. Despite having been properly summoned and cognoscente that the case was being heard, the appellant heeded the call of the court only when he saw fit to do so. Note that he did not even appear before the Court a quo when he was served notice at the first instance stage with regard to the request for recognition and enforcement".

– *ATS*, 20 January 2004. *Web Westlaw* JUR 2004/54318.

Denial of *exequatur*. Failure to personally notify defendants of the judgement: constituting the only means by which the said defendants could have filed appeal through ordinary channels against such judgement. Judgement lacking sufficient grounds: impossible to determine the legal reasons justifying the conviction.

"Legal Grounds:

(. . .) Having regard to the compulsory notification of judgements it should not be forgotten that the personal communication to the defendants of the results of the lawsuit is the only means by which the said defendants can file an appeal through ordinary channels against such judgement. This issue is clearly important with regard to procedural guarantees which undoubtedly inform the concept of public order in an international sense. Based on this premise, the requirement of personal notification of the judgement was clearly not complied with. Nothing is mentioned in this respect on the 'incidence list' attached and the expression contained on foreign resolutions 'With copy sent to:' followed by the name of the defendants and their address in the United States. Even if the hypothetical delivery could be accredited, this in no way proves the defendants' effective reception of the said judgements. The aforementioned lack of notification cannot be justified by the fact that the defendants were declared in default and that the said default was considered voluntary because, on the one hand, it has not been shown that in accordance with this foreign law the fact that the defendants were declared in default releases the courts from the responsibility of all subsequent notification including the judgement itself. And, on the other hand, even if the latter circumstance had been proven in light of the foreign law governing the proceeding of origin, the fact is that it would not have been accepted under domestic law. In light of the above, the appeal should be admitted and the *exequatur* requested declared inadmissible given that the requesting party failed to show that the defendants had personal knowledge of the results of the litigation".

V. INTERNATIONAL COMMERCIAL ARBITRATION

– *ATS*, 27 January 2004. *Web Westlaw* RJ 2004/1572.

Concession of *exequatur* regarding a resolution delivered by a German court. Defencelessness on the grounds of not knowing the language non-existent.

"Legal Grounds

(. . .) The party against whom recognition and enforcement of the foreign

decision is sought opposes the concession of the *exequatur* claiming, first of all, what he refers to as "language problems" in reference to the fact that both the introductory writ of the arbitration as well as the arbitral award and the acts of communication between one and the other were drafted in English or German and using technical language which is difficult for a person without a good command of those languages to understand. He claimed that this precluded his understanding and led to his rejection of those texts. The argument is in line either with violation of the regulatory rules of notarial legislation – an attempt was made to deliver notification of the arbitral award through this channel – due to the fact that the summons was not accompanied by a translation into Spanish of the act whose notification was intended or with violation of constitutionally recognised procedural guarantees given that the defendant was left defenceless because of the language used during the arbitration proceeding and for acts of communication between the parties.

The allegations made by the party opposing the *exequatur* should be examined from the perspective of the grounds for denial of recognition laid down in article V of the New York Convention paragraph one letter d) and paragraph two letter b). Neither of these two perspectives provides sufficient grounds for preventing the homologation sought. First of all, it has not been established by means of the facts alleged that what was agreed between the parties in respect of the arbitration proceeding was not upheld or that such facts represent a violation of the law of the country in which arbitration has taken place. Indeed the action of the arbitration court is in full compliance with the Arbitration Court Regulation Waren-Verein der Hamburger Börse e.V., regulating the proceeding at that arbitration institution to which the litigants were subject and article 12 of which (focusing on the language to be used by the arbitration court) states that the court shall determine the language to be employed throughout the arbitration proceedings. As a general rule, the German language should be used although the court could order or permit the use of a foreign language for specific actions during the proceeding especially for the testimony of a witness who does not speak German and likewise for the drafting of a claim, for other documents and for the submission of any document drafted in a foreign language. Second of all, in respect of notification of the arbitral award, the case file shows a summons issued to a Spanish notary public who bears witness to the fact that the aforementioned arbitration resolution was accompanied by the corresponding Spanish translation which would have permitted the opposing party to take full stock of its content if its delivery had not been rejected for no apparent reason. And third of all because in any case, from the perspective of respect for constitutionally recognised procedural rights and guarantees, the content of which is recognised by the procedural branch of the legal system, and especially upon examination of the allegation from the point of view of defencelessness prohibited by article 24.1 of the Spanish Constitution, it must be recognised that for the said allegation to be considered constitutionally relevant, it must be substantive and effective and not purely nominal formal or apparent. And it is not

easy to recognise the defencelessness of a person in these circumstances, taking part in international trade and voluntarily entering into a contract with a foreign company and voluntarily availing oneself to foreign law and a foreign arbitration institution; valid submission which envisaged being subject to the regulatory rules of the proceeding including, as mentioned above, rules regarding the language used by and before the arbitration court. It should also be added that language differences per say cannot be used to claim supposed defencelessness capable of undermining recognition of a foreign resolution. This is even more true when the language used throughout the arbitration proceeding is the same as the one used in drawing up the contract. And in this case the language used is that of the purchasing party and was not an impediment for the selling party's (the complainant in this case) comprehension of the content of that contract. In short, this cannot be grounds for a party involved in international trade where language differences are commonplace. Thus, traders involved in this market should favour the adoption – or at least envisage the adoption – of specific measures for the proper undertaking of business relations including cases which could turn litigious".

– *ATS*, 3 February 2004. Web Westlaw RJ 2004/3112.

Concession of *exequatur* of arbitral award delivered in London. Application of the New York Convention.

"Legal Grounds

(. . .) In accordance with the rules laid down in the New York Convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958 applicable to this case, given that the resolution whose recognition is sought is covered in article I of the Convention, the requesting party furnished the documents referred to in article IV, duly translated into Spanish, and also confirmed the enforceability of the arbitral judgement. The circumstances giving rise to the arbitral proceeding are liable for submission in Spain to an arbitration hearing and the repeated arbitral judgement is not in conflict with the Spanish legal system (article V.2). Before analysing the causes for opposition alleged by the company against the other seeking the *exequatur* of the arbitral award, it should be pointed out that the allegation system and the requisite distribution of burden of proof laid down in the New York Convention, on the one hand, and respect of the adversarial system and equality of arms in the proceeding forming part of the constitutionally recognised procedural guarantees, on the other, point to the need of the party requesting recognition, the party solely responsible, in principle, for alleging and confirming the concurrence of circumstances calling for homologation laid down in article IV taken in conjunction with article II of the Convention, to be served notice of the causes for opposition to the *exequatur* submitted by the other party against the said homologation in order that such requesting party may have the opportunity to formulate arguments against these causes and confirm circumstances that would disprove them. But this does not open a successive, reciprocal and unending process of allegations and evidence

between the parties because in the procedural acts the opportunities for defence of one or the other parties is not envisaged. The party opposing the *exequatur* is therefore not entitled to take advantage of compliance with the order issued to by this court calling on the said party to furnish the requisite translation of those documents supporting defence allegations presented in compliance with article 956 of *LECiv*/1881, to add new allegations and submit new documents in light of the terms of the writ responding to the questions formulated and the documentation attached to the said writ. These new allegations and documents should therefore not be taken into consideration in the resolution of this recognition issue. Further expounding upon the foregoing, the conditions are set to analyse the causes that, in the view of the party concerning which enforcement of the foreign decision is sought, prevent the homologation of the latter. The *exequatur* is opposed affirming the concurrence of the causes for denial of recognition laid down in article V(1)(b) and V(2)(b) of the New York Convention. Opposition is based on the same facts viewed from a different perspective; i.e. the arbitral institution failed to furnish proper notification of the arbitral resolution. The opposing party only received a copy from the claimant and therefore, given that the said party was unable to confirm the authenticity of the resolution received, he could not properly exercise his right to defence, filing within the deadline an appeal or other means of challenge envisaged in the rules governing the arbitration proceeding. This is the basis of the claim of defencelessness affirming the arbitral decision's violation of legal procedure.

However, these allegations do not justify the objective sought. First of all, in respect of notification of the decision, the requesting party furnished a certificate issued by Mr. Alvaro to the Federation for Oils, Seeds and Fats Association Ltd. – the arbitral institution- which indicated that the decision was final and binding and that the party now opposing its recognition was late in filing his appeal against the arbitral decision meaning that the said appeal was received past the deadline date. The said certificate goes on to confirm that the attached documents are authenticated copies of the originals which were sent to the *Sociedad Ibérica de Molturación, S.A.*, and include the certified letter sent by the aforementioned arbitral institution dated 12 December 2000 to the aforementioned entity to which a photocopy of the decision was attached in accordance with regulatory rules governing arbitration proceedings. A copy of the said letter has likewise been included in the case file together with the photocopy (which has not been challenged) of the postal service remittal document. Reception of this delivery has not been verified, only its remittal, but the opposing company does not deny having received this delivery but simply alleges that the photocopy of the arbitral award was not included. This does not, however, coincide with the content of the aforementioned certification of the arbitral institution. However, if despite the actions described above there still were doubts surrounding the effective reception by the opposing company of the arbitral resolution whose recognition is sought, these doubts would be cleared up once and for all upon examination of the content of the fax furnished by the requesting party con-

taining the letter sent by SIMSA on its own letterhead paper. This letter was sent to the arbitral institution as well as to the requesting party as acknowledgement of receipt of the decision whose recognition is sought and indicated the company's intention of studying the content of that decision and the possibility of filing a challenge.

It is at this point that the case surrounding the causes for denial of *exequatur* proposed by the opposing party begins to crumble. Whether examined from the perspective of article V(b) of the Convention or in accordance with the requirements of the international legal system, in light of the fact that the arbitral award was indeed received, the opposing party failed to prove, as was its obligation, that the said notification was contrary to the rules governing the arbitration proceedings or that the inadmission of the appeal against the ruling which was filed late was incorrect or in violation of procedural rules. And from the perspective of legal procedure, of constitutional content as is well known, the irrelevance of the opposing party's allegation becomes clear when the latter fails to establish that its right to defence has been violated for having been unduly deprived of the means and channels of appeal whether through an arbitrary decision with no legal base or grounds, or through a decision based on a clearly irrational interpretation of legality or based on a proven error, or through a resolution based on excessive and disproportionate formalities vis-à-vis the aims guaranteed by regulatory norms regarding access to appeal procedures laid down in the applicable procedural guidelines. In light of the foregoing, the grounds for opposition to the *exequatur* proposed by the defendant company should be dismissed and the decision should be declared enforceable".

– *ATS*, 20 July 2004. *Web Westlaw* RJ 2004/5817

Application of the 1969 Agreement signed between Spain and France or of the 1958 New York Convention to the *exequatur* of the ruling delivered by the Paris International Chamber of Commerce.

"Legal Grounds:

This sort of concurrence of regulations should be resolved, first of all, by attending to the rules regarding relations contained in each one of the aforementioned international instruments and then (and mainly) by attending to the principles that underlie the regulation of the recognition of decisions and the extra-territorial efficacy of resolutions (. . .).

This conflict of rules must then be resolved in accordance with the rule of specification which entails a preference for the supra-national rule (in light of its content) over the general rule and in accordance with the principle of maximum efficacy or a preference for the recognition of foreign decisions. Both of these principles displace the application of the bilateral agreement in favour of the multilateral one whose rules are rooted in the assumption of the validity and efficacy of the agreement to submit disputes to arbitration as well as the arbitral ruling or resolution resolving the said disputes (cfr. article II.1 and III.1 of the New York Convention). The said rules also envisage the transfer of burden

of proof to the party reluctant to accept the efficacy of the arbitral resolution (article V.1 considered jointly with articles IV.1 and V.2 of the Convention) thus establishing a more favourable recognition regime than that provided for in the aforementioned bilateral agreement".

VI. CHOICE OF LAW: SOME GENERAL PROBLEMS

1. Classification

- *SAP* Castellón, 21 January 2004. *Web Westlaw* AC 2004/452.
See X.4. Marriage

a) Proof of foreign law

- *STC*, 4 March 2004. *Web Westlaw* RTC 2004/29

Labour contract between a worker of Guatemalan nationality, resident in the US and the Spanish Consulate in Los Angeles. Proof of foreign law.

"Legal Grounds:

As is explained in detail in the background information, although the *petitum* of the petition for protection of the court is directed exclusively against the judgement handed down by the Social Affairs Division of the Supreme Court on 22 May 2001 (RJ 2001/6477), in this constitutional proceeding the petitioner claims that the judgement delivered by the Madrid High Court of Justice on 4 May 2000 rejecting his claim for dismissal, filed in response to dismissal by the Spanish Consul in Los Angeles (California, United States of America) in application of the California Labour Code (article 2922), violated his fundamental right to effective protection of the courts (Spanish Constitution article 24.1 [RCL 1978/2836]).

Following the order of violations put forward by the appellant, the first claim regards violation of the right to effective protection of the courts (Spanish Constitution article 24.1) in relation with articles 9.3, 117.3, and 118 of the same legal text claiming that the allegation, burden of proof and application of foreign law criteria followed in the appealed judgements contradicts case law on this point established by the Constitutional Court, the Supreme Court itself and likewise other lower courts. As a consequence of this resolution the burden of proof was inverted, becoming the responsibility of the complainant and thus causing his defencelessness.

In the view of the Counsel for the State, the request filed for protection should be denied because it does not comply with the requirement laid down in article 44.1 c) *LOTC* (RCL 1979/2383) because in the appeal for unification of doctrine the complainant failed to claim any violation of a fundamental right and simply claimed that the burden of proof in foreign law was the responsibility of the defendant, that the latter had not furnished such proof and that

therefore the case should be resolved applying Spanish labour law, lex fori, an argument of mere ordinary legality. He goes on to state that in this case there is no problem in the allegation and burden of proof of foreign law but there is rather a defect in the construction of the claim by the party who is now the appellant given that the latter, unaware of the conflict rule laid down in article 12.6 of the Civil Code (LEG 1889/27) (*CC*) which refers the case in an easily intelligible fashion to foreign law, bases his claim exclusively on Spanish law.

. . .

Before determining whether the right to effective protection of the courts has actually been violated as the appellant claims, an analysis of the procedural objection raised by the Counsel for the State must be analysed. As was indicated, in his writ the latter made a reference, as has already been mentioned, to the cause of inadmissibility as the lack of formal invocation of a violation of constitutional law in the proceeding and in the event that such a violation were proven, the claim would be admissible. If this circumstance actually were to arise, that would be grounds for non-admission envisaged in article 50.1 a) *LOTC* (RCL 1979/2383), in relation with article 44.1 c).

. . .

The prior invocation requirement has a dual purpose: on the one hand, to give judicial bodies the opportunity to rule on possible violation and re-establish, as needed, constitutional law in ordinary jurisdictional terms and, on the other hand, to preserve the subsidiary nature of the constitutional jurisdiction of protection . . .

As the Counsel for the State points out in this case, the judgement delivered in first instance dismissed the claim because it was proven that foreign law was applicable by means of a certificate submitted by the Spanish administration.

An appeal for reversal was filed by the claimant's legal representative and the first three grounds of that appeal requested a review of proven facts No 4 to 6. Ground four was based on violation of article 12.6 *CC* (LEG 1889/27) and case law interpreting the latter. The fifth and last ground for reversal claimed non-application of article 12.3 *CC* (public order). None of these grounds would even suggest infraction of fundamental law as now invoked.

The judgment handed down by the Social Affairs Division of the Madrid High Court of Justice on 4 May 2000 rejected the first three grounds for reversal. In addressing the other two the Court seemed to accept that the defendant (the General State Administration, Ministry of Foreign Affairs) failed to establish the law in force in California on the date that the worker was dismissed although this is not grounds for the application of Spanish law as the appellant holds. Quite the opposite is actually true. Once confirming that foreign labour law governs the employment contract, it was actually the complainant – according to the court – who should have proven it and he failed to do so.

The claimant filed a Supreme Court appeal for the unification of doctrine on 2 June 2000 clearly stating that the litigious issue focused on which party to the litigation, pursuant to article 12.6 of the Civil Code, has the burden of

proof, an issue of ordinary legality without any constitutional repercussions whatsoever. Logically, upon filing the Supreme Court appeal for the unification of doctrine on 5 July 2000, the only ground was that based on infraction of articles 1214, 12.6 and 6.4 *CC* and likewise article 12.3 *CC* in relation with different precepts of the workers' statute and article 10.6 *CC* and therefore no constitutional problem or issue was either directly or implicitly addressed. The arguments made were of simple legality and were limited to pointing out that proof of foreign law was the responsibility of the defendant, that the latter failed to furnish such proof and that therefore the issue should be resolved by applying Spanish labour law, *lex fori.*

In short, the party requesting protection failed to invoke alleged violation of fundamental rights at the proper moment and thus failed to comply with the requirement set out in article 44.1 c) *LOTC* (RCL 1979/2383); the two grounds for protection could have been valid at the Supreme Court Appeal".

– *STC*, 18 October 2004. *Web Westlaw*. RTC 2004/172.

Labour contract between a Spanish national and the Spanish Consulate in Montevideo (Uruguay). Proof of foreign law.

"Legal Grounds

This petition for protection of the court is aimed against the Judgements . . . determining that the dismissal was legitimate in accordance with Uruguayan law declared applicable to the case.

In the view of the petitioner for protection, the said judicial resolution is in violation of his fundamental right to effective protection of the courts (Spanish Constitution article 24.1 [RCL 1978/2836]) and of the criteria followed in this regard by this Constitutional Court in several different judgements, . . . on three accounts: for having applied Uruguayan law to the labour relationship when the criteria established by case law of the Supreme Court and of the very High Court of Justice given identical case facts is to apply Spanish legislation; for failing to accredit the said Uruguayan law in the case file which should have led to the application of Spanish law in light of the lack of proof of foreign law; and for failing to make mention of the law applied in the judgement so that this could be contested in the appeal for reversal thus causing a situation of defencelessness of the complainant due to lack of sufficient grounds. Indeed, the lack of sufficient grounds of the appealed judgements is the complaint which sets the stage for the classification of the three dimensions alluded to in the claim within the framework of the fundamental right to effective protection of the courts; the last of these directly given that the appealed resolutions failed to make mention of the Uruguayan law applied. As regards to the criteria adopted in the case of the first two according to which, in the view of the complainant, the judicial bodies diverged from proven case-law criteria, they should have been backed by further grounds in the absence of which it must be considered that the said resolutions are the fruit of a whimsical and irrational approach leading to the defencelessness of the complainant.

In contrast, the Counsel for the State denies that the alleged violations actually took place. Rather than a violation he points to the existence of a procedural obstacle standing in the way of admission of this appeal for protection consisting of failure to invoke, at the preliminary judicial stage, the fundamental right deemed violated in relation with two of the three alleged violations. Indeed, the appeal for reversal lodged against the first instance judgement only invoked the right to effective protection of the courts regarding the third of the three violations concerning the judgement's lack of sufficient grounds due to failure to cite the Uruguayan law applied. Independent of that fact, however, the Counsel for the State goes on to indicate that none of the three alleged violations exhibits even the most minimum consistency which would warrant granting protection of the court: the first because the list of case-law criteria do not actually exist and not even the Supreme Court judgement cited in the appeal or the STC 10/2000 of 17 January (RTC 2000/10), refer to litigation resembling that under analysis here; the second because there was no lack of proof of Uruguayan law as alleged by the complainant; and the third because the Uruguayan law applied, although not explicitly cited in the judgement, is sufficiently identified and was, in any case, subsequently made explicit in the reversal judgement.

. . .

