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The Future of Uniform Private Law in the European Union: New Trends and Challenges

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I. COMMUNITY LEGISLATION AS AN INSTRUMENT OF UNIFICATION: SOME LIMITS AND PROBLEMS

One of the key elements of European integration is a process of unification or harmonization of national laws which is formal and centralised, channelled as it is through the approval of binding (at least on States) rules by Community institutions, generally by means of directives. The level of normative development attained and its considerable impact on the regulation of business activity contrasts with the situation in other integration processes like the ones in progress on the

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American continent, which have not been accompanied by similar processes of approximation of laws.[1]

Harmonization directives have been used to deal with important aspects of private law in such crucial areas as intellectual property, mercantile companies, insurance contracts, misleading advertising, unfair trading practices, product liability, consumer contracts and electronic commerce. But despite that, EC Private Law remains essentially fragmented. Although in matters such as the law of contracts there is a highly significant body of directives, an overall appraisal of EC private law shows that harmonization is basically confined to isolated results in certain sectors.[2]

Inasmuch as the normative instrument used in the sphere of private law is mainly the directive, this process implies not unification but merely harmonization; this simply cuts down the plurality of rules and lends itself to distortions through incorrect or untimely transposition.[3] Also, the content of the directives is such as to encourage a complexity and wordiness of style in the transposing norms, which contrasts with the style of national law codes.[4] As a result, the endowment of directives with a measure of direct effect produces a considerable impact.[5] The shortcomings inherent in an instrument like the directive, and specifically the risk of distortions, contrasts with the efficacy of Community regulations, which do ensure unification. The use of regulations to deal with EC private law has been very limited, with significant exceptions in certain subject matters such as industrial property rights, companies, private international law, insurance and other contracts.

The preferential use of directives in the sphere of private law helps Member States to retain a certain degree of autonomy and flexibility. However, there is a tendency in the EU to replace minimal harmonization, which has traditionally been the policy in the sphere of consumer protection, with maximal harmonization as reflected in the Unfair Commercial Practices Directive of 2005.[6] This development is no mere technical adjustment but in fact has major implications for legislative

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[1] *See* H.P. Glenn, "Harmony of Laws in the Americas", *The University of Miami Inter-American Law Review*, vol. 34, 2003, pp. 223–246, pp. 224–232, in favour of an informal model of harmonization as typically followed in American integration processes, as opposed to the formal, centralised harmonization of the EU. Nonetheless, it would seem, to the contrary, that the differences in levels of harmonization have more to do with the fact that the degree of integration attained by those models is very different.

[2] For an analysis of the subject matters concerned, see S.A. Sánchez Lorenzo, *Derecho privado europeo*, Granada, 2002, pp. 43–73; and S. Cámara Lapuente (coord.), *Derecho privado europeo*, Madrid, 2003, pp. 235–1233.

[3] For an overall analysis, see L. Niglia, "The Non-Europeanisation of Private Law", *ERPL*, 2001, pp. 575–599.

[4] Cf. J. Basedow, "Codification of Private Law in the European Union: the Making of a Hybrid", *ERPL*, 2001, pp. 35–49, p. 38.

[5] *Cf.* T. Körber, "Europäisierung des Privatrechts durch Direktwirkung des Gemeinschaftsrechts?", *EuZW*, vol. 12, 2001, p. 353.

[6] Directive 2005/29/EC of 11 May 2005.

policy and may raise reservations from Member States. When Member States are allowed to impose additional restrictions – as in the case of minimal harmonization –, systems affording different levels of protection may coexist. If harmonization is maximal or complete, such coexistence is not possible, and that will raise difficulties to the extent that there are significant differences among the various national laws.

Because of the use of directives, the rules of harmonization in contractual matters affect the laws of Member States largely in the form of the incorporation of a number of rules dealing only with some particular aspects of certain contracts. One such example is the Directive on certain aspects of the sale of consumer goods and associated guarantees (99/44/EC) of 25 may 1999, which was incorporated into Spanish law by the Consumer Goods (Guarantees on Sale) Act, Law 23/2003 of 10 July. The rules contained in the Directive cover key aspects of the regulation of sales, such as remedies for hidden defects in the object of sale contained in article 1484 of the Spanish Civil Code. However, the uniform rules have not been incorporated into the Code; a specific regulation has been introduced[7] which, in view of the Directive's aim of protecting consumers, is basically exceptional in nature, and is further mandatory, which is not usual in the general law of contracts.[8] The fact that the directives do not directly change the Code produces the impression that the general rules of contract law continue to be essentially national in character, although it is undeniable that Directive 1999/44 very significantly affects the Spanish law of obligations[9] – particularly as the Directive incorporates the notion of conformity as a decisive consideration for performance of a contract – in line with the Vienna Convention on Contracts for International Sale of Goods of 1980 – and substantially modifies the legal rules of guarantee in the sale of consumer goods.[10]

That the unifying impact of Community law on the general contract law of Member States is limited is borne out by other Directives having a particular bearing on contractual matters. One such text is the Directive on electronic commerce

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[7] *See* J. Marco Molina, "La Directiva 1999/44/CE sobre determinados aspectos de la venta y las garantías de la venta de consumo", *La armonización del derecho de obligaciones en Europa*, Valencia, 2006, pp. 165–187, pp. 178–183.

[8] This may be a source of friction and problems in the interpretation and application of the rules; in connection with Directive 1999/44, see T. Tröger, "Zum Systemdenken im europäischen Schuldvertragsrecht – Probleme der Rechtsangleichung durch Richtlinien am Beispiel der Verbrauchsgüterkauf-Richtlinie", *ZeuP*, vol. 11, 2003, pp. 525–540, pp. 528–534.

[9] *See* M.P. García Rubio, "La trasposición de la Directiva 1999/44/CE al Derecho español. Análisis del Proyecto de ley de garantías en la venta de bienes de consumo", *La Ley*, 26 March 2003.

[10] *See* M.J. Reyes López, "La idea de conformidad en el ordenamiento jurídico español tras la entrada en vigor de la Directiva 1999/44/CE", *Derecho patrimonial europeo*, Navarra, 2003, pp. 321–338, pp. 328–338.

(2000/31/EC). Chapter Two Section 3 of this Directive (arts. 9 to 11) contains the rules regulating electronic contracts.[11] The Directive on electronic commerce only harmonizes national laws on contracts as they relate to the admissibility of contracting by electronic means and to the information to be provided before and after the formation of the contract, imposing certain obligations on information society service providers, which are generally compulsory insofar as the other party to the contract is a consumer. However, the Directive does not regulate key aspects for a general system of contractual obligations in electronic contracts, such as the moment at which a contract is deemed concluded.[12] This conclusion is generally true of other directives affecting the sphere of contracts, as for instance Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 2002/65/EC concerning the distance marketing of consumer financial services.

The foregoing reflects a situation in which harmonization directives on contracts seek only to approximate isolated aspects of the rules governing such contracts and have limited impact on the general system of contract law. Even when they regulate aspects related to that general system – such as remedies for hidden defects in Directive 1999/44/EC or the right of withdrawal in Directive 97/7/EC and Directive 2002/65/EC – they generally do so by means of specific rules for consumer contracts which are mandatory, so that the nature and scope of these rules is very different from the rules in the general system of contract law as set forth in the Spanish Civil Code and Code of Commerce.

II. SUBSTANTIVE SPHERE OF UNIFICATION

1. Mandatory contract law

The establishment and functioning of an integrated market like that of the EU, requires the unification or harmonization of national laws insofar as is necessary to remove obstacles arising from legal diversity. This is reflected in the provisions of the EC Treaty regarding the scope of the normative powers of Community institutions (especially arts. 94 and 95 EC Treaty). The needs of the internal market do not require unification of all law on obligations, or of course all private law.[13] The

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[11] *See* P.A. De Miguel Asensio, *Derecho privado de Internet*, 3rd ed., Madrid, 2002, pp. 350–382.

[12] In fact the moment of conclusion, an issue not included in the Directive, is the only aspect of electronic contracts that the Spanish legislator has incorporated into the general legislation on contractual obligations, through the amendment of articles 1262 Civil Code and 54 Code of Commerce introduced by Law 34/2002.

[13] The limited scope of the powers founded on the adoption of measures relating to the establishment and operation of the internal market was highlighted in a very special way

formal unification or harmonization of substantive private law beyond what is necessary for the operation of the internal market would require a political decision to support that process.

In private law, the rules governing contractual obligations are of particular importance for the internal market, for Community freedoms – specifically those relating to the movement of goods and capital and to the provision of services –. Contract rules have a close bearing on cross-border expansion of the autonomy of parties, for which the contract is an essential instrument. Determination of the boundaries of autonomy – by means of mandatory rules – at a Community level (not at a national level) is already largely the norm, as illustrated by the rules on practices restrictive of competition or on consumer protection.[14]

But in fact the very diversity as regards mandatory law, which cannot be departed from nor substituted by the will of the parties, may pose a significant obstacle to cross-border commercial activities.[15] Outside this sphere, the obstacle posed by legal diversity merely imposes certain transaction costs or psychological barriers on cross-border trade but is no more far-reaching than other obstacles such as those arising out of differences in language, culture or consumer habits, or transport costs determined by geographic distance.[16] In addition, as regards non-mandatory rules, many of the drawbacks of diversity can be obviated by including a choice of law clause in the contract.

Within the Community sphere, unification of conflict of laws rules and harmonization of the rules of private law have traditionally been viewed not as mutually exclusive[17] but as complementary,[18] as illustrated especially by the situation as regards consumer contracts.[19] Moreover, with respect to private law as a whole we

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cont.

by the ECJ judgment of 5 October 2000: case C-376/98, *Germany vs. Parliament and Council*. According to that judgment, the mere disparity of national laws and the abstract risk of obstacles to Community freedoms and the internal market are not sufficient to warrant resort to article 95 of the EC Treaty, which only authorises the adoption of measures to deal with situations entailing concrete and significant obstacles.

[14] *See* S. Grundmann, "Information, Party Autonomy and Economic Agents in European Contract Law", *CMLRev*, vol. 39, 2002, pp. 269–293, pp. 270–271.

[15] *See* G.A., Bermann, "A Commentary on the Harmonization of European Private Law", *Tulane Journal of International and Comparative Law*, vol. 1, 1993, pp. 47–58, pp. 51–52.

[16] *Cf.* "Social Justice in European Contract Law: a Manifesto", *European Law Journal*, vol. 10, 2004, pp. 653–674, p. 656.

[17] *See* S. Sánchez Lorenzo, *Derecho . . . op. cit.*, pp. 124–125; and S. Álvarez González, "Derecho internacional privado y Derecho privado europeo", S. Cámara Lapuente (coord.), *Derecho . . ., op. cit.*, pp. 157–190, p. 185.

[18] *See* J.D. González Campos, "Diritto privato uniforme e diritto internazionale privato", P. Picote (dir.) *Diritto internazionale privato e Diritto comunitario*, Padua, 2004, pp. 33–64.

[19] See F. Esteban de la Rosa, *La protección de los consumidores en el mercado interior europeo*, Granada, 2003, pp. 20–43.

should remember that unification of the rules of private international law – which has been encouraged by the rules introduced into the EC Treaty by the Treaty of Amsterdam[20] – could provide an adequate level of legal security. This path may therefore prove to be more in tune with the principles of proportionality and subsidiarity than a process of unification which seeks to comprehensively cover the substantive rules of broad sectors of private law.[21]

The development of uniform private law in the EU ought to be based upon harmonization or unification centralised in sectors where it is generally agreed that this may bring considerable benefits – particularly a significant reduction of transaction costs – to intra-Community commercial activity.[22] In practice, in the field of contracts this tends to confirm the desirability of unifying the rules that are mandatory and leaving aside non-mandatory rules, a category that includes the bulk of those making up the general corpus of the Member States' codes or laws regarding contractual obligations.[23] This criterion is not therefore conducive to the eventual adoption of a European civil code, inasmuch as the latter tends to be conceived as consisting basically of non-mandatory rules in line with the traditional contents of national codes.[24]

The EC Commission has been developing – typically mandatory – rules on consumer protection without regard to the attempts to establish a broad-based European contract law composed essentially of non-mandatory rules.[25] Moreover, the most recent Community directives on private law, which deal basically with aspects of consumer contracts, are drafted as unconditional and precise rules, which means that transposing rules – usually outside the Codes- are frequently confined to a literal reproduction, at most with some amendments to the terminology.[26]

The characterization of the structure of Community contract law makes it clear that the basic differentiation is between mandatory and non-mandatory rules. Moreover, Community law and the 1980 Rome Convention make specific reference to

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[20] *See* A. Borrás, "Derecho internacional privado y Tratado de Amsterdam", *REDI*, vol. II, 19992, pp. 383–426.

[21] *See* P.A. de Miguel Asensio, "Integración europea y Derecho internacional privado", *RDCE*, 1997, pp. 413–445, pp. 424–425.

[22] *Cf.* J.A. Alfaro Aguila-Real, "La unificación del derecho privado en la Unión Europea", S. Cámara Lapuente (coord.), *Derecho . . ., op. cit.*, pp. 107–127, p. 114.

[23] *See* B. Lurger, "The Social Side of Contract Law and the New Principle of Regard and Fairness", *Towards a European Civil Code*, 3rd ed, Nijmegen, 2004, pp. 273–295.

[24] *See* S. Cámara Lapuente, "Un derecho privado o un código civil para Europa: Planteamiento, nudo y (esquivo) desenlace", S. Cámara Lapuente (coord.), *Derecho . . ., op. cit.*, pp. 79–80.

[25] Critical of this situation, stressing the link between consumer protection rules and the general rules governing contractual obligations, is L.A. Deflorian, "Consumer Protection, Fair Dealing in Marketing Contracts and European Contract Law – A Uniform Law?", *Global Jurist Frontiers*, vol. 2, 2002, pp. 1–40, 33–34.

[26] *Cf.* M.P. García Rubio, "Hacia un Derecho europeo de contratos", E. Pérez Carrillo (coord.), *Estudios de Derecho mercantil europeo*, Madrid, 2005, pp. 83–103, p. 88.

mandatory rules that are internationally enforced. The latter are mandatory in international transactions, and hence their force cannot be obviated by agreement of the parties as to the applicable law.[27]

The applicability of national non-mandatory rules (or to be exact, rules that are not internationally mandatory) is freely determined by the parties, who choose what law is to be applicable (or do not agree to choose a law other than that applicable absent choice or to include clauses in the contract to obviate the application of these rules). The prevailing consensus is that the applicability of non-mandatory rules of Member States does not normally imply a restriction that is incompatible with Community freedoms.[28] These freedoms should not be invoked in order to constrain the free will of the parties except in situations where this may be warranted by shortcomings of the market. Only internationally mandatory rules impose constraints that the parties cannot remove.

The identification of market failures justifying the application of internationally mandatory rules basically arises in three types of case: where a market is not competitive, where there are asymmetries of information or where there are external factors – that is, when situations arise where the costs are not borne by those making and benefiting from the decisions –. The rules intended to remedy these shortcomings in the market must be applied internationally. The Community rules on contracts are intended to operate basically within the spheres where such failures arise, which is entirely consistent with the principles underpinning Community intervention.[29]

2. Non-mandatory rules and general provisions on contractual obligations

The content of non-binding instruments aimed at making European private law more uniform, and in particular the *Principles of European Contract Law* drawn up by the Commission on European Contract Law, is basically confined to non-mandatory rules as is the norm for rules on contractual obligations in civil codes. The tendency to focus on informal harmonization of non-mandatory rules reflects the idea that those sectors with mandatory rules are more concerned with political decision-making, and the fact that the rules relating to consumer protection have by now been substantially harmonized in the EU by means of directives.

In the current European context, however, the unification of non-mandatory rules on contractual obligations can be considered of minor importance in the

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[27] *See* S. Grundmann, "The Structure of European Contract Law", *ERPL*, vol. 4, 2001, pp. 505–528, pp. 513–516.

[28] *See* ECJ judgment of 24 January 1991, case C-339/89, *Alsthom Atlantique.* This judgment declares – *obiter dictum* – that rules which the parties are free not to apply by choosing a different applicable law can not be considered restrictions on Community freedoms prohibited by the ECJ.

[29] *See* S. Grundmann, "The Structure . . .", *loc. cit.*, pp. 517–521.

framework of the internal market. That is firstly because globally-oriented compilations of this kind with a comparable level of development already exist, for instance the UNIDROIT *Principles of International Commercial Contracts*. But most importantly, in the context of Community integration, unification aimed at removing obstacles posed to intra-community transactions by legal diversity can only be effective to the extent that mandatory rules are unified, since it is these that constitute (largely at least) such obstacles.[30]

Arguments aimed at restricting the europeanization of private law on the ground that it would weaken the cultural identity of the States can sometimes be used to try and protect the position of national jurists. However, the idea that since private law serves private ends there can be no cause to regret the disappearance of inefficient national legal institutions, for whose protection the existence of cultural differences in Europe is no argument,[31] will not stand up for a number of reasons.

Firstly, because despite notable coincidences, there is undeniably a significant degree of diversity between the private law of the EU member states, deriving from the cultural and linguistic diversity of the Union.[32] Secondly, because the different regulatory options, even in matters of contract law, typically obey to separate ideological criteria[33] and it is not clear that this ideological diversity (for example among solutions to the same question founded on a liberal or a redistributive approach) ought to be eliminated for the sake of efficiency. Moreover, the social, cultural, economic and other differences between the various Member States of the present EU may determine different – and in principle perfectly legitimate – normative preferences according to the country.

Given these facts, the justification for any unification of the general system of contractual obligations, and particularly of its non-mandatory rules, requires a differentiated analysis. Such broad unification is hard to justify in the current Community framework, especially if unification is approached comprehensively, given the way in which regulatory harmonization has traditionally been linked to the proper functioning of the internal market. As noted earlier, the functioning of the internal market can hardly be said to be negatively affected by the persistence of diversity among the laws of the Member States inasmuch as the rules of private international law are appropriately unified, since the regulation is non-mandatory and the parties can choose what law they wish to be applicable.

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[30] *See* M.W. Hesselink, *The New European Private Law*, The Hague, Kluwer, 2002, pp. 238–239.

[31] *Cf.* J.A. Alfaro Águila-Real, "La unificación. . . .", *loc. cit.*, p. 110.

[32] For all these, highlighting certain manifestations of that diversity, see S. Sánchez Lorenzo, *Derecho . . ., op. cit.*, pp. 225–271; and *id.*, "What Do We Mean when We Say Folklore? Cultural and Axiological Diversities as a Limit for a European Private Law", *ERPL*, 2006, pp. 197–219, pp. 213–216.

[33] *See* D. Kennedy, "The Political Stakes in 'Merely Technical' Issues of Contract Law", *ERPL*, vol. 10, 2002, pp. 7–28, pp. 26–27.

Nonetheless, to foster the unification of national laws on the subject is obviously quite legitimate and may even prove desirable insofar as it makes it possible to draw up more appropriate rules than the ones contained in the Member States' own laws. But intervention on this point by Community institutions, concerned with contractual law as they have been lately, ought not to be pursued without reference to national legislators, who are basically the ones with the powers to legislate on the subject. Respect for the different views of the Member States on the subject must be an essential part of any initiative aiming at the unification of general contract law.

The introduction of new mechanisms for coordination among Member States in the drafting and adoption of rules which are more stringent but are also more flexible and take better account of the peculiarities of the different States is an extremely important factor for modernisation. That development may facilitate the europeanization of contract law through reforms of national codes informed by common criteria set out in non-binding documents such as the *Principles of European Contract Law*.[34] Such a recommendation clearly flows from an analysis of the mechanisms for coordination of state laws operating in the USA, particularly the adoption of uniform rules by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI). In any event, in the US system uniformity is favoured by a set of decisive factors which are absent in the EU case, such as a legal culture common to all states, a considerable institutional fabric independent of federal power which facilitates the drafting of uniform laws that are not binding but are open to adoption by states, plus a feeling of belonging to the same legal community which prevails even in sectors of the law that are regulated at a state level.

It should be borne in mind in this connection that even comprehensive formal unification of private law by the EU Member States would not prevent the persistence of significant differences in its application and interpretation, since national traditions vary considerably, for instance as regards the definition of open or flexibly-worded rules and the significance attributed to jurisprudence.[35] Moreover, from the standpoint of the functioning of an integrated market, harmonization of laws through the kind of regulatory techniques typical of private law, such as the use of standards founded on indeterminate legal concepts like good faith, could lead to differing interpretations depending on the country and hence in practice not effectively help to reduce the obstacles to intra-Community trade.[36]

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[34] *See* L. Díez Picazo y Ponce de León, "Reforma de los Códigos y Derecho europeo", *Anuario de Derecho Civil*, vol. 56, 2003, pp. 1565–1574, pointing out that reform of national codes is a necessary premise for the achievement of uniform contract law among the Member States.

[35] *See* E. Hondius, "Finding the Law in a New Millennium: Prospects for the Development of Civil Law in the European Union", M. Bussani and U. Mattei (eds.), *The Common Core of European Private Law*, The Hague, 2003, pp. 79–103, pp. 89–95.

[36] *See* H. Collins, "The Freedom to Circulate Documents: Regulating Contracts in Europe", *European Law Journal*, Vol. 10, 2004, pp. 787–803, pp. 795–796.

3. Other sectors of private law

While the scope of civil codes makes them a key element in the legal and cultural identity of a country, they essentially contain rules, very often of a non-mandatory nature, dealing with relations between private individuals. Rules of private law aimed at imposing controls, as in the field of consumer protection, normally fall outside their scope. The kinds of rules that typically pose obstacles to Community freedoms or measures having a like effect are therefore only present in civil codes to a very limited extent.

Other areas of private law which have been subject to approximation through directives – such as company law, intellectual property or unfair competition – or regulations – for example on companies or industrial property – have a clear connection with the functioning of the internal market while regulating areas traditionally lying outside the scope of civil codification.

The harmonization of rules on issues normally addressed in codes poses special problems as regards adaptation of national legal systems, as the measures to be introduced can be especially difficult to place and systematise. Moreover, in common-law countries these are normally areas where judge-made law has greater relative weight, which also makes it hard to apply harmonization rules.[37]

At the same time, an eventual unification of the rules of broad areas of private law at a Community level is surely not the best solution if we consider the need to adapt the legal system to changing technological and social environments. This idea needs to be balanced against the difficulty of achieving acceptable Community-wide consensuses, which tend to be costlier and slower the more detailed and comprehensive is the proposed unification of the substantive law.[38]

The claim that European identity demands a unified legal system is gainsaid by the fact that a basic element of European identity is precisely the acceptance of a plurality of (legal) languages and cultures.[39] From this point of view, a wide-ranging codification of private law could be detrimental to European identity. According to Article 6(3) of the EU Treaty, the Union must respect the national identities of its Member States, a concept that may be assumed to embrace essential aspects of social and economic organisation associated with political concepts, traditions and (social and natural) circumstances, which are largely peculiar to each Member State.[40] Respect for the cultural identities of peoples is not a bar to evolution of national legal systems since the political and social concepts prevailing in a geo-

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[37] *Cf.* G.A., Bermann, "A Commentary . . .", *loc. cit.*, p. 54.

[38] *Cf.* W. Fikentscher, "Harmonizing national and Federal European Private Laws, and a Plea for a Conflicts-of-law Approach", M. Bussani and U. Mattei (eds.), *The Common . . ., loc. cit*, pp. 43–48, p. 47.

[39] *Cf.* T. Wilhelmsson, "Private Law in the EU: Harmonised or Fragmented Europeanisation", *EIPR*, 2002, pp. 77–94, p. 90.

[40] *See* E. Steindorff, "Mehr staatliche Identität, Bürgernähe und Subsidiarität in Europa?", *ZHR*, vol. 163, 1999, pp. 395–440, pp. 412–413.

graphical area change with the passage of time, as illustrated particularly by developments in the sphere of family law,[41] for instance regarding the treatment of same-sex marriages.

The will to unify private law at a European level implies an aspiration towards a common European identity and is an important component in the make-up of that identity. However, a project of this kind further requires the taking of major decisions on basic values relating to the organisation of social and economic relations and needs to achieve its own balance between contractual freedom and other freedoms linked to major social goals, particularly solidarity. This affects all areas of the legal system, albeit in some areas with a strong technical element cultural or ideological considerations are less important, but that is unusual in civil codes, except for rules on the validity and enforcement of contracts.[42]

In fact initiatives for wide-ranging europeanization of private law necessarily go hand-in-hand with the intent to transcend the limits inherent in the use of the internal market as a frame of reference for possible actions. For that reason such initiatives must be accompanied by progressive superseding of the operation of the internal market as a key element and affirmation of the EU as a political entity endowed with a constitution of its own.[43] However that has not been the case so far, and experience shows that formally, initiatives for the adoption of such measures have had to be presented as a requirement of the internal market and for the removal of barriers to trade.[44]

The private law systems of the various Member States are an essential component of the peculiar cultures and traditions of these countries, and of the personal identity of individuals inasmuch as this is tied to the cultural context in which that person lives. This is particularly evident in certain spheres of family and succession law in which the divergences among the laws of the EU Member States are moreover generally wider.

But the link between private law and cultural identity exists even in the contractual sphere, for the substance of this area of the legal system reflects the standards of distributive justice prevailing in a community and at the same time is a consequence of accepted social practices in a community, particularly in the functioning of its market. This cultural and social dimension of private law must be

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[41] *See* C. González Beilfuss, "Relaciones e interacciones entre Derecho comunitario, Derecho internacional privado y derecho de familia europeo en la construcción de un espacio judicial común", *Anuario español de Derecho internacional privador*, t. IV, 2004, pp. 117–186, pp. 179–180.

[42] *Cf.* K.D. Kerameus, "Problems of Drafting a European Civil Code", *ERPL*, 1997, pp. 475–481, pp. 478–479.

[43] *See* "Social . . .", *loc. cit.*, pp. 656–657.

[44] This was illustrated by the content of the Communication from the Commission "A more coherent European Contract Law. An Action Plan" of 2003, which offers practically no justification of the ambitious proposal for unification of private law that it contemplates.

taken into account when judging whether a given unification proposal entails excessive centralisation incompatible with the principle of subsidiarity, a risk which clearly arises to the extent that the uniformisation pursued is intended to encompass contract law in its entirety.[45]

III. THE SPATIAL SCOPE OF UNIFICATION

1. A private law for intra-Community relations?

To avert the loss that could result from European codification or binding unification of broad areas of private law, the possibility has been mooted that this process coexist, at least during the early stages, with the current national codes.[46] The idea of devising a system of specific private law for intra-Community situations is not readily justifiable other than for situations where what is at stake is the ambit of mandatory applicability of certain rules, which indeed would affect a very significant part of contractual regulation as illustrated by the directives on consumer contracts,[47] and even the ECJ jurisprudence on the directive regarding agency contracts.[48]

In the case of general contract law, which is typically non-mandatory, this option is not justified at all. The adoption of such an approach would introduce major elements of complexity, associated in particular with the need to demarcate and coordinate with other legal systems in this sphere and an increase in the costs associated with knowledge and application of the legal system.[49] Such drawbacks seem to outweigh by far the advantages that it would bring, a view borne out by the fact that in the making of uniform state laws on this subject in the USA, the option of creating a specific set of rules for inter-state situations has systematically been rejected, as illustrated by the *Uniform Commercial Code* (UCC).

However, it is quite another matter to introduce an optional instrument which does not supersede national laws except when chosen by the parties as applicable

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[45] *See* H. Collins, "European Private Law and the Cultural Identity of States", *ERPL*, vol. 3, 1995, pp. 353–365, pp. 359–363.

[46] *See* T.K. Graziano, "Die Zukunft der Zivilrechtskodifikation in Europa – Harmonisierung der alten Gesetzbücher oder Schaffung eines neuen? – Überlegungen anlässlich des 200. Jahrestags des französischen Code civil", *ZeuP*, vol. 13, 2005, pp. 523–540, pp. 532–537.

[47] *See* F. Esteban de la Rosa, "La aplicación de las directivas comunitarias en materia de Derecho privado a las situaciones transfronterizas", S. Sánchez Lorenzo and M. Moya Escudero (eds.), *La cooperación judicial en materia civil y la unificación del Derecho privado en Europa*, Madrid, 2003, pp. 179–204; and B. Añoveros Terradas, *Los contratos de consumo intracomunitarios*, Madrid, 2003, pp. 199–220.

[48] *See* ECJ judgment of 9 November 2000, case C-381/98, *Ingmar*.

[49] *Cf.* W. Van Gerven, "Harmonization of Private Law: Do We Need it?", *CMLRev*, vol. 41, 2004, pp. 505–532, p. 531.

to an international transaction. This approach is in line with the traditional procedure for application of a compilation such as the UNIDROIT *Principles of International Commercial Contracts*,[50] and as such it is not strictly speaking novel beyond the fact that it contemplates the drafting of a body of Community rules that can perform a similar function.[51]

In any event, it is not really satisfactory for the initiative of drawing up an optional set of rules on this subject to be taken by an organisation like the EU. The EU may promote other alternatives that do more to achieve better and more uniform coordination in this area, and to that end a comparison with the US experience in coordinating state laws may in this case provide pointers of particular interest to the EU, as it will be seen later on.

2. European law and international standards

In opposition to the inflexibility traditionally associated with the notion of a European civil code which was originally intended to compulsorily replace the statutes and rules in force in the various Member States – even though many of its rules were non-mandatory – it has been accepted for years now that any globally-applicable mercantile regulations would have to be endowed with a very general substantive scope and be highly flexible.[52] There is an international tendency, clearly reflecting the evolution of UNCITRAL and UNIDROIT, to abandon inflexible instruments like international conventions and to create more flexible instruments like directives, model laws or simple recommendations.[53]

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[50] *See* J.C. Fernández Rozas, "*Lex mercatoria* y autonomía conflictual en la contratación transnacional", *Anuario español de Derecho internacional privado*, t. IV, 2004, pp. 35–78, pp. 62–73; and N. Bouza Vidal, "La elección conflictual de una normativa no estatal sobre contratos internacionales desde una perspectiva europea", *Pacis Artes. Obra homenaje al prof. J.D. González Campos*, Madrid, 2005, pp. 1308–1334, pp. 1326–1334.

[51] This is apparent in the revision of Article 3 of the Rome Convention of 1980, in the terms of the Proposal for a Regulation on the law applicable to contractual obligations (Rome I), COM (2005) 650 final, which expressly contemplates the possibility that the parties may choose a set of non-State rules as applicable to the contract, devised specifically to allow the parties to refer to a document like the UNIDROIT Principles, the European Principles of Contract Law or some optional instrument drawn up in the EU, *cf.* COM (2005) 650 final, p. 5. This proposal of amendment does not substantially alter what is already possible with a proper interpretation of Article 3 of the Rome Convention, as there is nothing in the existing legal framework to prevent reference for example to the UNIDROIT Principles, which in practice should mean that the law applicable in absence of choice is relevant only in respect of issues not addressed in the Principles when the parties have chosen to apply the Principles; see P.A. De Miguel Asensio, "Armonización normativa y régimen jurídico de los contratos mercantiles internacionales", *Diritto del commercio internazionale*, vol. 12, 1998, pp. 859–883, 872–878.

[52] See J.C. Fernández Rozas, *Ius mercatorum (Autorregulación y unificación del Derecho de los negocios transnacionales)*, Madrid, 2003, pp. 113–282.

[53] See for example P. Behrens, "Voraussetzungen und Grenzen der Rechtsfortbildung durch

In this connection, although there has been little progress in implementing the proposals put forward in the context of UNCITRAL for a wide-ranging codification of the law on international trade, these are mainly based on flexible procedures, partially inspired by the American UCC model.[54] This model followed by UNCITRAL is based on the acceptance of a compendium of rules concerning the main kinds of commercial transactions, the result of coordination of rules most of which are already contained in various international instruments. The objective is to draw up a set of model regulations which can be amended, eliminated or added to by the individual States adopting them. It is believed that this last condition will make it easier to achieve acceptance (albeit with variations) of a uniform set of rules by a large number of countries and is better adapted to the major divergences existing in legal traditions world-wide.

While the choice of a flexible procedure rather than an inflexible option like an international convention improves the chances of approval, there are numerous obstacles standing in the way of a broad-based world-wide compendium of this kind due to the degree of disparity between the different systems and the absence of a well-developed institutional fabric that would facilitate drafting and coordination with the interests of the different States. These obstacles, which would nonetheless be much less severe or would be susceptible of correction to some extent in the case of a Community-wide project, would surely hinder rapid acceptance by numerous States of the essential substance of such a set of rules drafted on a world-wide scale (unlike the situation of the UCC in the USA).[55]

To the extent that it contains a balanced set of rules concerning international commercial transactions, a purportedly world-wide commercial code of broad substantive scope could prove effective essentially in the same situations as are contemplated for application of the UNIDROIT Principles. It would therefore be useful, particularly in cases where the parties to international contracts refer to these rules, and also insofar as decision-making bodies view it as an expression of rules and principles broadly-accepted in international commerce, not to mention its influence as a model for State legislators – albeit this will likely be limited, with nothing comparable to the unifying impact of the UCC in the USA.

This may be a good point when it comes to questioning the utility of drawing up a uniform European-wide optional instrument concerning contractual obliga-

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cont.

Rechtsvereinheitlichung", *RabelsZ*, vol. 50, 1986, 19–34, pp. 31–32; and H. Kronke, "Ziele – Methoden, Kosten – Nutzen: Perspektiven der Privatrechtsharmonisierung nach 75 Jahren UNIDROIT", *JZ*, vol. 56, 2001, pp. 1149–1157, pp. 1152–1154.

[54] See M.J. Bonell, "Do We Need a Global Commercial Code?", *Dickinson Law Review*, vol. 106, 2001, pp. 87–100, pp. 89–95, although it should be stressed that world-wide regulations ought to be limited to regulating international transactions.

[55] See W.J. Woodward, Jr, "Private Legislation in the United States – How the Uniform Commercial Code Becomes Law", *Temple Law Review*, vol. 72, 1999, pp. 451–466.

tions. European codification should particularly be rejected in sectors where an acceptable degree of harmonization has been attained world-wide (within which context the achievements of the UNIDROIT Principles and the *Vienna Convention on Contracts for International Sale of Goods of 1980* must be highlighted). The existence of similar regulatory instruments having differing geographical scopes of application (for instance depending on whether the business is intra- or extra-Community) would introduce a factor of uncertainty for operators, and for the same reason any codification that was not applicable to internal or national transactions would be inadvisable since it would create even greater regulatory complexity and uncertainty.

For purposes of greater approximation of commercial laws on a universal scale, it is important to note that there is now a tendency to revise the criterion whereby the WTO is defined as a body devoted to abolishing economic barriers to trade between States (by means of measures dealing with tariffs, quantitative restrictions, antidumping measures, etc.) but is not responsible for harmonizing the national laws regulating business activity, a task traditionally undertaken by other intergovernmental organisations such as UNCITRAL or UNIDROIT and non-governmental organisations like the ICC. Despite major criticisms of the WTO model from broad sectors, the position of the WTO is worth considering as it relates to possible harmonization of relevant areas of the Member States' laws.

In order to create harmonizing rules, the institutional fabric of the WTO offers a number of advantages and disadvantages vis-à-vis those other organisations. Besides the obstacles inherent in the fact that it was designed for other purposes, one difficulty that harmonization within the WTO poses is that it would aim to establish a legal framework that guarantees fair trading in the market and eliminates imbalances and obstacles to trade, and hence in the normal run of things harmonization may negatively affect certain States for which it entails an economic cost (particularly if they are forced to raise their standards of protection).

But the WTO also offers advantages as an organisation for harmonization of national laws; in particular it provides a framework within which benefits (e.g. on tariffs) can be offered to countries on which harmonized standards will impose a cost (consider for example the TRIPS Agreement on intellectual property).[56] An institutional framework like that of the WTO is therefore important if international harmonization of rules is to be achieved in sectors where levels of protection vary from country to country. In these cases, harmonization imposes costs on those countries that have to raise their standards, so that they will normally only be prepared to accept it if they receive something in return, which an institutional framework like that of the WTO is able to provide.[57] For that reason the WTO could be

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[56] See A. Reich, "The WTO as a Law-Harmonizing Institution", *University of Pennsylvania Journal of International Economic Law*, vol. 25, 2004, pp. 321–382, pp. 359–368.

[57] *Cf.* A.T. Guzman, "Choice of Law: New Foundations", *Georgetown Law Journal*, vol. 90, 2002, pp. 883–940, pp. 936–937.

an especially appropriate forum for harmonization, not so much of general laws on contracts as of those aspects – normally the ones that constitute the greatest barriers to international trade – in which countries apply different standards of protection, as in the case of consumer protection laws.

Although harmonization of national laws is not among the instruments contemplated by the WTO unlike the EC Treaty, it is worth remembering that GATT expanded with the passage of time to take in the harmonization of certain national policies and rules. That has been the case for instance in the spheres of customs, rules of origin, sanitary and phytosanitary measures, or in connection with antidumping measures – this last a subject on which GATT progressed from prohibiting certain abuses to significantly harmonizing national rules – and in the sphere of intellectual property on the basis of minimum substantive and procedural standards laid down in the TRIPS Agreement.

One of the items currently on the WTO's agenda according to the Doha ministerial declaration of 2001 is cooperation *inter alia* in the areas of competition policy and of environmental rules. In addition, the areas where there is special potential for harmonization under the auspices of the WTO include certain basic labour standards with major implications for world trade and the protection of human rights, the rules on product liability, taxation of international trade, and most particularly levels of consumer protection in international commerce. In all these areas the existence of different standards may amount to an obstacle to cross-border commercial activity.[58]

IV. EVOLUTION OF THE INSTITUTIONAL FRAMEWORK AND DEVELOPMENT OF NEW REGULATORY TECHNIQUES

1. Mechanisms of europeanization

Initiatives addressing the unification of large areas of private law in Europe envisage the drafting of rules as an essentially academic process, as illustrated by the work groups set up for purposes of Europe-wide civil codification and the premises of the Commission on European contract law.[59] The rule-making processes contemplated by these initiatives present major differences with respect to the traditional political process. The political process is typically less homogeneous in terms of the groups of representatives involved and the interests that they represent, and more pluralistic than the academic milieu in which work has been so far conducted on the europeanization of private law.

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[58] *Cf.* A. Reich, "The WTO . . .", *loc. cit.*, pp. 357–358.

[59] See J.C. Fernández Rozas, "El derecho de los contratos en el marco de la unificación jurídica del derecho privado de la Unión Europea", *Liber Amicorum en homenaje al prof. D. Opertti Badán*, Montevideo, 2005, nos. 20–23.

Whereas hitherto proposals for Europe-wide regulatory instruments in the sphere of private law have been drawn up by academic groups, the social importance and political significance of a civil code or a code of obligations is such that it has been suggested that a special procedure will be needed for its adoption in order to guarantee its legitimacy and an adequate level of acceptance. In this connection, it has been proposed that a specific procedure will be necessary, modelled on the one followed for adoption of the *Charter of Fundamental Rights of the European Union* (and subsequently for the *Treaty establishing a Constitution for Europe* of 2004), whereby the text of the code would be drawn up by a group of experts appointed by the Member States, which would be linked up to parliamentary commissions from both national parliaments and the European Parliament.[60] In any event the importance of this approach is currently very limited inasmuch as the very idea of codifying broad areas of private law at a Community level is very much open to question and those not seem a reasonable objective in the short time.

The Commission put forward a number of proposals through its Action Plan on Contract Law of 2003,[61] aimed at creating a more coherent European contract law. The Commission has adopted a largely technocratic approach in which the issue of a European civil code – as compared to the significance of great national codifications – is simply a matter of transaction costs in intra-Community supply of goods and services.[62] Moreover, there is no provision to reinforce the participation of political organs imbued with particular democratic legitimacy such as national parliaments and the European Parliament. One essential point for development of the future code in the Action Plan is the creation of a common frame of reference, which should lay down the meaning of principles and concepts used in European contract law. It is expected that this will be drawn up fundamentally in the academic sphere. An approach of this kind basically reinforces the position of the Commission itself and of certain academic circles.

It seems that this orientation does not give due consideration to the fact that a code or instrument like the one envisaged necessitates the taking of significant decisions of political or ideological import, which means that it would be best to follow a procedure that from the outset guarantees the possibility of intervention by the various sectors concerned, and also some kind of connection with bodies enjoying democratic legitimacy. Even in to a relatively technical area of private law such as the rules on contractual obligations, regulation implies the taking of political and ideological decisions.[63] In a market economy wealth circulates and is

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[60] See W. Van Gerven, "Codifying European Private Law", 2002, at <http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments>.

[61] COM (2003) 68 final of 12 February 2003 (*DO* 2003 C 63/1).

[62] *Cf.* G. Canivet and H. Muir Watt, "Européanisation du droit privé et justice sociale", *ZEuP*, vol. 13, 2005, pp. 517–522, p. 517.

[63] See D. Kennedy, "The Political . . .", *loc. cit.*, pp. 7–28.

distributed chiefly by means of contracts, and hence the rules on the subject indubitably impinge on the distribution of wealth in society.[64]

In October 2004 the Commission published a new Communication on European contract law.[65] This Communication stressed the Commission's resolve to revise the entire Community *acquis* as it relates to consumer contracts, bearing in mind that the common frame ought to serve to lay down a set of terms, concepts and definitions that may be of particular use in rendering the Community acquis more coherent in the course of the revision process.[66] Certainly, as regards the orientation of that common frame of reference, one of its chief and immediate objectives ought to be to enable coordination of the various relevant directives issued by the EU on contracts.[67] This task may prove to be particularly important and difficult given that directives do not define basic concepts, the choice of some of the terms used is too loose in the light of national legal terminology, and they do not take due account of the fact that some of these concepts vary substantially from State to State. All this decisively affects the legal rules governing contracts and is detrimental to uniformity in the application of directives.[68]

The Commission further stressed that the common frame of reference may be adopted as a model for national legislators in order to foster gradual approximation of the Member States' laws, as a basis for the drafting of model contracts, and possibly for the creation of an optional instrument, the need for and scope of which still require further discussion. Particularly noteworthy as regards the drafting of the common frame of reference is the Commission's view that it should be based upon the Community *acquis* and the best solutions contained in the laws of the Member States.[69] However, the decision as to which of these solutions are the best is no mere technical matter but is essentially a political issue, especially considering that the differences among laws are predicated upon the particular social, cultural and economic circumstances of each one.

One very important point given the plurinational nature of the EU is that in practice the academic groups are so organised that some legal cultures or traditions

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[64] *Cf.* M.W. Hesselink, "The Politics of a European Civil Code", *European Law Journal*, vol. 10, 2004, pp. 675–697, p. 677.

[65] "Communication from the Commission – European Contract Law and the revision of the acquis: the way forward", *COM (2004) 651 final.*

[66] The 2005 Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union of 2005 (Official Journal C 198 of 12/08/2005) envisages the completion of a final research report in 2007 including a draft common frame of reference in the sphere of European contract law and the adoption of the common frame of reference, envisaged for 2009.

[67] *Cf.* B. Zypries, "Der Aktionsplan für ein kohärentes europäisches Vertragsrecht der Kommission – oder: Was ist zu tun im Europäischen Vertragsrecht", *ZEuP*, vol. 12, 2004, pp. 225–233, p. 228.

[68] See B. Pozzo, "Harmonisation of European Contract Law and the Need of Creating a Common Terminology", *ERPL*, 2003, pp. 754–767, pp. 763–766.

[69] COM (2004) 651 final, p. 3.

(essentially German, English and French) are over-represented, whereas others are almost entirely sidelined with virtually no influence (particularly the southern Europeans).[70]

Moreover, it seems clear from the Spanish point of view that the doctrine written in Spanish would carry little weight in the interpretation of the rules of European private law given that it is not normally consulted in the sphere of the dominant legal traditions, even when issues of European private law are concerned. This situation would be particularly irksome in the event that such rules were to become applicable in Spain and had to be interpreted in a uniform manner throughout the Community. It is not then an approach that can readily be accepted from a Spanish position. In that connection it is particularly important to note at this juncture that there is also an extraordinary imbalance in the geographical origin of the members of the expert network set up by the Commission to draw up the common frame of reference, despite the fact that one of its organisational objectives is to achieve comprehensive coverage of all European legal traditions.[71]

2. Comparison with the USA

The experience in the USA, where *soft law* – in the form of uniform laws, model laws or restatements – has been developed as a means of reaching greater uniformity, illustrates the importance of non-binding elements for harmonization. In the realm of private law are common in the US normative compilations of this kind, such as Restatements, which do not imply compulsory harmonization.[72] The American experience shows that if introduced in the context of a suitable institutional fabric, instruments of this kind can be formulated in a manner less dependent on state legal systems and facilitate progressive unification of state laws through the influence of uniform non-binding rules on review processes. Moreover, especially in the commercial sector those instruments open the door to gradual

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[70] See U. Mattei, *The European Codification Process (Cut and Paste)*, The Hague, 2003, p. 69; and M.W. Hesselink, "The Politics . . .", *loc. cit.*, p. 688.

[71] See Report from the Commission – First Annual Progress Report on European Contract Law and the Acquis Review, 23 September 2005, *COM (2005) 456 final*, where there are obvious imbalances in the origin of the members of the Network: there are 35 German representatives; the next largest contingent comes from the United Kingdom with 25 followed by Italy with 10, while France has 8 and Spain 7 – a situation that reflects the traditionally scant participation of southern European countries in these activities. It is also striking that Poland should only have two representatives (as compared to 35 from Germany).

[72] See M.A. Eisenberg, "Why is American Contract Law so Uniform? – National Law in the United States", H.L. Weyers (Hrsg.), *Europäisches Vertragsrecht*, Baden-Baden, 1997, pp. 23–43, pp. 30–42.

acceptance by operators, who are able to incorporate them into their transactions on a voluntary basis.[73]

An important factor in the harmonization of state laws in the USA has been the adoption of uniform laws within the NCCUSL and ALI frameworks, the prime example of which is the *Uniform Commercial Code* (UCC). These instruments are also optional, but unlike the ones currently being proposed in the EU for the creation of an optional instrument, they are essentially aimed at state legislators, which is entirely logical given that the chief objective is to attain uniform state laws. Moreover, the members of the NCCUSL are also appointed by the states. The drafting of uniform instruments in the sphere of private law in the USA has helped in the creation of a regulatory framework which provides legal security, reducing the need for private individuals to negotiate agreements – and the costs and risks inherent therein – facilitating the modernisation of laws that have been rendered obsolete by social and technological developments, and limiting the circumstances in which conflicts of laws can occur.

There are circumstances which militate in favour of the development of instruments of this kind in the Community sphere, such as the similarity of the principles of private law in the generality of Community systems, as highlighted by the ECJ.[74] In addition, a legal literature that is European as opposed to national[75] – with a consequent focus on comparative method – is developing. These studies are centred on the principles and rules common to the (major) European legal systems in the various sectors of the law of obligations and consider national differences as local variations of a substantially unified system.[76] However, at the present time this approach can be deemed as far removed from reality inasmuch as there are no unified European rules in a large proportion of subject matters. The European context in this respect is at present entirely different from that of the USA, where the weight and prestige of the judiciary, which is much greater there, further helps to assure that judicial decisions, reinforced by a policy of *stare decisis*, are not perceived as *soft*.[77]

The method develop to create uniform laws in the US is one which has not for the moment been tried in the europeanization of private law, nor has it had any

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[73] See B.S. Markesinis, "Why a Code is not the Best Way to Advance the Cause of European Legal Unity", *ERPL*, 1997, pp. 519–524, pp. 522–523.

[74] See R. Schulze, "Le droit privé commun européen", *Revue internationale de droit comparé*, vol. 47, 1995, pp. 7–32, pp. 18–28.

[75] See C. Schmid, "Anfänge einer transnationalen Privatrechtswissenschaft in Europa", *ZfRV*, 1999, pp. 213–222, pp. 215–220.

[76] One of the pioneering works in this area is R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civil Tradition*, The Hague, 1990; and pioneering reference works in this line, in the sphere of contracts and contractual obligations respectively, are H. Kötz, *Europäisches Vertragsrecht*, vol. I, Tübingen, 1996; and C. Von Bar, *Gemeineuropäisches Deliktsrecht*, vol. I, Munich, 1996.

[77] See U. Mattei, *The European . . ., op. cit.*, pp. 118–119.

significant influence in the EU. From a private-law perspective, the influence of the USA has been evident in the intent to draw up instruments inspired by the ALI restatements, or even by the UCC; however, endeavours of this kind have been pursued only by groups of academics acting mainly on their own initiative. But, unlike the situation in the US, these groups in Europe typically work entirely independently of States rather than within a framework that would facilitate the composition of instruments – such as the uniform laws of the NUCCSL – that might be adopted by the different States and therefore help to achieve significant harmonization or unification between national laws.

Aside from the influence of the restatement model on the Principles of European Contract Law, the apparatus that has grown up in the USA to foster uniformisation of state laws has impinged little in the EU. Within the EU, there has been no progress towards the construction of an institutional fabric that fosters uniformity among national law codes and statutes by means of suitable national review processes modelled on European-scale instruments comparable in flexibility to the model and uniform laws of the NCCUSL. The instruments used up to now in the Community for harmonization of laws – in particular regulations and directives (and to a much lesser extent international conventions between Member States) – would be of no use in drawing up this kind of instrument, and therefore it has been proposed that it take the form of a recommendation.[78] In particular Article 211 of the EC Treaty envisages adoption by the Commission of recommendations which according to Article 149 of the Treaty will not be binding. In any case the Community framework for the drafting of measures of this kind is quite unlike the fabric existing in the USA for the creation of uniform laws by the NCCUSL and the ALI, underpinned – especially in the case of the NCCUSL – by a mechanism for inter-state cooperation.

The comparison with the USA uniform and model laws and restatements, the institutional framework in which they are created and how they become state law deserve special attention to find better mechanisms for the europeanization of private law. Anyway, it should also be considered that the impact of these instruments as means of unification in the USA is limited when compared to the significance of having a common legal culture making it possible to develop common principles which reflect shared values. The make-up of that shared culture is directly influenced by the existence of a national market and a national feeling, a high degree of population mobility and other cohesive factors, which are far more important for harmonization of business practice than are doctrinal constructs.[79]

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[78] Bearing in mind that this could be an initial solution pending the eventual adoption of a regulatory instrument in the form of an international convention, see A.M. López Rodríguez, *Lex Mercatoria and Harmonization of Contract Law in the EU*, Copenhagen, 2003, pp. 263–264.

[79] *Cf.* A. Rosett, "Unification, Harmonization, Restatement, Codification and Reform in International Commercial Law", *AJCL*, vol. 40, 1992, pp. 683–697, pp. 694–695.

3. Prospects of evolution in the EU

As the years go by, certain trends are becoming apparent in the prospects in the EU, reflecting what must be among the chief concerns in this sphere and departing not only from what was for long the core of the doctrinal debate, but also from some of the stated objectives of the Commission – including very recent ones.

It is highly significant in this regard that the idea of codifying large areas of European private law does not now seem to be an objective of the Community's institutions in spite of previous – and still recent – statements to that effect. With its 2003 Action Plan on this subject, it is also clear that contrary to the opinion traditionally sustained by the proponents of a civil code (or law of obligations), the EC Commission proposes to create a common frame of reference based not on a comparative-law approach (entailing a search for common denominators or convincing rules – which in the final analysis would imply making political decisions) but first and foremost on the Community *acquis*. According to the Commission, the Community *acquis* should provide the basis on which to develop the common principles, definitions and rules that will make it possible draw up a common frame of reference, and eventually perhaps a European civil code. Following in the same direction, there is now a tendency to review the priority awarded to some of the Commission's most recent and important objectives, for instance to draw up an optional instrument on contract law.

Following that Action Plan, it seems clear that for the future the EU Commission prefers to draw up an optional instrument (the so-called 26th regime) – that is, one that does not bindingly replace those existing in the Member States – but it does not explain in detail how such an optional instrument will work.[80] The idea of an optional instrument applicable only to international transactions – and hence coexisting in the countries that adopt it with national laws which will continue to be applicable to internal relations – is surely quite unsuitable, despite the fact that the Commission mentions it in its 2003 Action Plan in connection with contract law. For the Commission at this time the optional nature of the instrument relates to the free will of the contracting parties and the possibility that they may opt to declare it applicable to their relationship, in line with the major tendency in the Principles of European Contract Law.[81]

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[80] In particular, whether the parties will have to opt in (the default is non-application) or opt out (the default is application of the instrument); while the first alternative seems the more reasonable (since the second adds little to the non-mandatory nature of the rules) and is similar in structure to other Community legal institutions that coexist with national provisions, in the sphere of contracts its practical utility is doubtful since parties are hardly likely to take up this option given fear of the unknown (and for example the absence of any body of case law), *cf.* J. Basedow, "Ein optionales Europäisches Vertragsgesetz – opt-in, opt-out, wozu überhaupt?", *ZEuP*, vol. 12, 2004, pp. 1–4, p. 2.

[81] *Cf.* S. Sánchez Lorenzo, "La unificación del Derecho comercial internacional", *Globalización y comercio internacional (Actas de las XX Jornadas de la AEPDIRI)*, Madrid, 2005, pp. 239–265, pp. 248–249.

In any event, some thought needs to be given to the potential significance of the proposal to configure the common frame of reference as an optional instrument. It is important to note first of all that the impact of the so-called common frame of reference as an instrument that is optional for the parties may well be limited. In the sphere of international commerce, it is unlikely to achieve sufficient stature to oust the UNIDROIT Principles, besides which, in view of the latter's success there is surely some doubt as to the need of a common frame of reference and whether it constitutes progress. Moreover, within the Community there is already an instrument which is optional, because it is non-legislative and essentially dependent for its efficacy on the favourable opinion of the parties concerned. That instrument is the *Principles of European Contract Law*,[82] which are conceived not only as a basis for the adoption of rules at a Community level and as a coherent set of rules that parties may declare applicable to a contract (a modern formulation of *lex mercatoria*), but also as an alternative or a first step towards the eventual drafting of a European code of obligations. For the future, there is also the possibility – not yet developed in the EU- of creating instruments that are optional basically because whether they are applicable or not depends on whether the national legislators – and not the parties to specific contracts – choose to adopt or incorporate it into the State system, as is the case of uniform laws drafted under the NCCUSL in the USA.

The common frame of reference rests basically on non-mandatory rules; it is expressly envisaged that should a rule be mandatory, this must be clarified and justified,[83] which means that given the demands of the internal market and the need to remove obstacles to it, the utility of the frame of reference will be severely limited unless that orientation is altered.[84] But more importantly given this context, particular attention must be paid to the review currently in progress on the *acquis* in consumer matters, in respect of which there is undoubtedly a need to clarify certain definitions and utilise terms more consistently.

The criterion adopted by the Competition Council at its meeting on 28 and 29 November 2005 is entirely consistent with what was earlier said about the criteria that should guide determination of the substantive scope of unification of private law in the EU at this time. The Council's conclusions at that meeting regarding the proposal on European contract law and its review of the *acquis* in matters of

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[82] While the harmonising force of the European Principles may be enhanced by their limited geographical scope and by the fact of having been conceived for both international and internal transactions, for the moment they have had less impact on contract practice than the UNIDROIT Principles, largely because the international and non-binding nature of the latter is especially well suited to the needs of international business.