However, the Counsel for the State's argument must be dismissed in light of the fact that in his appeal the complainant invokes, not so much three independent violations of the fundamental right to effective protection of the courts, but rather three facets, a three-pronged dimension in the words of the request for protection, which are intimately linked around the same violation of his fundamental right caused by the decision, described as ungrounded, whimsical and irrational, to apply Uruguayan law to the case and, in his view, the said law was not applicable, was not proven, nor was it sufficiently identified by means of a citation of the specific rule applied. It is from this global perspective that an assessment should be made of the invocation of the fundamental right made by the complainant in his appeal for reversal against the judgement of 11 July 2000 where he points out that the right to effective protection of the courts is satisfied with a legally grounded and reasoned response and is violated when the holder of that right is not granted access to the jurisdiction, receiving a response from the latter which lacks legal grounds and when the alleged violator of the said right is the appealed resolution delivered by a judge who saw it fit to apply Uruguayan law ex officio but failing to stipulate in any way whatsoever the law, article or any other reference to the aforementioned law thus giving rise to a violation of the constitution in the event that the latter were the applicable legislation. As can be deduced by the foregoing, in his appeal for reversal the complainant questioned the compatibility of the right to effective protection of the courts with the judicial decision as a whole which deemed Uruguayan law applicable and the way in which the said law was applied, regardless of the fact that in the structure used in the formulation of the appeal the complainant developed, in the section immediately following, the supposed

violation of articles 10.6 of the Civil Code (LEG 1889/27) and 1.4 of the Workers' Statute Law, merged text approved by Royal Legislative Decree 1/1995, of 24 March (RCL 1995/997) (hereafter, *LET*) in the selection of applicable law. This was the understanding of the court hearing the appeal for reversal which, upon analysing this ground for appeal, adopted the view that the appellant was denouncing the violation of Spanish Constitution article 24 by the judgement which admitted the applicability of Uruguayan law and which, ex officio, took the said decision while failing to cite any law in this regard. The conclusion which can be reached from the foregoing, with a greater or lesser degree of precision or technical rigour, is that the constitutional facet of the problem was revealed before the judicial body in terms that the latter was able to recognise.

. . .

A second general consideration needs to be made before delving into a detailed analysis of the appealed judicial resolution. As has just been pointed out, the petitioner for protection links the violation of his right to effective protection of the courts to the decision taken by the judicial body which the said petitioner describes as ungrounded, whimsical and irrational for applying Uruguayan law to this case and in his view the aforementioned law was not applicable, was not proven, nor was it sufficiently identified by means of a citation of the specific rule applied. Before analysing these issues it should be pointed out that on four occasions over the last several years this court has had to deal with different problems arising from the relationship existing between the fundamental right to effective protection of the courts and the allegation and proof of foreign law: SSTC 10/2000 of 17 January (RTC 2000/10); 155/2001 of 2 July (RTC 2001/155); 33/2002 of 11 February (RTC 2002/33); and 29/2004 of 4 March (RTC 2004/29). The issues addressed in the aforementioned judgements, while sharing a common legal problem, are all significantly different from one another and are also clearly different from the case now under scrutiny.

It should be made clear from the very outset that the issue which needs to be resolved in this appeal for protection is hardly comparable to any of the cases mentioned above. Indeed, although the appellant seeks support in case-law doctrine as has already been mentioned, it is also true that in this appeal, in contrast with that analysed in the other four, the complaint has not been dismissed due to lack of allegation or proof of foreign law. Quite to the contrary, both the Social Affairs Court as well as the Social Division of the High Court of Justice, without prejudice to certain ambiguities, have determined as proven the foreign law alleged by the accused administration and, based on the said allegation and proof, they have considered the dismissal of the complainant to be legitimate and have therefore dismissed his claim.

It is, therefore, from this perspective that we should analyse the three violations of the right to effective protection of the courts denounced by the complainant in his appeal.

The appellant has first of all denounced the decision taken by judicial resolution to apply Uruguayan law to his labour relationship when case-law criteria

of the Supreme Court and of the very High Court of Justice, when faced with identical case facts, applied Spanish law. Therefore, in the words of the appellant, in straying from established case-law, the judicial resolutions should have provided further grounds justifying this change in criteria and for not recognising a constitutional right and failing such grounds the conclusion is that the court is simply being whimsical.

This ground, however, cannot be admitted. First of all, no case-law has been identified featuring facts identical to the ones featured by the case at hand and the complainant has only identified a judgement delivered on 18 May 1999 (RJ 1999/4833) by the Social Division of the Supreme Court but regarding a case which is not at all identical to the case at hand. In this latter case it was proven that the labour contract had been signed in Spain which led to the ruling that Spanish law was applicable in accordance with article 1.4 *LET* (RCL 1995/997), in contrast to this case in which it is an equally verified fact that the labour contract was signed in Uruguay, the place of residence of the worker and the place where services were rendered.

This circumstance, i.e. the place of residence of the worker and the place where services are rendered, and which likewise coincides with the place where the contract was signed, supports the argument in favour of applying Uruguayan law in accordance with article 6 of the Rome Convention of 19 June 1980 (RCL 1993/2205, 2400) on the law applicable to contractual obligations.

Second of all, it must be verified whether the appealed judicial resolutions are supported by specific and detailed grounds in respect of this point, with a clear expression of the legal reasons justifying the said consideration thus excluding any suspicion of whimsical or arbitrary decision-taking. In this respect the first instance judgement points out that given that the labour contract took place between the parties verbally in Uruguay, Spanish labour law is not applicable to the case in accordance with article 1.4 of the Workers' Statute as well as with trade union considerations as pointed out in the Supreme Court judgement of 10 December 1996 (RJ 1996/9140), criteria and grounds which are reiterated in the reversal judgement.

Consequently, from the perspective of the requirement for reasoned judicial resolutions, it must be concluded that the appealed resolutions are in compliance with the right to effective protection of the courts in accordance with our doctrine. Indeed, the appealed judicial resolutions reveal the reasons on which their decision was based, the legal grounds of which are the rational, non-arbitrary and proper application of legality (applicable to all, SSTC 221/2001 of 31 October [RTC 2001/221], F. 6; 20/2003 of 1 February [RTC 2003/20], F. 5; and 136/2003 of 30 June [RTC 2003/136], F. 3), thus illustrating the *ratio decidendi* of the judicial decision and revealing the essential legal criteria underlying the decision regarding jurisdiction (SSTC 196/1988 of 24 October [RTC 1988/196], F. 2; 215/1998 of 11 November [RTC 1998/215], F. 3; 170/2000 26 June [RTC 2000/170], F. 5; 68/2002 of 21 March [RTC 2002/68], F. 4; 128/2002 of 3 June [RTC 2002/128], F. 4; 119/2003 of 16 June [RTC 2003/119], F. 3).

Second of all, the complainant claims grave defencelessness given that the appealed resolutions have intentionally and unreasonably strayed from case-law criteria and rules regarding the need to judge and deliver decisions in accordance with the law of the country when the application of foreign law has not been sufficiently proven.

In order to rule out any constitutional violation on this point without delving into an analysis of the substance underlying the claim (on which analysis was focused in the previous pronouncements made by this Court referred to above) it suffices to indicate that the two appealed judicial resolutions have deemed Uruguayan law proven and declared it applicable and this has not been a motive for dismissal of the claim for lack of proof of foreign law nor for subsidiary application of *lex fori*. They have simply applied the law designated by the conflict rule (art. 10.6 *CC* [LEG 1889/27] to govern the contract and, based on that, have ruled the dismissal legitimate.

In this respect it must be borne in mind that the accused administration dismissed the worker based on circumstances that it considered warranted dismissal and based on law (Uruguayan law) which, in its view, governed the contract. Having confirmed this latter point, the judicial bodies analysed the alleged causes for dismissal and assessed them as indeed warranting dismissal while expressing their approval of applicable legislation. It was the complainant who, as stated in the request for protection, invoked Spanish legislation in the proceeding with a view to defending the inadmissibility of the dismissal for failing to follow the formal channels established in the said legislation in the case of dismissal of legal representatives of workers, post that the complainant claimed to hold. However, that pretension was rejected by the legal bodies for lack of grounds given that it was based on Spanish legislation which was not applicable to the case.

The foregoing consideration is not overshadowed by the existence of certain ambiguities in the first instance and appeal for reversal judgements the aim of which seem to be, in response to the claims made by the complainant regarding the application of Spanish law to the case (in the case of the first instance judgement), to clarify that even in the hypothetical case that Spanish law had been applicable the proven conduct of the complainant would continue to warrant dismissal, and in the case of the judgement delivered in the appeal for reversal, to state the different alternatives arising from the hypothesis of lack of accreditation of foreign law (hypothesis rejected by the court) because, as pointed out by the public prosecutor in his report, these considerations should be considered carried out under *obiter dicta*, lacking relevance in terms of the grounds of the decision.

Consequently, application of Uruguayan law deemed proven, the judicial bodies considered the dismissal lawful and rejected the existence of a procedural defect claimed by the complainant. The judicial bodies made a reasonable assessment of the evidence presented and based on the latter adopted a decision regarding the substance, reasoned and suited to the system of sources and sat-

isfying the complainant's fundamental right to effective protection of the courts despite the fact that this was a far cry from his pretensions given that, as we have pointed out time and again, this fundamental right does not guarantee a pronouncement in harmony with the pretensions of the party but rather a resolution based on law (SSTC 10/2000 of 17 January [RTC 2000/ 10], F. 2; and 88/2004 of 10 May [RTC 2004/88], F. 5, for all). In adopting the said decision, they exercised the jurisdictional authority specifically attributed to them by article 117.3 of the Spanish Constitution (RCL 1978/ 2836). It is not, however, the duty of this court to assess the latter given that, as we have pointed out on numerous occasions, this is not a third instance revision or Supreme Court appeal that should or may indicate the degree of wisdom of the judicial resolutions nor indicate the interpretation that should be made of ordinary legality. This is the exclusive responsibility of the corresponding jurisdictional order unless the said resolutions are unreasonable, arbitrary or show evidence of clear errors (for all, SSTC 165/1999, of 27 September [RTC 1999/165], F. 6; 198/2000 of 24 July [RTC 2000/198], F. 2; and 170/2002 of 30 September [RTC 2002/170], F. 17) which, as has already been discussed, is not the case here.

Once again within the scope of the requirement of a reasoned judicial resolution, the complainant finally claims failure to mention in the judgement the rule (of Uruguayan law) applied so as to be able to challenge it in the appeal for reversal. However, as the public prosecutor pointed out, this claim is unfounded in light of the fact that in legal ground four of the first instance judgement, specific mention is made with regard to evidence of the accused party indicating that some documents have been furnished by the Uruguayan law and, although it is true that no specific precept is cited in the judgement, it is equally true, as pointed out in the appeal for reversal judgement, that the law and case-law applied have been sufficiently identified in the proceedings. The judicial resolutions also make mention of the elements upon which they based their decision which, as has already been mentioned, satisfies, from the perspective of the requirement of reasoned judicial resolutions, the complainant's right to effective protection of the courts in accordance with our doctrine. It is clear that the complainant was able to challenge the first instance judgement in his appeal for reversal with full knowledge of the reasons for which his claim had been dismissed".

– *SAP* Guadalajara, 14 January 2004. *Web Westlaw* AC 2004/371

Accreditation of Ecuadorian law. Law applicable to divorce proceeding involving Ecuadorians and taking place in Ecuador.

"Legal Grounds:

The accused party challenges the divorce judgment handed down in first instance claiming that, given that Ecuadorian law is applicable and that the latter had not been sufficiently proven by the party invoking it as was acknowledged in the appealed resolution itself, the judge should dismiss the case under way

without delivering a resolution applying Spanish law. This petition was opposed by the representation of the plaintiff who, however, expressed disagreement with the legal grounds of the judgement (but not with the ruling) holding that, despite the applicability of the Ecuadorian *CC*, this was duly proven by means of photocopies of the aforementioned law sealed by the Ecuadorian Consulate in Madrid. If the judge a quo did not deem himself sufficiently instructed in respect of the content of the said foreign law, he could have implemented whatever means were necessary for said accreditation. Here it should be pointed out that, although it is true that article 107.2 *CC* (LEG 1889/27) establishes that separation and divorce shall be governed by the domestic law common to the spouses at the time the suit is lodged, it is equally true that article 12.2 *CC* envisages that remission to foreign law means substantive law without consideration of the referral that conflict rules can make to another law other than the Spanish; pointing to paragraph 6 of the said article 12 that the courts and authorities shall apply the conflict rules of Spanish law ex officio; articles 21 and 22.3 *LOPJ* (RCL 1985/1578 and 2635) establishing that the application of Spanish jurisdiction to proceedings such as these remains in force; article 3 *LECiv* (RCL 2000/34, 962 and RCL 2001, 1892) focusing on the territorial scope of the rules of civil procedure pointing out that with the sole exceptions envisaged in international treaties and conventions, civil proceedings taking place in national territory shall be governed exclusively by Spanish procedural rules based on which the 752 *LECiv* is fully applicable and which, in regulating proof in separation or divorce proceedings provides that, inter alia, the aforementioned proceedings shall be decided in accordance with the facts that have been the object of debate and have been verified regardless of the moment in time when they have been alleged or introduced in some other way in the proceeding; adding that without prejudice to the evidence collected on the order of the public prosecutor and the other parties, the court shall be free to decree, ex officio, the gathering of all evidence deemed pertinent and also that such arrangement shall be likewise applicable in second instance; also considering article 770. 4 of the Procedural Law providing that the court may agree ex officio on the collection of evidence deemed necessary for the verification of the concurrence of circumstances required in each case by the Civil Code to declare nullification, separation or divorce and likewise evidence related to facts underlying pronouncements affecting children who are minors or are handicapped in accordance with applicable civil law based on which the appeal took interest in the Ecuadorian Consulate in Madrid certifying the regulatory rules pertaining to the causes of divorce and the measures inherent to cessation of life together, evidence which was collected. The said consulate delivered a copy of the Ecuadorian *CC* in force although pointed out that, in accordance with Ecuadorian law, the diplomatic missions and consular offices of that country are not authorised to make certifications such as the one requested with respect to the enforceability and content of the law of the said State whose jurisdiction lies in the legislative and judicial spheres based on which the appellant insists that, given that a

verifiable certification was not procured, applicable law was not proven and therefore the divorce claim should be dismissed. These arguments do not stand up however because, although official certification was not provided given that such duties are beyond the scope of the consulate called on to do so, bearing in mind that the copy of the Ecuadorian *CC* figuring in the case file was delivered by the said Consulate thus eliminating doubt regarding its authenticity. Attention should be paid to the doctrine contained, inter alia, in *STS* 3–3–1997 (RJ 1997/1638), establishing that the iura novit curia, while extenuating the scope of foreign law, is not excluded as a principle as concerns awareness of non-national rules, although the parties should cooperate with the judge in searching for the foreign rule providing him with the means by which to gain such awareness. Thus, more than the gathering of evidence in a strict sense, it is more of a collaboration process between the parties and the legal body, resolution adding that article 12.6 in the draft provided for Title one of the Civil Code by Decree 1836/1974 of 31 May (RCL 1974/1385) made clear: a) the foreign rule must be accredited; b) in applying the rule, the judge may employ all information gathering instruments deemed necessary, adding that the term accreditation is not used in a generic sense but rather in a technical sense meaning that it is not necessary for the verification, content and applicability of the foreign rule to meticulously conform to the rules of proof but rather should conform to more open approaches to proof referred to in doctrine as "free"; in other words, evidence that envisages freedom in terms of the means employed in the gathering of evidence (provided they are legal and are obtained by means which are not prohibited) and freedom of assessment or evaluation, the judgement concluding in stating that if the judge, with the contributions made by the parties, does not deem himself sufficiently illustrated, should and is free to act ex-officio and investigate the applicable rule. The copies of the Ecuadorian *CC* delivered by the Consulate envisage in article 108.3 grave slander or a hostile attitude clearly indicating a habitual lack of harmony between the two spouses as a cause of divorce. There is no doubt that the facts of the case described in the case record concerning provisional measures taken based on evidence gathered fit the description of this precept. Both the psychological and social reports issued by impartial professionals at the Social Welfare Department describe a situation of domestic abuse at the hands of the appellant towards his wife and child that ended up with the latter two fleeing to a shelter. Tests also showed that the wife suffered from depression and currently suffers from anxiety. The child is reported to be fearful, losses control of his bowels, does not adapt well to school nor does he get on well with the other children. Based on these circumstances the specialists advised that, for the time being, the father should not be granted visiting privileges with a view to allowing both the mother and the child to establish emotional and social stability outside of this context of violence in which they lived prior to the separation, the view being that if these measures are not taken the effect would be destabilising and would endanger the proper psycho-emotional development of the child. It should also be pointed

out that, even in the event that Ecuadorian law had not been proven applicable by the complainant, this would not automatically imply the dismissal of the case given that the Supreme Court has repeatedly pointed out that when the court considers that it has not been sufficiently instructed in respect of the content of the foreign law applicable, it shall resolve the issue in accordance with the rules of our own legal system, *STS* 5–3–2002 (RJ 2002/4085) citing those of 7–9–1990 (RJ 1990/6855), 11–5–1989 (RJ 1989/3758), in the same sense *SSTS* 25–1–1999 and 13–12–2000 (RJ 2000/10439), encompassing those of 16–7–1991 (RJ 1991/5389) and 23–3–1994 (RJ 1994/2167), without losing sight of reiterated doctrine declaring that, by virtue of article 12.3 of the Civil Code (LEG 1889/27), supporting the principle that under no circumstances shall foreign law apply when it runs contrary to the legal system and it is the responsibility of the Spanish courts to underscore and establish for each case what constitutes the legal system of the forum which should be safeguarded against the possible application of antagonistic or incompatible foreign law, *STS* 23–10–1992 (RJ 1992/8280). It is obvious that the party cannot base his case on the lack of accreditation of foreign law invoked as applicable if that course of action is contrary to the cessation of a marriage bond when a legal cause for such cessation exists in accordance with Spanish law and when the decision dismissing this pretension would put an end to the provisional measure taken to protect the spouse and child, both of whom were victims of domestic violence, especially taking into consideration the unique nature of proceedings of this sort, beyond the reach of the provisional authority of the parties as laid down in article 751 *LECiv* (RCL 2000/34, 962 and RCL 2001, 1892), and bearing in mind the favor filii principle governing these matters even when the latter are not specifically requested by the parties in accordance with, inter alia, *SSTS* 27–1–1998 (RJ 1998/125) and 2–5–1983 (RJ 1983/2619), and along the same lines *STS* 17–9–1996 (RJ 1996/8205), which declares that the higher interest of the child is the overarching principle in such matters linking the judge to all public authorities and even to parents and citizens meaning that the latter must adopt the most suitable measures in accordance with the circumstances as can be interpreted from LO 1/1996 (RCL 1996/145) containing the spirit of the international conventions to which Spain is party (United Nations Convention of 20 November 1989 [RCL 1990/2717], ratified by instruments on 30 November 1990), the best interest of the child which should prevail over the exercise a fortiori of the authority of the parents as pointed out in *STS* 23–2–1999 (RJ 1999/1130) and likewise in *STS* 2–7–2001, reiterating the consideration that the best interest of the child must take precedence. Similarly, *STS* 17–7–1995 (RJ 1995/5591) which, interpreting article 92 and 94 *CC* (LEG 1889/27), points out that these precepts establish the judge's discretional authority to declare the measures deemed most suitable in benefit of the child. This authority is only limited by those circumstances which indicate clear and serious prejudice in respect of education, care, physical and mental development and the emotional stability of the child. From a different point of view it should like-

wise be pointed out that the appellant focuses his appeal exclusively on the inadmissibility of applying the Spanish legal system and the inviability of the divorce due to lack of proof of Ecuadorian law but does not deny that the appellant, after moving out, was undergoing separation proceedings nor did he dispute the lapse of time required under Spanish law and applied by the judge a quo to give rise to the divorce. Nor did he challenge any of the specific measures agreed to in the judgement, coinciding with those which were formerly provisional and which were deemed suitable in light of the situation described in the case file on provisional measures, the arguments of which have been reproduced verbatim, considerations that dismiss the appeal and confirm the appealed ruling".