[83] This is expressly mentioned in connection with the procedure for drafting the common frame of reference in the First Annual Progress Report on European Contract Law of the Commission, *COM (2005) 456 final*, p. 5.

[84] See H. Heiss and N. Downes, "Non-Optional Elements in an Optional European Contract Law: Reflections from a Private International Law Perspective", *ERPL*, 2005, pp. 693–712, pp. 697–699.

consumer protection, which is an outcome of the EU Commission's First Annual Progress Report on European Contract Law, clearly stress the need for an early review of the *acquis* in matters of consumer protection (especially conclusions 13 to 17).

Clearly that review should be conducted separately from the drafting of the common frame of reference, with priority status; that is certainly the best option given the advantages to be derived from a review and an improvement of the rules in that area, for which there is definitely room in terms of predictability and legal security.

We would note by the way that in the review of rules on consumer protection, consideration must be given to the serious problems existing as regards the applicability of private-law directives to cross-border situations, meaning that these rules ought to be revised and a unified system of law established for that subject matter.[85] Indeed, in view of the lacunae arising from the introduction of isolated rules in Community provisions on sundry matters, as illustrated in particular by the chaotic situation resulting from the inclusion of imprecise rules on mandatory applicability of the rules on consumer protection, there is a need for greater unification of private international law at a Community level.[86]

The chief legal barrier facing companies which seek to operate at a Community level is that the differences in national laws prevent them from being able to pursue a uniform contractual/commercial strategy for the European Union as a whole, for instance because the different national restrictions make it difficult for them to use the same commercial offers or offer the same general contract conditions in all Member States.

One fundamental obstacle is the fact that at a Community level there are generally hindrances in the way of companies unifying the rules applicable to their transactions with consumers located in different countries of the Union. The reason for this is that the applicable rules of protection must be those of the consumer's country – as provided in Article 5 of the Rome Convention – thus limiting the possibility of companies choosing the applicable law. That situation is further aggravated by the fact that in matters of advertising and fair trading in the market, the legal rules normally applicable are those of the country at which the advertising is directed or where the effects of the given business conduct materialise. That country is normally the country of residence of the consumer with whom a distance contract is concluded.

In reforming consumer protection in the internal market with a view to establishing a coherent regulatory framework and improving the level of protection currently available at a Community level, the objective should be to ensure that the

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[85] See F. Esteban de la Rosa, "La aplicación . . .", *loc. cit.*, pp. 178–204.

[86] *Cf.* S. Sánchez Lorenzo, "La función de las técnicas conflictuales en los procesos de unificación del Derecho privado material", *Pacis Artes. Obra homenaje al prof. J.D. González Campos*, Madrid, 2005, pp. 1765–1786, p. 1785.

laws of any Member State guarantee adequate and appropriate protection. The eventual outcome of this situation should be to make it possible generally for choice of law clauses in consumer contracts to be effective without restriction as long as the chosen law is that of a Member State. Such a development would be decisive in enabling companies of the Member States to unify the terms of cross-border contracts throughout the Community, with due guarantees to all consumers secured by harmonized Community rules and hence irrespective of the Member State whose laws are applicable to that consumer transaction.

In support of the desirability of a broad-reaching unification of substantive private law in Europe, its proponents generally point to the drawbacks of the unification of private international law rules as an instrument of integration.[87] But the fact is that for the short term the integrative potential of more unification of the rules of private international law will clearly continue to be greater than that of an ill-defined proposal for uniformisation of substantive rules in areas of private law where substantive unification is not essential to proper working of the internal market.[88]

In some areas major differences persist among the laws of the States, reflecting legitimate divergences of interests and traditions, and unlike what happens within the framework of creation of uniform rules in the context of inter-state cooperation in the USA, attempts to carry out a broad-reaching uniformisation have so far been pursued practically in isolation from national legislators, who remain the competent authorities for purposes of legislation in these matters.

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[87] See J.D. González Campos, "Diritto . . .", *loc. cit.*, pp. 56–61, referring to these drawbacks and the inadequate basis of the analyses of those who emphasise them.

[88] See P.A. De Miguel Asensio, "Conflictos de leyes e integración jurídica: Estados Unidos y la Unión Europea", *Anuario español de Derecho internacional privado*, vol. V, 2005, pp. 43–102, pp. 98–102.

On the Regulation of Aliens and Immigration in Spain in 2006

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I. Introduction

II. On Being an Alien or an Immigrant in Spain and in Europe

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VI. Schematic Synopsis of the Stages of Spanish Legislation Regarding Aliens, Immigration and Asylum

I. INTRODUCTION

The purpose of this article is to familiarise non-expert readers with the general features of Spanish policies regarding aliens and immigration as from the entry into force of the Spanish Constitution of 1978, and to provide an overview of the legal framework and the published sources of law relating to this subject. It is important to set forth the scope and confines of this paper in advance, as otherwise we might overwhelm the reader by offering a list of the endless provisions that have emerged from the different concurrent legal sources (domestic, autonomous regions, the European Union and international) or a description of Spain's many erratic and often contradictory policies since becoming a democracy. The existence on this subject of disparate contradictory policies formulated by right- and left-leaning governments are not the exception but rather the rule.

Starting in 1984 (when the first law on asylum and refugee status was enacted), in Spain everything relating directly or indirectly to immigration and the rights granted to non-nationals has moved along at an accelerated pace to 2006, following the

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most recent "regularisation/normalisation process" that took place in 2005 and with the continued massive arrival in the Canary Islands of "cayucos" (traditional wooden boats) from Africa.

Spain has achieved of "Guinness record" of sorts in the enactment of organic laws (the law of highest rank in the land) on aliens, with the passage of four laws on this subject in a three-year period (2000–2003), in addition to a large number of implementing provisions.

The stark reality is that over the past fifteen years the entry of aliens into Spain, particularly of immigrants, has mushroomed. This phenomenon has brought about some changes in the receiving society, owing to heterogeneity of the immigrant population, its multiracial nature and religious diversity, and the different social value scales now present in Spain. These circumstances have made it necessary to repeatedly change policies aimed at regulating and managing the entry and accommodation of immigrants into Spain and as a gateway into Europe. These policies have, unfortunately, been unsatisfactory to date, as thousands of people continue to arrive daily in Spain by land, sea and air, seeking a "better life." The result of this avalanche is the oft-encountered, albeit strange and peculiar "status" of many individuals described several years ago by the author of this paper[1] as "irregular immigrants with official deportation orders, who are registered residents and living legally in Spain."

Owing to its limited length, this paper will not deal with the system of sanctions applicable to aliens, nor with the "privileged, special or unfavourable status" in Spain into which an alien can be categorised in application of internal, community or conventional legislation. In the first place we are referring to the system for asylum-seekers, refugees, stateless and displaced persons with unfavourable status. Second, we refer to the status derived from the Kingdom of Spain's historical and treaty relations with former colonies, particularly in Latin American.[2] Lastly, we also will not discuss the status of aliens who are EU nationals, as they enjoy an especially privileged status in terms of comparative law as citizens of the European Union.

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[1] E. Sagarra Trias, "Un nuevo status de extranjero en España: El Inmigrante, irregular, empadronado, residente trabajando y con orden de expulsión". "New Alien Status in Spain: The Irregular Immigrant with Official Deportation Orders, Who is a Registered Resident and Lives Legally in Spain". *Revista de Derecho Migratorio y Extranjería* (Journal of Migratory and Alien Law), no. 1 Editorial Lex Nova, Valladolid, November 2002, pp. 89–97.

[2] On this subject we recommend a very good paper by María A. Álvarez Rodríguez on regulation of acquisition, attribution, retention, loss and recovery of Spanish citizenship, "*La nacionalidad española. Analisis de la normativa vigente*", (Spanish Citizenship, Analysis of Current Regulations) Ministry of Labour and Social Affairs 2nd Edition, Madrid 2003.

II. ON BEING AN ALIEN OR AN IMMIGRANT IN SPAIN AND IN EUROPE

Just as in comparative law, in Spain the meaning of the term "alien" is evident and obvious: an alien is anyone who is not a national of the state in which he is at the moment. One is an alien regardless of having one or several nationalities (*positive nationality conflict*), or no nationality (*stateless person, or negative nationality conflict*). In any case, no one is an alien in the abstract, but rather vis-à-vis a specific state or a specific nationality.

In 2006 any discussion of the immigration law and policy in force in Spain is quite difficult and, sometimes, at great risk. It is a "magmatic" reality subject to daily changes, and, owing to this vivacity, must be approached, to take a phrase from the media, by "transmitting the facts live and as they unfold." It is a thorny issue where, more than with any other, the political, sociological, humanitarian and economic factors involved in shaping the overall worldwide phenomenon of "political and legal globalisation" all come into play.

As regards the treatment of aliens in any First World receiving country, be it in Europe, North America, Australia or any of the privileged areas in the developing world characterised by having a political system based on democracy and the rule of law, we find a contradiction, difficult to solve situations based on three premises:

First: The domestic and international law of any democratic system defines and seeks to ensure fundamental individual rights and public freedoms for individuals and peoples or groups of people. These are the political and legal assets of the system as such and are made up of constitutional provisions and international treaties, bilateral and particularly multilateral under the auspices of the United Nations; the Council of Europe or the European Union. These organizations define these rights and freedoms and advocate that they be applied everywhere. This is what makes up the "*corpus juris*" that we call "International Human Rights Law."

Second: Policies on immigration and migratory flows are at the margins of legality in regard to individual rights and freedoms. This is true not only as regards their design (laws, regulations, decrees and orders) but especially as regards their effective application (resolutions, decisions, administrative decisions, limitations, restrictions and coercive measures). Here we can state that the authorities, the administration or the State security forces violate the laws in force on many occasions. Some non-nationals are not given the same treatment, coverage or real protection of the essential rights and freedoms set forth in democratic constitutions, such as the presumption of innocence, the prohibition of illegal detention; *habeas corpus*, the right to a defence, the principle of legal protection, as that provided in the legal system for "all."

Third: The indispensable needs of the labour and job market in a "welfare state" make it very difficult to combine the need for this foreign labour with a rational immigration policy. This contradiction is also found in the consumer goods production, and the need to enlarge foreign markets and to increase the number of

potential consumers of the goods and services produced by the former metropolis and immigrant-receiving societies. These goods and services are, in turn, difficult to export to third-world countries without effective guarantees and means of payment for first-world producers and purchases are principally financed through foreign currency remittances sent by immigrants to their countries of origin. In some of these countries this is currently the major or the sole source of wealth.

Spain and Europe are becoming a lands of immigrants, similar to the United States but on a different scale. The magnitude can, however, be considered proportionally similar if we take into account all the countries belonging to the Schengen space in Europe.[3]

The proclamation, protection and guarantee of personal rights and freedoms, and access by aliens to status as "normal holders of rights and citizenship" is one of the constant and as yet unresolved dilemmas and challenges of both Spanish and European societies: governments, administrations and public and private institutions, along with citizens and aliens themselves.

III. SOME OBVIOUS FACTS AND CONSIDERATIONS REGARDING IMMIGRATION AND ALIENS IN SPAIN IN 2006 THAT NEED TO BE TAKEN INTO ACCOUNT IN ORDER TO UNDERSTAND THE CURRENT SITUATION OR REALITY OF THE NEW SPANISH SOCIETY

A. The Status of Non-Nationals as Persons in a Parliamentary Democracy

Under Spanish law, just like in most other legal systems, an alien is defined in the negative. An alien is anyone who is not a national or does not possess the nationality of the country in which he/she is at the time.[4] Nonetheless, having set forth this legal-political definition, an alien still has legal status as a person – with inherent dignity – and all the rights and obligations pertinent to such status, as protected, evidently, by internal and international norms that guarantee his/her intrinsic human rights. It is advisable, before going further, to know who is a national and who is not.[5]

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[3] Kingdom of Spain's Accession Agreement to the Schengen Convention of 14 June 1985, on the gradual abolition of checks at the common borders, signed in Schengen on 19 June 1990 (BOE 5 April 1994).

[4] The current Organic Law on Rights and Freedoms (referred to hereinafter as LODYLE) 8/2000. Art. 1.1. states, "For the purposes of the application of this law, aliens are considered to be persons who do not have Spanish citizenship."

[5] The Spanish Civil Code sets forth rules in Articles 17–27 on the acquisition, loss and recovery of Spanish citizenship. In 2002 the Law modifying the Civil Code was published in the State Gazette of Spain on 9 October 2002, amending certain articles [see

Therefore, when any Law establishes a general statute of rights using words such as "ALL" or, prevents exclusion using "NO ONE," and even when it states the indefinite "are granted or are recognised," the grammatical sense of the term makes it clear that the Law does not discriminate or distinguish and that in such cases the category of "alien" is not a differentiating factor.

If this interpretation is not as clear and simple as all this, we must ask our legislators to amend the Constitution, because when it uses terms such as "All, No One, or No Person" there is no room for unfortunate misinterpretation. If we are going to change something important, let us do it straight on, starting with the Constitution and then working our way down the other declarative rules and regulations on fundamental freedoms, taking this regression on board if we are able. This would be a serious responsibility to be borne by the Spanish society as a whole.[6]

B. Prime Interest by the Western World's Economic and Political Systems in the Corret Accomodation of Immigrants

The non-nationals that we generically refer to as "aliens", become immigrants when they either decide to remain to work in the foreign country to which they have travelled or when the purpose of their trip is precisely to work or reside permanently in that country.

If only out of pure selfishness on the part of the capitalist system of production, immigrants need to be dispensed treatment in the country of residence that is similar and equivalent to that of national workers. Such treatment not only grows out of the society's political, ethical, moral or religious convictions, but results from the pure and simple profitability of the work performed by alien workers.

It may seem an extraordinarily materialistic line of reasoning, but in a free market system it is not possible to have a nationals working side-by-side with other workers living in fear, uprooted, isolated and not integrated. Such a situation is very costly to the system in work-related risk prevention and on-the-job accidents, and in terms of absenteeism, loss of working hours, and even the wasted work-related training that companies or the State itself invests in foreign workers.

All human beings have cultural, sentimental, health, sexual, social and physiological needs that they legitimately must meet. Fear on the face of immigrants in

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cont.

commentary on the Aliens Webpage reicaz@extranjeria.info and commentary by E. Sagarra Trias on the recent modification in the *Revista de Extranjería* (Review of Alien Law) No. 12 by *Lex Nova* and that of the same author in the *Revista Jurídica de Catalunya* (Legal Review of Catalonia), No. 2 of 2003].

[6] Currently, due to regulation on obtaining citizenship, a large number of immigrants become Spanish nationals every year, by choice or by residence. The Ministry of Justice Resolution of 16 May 2006 (B.O.E. 2 June 2006) publishes that for the second half of 2005 a total of 20,494 persons became Spanish citizens by derivative citizenship acquisition.

our country's cities and towns does not help at all to make their work as effective as the host society desires.

C. New Technologies and the Information Society as a Draw Factor in the Migratory Phenomenon of the 21st Century

Technological advances, globalisation and the Information Society inexorably promote massive immigration, both legal and illegal, or irregular. As those who have travelled to North or Sub-Saharan Africa know, in any hut in the remotest spot in the savannah, the desert or the jungle there may not be running water or electricity, but you will find a dish antenna, a television set and people familiar with the names of the European footballers and who know more about Barça's Ronaldinho and Eto'o than many of us do.

On a daily basis they view a promised land called Europe, where refrigerators are full, supermarkets are clean and orderly with what looks to be an overabundance of food, and surplus food is burned to keep up prices, in line with market laws they do not understand. Through TV they learn about how the Common Agricultural Policy of the European Union is used to subsidise unproductive crops that compete with theirs, and how tariffs are raised against their products and raw materials, preventing competitive trade and development.

Seeing the wastefulness of the neighbouring Europe just spurs inhabitants of other continents, especially any parents who consider themselves responsible, to send their children to this promised land, knowing that not all get there, but those who do – by whatever means or in whatever state (as stowaways, in the freight or the wheel assembly of a lorry, or in a rickety wooden boat) – will have expectation of a better life and a better future than he/she could ever dream of in his/her own country. Also, those who do get to Europe and are living there can serve as links for other family members to enter that paradise legally, under "family reunification."

D. In Spain and the European Union Fundamental Individual Rights and Individual Public Freedoms are Rules of Public Order

The rules that proclaim and protect the rights and freedoms of persons (nationals, stateless persons, and aliens) in Europe are European Union rules of public order, to which the legal systems of the member States of the European Union must abide because they are the structural principles on which the democratic system is based.

Spain is obligated doubly; first by belonging to the European Union, a European organization with supra-national aspects that is based on values such as freedom, security, equality and justice;[7] and secondly because, among other conventions to

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[7] Constitution for Europe, Articles I–2 approved by the Council of Heads of State of the

which it belongs, Spain is an integral, active party to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in 1950 in Rome,[8] under the auspices of the Council of Europe.

Any limitation or restriction of human rights should be permitted solely in the overall interest of European society, and always under the perspective of the compass that guides a political system based on democracy, the separation of powers and the Rule of Law.

To this we are obligated, since these rights and fundamental freedoms are essential features of our democratic system, as set forth by the Spanish Constitutional Court:

> "Fundamental rights are not merely constitutional rules that establish subjective public rights but rather essential features of the democratic system; effective protection and concrete enforcement of the fundamental right transcends individual cases and takes on objective dimension." (Constitution Court Decision, Plenary 16 December 1991)

E. Principles and Values as the Foundations of a Legal System

A political system based on the Rule of Law is an organised set of legal principles and norms.

- Principles: express fundamental and structural social, ethical and moral values that inspire certain parts of the legal system or its entirety, as examined at a specific time in history. Example: freedom, democracy, life, property, family.
- Norms: the imperative mandate of conduct or prohibition of conduct by its subjects, citizens, public administrations, and political representatives.

A political-legal system is shown to be consistent through the proper interplay of its values-principles and its specific rules-laws. Neither one nor the other are unchangeable over time or space since they can vary gradually and evolve along with the society and the national and international community. Unfortunately, too often such values are becoming more restricted through the issuance of specific rules and alleging, in justification, the general economic or political interest of the State as a whole or the European Union.

The Spanish Constitution of 1978 in its entirety, and the norms of the European Union, (specifically the Treaty establishing a Constitution for Europe) are based on

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European Union in Rome on 29 October 2004: Affirmative vote by referendum of the Spanish people held on 20 February 2005. Pending ratification by a majority of the Member States. France and the Netherlands have voted no.

[8] Convention for the Protection of Human Rights and Fundamental Freedoms, concluded in Rome on 4 November 1950 (Official State Gazatte, 10 October 1979).

and anchored in values such as dignity, equality, tolerance, justice and freedom, that are the driving force behind the social harmony of its people.

It is therefore legitimate to ask whether positive norms of lower hierarchical rank that mandate certain behaviour in relations among citizens and between said citizens and the institutions of the State should abide by such values or not. If such consistency is lacking, I feel this would amount to a tremendous dis-connect that would be difficult to comprehend and have unforeseeable consequences.

The question is whether the values and principles that guided the drafting of our Constitution of 1978 are still valid today as a foundation, or superstructure, for the complex regulatory and jurisprudence framework regarding aliens, or whether, to the contrary, current values are in flagrant contradiction with alien and immigration policy and with the specific rules applicable to aliens and immigration in Spain.

Both the press and public opinion are taking positions, and while there is comprehension of the immigrant phenomenon under a certain viewpoint of human rights, racist and xenophobic attitudes are also coming to the fore. Sociologists report that we are facing a true crisis in values, and discovering that our parents' and grandparents' basic social values are not the same as ours and are today mostly insufficient or not very useful, and at the very least most of these values do not help us regulate today's complex, global society.

This new scenario is one in which there is a mix of cultures with differing and sometimes not at all compatible values and principles. It is therefore not unusual to note the coexistence in the same society, without knowing the causes, of two contradictory and antagonistic phenomena: tolerance and fanaticism.

IV. SPAIN IS THE EUROPEAN UNION MEMBER STATE IN WHICH THE IMMIGRANT POPULATION HAS INCREASED MOST FROM 1990 TO 2006

Immigrant flows have been constant and continuous since the end of the Franco dictatorship in 1975. They have, however, intensified, particularly since 1995, when, like now, massive waves of immigrants started flowing into Spain on a many different means of transport. Looking at statistics, dates and magnitudes, we find that in 1995 Spain barely had half a million (500,000) resident aliens. Of these, less than 40%, or 200,000, amounting to less than 2% of the Spanish population, were considered immigrants, and were scattered unevenly throughout the country.

At the beginning of 2006 the legal alien population exceeded 3.8 million, over 8.5% of the total population. The latest official Spanish population census dates from 1 January 2005 and shows a population of 44.11 million, of which 3.73 million were legal aliens (8.5% of the total). Of these aliens almost 70% are now categorised as immigrants. To this we must add the over 700,000 aliens that were "normalised" under the most recent regularisation process, in 2005, and all the "irregular" aliens that were living in Spain but did not meet the requirements to

be able to take advantage of the "regularisation/normalisation" process, in addition to others who have entered Spain both legally and illegally since 2004 and are awaiting a new regularisation process that will convert them from "invisible" into "visible" aliens or, stated in other words, into "citizens with rights and obligations."

Another recent statistic from the Spanish Ministry of Labour and Social Affairs comes from the latest Spanish Social Security census (30 April 2006) and shows on that date a total of 1,803,323 alien affiliates. To these rightholders we must also add all their family members as direct beneficiaries.

Immigration policy over the past 10 years has, in reality, consisted of not very effective attempts by successive Spanish governments (of whatever political leaning) to establish a system to regulate migratory flows in response to real criteria based on the needs of the national labour market. The most serious contradiction is that which exists in Spain between the job supply and the legal restrictions placed on the entry of skilled foreign workers.

Attempts to resolve this situation have led to the establishment of contradictory, ineffectual and counterproductive policies implemented through setting so-called "immigrant worker quotas." These annual quotas have done nothing to alleviate the problem or to resolve the needs of those offering jobs. Without evaluating actual results, the job offers published over the past 15 years by the Spanish State to cover normal or hard-to-fill jobs are ridiculously low. There is a large gap between official and real demand. The final result is that actual demand can only be met by resorting to irregular aliens.[9]

Together with the legal entry of immigrants provided for and encouraged by law, two other forms of entry are noted, which I will personally call "atypical."

- Family reunification is, without a doubt, one of top priorities in any Spanish immigration policy and is a major way for new immigrants to enter countries like Spain particularly, that border on the Third World.[10]

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[9] Dates and quotas are summarised below for the 1993–2006 period. Quotas were contradictory and unrelated to the actual needs of the Spanish job market:

Resolution 4 May 1993	**Quota: 20,600**
Resolution 21 September 1994	**Quota: 20,600**
Resolution 9 June 1995	**Quota: 17,000**
In 1996 no quota was set	
Resolution 31 January 1997	**Quota: 15,000 (increased to 24,900)**
Resolution 14 March 1998	**Quota: 17,000**
Resolution 16 January 1999	**Quota: 30,000**
No quotas were set for 2000 and 2001	**(regularisation processes were carried out)**
Resolution 11 January 2002	**Quota: 32,079**
Resolution for 2003 (19 December 2003)	**Quota: 10,575**
Resolution para 2004 (22 January 2004)	**Quota: 10,908**
(special quota established for domestic workers)	
2005 quota extended by the Council of Ministers on 3 January 2005	
Resolution January 2006	**Quota: 16,879**

[10] A. Álvarez Rodríguez, "La transposición de directivas de la UE sobre Inmigración. Las

- Continued regularisation processes, ordered and promoted by the Government with the blessing of the opposition, are a non-conventional way of converting people left outside the law and the implementing regulations and those whose entry, stay or illegal or irregular labour situation made them into "clandestine" or "invisible" aliens, into regular or legal immigrants. It amounts to a realistic policy of *faits accomplis*.[11]

From 1985 – when the first law was enacted – to date, a number of overlapping and incomplete regularisation processes have been undertaken and have become the true and obvious "draw effect" that has undoubtedly been taken advantage of by mafias and organised human trafficking networks. They are aware of the political panorama and the changing legislation, and promise their "clients" that, sooner or later, if an irregular alien makes it to Spain and can somehow accredit his/her presence there, the government will end up regularising him/her.

V. CONSEQUENCES OF BAD IMMIGRATION POLICY

All this and the failure of the quota policy, which elicited a massive, uncontrolled entry of irregular immigrants, led to the creation of large pockets of irregular immigrants working in the underground economy. These people were not regularised, but neither were they "invisible" to the eyes of Spanish citizens or the authorities, particularly since their presence has caused a change in the characteristics of the populace and it is today totally normal to see people of many different races, religious and languages in Spain.

Their lack of integration has led to friction – fortunately not frequent or very serious – between the host society and the new entrants, that is gradually moving towards individual and collective positions of racism and xenophobia in communities which large immigrant collectives.

Over the ten year period, immigration policy has focussed on border policy, combating illegal immigration and human trafficking mafias, and attempting to

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directivas de reagrupación familiar y de residentes de Larga duración" (Transposition of EU Directives on Immigration. Directives on Family Reunification and Long-Term Residents) Documentos CIDOB no. 8. Barcelona 2006.

The Court of Justice of the European Communities (Grand Chamber), ruled on 27 June 2006 in Case 540/03 (*European Parliament Council of the European Union*), to abolish the last paragraph of Article 4.1, Art. 4.6 and Article 8 of Directive 2003/86/EC of the Council, of 22 September 2003, on the right to family reunification.

[11] For more detailed information on Regularisation in Spain since 1985 see E. Sagarra Trias, "La legislación sobre extranjería e inmigración: Una lectura – *Los derechos fundamentales y libertades públicas de los extranjeros en España*" (Legislation on Aliens and Immigration: A Reading – Fundamental Rights and Public Freedoms of Aliens in Spain), Universitat de Barcelona, April 2002.

recruit what Javier de Lucas calls "necessary or appropriate immigrants,"[12] requiring the rejection and return of immigrants (through deportation, repatriation, return, and prohibited entry) who do not fall into the category of what some authors call "desired immigrants."

The ten year period (1996–2004) of legislative instability, insecurity and misinformation on applicable rules, along with contradictory immigration policies, led to the presence of an estimated 1,300,000 irregular immigrants (as confirmed by the appropriate authorities) living in Spain when the Socialist government won its electoral victory in March 2004.

At the end of 2004, when the last Implementing Regulation of the Law on Aliens[13] was published, a very large percentage of the aliens living in Spain at paradoxically fulfilled from one to all eight of the characteristics set forth below, providing them with a somewhat unusual status:

1. *Alien*:
   Always a negative definition. An alien is someone who is not a citizen of the country in which he/she is present.
2. *Immigrant-alien*:
   An immigrant is an alien who seeks to work and live temporarily or permanently in the host country. The UN International Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Families that entered into force on 1 July 2003 (still not ratified by Spain) defines this category as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national."
3. *Irregular-immigrant-alien*:
   An irregular alien is an immigrant in Spain who lacks the appropriate permits to reside or work on Spanish territory, regardless of the origin of the administrative irregularity, is. It is possible therefore to be an irregular alien through: a) having entered Spain illegally; b) original irregularity, sought by the immigrant himself/herself who initially does not have the appropriate permits; c) the expiration of permits granted previously; d) lack of diligence on the part of the authorities responsible for processing "paperwork" (permit renewals).
4. *Registered-irregular immigrant alien*:
   Organic Law 4/2000 and Organic Law 8/2000 that reformed it, and applicable legislation on Local Administration, authorised and obligated aliens (both regular and irregular) to register in the municipality where they were living "de facto." Such registration on the municipal rolls was and is an individual obligation. The possibility of access by the Police to the municipal rolls was

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[12] *Le Monde Diplomatique* (5 January 2000).

[13] Implementing Regulations of the Law on Aliens: Royal Decree No. 2393/2004 of 30 December 2004 (Official State Gazette, 7 January 2005).

modified by Law 11/2003 of 24 October, making the irregular population afraid to register, the reason that many had not registered by the beginning of the 2005 regularisation process.

5. *Resident-registered irregular immigrant alien*:
   The term "resident" that we apply here is not used in a legal sense, but rather a *de facto* one. For example, the over 200 Sub-Saharans who lived for over a year (2000–2001) in Barcelona's centrally located Plaza de Catalunya were *de facto* residents, and that was undeniable proof of status as a *de facto* resident, as they occupied physical space, albeit not legal, or *political*, space.
6. *Working-resident-registered-irregular-alien-immigrant*:
   Everyone has existential needs that must be met, such as eating and trying to survive, and sustenance is obtained either in exchange for a wage (legal or illegal); or out of one's own funds, living off of public aid, begging or, unfortunately, through street crime or involvement in criminal networks and/or illegal human trafficking. It is evident that this situation promotes trafficking in illegal labour and exploitation.
7. *Working-resident-registered-irregular-alien-immigrant with a deportation order*:
   This is an increasingly more common reality in which irregular aliens or aliens who entered illegally, commit an administrative or criminal illegality, and are ordered to be deported after appropriate processing, having possibly been held in an appropriate facility, a non-penal institution, for up to 40 days.
8. *And, last but not least, working-resident-registered-irregular-alien-immigrant with a deportation order – living in Spain legally and at liberty*:
   If deportation was not carried out owing to lack of means or because of difficulty in locating the deportee or through lack of Administration coordination, or, lastly, because it was not known to where to deport the alien; the deportee can legally remain in Spain and move freely about Europe, as he/she cannot be held or detained since he/she has not committed any crime. These aliens are in a "stand by" deportation status. The situation is today more pathetic and schizophrenic than ever, as authorities are flying "deportable" from the Canary Islands to Barcelona and Madrid by plane and then leaving them at large to their own fate.

This was the status of many of the aliens who were legally in Spain in January 2005.

VI. THE LAST "NORMALISATION / REGULARISATION" OF IRREGULAR IMMIGRANTS IN SPAIN DURING THE FIRST HALF OF 2005

In 2004, the government in power, – in this case the Socialist government of Prime Minister Rodríguez Zapatero – in an attempt to regulate the existing chaos, had no alternative but to, once again establish a regularisation process for a period of time for immigrants who were in Spain in irregular status. The measure was

denounced and criticised by the Popular Party in the opposition, which was incomprehensible since the confusion and chaos had arisen during that party's time in charge of the government. This special regularisation process was set forth in the Third Additional Provision of the new Regulation on the Law on Aliens approved by the above mentioned Socialist Government.[14] It entered into force on 7 February 2005, one month after its publication.

The situation was a problem of State, the solution to which involved:

A. Pressing Needs

- *Amnesty for employers.* Although it might seem contradictory, the principle participants in the regularization were employers, who, by normalising the status of their alien workers could avoid criminal, administrative, tax and labour sanctions.[15]
- *Avoid mass deportations*, that furthermore were absolutely impossible to carry out. Neither the structure of society and the irregular employment of aliens, nor the economy of the country as a whole, could or should realistically bear the expulsion of several hundreds of thousands of aliens, without any international collaboration or help from their countries of origin.
- *Employer inspection and monitoring policy.* After the regularisation process, strict inspection of employer practices and conduct was threatened in order to prevent unlawful behaviour that would distort competitiveness vis-à-vis those employing regular immigrants. Irregular status means low costs and non-competitive pricing.
- *Increase enrolment in the Social Security system.* This is a past and present need of the Social Security system, to have all the aliens in the active population contributing to the Social Security system. Otherwise, the immigrants would be beneficiaries of healthcare, education and social benefits to which they did not contribute. Without participation by immigrants, the Spanish Social Security system would end up in bankruptcy. The sheer self-interest of the State dictated the need to obtain the maximum possible number of participants in the general and special systems of the Social Security program.
- *Need to fill essential jobs reserved up to now exclusively for Spanish nationals.* Although only anecdotal in scope, Spain needs aliens to meet the demand for professional military forces. The recent Law on Soldiers and

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[14] Regulation of the Organic Law on Aliens Royal Decree No. 2393/2004 of 30 December 2004 (Published in the Official State Gazette on 7 January 2005).

[15] See on this subject E. Sagarra Trias, "Sujeto legitimado, sujeto interesado y sujeto afectado en el proceso de regularización "normalización" de inmigrantes del 2005" (Legitimized subject, interested party, and affected subject in the 2005 immigrant regularisation "normalisation" process). Revista de Derecho Migratorio y Extranjería, Editorial Lex Nova No. 8, Valladolid March 2005.

Seamen of 24 April 2006 provides that aliens seeking to join the professional military forces must have legal resident status.[16]

B. Requirements that must be Met by Aliens:

- *Show proof of being in Spain before 7 August 2004* (6 months before the entry into force of the 2004 Regulation) but not just any type of proof was valid, as was the case in prior regularisation processes.
- *Alien must be registered in the municipal rolls of place of residence*, and accredited by means of a certificate. This was one of the most difficult points, which continues still today to inundating government offices and Judicial review courts all over Spain with administrative appeals. Mid-way through the regularisation period, permission was given for "certificates of omission of census registration" to be issued, causing great commotion in which reality and rule-bending surpassed even the wildest imagination.
- *Have a work contract or an offer of work for an initial one-year period*, signed by an employer, and accredited in a bona fide way by requiring the presence of the employer at government offices, thereby making the employer one of the parties most inconvenienced by having to take the time to wait on long lines at government offices.
- *Not have a criminal record in Spain or over the past five years in their country of origin* or of last residence.

C. Results

The process was carried out with some difficulty, contradictions and shortfalls caused by the Administration, particularly because of the acceptance, as indicated above, of a certificate of registration in the municipal rolls "certificate of omission" (approved in April) that led to a certain degree of legal insecurity for the irregular aliens.

The result was initially satisfactory, albeit incomplete. Out of a total of 690,679 applications filed, 504,786 were resolved favourably and over 319,000 persons joined the Social Security system, contributing a total of 750 million euros, with a projected 1,500,000 million euros for 2006.

The process set forth in the Regulations on "Normalisation of Aliens", commenced on 7 February and closed (theoretically) on 7 May 2005. We say "theoretically" because administrative and appeals for judicial review over denials are still being considered.

This is a synopsis of the recent "normalisation" and the tangible results. The renewal of the initially granted permits currently underway, while expected to be

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[16] Law 6/2006 of 24 April on Soldiers and Seamen. Official State Gazette of 25 April 2006, Vol. 98, pp. 15752.

difficult and complex, is benefiting from having more data processing and personnel resources devoted to it so as to avoid the confusion of the previous experience.

What has not been avoided is the increase in the pockets of irregular immigrants, both old and new, who are continuing to arrive by plane, "cayuco" (traditional wooden boat), train or bus, and the numbers of which no one exactly knows, in addition to family members who have entered national territory for reunification.

VII. SCHEMATIC SYNOPSIS OF THE STAGES OF SPANISH LEGISLATION REGARDING ALIENS, IMMIGRATION AND ASYLUM

Beginning with the Spanish Constitution of 1978, the most relevant provisions on this subject are set forth as follows:

SPANISH CONSTITUTION of 27 December 1978

Articles: 13, 10.2, 24.1, 96.1 and 53: these are the provisions that deal directly with the rights and freedoms of aliens and their exercise. The treatment given aliens consists of recognising their entitlement to fundament rights and public freedoms, but their exercise must be as stated by Law or by Treaty. This can be termed "restricted equivalency" of attributed rights.

- **Many other provisions of the Constitution and Organic Laws.** Such provisions recognise fundamental rights, administrative-political rights, and societal rights of aliens in general, or resident aliens.
- **Political Rights.** Aliens may actively vote in municipal elections only pursuant to a law or treaty authorising such a practice, and in reciprocity with the alien's country of origin. It is noteworthy that the only amendment of the 1978 Constitution to date (2006) was precisely of Article 13.2. The amendment consisted of adding the right of an alien to be elected and to vote in municipal elections. Spain was obligated to do so by signing the Treaty of the European Union (Maastricht), which grants such a right to "citizens of the Union."

FIRST STAGE: 1984/1990

- **Asylum:** Passage of the Law on Asylum and Refugee Status and its implementing Regulation, Law 5/1984 and Regulation of 1985.[17]
- **Aliens:** Publication of the first Law on Aliens, Organic Law 7/1985 of 1 July on the rights and freedoms of aliens in Spain.[18]

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[17] Law 5/1984 of 26 March (Official State Gazette no. 74 of 27 March), amended by Law 9/1994 of 19 May (Official State Gazette no. 9 of 23 May). Regulation of 1985.

[18] Organic Law 7/1985 of 1 July (Official State Gazette of 3 July 1985, no. 158).

- **Regulation of the Law on Aliens** of 1986.[19]
- **Jurisprudence:** During this period the Constitutional Court established doctrine defining alien rights, particularly in Decision no. 107/1984 of 23 November. Constitutional Court Decision 99/1985 also dealt with this issue and clearly and without discussion stated that aliens have a right to judicial protection since it is an inherent right of "every person." Constitutional Court Decision no. 115/1987[20] is of capital importance, as it declares certain provisions of Organic Law 7/1985 unconstitutional.

Successive regularisation processes were held during this period of time, the purposes of which were to gain an exact knowledge of the number of aliens residing *de facto* in Spain. The term used to refer to irregular aliens was "illegals."

SECOND STAGE: 1990/1996

- **Quotas:** During this stage a special regularisation process was undertaken in 1991 under the Resolution of 7 June 1991.[21] Public debate over the magnitude of the problem was augmented in 1993 by the application of quotas for alien workers and the entry into force of the Schengen Agreements[22] automatically making Spain the southern flank of the European Community.
- **Asylum:** The new Law on Refugee Status, no. 11/1994, of 19 May, amended the previous Law on Asylum of 1994, and in 1995 a new set of regulations was enacted to implement this Law.[23]
- **Aliens: 1996 Regulation:** This stage concluded with the drafting and publication of a new Regulation, no. 155/1996, of 2 February 1996,[24] that did not

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[19] Royal Decree 1199/1986 of 26 May approving the Regulations of the Law on Education of 1985 (Official State Gazette, 25 April 1986).

[20] Constitutional Court Decision. Plenary. Appeal. Unconstitutionality no. 880/1985 no. 115/87 of 7 July (Official State Gazette. Supplement 20 July 1987 pp. 15 and successive).

[21] Resolution of 7 June of 1991 by the Office of the Deputy Secretary providing for publication of the Agreement of the Council fo Ministers of 7 June 1991 on Regularisation of Alien Workers (Official State Gazette, 8 June 1991). On this subject, refer to SAGARRA TRIAS, E. Directed Seminar with the collaboration of other authors in "La regularización de 1991" (The 1991 Regularisation). Fundación Paulino Torres Doménech. Barcelona 1991. And also, "Otra vez con la regulación de 1991" (Again the 1991 Regulation) by the same Foundation. Barcelona 1992.

[22] Membership Agreement to the Convention to apply the Schengen Agreement of 14 June 1985, among the governments of the States of the European Union, regarding the gradual elimination of common borders, signed in Schengen on 19 June 1990 (Official State Gazette, 5 April 1994).

[23] Law 5/1984, of 26 March, amended by Law 9/1994, of 19 May, on the regulation of the Right to Asylum and Refugee Status. – Royal Decree 203/1995, of 10 February. Approves the Implementing Regulations of Law 5/1984, of 26 March, which regulates the Right to Asylum and Refugee Status, amended by Law 9/1994 of 19 May (Official State Gazette no. 52 of 2 March).

[24] Regulation of the Organic Law on Aliens, RD 155/1996 of 2 February 1996 (Official State Gazette of 23 February 1996).

amend the 1985 Organic Law. It is unusual for one Organic Law to give rise to two Regulations as differently in orientation as these. This notwithstanding, the 1996 Regulation, like the previous one, approaches immigrants or alien workers from a perspective of temporary stay. The alien's entire stay is based on different types of temporary, limited residency or work permits. The police and employment record of the alien is of more concern than the alien's integration into the social fabric where he/she lives. The new Regulation was established by consensus among the political and social forces and is much more rights-oriented.

- **Arrivals *en masse*:** The principal feature of this period was the sheer numbers of aliens entering Spain by all means of access with a view towards working and living in Spain. At police immigration check-points, the newcomers referred to themselves as "asylum seekers" when they were really were "economic asylum seekers" claiming refugee status because it was in principle more beneficial owing to its being based on International Human Rights Law and Treaties signed by Spain.

THIRD STAGE: 1996/2000

- **New PP Government:** Power changed hands from the former PSOE government to the new Popular Party (PP) government.
- **Organic Law 4/200 of 11 January 2000** on the Rights and Freedoms of Aliens in Spain and their Social Integration.[25] After a lengthy process, agreement was reached among the majority of the Spanish political parties on a new text, but the governing Popular Party voted against it. This was the first and only vote on a Law that the PP government lost during its first legislative period. In the campaign leading up to the subsequent elections, the PP promised to immediately change the Law, and did so. The law was based on consensus and broadened and recognised certain rights such as the right of family members to reunite with the family member residing in Spain, to the contrary of what would be the case in Law 8/2000 which gave the right to the reuniting resident.

FOURTH STAGE: 2000/2002

- **New Organic Law 8/2000:** *Organic Law 8/2000, of 22 December, that reformed Organic Law 4/2000, of 11 January, on Rights and Freedoms of Aliens in Spain.*[26] The two Organic Laws of 2000 gave rise to Decrees and new processes to regularise irregular, ordinary and special aliens, seeking to

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[25] Official State Gazette of 12 January 2000.

[26] Organic Law 8/2000, of 22 December 2000, to reform Organic Law L 4/2000, of 11 January, sobre Rights and Freedoms of Aliens in Spain and their Social Integration Official State Gazetteof 23 December 2000.

protect and legalise aliens in this category through their own volition, owing to changes in legislation, or because of administrative delays and/or neglect in resolving previous residence and/or work permits. These regularisations were carried out during 2000 and 2001.

- **New Regulation on Aliens.**[27] Interestingly, the two Organic Laws passed in 2000 continued to be governed by the most recent Regulation, which dated from 1996, a situation which produced legal insecurity and contradictions that were overcome through court decisions constituting jurisprudence, especially by the Supreme Court and the Territorial Courts. The 2001 Regulation is much more limiting of rights, and the Aznar administration blamed the previous Socialist administration and its Law 4/2000", for exerting a so-called "draw effect" on hundreds of thousands immigrants. Enforcement measures applied at borders were insufficient.

FIFTH STAGE: 2002/2004

- **Uncertainty and masses:** Policy was relatively unclear especially in the light of the avalanche of new immigrants and the inundation of embassies and consulates with applications for work contracts to perform essential, necessary jobs to fuel the Spanish economic "boom", which was greater than in the other Member States of the European Union, to which Spain belonged since 1986.
- **Mafias:** One of the main issues of concern to legislators, governing party and opposition alike, was the fight against terrorism and the mafias that traffic in human beings, that are fully aware of the system's shortcomings and the market's need for manpower.
- **Terrorism:** During this time period the terrorist attacks occurred in New York and Washington on 11 September 2001, and then there was the war in Afghanistan. International measures to combat terrorism and both direct and indirect terrorism financing affected immigration policies.
- **Citizenship:** The Spanish Civil Code was modified in regard to citizenship by Law 36/2002, promoting the naturalisation of immigrants in Spain, and creating new forms of accession to Spanish and, therefore, European citizenship.
- **New Quotas:** Priority was given to a policy of quotas, that resulted totally insufficient, and provisions were made to implement European policies and directives referring to family reunification.

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[27] Royal Decree 864/2001, of 20 July, that approved the Implementing Regulations of Organic Law 4/2000, amended by Organic Law 8/2000, Organic Law 11/2003 and Organic Law 14/2003 (Official State Gazette no. 174 of 21 July 2001). Special mention is also made of Royal Decree 865/2001 of 20 July, that gives approval for the recognition of Stateless Person status, published the same day.

- **Nullification of Regulation Articles:** The Supreme Court declared null and void certain articles contained in the 1996 Regulation.
- **New Organic Laws of 2003:** New Organic Laws were enacted that modified the Law on Aliens, Law no. 11/2003 of 29 September[28] and Organic Law 14/2003 of 20 November 2003 (Official State Gazette of 21 November 2003) the title of which, in and of itself, reads like a novel.[29] The two Laws amended Organic Law 8/2000. As we indicated, these Laws sought to curb mafia activities and complicity between such domestic organisations and their international counterparts. A number of provisions were established for implementation.[30]

SIXTH STAGE: 2004/2006

This is the stage we are in now. Here we will only set forth the most important milestones, as we lack the historical perspective necessary to be able to analyse effectiveness, and furthermore, this has been broadly discussed and assessed above.

- **Terrorist attack on the Atocha Train Station (Madrid)** on 11 March 2004: perpetrated by activists, apparently Islamic fundamentalists pertaining to the same organisation as Al Qaeda. Certain rights were granted to aliens affected by the terrorist attacks.[31]
- **Mr. Rodríguez Zapatero's Socialist Government:** In elections held on 14 March 2004, the Spanish Socialist Workers Party (PSOE) won in counter to all predictions and Mr. Rodríguez Zapatero became the Prime Minister.
- **Immigration is a priority of the Government and in the eyes of the public:** There was interest in immediately dealing with the issue of aliens in conjunction with the political parties and the country's social and economic forces. Pressure was exerted by the European Union to put a stop to irregular immigration and the massive influx of immigrants through Spain.

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[28] Organic Law 11/2003, of 29 September on Specific Measures on Public Security, Domestic Violence and the Social Integration of Aliens (Official State Gazette of 30 September 2003).

[29] Organic Law 14/2003, of 20 November, to Reform Organic Law 4/2000, of 11 January, on Rights and Freedoms of Aliens in Spain and their Social Integration, amended by Organic Law 8/2000, of 22 December; Law 7/1985, of 2 April, **Regulating Local System Bases**; Law d 30/1992, of 26 November, on the Legal System of the Public Administrations and Common Administrative Procedure, and Law 3/1991, of 10 January, on Unfair Competition (Official State Gazette of 21 November 2003).

[30] Circular containing Implementing Instructions for Organic Law 4/2000, on Rights and Freedoms of Aliens in Spain and their Social Integration, after the reform carried out by Organic Law 14/2003, of 20 November, Madrid, 16 December 2003. www.reicaz.es.

[31] Royal Decree 453/2004, of 18 March, on Granting Spanish Citizenship to Victims of the 11 March 2004 Terrorist Attacks.

- **New regulation on aliens:** Implementing Regulations for the Law on Aliens were enacted on 30 December 2004 (Official State Gazette 7.01.05).
- **Normalisation:** Normalisation, or regularisation, process was set to run from 7 February to 7 May 2005. Extensively discussed above.
- **Referendum in Spain on the Constitution for Europe** was held on 20 February 2005, with affirmative result.[32]
- **Lack of control at borders:** There was massive influx of aliens through Ceuta and Melilla, (by boat, "patera"); Mauritania, Senegal (by boat, "cayuco"), or from countries in Eastern Europe (by boat, train, bus), Latin America (by air).

VIII. CONCLUSIONS

FIRST: Spain's current situation can be described, in the words of Javier de Lucas,[33] as one of "overwhelmed preoccupation." The policy implemented over the past year is merely one effective step forward that has partially redressed a very dangerous human situation in Spain. Of the nearly 700,000 "invisible" immigrants seeking regularisation, the regularisation process brought over 600,000 people out of irregular status and made them visible, but has left over 750,000 people unregularised because they did not meet the requirements, a number that increases with new arrivals daily.

SECOND: The reality of a globalised world and the desperate yearning for the promised land of Europe will make regularisation processes not extraordinary events, but rather normal processes aiming to convert *de facto* population into legal population. The phenomenon of unremitting, massive immigration brings our progressive legal and political system into question, and whether nationals and aliens should have equal individual rights and freedoms.

THIRD: Laws exist to serve the needs of the people and knowledge of the law must serve to facilitate compliance thereto. If this is not the case, laws become illegitimate no matter how legal they may be. Laws should take into account the diversity of the people to which they apply and seek ways to integrate immigrants, **so as to prevent very dangerous situations of racism and xenophobia**.

FOURTH: As citizens of the First World we do not appreciate what we have or the privileges we enjoy daily. **The citizens of the third world, however, are fully cognizant of what they lack and will never have** if they do not move towards

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[32] Constitutional Court. Statement by the Constitutional Court (DTC 1/2004, of 13 December 2004) on the existence or not of contradiction between the Spanish Constitution and Articles 1–6, II–111 and II–112 of the Treaty by which a Constitution for Europe is established, signed in Rome on 29 October 2004.

[33] *Le Monde Diplomatique* of 01–05–2006.

the sources of wealth, be they in Europe or North America. The naïve belief that law enforcement measures and border controls at seaports and airports to prevent massive entry is the short- or medium-term solution, is unrealistic and reckless, just as is setting up a system of unrealistic quotas that does not meet the society's needs or prevent illegal trafficking in persons by structured international mafia networks.

FIFTH: The avalanche of desperate people, a characteristic of the 21st century, can only be dealt with successfully through: a) Collective engagement regarding the magnitude of the situation; b) Policies at the European Union level, since domestic measures are ineffectual; c) Promotion and funding of international cooperation in immigrants' countries of origin; d) Proclaiming austerity in our world on behalf of the Third World – from a standpoint of sheer selfishness – to dissuade them from coming. Fighting irregular immigration and securing our borders is like trying to keep back the sea, and will not keep immigrants from seeking a way to escape their grim reality. They have nothing to lose but their lives in the attempt.

SIXTH: The continuous, daily, and almost now normal practice of entering Spain by rudimentary is not an individual enterprise, but rather a collective family investment in the future. We Europeans are concerned about the future too, and start pension and retirement plans to provide for us when we retire, while in many parts of the world, Africa, Asia, Central and South America and Eastern Europe, people are investing and pawning their assets and those of the entire family, to finance passage on a boat or other means of transport. This amounts to their pension funds, their plans for the future. We must realise that in many parts of the world "there is no future" and Europe and the U.S. are the only future possible.

SEVENTH: In Europe and the U.S. the political influence of immigrants will increase. Immigrant aliens in Spain cannot now vote in national elections, and only European nationals can vote in municipal elections. However, the government's immigration and alien policy, and political party programs regarding immigrants will taken into account by Spanish voters and may be decisive in general elections. Aliens do not have the right to vote, but policies affecting them will be decisive and influence the results of upcoming national, regional and local elections.

EIGHTH: Our European society of the First World must come to grips with a difficult new reality and abandon policies dealing with immigration as a scourge against which to fight. We must seriously initiate a rigorous process in Europe in which immigration, multiculturalism and diversity are considered factors of progress and change as we enter the 21st century.

Spanish Policies towards Latin America: The Pros and Cons of a Guaranteed Mutual Relationship

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I. Introduction
II. Notes on the Nomenclature used: Hispano-America, Ibero-America, Latin America
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IX. Looking forwards: the Bicentenaries

INTRODUCTION

Relations between Spain and Latin America are one of the essential objectives and constant presences of Spanish foreign policy. Beyond governmental contacts, these relations form a basic part of the State's external actions, as they weave an extensive network of interactions between the different public administrations (at central, regional and local level), between private agents (companies, trade unions, non-government organisations and different types of collectives), and is permanently impregnated by the human factor, with migratory movements between both, solidly based on the sharing, overcoming the distance factor, of a whole range of values, principles and ways of being that complement each other. This leads to Latin Americans being identified as the most 'European' inhabitants outside of the old continent, and the Spanish as the most 'Latin' outside of their own.

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A statement made by Spain's King Juan Carlos during the visit of Argentina's president, Néstor Kirchner, on June 21st 2006, sums up the feelings shared with the rest of the nation with respect to its links with the Latin Americans: "nothing that happens in Argentina is distant to us", meaning that nothing that happens to the Latin Americans is considered as distant by the Spanish.

Another factor to be taken into account is the increasing complexity of relations between both parties, who have gone beyond the framework of intergovernmental action, activating the presence of a plethora of actors, logically operating in different areas with different degrees of importance. This is the case of Spain's Autonomous Communities (the elections held in Galicia were finally decided thanks to the vote of emigrants in Latin America), and its Local Councils (many of which are twinned with municipal districts in Latin America). There are also the 'Spanish' multinational companies that have such a high profile in the economy (and politics) of the region, thanks to the major investments that have been made, and even criticised as a new type of 'conquest'. Furthermore, there is a profoundly interwoven fabric of social relations, ranging from the increasing activity of non-government development organisations in many parts of the subcontinent, to including the two-way flow of population with Latin American immigrants travelling to Spain, and the importance of Spanish tourism in many parts of Latin America.

For more than five centuries, relations with Latin America have formed a part of Spain's foreign policy, although obviously subject to the changes derived from three variables: the internal situation in Spain, the situation in Latin America, and changes in the international system.

Without oversimplifying the topic, it is true to say that the end of the cold war helped configure one of the most favourable backdrops for these relations. Spain recovered the political and economic protagonism it had lost after forty years of dictatorship, and Latin America abandoned the leaden years of the military dictatorships that ravaged much of the subcontinent, although its economic situation continues to suffer, and there are chronic problems such as inequality. Also, the changes that have taken place in the international system have opened the way to new opportunities for increasing and consolidating mutual relations. This has all taken place against a backdrop in which the United States has lost part of it hegemony in the region, a result of the external weakness of which it is still a superpower. This does not mean it will be an easy process, and that tensions may not occur from time to time, especially in economic areas. However, over and above these situations, it is important to emphasise the primacy of acting as partners rather than enemies who resolve their tensions through conflict and not through dialogue. Spain and Latin and America are complementary actors in a wide range of areas on the worldwide stage.

Another important stage we have to take into account is the fact that this bilateral relationship is complemented by relations between the European Union and Latin America. The entry of Spain (and Portugal) into the European Community in 1986 opened the way for the other partners within the Union to intensify their

relations with a region that until that moment had been marginated in terms of European foreign policy.

And of course, it is inevitable to consider the triangle of Spain-Latin America-U.S.A. The United States have had and continue to have a dominant position in relation to their southern neighbours. Spain, together with its European partners, maintains a harmonious position with its partner with regard to Latin American affairs, although it cannot be denied that after the arrival in power of the Socialist Party in 2004, there has been more of a sense of divergence than harmony, as in the cases of Venezuela, Cuba or Columbia.

We will explore this question from the perspective of International Relations, giving it a thorough coverage from a multidimensional perspective, including several areas of the relations that exist between Spain and Latin America, such as politics, economics and the human dimension of these relations. We will start by referring to the terminology used in this case, then continuing with a brief overview of the origins and evolution of these relations, to then focus on the current situation, where we will analyse the bilateral agenda in its different aspects. We have also included the main elements that go towards configuring Spanish foreign policy, and its abilities to turn it into medium-ranking power on the rise. We will end by exploring a series of issues that will be of importance in the future, and the work that will have to be done in order to further consolidate and comprehend these bilateral relations, with a view towards the celebration of the bicentenary of the declaration of independence of the Latin American republics.

NOTES ON THE NOMENCLATURE USED: HISPANO-AMERICA, IBERO-AMERICA, LATIN AMERICA

While a matter of lesser importance, confusion may arise when using different terms to refer to the same region. Today this question is less important than in former years, although we believe it is necessary to briefly clarify this terminological issue to decipher why several names have been used to identify the same region.

Although it would be impossible to define the frontier between these terms, and on many occasions the frequent use of the language confuses them, we will draw a line between the three as at the end of the day, their use still has an important significance depending on the case.

Hispano-America: used to identify American countries in which Spanish is spoken. It was the favourite term used during the regime of Franco. Today it has cultural connotations connected with the use of the language or certain means of expression.

Ibero-America: a name used to the group of countries including Spain and Portugal, and in the American continent Mexico, Central America, some parts of the Caribbean, and South America. It corresponds to the territories colonised by the Iberian countries. Today they form the Ibero-American Community of Nations.

Latin America: name used for the nations and countries in the American continent stretching from Mexico to Tierra del Fuego, including the Caribbean countries.

The official Spanish terminology uses the term Ibero-America, although it would not be correct when dealing with relations between Spain and the countries of Latin America and the Caribbean. The two are close, but they are two different issues.

A BRIEF HISTORY: CONSTANTS AND VARIABLES IN RELATIONS BETWEEN SPAIN AND LATIN AMERICA

More than five hundred years of shared history form the foundations of relations between Spain and Latin America, and the Spanish with Latin Americans.

The official history started on October 12th 1492, although the 'discovery' of America was due to a mistake, as Columbus was attempting to reach India via the shortest route, and the continent was named by another Italian (Americo Vespucio).

The three variables mentioned above (the internal situation in Spain, the situation in Latin America and the international context, with the growing influence of the USA in Latin American affairs since the Monroe Doctrine in 1823 until today) help establish the coordinates of these relations in each historic moment.

At the start of the nineteenth century, three factors came together to lead to the independence of the Latin American Republics: the fight for emancipation (whose main symbol is Simon Bolivar), the support of the USA in consonance with its own process with regard to Great Britain, and the weakness of the Spanish monarchy after the Napoleonic wars and its internal crisis.

The end of the nineteenth and beginning of the twentieth century offered another example. There was tension in Latin America produced by backwardness and modernity, with serious internal strife and conflict between neighbours (the Pacific War in 1879); the hegemony and imperialism of the USA; military interventions, the creation of Panama and a protectorate in Cuba; and the crisis in Spain that came to a head in 1898 with the loss of its last colonies and guerrilla war in Morocco.

It was in this climate that José Ortega y Gasset wrote *La rebelión de las masas* (The Rebellion of the Masses), in the second part of which was a chapter entitled "Who controls the world?" in which he affirms "Spain shares a common history, a common race and a common language with the peoples of Central and South America, yet does not form a nation with them. Why? Only one thing is missing, something apparently essential: a common future. Spain was unable to invent a programme for a collective future capable of attracting these zoologically similar groups. The future plebiscite was adverse to Spain, and nobody then made use of the records, the memories, the forebears, the "fatherland". When this exists, all the rest act as forces of consolidation, but nothing more".

In reference to modern times, we return to the idea described above. The end of the cold war set a very favourable stage; Spain recovered its political and economic presence in the international system; Latin America fought to consolidate its

political processes and to improve its social and economic situation. Also, changes in the international global system have opened the way to new opportunities to increase and consolidate mutual relations.

Latin America – or rather, some Latin American countries – are recovering their roles at bilateral and regional level, as well as their presence on the international stage. It should not be forgotten that countries such as Mexico and particularly Brazil occupy an important position; in fact, Brazil is considered as one of the BRICS, the emerging powers, together with Russia, India, China and South Africa. Not without argument, the arrival in power of leftist groups, in all of their different shades, has caused another about turn in Latin American politics, searching for greater autonomy and breaking away from the policies of the USA, which have gradually lost their impact in the region, except in the special case of Mexico, for obvious reasons of their relations as neighbouring states. While the USA has given priority to an agenda dedicated to the fight against terrorism, Latin America has demanded action in other areas, such as the economic sphere or migratory issues.

In many cases, state policies have been recovered combined with a market economy, in order to recover ground that was lost through the process of liberalisation, deregulation, privatization and flexibility, supported by the consensus of Washington.

At the same time, there has been a geopolitical reorganization of the group of regions in Central America, the Caribbean and particularly South America, in a process of intensifying relations, led by Brazil. We have witnessed the crises and renewal of processes of integration in Latin America: Venezuela abandoned the Andes Community, criticising its partners, to the creation of the South American Community of Nations (III South American Presidential Summit, Cuzco, Peru, December 8th 2004, with the presence of leaders from 12 countries). Advances in Mercosur, with proposals to create a 'ring of energy', inspired in the CEC, which coexist with a low institutional level, as we are seeing in the so-called 'Pulp-factory crisis' between Argentina and Uruguay, outside of the framework they share in Mercosur, as a result of a lack of institutions capable of resolving conflicts.

Together with these issues, there are still structural problems awaiting a solution, both in the economy (above all the tremendous inequality that exists in most of the region), and in the political sphere, with the gradual consolidation of formal democracy, although there is a generalised discrediting of the way of carrying out politics, which has led to the collapse or disappearance of many traditional political parties, and the rise of many different types of social movements. Both the Economic Commission for Latin America and the Caribbean (CEPAL), in its Report for 2000 on equality, development and citizenship, and the United Nations Development Programme (UNDP), in its Report for 2004 on 'Democracy in Latin America. Towards a democracy of citizens' cover these issues in full.

And so, this is the backdrop to be taken into consideration when exploring the issue that concerns us: relations between Spain and Latin America. Before continuing, we will briefly examine the antecedents that have led to the current situation.

RECOVERING LOST TIME: THE IBERO-AMERICAN AGENDA FROM 1975

The death of General Franco on November 20th 1975 led to a drastic change in Spanish national and foreign policy. During the transition to democracy, Spanish foreign policy gradually recovered its life signs, the most important of which were an active participation in international affairs, breaking away with the previously existing isolation (for example, diplomatic relations with Mexico were resumed in 1977); joining Europe; its relations with the USA as partners, and as a result a new policy of security and defence. All of this took place within the framework of its presence on the international scene as a 'medium-ranking' power, an issue we will explore later on in this article.

Having accomplished these objectives, it was still necessary to redefine our relations with our main contacts in the local area: the Mediterranean (particularly in northern Africa, and with our southern neighbour, Morocco), and Latin America, for whom the rhetoric of Franco's regime had replaced any type of relations with real contents, a situation which Professor Roberto Mesa came to define as 'replacement policies'.

After 1975, Spanish policy towards Latin America, which we officially refer to as Ibero-American Policy, underwent a series of stages until reaching the present day; stages which we may mainly classify according to the different Spanish governments that existed from that time: during the transition to democracy, with the presidency of Adolfo Suárez until 1981; the short-lived government of Leopoldo Calvo Sotelo; the governments of the left-wing PSOE from 1982 until 1996, under the leadership of Felipe González; the governments of the right-wing PP under José María Aznar from 1996 until 2004, and the return of the PSOE to power after the elections of March 14th 2004, with the government of José Luis Rodríguez Zapatero.

As mentioned above, alongside the policies of the central government, a whole series of initiatives have been set underway by regional administrations, local corporations, companies, trade unions, non-government organisations and an extensive network of human relations.

The first governments of the transition would dedicate their efforts to recovering the 'life signs' of the country, without forgetting in its discourses the importance of relations with Latin America. Relations in which the head of state, King Juan Carlos, would play an important role, under the auspices of his powers (as the highest ranking representative of the Spanish state in international relations, especially with nations of its 'historical community' as defined in Article 56 of the Spanish Constitution), combined with the prestige enjoyed by the King in the region.

The Socialist governments would set policies underway (in the full sense of the term) towards Latin America, Ibero-American policies, strengthening bilateral links and activating the Ibero-American Community of Nations, whose first summit was held in 1991 in Guadalajara (Mexico). Also, a great deal of Spanish development aid policy would be destined for Latin American countries, as was seen in the creation of the Secretary of State for International Cooperation and Ibero-America in

1985, or the fact that Central America was the first region where an integral cooperation plan was implanted. This region would also receive the first Spanish 'blue helmet' troops, as Spain would be present in supporting the peace process in the region, alongside other European partners. This active role was recognised by Spain's participation in the San José Summit in September 1984, which represented the first step in the institutionalisation of relations between the European Union and Central America. The Spanish government also gave explicit support to the recovery of democracy in the region and the defence of human rights.

Business with the region would also occupy an important place from the start of the 1990's, with the favourable combination of two factors: the growth of the Spanish economy, seen in the internationalisation of companies, investments and the process of privatisation in Latin America, inspired by the conclusions of the "Washington Consensus". The weight of the economic agenda would be fundamental during the years in which Aznar was in power. But even more so would be the events that brought about a change in the relations we are analysing. One of them was the attack of September 11th 2001, which would place the fight against terrorism in the front line of the country's foreign policy, one of the key items in Aznar's political agenda. Another would be the war in Iraq: the unconditional alliance of Aznar with Bush's thesis would mean that apart from appearing in the 'Azores photo', he would be responsible for brokering Latin American collaboration with the intervention in Iraq, particularly considering that two countries from the region (Chile and Mexico) then held seats on the Security Council.

The elections of March 14th 2004, with the victory of the Socialist PSOE led by Rodríguez Zapatero, led to a major turnaround in Spanish foreign policy, which took shape in few days with the announcement of the withdrawal of Spanish troops from Iraq, and the subsequent anger of the USA, which to an extent still marks relations with Latin America.

With all of its hits (and misses), I believe that since then we have witnessed a revitalisation of Spain's relations with Latin America, and the recovery of Spain's important role in this region with the presence of governments that to some degree are similar to the Spanish government, and which share initiatives that Zapatero has presented since taking power, such as the Alliance of Civilisations or Spain's joining the initiative of President Lula's government in Brazil of fighting against hunger and poverty.

SPAIN AS A GROWING MEDIUM-RANKING POWER: ITS INCREASING IMPORTANCE ON THE INTERNATIONAL STAGE

This process has to be situated in line with Spain's capacity to have a real policy towards Latin America, ranging from occupying an active presence in globalized international relations, and therefore maintaining and even improving its role as a medium-ranking power. Let us consider what the theory of International Relations has to say about medium-ranking powers. Professor Esther Barbé, referring to the

idea of hierarchy and powers within the system, states that "The concept of a medium-ranking power is possibly the widest ranging. It is a frequently used concept in recent years in reference to large or medium sized countries with an active diplomacy in certain areas (human rights, mediation, peacekeeping forces) that in some cases brings them great prestige. Here it may be said that political intent has more importance than the resources of the state in question. Holbraad, an analyst of this question, states that 'medium-ranking powers are those who, due to their size, their material resources, their will and ability to accept responsibilities, their influence and stability, are on the way to becoming major powers'. Based on this decision (dubious with regard to its future dimension), and justified by a series of indicators, the author offers a list of countries, including Spain, Italy, Canada, Brazil, India, Mexico and Nigeria. Considering the imprecise limits of this definition, it is logical that Hobraad's list of medium-ranking powers differs from that of other authors. This said, the countries mentioned beforehand usually appear in all of the lists". (BARBÉ, Esther: *Relaciones Internacionales*. Madrid, Tecnos, 2003, second edition, p. 166).

Perhaps we should add that a state which, a priori, combines a series of requirements in order to be considered as a medium-ranking power, should be recognised as such by the rest, and this leads to doubts. This is typical of being in the middle: when Spain joined the European Union, it was said that it was the biggest of the small nations, or the smallest of the large. Also, we are referring to a process and not a fixed photo; a process that is slow in either direction (in the ascent towards higher categories, or in the descent towards lower categories). We have to remember that we may continue to see the light of stars for centuries after they have ceased to exist.

From the current perspective, and with the vision of the future mentioned above, it would seem that there can be little doubt that Spain has joined the group of middle-ranking powers with aspirations towards a more important role. The combination of a series of indicators allows us to verify this statement.

In terms of size, Spain ranks as number 50 out of a total of 214 countries and territories, with a total of 505,990 square kilometres, representing 0.38% of the total. Its location in Europe means it has been able to extend its relations towards the Mediterranean and the Atlantic. With a population of 41.3 million in 2004, it occupies the 29th position in the world ranking, representing 0.66% of the total. Its decreasing birth rate has been compensated by a major increase in its immigrant population, both regular and irregular, from Morocco, Latin America, central Europe and Sub-Saharan Africa.

In economic terms, Spain is the ninth economic power, if we base our conclusions on its Gross National Product, which in 2004 amounted to 875.8 billion dollars; 2.20% of the world total. However, it drops to number 22 if we consider the GNP per capita, at $21,210. It stands at position 21 out of a total of 177 in the Human Development Index of the United Nations Programme for Development. According to *The World Competitives Yearbook* from 2005, Spain ranks 32nd in competitiveness. According to Transparency International, Spain ranks 23rd on the

index for the perception of corruption. According to *The Heritage Foundation*, Spain ranks 31st in the economic liberty index for 2005. This data, together with a sustained growth of around 3.5% per year, which exists alongside a high external deficit, and the growing role of Spanish investment – particularly, but not only, in Latin America – in the hands of transnational companies, which are gradually scaling positions in the world ranking, have all led both the Conservative Aznar and the Socialist Rodríguez Zapatero to request that Spain, a hopeful with a good CV, be included in the group of world economic powers.

Other economic data indicate that Spain is the world's leading producer of oil, wine and wind power. According to the professional services company Ernst & Young, Spain occupies sixth position in the European ranking for its attractiveness to European investment, according to a survey carried out with European executives. The tenth *World Wealth Report* for 2005, published on June 20th 2006, drawn up by the investment bank Merrill Lynch and the consultancy firm Capgemini, shows that in Spain there are 148,600 millionaires, including people who have more than one million dollars in net financial assets; this number has grown at a rate of 5.7%, the second highest in Europe after Austria, leading it to occupy tenth position in the world ranking of places with most rich people (behind the USA, Japan, Germany, the UK, France, China, Canada, Italy and Switzerland). The European Monetary Fund published a report on June 14th 2006, drawn up by a team that worked for two years on exploring the solvency of the Spanish financial system; it gave a very positive evaluation of the strength of banks and savings banks in Spain, after overcoming several crisis simulations (mortgage credits, increases in petrol prices, depreciation of the Dollar, etc.). one of the scenarios studied was a crisis in Latin America, analysing the major financial risks of Spanish banks in the region, which at the end of 2004 were concentrated in Mexico (53%), Chile (14%), Brazil (12%) and Argentina (4%).

On the contrary, while the number of millionaires increased, there are more than suspicions that fraud is present on a major scale. It is significant that Spain is the country with most 500 Euro notes, and that different bodies have indicated that it is reasonable to assume that the rate of fraud is high. According to data from Spain's Tax Office, fiscal control actions in 2005 amounted to 4,583 million Euros, 12.9% more than in 2004, at 4,061 million Euros.

Evidently, all is not a bed of roses in the economic world, and amongst the negative elements that frequently raise their head are a constant foreign commercial deficit; in the first four months of 2006, the balance between exports and imports was negative, to the tune of 27,999.7 million Euros, representing an increase of 20% over the same period in 2005, although the deficit has grown at a slower rate than in previous years. One of the elements that puts the balance in the red is the country's energy dependence and the increasing price of petrol. Another negative feature detected in the Spanish economy is the lack of competitiveness and the low amount of capital invested in research and technological development.

Another of the scenarios in which the Spanish presence has undoubtedly become visible is in investment, with Latin America once again being one of its

most important destinations. Spanish multinational companies – remember that this term is something of a contradiction in itself – have occupied increasingly higher positions in the world ranking (the clothing firm Zara is 77th in the ranking for the world's top 100 companies), occupying sixth place in the world and second in Latin America. This flow of investment led to Spanish companies occupying first position in the ranking of direct foreign investment in Latin America at the end of the 1990's, although it also led to arguments regarding the advantages and disadvantages of this economic activity, as we will see later on in this article.

Furthermore, the Spanish political scenario has not only recovered lost time after forty years of dictatorship and international isolation, but has also had a clear international protagonism. 2006 marked the twentieth anniversary of the country joining the European Union, a transcendental event for Spanish politics, both in economic terms and in strengthening our external presence. Precisely the European Union serves to measure the qualification of Spain as a medium-ranking power, as we are the smallest of the large countries or the largest of the small, a situation we share with Poland, although it joined more recently. Spain forms an active part of many international organisations and institutions, in line with the multilateral dimension of its foreign policy. One of the consequences of this is that several Spaniards occupy high-ranking posts in these organisations, such as Rodrigo Rato, managing director of the International Monetary Fund. One of the most interesting signings was that made by media mogul Rupert Murdoch's News Corporation, incorporating Spain's ex-president José María Aznar as a managerial consultant.

In recent years, Spain has strengthened its diplomatic presence in countries and regions that previously were practically unknown, such as Sub-Saharan Africa and Southeast Asia. In the first case, one of the most important issues is migration, as thousands of people set off from this region in the hope of reaching Europe via the Canary Islands. In response to this situation, the Government has approved the 'Africa Plan', which includes a significant increase in its diplomatic presence in Sub-Saharan Africa (opening new embassies and making visits to encourage dialogue), new re-admission agreements, and increasing development aid, at the same time as persuading its partners in the European Union to get more involved in an issue that affects Europe's southern frontiers. In Asia, the increase in activity is due to the economic growth of the region, prompted by the driving force of China as an economic power.

This constant activity has led to the agenda of the Foreign Minister being more and more extensive, and an increase in the number of embassies. However, here we find one of the bottlenecks of Spanish foreign policy, the fact the increasing demand for an international presence is not in line with the resources made available for Spain's overseas administration, with a diplomacy that on several occasions could best be qualified as 'traditional', in terms of human and material resources. In order to face up to this imbalance, the government has proposed the reform of its foreign service, a process that is currently underway. Another case that may decrease this capacity for a foreign presence is the lack of coordination and coherence in foreign policy in general. Although it is true that the Spanish constitution expressly states that the Government is responsible for directing for-

eign policy (Article 97), in reality we find that other actors – particularly the country's Autonomous Communities – are seeking their own presence on the world stage; sub-state diplomacy is an element that enriches international activity as a whole, without forgetting that it dilutes the power that should be held by the Spanish state. The question therefore is how to combine a diplomacy rooted in the past with the complexities of modern public diplomacies for a country seeking to occupy a position of global leadership.

Another factor that explains the increase in Spain's presence is the participation by its troops and police in international peacekeeping missions, as 'blue helmets'. Spain is one of the most active members of the UN in this area. Traditionally, these missions have taken place in Latin America (from Central America to Haiti), although it is still surprising to find Spanish contingents as part of international operations in places as far flung as Afghanistan and the Democratic Republic of the Congo, in the latter case as part of an operation organised by the European Union.

Spain also has an increasing protagonism in development cooperation, with a steady increase in funds destined for official development aid, as well as measures aimed at increasing the quality of this aid. The International Cooperation for Development Law, passed on July 7th 1998, defined the objectives to be attained. The country's different governments have, to a greater or lesser extent, decided the policies to be adopted via the Master Plans for Spanish Cooperation. In the Master Plan 2005–2008, the main goal is to move from a policy of offering aid to a policy of development, reaffirming the commitment to comply with the Millennium Development Objectives adopted by the UNO on September 8th 2000. Recently, major steps have been taken to put basic elements in this field into effect, such as the approval of the Co-operator's Statute (regulating the legal and employment status of more than 1,400 Spaniards working in foreign countries), and a Law passed on June 22nd 2006, obliging the government to present within one year a plan to renegotiate external debt with the poorest countries that owe the largest sums (HIPC), owing before December 31st 2003. Here there are also a series of pending issues, particularly in terms of coordination between the different administrations and private entities that participate in foreign aid programmes, and particularly in improving the management system, with an in-depth reform of its main protagonist, the Spanish International Cooperation Agency.

Spain is also present in different collective actions that take place on the international stage, particularly its incorporation in 2004 as part of the initiative launched by the president of Brazil, Lula da Silva, to fight against hunger and poverty, and in particular, the proposal of president Rodríguez Zapatero, together with the Turkish government, to put the Alliance of Civilisations at the top of the global agenda, as a forum for dialogue to deal with different worldwide issues, particularly international terrorism. This is proof of the active and effective multilateralism that is one of the priorities of Spanish foreign policy.

Other data, less closely linked with the issue in hand but still important, support Spain's increasing protagonism, as Spain has some of the most advanced legislation in terms of sexual equality (although at the same time the reality of the

situation is grave); it is the world's number two tourist destination, a world leader in organ donation, has one of the planet's highest longevity rates, and different Spanish sports figures are included amongst the world's elite, in tennis or motor racing, for example.

In bringing to a close this list of elements that define Spain as a middle-ranking power on the rise, it is important to highlight the country's cultural presence, motivated by an increasing importance of Hispanic culture, in terms of the increasing growth of Spanish speakers (some 400 million, including those who speak Spanish in Sweden or Brazil), and its culture in general (cinema, TV, theatre, exhibitions, music, literature, etc.), linked to an increasingly important cultural industry. Thanks to this growing market, Spanish companies occupy an important position in the publishing industry, TV and musical markets. At official level, the presence of the Cervantes Institute has been strengthened (despite being created in 1991, one century after the Alliance Française), as the flagship of Spanish culture the world over.

Yet here too – borrowing a line from Billy Wilder's *Some Like it Hot* – nobody's perfect, and a recent report by José Luis Barberia, published in *El País* on the 19th, 20th and 21st of June 2006, informs us that "Invoking the name of Spain in the field of commerce does not lead to the benefits of prestige that would correspond to it as a developed country of the European Union. The label 'Made in Spain' subtracts more than it adds, when the globalisation of the economy calls for an internationalisation and intense competition in foreign markets. In no way does Spain's foreign reputation coincide with its economic, political and cultural reality".

Apart from these issues, and others we do not have the space to deal with in this article, many of which may be measured in different ways, there is a further key aspect: the support that a given political action receives, both internally, and above all, in relation to foreign affairs. Any text dealing with international relations will inform us that a State's resources must be supported by the will to play a specific international role (measured by an active presence or isolationism), and consensus between the political, social and economic spheres in order to further strengthen this international presence.

Latin America, together with Europe, has been an issue in which this consensus has traditionally existed. However, the current atmosphere of antagonism and confrontation that exists between Spain's two main political parties (the Partido Socialista Obrero Español and the Partido Popular) has also affected the Ibero-American agenda. Leaders of the PP frequently criticise the government's approach to cases such as Cuba, Venezuela or Bolivia, without forgetting the effects of its profound differences with respect to relations with the USA. This loss of consensus has contributed towards weakening Spain's influence on the international stage.

In conclusion, Spain is attempting to consolidate and increase its presence and protagonism on the world stage, and as a result in Latin America, adopting the role of a preferred partner. Yet we should not forget that the present and future situation of this role is conditioned by a recent past that has seen Spain pass from being a dictatorship to a democracy, from being backward to being progressive,

from being a poor nation to a rich one, and from being isolated to having a strong international presence.

THE CURRENT AGENDA OF RELATIONS WITH LATIN AMERICA: POLITICS, ECONOMY, SOCIAL AND CULTURAL RELATIONS

The current agenda of Spanish relations with Latin America started with the change of government after the elections of March 14th 2004, with the win at the elections (although without an absolute majority) of the Socialist party (PSOE) and the government led by José Luis Rodríguez Zapatero.

However, we should bear in mind that the government was not starting out from zero, and that these relations must always be seen as part of a process and a dynamism that conditions them. The period immediately beforehand was in the hands of the governments of the right-wing PP, presided by José María Aznar, which we will refer to in further detail.

The changes promised by Zapatero in his electoral campaign were quickly enacted in the area of foreign policy; multilateralism was strengthened, as well as the European, Mediterranean and Latin American dimension of Spanish foreign intervention, and two particularly important decisions were taken immediately: the withdrawal of Spanish troops from Iraq, and the change of the name of the Ministry, to Foreign Affairs and Cooperation.

In his investiture speech on April 15th 2004, Zapatero outlined the main areas of his government's foreign policy: "In this area it is now time to recover a consensus that should never have been broken. We have not progressed in any way by doing so, and have put many of our most important interests at risk. A consensus which, in this order, must clearly express a clear commitment towards Europe; it must focus many of our centres of preferential attention on Latin America and the Mediterranean; it must maintain a relationship of partners and friends with the United States, based on reciprocal loyalty and openness; it must firmly remain in line with international legality, with the reform and strengthen of international instruments of peace, and finally, it must make cooperation for development an essential element of our international policy. All of these areas must be dealt with by a new external service of the State, powerful and prepared to serve Spain as part of a globalized world."

In reference to Latin America, the president made special mention of the main objectives to be reached: "I will make every effort to recover the institutional, political, cultural and economic presence of Spain in Latin America, in order to contribute towards the definitive progress of its peoples, to consolidate democracy in all of its countries, and to lay the foundations for the modernisation and effectiveness of our community of nations."

This constant presence of Latin American affairs in Spanish politics may be seen in the following episode. Set against the backdrop of a debate on energy matters, when the president of the government, José Luis Rodríguez Zapatero, was

asked on February 22nd 2006 about the takeover bid by the German company E.ON for the Spanish firm Endesa, he replied "understand that Germany wants to have a strong company in the international market. Spain also wants to have one. Our position in Latin America is a matter of State".

Two years after accepting the post, the Minister of Foreign Affairs and Cooperation, Miguel Ángel Moratinos, offered a balance of his department's handling of its work ("Del compromiso electoral a la España del mundo global [From an electoral promise to the Spain of a global world]", *El País*, April 29th 2006): "Our proposal was to participate actively and effectively in the construction of the international community. At the same time, we have begun the renovation of our foreign actions, and taken firm steps to modernise and establish an integral reform of the Foreign Service". Here the most important events were the return of troops from Iraq, Spain's return to the heart of Europe and good neighbourly relations with the Mediterranean countries, and particularly with Morocco. He includes talks about the thorny issue of Gibraltar, and active participation in the peace process in the Western Sahara. Other positive issues include coordination in the fight against international terrorism and the initiative of the Alliance of Civilisations. With regard to European construction, he refers to greater political involvement faced with the crisis of growth. He also highlights the constructive dialogue with the USA within the framework of transatlantic relations between the EU and USA; European-Mediterranean relations, supporting partnerships; peace, dialogue and cooperation in resolving the conflict in the Middle East; and strengthening its presence in Africa in Asia. He also highlights the increase in its economic presence (the eighth strongest economy in the world), and the promotion of a greater political and cultural presence through the Cervantes Institute, as well as growing solidarity to reach 0.35% of the GNP dedicated to Spanish development aid. With regard to the future, he states that "Spain must be an agile performer", in the sense of the Integral Reforms of the Foreign Service. As a general reflection, Moratinos gives priority to "promoting a global Spain, committed towards sustainable development, peace and progress".

With regard to Ibero-America, the minister states that "In the first two years, the government has strengthened the Ibero-American community, since the Salamanca Summit. Contact with Chile, Argentina, Mexico and Brazil has multiplied bilateral relations. This dynamism is beneficial to closer contact between the EU and Latin America and has permeated our relations with Cuba, Venezuela and other countries in the region, with whom we have constructed a dialogue that aspires to a future that is respectful towards human rights, stable and prosperous".

Another fact that reveals the importance of Latin America is the constant role of the Spanish Congress and Senate (where there is a Commission on Ibero-American affairs) in the monitoring, control and support of these relations. In the debate on the state of the nation in the area of foreign action, the lower house called on the government (in the parliamentary bulletin n° 206, dated May 20th 2005) to "6. Maintain relations with Latin America as a strategic point of reference for our foreign actions. The Ibero-American summits, which Spain will

organise this year, are an essential instrument as part of this policy. The Government must continue to intensify its political dialogue in order to comply with human and social rights, strengthening our presence, visibility and fair commerce with Latin America, and supporting bilateral relations with the European Union".

Based on these central guidelines, we will now explore the main areas of action for Latin America:

a. The political sphere

One of the indicators that best demonstrates a country's commitment to its foreign policy is the number of trips made by its representatives, particularly the head of state, the president and the members of the government, particular the head of Foreign Affairs. In the case of Spain, this indicator is accompanied by official trips by representatives of the country's Autonomous Communities and local councils.

In some cases a tradition already exists: the first official trip made by the president of the Spanish government is to Morocco (in the case of president Zapatero, on April 24th 2004). Apart from those made for obvious reasons to Europe, Latin America is the preferred location for diplomatic exchange. From Spain, the King honours Article 56 of the country's constitution, especially to attend the inauguration ceremonies of new presidents of the Latin American republics, ceremonies which have recently been attended by his son, the Prince of Asturias.

Although these form a part of international protocol, the destination and moment chosen for the visit are still important. For example, the last official visit made by president Aznar was to Columbia, where in Cartagena de Indias on February 20th 2003, he reaffirmed together with its president, Alvaro Uribe, the mutual commitment in the fight against terrorism.

Spain's King Juan Carlos and Queen Sofía have made official state visits to every Latin American country except Cuba; however, they were present for the ninth edition of the CIN, held in Havana on November 16th 1999.

The president and members of the government make frequent trips to Latin America, and some are particularly famous, despite the intended discretion of these journeys, such as that made by the Minister of Defence, José Bono, to Venezuela for the sale of defence materials. However, in recent times there has been an important procession of ministers from the government of the PSOE to the United States, perhaps with the intention of smoothing out the diplomatic 'wrinkles' caused by the meetings (for example at the NATO summit) between presidents Bush and Zapatero.

However, the list of these journeys reveals that the Minister Moratinos is not a great fan of travelling to the region, perhaps as a result of the diversification of Spanish foreign policy and his more influential role in other parts of the world (the Middle East, Asia and Sub-Saharan Africa, a region visited for the first time by a Spanish Minister of Foreign Affairs at the end of 2005), leaving Latin America to occupy a secondary position in his agenda.

A particularly significant moment was the presence of the president of the Spanish government in Ciudad Guyana (Venezuela), where on March 29th 2005 he signed a declaration together with the presidents of Venezuela (Hugo Chávez), Brazil (Luiz Inacio Lula da Silva) and Columbia (Álvaro Uribe).

Moratinos presented a report to the Foreign Affairs Commission on March 2nd 2006, on relations between Spain and Venezuela, and the contract for the sale of arms to the country, with the following argument: "During the visit to Venezuela by the president of the government in March 2005, two protocols were signed, one of which was ratified by the Spanish and Venezuelan ministers of defence, and another signed by the Minister of Foreign Affairs and Cooperation and the Venezuelan Minister of Energy and Mines. The first of these protocols included the purchase by Venezuela of four ocean patrol vessels, four coastal protection vessels, ten C-295 medium transportation planes and two CN-235 marine observation planes. The second protocol covered the purchase by Venezuela of two asphalt-carrying vessels and a Panamax-type vessel, as well as the repair in Spanish shipyards of vessels belonging to the seagoing division of the Venezuelan company PDVSA. The reason for this sale is that it is material suitable for civil and even humanitarian use. The material will be of great use to control territorial waters and jungle regions and in the fight against drug trafficking. The vessels and aircraft sold do not in any way affect the regional strategic balance nor the military balance between Venezuela and Columbia, as their offensive capacity is greatly reduced. The Spanish government has sought to promote an operation which is also of great interest for companies in our country, some of which are experiencing particular difficulties. For these reasons, Spain does not share in the opinion of the USA of not authorising the use of US components in the planes covered by the contract. In any event, it should be noted that the affected companies are responsible for undertaking the contracts they have signed, and as a result for taking any decisions in connection with them. The Government hopes that these contracts are completed successfully, and we will do everything in our power to ensure that this is the case".

Apart from this relation, there were visits by representatives of Latin American governments. In the first half of 2006, three Latin American presidents have already visited Spain.

The president-elect of Bolivia, Evo Morales, winner of the elections at the head of the *Movimiento Al Socialismo*, travelled to Spain as part of his tour of several countries before taking possession of his post on January 22nd 2006. During a visit lasting some thirty-six hours, on January 4th, he met the Minister of Foreign Affairs and Cooperation (Moratinos), the Minister of Industry and Commerce (José Montilla), the president, Rodríguez Zapatero, the general secretary for Ibero-America (Enrique Iglesias), the ex-president, Felipe González, and a group of business representatives, including Repsol YPF, and its president, Antonio Brufau, one of the largest companies in the gas business, whom he offered an "open and fluid dialogue", emphasising that Bolivia needs partners to invest. Finally he was received by the King, Juan Carlos. Faced with uncertainty regarding his economic

decisions and his sympathies towards Fidel Castro and Hugo Chávez, both of whom he had visited before travelling to Madrid, Morales stated that: "The State will exercise is right to ownership of its natural resources. There will be nationalisation, although this does not mean it will confiscate or seize property from the companies". Zapatero offered his support and the promise to write off most of Bolivia's debt with Spain, in order to dedicate these funds to literacy programmes, as agreed at the Ibero-American summit in Salamanca. After Zapatero's meeting with Morales, the Secretary of State for Communication, Fernando Moraleda, stressed that "The Spanish government is convinced that the interests of Spanish companies will be fully compatible with the projects of the Bolivian government", in "conditions of legal safety". On the fifth, he met up with representatives of the trade union UGT (Cándido Méndez) and Comisiones Obreras (José María Hidalgo), gave a conference in the Elcano Royal Institute, and met the general coordinator of the left-wing party Izquierda Unida, Gaspar Llamazares. He did not meet with the leader of the PP, Mariano Rajoy, who was not in Madrid. Morales then travelled on to Brussels, France, South Africa, Brazil and China. On January 22nd the Prince of Asturias was present in La Paz at the inauguration ceremony of president Evo Morales.

In the case of Chile, relations have recently moved up a gear. On March 11th 2006 the Prince of Asturias was present at the inauguration of Michelle Bachelet as the new President of the country. The Prince, Felipe de Borbón, had been received the day before by Bachelet and the outgoing president Ricardo Lagos, who had expressed their wishes that Spain should maintain its troops taking part in the mission in Haiti.

On April 27th 2006 at the official residence of La Moncloa, Rodríguez Zapatero received the ex-president of Chile, Ricardo Lagos, who had just been appointed president of the Madrid Club, an organisation dedicated to strengthening democracy in the world.

On her way to the Vienna summit and on her first visit as president to a European country, Michelle Bachelet arrived in Madrid on May 9th 2006. On the same day the King offered a gala dinner at the Royal Palace, where he offered a toast for "very close relations of affection, respect and increasing cooperation" between the two countries. The following day Bachelet met Rodríguez Zapatero, who described Chile as an example of a country that was both "serious and modern", where "our companies feel at ease", both for Latin America and the rest of the world. For Bachelet, "Spain and Chile form a part of the global system in harmony". In reference to the crisis resulting from the decision of the Bolivian government to nationalise its hydrocarbons, Bachelet affirmed that "in Chile we respect the processes of each country". For Zapatero, the path stretched between regional integration and the strengthening of links with the European Union, with two main objectives: "strengthening democracy, and reducing social inequalities. The second will depend on the first". A Strategic Association Plan was signed, representing a higher level in bilateral relations, to coordinate efforts in a multilateral plane, contributing towards peace in the world with initiatives such as the Alliance of Civilisations,

economic cooperation and permanent dialogue, with at least one yearly meeting between the presidents and a permanent contact between the respective Ministers of Foreign Affairs. That night, Bachelet was guest of honour at a dinner held by the female vice-president Fernández de la Vega – who had presented her with the New Economy Forum Prize 2006, at which only women were present. Before the dinner, Bachelet had received the leader of the PP, Mariano Rajoy.

The Argentinean president, Nestor Kirchner, travelled to Spain on June 20th 2006, accompanied by the most relevant members of his cabinet. It was his fourth visit to Spain, the third in an official capacity, and was market by economic affairs (renegotiating the country's debt and conflicts with companies: Spain is the second largest investor in Argentina, and Argentina is Spain's largest debtor, for a total of some 1,300 consolidated Dollars). Amongst the official acts held on the twenty-first, there were a series of meetings between Kirchner and Spanish businessmen, who he met in the Pardo Palace, followed by his visit to the King at La Zarzuela Palace. During the toast, the King emphasised Argentina's efforts in escaping from its economic crisis, Spain's support during those difficult times, and called for "the greatest of efforts" to preserve "the important bilateral economic links". In turn, Kirchner thanked Spain for its support, and stressed the opportunities offered by the Alliance of Civilisations. The following day, Kirchner met with Rodríguez Zapatero, emphasising the political harmony between both, in line with the Strategic Association both countries have had since 2005, developed together with a plan of action for 2006–2007.

When referring to the importance of relations with Argentina, we find that investment by Spanish companies in the country amount to 42,000 million Euros, which has grown over recent years, even during the crisis of 2001, reaching a total in 2005 of 1,800 million Euros. Migratory exchanges have also marked the bilateral agenda: some 284,000 Spaniards live in Argentina, and around 320,000 of their descendants. Now it is the Argentineans who travel to Spain, with a community of some 80,000.

Also, as part of this active diplomacy of international summits and meetings, we would also have to include the meetings held as part of the Ibero-American National Summits and the Summits between the European Union and Latin America and the Caribbean, which we will explore later in this article, as well as those held at different sessions called by the United Nations Organisation in New York.

Apart from official visits, there is an endless to and fro of Spanish businessmen travelling to the region (in this case, there is no 'and vice-versa'). This is nothing new, although the intensity and scope of these visits have changed. Although being lesser known, many meetings are held between Latin American presidents and the heads of Spanish companies with interests in the region. One noteworthy case is that of the president of Repsol YPF, Antonio Brufau, who we can safely say has as many meetings with Latin American presidents as the president of the Spanish government. One of the most important was the meeting held in La Paz on March 3rd 2006 with the president, Evo Morales. Brufau declared the company's com-

mitment towards the country, that it would maintain its investments, and expressed his willingness to immediately start negotiations for the migration of contracts within the framework of the new hydrocarbons Law. No one can deny the involvement of this company in Bolivian affairs, against the backdrop of the decision to nationalise energy resources resulting from the Decree issued on May 1st 2006, having been accused of corruption, and Brufau himself of "psychological warfare" after stating that he would not be concerned about abandoning the country.

Another important element is Spain's contribution towards processes of peace and stability in the region, with its first involvement being the presence of Spanish troops in the peacekeeping operations in the region as a whole (ONUCA) and in El Salvador (ONUSAL). Until recently there were Spanish troops stationed in Haiti – on July 1st 2005 there were 6,207 'blue helmets' there from 20 countries, 200 of which were Spanish, and 1,288 police from 34 countries (35 from Spain), after the request issued by the Chilean president Ricardo Lagos and the Brazilian president Lula da Silva. An interesting feature in this case is the presence of Moroccan troops in the Spanish force (who would have imagined such a thing, after the incident of 'Perejil Island', which led to a serious stand-off between Spanish and Moroccan troops). However, despite the requests of several Latin American governments, on April 6th 2006 a joint declaration was published on cooperation between the kingdoms of Spain and Morocco, as part of efforts in the stabilisation mission of the United Nations in Haiti (MINUSTAH), established by Resolution 1542 of the Security Council of the UN. After elections were held in Haiti on March 26th, both governments decided to put an end to their mission, sending their troops home in a coordinated operation on March 30th 2006, with their equipment and other material returning home over the following days.

This event reflected, as has occurred in other cases (such as the sale of 'defence materials' to Venezuela) the lack of coordination, and some divergence between the Minister of Foreign Affairs and Cooperation and the Minister of Defence, during the period in which the ministry was headed by José Bono.

Another noteworthy feature is the presence of Spanish interlocutors in peace processes and as mediators in solving conflicts. Through the media, we discovered on July 19th 2005 that ex-president Felipe González was acting as a mediator between the Columbian government and one of the guerrilla factions operating in the country, the Ejército de Liberación Nacional (ELN). During the process of mediation and dialogue between the parties, Spain (in particular its ambassador, Yago Pico de Coaña) played an active role in the Group of Friends of Columbia. It is not the first time that a Spanish politician has played such a role, as ex-president Adolfo Suárez had already done so in conflicts between Latin American countries.

A polemical affair was the sale of military material to Latin American countries, with the involvement not only of the countries directly involved, but also the USA, with its aggressive policy towards the government of Hugo Chávez. This occurred during the government of president Aznar in the case of sales of arms to Columbia, and during the government of Zapatero with the sale of arms to Venezuela.

Even in this case, as we have seen, differences became apparent within the government between the Minister of Foreign Affairs (Moratinos) and the Minister of Defence (Bono). On May 19th 2006, when the Venezuelan Minister of Foreign Affairs, Alí Rodríguez Araque was questioned about criticisms levelled by the Partido Popular about this operation carried out by the Socialist government, he affirmed that "When the government of Chávez first took power, president José María Aznar came to Venezuela, to propose business very similar to that we are currently doing with the present Spanish government".

Although we are not able to deal with it in the depth it deserves, we cannot leave aside an issue as transcendental as human rights. In the absence of national or international mechanisms, Spanish justice has served to try cases of violations of human rights and fundamental liberties. The most publicised case was the trial in Spain of the Chilean dictator Augusto Pinochet. However, the cases have continued, and have culminated with sentences issued to torturers and mass murderers. On April 19th 2005, Spain's High Court condemned Adolfo Scilingo, a former Argentinean soldier, to 640 years' imprisonment for crimes against humanity. There are other cases underway, such as the process against Ricardo Cavallo for crimes committed during the Argentinean dictatorship. The Nobel Peace Prize winner, Rigoberto Menchú, has filed criminal charges against politicians and security chiefs in Guatemala for a series of crimes, including the assault against the Spanish embassy in Guatemala City in January 1980. On September 26th 2005 the Constitutional Court issued a groundbreaking sentence, establishing that Spanish courts have the power to investigate and judge crimes of genocide and against humanity committed in other States, even when there are no Spanish victims.

As we have seen, it is important to take into account the role of other public and private bodies, including the foundations that have Latin America as the main recipient of their activities. These include the Carolina foundation or the International Foundation for Ibero-America for Public Administration and Policies (FIIAPP).

To sum up this section, Spanish foreign policy towards Latin America appears to give priority to the most important nations, with which it has created strategic associations (such as Argentina, Brazil, Chile and Mexico) leaving to one side other more problematic countries such as Cuba, Venezuela or Bolivia. This was revealed by the Minister Moratinos in an interview published in the newspaper *La Vanguardia*, on May 28th 2006, in which affirmed that "We do not have bad relations with Cuba, Venezuela or Bolivia, but they are not our priority. The volume of Spanish investment in Bolivia is 1% of its total investments in Ibero-America, with this percentage including the one billion Euros invested by Repsol".

During his appearance before the Foreign Affairs Commission in the Senate on May 31st, Moratinos said "Our policy with Ibero-America must consist of strengthening the strategic alliances we have with Argentina, Brazil, Mexico and Chile, and giving a new impulse to relations between the European Union and Latin America through the results of the Vienna Summit, and mediate and support dialogue and agreements between the European Union and Mercosur, the Andean

Community and Central American Community, as well as support these processes of Latin American integration. We also wish to continue mediating as before between Columbia and Venezuela in order to prevent the outbreak of regional conflicts. We will continue to support the new direction of European Union policies towards Cuba, insisting on respecting human rights".

b. Economic relations: How important is Spanish commerce and investment in Latin America?

In this chapter on economic relations, it is necessary to break down a series of components, according to a number of specific coordinates. In commercial issues, Spain no longer has its own say, as this policy forms part of the responsibilities of the European Union, whose European Community Treaty includes a common commercial policy. Forming part of the same block means that most commercial relations are carried out within the block. For this reason, we may describe commercial relations between Spain and Latin America as scarce, and continue to consider as valid the statement made by Felipe González some years ago, when he stated that Spain traded more with Portugal that with the whole of Latin America.

Although taking only one year as an example has its shortcomings, if we take 2004 as our point of reference, it may be highly revealing. Imports from Latin America represented 2.59% of the total, while Spanish exports to the region were 3.58%. By countries, the main destination of Spanish exports was France, with 19.39%; we have to look down as far as position number 10 to find the first Latin American country, Mexico, with 1.56%. In terms of imports, the first is Germany, with 16.12%; the first Latin American country is also Mexico, at number 19, with 0.95%.

With regard to investments, we have already discussed the importance they have obtained in recent times. In any event, most investments are the responsibility of multinational companies, who have become major economic players (and political figures, naturally). Which, at the end of the day, forms part of the way of doing business and obtaining profits for their shareholders, offering a series of questions, especially in terms of remaining in the market (despite the crisis) or which become what have become known as "swallow capitals". This said, the figures reveal the importance of investments: in Latin America, these plunged from 27,700 million Euros in 1999 to 6,100 million in 2004. A further piece of data is highly revealing: this last amount only represents 14.4% of direct Spanish investment abroad, and less than 0.8% of the GNP, while in 1999 it represented 65% and 5% respectively. Meaning that while the presence of multinational Spanish companies investing in Latin America is very important, what the figures tell us – as seen in the reports by the United Nations Conference on Development or those of the CEPAL – is that the most important investments occur in and between rich countries, that are safer, more reliable, and offer greater legal safeguards for investors.

What does make the presence of Spanish companies in Latin America more important is that their investment has been made in strategic sectors, such as energy, banking, transportation, communications or water. This situation, in countries that previously had strict state control over these sectors, accompanied by extensive poverty resulting from following the indications of international financial bodies, and a misguided sense of superiority by the heads of these companies, led to a general mood that was opposed to Spanish investments, which in isolated cases led to the burning of Spanish flags and the belief that a new Spanish colonisation and conquest was occurring. To further aggravate the situation, the *Financial Times* referred to a new 'Spanish Armada'.

What cannot be denied is that business in Latin America has substantially benefited the profit and loss accounts of many Spanish companies. The joint assets of BBVA and SCH in AL (140,000 million dollars) represent nearly 9% of their consolidated balances, and 53% of the total assts of the top 10 transnational banks in the region. In terms of attributed profits, Latin America provides 42% of those of BBVA, and 29% of SCH. In the case of Telefónica, business in Latin America represents 34% of its total income, with Telefónica Móviles, with 57 million customers, as the leading company in the region. More than 45% of the income of Repsol YPF and 23% of Endesa come from Latin America. One final piece of data: In 2005, petrol company Repsol YPF presented the best results in its history, with net profits totalling 3,120 million Euros. Curiously, in January 2006, the area of exploration and production made an over-estimate of 1,254 million barrels of petrol (25% of the total) for the company's proven reserves, especially in Bolivia and Argentina. In these two countries, Repsol YPF has a major presence, as a result of the decree nationalising the energy sector in the former, and as a result of efforts by the Argentine government to recover lost ground in this sector.

Another issue of particular relevance is the question of debt. On several occasions, Spanish governments have dealt with the issue in a bilateral manner, dealing above al with human disasters caused by natural disasters. On July 8th 2005 the Council of Ministers took a decision to cancel more than 2,200 million Euros owed by 38 poor countries that are highly in debt. Four are Latin American countries: Bolivia, Nicaragua, Honduras and Guyana. In this case an important initiative was taken by the Lower House of the Spanish Parliament, the *Congreso de los Diputados*, which on June 22nd 2006 gave its approval to a law whereby the government would have to present within one year a plan to renegotiate the foreign debt of the poorest countries most deeply in debt (the HIPC), owing to Spain before December 31st 2003.

Also in the political-economic sphere, we should include a matter that reflects Spanish tension and dualism with regard to its affective bond with Latin America and its obligations as a member of the European Union. I refer to demands from Latin America to do away with commercial protectionism and the difficult situation of Spain faced with demands from Latin America and the advantages of belonging to a club that offers large-scale grants through the Common Agricultural Policy, amongst others.

The case of Bolivia has served as a reflection of the complexity of dealing with matters that are chiefly economic, but which have a clearly political undercurrent, involving public and private sectors. The chronicle of the first days of May 2006 reflect this situation. After the decree issued by the Bolivian government on May 1st, nationalising the hydrocarbon sector, the Spanish government responded by calling for a meeting with Bolivia's commercial attaché in Madrid Álvaro del Pozo, who was received by the Director General for Ibero-America, Javier Sandomingo. He was warned of the "consequences for bilateral relations" that would result from applying the decree. The Bolivian authorities set a deadline of 180 days for the companies, including Repsol YPF, to adapt to the new rules. From Buenos Aires, the president of the company, Antoni Brufau, expressed his "concern" for the "sad and worrying" decision made by the Bolivian government. In turn, Spanish vice-president Fernández de la Vega requested that the minister of Industry, José Montilla, met with the Spanish companies with interests in the country, and with various Secretaries of State, the Economy (David Vegara), Foreign Affairs and Cooperation (Bernardino León), Presidency (Miguel Sebastián) and the Secretary-General for Industry (Joan Trullen).

c. Cooperation for development

From its very outset, Latin America has been a priority destination for Spanish Official Development Aid. The International Cooperation for Development Law makes it clear that "international cooperation policies for development forms part of the state's external actions, and is based on the state's unity of action abroad" (Article 3). Based on these foundations, and taking the situation of Latin American countries into account, the main destination of Spanish aid is linked with the interests of foreign policy. On dealing with geographical priorities, Article 5 states that within the bilateral framework, and notwithstanding the establishment of other territorial areas as established in Article 5, the preferential areas of action will be considered as the countries of Latin America, the Arab countries of north Africa and the Middle East, as well as those less developed nations with which Spain has special bonds of a historic or cultural nature.

This priority towards the Latin American countries has been reflected in the different Master Plans adopted between 2001 and 2004, and 2005 and 2008. In the current Master Plan for Spanish Cooperation 2005–2008, a series of criteria are established as the basis for geographical assignment: an orientation towards the poorest countries; a greater commitment from the destination countries with development objectives; greater comparative advantages to guarantee greater effectiveness of the aid given; and the presence of cooperation agreements and treaties between Spain and the destination countries. In terms of geographic priorities, there are four types of countries: priority nations, in which the largest volume of resources will be concentrated, creating a Strategic Country Document, which in Latin America includes Honduras, Nicaragua, El Salvador, Guatemala, Haiti, the Dominican Republic, Paraguay, Bolivia, Peru and Ecuador; countries with special

attention, depending on the need to prevent conflicts or contribute towards the construction of peace, as a result of weaknesses in human rights and the democratic system, and as a result of natural disasters or others caused by economic problems, including Cuba and Columbia; and preferential countries, in which there are sectors of the population living in conditions of limited economic and social development, including Costa Rica, Brazil, Mexico, Chile, Venezuela, Panama, Argentina and Uruguay.

The Secretary of State for International Cooperation, Leire Pajín, detailed the aims, instruments, resources and participants in Spanish cooperation with Latin America on June 6th 2006, before the Ibero-American Affairs Committee of the Spanish Senate. Once again, she stressed that: "Latin America is an essential point of reference for our country, and a priority area for our foreign policy, and of course for our development cooperation policy". Pajín described how 10 countries in the region (Honduras, Nicaragua, El Salvador, Guatemala, Haiti, the Dominican Republic, Paraguay, Bolivia, Peru and Ecuador), together with a further 13 countries throughout the world, considered as priority, receive 70% of Spanish Official Development Aid. The amount set aside for 2006 totals some 613 million Euros, a "historical record" in the words of the Secretary of State.

If we look through the list, we see that of all the Latin American countries, plus Cuba, Haiti and the Dominican Republic in the Caribbean are included (except for some logical exceptions, such as Surinam) in some type of preference for Spanish cooperation. Amongst the arguments handled by the Master Plan to continue this preference, is "the political commitment that has been continuously renewed, and which is expressed in a cooperation based on accompanying the main public policies and strategies of poverty in the Latin American countries". It is a type of language that diverges from that of the previous period, under the government of the PP, which focused more on the worthiness of liberalism and private initiative as motors for the economy, with the accompaniment of aid for development.

The Annual International Cooperation Plan 2006, approved by the Cabinet on January 20th this year, takes a step forward in making progress towards improving the quality and quantity of Spanish aid. It is expected that the total amount of official development aid totals some 3,234.96 million Euros, representing 0.35% of the Gross National Product. The government is committed to increasing this figure to 0.5% of the GNP by 2008, and then reaching 0.7%, in the event of achieving a second legislature, for 2012.

Without including any major changes in its priorities, the Plan for 2006 reflects new priorities, conditioned by factors such as immigration, mainly from Sub-Saharan Africa. It emphasises that "Spain has supported the priority action included in the Declaration for the Countries of Low Income and Less Advanced Countries, particularly in Sub-Saharan Africa, where the greatest needs are concentrated in terms of achieving the Objectives of the Millennium", without forgetting that "this support has been complemented with the defence of the need to maintain attention on Medium-Income countries, in particularly those of Medium-Low Income Countries, many of whom face up to problems similar to those of countries with less income".

For Latin America, as a result of the agreements of the fifteenth Ibero-American Summit (held in Salamanca on the 14th and 15th of October 2005), the most important commitments are: setting up an Ibero-American Plan to eliminate illiteracy in Latin America before 2015; supporting programmes to exchange debt for social investment; establishing foundations to create an Ibero-American Cultural Charter; preparing an Ibero-American Agreement on Social Security; supporting the Ibero-American Judicial Cooperation Network; supporting the establishment of an Ibero-American Humanitarian fund; the decision to implement a coordination mechanism to offer an effective response to natural disasters in the region; the joint declaration by Ibero-American business associations and trade unions; the integration of the indigenous perspective and gender issues as essential factors in Ibero-American cooperation; the preparation and presentation of an Ibero-American Meeting on Migrations; the monitoring and analysis of the features of cooperation in Medium-Income countries; and the maintenance of Ibero-American support for the reconstruction and development of Haiti.

An ambitious plan, often counting on more political willpower than the actual resources necessary to set them underway, and in particular to provide them with the continuity necessary to ensure their sustainability.

An important piece of data to bear in mind is that according to the Spanish Cooperation Association, some 1,400 Spaniards work in this field on a professional basis; of this total, 58% work in Latin America, according to the first census taken for this group. This reveals the growing inclusion of non-governmental agents in the field of cooperation, a much relevant role in the case of decentralised cooperation, carried out by Regional Authorities and local Councils.

d. Cultural Relations

Here we would include a few lines on the fact that these cultural relations are directly linked to the increase of Hispanic culture and increasing number of people who speak Spanish in the world. We should remember that candidates to the presidency of the USA have to speak a few lines in Spanish to win the vote of part of the electorate in the southern states, and the fact that many cities, including Los Angeles, have Hispanic mayors.

This leads on directly to the importance of the culture industry in Spanish, especially visible in music and cinema, with an increasing Latin presence, opening the way to a large market for film companies.

An important issue is the diffusion of culture and the role of the Cervantes Institute. Its work has particularly come to light with the recent 400th anniversary of the publication of Don Quixote.

As regards the future, one interesting proposal is the configuration of an Ibero-American Space for Higher Education, which could be set up alongside the Euro-Latin American Educational Space, supported amongst other agents by the European Parliament. It also received the explicit support of the Ibero-American conference of University Chancellors, held on May 19th and 20th, bringing together 406 Chancellors in Seville from Universities in Spain, Portugal and Latin America.

One last matter for consideration is that on June 13th 2006, in Cordoba, Andalusia, the Cultural Charter of the Ibero-American World was adopted, as part of the eighth Ibero-American Culture Conference.

e. Social relations. The human dimension; Migrations: Spain, from a country of emigrants, to a receptor of immigration.