3. Renvoi

– *SAP* Granada, 19 July 2004. *Web Westlaw* AC 2004/1527

Succession of an Irish national with habitual residence in Spain. Applicable law. Referral. Limits to referral.

"Legal Grounds:

Article 9.8 of the *CC* (LEG 1889/27) establishes that succession due to death shall be governed by the national law of the testator at the time of death regardless of the nature of the property or the country in which they are located. Thus, the first issue which needs to be addressed is that of determining the specific nationality of the testator of the inheritance, Ms. Aurora in this case, and whether she has double nationality or undetermined nationality with a view to establishing the personal law of succession or the application of the law of the country based on article 9.9 and 9.10 of the Civil Code.

In this matter we are not able to express our agreement with the appealed judgement which holds that the cuius was of English nationality (actually British). From the evidence collected through the proceedings it can be determined beyond all doubt that the Mrs. María Dolores was of Irish nationality. This is the nationality that figures in all of the documents included in the case file such as her Irish passport and her residence permit issued by the Spanish authorities, documents subscribing to and confirming the said nationality. Similarly we have the statement which she made before a notary public in the will of 15 July 1997 in which she mentions her Irish nationality. And lastly, especially significant is the certification from the Irish Embassy in our country which considers her a full-fledged Irish citizen.

Consequence of the foregoing is the application of the conflict rule laid down in article 9.8 of the *CC* (LEG 1889/27) in lieu of the aforementioned paragraphs 9 and 10 of the cited precept. Mention must also be made of the substantial change in the arguments of the appellant with respect to the assumptions of the formal action of the complaint from basing the application of Spanish law on the so-called return referral envisaged under article 12.2 of the *CC* to basing it on the direct application of our legal system in light of the fact

that this is a case of double nationality or undetermined nationality, contradicting the basic fact underlying his pretension. A modification of this nature means a veritable mutatio libelli which is not allowed in our procedural law.

Having established the national law of the deceased, the complainant alleged in his claim that the Irish succession law of 1965 remitted all succession issues to the law of the place of habitual residence of the deceased for both moveable property and real estate if the latter died outside of Ireland without a will. However, this alleged conflict rule was not proven given that the simple report issued by an Irish lawyer was insufficient to that end (*SSTS* 23–10–92 [RJ 1992/8280] and 4–5–95 [RJ 1995/ 3893]). While this refers to a case of succession without a will this is not the case here for the will in force was issued on 15 September 1993 with the confirming codicil 24–2–98.

To the contrary, the defendant furnished a report also drafted by the lawyer John H. Hicksan which states that Irish private international law rules are governed by old traditional legal principles and that succession of moveable property is governed by the law of domicile at the moment of death while in the case real estate by the law of the place of their location (*lex rei sitae*). The counterpart appears to agree with this criteria judging from statements made in the conclusions document which are similar.

Now, in light of the fact that the testator's habitual residence was in Spain (Lentengi) and that she possessed real estate both in Spain as well as in England, the referral rule would lead to the regulatory division or fragmentation of inheritance. On the one hand, Irish and not English law would be applicable to the properties located in England given that article 12.2 of the *CC* (LEG 1889/27) prevents the referral that Irish rules can make to another law given that remittal to foreign law would be assumed as made to its substantive law without bearing in mind the country where the assets are found (article 9.8 of the *CC*).

On the other hand, Spanish law would be applicable to the moveable property and real estate found in Spain given that the aforementioned article 12.2 recognises return referral to the succession rules of our legal system. We therefore find ourselves in a situation similar to the one considered in the first instance judgement and similar to the case-law cited but referring to Irish (not English) and Spanish law.

In these cases case-law tends to seriously restrict the possibility of return referral in order to prevent succession fragmentation in light of the general principle of unity of the succession regime and its universal character by applying the predominant character of the national law of ownership. This is the sense of the well known *SSTS* of 15–11–96 (RJ 1996/8212), 21–5–96 and the more recent one of 23–9–2002 (RJ 2002/8029).

In light of the foregoing, Irish law is applicable to the succession of Ms. Aurora without distinction as to the nature of the assets or where they happen to be located. In this sense the ground of the appeal is lack of accreditation of foreign law. Case law holds that proof of foreign law is an issue which must be alleged and proven by the party invoking it (*SSTS* of 11–5–89 [RJ 1989/

3758], 3–3–97 [RJ 1997/1638] and 13–12–00 [RJ 2000/10439]), while the *STS* of 25–1–99 (RJ 1999/321) adds that it is necessary to accredit the exact identity of the law in force as well as its scope and authorised interpretation in order that its application not lead to even the slightest doubt on the part of the Spanish courts.

In this case the Irish Succession Law of 1965, in force and duly translated, was furnished, updated to May 1999 and remitted by the Government Publications-Sur Allianz House. The document has sufficiently enlightened this Court regarding the debated issue of the lawful share to which children are entitled and disinheritance and no further evidence was required in light of the *STS* of 9–11–84 (RJ 1984/5372) and 10–3–93 (RJ 1993/1834) stating that the judicial bodies have the authority but not the obligation to collaborate in the understanding of foreign law.

Part IX of this succession rule contains the regulation regarding the lawful share to which the spouse of the testator is entitled and measures for addressing issues concerning the children. A close look at this regulation shows that inheritance rights are only established for the surviving spouse. As concerns the children, article 117 states that when upon request from the child of a testator or on the former's behalf the court considers that the testator has not met his moral obligation of properly meeting the needs of his child commensurate with his means, either through his will or in any other way, the court may order these needs to be met using the inheritance as considered right and proper. As can be observed, and in accordance with the judge a quo, no right regarding lawful share is envisaged in this rule which limits one's power to draw up a will and freely dispose of one's assets (article 76 of the 1965 Act). The only limit is comparable to child support payment drawn from the inheritance in cases of need. As a result, the interpretation that needs to be made from our perspective is clear and does not require any further proof.

In conclusion, the nullification of the will sought must be dismissed in light of the fact that the claimant's are not compulsory heirs and the great degree of freedom on the part of the testator vis-à-vis her children. Therefore, we must ratify the appealed judgement although for different reasons.

The same stand must be taken in respect of the request for nullification of the will based on the lack of capacity of the testator".

VII. NATIONALITY

– *RDGRN* No 5/2004 of 30 January 2004 *Web Westlaw* JUR 2004/142404.

Birth registration in a foreign country and the option of Spanish nationality of a Belgian citizen born in France and adopted under Belgian law in 1945 by an adopting parent of Spanish origin. Not admissible: in accordance with the situation resulting from the original drafting of the *CC*, the adopted person kept the nationality to which he was entitled by virtue of filiation and the adoption did not communicate the nationality of the adopting parent.

"Legal Grounds:

(. . .) The purpose of these proceedings was to register the birth and opt for Spanish nationality in the case of a Belgian citizen born in France in 1936 and adopted under Belgian law in 1945 by an adopting parent of Spanish origin.

. . . Given the date on which the adoption was constituted in Belgium, the draft of the Civil Code in force at that time (LEG 1889, 27) must be applied and, in principle, subsequent reforms regarding domestic and international adoption in our legal system may not be considered (. . .). Regardless of whether the adoption constituted under Belgian law is valid or not, the fact is that the original drafting of the Civil Code does not, in any way, attribute the nationality of the adopting parent to the adopted child. Indeed, the adopted child retained the rights to which she was entitled in her natural family with the exception of those concerning authority of the parents (article 177 of the original version of the *CC*). Therefore, the adopted child retained the nationality to which she was entitled by virtue of filiation and the adoption made no communication of the nationality of the adopting parent given that the change in the legal situation was limited to the authority of the parents and consequences of the latter (Article 46, 111, 166, 175, and 177 of the original draft of the *CC*).

IV. Under these conditions and in light of the limited value that our Code (LEG 1889, 27) placed on adoption with respect to natural filiation, it must be concluded that there was no real filiation which permitted the interested party to opt for Spanish nationality as the daughter of an originally Spanish father born in Spain in accordance with the new version of article 20 of the Civil Code laid down in Law 36/2002 of 8 October (RCL 2002, 2346). Moreover, the interested party could have taken advantage of the reduced period of two years of effective residence laid down in article 20 of the Civil Code, version in accordance with the 1954 Law (RCL 1954, 1084) favouring foreigners adopted as minors by Spanish parents. As for the rest, the registration certificate furnished has not been legalised and the Belgian judicial resolution which constituted the adoption is not enforceable in Spain because the compulsory *exequatur* was not obtained".

VIII. ALIENS, REFUGEES AND EUROPEAN COMMUNITY CITIZENS

– *STSJ* Madrid, 2 June 2004. *Web Westlaw* JUR 2004/299618.

Residence by virtue of family reunification. Adopted child. Efficacy of foreign adoption in Spain. Not admissible.

"Legal Grounds:

(. . .) Refusal of the request was based on the fact that the adoption of the minor Chen Linglin had no point of contact with the form of adoption recognised by the Spanish legal system and the resolution, although brief, is reasoned in that it incorporates the basic grounds on which the decision is based and

therefore the appellant was not in a situation of defencelessness given that he was able to appeal the dismissal based on the entire content of the case file and with full cognizance of the grounds for the administrative decision.

. . .

Article 17 of Law 4/2000 of 11 January, amended by Law 8/2000, states that in the case of adopted children, it must be verified that the resolution giving rise to the adoption has the elements needed to take effect in Spain (similarly article 54 R.D. 155/96).

Surely, as pointed out by the Counsel for the State, the appellant did not furnish any document showing that the adoption was effective in Spain. The case file contains a notarial act dated 19 March 2001 bearing witness to an adoption agreement but there is no other evidence of the legality of the said adoption. It should not be forgotten that in Spain adoption is constituted by judicial resolution and, in most circumstances, subsequent to a proposal by a public entity (article 176 *CC*). There is no proof of foreign law with reference to this matter nor accreditation of any sort that the adoption can take effect in Spain either by reciprocity, legalisation with recognition of effects, etc. meaning that, based on the foregoing, the administrative decision cannot be described as being arbitrary in light of the requirement laid down in article 17 of law 4/2000 nor can this be considered a violation of the constitutional and conventional precepts invoked and therefore the claim must be dismissed".

IX. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

X. FAMILY

1. Filiation

- *SAP* Guipúzcoa, 28 September 2004. Web Westlaw JUR 2004/308640
  International judicial competence in matters of filiation. Applicable law.

  Legal Grounds:

  "(. . .) Infringement of art. 22.3 of the *LOPJ* (RCL 1985/1578, 2635) Appellant takes the view that according to the cited rule, in the case in point here, concerning filiation, the Spanish jurisdiction is only competent where the child's habitual place of residence at the time of the action is in Spain or the plaintiff is Spanish or habitually resident in Spain; and therefore, given that the plaintiff has her habitual place of residence in Germany and is German, jurisdiction lies with the German courts.

  The Court does not accept this criterion for the following reasons:

  – The criterion laid down in art. 22.3 of the *LOPJ* is applicable in the absence of precedent criteria – in other words it is subsidiary by nature.

According to art. 22.2 of the cited statute, at civil law the Spanish law Courts enjoy general competence where the parties have expressly or tacitly submitted to the jurisdiction of the Spanish Courts or where the defendant is domiciled in Spain.

- In the present case, the two circumstances provided for in art. 22.2 are given, in that the defendant is domiciled in Spain, and furthermore there is tacit submission, the defendant having tacitly submitted by dint of failure to enter a declinatory plea in form as required under art. 56 of Law 1/2000 of 7 January (RCL 2000/ 34, 962 and RCL 2001, 1892), which provides that the defendant shall be understood to have tacitly submitted by the fact of having, after appearing in the proceedings following initiation of the action, taken any step other than to enter a declinatory plea in due form, and in relation to art. 39 of the said Law which provides that the defendant may by declinatory plea claim lack of international competence or lack of jurisdiction on the ground that the matter appertains to a different jurisdictional order or because the dispute has been put to arbitration – *STS* of 11/2/2002 (RJ 2002/3107) and 10/11/2003 (RJ 2003/ 8281) – the ground cannot be entertained.

. . .

Having regard to the applicability of the German Civil Code, under art. 281.2 of the *LECiv* it is up to the party invoking the foreign law to accredit both its content and its validity by any means recognised in Law; the party cannot be excused from this burden by the fact that the Court has means of ascertainment at its disposal, since it is not part of the court's function to fill the gaps in the parties' evidence, as the jurisprudence of the Supreme Court has repeatedly established (*STS* 15/3/1984, 12 January 1989 [RJ 1989/100], 7 Sept 1990 [RJ 1990/6855]).

In the present case, the defendant has not proved the existence of the precept invoked, its validity or its applicability to the case at issue, documentary evidence which is deemed essential to the end pursued; therefore, where the foreign law has not been proved or has not been adequately proved, the case must be resolved in accordance with Spanish law (*STS* 7 September 1990).

– Having regard to the precepts of the Civil Code, arts. 110.2, 120.1 and 121, which were in force at the time the appellant was born, be it noted that the applicable legislation is that in force at the time of the action – i.e., the present Civil Code – and as to the legitimation of the children through marriage, in order for filiation to be accepted as matrimonial through the subsequent marriage of the progenitors, the present art. 119 of the Civil Code requires that the fact of filiation have been legally determined, either by acknowledgement before the Civil Registrar, by testament or other public document, by resolution of proceedings through the Civil register or by final court decision.

In the present case, the consequences deriving from art. 119 of the Civil Code are by no means applicable in respect of the appellant and her mother's husband, since her paternal filiation had not been legally determined either

before or after the marriage between the two, given that after the marriage there was no more than the passing on of surnames, which does not imply any acknowledgement or legitimation of paternity.

Art. 9 of the Civil Code, as it relates to the content and nature of filiation, states that these shall be governed by the personal law of the child, which according to paragraph one is determined by its nationality, and in this case the appellant is German.

Viewed from this perspective, as the Supreme Court established in its decision of 22/3/2000 (RJ 2000/2485), the establishment of filiation as sought here would render the German Civil Code applicable as the national law of the plaintiff. However, under the material Spanish law, the national statute can be applied and the foreign one dispensed with, since German nationality is not a closed and exclusive condition but is rather a first or provisional nationality, as under art. 17.1) of the Civil Code, all persons born of a Spanish mother or father are Spaniards . . . hence, the applicability of the material Spanish statute in this circumstance is imposed as immediate and imperative by the public policy of the forum in order to afford adequate protection . . . On the basis of the foregoing doctrine of the Supreme Court, it follows that the Spanish Law is applicable."

2. Marriage

a) Celebration and registration

– *SAP* Barcelona, 10 May 2004. Web Westlaw JUR 2004/181213

Marriage celebrated in Morocco. Annulment. Applicable law to celebration. Lack of proof of the foreign law. Dismissal.

"Legal Grounds:

(. . .) In this second instance the original plaintiff, Carlos María, again seeks acceptance of his request for a declaration of annulment of his marriage to Maribel, celebrated on June thirtieth of the year two thousand, which the Court rejected on the grounds that it considered the alleged causes to be not proven.

But the first problem that arises when considering the question of annulment is that of the applicable law, since the marriage was celebrated according to Islamic rite in the Moroccan locality of Safi, as stated in the application and as accredited (the latter part) by a certificate of registration of the marriage with the Central Civil Register. This issue has not been addressed by the parties or by the Court, but this bench must consider it in first place, since courts are bound to apply the legal rules that are appropriate for the resolution of lawsuits even if these rules have not been invoked by the parties, and therefore the first thing they have to do is choose these rules – that is to say determine which are applicable.

. . . Certainly, the current state of Spanish legislation in this respect is quite clear. Article 107.1 of the Civil Code, introduced by Organic Law 11/2003 of

29 September, declares that the nullity of marriage and its effects are to be determined in accordance with the law applicable to its celebration, and hence, going by this rule, the question of nullity as requested here must be regulated by the law of Morocco.

The cited legal norm was published on 30 September 2003, when the judgment here appealed had already been delivered; the fact is, however, that now, when it comes to reaching a definitive resolution of the matter, it is in force. The law of 29 September does not contain transitional norms governing proceedings pending at the time the law came into force. But that is neither here nor there given that, according to the principles of the legislation in force prior to the cited law of 29 September, the conclusion is necessarily the same, that is that the annulment sought here must be regulated by the law of Morocco.

Prior to the cited law of 2003, there was no legal precept that referred specifically to this question, and to this bench's knowledge there was no jurisprudence in that respect. The doctrine held that nullity ought to be governed by the laws of the country in which the marriage took place, and that certainly is what follows from article 11 of the Civil Code. According to the latter, the manners and formalities of contracts, testaments and other legal acts are to be governed by the law of the country in which they are formalised. Article 49 of the same Code clearly ordains that Spaniards may marry abroad in the manner laid down by the law of the country where the marriage takes place. This is what happened in the present case, in which Carlos María, a Spanish national, married in Morocco in accordance with the law of Morocco, to which he submitted by virtue of contracting marriage there.

The marriage having been celebrated under the cited foreign law, it would make no sense whatever if the nullity of the marriage were to be governed by Spanish law, even with regard to what we might call substantive aspects of the celebration of the marriage, such as the free giving of consent. It can be argued that the celebration of marriage by free and duly informed consent is a universal and indispensable requirement such that when the lack of such consent is alleged in Spain, the matter must be examined and a resolution delivered as to the validity or otherwise of a marriage celebrated in Morocco. But the matter is not as simple as that: what we have here is not a problem of violence or intimidation or of complete absence of consent, which may be considered the object of that universal principle of freedom to marry, but a twofold problem involving mental reservations and personal qualities of one of the partners; in such cases the norm may well differ from one country to another, to the extent that a mental reservation of one of the partners may not be admissible as a cause of nullity of marriage. Then again, under Moroccan law the possibility of a decree of annulment in such cases may be subject to terms or forms of which we know nothing.

In short, the validity or otherwise of a marriage celebrated in Morocco in accordance with the laws of that country and within the ambit of the Islamic faith must be judged in accordance with the law of that State, and it makes no

sense whatever to judge the substance of the matter according to Spanish law, which did not govern the celebration of the that marriage.

. . . It is true that the effects in Spain of marriages celebrated abroad are subject to the public policy exception. The Spanish State can deny legal effects in this country to marriages celebrated abroad and valid (at least formally) in the terms of the laws in force at the place of celebration. Such denial of effects arises in cases where the marriage conflicts with norms regarding the celebration of marriage that are imperative in Spain. Specifically, where it is evident from the circumstances of the case that the marriage was celebrated without proper consent to marry, the State refuses to recognise the bond thus established and prohibits its entry in the Spanish Civil Register. The most common and best known such cases are marriages of convenience between Spaniards and aliens, in which registration of the marriage is frequently refused on the presumption that there has been no true consent to marry.

Conceivably, if it is in the form described, it should also be possible here to annul a marriage celebrated abroad if it appears, as Carlos María sustains, that there was no matrimonial consent on the part of Maribel, who did not really wish to enter into a marriage contract but some other kind of arrangement, and that furthermore, according to the said gentleman, she had in the past engaged in conduct of which he was quite unaware. However, it seems clear to us that the issue here is quite different. It is one thing for the State to deny recognition to a marriage if it reaches the conclusion that there was no genuine matrimonial consent, and it is quite another for it to intervene and annul a marriage celebrated in a foreign country. What is sought here is not to divest the marriage celebrated by the litigants in Morocco of effects in Spain but purely and simply to have it annulled as contravening Spanish law, which was not the law governing the celebration thereof. We reiterate that it is one thing to deny effects to a marriage for contravening norms of the State in which it is intended that these effects should materialise, and it is quite another to declare a marriage null without distinguishing the effects of that nullity – that is, to divorce the issue from the world of the law. The denial of effects which is so often observed obviously never goes as far as that.