It is impossible to deny the continuous exchange of people crossing from one side of the 'pond' to another, over a common history spanning these 500 years.

In the case of migrations, this transit has been constant, and depending on the conditions and the political, social and economic situation, has changed over the years. Recently, the Universities of Madrid paid homage to the family of the president Lázaro Cárdenas, who opened Mexico's frontiers to receive thousands of Spaniards fleeing from the Civil War and Franco's dictatorship.

As we mentioned before, the circumstances have changed, and now the migratory currents bring thousands of Latin Americans to Spain, and thereby to other countries in the European Union. After the process of regulating permits for immigrants carried out by the Ministry of Employment between February and May 2005, a total of 691,655 requests were received, of which 688,139 were processed. From these requests, 122,414 were from Ecuador, followed by Romania (95,830), Morocco (64,477), Columbia (48,265), Bolivia (37,179), Bulgaria (21,270), Argentina (20,271), The Ukraine (18,626), Uruguay (9,148), etc. It has been calculated that immigrants represent 8.5% of the total population of Spain. The figures also reveal that Spain is the country within the European Union that received most immigrants in 2005, with a total of 652,300, followed by Italy with 338,100.

This situation opens an extensive debate on questions regarding immigration, frontier control, the integration of immigrants, repatriation, etc, with its focal point as money sent home by emigrants, which in the case of some Latin American countries (Ecuador and Mexico) has become one of their main sources of income. According to data from the Bank of Spain, these amounts sent by emigrants to their countries of origin totalled some 3,844 million Euros in 2005, 10.42% more than in 2004.

The fact that in some cases visas have been requested to enter in Spain, which has justified the decision as it was taken within the framework of European institutions, has meant that in the case of Columbia, the writer and Nobel Prize winner Gabriel García Márquez has refused to visit the country.

In this case, it is necessary to redefine the spaces we share, at the same time as improving quality of life in all areas, including democracy. This is the goal of the Secretary of State for Cooperation, Leire Pajín, from the pages of the Carolina Foundation, referring to the creation of an active Ibero-American citizenship: "One of the main goals of Spanish policy towards the region, as indicated in the Spanish Cooperation Plan 2005–2008, is to use part of those resources towards promoting the quality of democracy through real and effective participation by society, and

the exercising and respect of fundamental rights. For this reason, the Spanish government is dedicated to supporting and promoting representative and participative democracy, and political pluralism; in supporting and strengthening the processes and mechanisms of social dialogue; and in strengthening the State of Rights, coinciding with the wishes of many of the governments in the region. Here, the actions carried out by Spanish Cooperation in the sector of democratic governability and institutional development range from supporting the development of an Administration at the service of its citizens to the correct handling of public affairs, and the strengthening of Public Administrations aimed at guaranteeing equality and quality in the access, management and provision of public services".

RENEWING THE IBERO-AMERICAN COMMUNITY OF NATIONS AND THE IBERO-AMERICAN SUMMITS

One of the 'star items' on Spain's foreign policy agenda with Latin America is the Ibero-American Community of Nations. Without doubt, even as a collective project, it was born and has developed thanks to Spanish support, at both political and financial level.

In order to make this project a reality, the Ibero-American Summits took place, the first of which was in Guadalajara (Mexico) on July 18th and 19th 1991, leading to the following declaration of intentions: "We have met together for the first time in history in order to jointly explore the major challenges that face our countries in a world undergoing transformations. We therefore propose to channel all of the political will of our governments towards providing the solutions for these challenges, and turning a series of historical and cultural similarities that bind us into an instrument for unity and development, based on dialogue, cooperation and solidarity."

The fifteenth summit took place in Salamanca, Spain, on October 14th and 15th 2005, bringing together a total of 22 countries: three from Europe (Andorra, Spain and Portugal) and 19 from Latin America and the Caribbean. Their representatives ratified "all of the joint efforts made by Ibero-America including the values, principles and agreements that we have reached in previous Summits. These are still maintained through the full effectiveness and commitment towards the proposals and principles consecrated in the United Nations Charter, in our adhesion to International Law, extending democracy, development, the promotion and universal protection of human rights, the strengthening of multilateralism and cooperation between peoples and nations, and the rejection of unilateral coercive measures contrary to International Law."

One of the shortcomings detected, the lack of continuity, visibility and institutionality was attempted to be resolved with the creation of the General Ibero-American Secretariat (SEGIB) as a permanent supporting body for the institutionalisation of the Ibero-American Conference. It was headed by an international figure, Enrique V. Iglesias, who had previously held the post of president of the Inter-American Development Bank. The 22 countries appointed him to support the objectives

established in the Convention of Santa Cruz de la Sierra aimed at strengthening Ibero-American cooperation, internal cohesion and the international projection of the Ibero-American Community of Nations. It achieved this to the extent that the Ibero-American Community is recognised by the United Nations Organisation, and Enrique Iglesias (who has frequently been the subject of jokes as a result of sharing the name of the famous singer) has met with representatives of the institutions of the European Union as part of the preparations for the fourth European Union – Latin America and the Caribbean Summit.

As regards the objectives being sought, the Ibero-American countries reaffirmed in Salamanca the "commitment of the Ibero-American Community with International Law and an effective multilateralism, which we intend to contribute towards in a relevant manner. We commit ourselves to actively supporting an extensive reform of the system of the United Nations which, based on the principles of efficiency, participation, transparency, representation, sovereign equality and democratisation, strengthens its role in preventing threats, maintaining peace and international security, and promoting economic and social development. In this sense, we declare our recognition of the work of the General Secretary of the United Nations on the occasion of the sixtieth anniversary of the Organisation."

Tasks whose effective completion may contribute towards diminishing one of the criticisms most frequently levelled against the Ibero-American Community, its tendency towards excessive rhetoric instead of actions.

One of the authors who has explored the summits in greatest detail, Celestino del Arenal, states that: "the fact that they have come to articulate in practice this common Ibero-American space, expressly recognising its existence, is the most tangible expression of the reality of this space, and of the idea that this may be a starting point for further exploring the relations that exist between Ibero-American countries as a whole, which may take shape in specific ways of cooperation and exchange, of the most varied types and in the most diverse fields".

THE TRIANGLES: SPAIN – EUROPEAN UNION – LATIN AMERICA AND SPAIN – USA – LATIN AMERICA

In a world that is increasingly interrelated and globalised, foreign policy agendas interweave without ceasing. For this reason, relations between Spain and Latin America have to be considered taking another two coordinates into account, visible in the triangles mentioned above.

In the first, Spain – European Union – Latin America, there was great expectation that Spain would act as a bridge between the other two groups. Negotiations for Spain to join the EU, leading to its entry on January 1st 1986, made it clear that it was not Spain that would change the policy of the European Community, but instead community policies that would change Spanish politics in many of its facets, both in national and foreign affairs. In the same year, Latin America was marginalized from European foreign actions, and the entry of Spain (and Portugal, it should be remembered), led to the start of a relation which would gradually

reach the category of a strategic association, although once again, the name was considerably more important-sounding than what actually occurred. Since then, relations have been consolidated, and we may say that there is a clear harmony in the political agenda, and clear differences in economic matters.

Institutionalised political dialogue reached its highest level at the European-Latin American summits. The first took place in Rio de Janeiro in June 1999, the second in Madrid in May 2002, the third in Guadalajara in May 2004, and the fourth in Vienna on May 12th 2006.

Without ignoring the importance of the first, simply for this reason, the meeting held in Guadalajara was particularly interesting, as it incorporated two major novelties: the incorporation of 10 new member states, with the European Union now reaching a total of 25 member states; and the change in the Spanish Government, with the triumph of the Socialist Party. The fact of bringing together politicians representing parties from the left led to the summit including two essential issues in its final declaration: active and effective multilateralism, and social cohesion.

The Vienna meeting carried on from previous contacts, although it was marked by a loss of importance of Latin America in Europe's foreign policy agenda (the Austrian presidency had other priority issues, and the geopolitical map of the 25 member states did not look so far afield, to a region that did not cause it any problems), and also, because Latin American integration appeared to be on rock ground at that time, with Venezuela abandoning the Andes Community, and with the crisis in Mercosur (resulting, amongst other problems, from the so-called paper mill crisis between Argentina and Uruguay).

Spain, together with other partners, especially Portugal, has the role of being Latin America's main partner in the EU, making every effort to ensure that neither the internal crises of the union nor the new map of external relations, based on threats to European security, serve to hinder relations with Latin America. If this task is relatively simple in politics, it is much more complicated in the economic sphere, where Latin American countries, once again led by Brazil, continue to demand that the rich countries (whether from the European Union, USA or Japan) abandon their protective policies that have such negative consequences on the economy of poorer countries. In this case it is difficult, as we have seen, that Spain abandons the benefits of Common Agricultural Policy grants to defend the proposals of Latin American nations.

We are left with the other triangle. We could sum up relations between the USA and Latin American countries with a famous phrase from its southern neighbour, which states "poor Mexico, so far from God and so close to the USA". Latin America was the first to suffer the consequences of the expansion of the USA, from 1847, when Mexico lost nearly half its territory, up to the present day, although this power has decreased with the passage of time. This means that there is an extensive list of negative events in inter-American relations, combined with relations of cooperation and 'good neighbourliness', as relations were referred to during the government of Franklin D. Roosevelt.

It comes as no surprise that the European Union, a weak player, has had little presence in a region considered as the back yard of a superpower. By increasing its international presence, the EU should also occupy its own space in Latin America, although without altering the dominant status quo. And Spain is responsible for supporting good relations with Latin America and the USA, both from a bilateral point of view as well as from its position within the European Union.

However, the variables in this area are extensive, and the changes frequent. There is no similarity between Spain's relations with the USA during the government of president Aznar (who had the privilege of putting his feet up on the table and smoking a cigar together with Bush) and those during the period of president Rodríguez Zapatero, whose decisions in foreign policy (such as the withdrawal of Spanish troops from Iraq) have been punished by not having met with Bush for an interview. And these relations have had their consequences in Latin America. The presence of Aznar in the photo from the Azores summit (together with Bush, Blair and Barroso) led on to his trips to find converts to the cause of fighting a war against Sadam Hussein, using the falsehood of the presence of weapons of mass destruction as an excuse. These were important trips, if we consider that two Latin American countries (Chile and Mexico) occupied a non-permanent seat on the Security Council, like Spain. Aznar achieved a lesser prize, as some Central American countries, faithful to the Bush administration, did decide to send troops.

With the arrival of president Rodríguez Zapatero the map changed. Not only the withdrawal of Spanish troops from Iraq, but also decisions regarding Latin America have irritated the USA. The removal of sanctions on Cuba and greater contact and dialogue with the Cuban regime; criticisms of the situation in Columbia; the sale of arms to the government of Hugo Chávez, as part of which operation the USA administration refused that components made in the USA could be sold, are all examples of thorny issues that have made relations more difficult. However, it does appear that the frosty atmosphere is thawing a little, after a series of visits by members of Zapatero's government to Washington and a brief encounter between the two presidents (on February 22nd 2005, Bush and Zapatero crossed paths in Brussels, during a NATO summit; the exchange was brief, with Bush saying in 'Spanglish': "Hola! Qué tal, amigo?" (Hi, how are you, friend?), with Zapatero replying: "Bién, y tu?" (Fine, and you?).

The first glimmer of a degree of reconciliation was seen during the visit by Minister Moratinos to Washington, where he met Secretary of State Condoleezza Rice on June 19th 2006, with both emphasizing the favourable progress of relations. The visit took place in the midst of an argument regarding reports from the European Council on the transportation of detainees accused of terrorism on flights organised by the CIA. Moratinos qualified Spain's policy as "complementary" to that of the USA with regard to Latin America, and according to reports, dealt with the thorniest cases, such as Cuba and Venezuela. With regard to Cuba, Moratinos said: "We differ with the USA on its current policy, although Spain's greater capacity to act as an interlocutor with the Cuban authorities has been highlighted, and our intention is to use this ability to enable Cuban society to extend its level

of democratisation, and improve its human rights record". The day before, in Tampa (Florida), during the annual meeting of the Spain-USA Council, Moratinos had discussed his idea of working in a complementary capacity: "When it comes to Latin America, it is our intention to work in a complementary manner, although there are still some differences that need resolving. Each of us has its abilities, and we have to play the role that corresponds to us. We do not wish to replace the USA; we need the USA more in Latin America, but we also need Spain to bring a real projection to the region". Several days earlier, on June 13th, in the Spanish Senate, Moratinos had said that: "We believe that in the Latin American perspective, the desire for autonomy and independence does not necessarily call for confrontation. On the contrary, it is compatible with a certain level of cooperation". It was every bit a declaration on a way of working that could redirect relations between Spain and the USA, with consequences for Latin America.

Here we would also have to situate the relations between the USA and the European Union in reference to Latin America, conditioned to some extent by the previous 'triangles'. On the twenty-first of June, a Transatlantic Summit was held in Vienna between the two main world powers, which in its final declaration included their concern for the situation of human rights in Cuba. The Cuban response was as undiplomatic as it was blunt, with the editorial in the newspaper *Granma*, of June 23rd, ending with the following phrase: "The alliance of the European Union with Bush is pathetic. They do not have the moral authority or the capacity to dictate conditions, or impose decisions upon Cuba. Even the empire itself was capable of doing that. The power of the lackeys is minimal". We should remember that from December 2nd 1996, at the behest of Spain's then president Aznar, the European Union had adopted a common position, conditioning its relations with Cuba on a change in its economic, political and social system.

LOOKING FORWARD: THE BICENTENARIES

Curing the wounds of the past (colonisation), without blaming the colonisers for everything that happens

Although a series of strategic bilateral associations have been established, their content, and particularly their results, would appear to be insufficient. This is an opinion related to that of the writer Celestino del Arenal (in the Spanish newspaper *El País*, on May 28th 2006), when he said, "Spanish policy in Latin America is more than summits. The main problem of Spanish foreign policy is that it is not planned in the medium and long term, and no strategic objectives are defined country by country. Action is taken on a day to day basis, in a reactive manner".

Consensus

The intensity of these relations at present, based on the community of values and an absence of conflicts, does not mean that there are no problems pending

solution: these would include increasing cooperation for the consolidation of democracy (clearly detailed in the Report from the PNUD from 2004, entitled *La democracia en América Latina. Hacia una democracia de ciudadanas y ciudadanos*); the fight against poverty and the problem of inequality that so severely afflicts Latin American societies; questions relating to immigrants, including their integration and the money they send back to their countries of origin; the economic agenda in the light of problems such as debt, an area in which there are already a series of interesting initiatives, or the activity of Spanish companies. Furthermore, Spain, and particularly its government, must strive to make the best use of its position with Latin America in the forums and organisations in which it has a presence and influence, particularly in the case of the European Union, beyond the usual proposal of acting as a 'bridge'.

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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

1. Nature, Basis and Purpose

In his address to the 2005 session of the Sixth Committee, the Spanish Representative, Mr. González Campos, stated Spain's position regarding the tasks carried out by the ILC on fragmentation of International Law:

"1. The object of this address is the work of the ILC in 2005 on the subject of 'Fragmentation of International Law'. I should like to say first in this connection that my Delegation entirely agrees with a judgement expressed by the Commission at the outset of its examination – namely that this subject was 'different from other subjects that the Commission had considered hitherto' (A/55/10, para. 731). Or if you like, as it was described later on, this work was of 'a very unusual and special nature' (A/59/10, para. 436).

However, if we ask ourselves what makes this different from other subjects, the answer is not hard to find if we consider what the work of the ILC had consisted of until then. It is clear that the Commission's work has consisted largely of the gradual codification and development of International Law, entailing the drafting of articles on subjects relating to a specific area of international law (for example diplomatic relations), or again on a broader field (the law of treaties). The subject of 'Fragmentation of International Law', on the other hand, differs in terms of the analytical viewpoint from which the Commission had to work – i.e., that of the international legal system as a whole – in order to deal with relations between different groups of international rules and in this way examine the problems posed by the specialisation of certain rules as opposed to general rules, hierarchical orders among certain rules, their complementariness or the substitution of some rules for others.

That then is the general setting in which 'Fragmentation of International Law' is framed. And indeed, this analytical framework is a welcome one for international law doctrine in view of its theoretical importance, for the subject has been raised by the doctrine in a number of studies since the 1980s which have given voice to concerns relating both to the proliferation of international authorities that apply the Law and to the expansion of the range of matters regulated by International Law. It must be said, on the other hand, that in deciding to include the subject in its work programme, the Commission was venturing into indubitably complex legal terrain, given the highly general nature of the subject and its strong doctrinal dimension. And that might help to account for the reservations expressed at the inclusion of the subject – by some members of the ILC at the outset, and also by several States during earlier session periods of this Sixth Committee (for 2004 see A/AC.4/549, paras. 118–119).

2. And yet the subject has in fact been addressed by the ILC before, and my Delegation therefore feels bound to express reservations now regarding two closely-

interrelated points, namely the *choice of aspects of the subject* that the Commission has made, and *the results* of its work as envisaged.

On the first of these points – the aspects of the subject that have been chosen – we have no objection in principle to the choice of the relations between general international rules and *lex specialis*; in our view this is, after all, the most salient and topical aspect both of the expansion of the international legal system and of the consequence which it entails, that is the possible 'fragmentation' of that system. However, my Delegation does have reservations as to the other aspects of the subject chosen by the ILC. The first of these is that the 'primordial' nature or 'superior normative rank' of certain international rules has also been included. I refer specifically to rules of *jus cogens*, of *erga omnes* obligations and of art. 103 of the UN Charter over all other rules of the system. The fact is that this group of rules is not homogeneous; *erga omnes* obligations, and the corresponding rights that other States may enforce against those violating them, are special in terms of their function in the international system, as highlighted in the Resolution adopted by the International Law Institute at its Krakow session in 2005. Similarly, art. 103 of the Charter also possesses special features. But aside from that, we would also note that the doctrine largely views International Law as possessing an inadequate or flawed hierarchical structure, and hence there is good reason to doubt whether in this respect the ILC will be capable of achieving satisfactory and generally-accepted results.

3. The work group has also decided to carry on its examination of 'fragmentation' in three other aspects related to the 1969 Vienna Convention on the Law of Treaties, specifically art. 30, art. 31.3.c) and art. 41. And the mere indication is sufficient to prompt the question of why the examination focuses on certain provisions of the 1969 Vienna Convention when there are many other integrative, complementary or substitutive relationships among rules in the international system which are equally deserving of consideration. In the view of my Delegation, then, the choice of aspects of the subject of 'fragmentation' connected with the Vienna Convention is inappropriate, and furthermore it entails certain risks as we shall see in a moment.

4. The *second* of my Delegation's reservations is connected with the *scope of the results of the work* envisaged by the ILC. The work group's stated intention in that respect is 'to achieve a concrete result of practical utility' to certain legal operators which daily apply International Law. To that end it has been announced that the result of the endeavour will take the form of a series of 'studies' and 'conclusions' from the group's work on the various selected aspects of the subject, along with 'a set of practical guidelines' (A/60/10, paras. 447–448).

However, the chief source of my Delegation's reservations on this point is the scope or the effects of the 'practical guidelines' depending on their content, and their future. For we would note firstly that, if these 'guidelines' are to be comprehensive enough to be of 'practical utility' as the ILC intends, my Delegation believes that it will be extremely difficult or practically impossible to achieve that objective in connection with relations between general law and *lex*

specialis, and with the ranking of rules. And if they relegate other problems and hence are only partial 'guidelines', there is a danger that they will be of little practical use. Which brings me to a question regarding their future in the latter case – namely, should the 'guidelines' ideally be couched in a recommendation by the General Assembly, or should the latter simply confine itself to noting the work carried out by the Commission on this subject?

5. Then, regarding those aspects of 'fragmentation' that have a direct connection with the 1969 Vienna Convention, other risks may arise apart from the ones I have just noted. For instance, if the 'practical guidelines' are intended to be, on the one hand, an *interpretation* of the cited Convention provisions by the ILC, then it will undoubtedly be an interpretation of weight given its source. But if we consider the terms of sections 2 and 3 of art. 31 of the same 1969 Vienna Convention, we arrive at a different conclusion; for the 'practical guidelines' would of course come from a source other than the parties to the Vienna Convention. That therefore means that their scope would be hard to define and moreover might not match the interpretation of the States Parties to the Convention.

6. Then again, at the Vienna Conference on the Law of Treaties, the Special Rapporteur for the subject, Sir Humphrey Waldock, stressed the need to distinguish between the interpretation of an international treaty strictly speaking, and the emergence *ex post* of a practice by all the parties in an agreement which diverged too far therefrom and hence in reality constituted a modification thereof (*UN Conference on the Law of Treaties, First Session, Official documents*, p. 209). And this brings us to a second potential risk, in that if the 'practical guidelines' adopted by the ILC are applied by States after their adoption, they may effectively lead to a subsequent practice by States which would constitute either a partial modification of the regulation contained in the Vienna Convention or a supplement tending to modify these provisions (A/57/10, para. 512).

Such a result would not be at all welcome, for if this were so it would mean that although contemplated in art. 38 of the articles proposed by the ILC on the Law of Treaties in 1966, it was nonetheless rejected by a large majority at the Vienna Conference in view of the uncertainty that amendment of the articles by virtue of subsequent practice might generate for conventional relations and the stability of treaties (*Vienna Conference*, cit. p. 215). And I would note in this respect that perhaps the risk was not taken into consideration, since proposals have been made in the work group to complete the Vienna Convention provisions regarding the question of 'timing' as it relates to art. 31.3.c) or regarding events not provided for in art. 30 of the Convention. Which begs the question, if in practice States apply the 'practical guidelines' with such content, will that not constitute modification of the provisions of the 1969 Vienna Convention, if only by complementing them?

7. These, Mr Chairman, are some of my Delegation's reservations regarding the *terra incognita* presented by the drafting of 'practical guidelines' rather than draft articles by the ILC. However, the Commission intends to present the

results of its endeavours next year, and we shall then have the opportunity to examine the content of these 'guidelines' and see if my Delegation's present concerns are allayed or confirmed".

The Final Declaration adopted by the XV Iberoamerican Summit of Heads of State and Government, held at Salamanca (Spain) on 14–15 October 2005, included the following:

"1. We, the Heads of State and Government of the Iberoamerican Community of Nations, assembled at their 15th Summit in Salamanca, Spain on 14 and 15 October 2005, hereby ratify the Iberoamerican *acquis* in its entirety, enshrined in the values, principles and agreements approved by us at previous Summits. These are underpinned by the full force of and commitment to the purposes and principles enshrined in the United Nations Charter, in our adherence to International Law, the deepening of democracy, the development, promotion and universal protection of human rights, the strengthening of multilateralism and of cooperative relations among all peoples and nations, and rejection of the application of unilateral coercive measures contrary to International Law.

2. We welcome Andorra as a new member fully sharing the identity and the criteria for participation in the Summit System. . . .

3. We are resolved to set in motion an Iberoamerican Secretariat-General (Sp. Acronym SEGIB) as a permanent organ to support the institutionalisation of the Iberoamerican Conference.

4. We reaffirm the commitment of the Iberoamerican Community to International Law and to effective multilateralism, to which we desire to make an appreciable contribution. We undertake actively to support a wide-ranging reform of the United Nations system based on principles of efficiency, participation, transparency, representativeness, sovereign equality and democratization which will enhance its role in the prevention of threats, maintenance of international peace and security, and promotion of economic and social development. . . .

(. . .)

6. Democracy is a factor lending itself to the cohesion of the Iberoamerican area. We consider it necessary to draw up an Iberoamerican agenda that will enhance the quality of our democracies and their ability to meet the expectations of their citizens in terms of protection of their rights and satisfaction of their socioeconomic needs . . .

(. . .)

8. The diversity, size and bi-regional nature of the Iberoamerican Community endow it with tremendous potential as an active partner on the international stage. We are seized of the need to reinforce our mechanisms of dialogue and coordination in order to realise that potential. We believe that effective participation by our countries in an active multilateral policy will

contribute to security, peace, development and the defence of International Law.

(. . .)".

II. SOURCES OF INTERNATIONAL LAW

1. Treaties

a) In General

On 22 July 2005, the Government replied to a parliamentary question on the status of the processes of Spanish ratification and accession to Additional Protocols four, seven, twelve, thirteen and fourteen of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms:

"Protocol No. 4 to the Convention . . .

This Protocol, which was opened for signature on 16 September 1963 and came into force on 2 May 1968, was signed by Spain on 23 February 1978.

The International Legal Advisory Office (Sp. Acronym AJI) reported favourably on 3 September 2004 and the Ministry of Justice, the competent department in Treaty matters, remitted its mandatory report, in favour of ratification, on 18 April 2005. The Gibraltar Office at the Ministry of Foreign Affairs and Cooperation also expressed its concurrence in a Note dated 13 September 2004.

Therefore, procedures can now be initiated to seek the Cabinet's authorisation to remit the said Protocol to the Parliament for ratification.

Protocol No. 7 to the Convention . . .

This Protocol was opened for signature on 22 November 1984, and Spain signed on that date. It came into force on 1 November 1988.

The Ministry of Justice report of 18 April 2005 was favourable to ratifying the Protocol. The report of the International Legal Advisory Office of 22 November 2004 notes that 'ratification of Protocol no. 7 entails no risk in the sense of providing a possible formula for contact between the Spanish and Gibraltarian "authorities", as it contains no mechanism of communication between national or local authorities of the States parties'.

It is therefore now possible to initiate the procedures for ratification, to be pursued in accordance with Circular Order no. 3,173 of 14 March 1992.

Protocol No. 12 to the Convention . . .

Protocol No. 12 was opened for signature on 4 November 2000 and came into force on 1 April last.

The International Legal Advisory Office reported on 29 November 2004, and the Ministry of Justice did likewise on 18 April 2005.

The Ministry of Justice report of 18 April 2005 was favourable to ratifying the Protocol. The report of the International Legal Advisory Office of 29

November 2004 notes that 'ratification of Protocol no. 12 entails no risk in the sense of providing a possible formula for contact between the Spanish and Gibraltarian "authorities", as it contains no mechanism of communication between national or local authorities of the States parties'.

It is therefore now possible to initiate the procedures for ratification, to be pursued in accordance with Circular Order no. 3,173 of 14 March 1992.

Protocol No. 13 to the Convention . . .

Protocol No. 13 was opened for signature on 3 May 2002 and came into force on 1 July 2003. Spain signed it *ad referendum* on 3 May 2002.

A favourable report has been received from the Ministry of Justice, and the International Legal Advisory Office likewise reported favourably on 22 November 2004.

Pursuant to art. 5.1 of the Government Act, Law 50/97, and article 14 of Decree 801/72 on organisation of government activity in matters of international treaties, the Cabinet must be asked to approve the signature *ad referendum* and remittal of the text of the Protocol to the Parliament for the purposes of article 94 of the Constitution.

Protocol No. 14 to the Convention . . .

This Protocol was opened for signature on 13 May 2004. It has not yet come into force. The Spanish Cabinet authorised signature on 5 November 2004, and Spain signed it on 10 May 2005 during a visit by the Minister of Justice to the Council of Europe at Strasbourg".

(*BOCG-Congreso.D*, VIII Leg., n. 247, pp. 84–85).

b) Reservations

In her address to the 2005 session of the Sixth Committee, the Spanish Representative, Mrs. Escobar Hernández, stated Spain's position regarding the tasks carried out by the ILC on the institution of reservations:

"This year Prof. Pellet devoted his report to a topic which in my delegation's view is crucial for the institution of reservations, namely the conditions in which these must be formulated in order to be considered valid and the definition and scope of the category 'object and purpose of the treaty'. The approach he adopts there bears closely on art. 19 of the Vienna Convention, with which my delegation agrees. We likewise agree with the use of the term 'validity', which we also favoured last year over other options now ruled out by the Special Rapporteur.

Having regard to the draft guidelines presented in the tenth report, my delegation generally approves their spirit and agrees on the need for specialised treatment of certain categories of treaty or specific clauses contained in treaties. In that connection we believe that guideline 3.1.12 is adequate as drafted in that in our view it will make it possible to safeguard the principle that the essential substance of human rights is indisposable. And the same applies to draft guideline 3.1.13, which achieves an adequate balance between the safeguarding of

the treaty's object and purpose and the principle of freedom of choice of the means of dispute settlement, all the while safeguarding the practice – which my delegation views as inalienable – of including dispute settlement clauses in multilateral international treaties.

Nevertheless, Mr. Chairman, my delegation believes there is a need for a more thorough discussion of the following draft guidelines:

i) My delegation notes that draft guideline 3.1.1, which lists the various categories of prohibited reservation, is totally silent on the subject of tacit prohibition and thus departs from the pattern followed in draft guidelines 3.1.3 and 3.1.4. We therefore feel that it would be appropriate also to include the formulation of tacit prohibition in guideline 3.1.1, at least in respect of those events for which the treaty contemplates a clause 'exclusively' authorising certain reservations, for as we see it this necessarily entails the prohibition of all others without the possibility of referral to the object and purpose of the treaty as a criterion for determination of the validity of the reservation.

ii) We believe that draft guideline 3.1.11 requires further study to bring its present wording into line with the object and purpose of the treaty, and also with art. 27 of the Vienna Convention, on which this guideline would have a strong bearing. This is particularly so considering the practice followed by States with this category of reservations, from which it is clear that the formula relating to national law is habitually used as a means to evade the obligation to respect the treaty's object and purpose. In that respect my delegation considers that it may be useful to link this draft guideline to the one referring to vague and general reservations (3.1.7).

iii) While we naturally agree with the guideline devoted to reservations contrary to provisions implementing a rule of *jus cogens* (3.1.9), my delegation believes that it is so obvious that it does not warrant inclusion. Also, it could be detrimental to the very category of *jus cogens* to include this problematic area in a set of guidelines whose sole purpose is to provide practical guidance on the application of an institution – treaty reservations – that is entirely consensus-based.

My delegation also wishes to offer some critical remarks on the two guidelines provisionally approved by the International Law Commission in this session period.

First of all, as regards guideline 2.6.1 my delegation has a number of reservations in connection with the expression 'by which the first State or the first organisation proposes to exclude or modify the legal effects of the reservation'. While we believe the statement is true in teleological terms, in the light of the Vienna Convention provisions we are not sure that that objective can be achieved in every case. Therefore, since this topic has more to do with the effect of the objection than with the actual concept of objection, it would perhaps be helpful to discuss this topic in the future work of the Commission.

Secondly, with regard to the guideline relating to objections to a late reservation or a late extension of an already-formulated reservation (2.6.2), my

delegation wishes to repeat once again what it said in the previous session period of the Sixth Committee regarding late reservations. To contemplate this possibility, even with all the limitations and precautions devised to date, poses a serious risk of establishing a model of permanently-open treaty, which further raises doubts as to its compatibility with the law currently in force. We therefore believe that this guideline also requires further analysis.

And to close, allow me to say just a few words in response to a question raised this year by the International Law Commission.

Spain is not as a general rule opposed to a treaty's entering into force between itself and a third State to whose reservations Spain has objected on the ground that they are contrary to the treaty's object and purpose. Without seeking here to go in detail into the reasons underlying such a practice, we do wish at least to draw attention to the fact that it is a practice permitted by the Vienna Conventions, and that in our view is because these endeavour to promote the broadest possible participation in multilateral treaties. And that is undoubtedly something to be welcomed.

But the effects this practice is intended to achieve is another matter altogether, and one closely linked to that of the effects of objection itself. In my delegation's view, objections of this kind, although important, are subject to the same rules as other objections formulated by States, regardless of the actual arguments raised in objection to a reservation at any time. The issue thus labours under the same ambiguity as has been noted in the work of the International Law Commission.

True though this is, however, my delegation believes it is extremely important to establish that the work of the ILC ought not to proceed on a strictly theoretical and academic plane but ought to be conceived in such a way as to produce practical consequences. And from that perspective the formulation of objections to a reservation as contrary to the treaty's object and purpose while the treaty remains in force between the State making the reservation and the State objecting to it has at least one positive effect, as other delegations have already pointed out in this session period: namely, the identification and denunciation of reservations that violate the essence of a treaty, making it possible to open what the Special Rapporteur has called 'dialogue on the reservation', and if appropriate the withdrawal of that reservation or a redrafting to bring it within acceptable limits. And the same goes for the consequences that the interplay of reservation and objection may have in future in the event of a dispute over the provision or provisions affected by the reservation and the objection.

If we analyse the practice, we may find meaningful examples of the event I have just referred to, and Spain therefore considers that – at least from this standpoint – it is helpful to retain the option of objecting to a reservation while maintaining the treaty in force between the States Parties concerned".

III. RELATIONS BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

1. Transposition of Community Directives

On 30 June 2005, in reply to a question raised in the Senate as to the Government's expectations regarding the transposition of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, the Government explained:

"The Minister of the Environment has drawn up a draft Bill to regulate rights of access to information, of public participation and of access to justice in environmental matters; this will incorporate into Spanish law not only Directive 2003/35/EC, but also Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

With these Directives, part of the content of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters is incorporated into the Community *acquis*. However, this draft Bill is intended to go further than the Directives and incorporate all the Aarhus Convention provisions into Spanish law.

As to the state of progress of the Draft Bill, on 21 April it was presented to the Sectoral Conference on the Environment and on 14 May to the Environmental Advisory Council. Also, the text was hung on the Ministry's web site for anyone interested to comment on until 20 May, and on 28 April it was forwarded to the Ministerial Departments for their reports on it.

As for the steps still to come, the text has to be submitted to the Autonomous Communities and Local Authorities, and reports must be elicited from the Social and Economic Council and the General Council of the Judiciary.

Finally, the Council of State will be asked for its mandatory Opinion prior to approval by the Cabinet as a Bill and remittal to the Parliament for consideration".

(*BOCG-Senado.I*, VIII Leg., n. 266, pp. 21–22).

IV. SUBJECTS OF INTERNATIONAL LAW

1. Self-determination

a) Western Sahara

In reply to a question relating to the Government's position and the steps it proposes to take to arrive at an urgent, fair and definitive solution to the issue of the

Western Sahara, tabled before the Senate in full session on 22 June 2005, the Minister of Foreign Affairs and Cooperation, Mr. Moratinos Cuyaubé, stated as follows:

"Since this Government took up office, one of its absolute priorities has been precisely to try and facilitate a fair and urgent solution to the problem of the Western Sahara. We wished to move on from the policy of passive neutrality traditionally pursued by Spanish diplomacy to one of active commitment to seek a definitive solution to this problem, which, as I have said on many occasions, has persisted for too long – almost 30 years since Spain abandoned the territories of the Western Sahara.

For that reason, and in view of the incidents that have occurred – we were already quite aware of the urgency of taking all possible diplomatic action to achieve the application of international legality and hence the enforcement of the last Security Council resolution and put the Baker Plan into practice – we wished from the outset to initiate conversations with all the parties, not only Morocco but also the Frente Polisario and the other countries with a stake in finding a definitive solution to the problem.

Spain will therefore keep pressing, within the framework of the United Nations and the responsibility of the UN Secretary-General and his Secretariat, and of all the parties involved in the conflict, to try and achieve an urgent, fair and definitive solution to the conflict of the Western Sahara.

(. . .)

What has this Government's attitude been towards the Saharan population and the representatives of the Frente Polisario? Which of the Governments of the last thirty years has three times sent Secretaries of State from the Ministry of Foreign Affairs? Tell me.

The answer is none. This is the first time in history, since 1975, that a Spanish government has sent the Secretary of State for Foreign Affairs and Foreign Policy and the Secretary of State for Cooperation to camps at Tinduf on two occasions. Humanitarian aid to the Saharan population has doubled; there has been a work meeting between the general secretary of the Frente Polisario, Mr. Abdelaziz, and the general secretary of the Spanish Socialist Workers' Party, Mr. Rodríguez Zapatero; I have had two work meetings with the person in charge of international relations in the Frente Polisario – and all this without any break at all in the dialogue with Morocco, while seeking the approval of the UN Secretary-General regarding the role that the United Nations ought to adopt.

(. . .)".

(*DSS-P*, VIII Leg., n. 46, pp. 2461–2462).

Subsequently, in reply to a question in Congress on 15 September 2005, the Government explained its position regarding the Baker Plan for the Sahara, in the following terms:

"The Government's approach to the Western Saharan question is founded on the conviction that a peaceful solution to the conflict is of the first importance for the stability and the economic and social development of the Maghrib region, which itself is a primordial strategic objective of Spanish foreign policy. And in that conviction the Government is taking an active diplomatic course in pursuit of a solution whose legal and practical frame of reference is the UN and an indispensable understanding between the parties.

In its efforts to foster a solution to this conflict, the Government is very conscious of the various Resolutions of the United Nations Security Council (UNSC). These stress the importance of the Baker Plan as a frame of reference for a peaceful solution to the conflict, and likewise the importance of dialogue to find a way out of the present impasse.

The last few weeks have seen events that have raised the levels of tension concerning the Western Saharan conflict and that confirm the need to resolve a situation that has now gone on for thirty years and continues to block the process of integration of the Maghrib. This blockage carries an immense political, economic and social cost, not only to the countries of the Maghrib but also to Spain and to Europe as a whole.

To achieve that objective, it is important, urgent and desirable that each party accept its own responsibilities, particularly the countries which are friends to the parties, among them Spain for well-founded historical and geostrategic reasons. The Spanish government therefore remains actively committed and spares no effort to find a fair and definitive solution to the conflict that accords with international legality and is mutually acceptable to the parties. With that end in view, Spain is working closely and maintaining contact with all the parties in order to reduce the tension in the short term and promote a climate of mutual trust and understanding that will facilitate approximation, a willingness to dialogue and resumption of the process of settlement of the conflict within the framework of the UN.

The Minister of Foreign Affairs and Cooperation met his Algerian and Moroccan colleagues during the Euro-Mediterranean Ministerial Conference in Luxembourg on 30 May last. He also entered into contact with the political representatives of the Frente Polisario. To all these he conveyed a message of calm and the need to resume efforts to create a suitable climate in which to arrive at a solution.

The Minister of Foreign Affairs and Cooperation has also sent a letter to the UN Secretary-General stressing the urgency of appointing a new Personal Representative for the Western Sahara, and he has written to his opposite numbers in Morocco, Algeria and Mauritania, and to the head of international affairs of the Frente Polisario, asking their help to achieve progress towards a settlement within the framework of the UN.

On 8 and 9 June last the Secretary of State for Foreign Affairs and Iberoamerica visited Morocco, Algeria, Mauritania and also Tinduf, to meet representatives of all the parties and neighbouring States. This is the first time that

a tour of the Maghrib has been organised to deal exclusively with the subject of the Western Sahara. During the tour, which was judged positive by all those concerned, the Secretary of State conveyed Spain's concern about the situation and stressed the need to maintain the calm, adopt a receptive attitude and revitalise the process of settlement within the UN framework. To that end, urgent measures are required, among them for the Secretary-General to appoint a new Personal Envoy with capacity to mediate politically among the parties, and also to appoint a new Special Representative to head MINURSO. In addition, Spain will be asking the UN Secretary-General to publish a report based on the data supplied by MINURSO with a view to securing transparent and objective information about the recent incidents. Consultations should be held under the auspices of the UN between the Personal Envoy, when he is appointed, and the parties, in order to reactivate the settlement process; these should hopefully produce new initiatives aimed at the application of international legality and the UNSC resolutions currently in force.

The Minister of Foreign Affairs and Cooperation has sent a letter to his Moroccan, Algerian and Mauritanian colleagues and to the Frente Polisario conveying these messages and urging them all to resume the political process and to contribute by taking concrete steps to promote trust in the region".

(*BOCG-Congreso.D*, VIII Leg., n. 257, pp. 369–370).

On 31 October 2005, expressing its opinion regarding the ongoing expulsions of parliamentary and municipal delegations from the Western Sahara, again in reply to a parliamentary question, the Government stated the following:

"In response to the latest outburst of tension arising from the incidents in El Aaiun and other towns in the territory in May 2005, the Spanish government has rapidly undertaken a series of urgent initiatives to deal with the crisis. On several occasions the Government has expressed concern to the supreme Moroccan diplomatic authorities, both bilaterally and through the European Union, over the response to these incidents and over the refusal of entry to delegations from Spain. One of the messages conveyed by Spanish diplomacy in its contacts with Moroccan authorities has been the need to respect the individual rights of those arrested and put on trial, and likewise to assure transparency in the treatment of information.

Apart from several top-level contacts conducted by the Minister of Foreign Affairs and Cooperation, the Secretary of State for Foreign Affairs and Iberoamerica visited Rabat, El Aaiun, Algiers and Tinduf last June for the sole purpose of issuing a call for calm, demanding transparent information about the incidents and proposing a constructive dialogue about the root of the problem. The Spanish government positively welcomes and wishes to help facilitate the invitation issued to the Spanish Congress and Senate by the respective Moroccan chambers, to visit the territory of the Western Sahara. In that respect it is hoped that the wish expressed by various Spanish political parties and other social

organisations will be fulfilled, that is to have improved facility of access to that territory and gain a better understanding on the ground".

(*BOCG-Congreso.D*, VIII Leg., n. 284, pp. 429–430).

2. Cyprus

Explaining its official position on the situation of Cyprus as regards the *de facto* partition of the island in reply to a question tabled in Congress on 7 December 2005, the Government stated the following:

"The Government's position is in favour of a solution to the Cyprus question based on the United Nations doctrine, specifically on the various Security Council resolutions since 1964, and on the guiding principles of the EU. Consequently, it has not recognised the self-styled 'Turkish Republic of Northern Cyprus' – the Spanish government only recognises the Republic of Cyprus as a subject of International Law – and it fully supports the efforts of the present UN Secretary-General as it did those of his predecessors, since a settlement of the Cypriot question would contribute to peace, stability and harmonious relations in the region. In any event, the Government respects the decision of the Greek Cypriot part as expressed in the referendum of 24 April.

The Government would like to see the resumption of negotiations soon, in a constructive and forward-looking spirit, between the Republic of Cyprus and the Turkish Cypriot community in the north of the island, leading to unity in satisfactory terms of security and equity for both sides, based on the concept of a united federal bi-zonal and bi-communal Cyprus, and it will do whatever is in its power, in a constructive spirit, to help reach a solution to the Cypriot question".

(*BOCG-Congreso.D*, VIII Leg., n. 320, p. 623).

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. Diplomatic and Consular Protection

In reply to a parliamentary question on 21 June 2005, the Spanish government reported on its actions regarding the situation of Spanish nationals under arrest and imprisoned in Morocco.

"The Government is aware of the situation of Spanish arrestees and prisoners in Morocco, and the Ministry of Foreign Affairs and Cooperation is addressing the subject as a matter of priority, both through its central departments and through the various Consulates-General in Morocco and the Spanish Embassy in Rabat.

These Spanish citizens receive permanent attention through the Consulates, including regular fortnightly or weekly visits and contacts with families and friends.

The various actions for the care and protection of these citizens are clearly set out in the relevant rules and include: periodic visits, commencing whenever the arrest becomes known; providing information about the country's judicial and prison system, about free legal defence if available and about lawyers who can undertake their defence; liaising with family and friends of the arrestee and providing a channel for the dispatch of correspondence, medicines or money; granting periodic or extraordinary financial assistance; keeping track of the arrestee's procedural and penal situation in liaison with the defence lawyer, etc.

The Government is seized of some accusations of ill-treatment by police at the time of arrest, made by the arrestees concerned, and it has formally asked the Moroccan authorities to conduct an inquiry into the facts".

(*BOCG-Congreso.D*, VIII Leg., n. 229, pp. 664–665).

2. Human Rights

In reply to a parliamentary question on 26 September 2005, the Spanish government reported on its plans for the introduction of legal changes to adapt the Spanish laws to maximise the protection of fundamental rights of persons accused of terrorism and held incommunicado.

"This Government plans to undertake a general reform to modernise our century-old criminal law, and in this context it will propose a reform not merely of remand and arrest or the rules for incommunicado custody of persons accused of terrorism, but of the entire set of Protective Measures that may be adopted in criminal procedure, in line with the consistent doctrine of the Constitutional Court and the European Court of Human Rights.

The last reform of remand in 2003 was not suited to a system of criminal procedure that assures respect of the accused's rights and in which remand is to be considered as a subsidiary protective measure subject to the principle of proportionality.

Having regard to the rules for holding incommunicado under arrest and on remand, it is important to remember that given the respect due to the accused's rights and the subsidiary and exceptional nature of the measure, there must be limits not only on duration but also on the circumstances and forms thereof as provided in art. 8(1) of the ECHR and by the Constitutional Court.

For its part, holding under incommunicado arrest (art. 520 *bis*) needs to be regulated as an exceptional measure and its duration limited; there is no justification for extending it to the entire duration of provisional custody (72 hours, plus 48 hours if applicable) but only for as long as is necessary for the government authority's inquiries".

(*BOCG-Congreso.D*, VIII Leg., n. 262, p. 246).

Replying to a parliamentary question on 31 October 2005, the Spanish government reported on the steps taken to secure the release of Daw Aung San Suu Kyi and all Burmese political prisoners:

"The Spanish government's position regarding the political situation in Burma is implicit in the action pursued by the European Union in that respect. In effect, with the aim always of promoting the process of reconciliation in Burma/Myanmar and securing the release of Aung San Suu Kyi and the other leaders of the NLD (National League for Democracy), Spain has supported and continues firmly to support the measures adopted by the EU.

These measures include the approval of a common position in April 2004 for renewal of the restrictive measures applied to Burma; the subsequent approval of additional sanctions against the military regime; and a Declaration issued in December condemning the extension of the house arrest of Aung San Suu Kyi for a further year and disapproving the large number of political prisoners still being held in that country. In addition, the common position just mentioned was renewed in April 2005.

It seems that the policy pursued by the EU is beginning to bear fruit, as witness the Burmese authorities' release of 250 political prisoners on 6 July last, a decision that was welcomed by the EU. Indeed, the British Presidency issued a Declaration stressing that this release marked a step in the direction of national reconciliation in Burma. Nevertheless, the EU has made it clear that the process of reconciliation must embrace all political and social forces, and therefore the Burmese authorities should order the immediate and unconditional release of all the political detainees in the country.

The policy pursued by Spain in connection with Burma is therefore an active and a realistic one. It is active in that its primordial objective is to promote a genuine process of national reconciliation using the political instruments of the EU.

And it is realistic in that the programme of sanctions selectively targets the Junta and its members, so that the general population of Burma do not have to suffer the negative consequences of the sanctions programme.

(*BOCG-Congreso.D*, VIII Leg., n. 284, p. 277).

3. Aliens

In her address to the 2005 session of the Sixth Committee, the Spanish Representative, Mrs. Escobar Hernández, stated Spain's position regarding the work of the ILC on the expulsion of aliens:

"My delegation welcomes the inclusion of the topic of expulsion of aliens in its work programme, for two reasons in particular: firstly, because it implies the recognition that the right of a State to determine the rules governing the entry and stay of aliens in its territory has not been challenged as a premise by International Law; and secondly, for the equally evident recognition of the importance that the migratory phenomenon has attained in these times and of the exalted place that International Human Rights Law occupies in contemporary international society. And that surely calls for a new and thoughtful

discussion of some of the components of what we might call the aliens rules as defined by International Law. From this standpoint it is clear that the topic of the rules governing the expulsion of aliens is one that deserves to be addressed by the International Law Commission.

My delegation was therefore interested to receive the preliminary report compiled by the Special Rapporteur Mr. Kamto, whom we wish to thank for his analysis of the subject, his systematic approach to the problems that arise and his methodological proposals for forthcoming work. For our own part, we have a number of comments on the subject.

Firstly, my delegation considers that any work on the expulsion of aliens must make adequate allowance for the fact that the field embraces rules relating both to the personal competences and to the territorial competences of the State. Hence, work on the expulsion of aliens must take into consideration the right of a State to define the legal rules that are applicable to the entry and stay of aliens in its territory, and likewise the consequences attendant on infringement of these rules.

Secondly, we believe it will be necessary to set proper bounds on the scope of application of the work in progress. And that particularly entails defining as specifically as possible the conceptual categories that the work of the Special Rapporteur is required to address, especially as regards the concepts of alien and expulsion. In this respect my delegation feels that it will be necessary to arrive at a clear definition of the various categories of aliens and of the situations in which aliens in these categories may find themselves, with the ultimate aim of determining whether all of them, or only some of these categories, are to be considered in defining the active scope of the International Law Commission's work.

And thirdly, but no less important, my delegation wishes to place on record the importance that it attaches to respect for internationally-accepted human rights, which must therefore indispensably be addressed in the work of the Special Rapporteur. And that applies both to the procedure that is to be followed in deciding on the expulsion of aliens and equally importantly to the form in which expulsion is to be carried out.

In connection with this topic my delegation believes it is still too early for any pronouncement on the form that the final result of the International Law Commission's work is to take. We await the Special Rapporteur's next report with keen interest, and likewise the collection on practice to be compiled by the Secretariat".

In reply to a parliamentary question on 26 September 2005, the Spanish government reported on the instructions issued to the State Security Forces and Corps informing them of the new Aliens Regulation, which provides that immigrant women reporting ill-treatment are not to be repatriated:

"Article 19 of Organic Law 4/2000 contemplates the possibility that a reunited spouse who is a victim of domestic violence may obtain an independent resi-

dence permit as soon as a protection order in her favour is forthcoming.

Also, article 59 of the Organic Law provides that aliens who are in Spain irregularly or are working without a permit, without papers or with irregular papers and have been victims of, prejudiced by or witnesses to, *inter alia*, acts of exploitation for purposes of prostitution with abuse of their state of need, may be exempted and not expelled if they report such exploitation to the competent authorities or cooperate and collaborate with police officers competent in matters of aliens, by furnishing essential information or testifying, as the case may be, in the relevant proceedings.

Also, the Regulation of Organic Law 4/2000 implements the provisions just cited, and article 45.4.a adds – in application of article 31(3) of the Organic Law – the possibility that temporary residence permits may be granted for humanitarian reasons, *inter alia* to aliens who are victims of offences of violence perpetrated in the family circle, in the terms laid down in Law 27/2003 of 31 July which regulates protection orders for victims of domestic violence, provided that a court has delivered a judgment on such offences. In such cases, according to article 46.3 of the Regulation, application may be made for a temporary residence permit for humanitarian reasons in view of exceptional circumstances once there is a court order for the protection of the victim, and the permit may finally be granted once the court has delivered a judgment on the offences concerned.

The procedure to be followed by the Security Forces and Corps when an alien woman in an irregular administrative situation comes to a police office to report ill-treatment is detailed in the Action Protocol for the Security Forces and Corps and for Coordination with the Courts for the Protection of Victims of Domestic and Gender Violence. Under heading I.A, this Protocol lists the steps that must be taken by police officers as a priority in order to protect the life, the physical safety and the legitimate rights and interests of victims and the members of their families, and specifically mentioned among these is to inform victims of their right to regularise their situation for humanitarian reasons, in the terms provided in articles 45.4.a and 46.3 of the Aliens Regulation.

As to fulfilment by police officers of the obligations placed upon them by the aliens rules when they encounter an infringement of these, in order to guarantee the victim's rights as recognised in the Integral Act and the Aliens Regulation and avoid further victimisation as far as possible, it was felt necessary to issue precise instructions as to the procedure to be followed in order to cause suspension of the opening and subsequent pursuit of sanction proceedings pending respectively a judicial decision on a protection order and an administrative decision on a temporary residence permit due to exceptional circumstances.

This Instruction has been seen by the Executive Committee for the Unified Command (Sp. Acronym CEMU) and is presently being circulated to the State Security Forces and Corps for implementation".

(*BOCG-Congreso.D*, VIII Leg., n. 262, pp. 232–233).

In an appearance before the Commission of Home Affairs of the Congress of Deputies, the Spanish government reported on the situation at the frontier in Melilla.

"(. . .)

. . . Surfacing at the gates of Melilla and Ceuta, but only very slightly, is one of the tips of a human iceberg composed of hundreds of thousands of African citizens who are expelled – in inverted commas – from their territories of origin by such factors as hunger, war, misery and persecution. We all know too that Ceuta and Melilla are two autonomous Spanish cities which constitute a peculiar and a special external frontier of Spain and the European Union on territory in the African continent, the management of which presents difficult and atypical problems for obvious reasons. The thousands of African citizens who travel thousands of kilometres at the risk of their lives do not do so in response to any incentive from this side of the Spanish and European Union border; they reach the gates of Ceuta and Melilla or attempt hazardous sea crossings, or they fall into the clutches of unscrupulous mafias, for a very simple and very terrible reason: that is, that the factors of war, misery and hunger constitute an authentic, powerful and irresistible force that drives these men, women and children out of their territories of origin . . .

These difficulties in the management of frontiers do not prevent us from taking border control action – firstly following the same rules that apply to the management of any other border; secondly following the operational rules of the State Security Forces and Corps subject to the authorisation and guidance of our legal system; and lastly with absolute respect for the human rights of citizens who unlawfully attempt to cross one of our external frontiers. In acting in this way we are scrupulously complying with and supporting the strategic underpinnings of our immigration policy exactly as they were defined by the Prime Minister at his investiture. These underpinnings consist of real and effective management of migratory flows; strict control of our frontiers to prevent irregular immigration; integration policies for those entering our country illegally, and finally policies of cooperation and development targeting the countries of origin or transit from which these migratory flows spring . . .

(. . .)

We can gain a notion of the intensity of the pressure on the Melilla border by looking at the numbers of immigrants who have been turned back at the frontier: in 2002, 12,337 immigrants were turned back; in 2003, 26,368 and in 2004 – the first year of the present Government – 55,645. During all these years, the attempts to enter our territory have followed one or other of two patterns. Before, some of these immigrants sought to reach the city from the sea, . . . now we are seeing a palpable increase in the number of attempts at mass, synchronised entry using force. . . . As to the most recent years, during 2004 this method was used on seven occasions at different points on the border perimeter, by groups averaging 100 immigrants. This year has seen a redoubling of this kind of mass entry, with 21 synchronised entry attempts using

force since May 5 last. The last two attempts, which took place yesterday, involved 500 and 400 immigrants respectively.

(. . .)

. . . the problem that we face is not only a political issue, and anyone who thinks it is only a police matter is mistaken. It is an issue that occupies the policies of Spain and of the European Union, and it is one that necessarily demands international, economic and social action. All European governments are aware of this, the Spanish government particularly so, and as such they have made irregular immigration a priority issue of their foreign policy; this is so both in the context of our multilateral relations – especially European relations – and above all in that of our relations with Morocco. In the sphere of the European Union we have been pursuing a variety of political, economic and legislative initiatives for the specific purpose of achieving progress in the control of irregular immigration from Africa. In particular, the Spanish government is participating actively in the Euro-Mediterranean process, known to us as Euromed. Late last July, in conjunction with France and Morocco we presented a three-country proposal for the creation of a common Euro-Mediterranean area of cooperation in matters of justice, security, immigration and social integration. The aim behind this initiative is to create a common area in the Mediterranean characterised by the treatment of immigration and social integrated as an integral whole, promotion of development of the countries of origin, cooperation with these countries in vocational training, and enhanced technical collaboration in the management of migratory movements on an institutional level. The document also contains proposals on matters of judicial and police cooperation within the Euromed ambit in order to combat terrorism, organised crime, drug trafficking and trafficking in human beings . . .