. . . If, then, the laws of Morocco are applicable for the resolution of the dispute, there is no alternative but to reject the petition of annulment, for the simple reason that the content of the cited foreign law is not known to the court and has not been invoked or accredited by the litigants. This being so, we are clearly not in a position in any event to tell whether the marriage is valid or void according to a set of laws of which we are ignorant and must therefore dismiss the petition of Carlos María, confirming the decision appealed from inasmuch as it declares that there is no case for annulment.

Article 281.2 of the Civil Procedure Act ordains that the content and validity of the foreign law must be proven. It adds that the courts may use whatever means of inquiry that they deem necessary for its application. This last point raises a doubt as to whether the guiding principle in this matter is that the

burden of proof lies with the party. Certainly the law does not contradict that principle inasmuch as it does not say that the courts may use whatever means of inquiry they deem appropriate *ex officio*, as it does in other cases (e.g., in the instance cited in article 752 of the Act) where it states unequivocally that the judges may proceed *ex officio*. The said possibility may also be interpreted as meaning the possibility of using means of inquiry other than those defined in the law.

But even if we interpret the legal peculiarity here considered to mean that the judges are empowered to proceed *ex officio* to inquire into the foreign law, we cannot conceive that such power extends to entirely making up for the failure of the parties to act in this respect, and further to initiating, on appeal, an inquiry into the foreign law that has not in any way been raised by the litigants".

– *SAP* Castellón, 21 January 2004. Web Westlaw AC 2004/452.

Islamic marriage celebrated at the Iranian embassy in Spain. Claim of dowry. Applicable law to effects of marriage. Consideration of the dowry.

"Legal Grounds

(. . .) With the object of the appeal, and hence of the present decision, thus delimited, we find that it consists in an examination of the pertinence of the plaintiff's claim in this appeal, namely that Antonio should be ordered to pay the 3,000,000 pesetas (or 18,000 euros) which she says is the dowry it was agreed that the husband should provide when the couple contracted Islamic marriage on 2 February 1999 at the Spanish Embassy in the Republic of Iran (folio 44).

This claim cannot be entertained, for the same good reasons as were put forward in the original judgment. Each of the reasons set forth hereafter is of itself sufficient to rebut the appellant's claim.

1. Given that these are marital proceedings, the petition of reference must be addressed from the standpoint imposed by the class of proceedings in which it is to be heard, and therefore we must rule on whether it can properly be upheld as a measure supplementary to the basic decision on the dissolution of the marriage tie (article 91 *CC* [LEG 1889/27]).

From this point of view, a so-called commitment acquired upon contracting a marriage which is entirely without effect under Spanish law cannot be admitted as binding.

Firstly, since the partners were of different nationalities at the time of marrying (the groom Spanish and the bride Iranian), and since the marriage was celebrated in Spain by persons who then resided in this country and continued to do so thereafter, the effects of the marriage must be governed by Spanish law, in pursuance of article 9 sections 2 and 3 of the Civil Code. And it is well known that at this time our laws do not regulate the institution of the dowry.

Secondly, a marriage cannot be effective under Spanish law which was not contracted in accordance with that law (arts. 49 *et seq.* of the Civil Code) and which, assuming that it was celebrated according to the Islamic rite and was

hence a religious wedding (art. 49.2 *CC*), was not entered in the Civil Register as expressly provided in articles 59 to 61 of the Civil Code, as it relates for purposes of this case to the terms of Law 26/1992 (RCL 1992/2421) on reception in Parliament of the Agreement between the State and the Islamic Commission of Spain.

2. Viewed from a different standpoint, the articles of the Civil Code (*CC*) of the Republic of Iran relating to the dowry as invoked by the appellant are without effect inasmuch as the jurisprudential criteria regarding the applicability of article 12.6 of the Civil Code (LEG 1889/27) have not been fulfilled.

. . .

And it is clear that in the present case these requirements have not been met, given that all that has been presented in evidence of the validity, scope and content of the foreign law invoked is a communication from the Iranian Embassy regarding the validity of marriages celebrated at that embassy and a brief reference to the precepts regulating dowries, accompanied by respective translations (folios 44 to 52). The Iranian Authority may well have the power to declare such marriages valid in terms of its own laws, but it does not have the power to declare as to their validity in Spain.

Therefore, the Iranian Civil Law invoked cannot be applied by this court.

3. Finally, as if the foregoing were not already enough, it must be remembered that, as the appealed decision said, it is our duty in these proceedings to rule on the propriety of measures which, if requested, are supplementary to the judicial decree of divorce. The request for payment of the dowry is clearly not proper, not only because, as already noted, it was agreed in connection with a marriage that is without civil-law effects in Spain, but also because it was agreed as a consequence of the same marriage and hence has nothing to do with the dissolution thereof; thus, it cannot be a consequence of these proceedings, nor therefore has it a place herein".

b) Matrimonial property

– *RDGRN*, 1 February 2004. Web Westlaw RJ 2004/2000.

Entry of real estate in the Register of Property. Alien spouses. Determination of marital regime.

On 4 April 2003, by virtue of a public document authorised by the Notary Public of Torrevieja, . . . the spouses, under the regime of their national law, . . . of British nationality, purchased an urban property under their marital regime.

The Registrar of Property reported: therefore, following accreditation of the foreign law to which the purchasing spouses declare themselves subject as regards their marital economic regime, according to which they have separation of estates, it is proper to determine the quotas referred to in article 54 of the Mortgage Regulation. 5.8 It should further be noted that the rules have to be interpreted in accordance with the reality of the times in which they are applied – article 3 of the Civil Code – and one cannot be unaware of the massive movements of immigrants and tourists in present-day society or the new attitude

adopted by article 281 of the Civil Procedure Act towards foreign law, which is no longer treated as a procedural fact requiring allegation and proof by the parties before it can be applied and has begun to be treated as actual law which the Judge, if he is cognisant of it (and such cognisance ought reasonably to be promoted), can apply directly, thus accepting a criterion already established for some time in the sphere of registration by article 36 of the Mortgage Regulation and moving towards the new systems of Private International Law (the Swiss of 1997, the Italian of 1995) whereunder the courts are obliged to apply the foreign law *ex officio*.

"Legal Grounds

(. . .) The facts germane to the resolution of the present appeal are as follows: A public document was presented at the Register, by virtue whereof a married couple of British nationality acquired a certain urban property in accordance with their marital regime. The Registrar suspended entry for lack of an indication of the proportion acquired by each of the purchasers as required under article 54 of the Mortgage Regulation (RCL 1947/476, 642). The Notary appealed against this decision.

The appeal failed. The acquiring spouses declared themselves subject to the legal regime of their own country. Consequently, the Registrar having stated that the concept of a marital economic regime is unknown to British law and hence that the acquisition is akin to one conducted under a system of separation, and that statement not having been rebutted, article 54 of the Mortgage Regulation (RCL 1947/476, 642) requires that the quota of the undivided good appertaining to each of the purchasers be set.

This Directorate-General has resolved to dismiss the appeal".

c) Divorce

– *SAP* Almería, 28 June 2004. Web Westlaw AC 2004/1440.

Spouses of Moroccan nationality. Applicability of Spanish law owing to lack of proof of foreign law. Direct applicability of Spanish law according to the current wording of article 107.2 of the *CC*.

"Legal Grounds

In response to the original decision dismissing the suit for divorce filed by the wife with the consent of her husband on the ground that since both possess Moroccan nationality, the divorce must be governed by their common national law as provided by art. 107 of the Civil Code (LEG 1889/27), it not having been accredited that the laws of their country contemplate the legal ground for divorce cited in the action, the plaintiff has lodged an appeal petitioning the court to quash the said decision and instead declare that the Spanish courts are competent to hear the case and in consequence grant all the terms of the suit.

. . .

In this connection, from the record of proceedings it appears that both marriage partners possess Moroccan nationality and that they celebrated a religious marriage according to Islamic rite in Almeria on 1 November 1995.

Hence, according to article 107 of the Civil Code (LEG 1889/27), in the wording current at the time of the previous phase of these proceedings – which wording has since been substantially modified, as we shall see – the substantive rules applicable to regulation of their marital separation would be those of Morocco, since both are nationals of that country. Nevertheless, as the appealed decision points out, no evidence has been offered to demonstrate the content and the currency of the Moroccan law as required under art. 281.2 of *LECiv* (RCL 2000/34, 962 y RCL 2001, 1892). But the proper legal solution to this absence of proof of the foreign spouses' common national law cannot be the one adopted by the Court *a quo*, with whose judgment this Bench disagrees, given that in cases like the present one in which the content of the foreign law whose applicability is moved is not known, the jurisprudence of the Supreme Court is unequivocal as to the applicability of Spanish law, stating that the applicability of a foreign law is a matter of fact and as such must be proven by the party invoking it so that its applicability does not raise the slightest reasonable doubt in the minds of Spanish courts. Where these courts cannot be absolutely certain as to the applicability of the foreign law, they must judge in accordance with Spanish law (*SSTS* of 31 December 1994 [RJ 1994/10245], 25 January 1999 [RJ 1999/321], 5 June 2000 [RJ 2000/5094] and 17 July 2001 [RJ 2001/5433]). Although this approach entails the risk of leaving the issue of the applicable law up to the parties (it may not be in their interests to plead the foreign law applicable under the rules of conflict, and they may prefer the *lex fori*), according to the Constitutional Court the jurisprudential doctrine whereby recourse must be had to Spanish law in the absence of proof of the foreign law is closer to the spirit of art. 24.1 of the Spanish Constitution (RCL 1978/ 2836) than the solution of dismissing the suit as adopted in the decision here appealed, given that in a situation of external intercourse Spanish law may, in substitution of the law that is applicable, also offer the solution founded in Law that the cited article of the Constitution requires (*STC* 155/2001 of 2 July [RTC 2001/155]).

For all the above reasons, in order to ensure effective guardianship of the interests at stake (art. 24 Spanish Constitution [RCL 1978/ 2836]), avoiding defencelessness and seeking to protect the higher, fundamental and basic interest of the minor and a solution to this specific case, it falls to us to uphold the appeal and, setting aside the original decision, to accept in its stead the petition raised by the two spouses, who are agreed in seeking a divorce, and to approve the regulating agreement proposed with the action, since this adequately guarantees the higher interests of the child of the marriage, a minor, the Public Prosecution having expressed its assent to approval thereof.

Moreover, independently of the foregoing, the reform of the Civil Code (LEG 1889/27) introduced by Organic Law 11/2003 of 29 September (RCL 2003/2332) leads to the same conclusion in that under the new drafting of art. 107, section 2) point b) provides that Spanish law is to be applied in any case where one of the spouses . . . is habitually resident in Spain if in an action

brought before a Spanish court both spouses ask for separation or divorce, or one does so with the consent of the other, which requirements are fully met in the present case, since both spouses have their habitual domicile in this country and the suit for divorce was brought by the wife with her husband's consent, both having ratified their positions in the presence of the court both in the filing of the suit and in the proposal for a separation agreement accompanying it; and while it is true that the said rule was introduced in our legal system at a later date than the decision given at first instance, it makes no sense from the standpoint of procedural economy and of actual material justice – especially where there is a young child whose higher interests merit rapid and effective protection – to remit the parties to new civil proceedings in which the outcome would be exactly the same as is sought here and in which there would no longer be any need to prove the common national law of the spouses, since divorce by mutual accord is governed by Spanish law as provided in art. 107.2.b) of the *CC* (LEG 1889/27), currently in force".

– *SAP* Vizcaya, 6 April 2004. Web Westlaw JUR 2004/296271.

Spouses having Colombian nationality. Divorce. Applicable law. Failure to plead and prove. Dismissal

"Legal Grounds

(. . .) Two. The decision here appealed applies the material Spanish law to decree the dissolution of a marriage celebrated in Colombia between two persons both possessing Colombian nationality who ceased to live together in this country years ago and who have recently, each separately, established their residence in Bilbao.

In this matter of private international law, as regards the procedural side of the rule of conflict or international connection, it is clear that the Spanish laws of procedure are the only ones applicable to actions materialising in Spanish territory (art. 3 of the *LEC*), that in all cases they are to be classified according to Spanish law (art. 12.1 *CC*), and that in matters of personal and property claims between spouses, annulment of matrimony, separation and divorce, where both spouses are habitually resident in Spain at the time of the suit, the Spanish civil courts are competent (art. 22 third rule *LOPJ*).

In substantive terms, the applicable precept is art. 107 paragraph one of the Civil Code, which lays down the rules of connexion of the applicable substantive law, favouring the spouses' common national law and subsidiarily favouring the laws of the spouses' habitual place of residence, and as a last resort whichever Spanish courts are competent. Paragraph 1 of art. 12.6 of the Civil Code provides that the Courts are to apply *ex officio* the rules of conflict of Spanish Law, whereas paragraph 2 has been set aside by Repeal Provision 2.1 of the *LEC* and substituted by art. 281.2 of the *LEC*, whereunder proof of the foreign law is also required as regards content and validity, and the Court may use whatever means of inquiry that it deems necessary for the application thereof. In this connection the jurisprudence of the Supreme Court has

established that the foreign law cannot be applied *ex officio* if it is not adequately pleaded and if no-one invokes it; nor does a simple report at the instance of the appealing party suffice: express reference must be made to the case at issue . . ., and the literal text of the applicable precepts must be reproduced (decisions of the *TS* 17 March, 23 October 1992, and 4 May 1995), which criteria are reiterated in the Supreme Court Decision of 13 December 2000, which explains that it is the doctrine of the First Bench to treat the foreign law as a matter of fact which must therefore be pleaded and proven by the party invoking it, that the courts have the power but not the obligation to assist with whatever means of inquiry they deem necessary, and that in Spain the foreign law cannot be applied *ex officio* where it has not been adequately pleaded.

In short, art. 107 of the Civil Code is clearly applicable to this case, which must therefore be resolved in accordance with the law of Colombia as the common national law of the spouses. Furthermore, it raises a question of public policy which the parties cannot elude and which it is the duty of this court to judge *ex officio*".

XI. SUCCESSION

– *SAP* Baleares, 31 March 2004. Web Westlaw AC 2004/861.

Joint will made in Germany. Subsequent holograph will legalised in Spain. Applicability of German law.

"Legal Grounds

(. . .) The first ground of appeal adduced by the appellant is the exception of *res judicata*, which was disallowed, under protest by the appellee, in the preliminary hearing.

This court does not admit the exception adduced, which is based on the claim that the German courts had already ruled on the point at issue in the manner already explained. Firstly, it must be considered that the sense of the decisions handed down by the German courts was other than is claimed by the appellant, in that they denied the certificate of succession in his favour and granted it to the plaintiff/appellee as sole heir, so that one is at a loss to understand the purpose of acknowledging a foreign decision which according to the record of proceedings is of no benefit to the party invoking it, unless the aim is to delay the present proceedings. Furthermore, and most importantly, the proceedings held up for comparison do not match in either object or reason for pleading. What is sought in the present case is annulment of a holograph will legalised with the Spanish authorities by judicial decision, so that whatever the content of the petitions filed with the German authorities, clearly such a decision can only be sought by way of independent proceedings such as those now brought, whose substance is different from that resolved by the judicial decision founding the claim of *res judicata*, and therefore the exception claimed must be disallowed.

It is agreed that the law applicable to the case at issue is the German civil law, as codified in the *BGB*, that being the nationality of the testator at the time of his decease (art. 9.8 of the Civil Code [LEG 1889/27]), regardless of the nature of the goods and the country in which they are situate.

With his writ of action the plaintiff submitted a translation by sworn interpreter of arts. 2270, 2271 and 2296 of the *BGB* (folios 38 and 39), the accuracy and validity of which were not initially disputed in the plea in defence, which were in fact the articles referred to in the above-cited decisions of the German courts. It transpires from the said articles that the joint will is valid in Germany, that the relationship between the reciprocal provisions is such that the annulment or revocation of one provision results in the annulment of the other and that in case of doubt, a reciprocal relationship is presumed to exist where the spouses make reciprocal wills (art. 2270). For rescission of the succession agreement, the other contracting party must be notified by notarised certificate (art. 2296), albeit art. 2271 provides that one spouse cannot during the lifetime of the other unilaterally annul his or her disposal with a new disposal mortis causa. The normative spectrum is perhaps best closed by citing the third and last paragraph of art. 2270, whereunder the correspondence between joint disposals and their consequences of reciprocal annulment does not apply to other disposals which are not appointment of heirs, legacies or taxes, which means that in the cases indicated it is applicable.

At this point it is appropriate to analyse the second ground of appeal, under the heading of compatibility of a joint will with a prior disposal, in which it is asserted that the plaintiff has not accredited the existence of the German law that it is sought to apply and that the latter's interpretation of that law has not been followed by the German courts, so that, the burden of proof of the law lying with the plaintiff, it has not been adequately proven since the mere invocation of laws cannot suffice if the requirements alluded to are not met.

. . .

While aware of these limitations, this court considers that the plaintiff has successfully discharged the burden of proof imposed by the law and the jurisprudence. As to accreditation of the articles of reference, as already noted no objection has been raised as to its accuracy or correctness. The appellant argues that there are other precepts which could constitute legal exceptions to the provisions accredited, but there can be no doubt that if such a precept were submitted as an exception, the burden of proof would lie with the defendant/appellant, who has not taken the trouble to produce such proof. Having regard to the authorised interpretation of the applicable rules according to the national jurisprudence from which these derive, in the case here at issue there are actual interpretations referring particularly to the circumstance in point, encapsulated in decisions of the German courts of August and 21 September 2000, while none has been submitted in rebuttal. Both agree that this is a joint will, that the reciprocal appointment of heirs is effective, that the possible testamentary disposal of 27 October 1999 was not formally notified and that the joint disposal

cannot therefore be modified, by virtue basically of the provisions of the *BGB* transcribed above, which award precedence to the joint will over the holograph will legalised in Spain.

Finally, we would point out that in the common Spanish law the appointment of heirs may coexist with the figure of the legatee, as stated in the appeal, and that they are likewise compatible in German law as noted in the expert opinions annexed to the proceedings on folio 105, which is not a decisive argument since it is not the foundation of the decision here confirmed; therefore, a succession agreement or joint will cannot subsequently be modified – especially where the appointment of heirs is reciprocal with no further qualifications – unless the legal formalities laid down in the *BGB* are fulfilled and subject to the consequences established therein, and such modification cannot be made by way of legacies to third parties, which, as the decision *a quo* argues, would raise the possibility of rendering the contractual part without substance, an eventuality which the above-transcribed third paragraph of article 2270 of the *BGB* is intended to preclude.

For all the foregoing reasons, this court dismisses the appeal as filed and confirms all points and arguments of the opposed decision".

XII. CONTRACTS

– *STSJ* Madrid, 5 October 2004. Web Westlaw AS 2004/2960.

Contract of employment: submission to the Laws of the State of Illinois. No proof of the foreign law is required, it being common knowledge that US regulations allow free dismissal.

"Legal Grounds.

Under article 191 section c) of the Labour Procedure Act, both appellants allege infringement of articles 1.4 of the Workers' Statute and 10.6 of the Civil Code on the ground that Spanish laws are not applicable to the work of Spanish employees not hired in Spain in the service of Spanish companies abroad, and therefore, the contract having been concluded in Chicago with an entity domiciled in the USA with express submission to US law, the second of the cited norms is applicable and the law of the place where the services are rendered must preside.