And finally, I should like to say a word about the Meda programme . . . Within the framework of this programme, as regards Morocco and migratory issues, 87 million euros has been allocated to development of the northern provinces; 5 million to institutional support for migratory movements and population shifts; and 40 million that Spain and France will administer jointly for improvement in technical and professional aspects of control of Morocco's borders. These 40 million euros are to be disbursed immediately, chiefly for use in improving border control infrastructures, vocational training and acquisition of border surveillance resources. This fund will make a positive contribution to improved results in the fight against organised crime, immigrant smuggling networks and trafficking in human beings.

(. . .)".

(*DSS-C*, VIII Leg., n. 377, pp. 3–9).

VI. STATE ORGANS

1. Foreign Service

On 27 June 2005, replying in Congress to a question regarding the amount by which the means at the disposal of Spanish Consulates in the countries of origin of immigrants had increased, the Government noted:

"(. . .)

The Spanish consular network in Morocco has Consulates-General at Casablanca, Nador, Rabat, Tangiers, Tetuan, Agadir and Larache. The personnel of the Spanish Consulate-General in Casablanca has been increased by three new permanent clerks and has been further strengthened by the engagement of two temporary employees; the Nador and Rabat consulates have received two additional temporary clerks each; the personnel of the Consulate-General in Tetuan has been increased by one new clerk and another on temporary contract; the personnel at Tangiers has been increased by two new clerks; and lastly the Spanish Consulate-General in Larache has been strengthened by the temporary engagement of an clerk.

In Algeria, the personnel at the Spanish Consulate-General in Oran has been reinforced by the temporary engagement of a clerk.

At the Lagos Consulate-General in Nigeria, the position of Chief Visas Officer has been created. And in addition, two clerks and an ancillary employee have been engaged on a temporary basis.

In Europe, the embassies in Poland and Romania, the countries of origin of the majority of European immigrants to Spain, have also had a substantial increase in manning. Consular affairs there, including visas, are handled by the consular sections of the respective embassies, and therefore the personnel at the Spanish Embassy in Warsaw has been reinforced by the temporary engagement of two clerks and an orderly/chauffeur. For its part, the personnel at the Spanish Embassy in Bucharest has also been strengthened by seven temporary clerks and another orderly/chauffeur. And in the Ukraine too, the third largest source of European immigration to Spain, a clerk and an orderly have been engaged on a temporary basis for our embassy in Kiev.

In Asia, a position of Senior Administrative Officer has been created at the Spanish Embassy in Pakistan, with residence at Kabul. Applications for this position have been invited and it is currently pending award. As to contract personnel, the Spanish Embassy in India has increased its staff by one new clerk. However, the bulk of the growth has been in China in view of the increasing numbers of immigrants coming from there: the Spanish Embassy in China has temporarily engaged nine administrative officers and three clerks, and the personnel of the Spanish Consulate-General in Shanghai has been strengthened by temporary engagement of four clerks and an orderly/chauffeur. In addition, in China Spain will shortly be opening a Consulate-General at Beijing, which will

take over the functions hitherto discharged by the consular section of the embassy.

And turning finally to Latin America, that is where the network of Spanish consulates is largest, and where the engagement of new personnel, both permanent and temporary, has been most abundant in addition to an increase in the number of officials. In Ecuador, a position of staff secretary has been created at the Spanish Consulate-General in Quito and the personnel there has been further reinforced by the temporary engagement of six clerks and an orderly/chauffeur, plus another clerk on a part-time basis. In Colombia, the former consulate is now the Spanish Consulate-General in Bogotá; its personnel has been reinforced by the recent creation of two new staff positions, one secretary and one Chief Visas Officer, and ten clerks and an ancillary employee have been engaged on a temporary basis. The personnel of the Spanish Consulate-General in Santo Domingo has also been increased with the permanent engagement of two clerks plus a further temporary clerk. In Peru, the Spanish Consulate-General in Lima has taken on one new permanent clerk. The consular section at the Spanish Embassy in La Paz has likewise engaged a new clerk, in this case on a temporary basis. And finally in Argentina, where Spain has Consulates-General in Buenos Aires, Bahia Blanca, Cordoba, Mendoza and Rosario, manning levels have been raised by temporary engagements as follows: twenty-seven clerks at the Spanish Consulate-General in Buenos Aires; seven clerks at the Bahia Blanca consulate; seven clerks at Cordoba; six clerks at the Spanish Consulate-General in Mendoza; and eight clerks and an orderly at Rosario.

And to close this report, a proposal is currently being studied by the Interministerial Pay Commission (Sp. acronym CECIR) for the creation of thirty-four new positions of Chief Visas Officer".

(*BOCG-Congreso.D*, VIII Leg., n. 229, pp. 562–563).

In a reply to a question tabled in Congress on 27 June 2005, the Government referred to the steps taken in connection with the consulates in Spain of those countries from which the migratory pressure on Spain is strongest:

"As regards the normalisation process contemplated in the new Aliens Regulation, well in advance the Department of Consular Affairs and Assistance at the Ministry of Foreign Affairs and Cooperation invited the Ambassadors and Consuls-General of the countries mentioned by the Honourable Member to a meeting to inform them of the details of the normalisation process and to seek their fullest cooperation to assure optimum implementation of the process.

During the normalisation process, these diplomatic and consular representatives maintained frequent contact with the responsible Spanish authorities to clarify concrete aspects regarding the papers that their nationals would need in order to be included in the normalisation process.

We would note also that according to the 1961 and 1963 Vienna Conventions, accredited diplomatic and consular representatives in Spain represent sovereign States which apply their own national rules to those of their nationals

who are in Spain. The Spanish authorities refrain from interfering in any way in the internal affairs of these representations".

(*BOCG-Congreso.D*, VIII Leg., n. 229, p. 725).

The accusations made against the military attaché at the Chilean Embassy in Spain prompted a parliamentary question, to which the Government replied on 30 June 2005, in the following terms:

"The Government is cognizant of the accusations that have been made by the family of Da Susana Obando against the present Chilean military attaché, and likewise of the fact that Colonel Ortega Pardo made a statement before the Chilean examining magistrate, Ms. Carmen Garay. The Government has also learned through the Chilean authorities that the said Colonel is not the object of any judicial proceedings in Chile in connection with the events the Honourable Member is referring to.

The Spanish government has been informed by the Chilean authorities that Colonel Ortega Pardo will shortly be relieved of his duties as military attaché at the Chilean Embassy.

The Spanish government issues its agreement to the accreditation of foreign diplomatic representatives in accordance with the Vienna Convention on Diplomatic Relations.

It further expects them to discharge their duties in a manner beneficial to bilateral relations and to respect the principles and values governing relations between two friendly States such as Spain and Chile".

(*BOCG-Congreso.D*, VIII Leg., n. 232, p. 115).

VII. TERRITORY

1. Territorial Division. Control of Frontiers

In reply to a question put by the Popular Party Group in the Senate in plenary session regarding the presence of ground troops in the cities of Ceuta and Melilla to control the frontier, the Defence Minister Mr. Bono Martínez reported as follows:

"... The task of mounting surveillance on the ordinary frontier crossing lies with the State Security Forces and Corps, specifically the Civil Guard, and the Armed Forces are required to assist in that mission when called on to do so. The Army is there because the Prime Minister has ordered it, just as it was on other occasions, in 1996, 1997, 1998 and 1999, but it must be there only for as long as is necessary. That is how long it is going to be there.

(...)

... Vice-President and Commissioner Frattini ... said: The time has come to assist Spain and Morocco. And I believe that these are most reasonable words – I think it is good to assist Spain and Morocco in the problem of those frontiers ...

(. . .)

And as regards illegal immigration, we must try and see that no-one crosses these frontiers illegally, at Ceuta or at Melilla, or enters by boat, by plane . . .".

(*DSS-P*, VIII Leg., n. 57, p. 3087).

In reply to a parliamentary question put in Congress, the Government reported thus on the causes of the increase in the number of *pateras* reaching the coasts of Melilla:

"(. . .)

The rise in the numbers of immigrants attempting to land on the coasts of Melilla from *pateras* has three fundamental causes:

– The increased difficulty that immigrants find in entering Melilla clandestinely through the security system set up around the border perimeter, chiefly thanks to the raising of the fence, whose height has been doubled to 7 (seven) metres over a third of the landward border perimeter.

– Effective collaboration from the Moroccan security authorities and forces in surveillance of the border perimeter, and above all the eradication of perpetual sub-Saharan settlement on Mount Gurugú.

– The collaboration of the Moroccan security authorities and forces is less effective when it comes to acting on the operations of Moroccan organisations engaged in the smuggling of immigrants aboard *pateras*.

Madrid, 26 August 2005. The Secretary of State for Relations with the Cortes".

(*BOCG-Congreso.D*, Leg. VIII, n. 262, p. 327).

2. United States Military Base on Spanish Territory

In reply to a parliamentary question tabled in Congress regarding the intention of the United States Government to alter the status of the Rota military base, the Government stated:

"On 13 July 1994, a Memorandum of Understanding was signed between the Spanish Navy and the US Navy for the establishment of a special US Navy naval operations training unit at the Rota naval base. That unit has remained in Rota since that time.

No official request has been received to date for the basing at Rota of any other special operations unit by the United States Armed Forces.

We have no official knowledge of any interest by the United States Government in modifying the present status of the Rota naval base.

According to article 2 of the Agreement on Defence Cooperation between the Kingdom of Spain and the United States of America, 'Spain concedes to the United States of America the use of support facilities and grants authorisations for their use in Spanish territory, territorial waters and air space for purposes coming within the bilateral or multilateral scope of this Agreement. Any use that goes beyond these objectives shall require the prior authorisation of the Spanish

Government'. At no time has the Government had knowledge of the conduct of activities in violation of human rights.

Madrid, 14 June 2005. – The Secretary of State for Relations with the Cortes".

(*BOCG-Congreso.D*, VIII Leg., n. 237, p. 345).

3. Colonies

a) Gibraltar

In reply to a parliamentary question tabled in Congress as to whether Spain had granted Gibraltar veto rights in the negotiations currently in progress, the Government stated:

"The Government has not granted Gibraltar veto rights in its present strategy on the Gibraltar question, key elements of which are the establishment of a forum for dialogue separate from the Brussels process, and of a Joint Commission on Cooperation and Collaboration.

Another important element of the Government's new strategy has been the participation of the Gibraltarians in the negotiation process. This is something that previous governments have tried and this government has achieved. In this connection it would be appropriate to recall the words of Foreign Minister Abel Matutes, spoken in London on 10 December 1997 at a meeting with his British colleague:

'As a democratic State we cannot conceive of reaching a solution to the problem of sovereignty that is forcibly imposed against the will of the citizens of Gibraltar, who would be affected by a new situation of sovereignty'.

The same line was taken by Minister Josep Piqué, who repeatedly invited the government of Gibraltar to take active part in the negotiation process. In this respect it is worth quoting the following paragraph from the Communiqué issued at the Piqué-Straw ministerial meeting in Barcelona on 20 November 2001:

'We agreed that the Government of Gibraltar had a very important contribution to make to our discussions. Gibraltar's voice should be heard. We reiterated the invitation which we issued to the Chief Minister of Gibraltar when we met in London on 26 July to attend future Brussels Process Ministerial meetings. His role will be fully respected and he will have the opportunity to contribute fully to the discussions. The Process would benefit greatly from the direct views of the Government of Gibraltar, and through the Government of the House of Assembly and public opinion in Gibraltar as a whole'.

On 16 December 2004, the Ministry of Foreign Affairs of Spain, the Foreign & Commonwealth Office of the United Kingdom and the Government of Gibraltar

issued a Joint Communiqué on Gibraltar. This Joint Communiqué was instrumental in opening up a new avenue to deal with the question of Gibraltar. It is worth mentioning the nature of that Joint Communiqué in view of its complexity and the number of caveats that it contains:

– It is a Press Communiqué and not an International Treaty or Agreement.

– It is a political and not a legal document.

– It confirms the establishment of a Forum for Dialogue, not a negotiating Conference.

The introduction to the Joint Communiqué of 16 September 2004 contains an important caveat with regard to the communiqué as a whole. This is that a new Forum is to be established without prejudice to the respective positions of the parties. In our case, the 'Spanish position' includes the preferential right to acquire the Rock, no legal cession of the Isthmus, non-application of the principle of external self-determination, etc. In other words, the institution of this instrument of dialogue entails no renunciation of Spain's historical position, and in particular there is no renunciation of our claim to Gibraltar.

The introduction also contains an important clarificatory point, where it says that the new forum is 'separate from the Brussels Process'. It therefore does not say that the Brussels Process is dead, or that the Forum for Dialogue is the successor to that Process. It simply says that they are two different things.

The agreed conditions for the new Forum for Dialogue as set out in the Joint Communiqué are as follows:

– Open agenda: the basis for dialogue will be an open agenda. This means that at the Forum Spain will be able to raise the point of negotiation of sovereignty over Gibraltar whenever it considers the time is right.

– Each participant to speak separately with its own voice: here Spain introduced another important caveat. It specifically states that the fact that each of the parties has its own separate voice and participates in the Forum on that basis shall be without prejudice to the constitutional status of each one. But not only does it recognise the differences between Gibraltar on the one hand and the United Kingdom and Spain on the other in constitutional terms, but it also explicitly adds that Gibraltar is not an independent sovereign State. And incidentally, Minister Piqué already offered the Chief Minister of Gibraltar such a differentiated voice of its own once before, in the Joint Press Communiqué (Piqué-Straw) of 4 February 2002.

– Three-way agreement: this is the most complex part of the Joint Communiqué. In order to understand this section properly, we must bear the following in mind:

– This is fully covered by the clause in the introductory paragraph reserving the respective positions and the difference in the statutory and constitutional standing of the participants.

– The Joint Communiqué of 16 December 2004 states that 'any decision or agreement reached at the Forum must be agreed by each of the three participants'.

This sentence obviously refers to those matters in which the Government of Gibraltar has domestic powers which have been transferred by the United Kingdom. However, it is possible decisions or agreements will have to be reached on matters regarding which the Government of Gibraltar does not have powers – for instance questions of sovereignty. In that case any relevant decisions or agreements may only be adopted by the competent sovereign States – that is exclusively Spain and the United Kingdom.

– This section recognises that some matters require a formal, exclusively bilateral agreement between Spain and the United Kingdom (as matters in which only States are competent). (If all three parties wish to adopt a decision at the Forum in connection with a matter on which the formal agreement ought to be made in the appropriate form between Spain and the United Kingdom, etc.).

– It is true that the section makes a neutral reference to the principle of consent of the Government of Gibraltar. However, in this case it is a commitment of the United Kingdom that has been stated repeatedly over the years – in the Brussels Declaration of 10 April 1980, in the Brussels Joint Communiqué of 27 November 1984, in several documents of the Brussels Process, in annual Decisions on the Gibraltar Question approved by consensus of the United Nations General Assembly, and ultimately in the documents negotiated by Ministers Piqué and Straw between July 2001 and July 2002. The British commitment I refer to is an internal, unilateral commitment by the United Kingdom and it is nothing new. It does not at all mean that Spain grants veto rights to the Government of Gibraltar. An agreement on sovereignty will always be an agreement between States, but it would be a mistake to ignore the voice and the opinion of the people of Gibraltar.

To recap, then, let me repeat clearly and firmly that the Government has not granted any veto rights to Gibraltar as part of the strategy it is pursuing in connection with that territory.

Madrid, 23 May 2005. – The Secretary of State for Relations with the Cortes".

(*BOCG-Congreso.D*, VIII Leg., n. 229, pp. 705–706).

Again, in reply to a parliamentary question in Congress regarding the negotiations with the United Kingdom on Gibraltar, the Government reported as follows in connection with the Forum for Dialogue:

"On 27 October 2004 the Foreign Ministers of Spain and the United Kingdom announced the establishment of a new three-way Forum for Dialogue on Gibraltar. Subsequently, on 8 and 9 December 2004, agreement was reached on the launching and the conditions of that Forum. The first formal meeting of this Forum took place in Malaga on 11 February last. That meeting addressed issues of great importance for all the parties:

1. Airport: The parties began to explore different formulas to achieve a situation where Gibraltar airport is beneficial both to Gibraltar itself and to the *Campo de Gibraltar.*

2. Submarines: The Spanish government asked the British government to see that nuclear systems of submarines are not repaired at Gibraltar and to issue a written declaration to that effect.

3. Barrier: The Forum analysed the present situation as regards crossing the Barrier and agreed to expedite crossing, subject to legal and security requirements.

4. Telecommunications: It was agreed to promote meetings between experts and the telephony regulators concerned to seek solutions to the existing problem of telephone communications in Gibraltar.

(. . .)

The issue of pensions for former Spanish workers in Gibraltar was addressed by experts at a meeting of a Work Group in London on 28 January. This meeting, in which Spanish, British and Gibraltarian technical experts took part, served as a means to exchange information, documentation and points of view on the situation, which affects between 5000 and 6000 Spanish pensioners.

The Spanish delegation made it quite clear that it acceded to this exchange of information without prejudice to the work being carried on by the European Commission with a view to adopting a position on the compatibility of the present pension system in Gibraltar with current Community Law.

In this connection, at a meeting of the Members of the Commission of the European Union held on 16 March last, it was decided to remit a letter of formal notice to the United Kingdom regarding discrimination on the basis of residence against former Spanish workers in Gibraltar, who do not receive a pension supplement that is received by pensioners resident in Gibraltar (known as the 'Household Cost Allowance'). The authorities of Gibraltar are presumably practising direct discrimination for reasons of nationality, which the Treaty prohibits.

The European Commission has given the United Kingdom two months in which to remedy this situation, which could have serious economic consequences for the British Treasury. If the European Commission's recommendation is not accepted, the United Kingdom will be brought before the Court of Justice of the European Communities.

And again, the agenda of the first Málaga meeting of the Forum for Dialogue included the matter of the airport. At that meeting the participants began to explore the different possible formulas for joint use of Gibraltar Airport, and it was decided to set up a group to deal with the technical aspects.

On 10 March last a tripartite delegation visited Geneva Airport to determine whether any of the procedures permitting joint use of that airport by Switzerland and France could be used in the case of Gibraltar Airport.

The Forum participants have exchanged basic documents with a view to establishing a formal framework for the future agreement. The conversations are progressing normally, and a technical group will shortly be created to clear up all the technical aspects of the future agreement. Given the complexity of the matter and the sensitivity of the territory where the airport is situated (Spain never ceded the isthmus), it will take time until the process is brought to a definitive conclusion.

Madrid, 30 May 2005. – The Secretary of State for Relations with the Cortes". (*BOCG-Congreso.D*, VIII Leg., n. 229, pp. 804–805).

In reply to a parliamentary question in Congress regarding Spain's representations to Great Britain to stop nuclear submarines putting into the naval base on the Rock of Gibraltar for repairs, the Government reported:

"... It cannot prevent nuclear-powered submarines from putting into the port of Gibraltar since the internal waters of the port were ceded by Spain to Great Britain by the treaty of Utrecht of 1713, and Spain does not have jurisdiction over these internal waters.

What the Government has done is to ask the United Kingdom, as a partner and ally, to adopt a constructive, cooperative attitude in this matter, especially with a view to assuring the safety of the population in the zone.

To that end the Spanish government included the subject of repairs to British nuclear submarines in Gibraltar in the agenda of the first meeting of the three-way Forum for Dialogue (Spain, the United Kingdom and the Government of Gibraltar) in Malaga on 11 February 2005. At that meeting the Spanish delegation recalled the commitment made in May 2001 by Foreign Secretary Robin Cook to the then Spanish Minister of Foreign Affairs Josep Piqué, not to allow more nuclear repairs to British submarines in the Port of Gibraltar.

Thus, the information that was passed on to the press after the first meeting of the Forum for Dialogue in Malaga and was agreed among all the participants included the following:

'We have also reviewed the question of repairs to British nuclear submarines in Gibraltar. We have agreed that owing to the sensitivity of this issue, we need to have elements to set the mind of the population in the zone at rest.

The Spanish government has asked the British government not to allow repairs to nuclear systems of submarines in Gibraltar.

The British government has confirmed that the repair of the *Tireless* was exceptional. The Spanish government has asked the British government for written confirmation of the declaration made by Minister Piqué repeating what Minister Cook had said'.

(...)

Madrid, 30 May 2005. – The Secretary of State for Relations with the Cortes". (*BOCG-Congreso.D*, VIII Leg., n. 257, p. 624).

VIII. SEAS, WATERWAYS, SHIPS

1. Baselines and boundaries

Note: See VIII. 3. Fisheries

In reply to a parliamentary question in Congress regarding the provisional delimitation of maritime boundaries between the Canary Islands and Morocco, the Government reported:

"At a meeting of the Spanish-Moroccan work group on delimitation of maritime boundaries on the Atlantic seaboard held at Rabat on 26 October 2004, preliminary agreements were reached on a number of points.

As a result, the parties have accepted the provisional median line as a criterion for provisional delimitation of the maritime areas concerned, which line may be modulated at the time of definitive delimitation in response to any circumstances that may be deemed pertinent for the purpose of reaching an equitable solution.

Because this median line is provisional, it will be used as a baseline in successive negotiations. However, the coordinates of this median line have yet to be plotted. They must be accepted by both parties.

Also, the Spanish and Moroccan delegations have agreed that negotiations are to constitute a package deal, so that none of the agreements reached will be final until all of them have been accepted. We would therefore stress that the delimitation of the median line is likewise provisional.

Madrid, 3 October 2005. The Secretary of State for Relations with the Cortes". (*BOCG-Congreso.D*, VIII Leg., n. 284, p. 218).

In addition, replying to a parliamentary question in the Senate regarding the agreement signed between Morocco and the Australian oil company Pancontinental to explore a territory including the city of Melilla, the Chafarinas archipelago and the island of Alborán, the Government reported:

"As soon as the Government learned of the possible granting of licences to explore in Mediterranean waters at the beginning of August last year, it immediately contacted the Moroccan authorities and received an assurance that no action of their Government would infringe Spanish rights.

Madrid, 29 March 2005. The Secretary of State for Relations with the Cortes". (*BOCG-Senado.I*, Leg. VIII, n. 207, p. 56).

2. Islands

Appearing before the Senate in plenary session to reply to a question from the Coalición Canaria Parliamentary Group of Senators on the Government's disposition regarding the legal status of the maritime and air space of the Autonomous Community of the Canary Islands, the Prime Minister Mr. Rodríguez Zapatero reported:

"... The Government has a receptive attitude as regards the importance for the Canary Islands as an Autonomous Community of their peculiarities as an archipelago, as is fairly obvious, logical and consistent with a basic principle regarding what waters and sovereignty over them mean in the International Law of the Sea. And all that is compatible with the autonomous community's desire to extend its powers for purposes of use of these waters, progress on the land and consequently the benefit of all Canary citizens, and I believe we will find a suitable formula in the statute".

(*DSS-P*, VII Leg., n. 62, p. 3371).

3. Fisheries

a) Portugal

In reply to a parliamentary question in the Senate, the Government reported on the meeting between representatives of Portugal and Spain at Lisbon on 20 July to discuss rights of access to the waters of Madeira and the Canary Islands:

> ". . .The meeting examined the criteria that the fishery authorities of Spain and Portugal will have to lay down for effective implementation and application of article 5 of Regulation (EC) No. 1954/2003 establishing conditions of access to waters within 100 miles of the Canary Islands, the Azores and Madeira, and if appropriate to formalise an agreement signed by the sectors of the Canary Islands and Madeira for fishing by certain tuna line-fishing vessels from both regions.
>
> In this connection, it was agreed that both delegations should move forward in establishing conditions of access for vessels from the islands and vessels traditionally fishing within 100 miles of the other archipelagos; the meeting therefore concentrated on setting out the initial conditions of access and left more concrete details of such access (number of vessels, fishing method, season, etc.) to a future meeting.
>
> It was agreed that the parties would meet the sectors concerned again to present concrete proposals and requests. Once that agreement is reached, it will be formalised by the fishery authorities of the two countries and forwarded to the Commission in compliance with the obligations laid down in article 5 of Regulation (EC) No. 1954/2003.
>
> Madrid, 26 October 2005".
>
> (*BOCG-Senado.I*, VIII Leg., n. 350, p. 60).

b) Morocco

In an appearance before the Congress Agriculture, Fisheries and Food Commission in connection with the Fisheries Agreement and Protocol signed by the European Union and the Kingdom of Morocco for the next four years, commencing on the first of March 2006, the Minister of Agriculture, Fisheries and Food, Mrs. Espinosa Mangana, reported:

> "(. . .)
>
> . . . The resumption of fishing relations, which had been suspended following denunciation of the previous agreement, in force from 1995 to 1999. One of the reasons for the success of the negotiations was the climate of dialogue and trust established between Spain and Morocco, the outcome of a series of fishery cooperation initiatives in the fields of research and training in sea fishing and fish farming, and of the normalisation of political relations between the two countries which, as you will recall, were resumed with the Prime Minister's official visit to Morocco in April 2004. . . .

The spirit of this agreement is moreover . . . cooperation between the European Union and Morocco aimed at promoting responsible fishing so as to assure the long-term conservation and lasting productivity of marine resources. This agreement is part of a new drive to establish partnerships between the European Union and third countries in matters of fisheries. This new approach, based on cooperation as I said, entails active participation to promote development of the fisheries sector in Morocco. For instance, through dialogue and prearranged agreement, a basis has been laid on which to promote rational, sustainable fishing and combat illegal fishing, and to encourage economic, financial, scientific and technical cooperation in the sphere of fisheries, and inter-company cooperation and integration.

. . . Out of 36.1 million euros that the European Union allocates annually to this agreement, 13.5 million per annum is set aside for the development of a lasting sectoral fisheries policy in Morocco. This amount of 13.5 million euros is specifically earmarked for the following purposes: 7.5 million for modernisation of the coastal fleet; 1.5 million euros to the programme for definitive withdrawal of drifting gill nets, an extremely important initiative for Spain's Mediterranean fishing sector in that it removes serious obstacles to their swordfish operations; and 5 million euros for other actions involving research, restructuring of small-scale fishing, marketing, training and so forth. I would therefore like to stress that 37 per cent of the annual counterpart will go to help fisheries development in Morocco. That is a major step forward and will benefit the Spanish joint ventures that have been set up there.

I would now like to highlight the main aspects of the agreement so that you can properly judge its scope. The duration is to be four years starting on the first of March 2006, and the aggregate amount involved over the four years is 144.4 million euros. So, before I was talking about annual figures, whereas now I am giving you the global figures for the first four-year period. But unlike the previous agreement, this one is tacitly renewable for identical periods unless denounced by either of the parties. That might happen, among other causes in the event of depletion of stocks, if it were found that Community vessels were making very little use of the agreed possibilities of fishing, or in the event of failure to fulfil the undertakings made in connection with the fight against undeclared and unregulated illegal fishing.

(. . .)".

(*DSC-C*, VIII Leg., n. 349, pp. 2–4).

c) NAFO

In reply to a parliamentary question in Congress about the closing of the fishing grounds in the NAFO area, the Government reported as follows:

"In 2003 the European Community, supported by Spain, proposed a long-term recovery plan to rebuild stocks of Greenland halibut, for which purpose the biomass of the stock must achieve a certain growth level.

The assessment conducted by the NAFO Scientific Council in June 2005 indicates that the population is growing according to plan and that overfishing could endanger it or cause a deviation.

As regards closing of the fishery, then, it was estimated that Spain had exhausted its quota for 2005, and therefore it was closed on 31 August so as not to endanger recovery of the stock.

Nevertheless, the fleet may continue to operate in NAFO international waters as long as it fishes other species for which there is still quota available, for example rays, red sea bream and forkbeard, and other incidental catches.

In addition, the Spanish fisheries authority has successfully negotiated the assignment of 1000 tonnes of red sea bream by Lithuania to the Spanish fleet operating in NAFO area of capture: 800 mt in area 1F and 200 mt in area 3M. This additional quota from Lithuania is in addition to 1300 tonnes, also of red sea bream, assigned by Germany without strings, which Spain can fish in areas V and VI in Greenland waters.

As to the scientific studies on the various populations in the fishing ground, NAFO conducts annual assessments of the most vulnerable stocks such as Greenland halibut, and three-yearly assessments of other populations.

Also, following the assessment conducted in June of this year, it was agreed at the latest NAFO meeting in Tallin last September to carry on with the schedule of catches envisaged in the 2003 recovery plan.

As to the social and economic consequences, that Plan was devised fifteen years ago to mitigate the economic effects on the fleets concerned. According to the projection model, any increase with respect the TACs proposed in the plan would have caused shrinkage rather than recovery of the stocks, leading to the collapse and closure of the grounds in a matter of years.

And finally, the Government and the fisheries sector are to draw up a management plan for the fleet with a view to tailoring its operations to the fishing available for 2006, which will be forwarded to Brussels.

Madrid, 11 November 2005. – The Secretary of State for Relations with the Cortes".

(*BOCG-Congreso.D*, VIII Leg., n. 305, p. 166).

4. Ships

a) Maritime Safety

Note: See X. 3. Maritime Pollution. Maritime Safety

In reply to a parliamentary question in Congress on initiatives to promote safety and risk prevention programmes on fishing vessels, the Government reported that the Spanish Fisheries Sector Action Plan:

"... will contribute to the design and implementation of measures to improve safety aboard vessels and of crews during fishing operations, and also to the

modernisation, competitiveness and improved profitability of the sector. The Plan is to consist of a number of measures relating to analysis and assessment, along with financial support measures to meet the costs of developing and implementing the Plan.

At the same time, a Cabinet Decision of 29 April 2005 introduced a number of joint initiatives involving the Ministries of Public Works, Agriculture, Fisheries & Food and Labour & Social Affairs for the purpose of improving safety on fishing vessels. One outcome of this decision is the creation of a Working Commission of representatives of the three Departments involved. The results of those assessments of risks and the analyses of the causes most commonly affecting safety conditions in fishing operations that are conducted in implementation of the Action Plan will be remitted to the tripartite Working Commission as contributions to the objectives laid down in the decision to set up the Commission.

Also, at the initiative of the Department of the Merchant Marine, a draft regulation is currently being drawn up to deal with safety in connection with vessels less than 24 metres in length.

Having regard to the Labour and Social Security Inspection System, protocols for inspection for purposes of prevention of industrial risks have been drawn up through working groups coordinated by the Deputy Directorate-general for the Prevention of Industrial Risks and Equal Opportunities Policy, a section of the Labour and Social Security Inspection Department, differentiating between vessels more than 15 metres in length and vessels of smaller length. These protocols come with a guidebook to facilitate inspections, with the ultimate aim always of reducing the accident rate in the sector and promoting improved health and safety conditions.

And finally, we wish to highlight the work of the Marine Social Institute, as a Social Security Management Body, on safety and accident prevention on board ship with no specific distinction between the fisheries sector and the merchant marine.

1. Regulatory framework

The regulatory framework governing safety, risk prevention and improvement of working conditions for seamen, and specifically for workers on fishing vessels, is Directive No. 93/103/EC concerning the minimum safety and health requirements for work on board fishing vessels, which for specific purposes of fishing incorporates the terms of Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work.

Directive 92/29/EEC on the minimum safety and health requirements for improved medical treatment on board vessels is also fully applicable in the ambit of sea fishing.

The statutes specifically implementing these rules in Spain are the following:

– Royal Decree 1216/1997 of 18 July establishing minimum safety and health provisions for work on board fishing vessels.

– Royal Decree 258/1999 of 12 February establishing minimum conditions for health protection and medical care of seamen.

– Order PRE/930/2002 of 23 April modifying the required contents of first-aid kits on board vessels.

– Order PRE/646/2004 of 5 March establishing minimum conditions for specific health training programmes and conditions for the issuance and recognition of certificates of health training for seamen.

2. Measures that help to improve and ensure safety and risk prevention on board vessels.

Council Directive 93/103/EC of 23 November 1993 is based on the idea that compliance with the minimum standards that will assure a higher level of health and safety on board fishing vessels is essential to guarantee the safety and health of the workers concerned.

2.1. Training

One necessary, indeed essential measure to improve safety is training of workers themselves. To that end the Marine Social Institute annually implements training action plans through which it seeks to help seamen adapt better to new types of vessels, to become more familiar with safety techniques, new communications systems and so on.

The scheduled courses bearing most closely on safety and risk prevention on board, in broad terms, cover the following subjects:

– Health Training:

– Basic health training (first aid). Since not all vessels have a doctor on board, all persons taking ship are legally required to furnish evidence of health training at the compulsory basic level.

– Elementary specific health training: (first aid, basic life-saving, acting in emergencies, cardio-pulmonary resuscitation) intended for all officers on engine-room watch, and all officers, skippers and masters who have to do navigation watch on vessels that are required to carry a type C first-aid kit (sailing or fishing less than 12 miles or 24 hours from the coast).

– Advanced specific health training: (advanced nursing, first-aid kit management and remote medical consultation) intended for all officers, skippers and masters who have to do navigation watch on vessels that are required to carry a type B or C first-aid kit (more than 12 miles or 24 hours from the coast)

– Advanced specific health training: (advanced nursing, first-aid kit management and remote medical consultation) intended for all officers, skippers and masters who have to do navigation watch on vessels that are required to carry a type B or C first-aid kit (more than 12 miles or 24 hours from the coast)

– Training in prevention of industrial risks.

– Training in safety at sea.

– Training in marine communications.

Specific information on the training activity of the Marine Social Institute in

the fields of safety and risk prevention at sea and health training is supplied in the relevant annex.

2.2. Health and safety on board

– Pre-embarkation medical examinations, intended to ensure that employees board ship in the best possible physical and mental shape, that they are not suffering from any disorder that could be made worse by working at sea or that might pose a danger to the others on board.

– Assistance by the Radio-Doctor Centre, to guarantee urgent medical attention for crew members.

– Prevention campaigns:

– to raise awareness of certain risks.

– Conduct of epidemiological studies, vaccinations, disease prevention campaigns, health promotion campaigns, etc.

– Control and inspection of first-aid kits on merchant vessels.

– The On-board Health Guide.

– Verification of public health conditions on vessels.

– Technical Guide for assessment and prevention of risks relating to working conditions on board fishing vessels, published by the National Institute of Health and Safety, compiled with the help of the Marine Social Institute.

Madrid, 8 June 2005. The Secretary of State for Relations with the Cortes". (*BOCG-Congreso.D*, Leg. VIII, n. 237, pp. 274–275).

IX. INTERNATIONAL SPACES

X. ENVIRONMENT

1. In General

In response to a query raised in Congress concerning action taken within the framework of the European Union's Environmental Technology Action Plan in 2005, the Government provided the following explanation at its 8 June appearance:

"The Ministry of the Environment is drawing up a new Ministerial order on the implementation of environmental criteria for government procurement to replace the Order of 14–10–1997 based on information compiled from the different units.

We are working with the Public Procurement Advisory Board on the modification and adaptation of contract conditions for supplies and services.

We are also working on improving the energy efficiency of the *Nuevos Ministerios* complex, headquarters of the Ministries of the Environment, Labour and Public Works, bearing in mind not only the buildings and annexes but also the civil servants employed at that complex as consumers of energy in their daily work,

paying special attention to work-related travel and transportation from their homes to the workplace. Actions include energy certification of buildings with a view to reducing energy consumption and improving efficiency and the study and evaluation of the possibility of incorporating thermal and photovoltaic solar energy.

Bilateral meetings have been held with the United Kingdom to share experiences and points of view regarding drinking water treatment plants (DWTP) and especially concerning 'green purchases'.

We are active participants in the expert working groups on DWTP where they are looking into the possibility of presenting a pilot project on performance targets (draft stage) in coordination with the Ministry of Foreign Affairs and the Permanent Representation of Spain to the European Union (Sp. Acronym REPER).

A DWTP working group has been set up at the Ministry of the Environment to coordinate efforts, especially with the Ministry of Education and Science responsible for the national research programmes, as well as with other ministries for the drafting of a National Environmental Technology Plan to define the strategy for the implementation of these technologies and priority areas of action to be taken up by the rest of the administrations involved and by social and economic agents.

(. . .)".

(*BOCG-Congreso.D*, VIII Leg., n. 218, p. 87).

A query was raised concerning the Government's assessment of the United Nations Environment Programme (UNEP) and was answered in the following terms on 27 June 2005:

"In the aftermath of the Stockholm Conference on the Human Environment, Resolution 2997 (XXVII) of the UN General Assembly officially established the United Nations Environment Programme (UNEP) as the central axis of international environmental cooperation and the drafting of international treaties. The said resolution likewise established the UNEP Board of Directors as a forum where the institutional community can address emerging high-level political issues. . . . In 1992 the United Nations conference on environment and development reaffirmed the UNEP mandate as the main body focusing on the environment within the United Nations system and supported the bolstering of UNEP and its Board of Directors.

For the last several years the UNEP has been doing commendable work in the area of environmental policy and the promotion of international cooperation, enforcement of United Nations environmental programmes and the evaluation and exchange of know-how within the scientific community and the ongoing review of national and international environmental impact policies and the measures adopted by developing countries for the enforcement of environmental programmes and projects, guaranteeing the compatibility of the said programmes with the development plans and priorities of these countries.

The latest period of sessions of the Board of Directors – World Environmental Forum at the UNEP ministerial level held recently, concluded with the adoption of a series of decision among which special attention should be drawn to the need to strengthen the UNEP's scientific basis, the universality study conducted by the UNEP's Board of Directors and supported by the Spanish Government, the development of criteria on gender equality and assistance to governments concerning matters of social and economic policy for the eradication of poverty.

The Ministry of the Environment participates on a regular bases at the meetings of Member Countries and high-level meetings are also held between the Minister of the Environment and the UNEP Executive Director, Klaus Töpfer, at international and national forum meetings and at meetings organised at the initiative of the two officials.

In this context, we would stress the participation of the Delegation of the Ministry of the Environment at the 23rd period of sessions of the Board of Directors-World Environmental Forum on 21 to 25 February in Nairobi . . .

(. . .)

Worthy of mention is the Spanish intervention having regard to water and sanitation policy within the framework of Millennium Development Goal No 7 which stresses the need to put sustainability issues at the top of the political agenda to guarantee the supply of quality water and Spain's support for the adoption of a Decision concerning Water and Sanitation was repeated, highlighting a focus on rural areas, adapted technologies, gender issues and governance. The Spanish representation also supported, as co-sponsor, the motion for a Decision on gender which was proposed by the women Ministers present.

At the meeting between the Spanish delegation and the Executive Director of the UNEP, the latter was informed of the Spanish Government's decision to support the creation of a United Nations Environmental Organisation and to study an increase in our contribution in line with the indicative scale . . .

(. . .)".

(*BOCG-Congreso.D*, VIII Leg., n. 229, pp. 368–369).

On 31 October the Government also responded to a query raised in Congress concerning the social and environmental advantages of enforcing the Stockholm Convention ratified by Spain:

"The aim of the Stockholm Convention is to protect human health and the environment from persistent organic pollutants (POPs) by reducing and eliminating these pollutants when possible.

Spain ratified the Stockholm Convention on 28 May 2004 thus becoming party to it. Entry into force in Spain took place on 26 August 2004.

In order to implement the provisions of the Stockholm Convention, the European Union passed Regulation 850/2004 on POPs which entered into force for all Member States on 20 May 2004. This is linked to other legislative instruments which already partly included the Convention's obligations.

(. . .)

Both the Stockholm Convention (Art. 7) and Regulation (EC) No 850/2004 of the European Parliament and of the Council (Art. 8) call for the drawing up of a National Implementation Plan (NIP) to comply with all of the provisions laid down in these two regulatory instruments of persistent organic pollutants.

Art. 7(2) of the Stockholm Convention stipulates the need to consult with the direct stakeholders at national level for the drafting, enforcement and update of the implementation plans. Art. 8 of Regulation (EC) 850/2004 calls on Member States to give the public early and effective ways to participate in the drafting of the National Implementation Plans.

The technical implementation of the NIP should also take stock of the "Internal guidelines for the development of a National Implementation Plan of the Stockholm Convention" drawn up by the Chemical Products Department of the United Nations Environmental Programme (UNEP) and the World Bank with a view to encouraging compliance with Convention provisions.

These Guidelines provide that, to assure the participation of all relevant stakeholders, countries must appoint or constitute a National Administrative Body to take responsibility for the development and drafting of the National Implementation Plan. In addition to focusing on Convention obligations, the Guidelines also provide that the Plan must contain chapters on financial and technical assistance for developing countries.

Hence, the Ministry of the Environment . . . formed a National Coordination Group on POPs following a number of meetings with stakeholders.

The National Coordination Group is composed of experts from different sectors of industry, non-governmental environmental organisations, trade unions, consumer associations, universities and the scientific community, Autonomous Communities and the General State Administration. Procedural rules, general priorities and a schedule of actions and meetings have been agreed.

(. . .)

The National Implementation Plan is expected to be ready by May 2006, i.e. within the two-year deadline laid down in the Regulation and the Convention.

For all of the foregoing, the Ministry of the Environment holds that the enforcement of the Stockholm Convention will provide irrefutable social and environmental advantages. It will contribute to the reduction or elimination of pollution produced by these compounds and, by means of the effective operation of the National Coordination Group, will guarantee the participation of the society while raising the latter's awareness and providing ample information regarding this problem.

An additional advantage is the assurance of relevant stakeholders and hence, the consolidation and enforcement of sustainability policies for the chemical industry, an objective being pursued by the Government".

(*BOCG-Congreso.D*, VIII Leg., n. 284, pp. 239–240).

On 14th September 2005 the Minister of the Environment, Ms. Narbona Ruiz, appeared before the Senate Plenum to respond to a query relating to the actions her Ministry has undertaken or plans to undertake this year to combat desertification.

"Spain has adhered to the 1994 United Nations Convention to Combat Desertification. Despite this, Spain has yet to submit a final draft of its national programme to combat desertification which it has been working on all of these years but has not finished. The Ministry has sent an updated draft to the United Nations Secretariat so that we might have a tool which not only involves the Ministry of the Environment and the different competences of the Government, but also the Autonomous Communities which have to respond to the pressures of agriculture, urban development and forestry policy all presenting risks to the quality of our land.

In any case, the Ministry of the Environment is making a significant investment . . .

The Ministry is also conducting the national soil erosion inventory. This inventory must be updated every ten years and we therefore update five provinces annually to make erosion detection an ongoing process and to be able to assess the process followed in each area of Spain.

The Ministry also maintains a network of experimental monitoring and evaluation stations regarding erosion and desertification. We currently have 46 active experimental stations in 13 Autonomous Communities.

And lastly, the Ministry is drawing up a very detailed map of areas affected by desertification to be used as an action tool.

We hold the opinion that the fight against desertification, as well as combating climate change or the prevention and fight on pollution, are among the major environmental challenges which must be more firmly addressed in Spain and that is the reason that President Rodríguez Zapatero announced at the last President's Conference that next year's conference will focus on assessing, in conjunction with the Autonomous Communities, how to make headway with these environmental challenges, bearing in mind the structure of Spain in terms of the powers and responsibilities of each of the administrations".

(*DSS-P*, VIII Leg., n. 51, p. 2744).

2. Protection of Biodiversity

On 7 July 2005 the Government appeared before Congress to reply to a query regarding plans for the implementation of a Biodiversity Data Bank.

"The Biodiversity Data Bank (BDB) is a constantly evolving project as can be deduced by its very nature given that it is the depository of all of the georeferenced information generated by the work undertaken at the Directorate-General for Biodiversity at the Ministry of the Environment. In addition to being the depository, it is also responsible for the collection, analysis and dissemination of the information both within the aforementioned Directorate-General and to the outside. It is, therefore, one of the environmental cartography and information reference centres at national level and this is what makes it particularly relevant.

There are a series of ongoing annual projects such as the National Forest Inventory, the National Soil Erosion Inventory, the Spanish Forestry Map, the National Biodiversity Inventory, etc. which download all of the information they generate to the BDB.

As for the cartography, the BDB uses the products of the National Geographical Institute. The continuous renovation of these products means ongoing development in this connection.

And lastly, in terms of disseminating all of the cartography and information on deposit at the BDB, efforts are now under way to make it available through the Internet. While the BDB already has a cartographic server, it is being made more accessible and is to be integrated into the generic server being developed by the Ministry of the Environment to provide service to all areas of the department".

(*BOCG-Congreso.D*, VIII Leg., n. 237, p. 354).

Subsequently on 2 August, in response to a parliamentary query, the Government explained to Congress the contents of the proposal debated at the COMAR meeting held on 13 May 2005 regarding the conservation of marine biodiversity in international waters:

"(. . .)

The aim pursued by Spain is to forge ahead in the preparation of a Common Position which is consistent with the commitments made at the Johannesburg World Summit on sustainable development and in accordance with the requirements called for under international law (United Nations Convention on the Law of the Sea, the Agreement on Straddling Stocks and Highly Migratory Species and the Biodiversity Convention) and European Community law. Our aim is also to offer an integrated approach able to respond to all of the problems affecting the marine environment and the conservation of marine biodiversity.

At the COMAR meeting held on 13 May, the Member States basically examined the second draft of the Common Position drawn up by the Presidency. A third version was also distributed on an informal basis . . .

. . . Both documents are based on the premise that there is currently no legal framework suited to the conservation and sustainable use of biodiversity in areas situated beyond national jurisdiction. In light of this situation, the Presidency tabled the short-term proposal of fostering cooperation between international bodies and regional programmes, support for certain private initiatives and the implementation of urgent action which, based on the use of the best scientific information and exercise of the precautionary principle, would have a positive effect on certain harmful practices and could result in the implementation of a moratorium, limited in time and space, which would cover certain fishing activities, especially bottom trawling. Over the medium term, the Presidency proposed the adoption of an instrument by which to enforce the United Nations Convention which would be limited exclusively to the protec-

tion of biodiversity in areas outside of national jurisdiction. . . . Moreover, the President's draft would exclude mining, bioprospection and the use of genetic resources from biodiversity protection measures.

The stance taken by Spain . . . was based on an integral approach to the ecosystem which should cover marine areas, i.e. those under national jurisdiction and those beyond the control of governments, and all of the activities liable to cause them damage including fishing, mining, bioprospection and the use of genetic resources. Spain's position was based on the conviction that the existing legal framework should be completed and fully enforced, calling on all States to be responsible and fully comply with their obligations in areas under their jurisdiction and in respect of ships flying their flag. As for short-term measures, the need to bolster the role of regional fishery organisations was stressed . . . As for areas not regulated by these organisations Spain proposed, on a case-by-case basis and using the best available scientific information, to temporarily prohibit (based on the precautionary principle) all activities liable to damage the marine environment and not only certain forms of fishing. Furthermore, . . . it proposed the temporary prohibition of bottom trawling of the Atlantic, Indian and Pacific Ocean ridges. As for a long-term strategy, the Spanish delegation expressed the conviction that it appears premature to adopt an instrument of application for the 1982 Convention limited solely to the protection of biodiversity. If this option is chosen, however, it should cover all aspects of marine environment protection and not exclude any activity.

No consensus was reached at the 13 May COMAR meeting owing to the vast differences in opinion expressed by several of the delegations (Germany, the Netherlands, Belgium, Italy, Greece, United Kingdom, Sweden, France, Portugal, the Commission and Spain) in respect of different aspects of the Common Position draft".

(*BOCG-Congreso.D*, VIII Leg., n. 252, p. 592).

3. Marine Pollution. Maritime Safety

In its 4 July 2005 reply to a query raised in the Senate concerning the measures adopted or envisaged by the Government to minimise illegal dumping by European Union vessels off the coast of the Autonomous Community of Catalonia, the Government stated as follows:

"The Government of Spain, like the governments of other neighbouring States, has been unable to collect verifiable evidence of the amount of oil of any type illegally dumped in the sea by vessels given that quantification is practically impossible for two main reasons:

– These operations are generally undertaken at night or when no means of surveillance is nearby to detect them.

– Once the oil reaches the coast it is difficult to calculate what proportion of the sludge is actually oil and what part is sand, stone, etc.

Hence, the figures appearing in the media or in certain publications are speculative in nature. . . . Immediate action is taken in accordance with national and international legislation in force whenever it is possible to identify a vessel allegedly responsible for marine pollution.

As concerns prevention and combating marine pollution, the Government has begun to develop different action plans whose principal aim is to provide the State with modern and effective means for marine surveillance, the detection of possible infractions, to combat black tides at sea and to persecute possible perpetrators as provided for by national and international rules governing these matters.

The Government has been undertaking different initiatives whose purpose is to prevent and combat possible spills of pollutants in Spanish waters. The following is a summary:

– Improvement of the sea, air and electronic maritime surveillance capacity of the Rescue Service, an operational body of the Directorate-General of the Merchant Marine under the auspices of the Ministry of Public Works. These improvements have been made on a yearly basis and account for large investments in material and human resources.

(. . .)

– Increase of the activities envisaged under the collaboration agreements with the Navy, the Air Force, the Customs Patrol Service and other national and regional bodies and institutions responsible for surveillance at sea and pollution detection.

– Increase in the number of inspections at our ports . . .

– Periodic review of national pollution prevention legislation with a view to increasing efficacy.

– Impetus for parliamentary ratification of new international rules on preventing and combating pollution such as:

– Annex VI of the International MARPOL Convention 73/78 regarding the prevention of air pollution from ships.

– The International Convention on the prohibition of organotin compounds in anti-fouling paint used on ships.

– The new Protocol of the International Convention on Oil Pollution Preparedness, Response and Co-operation of 1990 (OPRC) on combating potentially dangerous toxic substance pollution other than oil (OPRC-HNS).

Moreover, work is under way to amend the National Contingency Plan for Accidental Sea Pollution in light of the accumulated experience in sea pollution since the publication of the Order on 23 February 2001 approving the said Plan. This work is based on the guidelines of the International Maritime Organisation and the Community regulations and directives passed subsequent to the publication of the 23 February 2001 Order having to do with sea pollution from ships. Consensus will be sought from the coastal Autonomous Communities in the approval of the new contingency plan in light of the latter's competences laid down in their respective Statutes of Autonomy.

The Order of 23 February 2001 makes recommendations to the Autonomous Communities in connection with the drafting of their territorial action plans in the event of sea pollution. To date, the only Autonomous Community which has developed its own Territorial Accidental Sea Pollution Contingency Plan with the help of the Directorate-General of the Merchant Marine under the Ministry of Public Works is Catalonia.

And lastly, we would point out that on 12 May 2005 the first meeting was held in the Balearic Islands on the possibility of signing an agreement for the Sub-regional Surveillance of the Western Mediterranean. This proposal was tabled by the Spanish Government and will be discussed with representatives from the governments of Italy, France and Monaco and with observers from different international organisations. The aim of the agreement is to enhance protection of the Western Mediterranean from illegal dumping from ships".

(*BOCG-Senado.I*, VIII Leg., n. 268, pp. 72–3).

Plans for the progressive elimination of single-hull oil tankers was the topic of a parliamentary query which the Government answered in the following terms in an appearance before Congress on 20 July:

"The Spanish Maritime Administration will urge the European Maritime Safety Agency, European Union body specialised, inter alia, in the prevention of sea pollution and which is responsible for the control and the drafting of a list of single-hull oil tankers affected by enforcement of the Regulation concerning the accelerated introduction of rules governing matters of double-hull or similar design for single-hull oil tankers.

It will also file a similar petition with the International Maritime Organisation (IMO) concerning tankers affected by the amendment of the Marpol Convention.

In the international arena we would refer, in addition to the Basil Convention . . . calling for compliance with its scrapping requirements in our country, to the specific regulation applicable to the scrapping or recycling of ships which, according to the IMO denomination, the United Nations organisation specialising in these matters, are the "IMO Guidelines concerning the Recycling of Ships", Resolution 962 of the 23rd General Assembly adopted on 5 December 2003 providing detailed regulations concerning all relevant aspects of ship recycling and which will be the rule of reference for the granting of authorisation for the scrapping of ships.

In this connection, the Spanish Maritime Administration will submit this issue to the European Commission so that the scrapping of Member State flag ships will conform to the aforementioned rule".

(*BOCG-Congreso.D*, VIII Leg., n. 245, p. 168).

On that same date the Government appeared before Congress to answer a question concerning the actions and resources envisaged to combat pollution of the sea, the coasts and the estuaries of Galicia:

"A concerted effort is currently being made to remedy some of the problems stemming from the Prestige accident which have not yet been fully resolved and which continue to have a negative effect on the environmental conditions of the Galician coast.

(. . .)

. . . The Ministry of the Environment, in coordination with the Centre for the Prevention and to Combat Sea and Coastal Pollution (Sp. Acronym CEPRECO), under the auspices of the Ministry of the Presidency, has deployed a surveillance device along the *Costa de la Muerte* for the elimination of waste and is simultaneously monitoring the evolution of the most affected ecosystems, specifically those included in the SIC list (sites of Community importance) along the *Costa da Morte.*

(. . .)

In certain sensitive areas where it was not possible to use hydro-cleaning devices to remove the oil clinging to rock surfaces, bioremediation techniques are being employed. This is the case of the Atlantic Islands National Park and along the rest of the Galician coastline (focusing mainly on the *Costa de Morte*) and in the Cantabrian communities under the supervision of the Institute for Marine Research of Vigo (High Council for Scientific Research, Sp. Acronym CSIC). The process is unavoidably slow but we have remained hard at work at all times. In fact, during the course of 2005, €26 million will be spent on the environmental recuperation of ecosystems.

(. . .)

Together with this recuperation and coastal protection work, other marine environment efforts have been made with a view to pollution prevention.

In this connection, we have stepped up our diplomatic efforts within the different international maritime organisations (the International Maritime Organisation, the European Maritime Safety Agency, etc.) with a view to supporting international regulatory reform in the sense of strengthening navigational requirements concerning vessel safety and maritime traffic.

Inspection measures are being strengthened for national vessels and for those calling at our ports. To this end the number of inspectors has been increased.

Maritime façades have been reinforced and harbourmasters have been provided with pollution coordinators, available means and materials have been strategically distributed and four new anti-pollution tugboats have been added to the fleet. Also, a cleanup ship provided by the European Maritime Safety Agency will be situated off our coast.

According to the information furnished by the Ministry of Public Works regarding anti pollution equipment, two multi-use rescue vessels featuring the following characteristics are currently under construction: 56 metres in length with a tug capacity of 100 tonnes and collection capacity of 300 tonnes. This ship will begin to operate next year.

This year a pollution collection vessel of the European Maritime Safety Agency will also commence operation along the Atlantic façade with a collec-

tion capacity of over 1,000 cubic metres. These vessels will be joined by a further two multi-use rescue ships in 2006: 75 metres in length with a tug capacity of 190 tonnes and collection capacity of over 100 cubic metres.

During 2005 the Merchant Marine Directorate-General of the Ministry of Public Works will engage a total of 25 people including an important number of naval and maritime inspectors with a view to increasing the number of checks and enhancing maritime transport safety. Likewise, in 2005 thirty more people will be added to the SASEMAR staff and Sea Rescue will be endowed with another crew for search and rescue missions.