(. . .) It having been established that the law of Illinois is applicable to the employment relationship between the parties, we must dismiss the appeal, not for lack of proof of the said law but because it is common knowledge that US regulations allow free termination of a contract of employment – in other words free dismissal with no right to compensation – and therefore the plaintiff's claims could not be entertained under any circumstances".

– *STSJ* Madrid, 21 September 2004. Web Westlaw AS 2004/2756.Contract of employment. Validity of the clause of submission to Portuguese courts and law.

"Legal Grounds.

Action in which a Spaniard concluded an indefinite contract of employment on 02/12/02 with the mercantile company Iberrail Portugal Viagens LDA, domiciled in Lisbon (Portugal), where the plaintiff served and had his residence up until the time of his dismissal, which occurred on 04/07/03 by virtue of notice of termination signed by the Chairman of the Board of Directors of Iberrail, SA as majority shareholder in the mercantile company Iberrail Portugal Viagens LDA.

(. . .) The clause of express submission contained in the contract drawn up between the parties in litigation on 02/12/02 must be deemed valid as a criterion for attribution of international judicial competence, since it meets the legal criterion for attribution of competence, which in this case is the forum of the place of domicile of the parties, that is Lisbon.

(. . .) It cannot be accepted that, as the appellant claims, the mention of Spanish law made in the contract dated 02/12/02 and concluded with the mercantile company IBERRAIL, SA whereby the parties agree to the suspension of the contract of employment subscribed by the parties on 01/12/80 literally constitutes a clause of express submission to the Spanish courts or to Spanish law, and much less that such mention nullifies the clause of express submission to Portuguese law and the jurisdiction of the Courts of Lisbon in the contract dated 02/12/02 between the employee and the mercantile company Iberrail Portugal Viagens LDA, the extinction whereof gave rise to these actions".

– *STSJ* Madrid, 28 July 2004. Web Westlaw JUR 2004/271378.
Applicable law to contract of employment. Imperative material norms.

"Legal Grounds.

The second and last of the grounds of appeal, citing article 191 section c) of the Labour Procedure Act, is alleged infringement of article 6.1 of the Rome Convention for failure to apply the rules of Spanish law concerning the term and extinction of the contract of employment, claiming that since all the plaintiff's activity was permanently carried on in Spain, the Law applicable in the absence of choice would be Spanish; it is argued that a different law cannot be applied unless it is more favourable, and that clauses establishing a term of four years for a contract of employment and the employee's waiver of any action or claim arising from termination of the contract are contrary to this law.

In the first place we must mention Regulation (EEC) No. 1612/1968 of 15 October, article 7 of which provides as follows: (. . .).

This is an imperative norm which denies that any national of a Member State of the European Union who lends his services in another State can have less rights than the nationals of the latter State as regards his conditions of employment and particularly, among others, in matters of dismissal, so that mere observance of the norm would render the Spanish rules applicable; but in addition, article 6 of the Rome Convention concerning individual contracts of employment establishes the following: (. . .).

And hence, as this Court had occasion to note in its decision of 3 June 1999, the choice of a given set of rules is only possible in matters of contracts of employment where these rules result in greater benefit to the employee, and never where they are restrictive, in which case the Law applicable in absence of such choice must be applied; and in this case it is clear that the rules of the United Kingdom, to which the contract signed by the parties remits, are unfavourable in that, as stated in the unaltered roll of evidence, they contemplate the waiving of any claim in connection with unfair dismissal and further permit the conclusion of temporary contracts of employment for no good reason, and these rules inform the clauses transcribed in exhibit seven, which clearly restrict the rights enjoyed by Spanish employees and are contrary to our Law, which forbids such pacts that fail to respect the minimum level of necessary rights laid down as an imperative in the Workers' Statute, which must consequently be applied to the case here at issue, considering that, the law of the United Kingdom not having been chosen, the contract must be governed by the labour law of the place where the employee habitually served – that is Spain – given that the statutory regulation of the extinction of employment relations cannot be "in pejorem partem", which is unaffected by the existence of a number of improvements in Social Security matters in the United Kingdom or by the fact that he is paid in Sterling, or naturally by the fact that he is provided with accommodation in Spain or that he pays taxes in the former country, because the decisive factor is that the contract has been performed at all times in this country and therefore our more benign law is indubitably applicable. As a consequence, we uphold the appeal and declare that the dismissal was unfair in the terms of article 55.4 of the Workers' Statute, there being no cause to warrant the temporary nature of the contract nor therefore its extinction through the passage of time, and the employer further having failed to meet the formal requirements for notification of such extinction pursuant to section 1 of the cited article of the Statute".

– *STSJ* Madrid, 15 June 2004. Web Westlaw AS 2004/2933.

Foreign law applicable to contract of employment. Applicability of art. 10.6 *CC*. Characterisation of the contract as an ordinary contract of employment. Fair dismissal for breach of contractual good faith.

"Legal Grounds.

The applicants lived in the city of Rome before being engaged in the same city to provide their services. It is the unified doctrine of the Supreme Court, (. . .) that the general principle laid down in article 10.6 of the Civil Code which considers the place where the service is rendered in determining the Law applicable to a contract of employment must be obeyed, especially if we consider that the services are always rendered in the place where the contract was concluded – that is, abroad – no doubt because this was the place where the employees had their habitual residence; and this being so, article 1.4 of the Workers' Statute, which implements the cited article 10.6, establishes as requirements for applicability

of Spanish labour law to the work performed by employees abroad, that the latter be Spaniards, that they work in the service of Spanish companies abroad and that such Spanish employees have been engaged in Spain. As we have seen, this last condition is not met in the present case, which means that the Spanish labour regulations are not applicable to the plaintiffs, since their contract is subject to Italian law as the plaintiffs themselves stated in the proceedings to which the third item of evidence refers, in which the cited foreign law was applied.

(. . .) We cannot accept that the relationship of the applicants with the Embassy – which, as the State Attorney says, is an integral part of the State Administration – may be considered domestic work, since an Embassy is obviously not a family employer, even although the Ambassador and his family dwell there, and therefore this contract is clearly not concluded personally by the Ambassador nor is it extinguished by the transfer of this Ambassador and the arrival of another, but by the Embassy, and the services are rendered to the Embassy even if they also include cleaning or attending to the Ambassador's apartments, and his family where applicable; and they are not confined to these but obviously extend to the needs of the Embassy; in other words these functions are not proper to a family home, and hence the applicable precepts are not those referred to by the applicant but those governing ordinary labour relations as collected in the "Discipline for labour relations of employees of Embassies, Consulates, Legations, Cultural Institutes and International Organisations in Italy" done at Rome on 14 May de 2003, submitted by the State Attorney and, in the version of 26 January 2000, by the applicants, under article 28 of which, reiterating Law n. 300 of 20/5/1970, dismissal is fair where there is a misdemeanour serious enough to warrant it. That is clearly so in the present case, it having been demonstrated that having opted voluntarily on 4 April 2002 to abandon the apartment that they occupied at the Embassy in view of the peculiar nature of their services and to dwell outside it, the applicants made themselves secure in the said dwelling and refused to leave unless they were granted certain working hours which they sought unilaterally to impose; such conduct was clearly in breach of contractual good faith inasmuch as they sought to bend the Ambassador's will to their own, sustaining their position for more than one year and taking advantage of the magnanimity of the latter, who graciously assented to successive extensions of their occupancy.

Whether or not the apartment is the domicile of the employees is neither here nor there; the important thing is that it is an integral part of the Embassy buildings, which they were allowed to occupy free of charge and which they themselves chose to leave and go to live outside the Embassy, and that they went on to hinder the works that had to be carried out in these rooms with the sole intent of unilaterally imposing their will on their employer. Such conduct warrants dismissal, which we hereby declare to be proper, with no entitlement to compensation, and we uphold the State Attorney's appeal, which would equally be successful were the relationship to be considered one of domestic service or were Spanish law to be applied, in light of the terms of articles 54 and 55 of the Workers' Statute".

– *STSJ* Galicia, 26 April 2004. Web Westlaw AS 2004/3077.

Contract of employment subject to foreign law. Closer links. Public policy exception. Imperative material norms.

"Legal Grounds.

a) "Carlos Antonio entered service with Empresa Nacional Elcano de la Marina Mercante SA. on 5 June 1978 (and) his professional category was that of fireman".

b) "On 15/11/1993 Empresa Nacional Elcano . . . and the Members of the Fleet Committee of the cited company agreed (the conditions of engagement with Lauria Shipping Co.)".

Among these conditions it is established that "these articles shall be the norm governing relations between the parties, and its clauses constitute an indivisible whole which cannot be amended, expanded or annulled without the consent of both parties, even through the application of rules of necessary right", that "where these articles do not provide, the international conventions ratified by Spain and applying to the Merchant Marine shall be applicable provided that they do not prejudice or alter the substance of these articles", that "any disagreements that may arise in connection with the application of the cited conventions shall be resolved by three arbiters, one to be appointed by either party and a third appointed by the first two", and that "the parties agree to be bound by Spanish law and jurisdiction solely in matters of discipline (sanctions, dismissals, etc.) and in connection with amendment of the conditions agreed in the articles" – Clause 26 of Annex I.

c) "On 22/11/2003 (sic, 1993) . . . they reached . . . (another) agreement whereby all employees whose employment relationship terminated – numbering 152 – signed new shipping articles with Lauria Shipping Co. and agreed that the latter would guarantee the continuity of the jobs (and) the individual shipping articles would consist of the rules set forth in the clauses agreed by the parties".

d) "On 2/12/1999 (sic, 1993) the Ministry of Labour and Social Security authorised termination of the contracts of employment of 287 employees of Empresa Nacional Elcano de la Marina Mercante . . . and declared the affected workers to be legally unemployed".

h) "The company Lauria Shipping Corporation Limited was incorporated on 9/11/1989 (and) its corporate domicile was initially in the Bahamas and is now . . . (in) Madeira, Portugal".

k) "Since 26/12/2002, the company Preston Marine . . . and following the conclusion of an agreement with Lauria Shipping, SA, it handles the management of the crew and the paperwork relating to shipping and unshipping . . . has its domicile in Lisbon, Portugal".

l) "On 25/2/2003, the company Lauria Shipping SA. and the Maritime Sector of the State Federation of Transport, Communications and the Sea, affiliated to the General Workers' Union (as a member Union of the International Transport Federation) concluded what was called (a) Framework Agreement, applicable solely to crew members who had been serving on Lauria vessels of Spanish

nationality who joined Lauria immediately after the lay-offs of 22/11/1993, recognised by the Spanish authorities as terminating their employment relations with Empresa Nacional Elcano de la Marina Mercante SA (and) the parties declare that they consider that the individual contracts of the above-cited crew members, incorporating the conditions of the Agreement of 15/11/1993, terminate at the end of 9 years, counting from their commencement, and they also cease to be valid at the end of that period . . . (and) that in light of the termination of the said contracts the parties deem it necessary to agree the conditions to govern the shipping articles of the said crew members hereafter" – Exhibit Thirteen.

m) "On 24/3/2003 Preston Maritime (as crew manager of Lauria Shipping SA) sent the plaintiff a letter, which the latter received at his domicile . . . (in) Riveira (A Coruña) and which indicated (that) . . . in order to offer you a place on a ship and give you the papers and instructions for embarkation, in the next few days we will invite you to come to our offices located . . . (in) Lisbon, Portugal . . . (and) we ask you to confirm your availability as soon as possible (and) we would stress the need to bring vouchers showing that you are up to date with your contributions to the Special Social Security Scheme for Emigrant Seamen (REM), or failing that and exceptionally for this sailing, that you are registered or have applied for registration in the said Special Scheme (and) you must also present the following papers . . . enlistment book".

n) "The plaintiff answered the above letter . . . by sending a facsimile on 9 April with the following text . . . as Lauria Shipping SA are well aware, I have been sailing for years without having to contribute to the Special Scheme, since for some time I have been registered as retired without this preventing me from sailing . . . my enlistment book is not necessary either since the vessel does not sail under the Spanish flag . . . I meet all the other requirements and confirm my availability to sail as soon as I finish my vacation"

o) "On 7/8/2003 the ISM (replied to the plaintiff that) . . . the work that you do on board vessels flying flags of convenience does not qualify for inclusion (in the Special Seamen's Scheme) and is therefore compatible with the retirement pension".

p) "Before the Framework Agreement of 25/2/2003 came into force, the company Lauria Shipping habitually engaged employees who were receiving a retirement pension".

(. . .) With the debate couched in the above terms, in light of the facts declared proven we must first determine what law is applicable to the employment relationship between the plaintiff and Lauria Shipping Sociedad Anónima, an employment relationship with a foreign element, which causes us perforce to apply the terms of the Rome Convention of 19 June 1980.

In the case here at issue there is no doubt as to the Law of the vessel's flag, namely that of the Bahamas, nor have the litigants disputed the validity under Bahamanian law of the collective agreements adopted on 15/11/1993 and 25/2/2003, which agreements remit by default to "the international conventions ratified by

Spain", and in specific matters to "the laws . . . of Spain", which fragmentation is feasible according to article 3 of the Rome Convention.

Such reference to "the international conventions ratified by Spain" fits perfectly with Spain's ratification of International Labour Organisation Convention number 147 on minimum standards in merchant ships, approved at the 62nd Meeting (Geneva 1976) on "substandard vessels, particularly those registered under flags of convenience".

(. . .) However, the imperative Spanish provisions are applicable in the case at issue, (i) because if we consider the circumstances of the employment relationship, there is ample reason to believe that there are closer links to Spanish law, and (ii) because in any case Spanish police laws are applicable since the Spanish courts are competent.

On the one hand there is ample reason to believe that there are closer links with Spanish law: the employee is Spanish and resides in Spain, his engagement by a company domiciled in the Bahamas is a consequence of a prior engagement by a Spanish company, the offers of employment were received in Spain, and also in establishing the laws applicable by default to the employment relationship, reference is made to the international conventions ratified by Spain, and in part to the laws of Spain.

Furthermore, it is not proven that Lauria Shipping Sociedad Anónima has a "genuine link" – in the terms of the International Convention on the High Seas (Geneva, 29 April 1958), likewise ratified by Spain (BOE 27/12/1971) – with the Bahamas other than its domicile; indeed, the crew manager of Lauria Shipping Sociedad Anónima is not Bahamanian but Portuguese.

(. . .). In conclusion, without prejudice to the validity and the enforceability under Bahamanian law of the Agreements of 22/11/1993 and 25/2/2003, they cannot in any case contravene imperative provisions of Spanish law; which conclusion does not gainsay the existence of a compromissory clause referring to the totality – the Agreement of 15/11/1993 states that "these articles shall be the norm governing relations between the parties, and its clauses constitute an indivisible whole which cannot be amended, expanded or annulled without the consent of both parties, even through the application of rules of necessary right" – since, regardless of the consequences of breach of that clause under Bahamanian law, even if these entail annulment of the contract of employment (which is not proven, and be it remembered that the foreign law must be proven under article 281.2 of the Civil Procedure Act), this would not preclude the application of the imperative Spanish provisions; indeed, the way would be clear for the application not only of the imperative Spanish provisions but of Spanish law in general, since the *pactum de lege utenda* being without effect, it would only remain to apply article 6.2 of the Rome Convention.

The law applicable to the contract of employment having been determined as noted, we must examine, from that perspective, the legal allegations made in the formalisation of the appeal and, with regard to the infringement of articles 82, 83, 85, 87, 88, 89 and 90 of the Workers' Statute, as they relate to points

54 and 55 of the legal allegations, tending to show unfair dismissal, the appellant argues that the Agreement of 25 February 2003 – whereby workers over a certain age were prohibited from sailing – is not applicable and the Agreement of 15 November de 1993 – whereby workers over a certain age are allowed to sail – is applicable to the plaintiff; whereas in its writ of objection to the appeal the company Lauria Shipping Sociedad Anónima supports the substance of the decision *a quo* which, to the contrary, considers the refusal to allow the plaintiff to sail warranted. For the rest, Empresa Nacional Elcano de la Marina Mercante Sociedad Anónima has made no objection to this ground of appeal. (. . .).

The question at issue – which in light of the arguments put forward by the parties may be summarised as whether the failure to call up the employee constitutes extinction of the contract of employment for just cause or whether, that not being so, the situation qualifies as unfair dismissal – must be settled, as explained above, in accordance with the imperative provisions of Spanish law or, failing that, in accordance with the Agreements of 15/11/1993 and 25/2/2003, insofar as Bahamanian law admits the validity and enforceability of such provisions.

(. . .) We should note first of all that the Agreements of 15/11/1993 and 25/2/2003 cannot be described as agreements on concrete matters, and that whether or not they are covered by the Statute does not affect their validity and enforceability, for the simple reason that such classifications belong to Spanish law, which is not applicable to this aspect – if it were, we would be in the absurd situation where any foreign collective agreement that was valid and enforceable according to the foreign law would be treated as not covered by the Statute in Spain.

We must further consider that the employer and defendant has furnished two legal reports, appended to the record as folios 613 to 618 and 746 to 748, which support the validity and enforceability of those Agreements under Bahamanian law, and that, to the contrary, no reason has been given to support the invalidity or unenforceability of the said Agreements under Bahamanian law – and be it recalled once again that the interested party must prove the foreign law according to article 281.2 of the Civil Procedure Act.

All this would lead us – albeit on a different legal foundation – to confirm the decision *a quo*; however, the solution will be quite different if we go by the Spanish imperatives, and specifically those relating to discrimination by reason of age – with the attendant judicial interpretation – which, fundamental rights being an integral part of Spanish public policy, this Court cannot under any circumstances refrain from applying, and this in turn, as we shall argue hereafter, must cause us to overturn the original decision.

Moreover, the inability of the competent Spanish courts to apply a foreign law – such as Bahamanian law, which apparently allows forcible retirement clauses – that is contrary to Spanish public policy finds normative endorsement not only in article 7 of the Brussels Convention, but also in article 12 section 3 of the Civil Code, which expressly provides that "under no circumstances shall a foreign law be deemed applicable if it is contrary to public policy".

4. If we reread the statement of proven facts we must conclude that in failing to call up the employee, the employer has applied a forcible retirement clause as established in Clause 7 of the Agreement of 25/2/2003(. . .).

To recapitulate, Clause 7 of the Agreement of 25/2/2003 is void under the current Spanish law in that it breaches the bar on discrimination by reason of age, and consequently the failure to call up the plaintiff, which is founded on that Clause, cannot be considered extinction of a contract of employment for just cause, which means – given that the plea in appeal is confined to this point – that the allegation of unfair dismissal must be upheld in accordance with articles 55 and 56 of the Workers' Statute.

(. . .) the reservation of the Spanish imperative provisions obliges us to determine whether according to these provisions any liability attaches to Empresa Nacional Elcano de la Marina Mercante Sociedad Anónima; and in this connection, weight must be attached to the allegations expounded in the legal objection raised in the appeal, to the effect that when the contract with Empresa Nacional Elcano de la Marina Mercante Sociedad Anónima was terminated, the employee and plaintiff was not paid the compensation – his legal right – due in respect of a lay-off instituted under Spanish law (article 51 of the Workers' Statute) but settlement of a pension scheme, so that, since he was never paid the said compensation – a necessary right – then the party who was obligated to pay it – Empresa Nacional Elcano de la Marina Mercante Sociedad Anónima – and did not ought now to be ordered to do so.

However, these arguments do not find the necessary substantiation in the declaration of proven facts – which do not show beyond doubt the correspondence between the agreed compensation and the settlement of the retirement scheme, nor the correspondence between the legal minimum compensation, which would be 20 days' pay per year of service under article 51 section 8 of the Workers' Statute, and the amount vouched for by the bank.

In any event the Spanish jurisprudence has admitted the availability of the compensation laid down in article 51 section 8 of the Workers' Statute in cases of voluntary acceptance of a retirement scheme prior to the authorisation of layoffs.

The peculiarities of the engagement of the plaintiff on a vessel flying a flag of convenience clearly place him in a more favourable situation than those contemplated in the jurisprudence of cassation in that his legal situation was that of unemployed, as if he had taken early retirement, and he was in receipt of a retirement pension, while at the same time he enjoyed a guarantee of relocation which was effectively honoured. Apart from this he received a substantial sum in compensation, so that when he signed the contract with Lauria Shipping Sociedad Anónima, there was absolutely no violation of the imperative rights of the plaintiff as a worker under Spanish law arising from his previous employment relationship with Elcano de la Marina Mercante Sociedad Anónima.

Briefly, then, given that the Agreement of 25/2/2003 is valid and enforceable under Bahamanian law, we must conclude that, absent any violation of the necessary

Spanish law, there is no ground on which to claim the compensation established in the Agreement of 15/11/1993 – which be it said is claimed in a dubious joinder with the action for dismissal (see article 27 of the LPL) as a subsidiary claim to that of unfair dismissal, albeit were the principal claim to be upheld then there would be no need to reject the subsidiary claim were it not for its significance as regards the resolution of this other legal allegation – and consequently no liability attaches to Empresa Nacional Elcano de la Marina Mercante Sociedad Anónima as regards the consequences of an unfair dismissal which are imputable solely to Lauria Shipping Sociedad Anónima.

The same arguments clearly also apply to the issue of the employee's seniority for the purposes of article 56 of the Workers' Statute".

XIII. TORTS

XIV. PROPERTY

– Decision of the Provincial High Court of Granada no. 383/2004 (Section 3), of 26 May. Web Westlaw AC 2004/970.

Industrial Property. Paris Union Convention. Annulment of trade mark registered in Spain by the defendant infringing a foreign trade name.

"Legal Grounds.

(. . .) While one might be hard put to understand why Holiday Autos should be considered a "well-known trade mark", nonetheless from the evidence as a whole this Court is bound to conclude that the trade marks registered in Spain by the defendant clearly infringe a foreign trade name used by the plaintiffs for many years before application was made to register the former and could give rise to confusion, and this alone would be sufficient to ensure success of the actions brought for annulment.

In this connection it behoves us to highlight some of the facts confirmed by the documentary evidence as it relates to the witness evidence:

- Holiday Autos ("partnership"), now "Holiday Autos International Ltd.", was incorporated in London in 1987 and then in Munich in 1988 as "Holiday Autos GmbH" and among the objects listed in the complaint is that of car hire. The company applied for the Holiday Autos trade mark in Germany and in Austria in 1988 and in 1990 applied for recognised international trade mark status in the terms noted elsewhere.
- Since then, under the trade name "Holiday Autos", they have carried on their activity, offering self-drive car hire services at various tourist resorts, some of them in Spain, particularly on the Costa del Sol and the Balearic Islands, in collaboration with Spanish firms in the sector.
- The defendant, Holiday Car Hire, SA, a firm engaging in car hire with an establishment in Málaga, applied to register "Holiday Autos Spain" as a Spanish trade mark on 15/6/93, and this was granted for self-drive car hire

services, with the number 1767376, on 28/6/95, published in the *BOPI* [Official Industrial Property Gazette] on 16/8/95. Subsequently, the defendant applied for and was granted Spanish trade marks 2035.083 and 2035.084 "Holiday Autos", the first for class 12 and the second for class 39. The grants were published in the *BOPI* of 16 May and 1 November 1997.

The foregoing demonstrates at the least that the trade marks whose annulment is sought undoubtedly infringe the trade name, which is moreover the plaintiffs' company name in their countries of origin with which they have been working continually since they began operating in the tourist services sector, and particularly self-drive car hire, in the way that they do. In our view this must evidently give rise to a risk of confusion for the consumer. A foreign tourist in Spain who has initially rejected the idea of hiring a vehicle in his country of origin may later decide to do so once at his destination, and he may notice the name "Holiday Autos"; even if it appears as it has until now along with the name of the defendant, given that the latter holds title in the trade mark, there is nothing to prevent him from using it on its own, and more widely".

– *SAP* Barcelona, 30 January 2004. Web Westlaw AC 2004/ 506.

Industrial Property. Exhaustion (international) of Right to the trade mark. Free Trade Treaty between the United States of Mexico and the European Community.

"Legal Grounds.

The essential question in the present proceedings is the exhaustion of the right to the trade mark and how this relates to parallel importations of products from a country outside the European Economic Area (Mexico). What is at issue is whether the proprietor of a trade mark registered in an EC country can lawfully prevent an authentic product identified by the same trade mark and placed on the market by him or with his consent outside the European Economic Area from being imported to the EEA by a parallel importer.

Although the issue has been and continues to be an object of controversy in our jurisprudence, there is much less of a basis for such controversy since the reiterated and clear judgments that have been issued on it by the Court of Justice of the European Communities, whose doctrine is binding on domestic judges even more, if possible, than that our own domestic courts.

The two fundamental rulings in this respect are duly recorded in the judgment *a quo* – that is, the Silhouette and Sebago cases. The CJEC later ratified and elaborated its criterion in the matter of Davidoff-Levi Strauss (JCJEC of 20 November 2001), containing a reference for a preliminary ruling by the English courts, in proceedings which addressed virtually the same issue as the present ones, in connection with a case in which Levi Strauss & Co. was a party, as it is in the present proceedings.

The question here raised relates to the interpretation of article 7.1 of Directive 89/104 regarding the approximation of the laws of the Member States in matters of trade marks. In point 32 of its judgment of 20 November 2001,

the CJEC noted that from articles 5 and 7 of the Directive of reference it follows that the Community legislator enshrined the rule of exhaustion of the trade mark in the Community – that is, the rule whereby the right conferred by the trade mark does not allow its proprietor to prohibit its use for products placed on the market in the EEA with that trade mark by him or with his consent. In adopting such rules, the CJEC asserted, the Community legislator has deprived the Member States of the possibility of making provision in their domestic law for exhaustion of the rights conferred by a trade mark in respect of products placed on the market in third countries (judgment of 16 July 1998, Silhouette International Schmied, section 26).

The effect of the Directive is, then – as the CJEC continues to sustain – to limit exhaustion of the right conferred on the proprietor of a trade mark strictly to cases where the products are placed on the market in EEA and to allow the proprietor to place his products on the market outside the Area without such marketing exhausting his rights within the EEA. In determining that marketing outside the EEA does not exhaust the proprietor's right to oppose importations of such products without his consent, the Community legislator has enabled the proprietor of the trade mark to control initial marketing in the EEA of products bearing the trade mark.

The judgment of 20 November 2001 states that consent to marketing in the EEA of products imported from third countries must be so expressed that an intention to renounce the right to control initial marketing in the EEA is unequivocally demonstrated (section 45), albeit consent may be implied where it is to be inferred from facts and circumstances prior to, simultaneous with or subsequent to the placing of the goods on the market outside the EEA which, in the view of the national court, unequivocally demonstrate that the proprietor has renounced his right to oppose placing of the goods on the market within the EEA. (section 47).

With so definitive and precise a doctrine the CJEC has sought to remove the possibility of different criteria prevailing in different member States regarding the exhaustion of trade marks and thus preclude any possibility that the notion of international exhaustion of trade marks, upheld in some States (including our own), might survive in the EEA. And so resolute is it in the will to impose that idea that it has not hesitated to homogenise interpretations such as that relating to what is to be understood by consent of the proprietor of the trade mark to marketing in the EEA.

The appellant claims that his circumstances are not the same as in the Silhouette, Sebago and Davidoff-Levi Strauss judgments because his concerns a Mexican company domiciled in Mexico, a country which has concluded a Free Trade Treaty with the European Union, in force since the year 2000, and therefore the applicable principles are those of "domestic" and "most favoured nation" status, enshrined in Decision no. 2/2000 of the EC-Mexico Joint Council of 23 March 2000 (2000/415/EC).

We cannot entertain such a construction. The matter of fact dealt with in the CJEC judgment of 20 November 2001 is identical with that addressed in this case. Section 22 of the decision indicates that the articles of clothing from which the litigation arose in the United Kingdom were manufactured in Mexico, as well as in Canada and the USA.

The Free Trade Treaty between the United States of Mexico and the European Community cannot be said to have altered the rules of exhaustion of trade marks referred to in the previous ground".

XV. COMPETITION LAW

XVI. INVESTMENTS AND FOREIGN EXCHANGE

– *STS*, 73/2004, 4 February. Web Westlaw JUR 2004/95512

Foreign investments. Prior verification. Retroactivity of most favourable sanctioning rule

"Legal Grounds.

The object of this appeal is to determine whether or not the challenged decision to impose a fine on the appellant, a Luxembourg company, for a minor administrative infraction consisting in having made an investment in Spain and set up a permanent establishment here without first requesting verification as required by art. 7.2.a) and d) of Royal Decree 671/1992 on Foreign Investments in Spain, is in accordance with the legal rules.

In light of the foregoing, there can be no doubt that at the time, the action of the appellant, a Luxembourg company, in reporting both its investment in a Spanish company Mosel Ibérica, SA and the constitution of a permanent establishment in Spain after rather than before the fact was classified and hence sanctionable. This is moreover quite aside from the possibility that the Spanish investors may have committed an infraction in acquiring stock in the Luxembourg company, which is separate from the conduct being judged here and would be susceptible of analysis under the rules on Spanish investment abroad (RD 671/1992 of 2 July).

However, subsequently to the facts and to the judgment imposing the sanction, while this was still in the process of application, the obligation of prior verification ceased to be – except in respect of some investments originating in territories or countries that are considered tax havens, meaning territories or countries referred to in Royal Decree 1080/1991 of 5 July and art. 4.2.a) of Royal Decree 664/99 – since the entry into force of the said Royal Decree 664/1999 of 23 April on foreign investments, which repealed the decree applied in the challenged judgment, namely RD 671/1992.

In accordance with the said jurisprudence, the principle of retroactivity of the most favourable subsequent sanctioning rule is applicable – even where, as in the present case, the most favourable sanctioning rule is introduced at a later

date than the sanctioning decision and while the jurisdictional appeal lodged against it is still being heard".

XVII. FOREIGN TRADE LAW

XVIII. BUSINESS ASSOCIATION/ CORPORATIONS

XIX. BANKRUPTCY

XX. TRANSPORT LAW

- *AAP* Huelva, 29 March 2004. Web Westlaw. JUR 2004/154823

  Preventive attachment of vessel. Brussels Convention of 10 April 1926 not applicable. Applicability of *Lex fori.*

  "Legal Grounds.

  The applicant seeks revocation of the lifting of the attachment ordered in the contested judgment and insists that preventive attachment is proper in that it entails a maritime lien in accordance with the Brussels Convention which entitles it to be granted the said attachment, and furthermore this has been judicially acknowledged and declared in a firm Judgment of the New York District Court and an affidavit has been signed by two Attorneys of the said city.

  However, in the present case the appellant itself acknowledges that there exists a genuine, and possibly an insurmountable obstacle in that the port of registration and the flag of the vessel, "Anax Puma", are Panamanian, and Panama is not a signatory of the Brussels Convention of 10 April 1926, which is therefore not applicable to it. It would of course be desirable that the rule be universal, particularly in a truly international sector like shipping, so that vessels flying the flags of non-signatory States could not be used as a fraudulent means of sidestepping international Maritime Law.

  This Court likewise concludes in favour of the possibility of preventive attachment in application exclusively of domestic Law – specifically the procedural rules laid down in arts. 728 *et cetera* of *LECiv*; in this way the requirements of *fumus boni juris* or the appearance of a sound claim and *periculum in mora* or the danger in delay or in procedural delay are met by adopting the criteria of the Brussels Convention and reinforcing them with legal grounds from our own Civil Law, as we shall see.

  We find yet another legal argument – one of material justice perhaps – favourable to preventive attachment as ordered: namely, the power to hold the good vouchsafed by arts. 1600, 1730 *et cetera* of our Civil Code to persons undertaking works or fulfilling an order in it, such as repairs, until they are paid their due. In this case we must consider that the claim of the New York repairer to hold on to the vessel it has repaired until it is paid its due has the appearance of

being a sound one, and for someone to receive the vessel once repaired without paying for that repair would constitute unwarranted enrichment, in which case the repairer would be entitled as a service provider to recover its losses in the same way as the creditors who exercised their right by disposing of the vessel to a party who must also pay this prior debt for repair, for a service from which they indubitably benefited.

The very fact of the disposal of the vessel to a third party and the flag of a non-signatory State warrant the claim of danger in delay or *periculum in mora*, given that its final destination is unknown and the possibility that the vessel may disappear or be removed to country not bound by international regulations".

– *SAP* Girona, 229/2004, 8 July. Web Westlaw. AC 2004/1511.

International road transport of goods. Action for recovery brought by the principal carrier against the party who performed the carriage. Lack of evidence.

"Legal Grounds.

The mercantile entity Doux Ibérica, SA commissioned Transportes Frigoríficos del Segre, SL to carry goods, to be uplifted on 19 April 2002 before 1 p.m. at the locality of Le Chatelet (France) and delivered at 6 a.m. on 22 April following at the locality of Els Alamus-Lleida. The load consisted of 600 boxes of fresh chicken carcasses which were to be delivered for preparation, packaging and distribution to Spanish superstores.

As the carrier had no vehicles available, it contracted the firm Manel Prades, SL to carry the said goods; it sent instructions to the latter by facsimile indicating the points of uplift and delivery (doc. 1 of the complaint on folio 4).

The lorry arrived late, and a claim was duly filed by Doux Ibérica, SA against Transportes del Segre, for the sum of 7,890.01, which sum the latter is now claiming from the actual carrier.

(. . .) It must be remembered that a peculiar feature of the international regulation mentioned (Geneva Convention of 19 May 1956) is that it established its own system of liability. Thus, art. 17 provides that the carrier is liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery, with a number of exceptions. Additionally, article 9 provides that the goods and their packaging must be presumed to be in good condition when the carrier takes them over unless the consignment note contains a specific reservation by the carrier (art. 9), and art. 18 places the burden of proving that loss, damage or delay was due to one of the grounds for exemption from liability specified in the preceding article fell upon the carrier. According to art. 3, the carrier is responsible not only for his own actions but for the acts of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage. In other words, it lay with the principal carrier now claiming as plaintiff to prove that a reservation was made in

due time and manner by the entity DOUX to whom the goods were delivered; as he failed to do so, his claim ought to have been dismissed instead of a species of simple subrogation being applied in respect of the sum paid by the applicant, thus failing in the strict application which, contrary to the assertion of the judge *a quo*, the referred Convention demands".

– *SJ1ª* Palma de Mallorca, 147/2004, 30 June. Web Westlaw, AC 2004/1811

International air transport. Joint and several liability of the company organising the journey and the company in charge of transport

"Legal Grounds.

Actions are brought by the plaintiff for extra-contractual and contractual liability respectively against Travel Plan as the wholesaler and against Air Europa as the air navigation company in charge of the transport, in connection with events that occurred during a Madrid/Punta Cana, Punta Cana/Madrid package contracted with the first of the two, scheduled to depart on 22 August 2003 and return on 31 August. On the said journey, a leisure trip, the plaintiffs' luggage was mislaid and has not appeared to this day.

The foregoing having been established, we may say that this case undoubtedly comes within the terms of the Package Travel Act of 6 July 1995 (RCL 1995/1978). (. . .) This is the spirit of the same Law which seeks to afford broad protection to the consumer, and so, since Travel Plan was the organiser of the trip and it has been demonstrated and admitted that the contract was not properly performed from the moment at which the plaintiffs' luggage went astray for the duration of the trip and until now, it is jointly and severally liable for the damages sustained, the nature and extent of which are determined in the following grounds.

Having regard to the airline company, as it sustains, air transport is subject to specific legislation (. . .) in the case of international transport as is the case here, the Warsaw Convention of 12 October 1929 (. . .) limits the carrier's liability to very specific sums in the event of loss of, damage to or delay of checked-in baggage in the absence of a special declaration of value, unless the carrier has acted maliciously or with culpable negligence – art. 25.

(. . .) In the present case, the company Air Europa has apologised for the fact that the luggage has failed to appear after a year but has not explained its disappearance – what is more, it has not even attempted to produce a satisfactory explanation, or at least to give an account of the inquiries it has made to determine whether the luggage was actually loaded on board, was stolen, and so on. In light of the foregoing, this demonstrates at the very least a serious failure of due diligence in the care, carriage and management of lost luggage, even although the company itself classifies it as an "incident". And this being so, the limit proposed by the defendant evidently cannot be entertained and it must be held liable for full compensation of the damage sustained by the plaintiffs. This is so whether we take such liability to derive from article 1902 of the Civil

Code – which would entail exclusion of the terms of article 22 of the Warsaw Convention – or we take there to be contractual liability under the principle of unity of civil culpability, since it is clear from the context that there were foreseeable possibilities of damages at the time the obligation materialised and that these were the necessary consequence of the carrier's failure to perform as required by article 1107 as it relates to article 1103 of the Civil Code, in that the company Air Europa did not take the trouble to demonstrate or even allege the causes of the loss".

- *STS* 1121/2004, 18 November. Web Westlaw RJ 2004/7653
  Maritime transport insurance. Preventive attachment of vessel.

  "Legal Grounds.

  As a consequence of a maritime transport insurance policy, "Cigna Insurance" was obliged to pay 22,633,610 pesetas to "Sociedad Ibérica de Molturación, SA" (Simsa) for damages sustained by the latter in certain consignments of soy beans carried by the vessel "Eve Trader" from San Lorenzo (Argentina) and Río Grande (Brazil) to Santander and therefore brought an action against "Oceanalpha Shipping" as carrier and against "Stamina Shipping" as the current proprietor of the vessel, for recovery of the sum indicated.Appeal by "Oceanalpha Shipping Limited". Two (. . .) the fact that "Simsa" received the goods upon discharge does not give the latter title therein, since the regular holder of the bills of lading is another entity which has not endorsed them.With regard to the argument summarised above, it should be remembered that the challenged judgment does not found the decision on a claim that "Simsa"'s ownership of the goods derives from the bills of lading submitted with the action, but on the fact – which it considers to have been amply demonstrated – of the existence of a contract of sale in which Simsa appears as the purchaser, and that Simsa was the entity that had taken out the policy for damage to the goods being carried and to which these were delivered when the vessel reached its port of destination. On the basis of these facts, which indicate the existence of title and means adequate under our law for the transmission of ownership, the High Court has taken the view that title in the goods belonged to Simsa, and that since the insurer bringing the action had compensated Simsa for the damages sustained in the carriage, it was legitimately entitled to recover the sum disbursed for the said damages. Appeal by "Cigna Insurance Company of Europe, SA-N.V." Five. The first of the three grounds – all founded on point 4 of article 1692 of the Civil Procedure Act – alleges infringement of article 14 of the Brussels Convention of 10 April 1926 as it relates to articles 12.6 and 10.2 of the Civil Code and 96 of the Spanish Constitution. (. . .) It is argued that although to be applicable, article 14 of the Convention only requires that the vessel be from a signatory country, in reality it is applicable to all international circumstances as domestic Spanish law with external effects for purposes of preventing fraud such as sale of the vessel to another shipowner.(. . .) Since both parties acknowledge that the vessel carrying the goods at issue flew the

Cypriot flag and it has not been shown that Cyprus is a signatory of the said Convention, this ground must be dismissed. Six. The second ground alleges infringement of article 12.6 as it relates to article 10.2, both of the Civil Code, and article 96 of the Spanish Constitution, asserting that while according to article 10.2 the law applicable to ships is that of their flag, article 12.6 requires that the person invoking a foreign law must accredit the substance and validity of that law. Therefore, it is argued, absent proof of the domestic law of the country under whose flag the vessel sails, the Brussels Convention of 1926 (RCL 1930, 1104) must be taken to be sole valid law, as Spanish law by virtue of article 96 of the Constitution. This ground must likewise be dismissed since the incorporation of the said Convention to Spanish law, consequent upon its signing by Spain and publication in the Official State Gazette, is necessarily *en bloc* – that is to say, including each and every one of its articles, and hence also article 14, which defines the scope of application of the rules it contains. This scope is founded on the premise that the vessel affected by the legal relationship – in this case maritime privilege – at issue belongs to one of the signatory States, which is not the case here (. . .) it is precisely article 12.6 of the Civil Code that commands the courts to apply the rules of conflict of Spanish law, one of which – article 10.2 of the Civil Code – clearly establishes that any rights in vessels shall be subject to the law of the place of their flag or registration. The immediate consequence of obedience to this last rule is that the rules of the Spanish Code of Commerce cannot be applied to the present debate, since – as the Provincial High Court has stated – the applicant has demonstrated that the vessel whose attachment is sought as security for the debt claimed is of Cypriot nationality".