As for airborne equipment for surveillance and rescue, Helimer helicopter waiting times will be shortened by having them prepared on the bases with their crews 24 hours a day. . . .

This year the aim is also to provide coverage for the south-eastern part of the Peninsula with another helicopter and in 2007–2008 air patrols will be established with fixed wing aircraft. These aircraft will be provided with recognition sensors aiding in the search and detection of pollution. We are thus implementing preventive measures which will put us on a par with other European countries.

In economic terms, the budget for the maritime safety and coast guard programme under the auspices of the Ministry of Public Works for 2005 is €140.3 million. This represents an increase of 13.6%. SASEMAR's net budget has also been increased by 25% vis-à-vis 2004 with a current budget for this public company in 2005 of €100 million".

(*BOCG-Congreso.D*, VIII Leg., n. 245, pp. 278–279).

4. Fresh Water

The measures being taken by the Government to recover the quality and ecology of Spanish rivers were the object of a Senate query. The Government responded on 1 March 2005 stating as follows:

"Ecological status is a concept which is referred to in Law 46/1999 of 13 December amending the Water Act, Law 29/1985 of 2 August concerning water planning and dumping authorisations. However, it was not until the entry into force of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 . . . that guidelines were given regarding how to assess that status. It was therefore as of that time that management took on real importance.

The principles of this Directive have been transposed into Spanish legislation via Law 62/2003 amending the consolidated text of the Water Act, Royal Decree Law 1/2001 and Royal Decree 606/2003 amending the Public Water Domain Regulation, Royal Decree 849/86.

(. . .)

The Framework Directive issues the objective of achieving a proper state for surface water by 2015 and defines this state as:

(. . .) 'the general expression of a surface water mass determined by the lowest value of its ecological state and of its chemical state'.

(. . .)

The Directive envisages five classes of ecological state based on the degree of alteration of the water mass with respect to its reference conditions: very good state, good state, moderate state, deficient state and poor state. The reference conditions (RC) are those representing the values of the ecological quality indicators of that type of water mass in a pristine state as defined in Annex V(1)(2).

(. . .)

Reference conditions cannot be the same for all water masses. Only similar water masses from an ecological standpoint will share the same reference conditions. As a result, the first step in defining the said conditions is to establish water mass types. To that end the Directive lays down two systems (A and B) described in Annex 11.1.1 and 1.2.

(. . .)

Therefore, when speaking strictly of measures to improve the ecological state of rivers, it is first necessary to define a classification system for the ecological state of water masses which includes all of the issues laid down in the Framework Directive. To this end, and as indicated in the Directive, the following series of preliminary works is under development:

– Water masses have been classified.

– The Pressure and Impact exercise laid down in Art. 5 of the Directive is under way.

– Preliminary work has begun for the establishment of Reference Conditions for each type of water mass.

– Control networks to determine ecological status by means of biological indicators are currently being implemented.

Once all of these works have been concluded within the time frame envisaged in the Directive (December 2006), a classification can be made of the ecological state of water masses and a programme can be implemented to guarantee the proper ecological state of water masses which, in accordance with the Directive, must be functional before December 2009.

Strictly speaking, therefore, we still do not know the ecological state of our water masses, meaning that the measures to be implemented within the context of the Framework Directive are still not operational. However, a great many administrative initiatives have been undertaken which can perfectly be considered beneficial to the ecological state of rivers. The following is a summary of those initiatives:

Measures for the control and monitoring of water quality (control networks)

The main instrument used to monitor and for surveillance of the state of inland water masses is the water quality control network.

Today there are networks for the control of surface water and for the control of ground water. These networks are designed to control water use, to evaluate compliance with the law and to monitor the evolution of overall quality.

(. . .)

Measures to control dumping

– New dumping management legislation.

– Implementation of the figure of collaborating entities based on compliance with standard UNE-EN ISO/IEC 17025 (in replacement of Collaborating Enterprises of the basin Organisation) to support dumping control.

– In support of all of the initiatives related to dumping, a "Waste water management handbook" is being compiled.

– Improvement in the quality of urban waste – National Sanitation and Sewage Treatment Scheme.

(. . .)

– Measures to control priority substances.

(. . .)

– Voluntary agreements. Voluntary agreements with industrial sectors have proven to be an effective instrument in the development of pollution reduction programmes.

(. . .)

In summary, strictly speaking the ecological state of Spain's rivers is unknown owing to the fact that the tools needed to make this determination are currently being developed in accordance with the specifications laid down in the Framework Directive on Water. However, the Government has undertaken a great many initiatives whose aim is to enhance the quality of our rivers as I have just outlined".

(*BOCG-Senado.I*, VIII Leg., n. 186 pp. 79–82).

5. Climate Change

On 7 January 2005 the Government stated as follows in an appearance before the Senate to respond to a query concerning measures taken to refocus energy policy and reduce greenhouse gas emissions in compliance with the Kyoto Protocol:

"The Ministry of Industry, Tourism and Trade is reviewing and updating the different energy plans, especially the Plan to Foster Renewable Energies 2000–2010 and the Spanish Energy Savings and Efficiency Scheme 2004–2012 (E4) to better adapt energy use and reduce greenhouse gases in compliance with the Kyoto Protocol.

This revision is based on the following activities:

a) The fostering of renewable energies . . . Development of renewable energy sources is one of the key aspects of our national energy policy due to its efficient contribution in reducing greenhouse gas emissions.

b) Encouragement for energy savings and efficiency mechanisms which comply with the objectives of the revision of the Spanish Energy Savings and Efficiency Scheme (E4) . . .

c) Clear support for development and research into non-conventional forms of energy, fostering better use of factors and improvement in processes and products through entrepreneurial development and innovation.

> Moreover, and included in the plans under way, an important change is taking place in the technological structure of electricity generation with a significant rise in installed power and natural gas production (combined cycle and cogeneration) and renewable energies. This trend also implies a reduction in greenhouse gas emissions".
>
> (*BOCG-Senado.I*, VIII Leg., n. 151, p. 144).

Subsequently, on 14 September in reply to a query at the Congress Plenum, the Minister for the Environment, Ms. Narbona Ruiz, referred to the climate change talks at the Council of Ministers of the Environment of the European Union held on 24 June:

> "We unanimously agreed that [the forthcoming meeting of the UN Climate Change Convention to be held in Montreal] will be the time to commence negotiations with other countries around the world concerning the framework for combating climate change beyond 2012. We are convinced that talks should commence with the large nations which have still not committed to a reduction in greenhouse gases because the problem of climate change is already having a profound effect on the safety and living conditions of our planet. Therefore, swift action must be taken. If business investments decisions are to be taken today concerning a transformation of the energy model on a world scale, we must provide a framework of certainty from a legal and institutional point of view which extends beyond the year 2012. There was unanimous agreement on this point, . . . and I promised to negotiate with the countries of Latin America. Next week in Panama, at the Latin American forum of Ministers of the Environment, I will have the opportunity to make further headway in the task which was begun last year with the creation of a Latin American network of climate change offices with the establishment of memorandums and the task of establishing the conditions under which those countries which currently have made no commitment to freeze or reduce greenhouse gas emissions will reconsider their positions. You will also recall that the European Council has carefully laid down the principles by which to advance beyond 2012 within a sufficiently flexible and balanced framework so that the distribution of responsibilities among the different nations of the world is in tune with their capacity and level of economic development".
>
> (*DSC-P*, VIII Leg., n. 109, p. 5494).

Also on 3 October, the Minister for the Environment appeared before the Senate Environmental Commission to respond to a query concerning the Government's outlook in terms of collaborating with the Town Halls to comply with the Kyoto Protocol. The Minister responded in the following terms:

> ". . . We must be capable of devising environmental polices at all three levels of government, each one within the framework of its competences. Oftentimes the Ministry of the Environment is unable to intervene directly in what is clearly the jurisdiction of another administration. Therefore, in the specific case

of the Town Halls, we have established institutional collaboration with the Spanish Federation of Municipalities and Provinces which forms part of all of the consultation and advisory bodies of the Ministry of the Environment. . . .

Specifically in terms of compliance with the Kyoto Protocol . . ., the first decision taken was to encourage a Spanish network of pro-climate cities in accordance with the Spanish Federation of Municipalities and Provinces with a view to setting up a framework of collaboration and support and to drive the policies developed by the Town Halls within the limits of their jurisdiction such as transport, energy usage in municipal buildings, street lighting, etc. So work is being done in that connection. The Spanish Network of Pro-climate Cities was launched and now has 109 members accounting for approximately 15 million citizens living within those municipalities. . . .

An urban waste management handbook is also being compiled with the focus that you mentioned of recommending technologies and solutions to reduce methane emissions...

. . . All of the Town Halls which have voluntarily joined this network have committed to undertaking a series of tasks which have to be evaluated by means of indicators and results must be controllable by the citizenry through open participation forums.

Moreover, the Government has approved a new renewable energy plan for the distinct purpose of intensely encouraging renewable energies, especially those related to biomass. Here at the Ministry of the Environment, together with the Ministry of Industry and the Ministry of Agriculture, we are working to encourage an increase in the use of bio fuels in Spain, . . .

And of course, in addition to all of the foregoing, the Ministry is trying to encourage the participation of individual Town Halls in the whole series of subsidies focused on promoting research and technological development in the area of the environment.

(. . .)".

(*DSS-C*, VIII Leg., n. 208, pp. 8–9).

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

1. Development Cooperation

a) General Lines

The Secretary of State for International Cooperation, Mrs. Pajín Iraola, appearing before the Commission for International Development Cooperation of the Congress to inform regarding the general lines of action of the Spanish Cooperation Master Plan for the period 2005–2008, stated as follows:

"(. . .)

The Master Plan is drawn up in accordance with a mandate of the Cooperation Act 23/1998, . . . Approval has been given for a commitment shared by the United Nations organisations, the Organization for Economic Cooperation and Development (OECD) and the Bretton Woods institutions, the World Bank and the International Monetary Fund and also by a growing number of countries from both the North and South. This change is due to the acceptance, by almost all of the beneficiary and donor countries, of the Millennium Declaration, its objectives, goals and indicators and the adaptation of their cooperation systems to this agenda. With this Master Plan the Government seeks to contribute more and more efficiently to this agenda . . . I should also point out that the millennium development goals focus on the entire international community, North and South, and address some of the many dimensions of poverty and its effect on the lives of individuals with its sights set on the year 2015.

What is the ultimate objective of the Master Plan for cooperation? . . . The fight against poverty, defined as the lack of opportunity and options to support a dignified standard of living. . . . In this way Spanish cooperation seeks to contribute to the process of broadening opportunities for which the capacities and freedoms of disadvantaged persons must be enhanced meaning that we must focus attention on the different factors which affect processes of social change. . . . First of all, the Government has committed a sum for Official Development Assistance. The increase envisaged in the 2005 budget will enable Official Development Assistance to reach 0.3% of GDP this year. . . . This also puts us on the path to meeting the commitment made by the Government to double the percentage of Official Development Assistance with respect to GDP during the course of this legislative period until reaching 0.5% of GDP in the 2008 budget as stipulated in this Master Plan . . .

(. . .)

. . . It is the duty of the Secretary of State for International Cooperation and of the Community of Donors, in addition to providing the resources needed for sufficient, high-quality cooperation, to assure that it is useful in combating poverty and the promotion of sustainable human development by using it wisely and improving efficiency and impact.

. . . First of all, strengthening of planning, management and evaluation processes; secondly, the programming of assistance through sector-specific strategies, country strategies and annual cooperation schemes implementing the priorities set out in the Master Plan and defining cooperation interventions; thirdly, participatory and systematic evaluation focusing on the measurement of results and impact and on the incorporation of what we could call lessons learned; and fourthly, the complementary nature of the use of cooperation instruments and the careful incorporation of new instruments related to sector-specific approaches. Together with this, the third major challenge facing Spanish cooperation which this Master Plan seeks to address is the consistency of public policies with the aim of development. . . . The philosophy underlying the Master Plan is one of

co-responsibility and association with the national development strategies designed by the beneficiary countries in constructive dialogue with the donor countries.

. . . As for geographical priorities, . . . Spain will prioritize the least economically and socially developed countries of Latin America, the Arab nations and the Middle East. It will likewise assist those countries least developed economically and socially and the WFP to which it will earmark at least 20% of its Official Development Assistance. It will also meet the needs of the least economically and socially developed countries which have special ties of an historic or cultural nature.

The plan thus establishes three categories of Spanish cooperation beneficiary countries with different definitions and objectives: first of all, the priority countries. The priority countries are those where the greatest volume of Spanish cooperation resources are concentrated . . . The following are the priority areas and countries. In Latin America: Honduras, Nicaragua, El Salvador, Guatemala, Haiti, the Dominican Republic, Paraguay, Bolivia, Peru and Ecuador; in the Maghreb and Middle and Near East: Algeria, Morocco, Mauritania, Tunisia, the Sahrawi population and the Palestinian Territories; in Sub-Saharan Africa: Mozambique, Angola, Namibia, Senegal and Cape Verde; and in Asia and the Pacific: Philippines and Vietnam. The second classification are what are known as the "special attention" countries. The purpose of this second classification is to group countries or regions with special circumstances either due to the need to prevent conflicts or contribute to peace-building efforts or owing to a lack of respect for human rights and the democratic system or, as is the case in Southeast Asia, due to crises arising from natural disasters which have had a great impact on the most disadvantaged sectors of the population . . . The following are countries receiving special attention. In Latin America and the Caribbean: Cuba; in South America: Colombia; in the Middle East: Iraq, Lebanon and Syria; in Sub-Saharan Africa: Ethiopia, Sudan, Congo, Equatorial Guinea and Guinea Bissau; in Asia and the Pacific: East Timor, Afghanistan, Cambodia and the Southeast Asian countries which suffered the consequences of the 2004 tsunami; in Central and Eastern Europe: Bosnia and Herzegovina and Albania. And lastly we have the preferential countries. This category includes the countries of preferential geographical areas not included among the priorities and countries, large or not, which depend on assistance and where there are sectors of the population with low economic and social development. These countries will be given specific attention focused on the least developed geographical areas and social sectors. In this category in Central America we find: Costa Rica and Mexico; in the rest of Latin America: Brazil, Chile, Venezuela, Panama, Argentina and Uruguay; and finally, we have Egypt and Jordan, South Africa, Sao Tome and Principe, Bangladesh and China; and in Central and Eastern Europe we have those low-middle income countries which are EU candidate countries and may require some specific assistance . . . and in the framework of the stability pact for South-eastern Europe.

I would like to highlight two key issues regarding geographical priorities. First of all, the subsequent annual international cooperation plans could reconsider the countries included in any one of the three classifications based on possible changing circumstances. This Master Plan is and must be a flexible instrument.

. . . As an overarching objective, approximately 20% of Spanish Official Development Assistance is earmarked for basic social sectors such as health and education. . . .

In addition to these sector-specific strategies, I would like to provide further details on the so-called horizontal or transversal priorities . . . In this connection, the fight on poverty will be a horizontal priority of Spanish cooperation followed by the defence of human rights. The horizontal approach to human rights and democratic participation calls for the will to fortify these in each and every one of the initiatives and actions of Spanish cooperation.

This integration refers to civil and political rights as well as economic, social and cultural ones. Spanish cooperation will focus on three aspects in the integration of human rights: First of all, on the analysis of the context and the status of human rights prior to the formulation and identification of the projects; secondly, on the assessment of the potential positive or negative effect of all actions or initiatives on the pre-existing human rights situation; and thirdly, on monitoring and evaluating programmes and projects. The third priority is that of equal opportunity between women and men . . .

The next transversal strategy is defence of the environment. The Master Plan prioritises environmental sustainability and to that end it is necessary to integrate the environment and the management and use of natural resources into all initiatives designed to achieve other objectives. Recognition must also be given to the key role that natural resources play in achieving the millennium development goals. . . .

The 1st horizontal or transversal strategy is respect for cultural diversity. . . . Cultural freedom and the right to diversity are a fundamental part of human development because there is no doubt that to live a full life it is important to be able to choose one's own identity without losing respect for others or being excluded from other alternatives. The Master Plan has also been inspired by the Unesco Declaration where recognition of cultural diversity is an ethical imperative inseparable from respect for personal dignity . . .

Another fundamental aspect of the Master Plan is multilateralism. This chapter bestows fundamental importance on cooperation, both quantitatively and qualitatively speaking. . . .

(. . .)

. . . Spanish cooperation's humanitarian actions are focused on disaster victims of all types with the objective of meeting their basic needs, establishing their rights and guaranteeing their protection. From this basic approach, the plan points out that the objective will be to close the gap with the average donor of the OECD's Development Assistance Committee, reaching the 7% level for official bilateral assistance by the end of this legislative period . . .

(. . .)

And lastly, I would like to refer to a new area which is receiving the special attention of all players, i.e. the chapter on education and awareness heightening. Summing up, I would like to underscore the strategic pillars of this Master Plan in achieving its ultimate objective which is the eradication of poverty. In this Plan it is very important to foster consensus among the players; secondly, to promote consistency in terms of policies; thirdly to coordinate and harmonise with other donors; fourthly, sector and geographical concentration; the fifth pillar is to increase the amount of ODA and lastly to improve the quality of assistance.

(. . .)".

(*DSC-C*, VIII Leg., n. 179, pp. 2–9).

In his appearance before the Foreign Affairs Commission of the Congress to address the results of the XV Ibero-American Summit of Heads of State and Government held on 14–15th October 2005 in the city of Salamanca, the Minister of Foreign Affairs and Cooperation, Mr. Moratinos Cuyaubé, stated that:

". . . The Government feels that the outcome was extremely positive and we should all be proud of that. The XV Latin American Summit . . . represented an important step forward in consolidating the Ibero-American area and in fostering the multilateral system which we established three lustrums ago to fortify closeness and cooperation between our countries. I would first of all like to highlight the high degree of attendance. . . . Seventeen heads of State participated. We also had the presence of the Secretary-General of the United Nations, Mr. Kofi Annan and the three major personalities of the European Union, the President of the Parliament, the President of the Commission and the High Representative and Secretary of the Council, as well as the Secretary-General of the OAS. . . .

(. . .)

. . . Some of the major topics discussed were the socioeconomic reality of the community and the challenges it faces, Latin American migration and the international projection of the Latin American Community of Nations.

. . . Firstly, having regard to the challenges deriving from the socioeconomic reality facing our countries and the need to bolster democracy as a fundamental factor promoting cohesion within the Latin American region, the leaders entrusted the Ibero-American General Secretariat, within the framework of the millennium development goals, to monitor a series of agreements set out in the declaration whose purpose is institutional strengthening, social cohesion and sustainable development in economies which are being further punished by today's energy crisis. The second block, the phenomenon of Latin American migration, . . ., has a decisive effect on the political, economic and social makeup of our societies. Rationalisation of this migration and the need to approach it in a positive manner in the interest of the host societies and of the groups of immigrants gave rise to a commitment on the part of the Latin

America leaders to coordinate common policies for the channelling and orderly treatment of migratory flows and to implement other measures which are explicitly laid down in the declaration. To make headway in all of these objectives, the Secretariat-General was entrusted with the preparation and calling of a Latin American meeting focusing on migration in support of the preparation of and subscription to a Latin American agreement on Social Security.

The third main topic, focusing on the international projection of the Latin American community, was based on the realisation of the great potential of our community as an active partner in the international arena which can strengthen an effective sort of multilateralism capable of contributing to peace, development and the defence of international law . . .

. . . One of Spain's objectives at this summit was to promote maximum interest and involvement of the civil society in the Latin American summits . . .

Other issues were discussed at the summit. . . . I would like to mention the impetus given to the creation of a Latin American area of knowledge. In this connection, the Secretariat-General for Latin America was entrusted with presenting the Member States with a Latin American literacy scheme to eradicate illiteracy between 2008 and 2015, this latter date being the deadline. Also of great importance was the decision to draw up a cultural charter for Latin America with a view to contributing to the consolidation of the Latin American area. The decision was taken to create a Latin American cooperation network for health-care which would cover issues ranging from transplants to the fight against tobacco addiction. The Summit also highlighted the importance of the regulation adopted to implement the Latin American judicial cooperation network . . .

Sixteen special communiqués were also passed covering diverse subjects and reflecting leaders' concerns. . . . The special communiqué referring to the economic, commercial and financial blockade of Cuba by the United States is one which was repeated in previous summits of heads of State and Government and contains 13 resolutions approved by the United Nations General Assembly. . . .

Another special communiqué refers to support for the fight against terrorism. . . . The 22 Latin American countries reaffirmed their commitment to combat terrorism and the need to prevent impunity in respect of these crimes. The value of extradition as an instrument to prevent this from taking place was likewise stressed.

(. . .)".

(*DSC-C*, VIII Leg., n. 401, pp. 2–3).

For his part, the Secretary of State for Foreign Affairs and Latin America, Mr. León Gross, in an appearance before the Foreign Affairs Commission of the Congress to report on the Barcelona Process and the Euro-Mediterranean Summit held on 27–28 November 2005 in the city of Barcelona, stated that:

". . . The Euro-Mediterranean Process has, since its advent at the end of the 80's and naturally since its launching in 1995, been one of the priority axes of

Spain's action abroad and of the Common Foreign and Security Policy of the European Union . . .

(. . .)

The impressive turnout on the part of our European partners represents very significant support for the Euro-Mediterranean partnership, making relations with the region a strategic priority for Europe as a whole and not only for the Southern European countries.

. . . It would behove us all to recall that the Barcelona Process continues to be the only forum which brings all of the region's players together, that it is the main framework for political and economic relations, social dialogue and regional cooperation and that the active participation of Israel and the Palestine Authority bears witness to its integrating capacity.

. . . I would now like to assess three documents which are the fruit of the Barcelona Summit: The Chairman's declaration, the action plant for the next five years and the code of conduct against terrorism. All of these documents were passed by consensus. No exceptional difficulties were encountered in negotiating these documents in the Euro-Mediterranean context despite, on this occasion, the extremely complex situation in the Near East. The political declaration, . . . At Barcelona, in addition to renewing the political commitment for Euro-Mediterranean partnership and reaffirming its general objectives, commitments and concrete proposals were made in the three traditional ambits – political, social and economic – and, as mentioned earlier, a new one: joint management of migratory flows.

The five-year action plan contains very broad measures and is more ambitious and to the point and renews the urgency of the Barcelona Process. Not intending to cover all points, . . . The agreement to liberalise trade in the agricultural sectors and services, with the commitment to immediately initiate a first negotiating round with a view to being able to conclude the new agreements before the end of 2006, a fundamental step in achieving the proclaimed objective of creating, by 2010 a Euro-Mediterranean free trade area; the commitment to raise standards in electoral processes, an objective which will be accompanied by technical assistance from the European Union; the objectives concerning matters of education, including the commitment to provide all children with access to at least a minimum standard of education and to cut the current illiteracy rate in half by 2015; the launching by the European Investment Bank of a budget line of €1.5 billion to support private investment in the region; the creation of the governance facility, . . . to support and accompany political reform processes taking place in countries of the region for a total of €1 billion. Spain is especially interested in the new chapter on migrations which, in addition to agreeing to hold a meeting at the ministerial level, sets up a global approach and strengthens the fight against illegal immigration through the signing of readmission agreements and border control.

Specific mention should be made of renewed cooperation in the fight on terrorism through the code of conduct which has the undeniable value of being

the first agreed document in this regard between the European Union, the Arab countries and Muslims of the Mediterranean coast and Israel . . . The code of conduct calls for a message of unity, commitment and firmness in the face of terrorism in each and every one of its manifestations as a threat to the lives of citizens and the open practice of the most fundamental rights and freedoms, directly and arbitrarily infringed by terrorism. It fully condemns terrorism independent of any religion, country or culture. It acknowledges the need to provide support and assistance to the victims of terrorism . . ., and establishes the fundamental lines of work and the benchmarks on which sights for future anti-terrorist cooperation should be set within the framework of the Barcelona Process; . . .

(. . .)".

(*DSS-C*, VIII Leg., n. 458, pp. 3–5).

b) Alliance Against Hunger: Millennium Summit

Note: See XI.1.*a) General Lines*

The Minister of Foreign Affairs and Cooperation, Mr. Moratinos Cuyaubé, in an appearance before the Commission for International Development Cooperation of the Congress to address Spanish policy in the light of the Millennium Summit, stated that:

"(. . .)

. . . Spain has fully accepted that the eradication of poverty must be a permanent and fundamental reference of its development cooperation policy and an essential pillar of its foreign policy . . . . and this is based on two reasons. First of all, ethical and moral reasons. . . . The fight on poverty is also vital if we expect to preserve global well-being, peace and security owing to the intricate interdependence characterising our world. . . . Development is the most important tool of all in achieving peace and preventing conflict. There are global public assets such as peace and security or the preservation of the environment whose protection is the responsibility of all members of the global community, especially the public authorities, i.e. governments and multilateral organisations.

The second pillar of our work is to raise the level of Official Development Assistance. . . . For developed countries such as Spain, objective 8 of the Millennium Declaration is especially significant . . .

The third pillar of our work is the quality of assistance . . . ., and in this connection, the principle criteria are planning and evaluation, coordination, efficiency and the complementary nature of our cooperation policies . . .

The fourth pillar which we have been working on during this last year is policy consistency. . . .

And lastly, we have been trying to give decided impetus to Spain's active participation in the international arena . . .

. . . It is in that spirit that we arrived at the United Nations summit to review the Millennium Declaration and whose results I will now analyse . . . The recent

United Nations summit was called for the purpose of reviewing the year 2000 Millennium Declaration and to analyse the most effective way to move forward in achieving those objectives. The Summit's final declaration addresses the major challenges that we, the international community as a whole, have identified and contains positive aspects consolidating what has already been agreed or introducing new content. The summit has once again put at the centre of the international agenda the major themes which were cast aside in the aftermath of the dramatic events of 11 September 2001 . . . The summit has drawn attention to the fact that reform of the UN multilateral system, peace and security, human rights and development are issues which are intimately and deeply interwoven. The summit's final declaration proclaims that development is the main objective in and of itself and, in this respect, underscores the firm determination to guarantee the full undertaking over time of the millennium development goals and the commitment to eradicate poverty and promote sustainable development, highlighting the need for urgent measures on all fronts, including more ambitious national strategies and initiatives backed by greater international support.

And lastly, I would like to highlight that the final declaration makes special mention of parliamentary and civil society participation in all of these issues . . . (. . .)".

(*DSC-C*, VIII Leg., n. 389, pp. 2–5).

2. Assistance to Developing Countries

Note: See XI.1.*a) General lines* and XI.3 Terrorism

a) Latin America

The Secretary of State for Foreign Affairs and Latin America, Mr. León Gross, in an appearance before the Foreign Affairs Commission of the Congress to report on the current state of relations between Spain and Latin America, stated as follows:

"Latin America today is a mixture of risk and hope. . . . Reasons for optimism include the fact that representative democracy is the most widespread model of Government in the region with very few exceptions. A concerted effort has been made towards the goals of integration and interregional cooperation. Moreover, in a world in which energy resources are becoming increasingly important as a factor of development, Latin America appears to be particularly well situated. To this we must add invaluable human resources, but there are also risks and shadows which currently may be in the forefront. . . .

An initial series of problems has to do with the weakness of democratic institutions. They are institutions which, to begin with, are facing serious difficulties inspiring respect among a long series of *de facto* powers ranging from the Armed Forces, although today these are a diminishing in power . . . In some cases, bilateral conflict is growing in the region due to unresolved past

territorial disputes such as the case of Bolivia and Chile or to conflicts relating to the harnessing of energy involving Argentina and Chile and once again Bolivia and Chile. There are also political factors which fan the fires of conflict such as the distrust surrounding Chavez in Venezuela . . . or the difficult relations between Cuba and Mexico and some countries of Central America or the distrust on the part of Mexico or Buenos Aires concerning Brazil's pretension to assume a degree of regional leadership.

On the economic front, growth over the last several years has not managed to conceal a worsening of the two principal evils affecting the region: poverty and inequality. . . . According to recent World Bank figures, the richest 10% of the Latin American population controls 48% of the wealth while the poorest 10% barely has access to 1.6% of the wealth, i.e. thirty times less. . . .

And Latin America's leadership role in the world has eroded . . . While it is true that some of its members have strengthened their role, it is equally true that as a region and the majority of its components have lost relative influence and are unable to attract the attention of political leaders or investors.

The Latin American policy which the Government has implemented in the first year of its mandate seeks, first and foremost, to defend our economic and business interests in the region and to bolster the international role of Latin Americans which will also have the effect of strengthening our role in the world. . . . We have done this in the domestic crises of Ecuador and Bolivia as well as in the dispute between Colombia and Venezuela and at the quadripartite summit held in the city of Guyana last March. We have also implemented triangular judicial cooperation mechanisms which have contributed to the alleviation of certain tensions. . . . the fight against poverty and inequality is another of our policy priorities. We play a leading role in the so-called initiative to end hunger. We are also working on fostering social responsibility policies on the part of our businesses trying to get Spanish investment in Latin America to contribute to the search for sustainable development models and a reduction in poverty and inequality. . . . We are also making an important effort to overcome the risk of Latin American isolation by contributing to its recovery of a relevant role in the international arena. To this end the Government is working along two lines. First of all by maintaining permanent support for the consolidation of regional integration processes such as Mercosur, the Andean Community, the Central American integration system and the establishment of a solid relationship between the European Union and those different various processes or mechanisms. We are making painstaking headway in re-awakening Europe's interest in the Latin American region and we hope that the forthcoming European Union – Latin America and the Caribbean summit to be held in Vienna en 2006 will bear witness to that effort.

Secondly, the Government is planning to promote the Latin American summit process . . .

Another facet of our Latin American policy is the defence and promotion of our region-wide economic interests, investments and trade. . . . It is our desire

to have a close relationship based on trust with all of the region's nations. Of course, not all of the relations will be the same and we have already identified some countries with which we would like to develop a strategic relation which today are Argentina, Chile, Mexico and Brazil, but this list is not closed . . . We will, in no case, close channels of communication with any Latin American nation and, in this connection, we have re-established communication with countries with which channels had been closed, which is the case of Cuba, or in a poor state as with Venezuela. . . .

With regard to Cuba, we have been instrumental in getting the European Union, and not only Spain, to re-establish broken channels of communication thanks to the calls made by the European Union in July 2003 . . .

As for Venezuela, we have re-established a close relationship which, over the last several years, had deteriorated to the point of hardly any communication whatsoever. . . . We believe that dialogue, rather than isolation and condemnation, is the best way to contribute to the strengthening of democratic Venezuelan institutionality and to encourage the Venezuelan regime to respect international legality and to contribute to stability and cooperation in the region. . . .

(. . .)".

(*DSC-C*, VIII Leg., n. 319, pp. 3–6).

The Government, in response to a parliamentary query raised in Congress with respect to actions being implemented to strengthen bilateral relations between Spain and the Latin American countries, stated as follows:

"The major objectives or guidelines of the Government's Latin American policy are:

1. The creation of a climate of trust, closeness and partnership by multiplying frequent contacts at all levels.

2. The strengthening of democratic institutions and party systems to face the challenge of populism.

3. A firm commitment to the fight on poverty, hunger and inequality throughout the region through, in addition to many other instruments:

– Increase in the resources earmarked by Spain for development cooperation.

– Support for just causes in Latin America at international financial institutions.

– Participation in initiatives such as the quartet against hunger".

– Support for regional or subregional integration processes and bolstering of cooperation mechanisms between these and the EU.

4. Pursuit of dialogue and multilateralism as mechanisms by which to take on different challenges.

Since coming into office, the Government has made numerous efforts in this connection.

1. The President of the Government as well as the Minister of Foreign Affairs and Cooperation have made a concerted effort to intensify contacts. . . .

2. The essence of the message transmitted in these trips, both in public and in private, is Spanish support for democratic institutions and processes and our rejection of populist movements emerging throughout the region. . . .

3. By the end of this legislative period, the Government plans to have doubled the volume of resources earmarked for development cooperation and intends to maintain the percentage allocated to Latin America (in the vicinity of 50%). The 2005 budgets are already a step in that direction.

Moreover, Spain has supported the stance taken by Latin American countries (Argentina, Dominican Republic) in their negotiations with the IMF and the Paris Club and will continue to encourage the conclusion of Association Agreements between the EU and MERCOSUR (in the final stages), the Andean Community and Central America.

The President of the Government has been one of the advocates (along with the Presidents of France, Brazil and Chile) of the "Anti-hunger initiative" with global ambitions but which will have a particularly important impact in Latin America.

4. The Government intends to encourage cooperation throughout Latin America with a view to making the Latin American Community an important player in multilateral dialogue by taking on the role expected of it in the world.

The final push in this effort is the creation of a Secretariat-General for Latin America. The Government is working hard and will continue to work even harder to make the forthcoming Salamanca Summit the beginning of a new stage characterised by specific agreements on economic, cultural, educational, legal, development cooperation and political collaboration issues".

(*BOCG-Congreso.D*, VIII Leg., n. 193, pp. 127–128).

b) Western Mediterranean

Note: See XI.3 Immigration

In response to parliamentary query posed in Congress with respect to action taken to deepen relations with Morocco and plans for the future, the Government reported that:

"Relations with Morocco are a foreign policy priority for Spain and it is the Government's will to put them at the proper level establishing suitable channels of communication allowing for the development of a global relationship based on a spirit of mutual understanding and trust. It is the Government's wish to enrich bilateral dialogue, extending it to all matters of interest for the two neighbouring countries and, to that end, spreading this dialogue to relations at all levels of the Administration, including the promotion of economic relations, stimulating contact between civil societies and the inclusion of cultural and educational domains.

(. . .)

The following examples bear witness to this global policy:

1. In the political arena . . .

(. . .)

2. Spanish initiatives towards Morocco also play a vital role within the framework of the European Union where the Association Agreement is under development. This important instrument will enable Morocco to incorporate and take advantage of all of the Community acquis . . . by means of a forward-looking statute. . . .

3. In the sphere of development and cultural cooperation, a bilateral cooperation effort . . .

In respect of culture, . . . the Averróes Committee has been revitalised with a view to giving new impetus to relations between the two countries' civil societies and the *Universidad de los Dos Reyes* is currently being created under the management of the Spanish-Moroccan Joint Commission.

In this connection, the signing of a new cultural and cooperation partnership agreement between Spain and Morocco is being studied together with a headquarters agreement and a cooperation statute to facilitate the work of our cooperation in Morocco.

4. In the area of economy and trade, Morocco is Spain's main customer and supplier in the Maghreb. Data from the period January-November 2004 indicate exports valued at €1.97 billion which is an increase of . . .

(. . .)

5. As for immigration, direct contacts between responsible officials from the two nations has led to an intensification of already existing collaboration especially concerning control of the departure of illegal immigrants to Spain. Morocco has stepped up surveillance of its coastline and the number of joint sea patrols has increased. This experience has been especially positive in the Atlantic and these results are expected to be repeated in the Mediterranean which has been the focus of attention since September 2004.

(. . .)

6. In the field of Defence, on the occasion of the IV meeting of the Joint Committee, military cooperation with Spain was increased . . .

7. In the area of judicial cooperation regarding domestic issues, . . .

As for cooperation in the fight against and prevention of terrorism, the mechanisms set up in May 2004 have been operating satisfactorily giving rise to joint police operations.

8. Support for candidacies in International Organisations: . . . Morocco has supported candidacies which are very important for Spain such as the city of Zaragoza for the 2008 World's Fair.

(. . .)".

(*BOCG-Congreso.D*, VIII Leg., n. 252, pp. 321–323).

Also in response to a Parliamentary query posed in Congress regarding co-development projects undertaken in 2004 and 2005 in Morocco, the Government responded as follows:

"In accordance with the 2005–2008 Master Plan, co-development policy will be consistent with the policies defined by the Ministry of Labour and Social Affairs and specifically by the Secretariat of State for Immigration and Emigration in coordination with other Administrations and cooperation agents. The homologation of a multilateral model based on the study of migratory flows will be addressed as a source of wealth for countries of origin and destination and for co-development as an area of multicultural and transnational action. Therefore, lines of action include fostering development at origin through economic stimulation, support for small enterprise and bolstering of the productive sectors; encouraging participation of immigrants in co-development strategies in coordination with immigrant associations in Spain as a way to foster integration; involvement of immigrants as agents of development and contributors to the social, economic and cultural advancement of their countries of origin; design of a dignified and sustainable return model including vocational and business training measures, economic support (microcredits or other financial instruments) and guidelines regarding the feasibility of the socio-productive initiatives proposed for the development of countries at origin; promotion of the rational use of remittances, channelling of foreign currency and favourable financial products, fostering information and advisory initiatives focusing on immigrants in this area.

Spanish cooperation will initially put a priority on co-development action in two countries which are enormously important owing to the volume of immigration to Spain: . . . To that end, the Moroccan Country Strategy Document will define an intervention strategy so as to be able to initiate projects of this nature".

(*BOCG.Congreso.D*, VIII Leg., n. 276, pp. 288–289).

c) Africa

In response to a parliamentary query posed in Congress on the political basis for cancelling the external debt of Senegal and Equatorial Guinea, the Government responded in the following terms:

"1. Cancellation of €9.33 million in the case of Senegal:

Cancellation of this debt was the result of the debt treatment agreed for Senegal by the Paris Club – with the participation of Spain – at its June 2004 session. This treatment was agreed in compliance with the commitments made by the member countries of the Paris Club within the framework of the HIPC initiative to alleviate the burden of debt on heavily indebted poor countries.

(. . .)

2. Cancellation of 9.8 million US dollars in the case of Equatorial Guinea:

This debt was cancelled in compliance with the commitments acquired through the "Agreement between Spain and Equatorial Guinea on matters of external debt". This agreement was signed on 17.06.03 and served to settle a dispute for default on payment by Equatorial Guinea dating back to the 80's

and which had frozen economic and trade relations between Spain and Equatorial Guinea for close to 20 years. The total volume of default on payment was €69 million including different categories of debt.

(. . .)".

(*BOCG-Congreso.D*, VIII Leg., n. 152, pp. 407–408).

With reference to commitments made concerning the reconstruction of Sudan the Government, in response to a Parliamentary query raised in Congress, reported that:

"At the Donor's Conference for Sudan held in April in Oslo for the purpose of procuring the financing needed to reconstruct the country in the aftermath of the peace accord between Jartum and the South, Spain offered support in the amount of €30 million for the triennial 2005–2007.

This commitment is additional to Spanish assistance for the Darfur crisis channelled through the Autonomous Communities and through projects funded by the Spanish International Cooperation Agency and implemented by NGOs and multilateral organisations totalling €7,925,540.

This effort is consistent with Sudan's status as a special attention country according to the Spanish Cooperation Master Plan 2005–2008 which distinguishes countries or regions which find themselves in special circumstances due to crises or conflicts".

(*BOCG-Congreso.D*, VIII Leg., n. 232, pp. 243–244).

d) Asia

In response to a parliamentary query raised in Congress on the conditions and characteristics of the announced cancellation of Iraq's external debt, the Government reported that:

"The recently announced cancellation of the debt owed to Spain by Iraq forms part of the debt treatment agreed for Iraq by the Paris Club – with participation of Spain – at its November 2004 session.

(. . .)

According to technical debt sustainability analyses conducted by the International Monetary Fund (IMF), Iraq's debt was clearly unsustainable (nearly 600 times Iraqi GDP). As of the very first studies it was clear that the country's economic recovery called for the cancellation of a substantial part of that debt. In light of this reality, the Paris Club agreed to a moratorium on Iraqi payment until the end of 2005 until a final treatment was passed.

This final treatment was agreed between the Paris Club and Iraq on 21 November and entails the cancellation of 80% of the Iraqi debt in current net value terms. . . .

(. . .)".

(*BOCG-Congreso.D*, VIII Leg., n. 152, p. 405).

3. Immigration

Note: See XI.1.*a) General Lines*; XI.2.*a) Latin America*; XI.2.*b) Western Mediterranean*

In response to a Parliamentary query raised in Congress concerning the degree of improvement in Spanish-Moroccan relations concerning clandestine immigration from the North of Africa, the Government reported that:

"On 13.02.92 the Kingdom of Spain and the Kingdom of Morocco signed an Agreement on the movement of persons, transit and readmission of foreign nationals entering the country illegally, currently in force and applicable to nationals of third countries (except for nationals from countries of the Arab Maghreb Union) when the latter enter illegally into Spanish territory using Morocco as a transit territory.

Morocco will also readmit its own nationals who are illegally residing in our country.

(. . .)

This effort has contributed to rounding out the initiatives undertaken by the Spanish Government in the domestic arena, the result being a decline in the number of persons detained and boats intercepted upon their arrival to the Spanish coast. Data for 2005 as of 30 April showed 121 boats intercepted (as opposed to 148 at the same date in 2004) and 2,726 occupants detained (as opposed to 3,168 at the same date in 2004).

(. . .)".

(*BOCG-Congreso.D*, VIII Leg., n. 245, pp. 119–20).

Also in response to a Parliamentary query posed in Congress on whether Morocco is expected to be able to control the mafias operating in El Aaiun, the Government reported that:

"With a view to improving and enhancing the exchange of information and police efficiency in the fight against illegal immigration, the Moroccan authorities have transferred to Spain and have accredited liaison officers at the Police Headquarters for Alien Affairs and Documentation, the Las Palmas Police Headquarters and the Algeciras Police Station, the principal destination of illegal immigrants arriving by sea, in order to obtain information on routes, boarding sites, and those responsible for trafficking in persons. For its part, Spain has an Interior Attaché and two liaison officers at the Spanish Embassy in Rabat and another liaison officer in Tangiers.

This important liaison network in our two countries has proven to be one of the most important Spanish-Moroccan cooperation tools facilitating the exchange of operational information and the arrangement of many bilateral details.

As a result of this information sharing, the Moroccan authorities have been successful in dismantling important illegal immigration networks in their territory and in locating and intercepting a significant number of immigrants intending to illegally enter Spanish territory.

(. . .)

There are scheduled meetings, at political level, of the Spanish-Moroccan permanent working group on immigration at which technicians and experts in border control and immigration also take part. . . .

At EU level, the Funding Agreement for the Cooperation Project on "Border management and control" has been approved with a view to improving border surveillance and control and will soon be implemented . . . Spain and France have been designated to lead that project.

(. . .)".

(*BOCG.Congreso.D*, VIII Leg., n. 284, p. 412).

4. Terrorism

The Minister of Home Affairs, Mr. Alonso Suárez, in an appearance before the Congressional Commission of Home Affairs to report on the recommendations made by the Commission investigating the 11 March terrorist attack (Investigation Commission 11-M), with reference to the efforts envisaged by the Government to foster international cooperation in the international fight against terrorism, stated that:

"(. . .)

Collective moral obligation compels me to begin by remembering and once again paying tribute to the 192 Spanish citizens and foreign nationals who were brutally murdered on the morning of 11 March 2004 . . .

The work and the opinion of the investigation Commission clearly stressed that a new, global and shared anti-terrorist strategy is needed to deal with the characteristics of this new scenario of terrorists threats. The investigation Commission first of all called for prevention and protection against new terrorist attacks, regardless of their origin or motivation and likewise recommended an effective attack on terrorists, their organisations, structures and economic and material support systems using all of the means and resources available under Rule of Law and international cooperation. Thirdly, it called for the implementation, in line with the principles of unity, effort, collaboration and mutual assistance, operational methods, intelligence units and national and international anti-terrorist police officers, mostly at EU level, able to respond adequately to this new era, this new reality and this new threat. Fourthly, it recommended a strategy requiring the establishment of effective political, economic, social and cultural alliances with Islamic culture and the leaders of Islam to prevent the spread of Jihad radicalism. The fifth recommendation calls for a strategy based on wide-ranging political and social consensus and an effective and non-controversial Parliamentary agreement against international terrorism.

The fifth basic action entails the strengthening of international cooperation. This is a priority issue for the Ministry of the Interior and, in general the National Government. Our position has been to enhance and foster mechanisms, bodies and units of international cooperation within our most natural geopolitical

area, i.e. the European Union, and with third States. . . . The Parliamentary Commission of 11-M recommended that the Government develop enhanced international cooperation in respect of combating terrorism, particularly Islamic terrorism. . . . Within the framework of The Hague Programme, approved by the European Council at its November 2004 meeting, envisaging very specific and far-reaching objectives regarding anti-terrorism, defining the latter as a common threat against the domestic security of each and every Member State, Spain, through my department, is one of the countries most intensely contributing to the implementation of the European Union's anti-terrorism Action Plan. . . . In order to assure Spain's adherence to and compliance with The Hague Programme, the Government decided to form an Interministerial group which, coordinated by the Ministry of the Interior, is supported by the Ministries of Foreign Affairs, Justice, Economy and Finance, by the Public Prosecutor's Office and by other Administrative bodies involved in one way or another in the fight on terrorism. . . . Nothing less would be expected in light of the global nature of this sort of criminal activity. The network of international terrorism affects over 60 nations of the international community and the response extends much further than the individual capacity of a community or a nation; it involves the international community of States.

(. . .)".

(*DSC-C*, VIII Leg., n. 407, pp. 2–9).

5. Humanitarian Assistance

In an appearance before the Commission for International Development Cooperation the Minister of Foreign Affairs and Cooperation, Mr. Moratinos Cuyaubé, reported on assistance provided by Spain to the Asian countries affected by the 26.12.04 tsunami:

". . . In light of the number of victims and countries affected, I feel that the tsunami catastrophe is of a much larger scale than any other recent natural disaster. . . .

(. . .)

. . . Spain was among the first to express its solidarity. The response of the Spanish society as a whole and of international cooperation organisations and institutions was immediate and far-reaching. . . .

Having regard to the immediacy of the assistance, I would first of all stress that we should all feel proud of the fact that Spanish assistance was among the very first to show its solidarity once news of the catastrophe had spread. . . .

(. . .)

. . . The assistance was widespread, pervasive and generous both in terms of the monetary sum, the number of individuals participating and the commitment made to the reconstruction of infrastructures and of devastated societies. . . .

The sum total of Spanish assistance earmarked to palliate the humanitarian crisis in Southeast Asia caused by the tsunami was €69,550,000. Of those, €50

million are in the form of a line of credit granted from the Development Assistance Fund with a view to contributing to the reconstruction of economic and social infrastructures devastated by the tsunami. . . .

In addition to the amounts earmarked, a moratorium has been agreed regarding the debt owed by the affected countries to Spain. The negotiations held at the Paris Club in respect of debt cancellation indicate that the affected countries have a debt of €524 million with our country, 90% of which corresponds to Indonesia. . . .

This solidarity that I have referred to must be sustained over time in order to make economic, social and environmental recovery a reality throughout the devastated areas. . . .

Part of Spain's action plan will be to pay closer political attention to the area. . . .

Within the scope of inter sectoral cooperation, the action plan envisages proactive support in the area of environmental protection, anti-terrorist cooperation, cultural cooperation . . .

(. . .)".

(*DSC-C*, VIII Leg., n. 177, pp. 2–6).

Having regard to the humanitarian assistance functions of the Spanish army undertaken in 2004, the Government responded to Parliamentary queries posed in Congress in the following terms:

The complementary and sometimes vital action taken by the Armed Forces in humanitarian assistance and emergency operations in 2004 only took place in those regions or crisis areas where the Spanish International Cooperation Agency (AECI) was already working.

(. . .)

1. Humanitarian assistance support (mainly by providing the means and facilities for other State institutions or non-governmental organisations to carry out action).

In this regard in 2004, upon request by the Spanish International Cooperation Agency (AECI), air support was provided by the Air Force for the transport of personnel and material in the aftermath of the following situations:

- Earthquake in Iran
- Earthquake in Morocco
- Tsunami in Southeast Asia
- Torrential rains in the Caribbean (Dominican Republic, Haiti, Nicaragua and Granada)
- Locust plague in the Côte d'Ivoire.

Moreover, in the first three actions referred to above, the Spanish Red Cross was granted use of the Torrejón Air Base for the loading and parking of civil aircraft chartered by that organisation, and support was provided for the "Recoletos Group" in the form of transport and use of facilities (see the publication "Gaceta Universitaria") for the dispatch of diverse medical material to the Paediatric Hospital in Kabul.

2. . . . Action undertaken either directly with the affected populations in the areas of deployment of our military contingents or through governmental or non-governmental organisations operating in these same areas.

Within this group, in 2004 the Spanish Armed Forces have undertaken a number of humanitarian assistance projects in their areas of deployment in Bosnia, Kosovo, Afghanistan and Haiti and have lent support to the work being done by humanitarian organisations in these territories, special mention of which should be made of the following:

– Transportation of diverse humanitarian assistance to the different areas of operations.

– Provision of medical assistance to the civilian population within its range of possibilities.

– Distribution of humanitarian assistance in coordination with NGOs and civil authorities.

– Support for the construction of infrastructures, within its range of possibilities, specifically:

– Wells.

– Digging of canals.

– Installation of overhead power lines.

– *Facilitation of civilian population mobility by*:

– Repairing roads and highways.

– Rubble removal.

– Collaboration in bridge-building efforts.

– Refurbishing of different public buildings (schools, colleges, hospitals).

3. Military humanitarian assistance missions. Consisting of the sending of military contingents with specific capacities to deal with crisis or catastrophe situations not caused by war. In 2004 no mission of these characteristics was undertaken. However, during the first months of 2005 a military contingent was sent to Indonesia to palliate the effects of the tsunami which devastated Southeast Asia."

(*BOCG-Congreso.D*, VIII Leg., n. 305, pp. 133–134).

The Minister of Defence, Mr. Bono Martínez, in a 26.12.04 appearance before the Defence Commission of the Congress to report on the humanitarian mission "Solidarity Response" with the Southeast Asian countries affected by the tsunami, stated as follows:

"This catastrophe has produced over 160,000 victims, has devastated an enormous expanse of territory and, in addition to the incalculable economic burden, is threatening the life of those who were not killed when it first struck. . . .

(. . .)

I will now outline the operation known as Solidarity Response, . . . I will first of all mention where our military are deployed. It was deemed advisable to concentrate our forces in Indonesia, the country most damaged so as to make the most efficient use of our presence, in the north of the island of Sumatra in

the enclaves of Medan (close to where our aircraft landed) and Meulabo, where the Ship Galicia, which as you know left the port of Alicante last Saturday, will anchor.

Contribution in terms of personnel. 594 military personnel from the three armed forces will take part in the operation. . . .

I would stress that for the first time voluntary reserve personnel will be sent on a mission abroad. . . .

Material contribution to the area is comprised of the following elements: a hospital on board the vessel Galicia; three water treatment plants, one of which was air-lifted in and is already set up in the affected zone and two more on board the Galicia; sufficient machinery for use by the engineering unit comprised of shovels, backhoes and a bridge; heavy machinery completely loading down the Galicia; 6 tons of medical supplies, 60 tons of foodstuffs. I should tell you that the Galicia is transporting 100 vehicles and approximately 200 tons of humanitarian assistance including water donated by Town Halls and different entities rounding out the total figures . . . Transport and logistics are as follows: Five transport aircraft including two Hercules which have already returned and three CASA-235 aircraft which will remain in the area . . .

(. . .)

As for the duration of the mission, we are planning for a maximum of two months although the Indonesian Government has informed us through the Ministry of Foreign Affairs that it would like to keep a limited foreign military presence until around 26 March and given that that date coincides with our plans we would like to comply with the wishes of the Indonesian Government.

(. . .)".

(*DSC-C*, VIII Leg., n. 174, pp. 2–5).

XII. INTERNATIONAL ORGANISATIONS

1. United Nations

a) Reform of the United Nations System

On 10 December 2004, in response to a parliamentary question regarding the Report of the High Level Group (HLG) on United Nations reform, the Government made the following statement:

"(. . .)

. . . The Secretary General is planning to submit to the General Assembly in March 2005 a Report based on the Report to be received from the HLG and containing concrete proposals for United Nations reform. These proposals will form the basis of what UN Member States, including Spain, will take into consideration in the discussions and negotiations to take place on this very important issue.

. . . The Government will continue to respond and inform the Parliament on this process as it evolves".

(*BOCG-Congreso.D*, VIII Leg., n. 137, p. 188).

b) United Nations High Commissioner for Refugees

On 26 August 2005, the Government responded to a parliamentary question on Spain's cooperation with the UNHCR by explaining:

"The Government of Spain has had and now has a policy of active cooperation with the UNHCR and its delegation in Spain. This policy includes not only effective coordination of asylum and refugee policy, but the fact that Spain is the only country in the world in which the UNHCR delegate plays an institutional role recognised by the Spanish legal system in the policy-making agencies on asylum and refugees.

In 2004, Spain signed and ratified a Framework Cooperation Agreement with UNHCR, which sets forth the basic parameters of cooperation.

Spain also cooperates in UNHCR budgets, not only through its annual voluntary contribution to the UNHCR budget, but also through special contributions. Spain also funds the office and operating expenses of the UNHCR delegation in Madrid, in addition to covering the cost of a number of expert legal staff. Furthermore, regional and local governments also contribute substantially to UNHCR operating funds. To further such cooperation, a Spain-UNHCR association exists, with which the Government cooperates fully.

In the context of Spain's general policy of increasing its contributions to Multilateral Organisation, there is provision for a substantial increase in both Spain's voluntary and special program contributions over the next few years.

While the number of applications for refugee status and refugee admissions in Spain and in Europe, in general, has dropped sharply in recent years, our work in a number of refugee protection processes is well known, particularly in Colombia and the Western Sahara, where cooperation between the UNHCR and Spain is essential for the success of the projects. Our cooperation in refugee protection and resettlement programs is expected to increase in the near future.

The recent election of High Commissioner Guterres was welcomed by Spain, and the Government has pledged to increase its human and economic cooperation within parameters to be determined by the UNHCR. A first visit by the High Commissioner to Spain is planned for late 2005.

(. . .)".

(*BOCG-Congreso.D*, VIII Leg., n. 257, p. 679).

c) United Nations Commission for Social Development

On 11 May 2005, in response to a parliamentary question, the Government explained the reasons it renounced the Vice Chair of the United Nations Commission for Social Development as follows:

"(. . .)

The Vice Chair of a functional commission essentially involves the planning of work and sessions, assisting the Chair in leading discussions, speaking order, and preparing working documents, etc.

The Vice Chair of the Commission for Social Development is an appointment made by the body itself, after deliberations by the different regional groups, from among the delegates of the Member States of the Commission, mainly on the basis of the personal qualifications and the professional experience of potential candidates in the work of the CDS and the United Nations General Assembly's Third Commission. Therefore, these are positions in which '*ad personam*' designation is a relevant feature.

During the 42nd Session of the CSD in 2004, the Commission named Ms. Paloma Durán Lalaguna, Counsellor for Social Affairs of Spain's Permanent Mission to the United Nations, to one of the four Vice Chair positions for the 43rd Session to be held in New York on 9–18 February 2005. However, Ms. Durán left her post on 31 October 2004, making it impossible for her to fulfil her duties as Vice Chair of the 43rd Session of the CSD.

In view of these circumstances, the Western and Others Group (WEOG), the Regional Group to which Spain belongs, decided to propose to the Commission that the vacant Vice Chairmanship be exercised by the delegate of Austria, Ms. Gerda Vogl, who possessed the necessary experience to be able to undertake the position during the Commission for Social Development's 43rd Session".

(*BOCG-Congreso.D*, VIII Leg., n. 215, p. 180).

2. North Atlantic Treaty Organisation

On 15 April 2005, in response to a parliamentary question, the Government stated its position on Albania's application to join NATO as a full-fledged member to the Congress as follows:

"As a member of the Atlantic Alliance, Spain is fully open to accepting new members in NATO who are in a position to promote the principles of the North Atlantic Treaty and contribute to peace and security in the Euro-Atlantic area.

All countries seeking to join the Atlantic Alliance must implement the Membership Action Plan designed to aid them in their preparations for membership, and to provide them with practical advice, assistance and support in all facets of NATO membership (political, economic, military and defence, resources, security and legal). At this time, this Plan is being implemented by Albania, Croatia and the Former Yugoslav Republic of Macedonia.

While embodying NATO's commitment to an open door policy, the Membership Action Plan does not guarantee future membership, nor does it consist merely of a series of parameters to be complied with by candidate countries. The decision to invite candidates to become members will be taken within NATO by consensus on a case-by-case basis".

(*BOCG-Congreso.D*, VIII Leg., n. 197, p. 225).

3. World Trade Organisation

On 3 February 2005, in response to a parliamentary question regarding the impact of WTO agreements on the Spanish and EU agro-food sector, the Government stated:

"(. . .)

The position on agriculture that the Government of Spain has been advocating, successfully to date, together with its other community partners and under the negotiating leadership of the European Commission, is that any commitments assumed under the WTO must not go beyond the Common Agricultural Policy (CAP) reforms.

In the WTO, there are fundamentally three areas of negotiation on agriculture:

– Internal aid: From the WTO point of view, the main element contained in the CAP reform is the de-linkage of aid in different sectors; namely, that aid to farmers will be independent of production or prices. . . . In this situation, it will be easier for the European Union to assume the commitments to reduce internal aid established under the Doha Round.

– Market access: Included in the negotiating framework is the possibility for each Member to designate a limited number of «sensitive products» for inclusion in the WTO negotiating framework, making such products subject to lower tariff reductions than the rest. This issue was very important to the European Union, which still maintains high agricultural tariffs in many sectors.

– Export subsidies: In the negotiating framework for August, agreement was reached to drop export subsidies (restitutions) from date to be negotiated, but this was dependent upon equivalent disciplines being established for the remaining forms of export supports (export credits, State companies, food aid).

We were also successful in getting the August decision to include the subject of denominations of origin in the negotiating agenda, an important issue for Spain and the European Union as a whole.

The prospective effect of WTO agricultural negotiations on the Spanish agro-food sector is virtually neutral, and therefore the aim is for commitments assumed not to go beyond the internal reforms carried out; in other words, to have changes in this sector determined fundamentally by international European Policy, the main objective of which is to improve the competitiveness of the community agro-food sector".

(*BOCG-Senado.I*, VIII Leg., n. 172, pp. 169–170).

4. International Organisation for Migration

On 22 June 2005, in response to a parliamentary question on the possibility of requesting full-fledged member status in the International Organisation for Migration (IOM) for Spain, the Government stated:

". . . At present Spain has observer status in the International Organisation for Migration. This Organisation already has an office in Madrid and a Memo-

randum of Understanding exists setting forth the goal of designing and implementing measures to foster orderly migration, voluntary return, the integration of immigrants and combat trafficking in human beings. Furthermore, the competent authorities in the area of immigration maintain a close, fluid relationship with the representatives of the International Office on Migration. Proof of this, your Honour, is the letter I received from them. I will read the first paragraph: 'I am honoured to send this letter to your Excellency to state, on behalf of the IOM and on my own behalf, our most sincere congratulations for the implementation and successful completion of the emigrant regularisation process in Spain.'

(. . .)

Therefore, I believe that we have taken measures that the International Organisation for Migration itself considers an example to follow.

. . . Spain was a Member State of this Organisation until the mid-seventies, when it decided to leave the organisation and take on observer country status. In recent years, the International Organisation for Migration has requested Spain to become a Member State once more, and at this time I want to indicate that the Government is making contact and taking the necessary steps to join this office as a full-fledged Member State.

. . . We are working so that in a reasonable time Spain will become a full-fledged member of the International Organisation for Migration".

(*DSS-P*, VIII Leg., n. 46, pp. 2458–2459).

XIII. EUROPEAN UNION

1. Enlargement

On 29 December 2004, in response to a parliamentary question on the entry of Turkey into the European Union, the Government stated:

"The Government is aware of the importance of Turkey's ultimately becoming a member of the European Union . . .

Furthermore, the Government is also aware of the importance of having popular support for Turkey's potential membership in the European Union. Such support would need to be reflected not only in polls, but also in the necessary backing by the Parliament of any future Membership Treaty, through the ratification process, and by the vote obtained in the European Parliament, a clear reflection of the sovereign will of the citizens of the European Union.

. . . The polls the Government has available correspond to different points in time, some more recent and some longer ago, albeit none goes back before 2002 (Eurobarometre, Fall 2002). This is because the Government considers it important to be aware of how public opinion is evolving on this subject over a two-year time period.

In any case, despite some logical disparity in results, from all the polls analyzed to date (with all the limitations inherent in any polling system), it can be

concluded that in Spain the percentage of people in favour of Turkey's membership, slightly under 40 percent, is higher than the percentage of people opposed to its membership. The opinion of the majority, therefore, favours membership.

This is further corroborated by the results of the macro-poll carried out by the Council for Sociological Research in collaboration with the Royal Elcano Institute on 10 December 2005. It revealed that approximately 44 percent of the Spanish population was in favour of Turkey's future membership in the European Union".

(*BOCG-Congreso. D*, VIII Leg., n. 141, p. 259).

2. Area of Freedom, Security and Justice

a) Asylum

On 15 December 2004, in response to a parliamentary question on the European Union's intention to set up emigrant retention and transit centres in the North of Africa for asylum seekers from African countries, the Government stated:

"Government of Spain representatives have, in principle, opposed establishing centres to attend to emigrants and asylum seekers outside European Union territory, while at the same time, in the Community context, underlining the need to first establish a long list of issues to resolve.

It would involve determining long-term strategies for EU cooperation with the countries of North Africa that are affected by the migratory phenomenon, to be considered as development aid. In the short term, it would involve defining aspects relating to the centres, their legal status, administration, conditions of management, funding, security, possible draw effects and others".

(*BOCG-Congreso.D*, VIII Leg., n. 137, p. 123).

Two months later, on 15 February 2005, in response to a parliamentary question on the same subject, the Government added:

"When this subject was discussed in the European Union in a more formal manner, the Spanish Interior Minister and the Secretary of State for Immigration reiterated what they had already stated in The Hague, that we approach this proposal with great scepticism and, in any event, before being able to decide whether we find it good or bad, we would like to have a clearer idea of what exactly is being proposed; namely, what would these centres be, under what authority they would exist, what would be their legal status, how would they be managed, how would they be funded, what security arrangements would be made, and what would be the potential draw effect of such centres in the countries of North Africa.

. . . We have not yet taken a position because we do not know specifically or clearly what is being proposed.

However, from what we have heard to date it does not seem to us to be a good idea in principle. We have responded fairly sceptically, but when the questions

posed by the Spanish Government are answered, we will see what our final position is. However, I repeat, at this time we view this with great scepticism. (. . .)".

(*DSS-C*, VIII Leg., n. 105, p. 22).

b) Immigration

On 7 July 2005, in response to a parliamentary question on Spain's position in the European Union regarding certain EU migratory policies, the Government stated:

"In the framework of the EU Financial Perspectives 2007–2013, under Heading 3 (Citizenship, Freedom, Security and Justice), the Commission presented the 'Framework Programme on Solidarity and the Management of Migratory Flows', made up by four funds:

- The External Border Fund
- The Fund for the Integration of Third-Country Nationals
- The Refugee Fund (already existing).
- The Return Fund

Spain supports the Commission's proposal, because it thinks that the European Union's immigration policy should have an all-inclusive focus, covering all aspects of the immigration phenomenon, such as integration, border controls, readmission and refugees, and use a wide variety of instruments for implementation, including those that are financial in nature.

As a Member State located on the external sea border of the EU, Spain feels that the Framework Programme's funds should be governed by the principle of solidarity, as stated and reflected on many occasions by the European Council.

The principle of solidarity as defined by the Commission, is based on the recognition that, in developing common asylum, migration and border control policies, some Member States are bearing a disproportionate part of the responsibility and effort, that benefit the Union and other Member States to a large extent, and have major financial repercussions.

Spain is advocating in assessing the efforts made by the different Member States, the efforts being made to control and monitor external sea borders, together with return operations and the institution of integration policies, be especially taken into account.

(. . .)".

(*BOCG-Congreso.D*, VIII Leg., n. 252, pp. 409–410).

On 19 October 2005, the Government answered a parliamentary question before a Senate plenary session regarding the measures the European Union was planning to take to address the massive immigration along its southern border, specifically that taking place into the cities of Ceuta and Melilla:

". . . The problem that recently affected Ceuta and Melilla was not an exclusively Spanish or Moroccan problem: it was a problem that affected all of us; principally the European Union. That was why I immediately contacted Commissioner Frattini – the European Union Commissioner for Justice,

Security and Freedom –, to transmit our concern to him and, above all, to get him to intervene on behalf of the European Union. As we have said on a number of occasions, Ceuta and Melilla are common external borders of the European Union, and need the support, concern and involvement of the European Union.

Commissioner Frattini's response was quick. . . . A new attitude is beginning to take shape, to be felt, among almost all the Ministers of Justice, Interior and Labour of the European Union, as I was told by the Spanish Minister of Justice who attended the JAI meeting on 12 October: seeking to make immigration policy a common European policy, something it unfortunately has not been up to now.

. . . For this reason, Commissioner Frattini made all necessary arrangements to speed the disbursement of the 40 million euros earmarked for Morocco under the MEDA programme. He headed a delegation to visit Ceuta, Melilla and Morocco, to generate concern over the situation and the future of sub-Saharan peoples. In this same spirit, Minister Benaissa of Morocco and I have proposed holding a ministerial-level conference on immigration, to deal with the problems of the countries of origin, transit and destination. Also, at their last meeting, the Prime Ministers of Spain and France decided to put a joint initiative before the next European Council.

Nonetheless, security and border protection are not sufficient; the roots of the problem must also be attacked and these are hunger, poverty and social injustice. In this regard, we have asked the European Union's Commissioner for Development, Louis Michel, to draft a European Union cooperation plan to deal with the major challenges on the continent that are at the root of the problem".

(*DSS-P*, VIII Leg., n. 57, p. 3083).

c) External borders

On 7 July 2005, the Government responded to a parliamentary question on the agreements reached at the G-5 Interior Ministers meeting in Paris on immigration, underlining the pros and cons for Spain:

"At the recent meeting on immigration of the G-5 Interior Ministers in Paris, the following agreements were reached:

– To harmonise the minimum amounts of economic resources foreigners are required to have in order to enter Schengen territory and promote the adoption of such agreement by the European Union.

– To study the conditions under which medical travel insurance can be required of foreigners entering Schengen territory.

– To promote a European Union project to exploit data from the Passenger Name Record (PNR) in the fight against terrorism.

– To study the possible creation of a «European border police intervention force» to mobilise national specialised assets to external border points where needed, in the event of a crisis situation.

– To carry out joint operations within Schengen territory as a means of strengthening the fight against illegal immigration.

– To reinforce cooperation with Maghreb countries in their fight against illegal immigration.

In respect of contributions, the Spanish Government participated actively, through the Ministry of the Interior, on all the issues dealt with at the meeting, making specific contributions in the area of utilisation of passenger data, an area in which Spain has some experience owing to its leading role in the initiatives that led to the adoption of European Directive 2004/82/CE on the obligation of carriers to report the data of passengers carried and the rules of this type that exist in Spanish legislation on foreign nationals.

As regards the specific impact on Spain of the agreements reached, the measures agreed will decisively contribute to improving control of the external border and to increasing effectiveness in the fight against illegal immigration and other forms of organised crime, including terrorism. The agreed measures are aimed at achieving these objectives, particularly the joint operations within Schengen territory and the exchange of passenger data".

(*BOCG-Congreso D*, VIII Leg., n. 252, pp. 614–615).

On 15 September 2005, in response to a parliamentary question on actions carried out by Spain together with other European Union countries to control the entry over our borders of foreigners from Romania and Bulgaria who remain in Spain in irregular status, the Government stated:

"The fight against irregular immigration and trafficking in human beings is one of the major objectives of the migratory policy not only of the Spanish Government but of the European Union as a whole . . .

In this regard, the Spanish State Security Forces participate alongside their counterparts in other European Union Member States in joint border control operations, which constitute a basic instrument of the policy to fight irregular immigration and trafficking in human beings.

The Directorate General of the Police has participated since early June 2004 in the following operations aimed at investigating migratory flows seeking to enter irregularly in the territory of the European Union Member States:

– Operation "Semper Vigilia 13".

– 18th joint operation at European Union land borders

– 19th joint operation at European Union land borders

– Heightening of border controls along the Spanish-French border

– Screening on the Milan-Barcelona TALGO train

– Collaboration with the Austrian police at the Nickelsdorf (Austria) "focal point"

In the second phase of this operation, two members of the National Police were sent to said location from 4 to 18 April 2005.

– Collaboration with the Romanian police at the Oradea (Romania) Coordination Centre.

– Inspection of borders between Hungary and Romania.

In addition to the operations set forth above, meetings with the participation of Spanish officials were held for the purpose of analysing the phenomenon of irregular immigration, with a particular focus on irregular immigration from Bulgaria and Romania, as follows:

– Spanish-French meeting on illegal immigration (held on 26 October 2004 in Paris).

– Spanish-Hungarian meeting on illegal immigration (held on 17 and 18 November 2004 in Budapest).

– OCRIEST working meeting between France and Spain (held on 9 December 2004 in Madrid): with participation on the Spanish side of members of the Central Unit on Illegal Immigration Networks and False Documentation (UCRIF, Spanish acronym).

– EUROPOL annual operational and strategic meeting on illegal immigration (held on 14 and 15 March 2005 in The Hague).

– Meeting on bilateral cooperation with Bulgaria (held on 12 April 2005 in Sofia).

– Meeting on illegal immigration from Romania and Bulgaria (held on 28 April 2005 in Rome)".

(*BOCG-Congreso.D*, VIII Leg., n. 257, pp. 375–376).

3. Economic and Social Development

a) Lisbon Strategy

On 26 August 2005, in response to a parliamentary question on the review of the Lisbon Strategy, the Government stated:

"... One of the fundamental issues dealt with at the European Council of 22 and 23 March 2005 was the review of the Lisbon Strategy. The basic purpose of this review is to give renewed impetus to Member State policies aimed at growth and employment in order to increase the European Union's potential for growth potential and narrow the gap vis-à-vis other advanced economies.

The focal points for achieving these objectives are investment in knowledge, innovation and human capital, and the creation of a more attractive European space for business development and employment.

One of the commitments assumed by the Member States in the framework of the Lisbon Strategy review is the drafting of a "national reform programme" adapted to each country's specific needs and circumstances.

The Lisbon Strategy review puts no additional demands on Spain, but acts rather in support of the economic policy the Government is already implementing.

In particular, in February 2005 the Government approved its Plan to Energise the Spanish Economy, containing a broad package of economic measures aimed at increasing productivity, employment and business competitiveness.

The package of economic reforms set forth by the plan focuses on the following areas: defence of competition, reforms in the goods and services markets and in the factors markets, promotion of R+D+I, quality and efficiency in public finance, and regulatory framework and transparency.

With this key plan in its economic strategy, the Spanish Government had a head start on the commitment by the Member States to present their respective action plans to re-launch the Lisbon Strategy.

Additionally, the 2006 Budget continues to give priority to R+D+I and infrastructure investment, which are key areas of activity for continued improvements in productivity and competitiveness by the Spanish economy.

(. . .)".

(*BOCG-Congreso.D*, VIII Leg., n. 262, p. 596).

On 3 October 2005, in response to a parliamentary question on this same subject, the Government added:

"Drafting the Spanish National Reform Plan is a concrete objective for the second half of 2005. To do this, the Government has set up an inter-agency group which is working on the plan. Furthermore, the national Lisbon coordinator met on 1 June with the European Commissioners directly involved in the Lisbon Agenda (Competitiveness, Economic and Financial Affairs and Employment and Social Policy) and with the Secretary-General of Commission in order to prepare the Spanish document. On 5 July European Commission officials travelled to Madrid to continue such contacts".

(*BOCG-Congreso.D*, VIII Leg., n. 284, p. 230).

b) Services Sector Liberalisation

On 10 June 2005, in response to a parliamentary question on its position with regard to the amendment of the Bolkenstein Directive liberalising the services sector, the Government stated:

"The proposed 'Directive of the European Parliament and Council regarding services in the internal market' (also known as the Bolkenstein Directive), adopted by the Commission in January 2004, is part of the economic reform process initiated by the European Council in Lisbon to make the European Union the world's most competitive and dynamic knowledge-based economy in the world by 2010. To achieve this goal it is indispensable to establish a true internal services market . . .

The objective of the proposed Directive is to create a legal framework eliminating all obstacles to freedom of establishment for service providers and free circulation of services among Member States.

The proposal embraces a broad variety of economic activities in services, with some exceptions, such as financial and transport services.

The proposal is in the discussion phase in both the European Parliament and the Council of Ministers.

The Spanish position considers that the issue must be analyzed in depth before going forward with this Directive.

(. . .)

That said, our position is to precisely analyze the impact of the Directive on certain services, more specifically, public services. There are issues on which Spain has established clear reservations such as taxation and gaming services, but there are others, such as audiovisual, health, sales distribution, consumer protection services and elements such as private security, the energy sector, etc. where there is no question that careful attention will have to be given to how they are dealt with in the Directive, and this work is being done with the involvement of practically all ministerial departments in a formally constituted Working Group.

It is important for us to be able to go forward with the liberalisation of services. But it is also important to establish adequate protection for public services, legal and consumer security, and detailed evaluation of the impact of the application of the country of origin rule is necessary.

In this regard I would point out that the last Spring European Council held on 22/23 March 2005 concluded the following:

– The Commission's proposal does not fully meet the demands of the Member States.

– In the framework of the legislative process underway (co-decision with the European Parliament), a broad consensus must be reached in response to two essential objectives:

– opening of the services market,

– respect for the European social model and for services of general interest.

In view of this situation, we need to await the findings after first reading by the European Parliament which are expected to be published in September or October. These findings will, in all probability, give rise to a revision of the proposal by the Commission".

(*BOCG-Congreso.D*, VIII Leg., n. 237, p. 221).

c) Ultraperipheral Regions

On 11 May 2005, in response to a parliamentary question on the concession of public aid for regional purposes as an instrument of development aid for the Canary Islands owing to its consideration as an ultraperipheral region by the European Union, the Government stated:

"The granting of public aid, particularly of aid for regional purposes, as an instrument to aid in the development of the Canary Islands as an ultraperipheral region is of fundamental importance and, therefore, given special recognition under community law.

In this regard, we must not overlook the provisions of the Treaty in force which states in Article 227.2 that taking into account the structured social and economic situation of the UPR, the Council shall adopt specific measures

aimed, in particular, at laying down the conditions of application of the Treaty and when doing so, shall take into account areas such as (*inter alia*) State aid.

The express recognition of ultraperipheral regions is also reflected, for example, in the draft of the future Guidelines on regional aid, which are currently under negotiation, and which provide for both functional aid, and greater intensity in investment aid. This evidences a clear desire on the part of the European Commission to take into account the special features of these regions.

However, first and foremost, mention must be made of the Constitutional Treaty signed in Rome last 29 October, which finally includes the ultraperipheral regions under Art. III-56.3.a) [equiv. Art. 87.3.a) of the current Treaty], thus reinforcing the arguments stated to date.

This Article states that aid aimed at promoting the economic development of ultraperipheral regions can be considered compatible with the internal market, taking account of their structured social and economic situation".

(*BOCG-Congreso.D*, VIII Leg., n. 215, p. 130).

d) European Commission Guidelines on Regional Aid

On 26 August 2005, in response to a parliamentary question, the Government expressed its position on the revision of Commission Guidelines on regional aid, stating:

"In its response to the first consultative document of the European Commission on the revision of the directives on regional aid, the Spanish Government proposes the establishment of preferential treatment recognising special difficulties for the regional development of regions with natural or structural difficulties, such as rural areas, industrial restructuring areas, as well as those suffering from serious permanent natural or demographic handicaps, such as northern regions with low population density or island, border or mountainous regions. This specific treatment could result in bonus payments of up to the maximum proposed aid ceilings, determined in accordance with the existence of a greater or lesser number of factors hampering general economic development".

(*BOCG-Senado.I*, VIII Leg., n. 298, p. 16).

4. Financial Perspective 2007–2013

In his appearance before the Plenary Session of the Congress on 22 June 2005 to report on the European Council held in Brussels on 16 and 17 June, the President of Government stated:

"... This is, certainly, a matter of great importance, as it is going to shape the financial framework of the Union for the seven year period beginning in 2007.... Budget negotiations within the Union have never been easy in the past, but this time there are circumstances making them particularly complex. These are the first financial perspectives aimed at accommodating a Europe of 25 and later of 27 Member States. This fact alone makes it necessary to

reassess the well-grounded financial equilibria established under other circumstances. . . . Thus, the complexity of the negotiation, with very narrow margins for the desires of the major net contributors, signatories of the so-called Charter of the Six, to limit the budget to 1 percent of community gross domestic product (GDP) and, similarly, the logical aspiration of the new Member States to benefit from the cohesion policy together with the desire of current receivers of funds not to lose them altogether.

(. . .)

. . . Throughout the negotiations, the Presidency and most of the States recognised one of the basic principles defended by Spain, that our country should not be drastically or abruptly deprived of cohesion funds owing to a mere statistical effect derived from enlargement. Recognition of this fact has given rise to gradual improvements in the successive proposals put on the table. Nonetheless, the negotiations are not focussed on Spain at all; the principal difficulty revolves around the so-called British cheque.

As you know, the United Kingdom was only willing to negotiate a reduction if in parallel a substantial reform in the EU cost structure at all to cut back on common agricultural policy items. As you know, in its last proposal the Presidency offered our country a four-year transitional Cohesion Fund mechanism. This recognition is very positive for future negotiations, but the benefits of this recognition were simultaneously offset by an increase in our contribution owing to the increase in our country's contribution to the British cheque and to different compensation offered to some of the major net contributors that continually held a position not favouring agreement. This balanced out to a final net amount that was not satisfactory to the Government, although it could have been a good basis for discussion if negotiation had continued. Nonetheless, knowing that its offer was going to be rejected by the United Kingdom, the Netherlands, and other Member States, in addition to Spain, the Presidency halted negotiation and forced a general pronouncement on the last proposal that, as predicted, was rejected by a number of Member States, including, as you know, Spain. . . .

I want to explain to the Members of Congress the principles that the Government upholds and will defend in these new times in order to reach an agreement on financial perspectives. First, the principle of sufficiency. Spain has for many months backed an expenditure ceiling of 1.24 percent of gross domestic product of the European Union 25 as proposed by the Commission in February 2004. In fact, this was the only thing Spain supported in a proposal that in all other regards was very harmful to Spanish interests. We have been flexible on this ceiling, seeking to reach an agreement with the countries in favour of a ceiling of 1 percent of the EU gross domestic product (GDP).

Second, the principle of graduality. . . . The Government is in favour of creating a safety net for the most affected Spanish regions. Furthermore, the Government defended extending the principle of gradual withdrawal of regions

to countries affected by the statistical effect of enlargement. Thus, the Government defended and was able to obtain recognition for Spain's gradual withdrawal from the Cohesion Fund, something which had not been contemplated previously.

Third, the principle of equity. The Government has upheld that the costs of enlargement should be shared equitably. . . . This would be seen in the magnitude of the drop in Spain's net balance.

Fourth, the principle of quality. The Government has defended the importance of certain funds for Spain and Europe from a standpoint of the added value they contribute in the modernisation and promotion of our economies. This is the case of the funds for the European Education Space, for trans-European infrastructures, for biodiversity funds in the framework of the Natura Network programme and, above all, for the research, development and innovation funds in the competitiveness category, or Category 1A. With respect to common agricultural policy, we seek a CAP that guarantees the continuance of farming activities, prioritising rural development that promotes greater territorial structuring and cohesion. Regarding competitiveness funds, the so-called Category 1A as referred to above, Spain has favoured funds having a national dimension consistent with the renewed Lisbon strategy, giving a greater national dimension to policies devoted to extending the knowledge-based and innovation society.

With regard to income, . . . we defend a system of income based fundamentally on recourse to gross domestic product. This principle is not compatible with maintaining the British cheque, and we have maintained that it should at least be frozen and did not support the generalised compensation mechanism owing to its arbitrariness.

(. . .)".

(*DSC-P*, VIII Leg., n. 99, pp. 4967–4968).

Later, on 31 October 2005, in response to a parliamentary question, the Government stated:

"As regards budgetary balance forecasts, it is true that the net balance with the Union has been decreasing in recent years. From a balance of some 9 thousand million euros in 2002, amounting to 1.2% of our GDP, in 2005 we show figures in the area of 0.7%. Nonetheless, the model proposed by the Commission, on both the expenditure and the income sides, would amount to receiving less community transfers for Spain in terms of commitments, albeit in terms of expenditures a relatively large amount of funds would continue to be received.

This reduction in the volume of community funds is explained in part by the following:

– The population of the Spanish regions with per capita incomes of less than 75% of the GDP of the EU15-Objective 1 regions- has dropped from 23.7 million to 15 million inhabitants. This figure is fundamental in determining the

volume of funds to be received because of the high relative weight given the population criteria in the distribution of the convergence objective, an aspect which inevitably affects Galicia.

– Spanish per capita GDP has gone from around 75% of the EU15 average in 1987, to 87.6% of the average in 2004.

These indicators show Spain to be a clear example of the success of the cohesion policy, in terms of our convergence with average EU levels, and inevitably point to less eligibility, both nationally and regionally, to receive community funds.

Furthermore, a more disfavourable economic growth situation in some of the major net EU contributors is determining the current negotiation of the Financial Perspectives 2007–2013 in a context of strict budgetary limitations, as refers to both domestic and community budgets.

All these circumstances will undoubtedly, therefore, affect the agreement that is ultimately reached and therefore, Spain's financial position vis-à-vis the EU".

(*BOCG-Congreso.D*, VIII Leg., n. 284, p. 225).

5. External Relations

a) China

On 15 June 2005 the Government answered a parliamentary question on lifting the arms embargo against China, stating:

"In the conclusions of the December 2004 European Council, the EU reaffirmed its political will to continue working to lift the arms embargo against China, invited the Luxembourg presidency to finalise work towards adopting a decision, and stressed that such decision should not result in an increase of arms exports by the Member States to China, in quantitative or qualitative terms. For this purpose, work is underway to strengthen a Code of Conduct to govern exports.

Furthermore, the European Council specifically states that human rights, stability and security in the region and the national security of friends and allies are criteria to be taken into account in arms exportation.

In the months following the December European Council, a series of different circumstances have gotten in the way of rapid adoption of a decision on this matter. At the informal meeting of EU Ministers of Foreign Affairs on 16 April, it was concluded that it was politically not the best time to lift the embargo.

This does not mean, however, that the matter does not continue to be under discussion. In this context, Spain, one of the Member States consistently in favour of lifting the arms embargo, continues to work to achieve the conditions for this to take place".

(*BOCG-Congreso.D*, VIII Leg., n. 237, p. 210).

Furthermore, on 26 August 2005, in response to a parliamentary question on China's refusal to support the measures requested by the European Union to curb their textile exports, the Government stated:

"In view of the growth of exports from the People's Republic of China to the European Union of certain textile and clothing products since the liberalisation of such products on 1 January 2005, in response to requests by both the industry and the Administrations of the Member States, the European Commission decided to set in motion the mechanism established in China's Protocol of Accession to the World Trade Organisation. This mechanism provides for seeking consultations with China when there is damage or the threat of damage to the sector of production as a result of an alteration in the development of trade. China's position, initially was to reject initiating all such consultations . . .:

(. . .)

The European Union did not accept China's arguments and set the formal consultation process in motion for two categories of products (t-shirts and linen yarn) and informal consultations and close monitoring of statistics for another series of categories that are especially sensitive for European industry.

Furthermore, Spain cannot take autonomous measures in foreign trade, since this corresponds to the European Union as a whole. In appropriate European Union fora in which foreign trade measures are discussed and ultimately approved, Spain's position, in continual coordination with the textile sector was to:

a) Try to reach a self-regulation agreement with China, a more practical and less contentious solution than applying unilateral measures.

b) Include in the self-regulation agreement a broad number of categories, since Chinese exports cover a large number of products that are sensitive for Spanish industry.

c) Not to delay the application of containment measures, but rather to operate on an urgent basis.

d) Coordinate a joint position with other countries (France, Italy, Portugal, Belgium, etc.) vis-à-vis the European Commission and China. It must be recalled that some European countries (Sweden, Denmark, Finland, Germany, United Kingdom, etc.) were against imposing any restrictive measures on China.

Because of the firm stance of Spain and other countries, the Commission finally negotiated an acceptable commitment to self-regulate exports with China.

On 10 June, the European Commission for Trade and the Chinese Minister of Trade signed a Memorandum of Understanding, the main characteristics of which are as follows:

a) China commits to limiting its exports in ten product categories . . .

These ten products account for approximately 60% of exports of products liberalised on 1 January 2005 to the European Union.

b) The agreement runs from 11 June of this year to the end of 2007.

c) Total liberalisation to exist, in principle, as of January 2008.

d) The European Union commits to exercising its rights under paragraph 242 of China's Protocol of Accession to the WTO (World Trade Organisation) to impose limitations on Chinese textile and clothing exports in 2008 and on products not included in the ten categories mentioned in 2005, 2006 and 2007 "with restraint".

On the whole, Spain gives a positive rating to the agreement reached with the People's Republic of China, for the following reasons:

a) It provides stability and predictability to textile trade between the EU and China for the next two and a half years, something which is positive for both sides.

b) It covers most of the products requested by the Spanish textile sector.

c) It avoids undesired confrontation with China, whose potential both from the point of view of imports and as a receiver of profitable investment is undeniable.

d) It gives additional time to the textile industries of developed and developing countries to undertake appropriate structural adjustments.

e) It received the support of the countries most hesitant to impose measures to regulate Chinese exports".

(*BOCG-Congreso.D*, VIII Leg., n. 262, pp. 502–503).

b) Iran

On 28 September 2005, in response to a parliamentary question, the Government stated:

"The Government values and supports the negotiating process being carried out by the European Union with the Government of Iran. . . . in October 2003 the European Union started a negotiating process with the Iranian authorities. Those were complex and difficult times; the Government of Iran was being threatened with sanctions and even the use of force was being discussed. In that situation, the European Union decided to mandate three countries, United Kingdom, France and Germany and, upon proposal by Spain, High Representative Mr. Solana, to initiate a process of negotiation and dialogue with Iran precisely to prevent it from acquiring military nuclear capabilities. I think the European Union's efforts were very fruitful. There was an agreement signed in Teheran in October 2003 and an agreement signed in Paris in November 2004.

What is happening now is that Iran's position has changed after a change of political leadership: it has unilaterally broken the agreements signed and the commitments made in Paris in November 2004, and have decided to once again embark upon enriching uranium at the Isfahan plant. Under these circumstances, the European Union must express its firm stance and its condemnation of the unilateral breach of the agreements duly reached between the European Union and the authorities of Iran.

This is why the European Union stands firm and united in calling for Iran to definitively suspend its uranium enrichment activities and return to the negotiating table. These are the clear, unanimous, unified messages sent by the EU ministers of Foreign Affairs, the European Presidency and the countries responsible for negotiating with Iran.

In a meeting with my counterpart, the Minister of Foreign Affairs of Iran, I had the opportunity to express this concern to him.

We are now still in the phase of dialogue and diplomacy. It is true that there is a recent resolution by the International Atomic Energy Agency calling upon the Director of the Agency, Mr. ElBaradei, to continue using all his diplomatic skill in order to be able to return to the negotiating table in two months' time, which is what the European Union seeks. It is true that the possibility of informing the Security Council is not ruled out, but at this time what is important is dialogue, diplomatic measures, and maintaining the European Union's firm and unified stance in favour of continuing to hold a dialogue with the Iranian authorities".

(*DSS-P*, VIII Leg., n. 53, pp. 2856–2857).

c) Morocco

Before the Senate Plenary on 14 September 2005, the Government, responded to a parliamentary question on the Agreement on Fishing signed between the European Union and Morocco:

". . . This agreement is the result of the efforts of the Spanish Government, which has accompanied the successful negotiating process by the European Commission; an effort that we must, of course, also attribute to the Kingdom of Morocco and the Spanish fishing sector.

The Government considers that the agreement is territorially balanced, as it permits access by the fishing boats that fished traditionally, such as those from the Autonomous Communities of the Canaries, Andalusia and Galicia, despite the fact – as you stated –, that some of these have already been mothballed and others relocated. However, sufficient boats remain for us to be able to place them under this agreement. Furthermore, it opens new possibilities for boats based in the Basque Country, Asturias and Cantabria.

I would also like to tell all of you that the agreement corresponds to a new mode of partnership between the European Union and third countries on fishing, involving active participation aimed at developing Morocco's fishing sector. I feel that the new cooperation component in which these partnership agreements are included – of which this is the first –, is going to contribute very positively to the value of the Moroccan fishing sector, enhancing employment expectations and generating more stable employment that will aid in combating illegal immigration.

(. . .)".

(*DSS-P*, VIII Leg., n. 51, p. 2729).

d) Code of Conduct on Arms Exports

On 10 October 2005, in response to a parliamentary question on the Spanish position in relation to the European Union Code of Conduct on arms exports, the Government stated:

> "Spain participated actively in the entire process of revision and enhancement of the Code of Conduct. This process started in 2003 and concluded during the first half of 2005, and is only awaiting transformation into a common position.
>
> Spain has been especially combative on this last aspect, owing to the importance of uniform application of the Code if we want to achieve greater harmonisation of policies on arms exports among European Union countries. The transformation process referred to is expected to be concluded during the second half of 2005".
>
> (*BOCG-Congreso.D*, VIII Leg., n. 284, p. 530).

XIV. RESPONSIBILITY

1. Responsibility of International Organisations

In his remarks to the Sixth Committee during its 2005 session, the Spain's Representative, Ms. Escobar Hernández, explained Spain's position regarding the work of the International Law Commission:

> "In relation to the subject of the responsibility of international organisations, my Delegation first wants to state its recognition of the Special Rapporteur, Professor Gaja, for his third report, as well as of the International Law Commission for its commentary. In both cases there is a clear desire to move forward in the complex and delicate sector of international responsibility arising from the special nature of the obligor involved: international organisations.
>
> As in past years, the work of the Special Rapporteur and the International Law Commission was carried out in strict parallel to the Draft articles on Responsibility of States for Internationally Wrongful Acts, introducing modifications *mutatis mutandis* made necessary owing to the presence of an international organisation. In this case, the parallelism is more evident, since – as stated expressly – in a large number of proposed articles that have been provisionally approved by the Commission, the modifications introduced consist merely of replacing the word 'State' with 'international organisations'. My delegation, in agreement in principle with the parallel treatment of international liability of the State and of international organisations for illicit acts, asks whether it might not be necessary to look more closely at the adaptation technique, especially in view of the great diversity of existing organisations. And all this, of course, is to the extent that the use of the generic term " international organisations" infers that an absolutely uniform system is being chosen.

In regard to the content of the articles approved by the International Law Commission during its 57th session, my Delegation would like to make two specific comments.

The first refers to Art 8, paragraph 2, something absolutely new as regards the Draft on Responsibility of States. I am sure there is an explanation for this new element, but I think we need to devote more thought to it, for the simple reason that by including this paragraph, the Special Rapporteur and the International Law Commission do not provide an answer to the classic debate over whether acts of International Organisations fall under International Law or not. Conversely, this seems to limit any potential existence of an illicit international act to the acts in question being able to be considered in this category.

This is a possible option that, however, under the current Article 8, paragraph 2, meets some difficulty in interpretation which could lead to some inconsistency. The paragraph refers to 'an obligation under international law established by a rule of the organisation' to which, in case of violation, the first paragraph of the abovementioned article defining the concept of violation 'also applies.' Does the use of the adverb 'also' and the expression 'rule of the organisation' mean that only under the express provision in Article 8, paragraph 2 would an International Organisation be internationally liable for violating its constitutional treaties or other equivalent internal rules? I do not believe this is the intention of the article in question, and for this reason – together with others to which I am unable to refer at this time – my Delegation considers, that this paragraph should be reviewed once more in order to offer a clearer text that is free from ambiguous interpretation. This is especially important because this article is central to defining any potential relationship of liability that may arise from violation of an international obligation on the part of an Organisation.

The second comment refers to the Article 15 included in the Report of the International Law Commission. In this regard, my Delegation considers it is appropriate to use the term 'elude', because it allows for a broader range of premises than that if the 'violate' is used. Moreover, we feel it necessary to take a closer look at the premise contemplated in paragraph 2; that is, the situations in an international organisation, that through mere recommendation or authorisation, might involve one of the premises I referred to in the first part of my remarks, in which there is a clear difference between the areas of jurisdiction and the acts undertaken by the different international organisations. It can be considered, therefore, whether it might be necessary, in relation to this article, to include a new element that would enable us to take into account the diversity of the legal systems in force in the international organisations, along with the different meanings of the terms 'authorisation' and 'recommendation' in each.

Lastly, in reference to the questions asked by the International Law Commission regarding its work in the future, my Delegation questions the advisability of including in Draft articles on Responsibility of International Organisations

specific provisions directly determining the international responsibility of the State. Conversely, it might be sufficient to include a remission clause, that would ensure the application, *mutatis mutandis*, of the rules already established in the Draft on International Responsibility of State.

With regard to the second issue posed, my Delegation does not consider it appropriate to include general wording acknowledging Member State subsidiary liability for violations directly attributable to an Organisation. Conversely, any work in that direction would require very nuanced consideration taking into account different factors, particularly the separate international legal entity of the Member State and the Organisation".

2. Reparation

On 2 August 2005, in response to a parliamentary question, the Spanish Government informed on measures to defend Spanish citizens demanding the reparation of the damages caused by the seizure of their property in Equatorial Guinea when it was a Spanish colony:

"In relation to the damages and personal harm caused to the Spanish residents of Equatorial Guinea as a result of said territory's independence in 1968, a distinction must be made between two types of compensation:

Compensation of a social nature for the loss of employment by employees and self-employed persons with small businesses and industries, as well as for the loss of household furnishings and effects. The compensation was approved by the Council of Ministers on 17 January 1980. Later, the Supreme Court decision of 15 February 1993 entitled the former residents of Equatorial Guinea to be compensated for the cost of travel, aid for their return and travel expenses, like the persons repatriated from the Western Sahara. Lastly, on 3 October 1996, the Council of State issued a recommendation in favour of increasing the number of people receiving compensation of a social nature.

Payment of this type of compensation was carried out from 1995 to 1999, through the Ministry of the Presidency in implementation of a Agreement by Council of Ministers. It was charged to the budget of the Ministry of the Presidency.

There is further compensation to offset the loss of goods and business activity as a result of the forced abandonment of the country. In this regard, on 24 November 2004 the Congress of Deputies approved a Motion urging the Government to provide consular assistance to former Spanish residents in Equatorial Guinea suffering the loss of goods and property owing to the discriminatory acts in that country, and to go before Equatorial Guinean courts to defend such interests.

Under the terms of this Motion, the Embassy of Spain in Malabo and the Consulate General of Spain in Bata are available to provide appropriate consular assistance to Spaniards who appeal or may appeal to Equatorial Guinean courts to defend their interests, in conformance with the rules of International

Law and common practice, and under the same terms as with any other Spanish expatriate who finds him/herself in similar circumstances".

(*BOCG-Congreso.D*, VIII Leg., n. 252, pp. 333–334).

XV. PACIFIC SETTLEMENT OF DISPUTES

XVI. COERCION AND USE OF FORCE SHORT OF WAR

1. Unilateral Measures

In response to a parliamentary question on 15 November 2005, the Spanish Government informed on Spain's position regarding international sanctions against Syria:

"The Spanish Government considers that a policy of dialogue and cooperation must be maintained with the Syrian authorities, while at the same time remaining steadfast in demanding compliance with international law. For this reason, Spain welcomed the withdrawal of Syrian troops and intelligence service personnel from Lebanon, in compliance with UN Security Council Resolution 1559.

In the European context, the Government has defended cooperation with Syria and its full participation in the Barcelona Process, as an ideal mechanism to promote and consolidate political, economic and social reforms in Syria and other Member countries in the southern and eastern Mediterranean. In this context, negotiations between the EU and Syria on an Association Agreement have concluded and are pending signature.

Currently, only the Government of the United States of America maintains unilateral sanctions against Syria, since May 2004, in application of the 'Syria Accountability Act.'

In the current context, the Government is not in favour of imposing international sanctions against Syria that have not been proposed for any other reason. However, the Spanish government, together with its other EU partners, has expressed the need for Syria to comply with United Nations Security Council resolutions, particularly Resolution 1559, and Resolution 1595, on the formation of an international commission to investigate the assassination of Rafiq Hariri".

(*BOCG-Congreso.D*, VIII Leg., n. 292, p. 277).

2. Collective Measures. Regime of the United Nations

a) Afghanistan

On 7 December 2005, in response to a parliamentary question, the Spanish Government informed on the deployment of Spanish troops in Afghanistan:

"The Spanish presence in Afghanistan began with its participation in Operation 'Enduring Freedom' as authorised by the Council of Ministers on 14 December 2001.

On 20 December 2001, the United Nations Security Council, in Resolution 1386, approved the creation of the ISAF (International Security Assistance Force in Afghanistan) and on 27 December 2001 the Council of Ministers authorised Spain's participation in ISAF. Its objective is to act in support of the Afghan Provisional Authority to maintain security in Kabul and its surrounding areas.

United Nations Security Council Resolution 1510, of October 2003, authorised the ISAF mandate in areas outside Kabul and its surrounding areas, as well as extending security to include United Nations personnel and international civilian personnel engaged in humanitarian operations and reconstruction.

The Council of Ministers of 2 July 2004 decided to put an end to Spain's participation in 'Enduring Freedom' and, at the request of the United Nations, authorised the deployment of a battalion in support of the electoral process in Afghanistan. This resolution was approved by the Plenary Session of the Congress of Deputies on 6 July 2004.

Later on, in February 2005, Spain took charge of a provincial reconstruction team at the request of the Secretary-General of the United Nations and President Karzai of Afghanistan. Under the continued auspices of the United Nations and at the request of the Afghan Government itself, the objective of the Spanish presence is to contribute to building a free, democratic and stable Afghanistan, to help in giving an opportunity to a population that, through contacts with same, shows its receptivity for and appreciation of such presence.

This overview of our participation in Afghanistan to date is complete with our support of the parliamentary elections held last 18 September.

In this process seeking the development and consolidation of State institutions, economic and social development of the people, reform of the system of justice, etc., the United Nations plays the essential role as the source of the legitimacy of the international presence.

The mission of the International Security Assistance Force in Afghanistan, bears no resemblance to situations experienced in the past in that country".

(*BOCG-Congreso.D*, VIII Leg., n. 302, p. 407).

b) Haiti

On 13 May 2005, in remarks before the Security Council, the Representative of Spain, Mr. Yáñez-Barnuevo, set forth Spain's position regarding the crisis in Haiti:

"(. . .)

Spain's active commitment to stability, democratisation and development in Haiti is expressed through our participation in the United Nations Stabilisation Mission in Haiti (MINUSTAH) with a military contingent working in close cooperation with one from Morocco and with a civilian police contingent, as

well as through our activities in the Ad Hoc Advisory Group on Haiti of the Economic and Social Council, in whose recent mission to the country we participated. The two missions – the Security Council's and the Economic and Social Council's – highlighted the complementarity of those organs when they address complex crises such as the one in Haiti. We agree with the recommendations resulting from the mission, which are set out in the report before the Council (S/2005/302).

The elections planned for the end of the year are undoubtedly one of the most important short-term challenges for the people of Haiti and for the international community. However, they cannot, in and of themselves, solve the country's problems, which also require long-term social, economic and institutional development efforts.

All political parties that renounce violence must be able to participate in free, transparent and inclusive elections in which there is the greatest possible participation by the people. We believe that, during the electoral process, the presence of international observers and the strengthening of security – the absence of which would pose higher risks for the success of the process – would be highly appropriate.

With a view to those objectives, the national dialogue begun on 7 April by Interim President Boniface Alexandre – which dialogue should be supported – should immediately serve to create an inclusive political scenario that will ultimately permit the governability of the country. The Haitian political forces have a special responsibility to ensure that the dialogue moves forward before the electoral process begins and that it continues after the installation of the new Government. The national dialogue should make it possible to define the political framework needed for the implementation of long-term development objectives.

The solution to Haiti's fragile situation is not purely military in nature. However, we all know that there can be no development without security. The two are interlinked and require progress in parallel. We agree with the recommendation that the Department of Peacekeeping Operations review the security situation in Haiti.

In that context, we believe that a new concept of operations should be adopted for MINUSTAH through a revised model of its civilian police component, with appropriate support for its military personnel – all of this to take place before the electoral process gets under way. We should also improve the coordination of MINUSTAH's civilian police component and strengthen its cooperation with a reformed Haitian National Police. The Mission should also be endowed with the required resources to improve its intelligence gathering capabilities and enhance its internal coordination with respect to the civilian police.

It is clear that MINUSTAH is playing a very important role in terms of stability and deterrence, which continues to be pivotal, even in areas where calm currently prevails, many of which have an insufficient State presence. We note with concern that there has been very little progress in terms of disarmament

and that distrust continues to prevail. One short-term goal is to enhance the people's perception of the level of security, because very often people hesitate to take a step forward in terms of disarmament for fear of losing their capacity for self-defence.

The disarmament, demobilisation and reintegration programme initiated in February by MINUSTAH should be carried out without delay. That requires a clear-sighted and resolute attitude on the part of the Transitional Government as well as the disbursement of the required financial assistance by the donor community.

Furthermore, as stated in the interim report Ad Hoc Advisory Group of the Economic and Social Council, to which the representative of Canada has just referred, in order to put an end to the violence, we have to tackle the underlying socio-economic conditions. The members of the Security Council and of the Ad Hoc Group noted in the field the weakness of Haiti's institutions. Their fragility is very clear in the areas of law enforcement and administration.

In that respect, reform of the judicial and penal system, as well as training in the area of human rights for administrative bodies and security forces, is indispensable. Any development activity in Haiti has to be based on rebuilding the State and making it more answerable to the people, with particular attention paid to the inland areas.

Regrettably, today the people's frustration is palpable at the scant international assistance that has been provided. We must therefore all work together to remedy that situation, including through the implementation of quick-impact projects in priority areas.

Environmental sustainability and capacity-building in the area of human resources, along with institutional development throughout the country, are the areas that most urgently require the use of shock tactics. What is required is a continued effort by the international community. The peacebuilding Mission undertaken by the United Nations last year, by its very nature and scope, has to be a long-term operation. We therefore believe that it would be logical to extend MINUSTAH's mandate for a 12-month period.

Spain, in keeping with its position within the European Union and its participation in the Ad Hoc Advisory Group of the Economic and Social Council Group and in MINUSTAH, will continue its efforts to promote peace and development in Haiti. In order to achieve those goals, it is indispensable, we believe, that the Core Group referred to in resolution 1542 (2004) fully carry out its mandate and receive support from all institutions concerned with Haiti's progress.

We are convinced that, with the Council's support, decisive actions can be taken in the coming weeks. Spain will contribute to this undertaking to the fullest extent of its capabilities.

(. . .)".

(UN Doc, S/PV.5178, pp. 20–21).

c) Iraq

The Spanish Government informed the Senate Foreign Affairs and Cooperation Committee, on the position of Spain in relation to the conflict in Iraq:

"(. . .)

If a special circumstance exists with regard to Iraq it is because, first, a very large percentage of Spanish public opinion called for it, and because the Government is seeking to be consistent with a position it adopted in early 2003 when it was in the opposition. It went into the elections with that position, and some time before they were held, in February 2004, the current Prime Minister expressed the terms under which Spanish troops could continue in Iraq. He did not exclude such presence, but did set forth conditions and went into the elections with such conditions on the table. As the conditions were not met, the Government did what any democratic government should do: be consistent with the commitments it made to the public.

In Tunis the Prime Minister did not call for the countries now in Iraq or there at that time to leave that country, but rather made very careful statements, something I know very well because I was with him at that time and he did not call for anyone to leave Iraq. The words spoken by the Prime Minister were, however, interpreted that way on the front page of certain newspapers, but I can assure the Members of Congress that that was not his intent and if there was any doubt regarding his words in Tunis, reading the text of his statement in full completely clarifies the issue.

Therefore, as I am unable to acknowledge that the Prime Minister spoke in those terms, I am also unable to comment on any potential change in position in that regard.

It is also not fair to say that the Prime Minister stated a specific position at the NATO summit in Istanbul. The present Government's commitment in regard to Iraq was expressed on 22 April, when the announcement was made that the troops would be withdrawn, and in that same announcement I would remind you that the Prime Minister expressed the Spanish Government's commitment to reconstruction, along with democratisation and territorial integrity, of Iraq. It was then, therefore, when the commitment was expressed, and what the Government did later was to abide by that commitment. That did not prevent the Government, when the NATO summit was held in Istanbul, from not having adopted a concrete measure, which is what the Prime Minister was referring to, but now measures have been taken.

The Government considers not only its own commitment but also that of the International Community to a sovereign, secure, united, prosperous, democratic Iraq at peace with its neighbours as fundamental, and it is in this framework that Spain is participating together with the United Nations and the European Union in initiatives seeking the democratisation, stability, and development to which the Prime Government committed himself on 22 April 2004. Proof of this interest is the current tour by the Minister of Foreign Affairs, whose

implication in the political and economic reconstruction process is fundamental and to which I have already referred, in which he is making use of his capability as an interlocutor with Iraq's neighbours.

The Government considers it a priority to contribute to the development of the Iraqi political process as set forth in United Nations Security Council Resolution 1546, a resolution in which the Government participated quite actively and regarding which it made a number of initiatives that are embodied in the text and were recognised by different international players. In December 2004 the Office of the Government Commissioner for the Reconstruction of Iraq approved a $20 million contribution to the International Reconstruction Trust Fund for Iraq. These funds were earmarked to be sent to the UNDP and used specifically for electoral processes, and thus Spain showed very clearly that its commitment to democratisation was to be through this contribution, which was part of a much larger one, to which I will refer later on.

As regards stability in Iraq, Spain is participating in various international multilateral fora, the principle objective of which is to train the Iraqi Security Forces to be able to gradually take over stability assurance functions in Iraq. Spain became involved in the NATO training mission in Iraq, approved in June 2004, pursuant to the abovementioned Resolution 1546. The independent mission of the multinational forces will provide perform training activities outside Iraq – as established in the resolution – and the Spanish Government has offered to fund and host specific courses in our country and announced a financial contribution for the training mission. The Atlantic Alliance will also carry out training missions inside Iraq, but, as the Members of Congress know, the Government will not be participating in those.

Furthermore, in the context of the European Union, the Spanish Government and other European governments responded to the request made by the United Nations Secretary-General to fund the force protecting the United Nations contingent, which is being funded by a 4 million euro budget line item in the PESC budget.

As the Members of Congress know, stability also has a civilian component, particularly the Administration of Justice, and for this reason, the Spanish Government has decided to participate in the joint mission on civilian crisis management and rule of law approved by the European Union. We will be participating in the funding and the organisation of integrated training courses for judges, prosecutors, police officers, defence lawyers, and prison staff in our country.

In addition to the above, political stability and reconstruction have another facet, the economy, that is fundamental for the new Iraqi Government, to which the people are going to look for improvements in their living conditions. For this reason, Spain has made major economic efforts along two tracks. First, regarding economic cooperation it has stated it will maintain the pledge made at the Madrid Conference, at which it announced $300 million in aid to the Iraqi people. Of these funds, $160 million – of which the Members of Congress

are surely well aware – were earmarked for the 2003/2004 period and today have already been allocated, leaving $140 million, which have been earmarked for the 2005/2006 period.

Furthermore, 80 percent of Iraq's debt with Spain has been condoned, as decided at the Paris Club and consistent with a very large number of Spain's partners in the international community. In practical terms, this amounts to cancellation of $482 million of Iraq's overall $602 million debt with Spain".

(*DSS-C*, VIII Leg., n. 105, pp. 18–19).

XVII. WAR AND NEUTRALITY

1. Humanitarian Law

In his speech to the Security Council on 9 December 2005, Spain's Permanent Representative, Mr. Yáñez – Barnuevo, set forth Spain's position on the SG's report on the protection of civilian population in situations of armed conflict:

"Let us recall that the main responsibility for the protection of civilian populations, including internally displaced persons, lies with national authorities. But where the State in question is unable to protect civilian populations on its territory it is incumbent on the international community to shoulder the responsibility, making use of appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, or when appropriate making use of enforcement measures pursuant to Chapter VII, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The outcome document of September's General Assembly summit (General Assembly resolution 60/1) set this concept out as a major advance in the action of the international community, and we cannot fail to welcome this.

Of particular concern is the need to ensure access to affected populations by humanitarian personnel and humanitarian assistance in situations in which the State or party to the conflict responsible for providing such access is unable or unwilling to do so. As the Secretary-General notes in his report (S/2005/740), and as the United Nations Emergency Relief Coordinator has indicated, in 2004 United Nations agencies were denied access to an estimated 10 million people in need of assistance. Grave security conditions not only hamper access for such assistance; often, they also make it necessary to remove humanitarian personnel temporarily, leaving affected populations without support or assistance of any kind. The case of Darfur provides a clear example of this.

At the same time, it is vital that those responsible for committing atrocities against civilian populations not go unpunished. Once again, it is the State in whose jurisdiction the crimes are committed that bears primary responsibility for ensuring that. Should such a State be unable or unwilling to do so, the international community must use all means at its disposal to combat impunity for

especially serious violations. Such means include transitional justice, truth commissions, special or joint tribunals and, in a broader framework, the International Criminal Court, which should play – and in certain cases already is playing – a key role in investigating and bringing to trial the perpetrators of genocide, crimes against humanity and war crimes.

Let me turn now to the leading role that can be played by the International Fact-Finding Commission created under article 90 of Additional Protocol I to the Geneva Conventions, relating to the protection of victims of armed conflicts – in this context, civilian populations in particular. The Commission, whose jurisdiction has already been accepted by 68 States, can help ensure compliance with the rules of international humanitarian law, in particular those relating to the protection of the victims of armed conflict, not only through investigation and fact-finding with respect to alleged violations of the relevant rules, but also by using its good offices to facilitate a return to respect for the Geneva Conventions and the Additional Protocol. This fully justifies the reference to the Commission's functions in resolution 1265 (1999), the first of the Council's resolutions on this matter.