– *SAP* Barcelona no. 247/2004, 16 April 2004. Web Westlaw JUR 2004/186078

International multimodal transport. Applicable legal regime.

"Legal Grounds.

The defendant is certainly right in asserting that in cases of international transport of goods the commission agent and the carrier are treated as the same, even where the latter does not undertake the carriage on its own account but takes all the necessary steps for effective carriage in its own name at the behest of the principal/purchaser of the goods to be carried.

When the matter is addressed thus, the first step is to inquire whether the defendant comes under the rules of the Code of Commerce (LEG 1885, 21) regulating overland carriage of goods (article 349 *et seq.*), which places no limits on the liability of carriers for loss of or damage to the goods carried as asserted in the judgment here appealed, with which this court does not concur.

That being so, there is no doubt that the defendant made out the bill of lading in its own name with the shipping company engaged to carry the goods by sea, and therefore according to the above doctrine, the special rules regulating international transport of goods must be applied, as discussed further below.

(. . .) Having established the foregoing considerations, we now turn to examine the rules applicable to the case, bearing in mind that the appellant in these

proceedings admits objective liability for the loss (and has offered no exonerating consideration) and now asks that the *quantum* be determined in accordance with those rules that may apply to the case here at issue in ascending order of value.

Therefore, applying first the principle *iura novit curia*, it is concluded that the defendant, as the party responsible for performing the carriage "door-to-door" – that is, from Los Angeles to Barcelona – used various different means of transport, so that the case may be treated *prima facie* as one of what is known as "multimodal" international transport. Hence, as noted earlier, the most likely theory is that the goods were lost during the overland part of the journey.

However, given that there is no uniform regulation of international multimodal transport, which entails at least two different systems of transport (rail and ship), and the UN Convention of 24 May 1980 on international multimodal transport is not applicable, we must look by analogy to the carriage contract corresponding to each case according to the site of the loss or damage.

This lack of normative force has caused the doctrine to seek the Law applicable to transport of this kind, the main positions centring either on the fragmentation of the regulations along the lines of the particular mode of transport involved, or else on integration of the plurality of stages and modes of transport in a single contract which determines a single legal regime. The latter is the posture with the most adherents (*STS* of 17 December 1990), who debate between the desirability of looking to the principle of absorption (and applying the regulations for the principal mode to the whole), resorting to the general rules governing carriage contracts or, as a last resort, adopting a uniform interpretation of the existing international Conventions on transport (until such time as one proper to the case is ratified and becomes effective).

The first of these options has the drawback of attributing primacy to one mode over others and extending the regulation of a unimodal carriage contract beyond its natural scope, while the second (which has nonetheless received a more favourable critique thanks to the subsidiarity that it espouses and has been the choice of the Jurisprudence on some occasions by all – *STS* of 31 January 1984) has the disadvantage of entailing a variety of regulations (arts. 1601 *et seq.* of the Civil Code, arts. 349 *et seq.* of the Code of Commerce or arts 652 *et seq.* of the same), all dating back to the last century, in an area in constant evolution, and hence all presumably rendered obsolete by the new technologies and unequipped to deal properly with these matters.

From this we infer: One. That the US rules cited by the party are not applicable to the case in point.

These internal US regulations place limitations on liability for the carriage of goods by sea from ports in that country for foreign trade.

They are confined to carriage "by sea" and are internal US regulations, and finally, for the foreign law to be applicable its scope and interpretation and whether it is in force must be reliably accredited in accordance with article 9 *et seq.* of the Civil Code, and therefore this petition must be refused.

The petition for application of the limits provided in the law of 22 December 1949 (RCL 1949, 1497) must be rejected since it has been established that the loss occurred before the vessel was "loaded". This rule and successive amendments cannot be applicable as they refer to damage at sea. Neither the 1968 nor the 1979 rules provide for damage occurring other than on journeys by sea or on boats or ships. This limitation is established in article 1 of the Maritime Transport Act.

Three. All that remains, then, is the Overland Carriage (Regulation) Act, Law 16/87 of 30 July and the regulating legislation of 28 September, which regulates the monetary limits on liability. These regulations are applicable not only as the rules most favourable to the plaintiff but also because the other regulations invoked by the defendant are not applicable. As noted earlier, we must look by analogy to the corresponding carriage regulations as supplementary and complementary rules (articles 65 and 106). It must be stressed, however, that unlike the judgments cited, in the present case the legislation governing international carriage by rail cannot be applied since these goods were carried by rail from Los Angeles to New York, and the USA is not a signatory of the Convention of 9 May 1980 regulating such carriage, which was ratified on 16 December 1981 and published on 18 January 1986. And finally, this not having been invoked by the parties, as already noted, we must have recourse to the applicable rules of Overland Carriage, which are more favourable to the party".

XXI. LABOUR LAW AND SOCIAL SECURITY

XXII. CRIMINAL LAW

XXIII. TAX LAW

– *STS*, 16 January 2004 Web Westlaw RJ 2004/939

Company Tax. Deductible expenses: differences in exchange rates in international movements of money

"Legal Grounds.

Having regard to the reimbursable advances from the parent company, effected by remitting currencies to a current account in the name of the Spanish branch and made in pesetas but invoiced in dollars, in which the conversion was done on the date of reimbursement to the parent company, generating differences in exchange rates, the court *a quo* took the view that these were not deductible expenses since the parties involved were not distinct legal persons, notwithstanding the "subjectivity" that the doctrine attributes to permanent establishments, since under the Company Tax Act, Law 61/1978 of 27 December, the concept of the taxable person is founded on the concept of legal personality.

As we saw when summarising the basis of the judgment *a quo* on this specific question of reimbursable advances effected by remitting currencies from the parent company to a current account, the entire argumentation rested on the assertion that the appellant lacked a legal personality distinct from that of the parent company in San Francisco and on the inapplicability of Ministry of Trade Instruction 20.2 for application of the Hydrocarbons Act. However, the existence of a legal personality is not a matter of fact but a matter of law; and from the powers vouchsafed by Locs Oil Company of Spain, SA and from its very denomination as a *Sociedad Anónima*, it is evidently a Spanish company with a legal personality of its own, despite its economic links with the US company.

Also, leaving aside the applicability of the Hydrocarbons Act (RCL 1958/2080), it is fair to say that differences in exchange rates resulting from international movements of money are deductible expenses for the purposes of Company Tax, since this is an aspect removed from the will of the parties which bears inexcusably on their profits".

– *SAN*, 4 October 2004. Web Westlaw JUR 2004/281549

International legal cooperation in matters of tax recovery. Absence of the guarantee on which liability is founded

"Legal Grounds.

1. On 8 March 2000, the Recovery Department of the *AEAT* (Inland Revenue) issued a payment form to the applicant entity in respect of tax settlement Code E0500000280000023 for the amount of 60,193,881 pesetas, indicating that this constituted notice, in pursuance of art. 103 of RD 1.684/90 of 20 December (RCL 1991/6, 284), of the debt owed to the State of Belgium, requiring that it effect payment and explaining that an appeal could be brought against the enforcement order with the authority of the demanding State and against the enforcement measures taken by the Spanish recovery machinery, a motion to set aside or an administrative economic complaint could be filed.

2. This injunction was accompanied by another document in which the Recovery Department stated that Banco Natwest España, SA, at that time Solbank, SBD, SA, appears as guarantor of the intra-Community carriage undertaken by Danzas Málaga, SL, and in the period running from 24 November 1995 to 12 January 1996 a total of 29 T1 customs documents in which the said company appeared as the declarant, and the said company having failed to present the goods at the office of destination, it was proceeding to recover the taxes owed. It added that it had not been possible to inform Danzas Málaga, SL of the debts, and that the guarantors were notified within the space of one year, that they had not been released from their obligations and that they were obligated to pay those amounts for which they were liable in respect of EC customs transit. They have not paid these sums.

In respect of a request for collection presented by the competent authority of a Member State, art. 19 of Royal Decree 1068/1988 of 16 September (RCL

1988/1930) implementing certain Community Directives on mutual assistance for the recovery of tax claims provides as follows: "1. Requests for collection must be made in writing and must be accompanied by an official original or a certified copy of the document authorising enforcement, issued in the Member State where the requesting authority has its headquarters. It must further contain a declaration stating that the requirements set forth in the subsequent art. 21 have been met, it must bear the official stamp of the requesting authority and must be signed by a functionary duly authorised to make the request . . .".

Having examined the actions, then, in relation to the arguments put forward by the appellant and to the documents in the administrative record appended to the proceedings – in which there is effectively no sign of the guarantee allegedly given by the appellant, be it said that on 2 April 2004 this Court ordered the suspension of the term for pronouncing judgment and issued a request to the Customs Office at Antwerp (Belgium) to remit to these proceedings accreditation of the requirements made to Natwest España, SA and the notices sent to the latter as guarantor in connection with payment of the duties owed due to failure to release the T1 documents of the company Danzas Málaga, SL, and also to remit the guarantee document furnished by the appellant, now Banco de Sabadell, SA and at the time Natwest España, SA; it also requested the National Recovery Office of the AEAT to remit to the proceedings the guarantee or surety signed by the alleged guarantor and debtor in connection with the intra-Community carriage undertaken by the company Danzas Málaga, SL, the subject of the present actions and whose existence the appellant denies.

The Customs Office at Antwerp has not replied to these requests despite the time that has elapsed to date; on the other hand the Head of the National Recovery Office of the Inland Revenue reported in an official communication of 26 May instant that she requested information from the Provincial Customs and Special Taxes Annex in Madrid regarding the said guarantee and was told that the guarantee had been returned by the functionary responsible for such procedures, but that in the return of the guarantee there was no mention of the date on which it was formalised or the identity of the person withdrawing it".

XXIV. INTERLOCAL CONFLICT OF LAWS

– *SAP* Barcelona, 9 September 2004. Web Westlaw Jur 2004/293050

Marital economic regime of community of acquisitions: private goods: inadmissible claim: dwelling acquired during marriage: Catalan separation regime not applicable: Catalan regional citizenship ("vecindad civil") not acquired, no marriage contract.

"Legal Grounds

(. . .) The assertion in the challenged judgment that neither spouse had acquired Catalan regional citizenship at the time of marrying on 7 April 1959 is correct and is founded on the balance of the evidence examined in the proceedings. This is a preliminary issue and is essential for determining whether title is held in private or in common in the dwelling transferred by the Ministry

of Housing under a private contract dated 7 April 1975 as the habitual and permanent home of the family . . . in the town of Manresa, finally paid off by instalments on 20 September 2000 and formalised in a public document on 18 October of the same year. And they had not acquired Catalan regional citizenship because Tomás was born in Madrid and Lourdes in Almería, and hence, sharing the same citizenship of origin they were subject to the common Civil Law, as provided in art. 14 of the Civil Code. Before marrying they had not opted to acquire Catalan regional citizenship, nor had they acquired it through ten years' continuous residence in Catalonia. They had not drawn up a marriage contract altering the marital economic regime, and therefore the regime was that of community of acquisitions as provided by default in art. 131 of the Civil Code as it relates to art. 1.345, art. 9–2 and article 1.315 of the same Code, at the time of marrying".

- *SAP* Barcelona, 23 July 2004. Web Westlaw Jur 2004/217442

  Marital economic regime of community of acquisitions versus separation of estates: common regional citizenship at the time of marrying; no marriage contract.

  "Legal Grounds

  One. The appeal centres on a challenge of the declaration contained in the judgment *a quo* to the effect that the marital economic regime was that of community of acquisitions and the assertion that it is that of separation of estates. However, other than the remarks that the appellant makes regarding acquisitions of goods by both litigants after the separation, the plea in appeal raises no argument of substance from which one might effectively conclude that the marital economic regime was indeed that of separation of estates . . .

  . . . Leaving aside the statements made by the parties in public or private documents declaring what their marital economic regime is, the aphorism that things are as they are and not as the parties would have them be is applicable in this case. The deed, as provided in article 319 of the Civil Procedure Act (RCL 2000, 34, 962 and RCL 2001, 1892) in force at the time, only records the fact or event giving rise to its making, and the date, but not the truth or otherwise of the statements made by the parties.

  When the litigants married, both possessed the common citizenship; they had not acquired the Catalan foral citizenship because ten years had not elapsed since their arrival in Catalonia from Andalusia, and consequently the applicable norms were those of the Civil Code, as provided in article 15 of the Civil Code (LEG 1889, 27) in force at the time of their marriage, and, absent a marriage contract, the legal marital economic regime had necessarily to be that of community of acquisitions, as was correctly construed by the challenged judgment, which must therefore be confirmed".

- *SAP* Valencia, 28 June 2004. Web Westlaw Jur 2005/1810

  Marital economic regime of separation of estates: husband with Catalan regional citizenship ("vecindad civil"): couple married and resident in Catalonia:

statement in separation agreement that the regime was community of acquisitions without effect; marriage contract required to change regime.

"Legal Grounds

One. The nexus of all the appellant's arguments is that in their separation agreement the parties stated that their marital economic regime was that of community of acquisitions; nevertheless, it must be borne in mind that since the husband possessed Catalan regional citizenship and the couple were married and lived in Tortosa, under the former and the present legislation alike the regime applicable to the spouses was that of separation of estates, as the judgment *a quo* very rightly and soundly asserts, given the impossibility of accepting a simple statement on a separation agreement as a valid basis for altering the marital economic regime – that can only be done through the appropriate marriage contract, and hence a simple separation agreement will not do, as this would be mean acknowledging as valid a change which our legal system requires to be made in a given specific form, namely in a marriage contract. To accept the appellant's thesis would be to accept as valid for a given act a formality other than that formally required. This cannot be entertained in our legal system, and therefore the judgment *a quo* is confirmed *in toto*, without indication as to the costs of this appeal".

– *SAP* Madrid, 25 March 2004. Web Westlaw Jur 2004/248602

Navarrese regional citizenship preserved by deceased on making will: appellant cognisant of acts made by her mother and recorded in public documents, of which she was a beneficiary.

"Legal Grounds

(. . .) As to the substance of the case here under review, it must be accepted, as accredited in the proceedings, that the deceased, Cecilia, possessed Navarrese foral citizenship by right of birth and by marriage to Jon, who died in 1973 leaving a Naverrese foral will, which was respected by all his children, including the applicant, even although it was because of his residing in Madrid for the sake of his work that Cecilia lived in Madrid from 1958 on. We must therefore stress that while it has been accredited that Jon never made the requisite declaration at the Civil Register to preserve his Navarrese citizenship, at the time of his death his daughter Sonia accepted the Navarrese foral will which he had drawn up, and the attendant notarised declaration of acceptance and statement of inheritance and donation of 1983 made by Cecilia as sole heir of her predeceased husband, in which she unequivocally claimed Navarrese foral citizenship, and in which declaration she gifted to her children various properties inherited from her husband – all facts accepted by all the children without demur.

It is also important to note that Cecilia was registered as resident in Tafalla from 1975 to 1958, and as late as 1982 she had a National Identity Document issued in Pamplona in which Tafalla appeared as her place of residence. The record also shows that she lived in Guipúzcoa and was resident in San

Sebastián at the time of her death, which occurred in the city of Madrid, fortuitously as she had travelled there on a family matter.

While Cecilia clearly did not make the requisite declaration at the Civil Register to preserve her Navarrese foral citizenship, the evidence shows that repeatedly, in all acts of significance – for instance the wills drawn up in 1974, 1976, 1982, 1993, 1996 and 1997, agreements and acts recorded in public documents, the acceptance and statement of inheritance and donation of 1983, the deed of renunciation of usufruct of 1984 and the agreement of 1986 – Cecilia reiterated, consistently and without change over time, that she possessed Navarrese foral citizenship, which assertion is reinforced by acts thus instrumented, which would not have been valid had she not possessed the said Navarrese foral citizenship. Having established the foregoing, we must now consider that, as the Provincial High Court of Valencia stated in its Judgment of 30 July 1999, "the jurisprudence of the Supreme Court has consistently taken the view that the acquisition of regional citizenship upon the elapse of ten years is equivalent to voluntary acquisition, so that any conduct that shows an attitude contrary to a change thereof must suffice to prevent such change". Therefore, the acquisition of regional citizenship willy-nilly cannot take place where there are acts demonstrating the person's will to preserve their citizenship, as is the case here; and we must further consider that article 14 of the *CC* (LEG 1889, 27) provides that the citizenship corresponding to the place of birth takes precedence over the common law citizenship and further establishes a presumption *juris tantum* of attribution of regional citizenship to the place of birth in case of doubt; thus, given the registered place of residence of Cecilia noted above, it may be inferred that it was not her will to establish her effective and permanent residence there with sufficient continuity – especially after the death of her husband – to warrant a change. And since that residence did not in the course of time come to be continuous and "legal" in the manner interpreted by the jurisprudence, it would be contrary to the acquisition of common law citizenship *ipso jure* as claimed by the applicant.

An essential element in support of the foregoing is the fact that the registration or lack of registration of the declaration of preservation of foral citizenship at the Civil Register can only be admitted as a constituent fact vis-à-vis third parties, a category into which the applicant does not fall since, as daughter of the deceased Cecilia, she was fully cognisant of the acts formalised in public documents by her mother, from which she benefited – and moreover she also represented her mother in publicly documented acts in which her mother's Navarrese citizenship was maintained.

For all those reasons, we must accept that Cecilia still preserved her Navarrese foral citizenship at the time of making a will subject to the said foral laws and hence we must dismiss the appeal brought by the applicant".

– *SAP* Gerona, 15 March 2004. Web Westlaw AC 2004/617

Declaratory action on title: inadmissible: property relations between spouses

with Catalan regional citizenship and marital economic regime of separation of estates: good in dispute belonging to the private estate of the wife: public deed of sale: principle of formal acquisition and not actual subrogation.

"Legal Grounds

(. . .) In other words, although a declaration of ownership is sought without reference to who paid the purchase price and in what proportion, the fact is that in the end frequent reference is made to this detail which, like it or not, is all that enables the appellant to sustain that he is entitled to one undivided half of the said property.

The appellant has not realised that even if we were to accept his line of argument, given the nature of the action he has brought, in order for his declaration of title in an undivided half of the property to succeed, it would be necessary to determine whether it has been demonstrated that he is the owner of that half, to which end it is essential to apply the legal rules regulating title in goods between spouses subject to the Catalan marital economic regime of separation of estates. And that is precisely what the Judge at first instance has done, absolutely correctly.

The problem here raised is, in short, that of property relations between spouses possessing Catalan regional citizenship and subject to the regime of separation of estates. The rules applicable for resolution of the case are the very ones followed in the challenged judgment in dismissing the claim, and the aspect of the problem relating to registration, which it is sought in this second instance to place at the core of the debate regardless of whether a right of ownership exists, is merely a consequence of the foregoing. One cannot expect to judge whether title published by the Register of Property is exact without inquiring whether the claim to title is lawful.

(. . .) On the basis of the foregoing, the parties do not dispute the fact that the good an undivided half of which is claimed belongs to the wife against whom the appeal is brought. Title in the disputed good is therefore not at issue here; the good belongs to the private estate of the wife, as recorded in the deed of sale.

This contract was formalised in 1981, which means that first of all we must determine which of the various norms successively regulating these matters is the applicable one. The provision in force at the time was article 23 of the Compilation of 1960 (RCL 1960, 1034). However, that provision, which contained the so-called Mucian presumption, was declared unconstitutional in judgments of the High Court of Justice of Catalonia of 10 May 1993 (RJ 1993, 6323), 31 January 1994 (RJ 1994, 4587) and 5 March 1998 (RJ 1998, 10049), and cannot therefore be applied. Equally inapplicable are article 49.3 of the version of the Compilation introduced by the Catalan Law of 20 March 1984 (RCL 1984, 1199, 1845, 2377 and LCAT 1984, 828), the Catalan Law of 30 September 1993 (RCL 1993, 2958 and LCAT 1993, 467) (article 21) on property relations between spouses, and the current article 39 of the Catalan Family Code, approved by Catalan Law 9/1998 of 15 July (RCL 1998, 2135; LCAT

1998, 422 and 521), since all these reforms were subsequent to the date of acquisition.

According to the judgment of said Court of 5 March 1998, given this legislative lacuna, the applicable precept must be article 7 of the original version of the Compilation (drafted in 1960), according to which in the regime of separation of estates either spouse is vouchsafed the ownership, enjoyment and disposal of his or her own goods. This means that under the regime of separation of estates in Catalan law, the principle of real subrogation of the spouse, who although having title in all or part of the consideration used in acquisition of the good is not registered as owner thereof, does not apply. This exclusion occurs both in the former article 23 and in the later article 49.3 of the Compilation. Consequently, the Supreme Court judgments of 10 May (RJ 1993, 6323) and 19 October 1993 (RJ 1993, 10181), 31 January 1994 (RJ 1994, 4587), 5 March 1998 (RJ 1998, 10049) and 27 June 2002 (RJ 2002, 10438) establish that in the Catalan regime of separation of estates the guiding principle is that of formal acquisition and not real subrogation.

The challenged judgment is correct in its application of the law, in the interpretation of the law by the Catalan court of appeal and in the legal consequences flowing from the facts of the case. . .

For all the above reasons, the appellant's petition to have himself declared owner of an undivided half of the property in dispute is not admissible in Catalan law and must therefore be dismissed. For reasons of consistency as explained in the first legal ground of the challenged judgment, as the issue was not raised in the application we are unable to consider the question of whether in the event that the appellant did indeed contribute to the acquisition of the property in which his wife holds title he would enjoy some right of credit over her for the monies invested therein".

Spanish Literature in the Field of Private and Public International Law and Related Matters, 2004

This survey, prepared and compiled by B. Arp and Dr. E. Crespo Navarro (Assistant Lecturers in Public International Law), and Dr. M. Guzmán Peces and J.I. Paredes Pérez, (Associated Lecturers in Private International Law), under the direction of Dr. I. García Rodríguez (Lecturer in Private International Law at the University of Alcalá – Madrid), is designed to provide information for international lawyers and law students on matters concerning Public International Law, International Relations, Private International Law and Community Law published in Spain or by Spanish authors.[1]

PUBLIC INTERNATIONAL LAW AND RELATED MATTERS

1. Essays, Treaties and Handbooks.

BERNARD Y ÁLVAREZ DE EULATE, M., *et al., Textos básicos de Organizaciones Internacionales*, (Basic Texts on International Organisations), Zaragoza 2004, 559 p.

FERNÁNDEZ TOMÁS, A., SÁNCHEZ LEGIDO, A. and ORTEGA TEROL, J. M., *Manual de Derecho Internacional Público*, (Handbook on Private International Law), Tirant lo Blanch, Valencia 2004, 636 p.

This work is one of the new handbooks intended for university instruction of public international law recently published in Spain. The main author is Antonio Fernández Tomás, Public International Law and International Relations Professor at the *Universidad de Castilla-La Mancha* and collaborating in the project were two of his disciples, Ángel Sánchez Legido and Juan Miguel Ortega Perol, both tenured professors at the same University.

Written with the clear objective of serving as a teaching instrument of Public International Law at the initial stage of university studies, this book covers the most important themes of the general aspects of the material in its 636 pages. For example it covers the fundamental characteristics of international society and its

[1] The enormous volume of works published on EC Law has made it necessary to select only those focusing on general Community Law. We have been careful to include the works of authors who lecture in the fields of Public International Law, International Relations, and Private International Law.

Spanish Yearbook of International Law, Volume X, 2006

legal system; the process of creating regulations in international law; the legal statute of the subjects of the legal system; international treaties; relations between international law and domestic law; international responsibility and diplomatic protection; State competencies regarding territory; the Law of the sea; the United Nations; the principle of the prohibition of the use of force and the pacific settlement of disputes. It likewise focuses on some subjects selected from specific aspects such as the international protection of human rights (*Lesson 19*) as well as a lesson which is very current dealing with crimes with international repercussions (*Lesson 20*). It should be pointed out that all of the subjects addressed are accompanied by footnotes where bibliography and fundamental related documentation can be found; very useful for anyone interested in delving further into the study of any one of them.

It should also be mentioned that most recent practice in Spain was taken into consideration in the drafting of all of the lessons of this handbook. Special mention should also be made of the fact that an assessment approach is employed by the authors when addressing the different subjects such as the chapters focusing on the international protection of human rights or crimes with international repercussions. In short, this work offers the reader an updated and modern vision of International Law and is written in a clear and easily understandable style making it a very useful reference handbook among the already abundant collection of general works in our discipline published in Spanish over the last twenty years. – J.F. and B.A.

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2. Books in honour of

3. Monographs and Collective Works

ADAM MUÑOZ, M. D. and GARCÍA CANO, S., (Dir.), *Sustracción internacional de menores y adopción internacional*, (International child abduction and international adoption), Colex, Madrid, 2004, 254 p.

This work is based on the Conference on the International Protection of Minors held at the Law Faculty of the *Universidad de Córdoba* on 25–26 April 2003 addressing the two subjects in this sector which, in my view, have the greatest legal relevance in light of their relevance today and the number of ongoing problems leading legislators to undertake continuous legislative reforms in these fields.

The book is structured in accordance with the aim of the work, i.e. to address, from both a theoretical and practical standpoint, the most significant issues related to the international abduction and adoption of minors. Concerning contributions, the introduction entitled "Globalisation, multiculturalism and the international protection of minors written by Dr. García Cano is the prelude and common theme of all of the studies featured in the book. Special accent is put on deficiencies in the enforcement of the Spanish domestic proceeding concerning the restitution of minors in the work of Adam Muñoz on the "Self regulation of the proceeding concerning the return of minors transferred illegally" which addresses possible solutions. Also participating in this collective work are Calvo Caravaca and Carrascosa González addressing the subject of the international abduction of minors from a conventional perspective and analysing the enforcement of the 1980 Luxembourg Convention and the Hague Convention of the same year undertaken by the Spanish authorities. The contribution made at the conference by C. González Beilfuss focused on the protection of minors with a comparative analysis of the regulations of the Hague Conference and the European Union (1980 and 1996 Hague Conventions and the 1980 Luxembourg Convention, the 2003 Council of Europe Convention, the Brussels Convention II and Brussels II bis and the Community regulation on matters of parental responsibility.

The book includes some contributions which help provide a global, practical and interdisciplinary vision of the issues addressed. This is the case of the study carried out by the Technical Department of the Deputy Directorate-General of International Legal Cooperation of the Ministry of Justice (E. Pías García) who analyses the Spanish Central Authority's enforcement of the Conventions on the international abduction of minors In his contribution, Mr. Alonso Carvajal, lawyer of the *Asociación para la recuperación de niños sacados de su país* (Association for the recovery of children taken from their country), addresses the problems arising on a daily basis concerning the abduction of minors. And Padilla Alba focuses on the criminal aspects of the illicit transfer of minors basically circumscribing his analysis to Organic Law 9/2002 of 10 December on the amendment of the 1995 Spanish Criminal Code.

The second part of the work focuses on the international adoption of minors and includes four theoretical and two practical studies. The practical part starts off with the contribution made by Adroher Biosca who takes a look at the causes contributing to the growth in international adoptions in a number of different countries, particularly Spain. This article specifically refers to each one of the problems arising in the legal recognition of adoptions consummated abroad and the progressive change in criteria applied by the Directorate-General of Registries and Notaries Public (simple adoptions done in Paraguay, Mexico, the Dominican

Republic or Guatemala and adoptions which do not envisage the same legal ramifications as those laid down in our legal system such as those done in China, Nepal and Vietnam. The operation of the 1993 Hague Convention on international adoption and especially the mediation role played by the so-called Collaborating International Adoption Organisations (Spanish initials *ECAI*) is addressed by Dr. González Martín, professor at the *Universidad Autónoma de México* who examines the processing of Mexican adoptions highlighting the need for coordination between the states party to the Hague Convention in order to prevent illicit practices and related unlawful benefits.

The most negative aspects of international adoption were outlined by Herranz Ballesteros in his work on secret adoptions and trafficking in children. As a solution to these types of undesirable practices he suggests the strengthening of the cooperation systems in place between States in the conventional field. In his presentation Diago Diago also addresses Fictitious or self-interest adoptions highlighting how foreign adoptions of legal-age persons have proliferated over the last several years for the purpose of gaining nationality and other immigration-related benefits in the host country along the same lines as "fraudulent marriages". This second part concludes with the participation of the Deputy Director-General of Child and Family Affairs of the Ministry of Labour and Social Affairs (A. Marina Hernando) whose contribution addresses the role played by the central Spanish authorities in the enforcement of the 1993 Hague Convention and likewise the participation of the President of ADECOP (*ECAI*) (Mr. Góngora Bernícola) who took a close look at the role played by the *ECAIs* in the adoption proceeding both within and outside of the framework of the 1993 Hague Agreement. – M.G.P.-

ADAM MUÑOZ, M. D., *La mutilación genital femenina y sus posibles soluciones desde una perspectiva del derecho internacional privado*, (Genital mutilation of girls and women and possible solutions from the perspective of private international law), Universidad de Córdoba, Córdoba, 2004, 176 p.

AGUILAR GRIEDER, H., *Acumulación de procesos en los litigios internacionales*, (Overlapping of proceedings in international litigation), Tirant lo Blanch, Valencia, 2004, 384 p.

Professor from the Universidad de A Coruña, Dr. H. Aguilar Grieder addresses an especially urgent topic of international civil procedural law in her work, that of *Acumulación de procesos en los litigios internacionales* (Overlapping of proceedings in international litigation). In this work she analyses the specifics of the international connectivity of the procedural institute not as a criteria for assigning competence but rather as an autonomous mechanism the purpose of which is to circumvent the risk of contradictory or irreconcilable decisions each time that two (or more) proceedings are pending before jurisdictional bodies of different States. In this regard, in light of the lack of a specific regulation from the said institute in our autonomous system and the fact that it is impossible to turn to the *legis*

analogy for the application of the domestic regulation regarding the overlapping of proceedings in the international arena, the value of Dr. Agular Grieder's monograph lies in her proposal to span this gap by formulating a proposal regarding guidelines under which *lege ferenda* should admit the said institute, especially the effects and conditions on which its admissibility and procedural treatment would be contingent.

In order to achieve this objective, from a formal point of view, the author divides her work into five parts while, from a substantial viewpoint, the overarching methodological plurality employed is plain to see. Although the intention here is not to assign a specific method to each chapter, four methods can be distinguished throughout the work and these comprise the line of topics, *topoi* in the Aristotelian sense, paving the way of doctrinal construction: legal mechanisms and their conditioners (suspension or stay of proceedings); the optional or compulsory nature of legal mechanisms; activation of legal mechanisms (allegation of officio or upon request by the party); criteria of dispute settlement between the connected proceedings (time priority principle or logical priority principle).

The dogmatic method can be observed in the *Introduction* and in *Part one* in which the author constructs the theoretical framework on which her work is based, delimiting the aim of the study with respect to concepts and similar (connectivity and competence; connectivity and lis pendens) and the peculiarities that the said connectivity present in our domestic regulation in respect of the topics highlighted.

Parts Two and *Three* of the work are examples of the teleological method thanks to the pertinent considerations made by Dr. Aguilar Grieder with a view to determining the admissibility of the international connectivity in Spain's domestic system. To this end, the author thoroughly scrutinises the constitutional rules to which the procedural institute under study, *de lege ferenda*, is subject and seeks justification for regulation in the autonomous system guaranteeing uniform international judicial protection preventing the risk of irreconcilable judicial decisions and meeting the demands stemming from the international principle regarding the harmonisation of solutions.

Once verifying the need for specific regulation and identifying the interests at stake and their limits, in *Part Four* Aguilar Grieder examines the legislative solutions offered by Spanish Private International Law and by comparative law in cases of lis pendens and connectivity. And especially, on this occasion taking the compendium of topics as a *leitmotiv*, the author makes use of two new methods different from the ones indicated above. On the one hand she uses the inductive method to analyse the existing international legal reality where she alludes to the guidelines that will allow her, in the last chapter, to formulate relatively universal rules. Of special interest is the thorough examination that professor Aguilar Grieder makes of connectivity within the scope of the "community" and on the "multilateral", "bilateral" and "global" level. On the other hand, she employs the comparative method focusing particularly on the study of two neighbouring countries (Switzerland and Italy) that have expressly regulated the effects produced in the forum of a foreign proceeding.

Following this detailed analysis, *Part Five* proposes a suitable solution *de lege ferenda*. In this connection, having illustrated the cases of international connectivity included within the decision-taking scope of the autonomous Spanish system, Dr. Aguilar Grieder then acknowledges, in terms of the modality of the stay of proceedings, that international connectivity constitutes a limit to the jurisdiction of Spanish courts and therefore, in the future, must be accompanied by a regulation at the Organic Law of the Judiciary level. Quite distinct from what should take place, in the view of the author, in the case of a suspended hearing because given that the said limit is not constituted in this case, international connectivity could be regulated by a rule at the level of an ordinary law. Similarly, from a substantial point of view, the thoroughness of the work is highlighted by the scrupulous care taken by the author in the regulation of each one of the topics studied with a view to conciliating the values at stake with the rights laid down in article 24 of the Spanish Constitution. Thus, on the one hand, in light of the risk of defencelessness that could arise in the case of a stay of proceedings (lack of international jurisdiction of the foreign courts to hear the connected case, excessive delay of the proceeding abroad, difficulties encountered in acknowledgement of the foreign judgement in Spain), Dr. Aguilar Grieder proposes extending the expiration date of the action so that the claimant is able to gain legal protection of his legitimate rights and interests by means of lodging a new claim before the Spanish courts. On the other hand, to prevent violation of the right to a hearing without undue delay, in the case of a suspended hearing of a proceeding pending in Spain, the author proposes making this procedural condition contingent upon certain deadlines, the limits of which would be the deadlines envisaged in domestic civil law proceedings leading to her intended public order character. And lastly, the same conciliatory nature can be observed in the condition or cases in which international connectivity is subject *de lege ferenda*, especially in the compulsory nature of the suspension or stay of proceedings, in the operability of the principle of temporal and logical priority and in the observation of the international connectivity of officio or petition by the party.

In short, this is a provocative work in terms of its aim and the results obtained and from our view it is recommended reading. – J.I.P.-

ARENAS GARCÍA, R., *Crisis matrimoniales internacionales: Nulidad matrimonial, separación y divorcio en el nuevo Derecho internacional privado español*, (International marriage crises: marriage annulment separation and divorce under the new Spanish private international law), Universidade de Santiago de Compostela, Santiago de Compostela, 2004, 585 p.

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CALVO-CARAVACA, A. L. and CASTELLANOS RUIZ, E. (Dir.) *El Derecho de familia ante el siglo XXI: aspectos internacionales*, (Family law in the 21st century: international considerations), Colex, Madrid, 2004, 854 p.

CALZADILLA MEDINA, M. A., *La adopción internacional en el Derecho español*, (International adoption in Spanish law), Dykinson, Madrid, 395 p.

This monographic study by Dr. Calzadilla Medina based, on her doctoral thesis directed by Dr. De Pablo Contreras, touches upon a subject that, although analysed by the greater part of civil and international private doctrine, pays special attention to adoptions constituted abroad in simple terms and which produce effects which are different from those envisaged in the Spanish legal system.

The work is divided into three chapters: The first, an introduction of sorts, analyses the principles which inform the legal institution of adoption both on the domestic and international levels. In the second chapter, in turn divided into two sections, the author delves deeper into the overall legal framework beginning with the conventional regulation (the 1993 Hague Convention and Bilateral Protocols) and then looks into the autonomous sector (9.5 Civil Code) wrapping up with the legal capacity and consent necessary for the constitution of adoption. In the second section the author focuses basically on the accredited organisations (also referred to as collaborating organisations in international adoption (Spanish initials *ECAI*) constituting, in my opinion, the most original and thorough part of her research. And lastly in chapter three, broken down into four sections, she addresses the constitution of adoptions by foreign authorities and recognition problems arising in Spain in those cases in which they were not constituted properly or not in accordance with the proceeding laid down in the Convention. However, in this connection we have to differ with the affirmation that the 1993 Hague Convention, in its material scope, also envisages simple adoptions because, from our viewpoint and based on the *ex lege fori* qualification (article 12.1 of the Civil Code) the adoptions that establish ties of filiation (Convention article 2.2) are full adoptions and, once recognised in Spain, have the effects envisaged in our legal system thus rendering meaningless the effects that the original State of the minor could attribute to the adoption.

As for the constitution of the adoption by another type of authority, the author focuses on the processing of the proceeding when a Spanish authority intervenes, drawing a distinction between those cases in which the cooperation mechanisms of authorities envisaged in the Convention have been followed and those others outside of the framework of the said Convention without losing sight of the *ex novo* constitution of adoptions denied recognition pursuant to paragraph five of Civil Code article 9.

Continuing with this logic of the adoption proceeding, Dr. Calzadilla addresses

the birth registry phase and dedicates the last two sections of her work to identifying the legal effects of the legal relationship validly constituted and duly registered, especially in terms of nationality and lastly takes a look at aspects concerning the extinction and nullification of the legal relationship.

In terms of criticisms, it should be pointed out that this work could have been enriched by addressing certain issues such as the historical development of adoption as an institution, analysis of this concept in the 1958 law and that of 1970 from the perspective of domestic Spanish law or by going into greater depth on the issue of suitability within the scope of each Autonomous Community or from the perspective of Comparative Law with some legislative notes regarding the principle states of origin of minors as well as the host states (using conventional terminology). However, the exhaustive bibliography and the practical knowledge of the adoption procedure are more than reason enough to consider this a compulsory reference work. – M.G.P.

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[1] This Index was compiled by M.A. Almeida Nascimento, C. Antón Guardiola, V. Carreño Gualde, J. Ferrer Lloret, F. Lozano Contreras, F. Pascual Vives and M. Requena Casanova (sections of Public International Law); B. Arp, A. Aura Larios de Medrano and E. Crespo Navarro (sections of Private International Law).

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