In that regard, we welcome the visit to New York by a delegation from the International Fact-Finding Commission, led by its President, Sir Kenneth Keith. We are confident that this visit will enable us all to become familiar with the activities the Commission can undertake, with a view to increasing the number of States accepting the Commission's jurisdiction and encouraging the parties concerned that they should have recourse to it. The Commission is a unique instrument for ensuring the proper implementation of international humanitarian law and for helping prevent recurrent violations of the rules governing armed conflict.

For that reason, we believe that consideration should be given to the establishment of formal channels by which cooperation between the United Nations and the International Fact-Finding Commission can be strengthened, with a view to realising the potential of the Commission's activities in terms of the work of the Organisation, particularly in the sphere of the protection of civilian populations in armed conflict".

(UN Doc., S/PV.5319 [Resumption 1], pp. 17–18).

2. Disarmament

a) Anti-Personnel Mines

On 2 August 2005, in response to a parliamentary question, the Spanish Government reported on the measures it has taken to identify the sources of supply of anti-personnel mines to non-state agents:

"It is a proven fact that certain non-state entities (irregular military or paramilitary organisations, terrorist groups) in certain countries (Colombia, Afghanistan, for example) are laying anti-personnel mines or similar devices. These are often

improvised, handmade explosive devices (IEDs, in the English acronym, or 'minas hechizas', as they are called in Colombia) and not industrially produced mines from a foreign supplier. In many cases, the non-state agents themselves are the ones making this type of device, by using leftover explosives and metal or plastic shrapnel, or recycling explosives from other devices (hand grenades, artillery shells, etc.). It is therefore, a problem that is not easily solved by monitoring foreign supply or procurement.

In any case, it is important to note that Spain does not produce or trade in anti-personnel mines, thereby guaranteeing that any such supply is not from a Spanish source acting legally (under Law 33/1998, of 5 October, on the total prohibition of anti-personnel mines and weapons of similar effect, including manufacture, storage, use and transfer). Also, Spain has provided training in this field (to train specialists in area of improvised explosive devices, owing to the experience of our security forces in this field through the fight against terrorism) at the International De-Mining Centre pertaining to the Ministry of Defence.

Also, Spain has maintained a unilateral moratorium on the export of all types of anti-personnel mines to any destination since February 1994. This moratorium was agreed by the Interministerial Regulatory Board on Foreign Trade in Defence and Dual Use Materiel. Therefore, and also in application of the abovementioned Law, the Spanish authorities in charge of regulating foreign arms trade have not granted any export licence for anti-personnel mines since the moratorium went into effect in February 1994. Furthermore, the sole Spanish producer of such devices stopped production in the 1988–89 time frame".

(*BOCG-Congreso.D*, VIII Leg., n. 252, pp. 633–634).

b) Nuclear Weapons

On 7 July 2005, in response to a parliamentary question, the Spanish Government reported on Spain's position in connection with the Nuclear Non Proliferation Treaty review process:

"The Nuclear Non-Proliferation Treaty (NPT) review process consists of a very complex series of activities set in motion with the NPT's entry into force in 1970. This Treaty was extended indefinitely from 1995, with a Review Conference being organised every 5 years to assess the progress achieved in implementing its provisions (which are very ambitious and entail very long-term commitments). In May 2005 a Nuclear Non-Proliferation Treaty (NPT) was held in New York under the auspices of the United Nations. In view of the above, it is understood that the NPT review is first and foremost a monitoring or enforcement process, rather than a reopening of the text of the Treaty. Spain certainly participates in this process, both in the 2005 Conference and in earlier conferences. The following sets forth some aspects of our country's position.

Spain's position is closely aligned to that of the European Union (EU).

As regards the position of the European Union, it must be pointed out that its members include two nuclear-weapons-possessing-states (France and Great Britain), some countries that are members of the Atlantic Alliance (such as Spain), and other countries that have in the past held neutral status (such as Sweden or Austria). Therefore, there are different sensitivities and some major differences in the EU regarding the NPT system (for example, relating to "unequivocal commitment" to achieving progress in nuclear disarmament, under Art. VI of the NPT). On many issues consensus and the desire to work in close collaboration prevail. European Union members share certain points of view on NPT review: after a long consultation process, a Common Position (a formal, binding position) containing relevant ideas, especially on issues of non-proliferation and regional crises was able to be adopted in the General Affairs Council (CGAER) of 4–26–05. This text expressed some basic positions:

a) the importance of maintaining the NPT in its integrity and the need to adopt measures in the event of non-compliance, in respect of international law and effective multilateralism.

b) firm support for monitoring certain United Nations processes (such as Resolution 1540) or instruments such as the Total Nuclear Test Ban Treaty (opened for signature in 1997, and not yet in force).

c) more technical aspects, such as the proposal to commence negotiations on limiting the production of fissile material for nuclear weapons.

A number of common EU statements on the implementation of this lengthy Common Position (7 pages) have already been issued (and are available on the Internet).

Regarding other NPT issues, such as, for example, Disarmament and Peaceful Uses of Nuclear Energy (Art. IV of the Treaty), while some points of contact exist, national positions have more visibility. Some aspects of Spain's national position may can be specified. Without detriment to EU documents and statements, the Spanish delegation participated in the general discussion at the Review Conference, and presented at least two documents (one on a national basis and the other in collaboration with Holland and Belgium) expressing certain national positions. In these reports, Spain voices particular support for monitoring the so-called 'Thirteen Measures for Disarmament' in accordance with the Final Document of the 2000 Review Conference. Other countries in our political environment have the same sensitivities (Netherlands, Belgium, Canada, Japan, Australia . . .) and are also going to present documents along these lines.

Other aspects of Spain's position involve defending certain priorities: the problematic of proliferation through non-state agents (terrorism and illicit trafficking in sensitive technologies), and the urgency of promoting multilateral solutions on transparency and verification in weapons control and technical cooperation (for example, on the controversial issue of nuclear fuel). Spain applauds the adoption last 1 April (and the upcoming opening for signature) of a text of a

Convention on Nuclear Terrorism, and the Government is in favour of more processes of this type.

(. . .)

Otherwise, notwithstanding our basic commitments, it is important to underline that the essential thing is to maintain an open, constructive position. On the subject of proliferation, a global crisis that transcends our political environment and sphere of influence is currently in the process of taking shape. Think, for example, of the different situations that are arising in the so-called arc of proliferation that extends from North Korea, a country that has withdrawn from the NPT, through India and Pakistan (two nuclear- weapons-states that are not parties to the Treaty) to the Middle East, the region where Israel (also not a party to the NPT) is located. Throughout this geographic arc, we find a long list of countries (including China, Iran y Egypt) with conflictive positions, that have not signed/ratified the Total Nuclear Test Ban Treaty (among other instruments). Very broad questions arise: How can we advance towards making the multilateral non-proliferation system universal? How can we improve treaty implementation in this area so essential for peace and security?

Neither Spain nor the European Union have the answers to all these questions. Work is being done to formulate a consistent position that would enable a constructive contribution to be made at this new Review Conference. It can be said that the central core of this position both in Europe and in Spain, is the consolidation and development of the existing multilateral system. We will make all necessary efforts to defend this position".

(*BOCG-Congreso.D*, VIII Leg., n. 237, pp. 366–367).

c) Morocco

On 2 August 2005, in response to a parliamentary question, the Spanish Government reported on arms sales to Morocco:

"Spain has sold no M-60 tanks to the Kingdom of Morocco, nor does it have any intention of doing so in the future. Within the past five years, the Government of Spain has only sold, on 24 October 2003, two WM-22 fire controllers and two Otto-Melara 76/62 mm cannons to the Kingdom of Morocco. This materiel was sold for a symbolic price of one euro per unit.

Nonetheless, during the 1999–2004 period, the Government authorised export to Morocco of a range of defence materiel, and the exports actually made boil down to military vehicles (100 Nissan Patrol vehicles in 1999; 300 Nissan Patrol, 50 Nissan lorries and 50 Uro troop transport lorries in 2000; 200 Nissan Patrol in 2001; 250 Nissan Patrol, 30 Nissan lorries and 30 Nissan Terrano ambulances in 2002; 54 Uro vehicles, 20 Nissan lorries y 30 Nissan Terrano ambulances in 2004), 1 revolver (2002), 23,200 rounds of practice ammunition (2003) and 2 rifles (2004)".

(*BOCG-Congreso.D*, VIII Leg., n. 252, p. 452).

d) Venezuela

On 29 September 2005, in response to a parliamentary question, the Spanish Government stated its views regarding the effect of the recent arms sale to Venezuela on Spain's relations with the United States:

> "From 2000 to 2003 the Popular Party Government authorised export licences for arms sales by Spanish companies to Venezuela, with no negative impact on relations with the United States.
>
> Also, according to European Union reports, and under operative provision no. 8 of the Code of Conduct relating to arms exports, from 2000 to 2003 a number of European countries authorised the sale of defence materiel to Venezuela, with no impact on their relations with the United States.
>
> Spain has explained that this materiel (cargo aircraft and patrol boats) is not offensive in nature, nor can it therefore be used against other countries in the region. The missions in which this materiel will be used will focus on the surveillance of Venezuelan territorial waters and border areas in order to fight drug trafficking.
>
> The Ministry of Defence considers that the Memoranda of Understanding signed between Spain and the Bolivarian Republic of Venezuela entail a large amount of work for the Navantia shipyards and our aeronautical sector, and are therefore very positive in terms of economic development and job creation.
>
> Currently, relations between Spain and the United States in the area of defence are good".
>
> (*BOCG-Congreso.D*, VIII Leg., n. 265, pp. 98–99).

Treaties to Which Spain is a Party Concerning Matters of Public International Law, 2005

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

III. RELATIONSHIP BETWEEN INTERNATIONAL AND MUNICIPAL LAW

IV. SUBJECTS OF INTERNATIONAL LAW

V. THE INDIVIDUAL AND INTERNATIONAL LAW

1. Aliens

– Agreement between the Kingdom of Spain and the Swiss Confederation on readmission of illegal aliens and Protocol for its implementation, done at Madrid on 17 November 2003.
Entry into force: 12/01/05 (*BOE* 17, 20/01/05).

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2. Human rights

– Resolution of 29 November 2005, of the Technical Secretariat-General of the Ministry of Foreign Affairs regarding the objection of Spain to the reservations formulated by the United Arab Emirates to the Convention on the elimination of all forms of discrimination against women, done at New York on 18 December 1979.
Deposit of the reservation: 6/10/05 (*BOE* 296, 12/12/05).
Note: "The Government of the Kingdom of Spain has examined the reservations entered by the Government of the United Arab Emirates to article 2, subparagraph (f); article 9; article 15, paragraph 2; and article 16 of the Convention on the Elimination of All Forms of Discrimination against Women upon its accession to that instrument on 6 October 2004.

The Government of the Kingdom of Spain considers that these reservations are incompatible with the object and purpose of the Convention, since they are intended to exempt the United Arab Emirates from obligations relating to essential aspects of the Convention: one of a general nature, namely the adoption of measures, including legislation, to eliminate all forms of discrimination against women (article 2, subparagraph (f)), and others concerning specific forms of discrimination in relation to nationality (article 9), legal capacity in civil matters (article 15, paragraph 2) and marriage and family relations (article 16).

The Government of the Kingdom of Spain recalls that, under article 28, paragraph 2, of the Convention, reservations incompatible with the object and purpose of the Convention are not permitted.

Moreover, the reservation to article 16 of the Convention makes a general reference to the principles of Islamic law without specifying their content, with the result that the other States parties cannot precisely determine the extent to which the Government of the United Arab Emirates accepts the obligations set out in article 16 of the Convention.

Accordingly, the Government of the Kingdom of Spain objects to the reservations entered by the Government of the United Arab Emirates to article 2, subparagraph (f); article 9; article 15, paragraph 2; and article 16 of the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Kingdom of Spain and the United Arab Emirates".

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 service passport holders, done at Quito on 20 November 2003.
Provisional application: 20/12/03 (*BOE* 32, 6/02/04).
Definitive entry into force: 28/02/05 (*BOE* 33, 8/02/05).

– Agreement between the Kingdom of Spain and the Republic of Honduras on remunerated employment for dependants of diplomatic, consular, administrative and technical staff of diplomatic and consular missions, done at Madrid on 9 May 2001.
Entry into force: 22 September 2003 (*BOE* 34, 9/02/05).

– Agreement between the Spanish Government and the Macedonian Government on exemption of visas for diplomatic and service passport holders, done at Madrid on 3 June 2003.
Provisional application: 3/07/03 (*BOE* 168, 15/07/03).
Definitive entry into force: 31/01/05 (*BOE* 21, 25/01/05).

2. Relations with International Organisations

– Agreement between the Kingdom of Spain and the Secretariat of the Convention on biological diversity regarding the meeting of the "Ad Hoc" Technical Expert Group on Island Biodiversity, done at Madrid on 10 December 2004.
Provisional application: 10/12/04 (*BOE* 83, 7/04/05).

– Framework Agreement on Cooperation between the Kingdom of Spain and the Office of the United Nations High Commissioner for Refugees, done at Geneva on 9 December 2002.
Provisional application: 9/12/02 (*BOE* 123, 23/05/03).
Definitive entry into force: 4/03/05 (*BOE* 88, 13/04/05).

– Agreement between the Kingdom of Spain and the United Nations Human Settlements Programme (UN-HABITAT) regarding the celebration in Barcelona (Spain) of the Second Session of the World Urban Forum, done at Barcelona on 13 September 2004.
Provisional application: 13/09/04 (*BOE* 123, 24/05/05).

– Framework Agreement between the Kingdom of Spain and the United Nations Children's Fund (UNICEF), done "ad referendum" at Madrid on 25 February 2004.
Entry into force: 9/03/05 (*BOE* 130, 1/06/05).

– Headquarters Agreement between the Kingdom of Spain and the Ibero-American Secretariat-General, done at Madrid on 30 September 2005.
Provisional application: 30/11/05 (*BOE* 243 and 256, 11 and 26/10/05).

– Framework Agreement between the Kingdom of Spain and the United Nations Industrial Development Organisation, done at Madrid on 15 December 2004.
Entry into force: 21/07/05 (*BOE* 262, 2/11/05).

– Framework Agreement between the Kingdom of Spain and the United Nations Food and Agriculture Organisation, done "ad referendum" at Madrid on 27 January 2004.
Entry into force: 22/03/05 (*BOE* 266, 7/11/05).

– Headquarters Agreement between the Kingdom of Spain and the Organisation of Ibero-American States for Education, Science and Culture (O.E.I.), done at Madrid on 24 June 2004.
Provisional application: 24/06/04 (*BOE* 198, 17/8/04).
Definitive entry into force: 28/10/05 (*BOE* 284, 28/11/05).

VII. TERRITORY

VIII. SEAS, WATERWAYS AND SHIPS

1. Fisheries

– Amendments to the Annex to the International Convention for Regulation of Whaling, adopted at the 56th session of the International Whaling Commission, done at Monaco on 22 July 2004.
Entry into force: 28/10/04 (*BOE* 107, 5/05/05).

IX. INTERNATIONAL SPACES

1. Space

– Agreement between the States Parties to the Convention for the establishment of a European Space Agency and the European Space Agency for the protection and exchange of classified information, done at Paris on 19 August 2002.
Instrument of ratification: 11/11/04.
Entry into force: 1/01/05 (*BOE* 53, 3/03/05).

X. ENVIRONMENT

1. General

– Kyoto Protocol to the United Nations Framework Convention on Climate Change, done at Kyoto on 11 December 1997.
Instrument of ratification: 10/05/02.
Entry into force: 16/02/05 (*BOE* 33, 8.02 and 97, 23/04/05).

– Convention on access to information, public participation in the decision-making and access to justice in environmental matters, done at Aarhus (Denmark), on 25 June 1998.
Instrument of ratification: 15/12/04.
Entry into force: 29/03/05 (*BOE* 40, 16/02/05).

2. Seas

– 2003 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, done at London on 16 May 2003.
Instrument of ratification: 1/12/04.
Entry into force: 3/03/05 (*BOE* 28, 2/02/05).

– 2004 Amendments to Annex to the 1978 Protocol to the International Convention for the Prevention of Pollution from Ships, 1973, (Annex IV revised MARPOL 73/78), adopted by Resolution MEPC 115(51), on 1 April 2004.
Entry into force: 1/08/05 (*BOE* 153, 28/06/05).

– 2003 Amendments to Annex to the 1978 Protocol to the International Convention for the Prevention of Pollution from Ships, 1973 (Amendments to Regulation 13 G of Annex I of MARPOL 73/78), approved by Resolution MEPC 111(50), adopted on 4 December 2003.
Entry into force: 5/04/05 (*BOE* 154, 29/06/05).

– 2002 Amendments to Annex to the Protocol regarding intervention on the high seas in case of marine pollution by substances other than oil, 1973 (revision of list of substances), adopted on 11 October 2002 by Resolution MEPC 100(48).
Entry into force: 22/06/04 (*BOE* 191, 11/08/05).

– 2004 Amendments to Annex to the 1978 Protocol to the International Convention for the Prevention of Pollution from Ships, 1973, adopted on 1 April 2004 by Resolution MEPC 116(51).
Entry into force: 1/08/05 (*BOE* 254, 24/10/05).

3. Air

– Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone, done at Gothenburg (Sweden) on 30 November 1999.
Instrument of ratification: 14/01/05.
Entry into force: 17/05/05 (*BOE* 87, 12/04/05).

4. Fauna and flora

– Protocol of Amendment to the European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes, done at Strasbourg on 22 June 1998.
Instrument of ratification: 30/10/03.
Entry into force: 5/12/05 (BOE 294, 9/12/05).

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

1. General treaties

– Basic Convention on Cooperation between the Kingdom of Spain and Bosnia and Herzegovina, done at Sarajevo on 11 June 2003.
Entry into force: 19/05/05 (*BOE* 140, 13/06/05).

– Framework Convention on Cooperation between the Kingdom of Spain and the Republic of Peru, done at Madrid on 6 July 2004.
Entry into force: 20/05/05 (*BOE* 218, 12/09/05).

2. Military and Defence Cooperation

– Treaty on the Statute of EUROFOR, done at Rome on 5 July 2000.
Entry into force: 4/02/04 (*BOE* 108, 6/05/05).

3. Scientific and Technical Cooperation

– Agreement on Scientific and Technological Cooperation between the Kingdom of Spain and the Republic of Portugal, done at Figueira da Foz on 8 November 2003.
Entry into force: 20/12/04 (*BOE* 39, 15/02/05).

– Agreement on Scientific and Technological Cooperation between the Government of the Kingdom of Spain and the Government of the Republic of South Africa, done at Barcelona on 12 May 2003.
Entry into force: 2/03/05 (*BOE* 54, 4/03/05).

4. Cultural Cooperation

– Exchange of Notes constituting an Agreement extending the "Agreement between the Kingdom of Spain and the United States of America on Educational, Cultural and Scientific Matters", 27 October 1994, done at Madrid on 20 January and 2 February 2004.

Provisional application: 2/09/03 (*BOE* 134, 3/06/04).
Definitive entry into force: 11/01/05 (*BOE* 42, 18/02/05).

– Cooperation Agreement on Art and Culture between the Government of the Kingdom of Spain and the Government of the Republic of South Africa, done at Pretoria on 3 February 2004.
Entry into force: 2/02/05 (*BOE* 63, 15/03/05).

– Exchange of Notes of 23 December 2004 constituting a Convention between the Kingdom of Spain and the Principality of Andorra on education.
Provisional application: 23/12/04 (*BOE* 69, 22/03/05).
Note: This Exchange of Notes supersedes and ends the provisional application of the Convention between the Kingdom of Spain and the Principality of Andorra on education, done at Madrid on 22 December 2003 (*BOE* 132, 1/06/04).

– Framework Agreement between the Government of the Kingdom of Spain and the Government of the French Republic on Educational, Linguistic and Cultural Programmes in Schools of both States, done at Madrid on 16 May 2005.
Provisional application: 16/05/05 (*BOE* 164, 11/07/05).

– Exchange of Notes constituting an Agreement between the Kingdom of Spain and the French Republic modifying the Convention on Cinematographic Relations and Annex of 25 March 1988, done at Madrid on 4 November 2003 and 23 March 2004.
Entry into force: 30/06/05 (*BOE* 183, 2/08/05).

– Amendment to the Convention of 22 November 1928 relating to International Exhibitions, modified and completed by the Protocols of 10 May 1948, 16 November 1966 and 30 November 1972 and by the Amendment of 24 June 1982, adopted by the General Assembly of the Bureau of International Exhibitions on 31 May 1988.
Instrument of acceptance: 6/07/90.
Entry into force: 19/07/96 (*BOE* 274, 16/11/05).

– Convention between the Government of the Kingdom of Spain and the Government of the Republic of Poland on the establishment and functioning of the Culture Institutes, done at Warsaw on 30 September 2005.
Provisional application: 30/09/05 (*BOE* 287, 1/12/05).

5. Sports

– Exchange of Notes constituting an Agreement between Spain and Andorra on mutual recognition of hunting and sports shooting arms licences, done at Andorra on 22 February 2005.
Provisional application: 22/02/05 (*BOE* 84, 8/04/05).

– Amendment to Appendix 1 of the Anti-Doping Convention of 16 November 1989, adopted by the Monitoring Group on 10 November 2004.
Entry into force: 1/01/05 (*BOE* 248, 17/10/05).

6. Commodities Cooperation

– International Coffee Agreement, 2001, approved by Resolution 393, done at London on 28 September 2000.
Provisional application: 1/10/01 (*BOE* 296, 11/12/01).
Instrument of ratification: 31/05/02.
Entry into force: 17/05/05 (*BOE* 148, 22/06/05).

– Amendment to paragraph 15.a of the Mandate of the International Copper Study Group, adopted by the United Nations Conference on Copper on 24 February 1989, by Decision of 17 March 2005 (*BOE* 248, 17/10/05).

7. Economic Cooperation

– Agreement between the Kingdom of Spain and the Arab Republic of Syria for the promotion and protection of investments, done at Damascus on 20 October 2003.
Entry into force: 14/12/04 (*BOE* 42, 18/02/05).

– Agreement for the promotion and protection of investments between the Kingdom of Spain and the Kingdom of Morocco, done "ad referendum" at Madrid on 11 December 1997.
Entry into force: 13/04/05 (*BOE* 86, 11/04/05).

8. Financial and Tax Cooperation

– 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 on capital, done at Riga on 4 September 2003.
Entry into force: 14/12/04 (*BOE* 8, 10/01 and 57, 8/03/05).

– Convention between the Kingdom of Spain and the Republic of Estonia for the avoidance of double taxation and the prevention of tax evasion and fraud in relation to taxes on income and on capital, done at Tallinn on 3 September 2003.
Entry into force: 28/12/04 (*BOE* 29, 3/02/05).

– Exchange of Notes of 26 November 2004 and 11 April 2005, concerning the taxation of savings income, between the Kingdom of the Netherlands on behalf of Aruba and the Kingdom of Spain.
Provisional application: 1/07/05 (*BOE* 153, 28/06/05).
Definitive entry into force: 23/11/05 (*BOE* 284, 28/11/05).

– Exchange of Notes of 26 November 2004 and 26 April 2005 between the Kingdom of Great Britain and Northern Ireland on behalf of the Cayman Islands and the Kingdom of Spain, concerning the automatic exchange of information about taxation of savings income in the form of interest payments.
Provisional application: 1/07/05 (*BOE* 153, 28/06/05).

– Exchange of Notes of 26 November 2004 and 7 April 2005 between the Kingdom of Great Britain and Northern Ireland on behalf of Montserrat and the Kingdom of Spain, concerning the automatic exchange of information about taxation of savings income in the form of interest payments.
Provisional application: 1/07/05 (*BOE* 153, 28/06/05).

– Exchange of Notes of 26 November 2004 and 11 April 2005 between the Kingdom of Great Britain and Northern Ireland on behalf of the Virgin Islands and the Kingdom of Spain, concerning the automatic exchange of information about taxation of savings income in the form of interest payments.
Provisional application: 1/07/05 (*BOE* 154, 29/06/05).

– Exchange of Notes of 26 November 2004 and 18 February 2005, constituting an Agreement, concerning the taxation of savings income, between the Isle of Man and the Kingdom of Spain.
Provisional application: 1/07/05 (*BOE* 154, 29/06/05).

– Exchange of Notes of 26 November 2004 and 4 April 2005 between the Kingdom of Great Britain and Northern Ireland on behalf of the Turks and Caicos Islands and the Kingdom of Spain, concerning the automatic exchange of information about taxation of savings income in the form of interest payments.
Provisional application: 1/07/05 (*BOE* 154, 29/06/05).

– Exchange of Notes of 26 November 2004 and 12 April 2005, concerning the taxation of savings income, between the Kingdom of the Netherlands on behalf of the Netherlands Antilles and the Kingdom of Spain.
Provisional application: 1/07/05 (*BOE* 155, 30/06/05).
Definitive entry into force: 23/11/05 (*BOE* 284, 28/11/05).

– Exchange of Notes of 26 November 2004 and 14 February 2005, constituting an Agreement, concerning the taxation of savings income, between the Kingdom of Spain and Jersey Island.
Entry into force: 1/07/05 (*BOE* 155, 30/06/05).

– Exchange of Notes of 26 November 2004 and 17 February 2005, constituting an Agreement, concerning the taxation of savings income, between the Kingdom of Spain and Guernsey Island.
Entry into force: 1/07/05 (*BOE* 155, 30/06/05).

– Exchange of Notes of 26 November 2004 and 21 January 2005 between the Kingdom of Great Britain and Northern Ireland on behalf of Anguilla and the Kingdom of Spain, concerning the automatic exchange of information about taxation of savings income in the form of interest payments.
Entry into force: 1/07/05 (*BOE* 155, 30/06/05).

– Convention between the Kingdom of Spain and the People's Democratic Republic of Algeria for the avoidance of double taxation and the prevention of tax evasion and fraud in relation to taxes on income and on capital, done "ad referendum" at Madrid on 7 October 2002.
Entry into force: 6/07/05 (*BOE* 174, 22/07/05).

9. Postal Communications

– Acts approved by the 22nd Congress of the Universal Postal Union (UPU), done at Beijing on 15 September 1999.
Instrument of ratification: 14/01/05.
Entry into force: 1/01/01 (*BOE* 62, 14/03/05).

– Acts, Resolutions and Recommendations of the Postal Union of the Americas, Spain and Portugal (UPAEP), adopted by the 18th Union Congress on 12 September 2000, at Panama.
Instrument of ratification: 27/04/05.
Entry into force: 1/01/01 (*BOE* 163, 9/07/05).

10. Road Traffic and Transport

– Amendments proposed by Portugal to Annexes A and B of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR), done at Geneva on 30 September 1957.
Entry into force: 1/01/05 (*BOE* 18, 21.01, 90, 15.04 and 134, 6/06/05).

– Multilateral Agreement M-160 according to Section 1.5.1 of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR), on carriage of certain receptacles for use in hot air balloons and hot air airships, done at Madrid on 7 September 2004 (*BOE* 26, 31/01/05).

– 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 the modifications introduced on 7 November 2003.
Correction of errors: *BOE* 28, 2/02/05.

– Multilateral Agreement M-163 according to Section 1.5.1 of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR), on

carriage of empty packagings, uncleaned of Class 2, done at Madrid on 7 September 2004 (*BOE* 48, 25/02/05).

– Agreement between the Kingdom of Spain and the Republic of Bulgaria on international transport of passengers and cargo by road, done at Sofia on 1 September 2003.
Entry into force: 12/03/05 (*BOE* 66, 18/03/05).

– Multilateral Agreement M-164 according to Section 1.5.1 of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR), on carriage of dangerous solids in class (L) tank-vehicles, done at Madrid on 27 December 2004 (*BOE* 71, 24/03/05).

– Multilateral Agreement M-157 according to Section 1.5.1 of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR), on derogation from packing instruction P 802, done at Madrid on 23 February 2005 (*BOE* 108, 6/05/05).

– Multilateral Agreement M-165 according to Section 1.5.1 of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR), on limited Quantity pack size applicable to UN 1791 Packing Group III, done at Madrid on 23 February 2005 (BOE 113, 12/05/05).

– Amendments to Annex 1, Appendix 2 of Agreement on the international carriage of perishable foodstuffs and on the special equipment to be used for such carriage (ATP), United Nations Secretariat-General, 19 December 2003 (*BOE* 114, 13/05/05).

– Exchange of Notes constituting an Agreement, modifying Annex 1 of the Agreement between the Kingdom of Spain and the Republic of Bulgaria on the mutual recognition and exchange of national driving licences, of 30 April 2002, done at Sofia on 24 March 2003, 23 September 2004 and 20 April 2005.
Provisional application: 20/04/05 (*BOE* 154, 29/06/05).

– Exchange of Notes, on 24 May and 14 October 2004, constituting an Agreement between the Kingdom of Spain and the Republic of Chile on the mutual recognition and exchange of national driving licences.
Entry into force: 10/06/05 (*BOE* 156, 1/07/05).

– Multilateral Agreement M-168 according to Section 1.5.1 of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR), on carriage of pharmaceutical products, ready for use, done at Madrid on 21 April 2004 (*BOE* 157, 2/07/05).

– Exchange of Notes between the Kingdom of Spain and the Republic of Venezuela on the mutual recognition and exchange of national driving licences, done at Caracas on 16 May 2005.
Entry into force: 26/08/05 (*BOE* 210, 2/09/05).

– Agreement between Spain and Romania on the mutual recognition and exchange of national driving licences of Spanish and Romanian citizens, done at Bucharest on 1 September 2004.
Entry into force: 13/10/05 (*BOE* 256 and 296, 26.10 and 12/12/05).

– Multilateral Agreement M-170 according to Section 1.5.1 of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR), applicable to the carriage of hydrogen peroxide aqueous solutions stabilised (UN 2015) in portable tanks whose characteristics comply with transport instruction T9, done at Madrid on 10 June 2005 (*BOE* 263, 3/11/05).

11. Rail Traffic and Transport

– Amendments to the Regulation concerning the international carriage of dangerous goods by rail (RID 2005), annex to the Convention concerning International Carriage by Rail (COTIF), signed at Bern on 9 May 1980, adopted by the Commission of Experts on RID, at Sinaia (Romania) on 21 November 2003.
Entry into force: 1/01/05 (*BOE* 18, 21/01/05).

– Amendments of the Statutes of "Eurofima", European Company for the financing of railway equipment. Increase in the share capital interest of the Hellenic Railways (OSE) in EUROFIMA, and amendment of article 5 of the Statutes, adopted at Basel on 16 December 2004 (*BOE* 47, 24/02/05).

– Multilateral Agreement RID 1/2004, according to Section 1.5.1 of the Regulation concerning the international carriage of dangerous goods by rail (RID), concerning a derogation from packing instruction P 802, done at Madrid on 30 December 2004 (*BOE* 125, 26/05/05).

– Amendments of the Statutes of "Eurofima", European Company for the financing of railway equipment. Restructuring of the Austrian Federal Railways; restructuring of the Belgian National Railways; restructuring of the Spanish National Railways and amendment of article 5 of the Statutes, adopted at Rome on 18 March 2005 (*BOE* 131, 2/06/05).

– Multilateral Agreement RID 3/2004 according to Section 1.5.1 of the Regulation concerning the international carriage of dangerous goods by rail (RID), concerning the carriage of empty packagings, uncleaned, which contain residues of Class 2, done at Madrid on 30 March 2005 (*BOE* 155, 30/06/05).

– Multilateral Agreement RID 2/2005 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/EC, concerning the carriage of solids in tanks with a tank code (L), done at Madrid on 30 March 2005 (*BOE* 157, 2/07/05).

– Multilateral Agreement RID 6/2004, 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/EC, concerning the carriage of pharmaceutical products (medicines), ready for use, done at Madrid on 20 April 2005 (*BOE* 170, 18/07/05).

12. Sea Traffic and Transport

– 2002 Amendments to the Appendix of the Annex to the 1988 Protocol to the Convention for the Safety of Life at Sea, adopted on 24 May 2002 by Resolution MSC 124(75).
Entry into force: 1/01/04 (*BOE* 22, 26/01/05).

– 2002 Amendments to the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships (INF Code), adopted on 12 December 2002 by Resolution MSC.135(76).
Entry into force: 1/07/04 (*BOE* 22, 26/01/05).

– Amendments to the Guidelines on the enhanced programme of inspections during surveys of bulk carriers and oil tankers [Resolution A.744(18)], adopted on 24 May 2002 by Resolution MSC.125(75).
Entry into force: 1/01/04 (*BOE* 23, 27/01/05).

– 2002 Amendments to the International Convention for the Safety of Life at Sea, 1974, adopted on 12 December 2002 by Resolution MSC.134(76).
Entry into force: 1/07/04 (*BOE* 26, 31/01/05).

– 2002 Amendments to the Condition Assessment Scheme, adopted on 11 October 2002 by Resolution MEPC.99(48).
Entry into force: 1/03/04 (*BOE* 30, 4/02/05).

– 1996 Protocol to amend the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976, done at London on 2 May 1996.
Instrument of acceptance: 1/12/04.
Entry into force: 10/04/05 (*BOE* 50, 29/02/05).

The Spanish adhesion was made with the following reservations:

1. "According to paragraph 2 section b) of article 15 of the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976, amended by the

1996 Protocol, the limit of liability for vessels of less than 300 registered tons is regulated by specific rules of the internal law of the Kingdom of Spain, so that in respect of such vessels the limit calculated in accordance with Article 6.1.a) and b) of the Convention is half the limit of liability applicable to a vessel of 2000 registered tons".

2. According to Article 18.1 of the Convention on Limitation of Liability for Maritime Claims, 1976, amended by the 1996 Protocol, the Kingdom of Spain reserves the right not to apply Article 2.1.d) and e) of the Convention.

Claims in connection with Article 2.1.d) and e) of the Convention carry no right of limitation on liability and are subject to the terms of national regulations, specifically Article 107 of the State Ports and Merchant Marine Act, Law 27/1992 of 24 November"

– International Convention for the Unification of Certain Rules Relating to Limitation of the Liability of Owners of Sea-going Vessels, done at Brussels on 25 August 1924.
Denunciation: 22/12/04.
Entry into force of denunciation: 4/01/06 (*BOE* 52, 2/03/05).

– International Convention Relating to the Limitation of Liability of Owners of Sea-going Ships, done at Brussels on 10 October 1957.
Denunciation: 22/12/04.
Entry into force of denunciation: 4/01/06 (*BOE* 52, 2/03/05).

– Protocol modifying the International Convention of 10 October 1957 relating to the Limitation of Liability of Owners of Sea-going Ships, done at Brussels on 21 December 1979.
Denunciation: 22/12/04.
Entry into force of denunciation: 4/01/06 (*BOE* 52, 2/03/05).

– International Convention on Salvage, done at London on 28 April 1989.
Instrument of ratification: 14/01/05.
Entry into force: 27/01/06 (*BOE* 57, 8/03/05).

With the following reservations:

"In accordance with the provisions of Article 30.1(a), 30.1(b) and 30.1(d) International Convention on Salvage, 1989, the Kingdom of Spain reserves the right not to apply the provisions of the Convention:

- when the salvage operation takes place in inland waters and all vessels involved are of inland navigation;
- when the salvage operations take place in inland waters and no vessel is involved (for the sole purpose of these reservations, the Kingdom of Spain understands by "inland waters" continental waters that are not in connection with sea waters and are not used by seagoing vessels);

- when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed".

– Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, done at Brussels on 23 September 1910.
Denunciation: 10/01/05.
Entry into force of denunciation: 19/01/06 (*BOE* 58, 9/03/05).

– Amendments to the Guidelines on the enhanced programme of inspections during surveys of bulk carriers and oil tankers [Resolution A.744(18)], adopted on 5 June 2003 by Resolution MSC.144(77).
Entry into force: 1/01/05 (*BOE* 224, 19/09/05).

– Technical provisions for means of access for inspections, adopted on 12 December 2002 by Resolution MSC.133(76).
Entry into force: 1/01/05 (*BOE* 228, 23/09/05).

– Amendments to the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on board Ships (INF Code), adopted on 6 June 2001 by Resolution MSC.118(74).
Entry into force: 1/01/03 (*BOE* 230, 26/09/05).

– Amendments to the Condition Assessment Scheme, adopted on 4 December 2003 by Resolution MEPC.112 (50).
Entry into force: 5/04/05 (*BOE* 235, 1/10/05).

– Amendments 32–04 to the International Maritime Dangerous Goods (IMDG) Code, according to Chapter VII of the International Convention for the Safety of Life at Sea (SOLAS), 1974, adopted on 20 May 2004.
Entry into force: 1/01/05 (*BOE* 304, 21/12/05).

13. Labour, Social Security and Emigration

– Administrative Agreement for the implementation of the Convention on Social Security between the Kingdom of Spain and the Tunisian Republic of 26 February 2001 and Special Agreement annexed to the Administrative Agreement concerning reimbursement of health care expenses, done at Tunis on 9 September 2004.
Entry into force: 1/01/02 (*BOE* 24, 28/01/05).

– Convention on Social Security between the Kingdom of Spain and the Republic of Peru, done "ad referendum", in Madrid on 16 June 2003.
Entry into force: 1/01/05 (*BOE* 31, 5/02/05).

– Agreement between the Kingdom of Spain and the Republic of Bulgaria on the regulation of migratory flows between both States, done at Madrid on 28 October 2003.
Provisional application: 27/11/03 (*BOE* 299, 15/12/03).
Definitive entry into force: 19/02/05 (*BOE* 81, 5/04/05).

– Labour Agreement between the Kingdom of Spain and the Kingdom of Morocco, done at Madrid on 25 July 2001.
Provisional application: 24/08/01 (*BOE* 226, 20/09/01).
Definitive entry into force: 1/09/05 (*BOE* 114, 13/05/05).

– Complementary Protocol to the Convention on Social Security between the Kingdom of Spain and the Argentine Republic 28 January 1997, done at Buenos Aires on 21 March 2005.
Provisional application: 1/04/05 (*BOE* 122, 23/05/05).

– Agreement between the Kingdom of Spain and the Republic of Peru on cooperation of migratory flows, done at Madrid on 6 July 2004.
Provisional application: 5/08/04 (*BOE* 237, 1/10/04).
Definitive entry into force: 31/05/05 (*BOE* 159, 5/07/05).

– Agreement between the competent authority of the Kingdom of Spain and the National Social Security Council concerning the reimbursement of contributions for benefits according to Regulations (EEC) 1408/71 and 574/72, done at Madrid on 1 December 2004.
Entry into force: 1/01/05 (*BOE* 248, 17/10/05).

– Complementary Convention to the Convention on Social Security between the Kingdom of Spain and the Republic of Uruguay of 1 December 1997, done at Segovia on 8 September 2005.
Provisional application: 1/10/05 (*BOE* 287, 1/12/05).

14. Industrial and Intellectual Property

– Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, done at Budapest on April 28, 1977, as amended on September 26, 1980.

Communication of 19 April 2004 relating to the extension of the list of kinds of microorganisms accepted for deposit by the Colección Española de Cultivos Tipo (CECT).

Reports to the Director General of the World Intellectual Property Organisation (WIPO) that the list of kinds of microorganisms accepted for deposit by the Colección Española de Cultivos Tipo (CECT), an international depositary author-

ity under the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, done at Budapest on April 28, 1977, as amended on September 26, 1980 (see Budapest Notification No. 106 of April 27, 1992), has been extended to include plasmids. The attached annex contains the updated list of kinds of microorganisms which may be deposited with CECT.

This communication will be posted on the WIPO website (http://www.wipo.int/budapest).

Annex

International Depository Authority: Colección Española de Cultivos Tipo (CECT)

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E-mail: **cect@uv.es**
Internet: http://www.cect.org

Kinds of microorganisms that may be deposited:

Bacteria, including actinomycetes, which may be preserved without any significant alteration of their properties by freezing or freeze-drying, and which belong to a risk group lower than group 2 according to the definition of the United Kingdom Advisory Committee on Dangerous Pathogens (ACDP) 1984, Categorisation of Pathogens according to Hazard and Categories of Containment (HMSO, London, ISBN 0–11–883761–3).

Plasmids, filamentous fungi including yeasts, with the exception of strains known to be human, plant and animal pathogens, which may be preserved by freezing or freeze-drying without any significant alteration of their properties.

The CECT does not accept the following biological material for deposit: anaerobic microorganisms (except Clostridium); algae and cyanobacteria; embryos; protozoa; animal cell lines; plant cell lines; mycoplasm; plant seed; viruses; bacteriophages.

Notwithstanding the foregoing, the CECT reserves the right to reject or accept for deposit any material which in the opinion of the Director represents a risk that is either unacceptable or too difficult to handle (*BOE* 34, 9/02/05).

15. Health and Relief Cooperation

– World Health Organisation Framework Convention on Tobacco Control, done at Geneva on 21 May 2003.
Instrument of ratification: 30/12/04.
Entry into force: 27/02/05 (*BOE* 35, 10/02/05).

– Exchange of Notes of 3 and 7 February 2005, between the Kingdom of Spain and the Republic of Indonesia concerning the status of the Spanish Armed Forces in Indonesia which took part in the "Solidarity Response" operation to help victims of the tsunami in South-East Asia.
Provisional application: 7/02/05 (*BOE* 68, 21.03 and 107, 5/05/05).

16. Narcotics

– Agreement between the Kingdom of Spain and the Republic of Paraguay on cooperation in the prevention of trafficking in narcotic drugs and psychotropic substances, done at Asuncion on 1 August 2003.
Provisional application: 1/08/03 (*BOE* 240, 7/10/03)
Definitive entry into force: 5/01/05 (*BOE* 194, 15/08/05).

17. Civil and Criminal Cooperation

– Convention on judicial assistance in criminal matters between the Kingdom of Spain and the People's Democratic Algerian Republic, done at Madrid on 7 October 2002.
Instrument of ratification: 2/06/04.
Entry into force: 26/03/05 (*BOE* 65, 17/03/05).

– Protocol established by the Council in accordance with Article 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, done at Luxembourg on 16 October 2001.
Provisional application: Between Spain and the Netherlands, as from 5/04/05, and between Spain and Finland, as from 22/05/05 (*BOE* 89, 14/04/05).
Definitive entry into force: 18/10/05 (*BOE* 258, 28/10/05).

– International Convention for the Suppression of the Financing of Terrorism, done at New York on 9 December 1999.

Spanish objection, 20/05/05, with regard to the reservation made by the Belgium upon ratification:

The Government of the Kingdom of Spain has examined the reservation made by the Government of the Kingdom of Belgium to article 14 of the International Convention for the Suppression of the Financing of Terrorism at the time of ratifying the Convention.

The Government of the Kingdom of Spain considers that the reservation is incompatible with the object and purpose of the Convention.

The Government of the Kingdom of Spain considers, in particular, that Belgium's reservation is incompatible with article 6 of the Convention, whereby States Parties undertake to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of the Kingdom of Spain recalls that, under the norm of customary law laid down in the 1969 Vienna Convention on the law of treaties (article 19 c), reservations which are incompatible with the object and purpose of a treaty are prohibited.

The Government of the Kingdom of Spain therefore objects to the reservation made by the Government of the Kingdom of Belgium to article 14 of the International Convention for the Suppression of the Financing of Terrorism.

This objection shall not impede the entry into force of the Convention between the Kingdom of Spain and the Kingdom of Belgium" (*BOE* 169, 16/07/05).

– Agreement between the Kingdom of Spain and the Republic of Latvia on cooperation in the prevention of terrorism, organised crime, trafficking in narcotic drugs and psychotropic substances and precursors and other serious crimes, done at Madrid on 24 November 2003.
Provisional application: 24/12/03 (*BOE* 32, 6/02/04).
Definitive entry into force: 31/05/05 (*BOE* 170, 18/07/05).

– Protocol modifying the Convention on extradition of 23 July 1892 between the Kingdom of Spain and the Republic of Colombia, done "ad referendum" at Madrid on 16 March 1999.
Entry into force: 17/09/05 (*BOE* 219, 13/09/05).

– Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, done at Brussels on 29 May 2000.
Provisional application between Spain and Portugal: 6/10/05 (*BOE* 247, 15/10/03).
Definitive entry into force: 23/08/05 (*BOE* 258, 28/10/05).

XII. INTERNATIONAL ORGANISATIONS

– Convention between the Government of the French Republic, the Government of the Federal Republic of Germany, the Government of the Republic of Italy and the Government of the United Kingdom of Great Britain and Northern Ireland on the establishment of the Organisation for Joint Armament Cooperation (OCCAR), done at Farnborough on 9 September 1998.
Instrument of adhesion: 1/12/04.
Entry into force: 6/01/05 (*BOE* 27, 1.02 and 53, 3/03/05).

– Convention for the Adhesion of the Kingdom of Spain to the Convention establishing the Central American Bank for Economic Integration, as an extra-regional member, done at Madrid on 5 March 2004.
Instrument of ratification: 1/12/04.
Entry into force: 27/12/04 (*BOE* 32, 7.02 and 53, 3/03/05).

– Convention for the establishment of an Inter-American Tropical Tuna Commission (IATTC), done at Washington on 31 May 1949.
Instrument of adhesion: 10/01/05.
Provisional application: 6/06/03 (*BOE* 181, 30/07/03).
Definitive entry into force: 27/01/05 (*BOE* 46, 23/02/05).

– Protocol regarding an amendment to article 56 of the Convention on International Civil Aviation, done at Montreal on 6 October 1989.
Instrument of ratification: 6/11/91.
Entry into force: 18/04/05 (*BOE* 134, 6/06/05).

– Convention on the European Forest Institute, done at Joensuu (Finland) on 28 August 2003.
Instrument of ratification: 16/06/05
Entry into force: 4/09/05 (*BOE* 197, 18/08/05).

– Statute of the Ibero-American Secretariat-General, done at San Jose (Costa Rica), on 20 November 2004.
Instrument of ratification: 29/07/05.
Entry into force: 2/09/05 (*BOE* 227, 22/09/05).

– Amendments to Articles 24 and 25 of the Constitution of the World Health Organisation, adopted at the 51st session of the World Health Assembly on 16 May 1998.
Instrument of acceptance: 10/09/01.
Entry into force: 15/09/05 (*BOE* 249, 18/10/05).

– Amendments to the Agreement for the Establishment of a General Fisheries Council for the Mediterranean, done at Rome on 24 September 1949, adopted at Rome on 6 November 1997.
Entry into force: 29/04/04 (*BOE* 275, 17/11/05).

XIII. EUROPEAN UNION

– Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, done at Luxembourg on 29 October 2001.
Entry into force: 1/02/05 (*BOE* 46, 23/02/05).

– Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Chile, of the other part, done at Brussels on 18 November 2002.
Entry into force: 1/03/05 (*BOE* 90, 15/04/05).

XIV. INTERNATIONAL RESPONSIBILITY

XV. PEACEFUL SETTLEMENT OF DISPUTES

XVI. COERCION AND USE OF FORCE SHORT OF WAR

XVII. WAR AND NEUTRALITY

– Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949. Convention relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

Convention relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.

Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.

Communication of 6 May 2004: "Spain has partially amended the rules on uniforming of Chaplains in the Religious Service of the Armed Forces (Sp. Acronym SARFAS). One of the amendments introduced constitutes an instance of adoption of domestic measures in application of norms of International Humanitarian Law. This concerns Chaplains from the Military Archbishopric taking part, with the unit to which they are posted or seconded, in operations that may involve the use of force, in which case they must display on their field uniform the international sign for religious personnel, consisting of a red cross on a white background, established for the protection of Chaplains attached to Armed Forces under the Geneva Convention of 12 August 1949 and the Additional Protocols of 8 June 1977" (*BOE* 34, 9/02/05).

– Convention for the reciprocal recognition of proof marks on small arms and Regulation with Annexes I and II, done at Brussels on 1 July 1969. Decision adopted by the Permanent International Commission for the proof of small arms at the 27th session on May 2002.
Entry into force: 20/09/03 (*BOE* 64, 16/03/05).

Treaties Concerning Matters of Private International Law to which Spain is a Party, 2005

This section was prepared by Dr. Blanca Vilà Costa, Professor of Private International Law at the Universitat Autònoma de Barcelona.

This survey covers the treaties and other international agreements published in the *Boletín Oficial del Estado* (Official Journal of the State) and in the *Official Journal of the European Union* in the course of 2005. 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

– Council Decision of 20 September 2005 on the signing on behalf of the Community of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*BOE* 16/11/2005).

– Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
(*Official Journal L 299*, 16/11/2005)

To date Denmark has not been involved in the adoption of measures based on Title IV of the EC Treaty. The Community instruments adopted within the sphere of *civil judicial cooperation*, particularly the *Brussels I* Regulation (44/2001), are therefore not applicable in Denmark. On several occasions Denmark had intimated its desire to be a part of the *Brussels I* Regulation "regime". Therefore, since the Kingdom of Denmark is a State Party to the 1968 Brussels Convention, and since an agreement of this kind can be used to *restore the previously-existing legal uniformity* before the cited Regulation comes into force, the European Commission took the view that in the general interest the personal and territorial scope of application of the common regime derived from the *Brussels I* Regulation and *Regulation 1348/2000* on service of documents, which is closely linked to the former, could be extended to admit the Kingdom of Denmark. To that end, on 15 and 18 April 2005 it presented two draft Council Decisions (*COM (2005) 145 final* and *COM (2005) 146 final*) authorising the signing and ratification of the Agreements

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between the European Community and the Kingdom of Denmark, extending to the latter the provisions of *Regulation 44/2001* on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("*Brussels I*"), and of *Regulation 1348/2000* on the service in the Member States of judicial and extra-judicial documents in civil or commercial matters (in connection with this second case, see section III *infra*). In view of its exceptional importance and its particular connections with the cited regulations, these agreements are transcribed verbatim hereafter.

Article 1

Aim

1. The aim of this Agreement is to apply the provisions of the Brussels I Regulation and its implementing measures to the relations between the Community and Denmark, in accordance with Article 2(1) of this Agreement.
2. It is the objective of the Contracting Parties to arrive at a uniform application and interpretation of the provisions of the Brussels I Regulation and its implementing measures in all Member States.
3. The provisions of Articles 3(1), 4(1) and 5(1) of this Agreement result from the Protocol on the position of Denmark.

Article 2

Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

1. The provisions of the Brussels I Regulation, which is annexed to this Agreement and forms part thereof, together with its implementing measures adopted pursuant to Article 74(2) of the Regulation and, in respect of implementing measures adopted after the entry into force of this Agreement, implemented by Denmark as referred to in Article 4 of this Agreement, and the measures adopted pursuant to Article 74(1) of the Regulation, shall under international law apply to the relations between the Community and Denmark.
2. However, for the purposes of this Agreement, the application of the provisions of that Regulation shall be modified as follows:

(a) Article 1(3) shall not apply.
(b) Article 50 shall be supplemented by the following paragraph (as paragraph 2):

"2. However, an applicant who requests the enforcement of a decision given by an administrative authority in Denmark in respect of a maintenance order may, in the Member State addressed, claim the benefits referred to in the first paragraph if he presents a statement from the Danish Ministry of Justice to the effect that he fulfils the financial requirements to qualify for the grant of complete or partial legal aid or exemption from costs or expenses."

(c) Article 62 shall be supplemented by the following paragraph (as paragraph 2):

"2. In matters relating to maintenance, the expression 'court' includes the Danish administrative authorities."

(d) Article 64 shall apply to seagoing ships registered in Denmark as well as in Greece and Portugal.
(e) The date of entry into force of this Agreement shall apply instead of the date of entry into force of the Regulation as referred to in Articles 70(2), 72 and 76 thereof.
(f) The transitional provisions of this Agreement shall apply instead of Article 66 of the Regulation.
(g) In Annex I the following shall be added: "in Denmark: Article 246(2) and (3) of the Administration of Justice Act (lov om rettens pleje)".
(h) In Annex II the following shall be added: "in Denmark, the 'byret' ".
(i) In Annex III the following shall be added: 'in Denmark, the 'landsret' ".
(j) In Annex IV the following shall be added: "in Denmark, an appeal to the 'Højesteret' with leave from the 'Procesbevillingsnævnet' ".

Article 3

Amendments to the Brussels I Regulation

1. Denmark shall not take part in the adoption of amendments to the Brussels I Regulation and no such amendments shall be binding upon or applicable in Denmark.
2. Whenever amendments to the Regulation are adopted Denmark shall notify the Commission of its decision whether or not to implement the content of such amendments. Notification shall be given at the time of the adoption of the amendments or within 30 days thereafter.
3. If Denmark decides that it will implement the content of the amendments the notification shall indicate whether implementation can take place administratively or requires parliamentary approval.
4. If the notification indicates that implementation can take place administratively the notification shall, moreover, state that all necessary administrative measures enter into force on the date of entry into force of the amendments to the Regulation or have entered into force on the date of the notification, whichever date is the latest.
5. If the notification indicates that implementation requires parliamentary approval in Denmark, the following rules shall apply:

(a) Legislative measures in Denmark shall enter into force on the date of entry into force of the amendments to the Regulation or within 6 months after the notification, whichever date is the latest;
(b) Denmark shall notify the Commission of the date upon which the implementing legislative measures enter into force.

6. A Danish notification that the content of the amendments has been implemented in Denmark, in accordance with paragraphs 4 and 5, creates mutual obligations under international law between Denmark and the Community. The amendments to the Regulation shall then constitute amendments to this Agreement and shall be considered annexed hereto.
7. In cases where:

(a) Denmark notifies its decision not to implement the content of the amendments; or
(b) Denmark does not make a notification within the 30-day time-limit set out in paragraph 2; or
(c) Legislative measures in Denmark do not enter into force within the time-limits set out in paragraph 5,

this Agreement shall be considered terminated unless the parties decide otherwise within 90 days or, in the situation referred to under (c), legislative measures in Denmark enter into force within the same period. Termination shall take effect three months after the expiry of the 90-day period.

8. Legal proceedings instituted and documents formally drawn up or registered as authentic instruments before the date of termination of the Agreement as set out in paragraph 7 are not affected hereby.

Article 4

Implementing measures

1. Denmark shall not take part in the adoption of opinions by the Committee referred to in Article 75 of the Brussels I Regulation. Implementing measures adopted pursuant to Article 74(2) of that Regulation shall not be binding upon and shall not be applicable in Denmark.
2. Whenever implementing measures are adopted pursuant to Article 74(2) of the Regulation, the implementing measures shall be communicated to Denmark. Denmark shall notify the Commission of its decision whether or not to implement the content of the implementing measures. Notification shall be given upon receipt of the implementing measures or within 30 days thereafter.
3. The notification shall state that all necessary administrative measures in Denmark enter into force on the date of entry into force of the implementing measures or have entered into force on the date of the notification, whichever date is the latest.
4. A Danish notification that the content of the implementing measures has been implemented in Denmark creates mutual obligations under international law between Denmark and the Community. The implementing measures will then form part of this Agreement.
5. In cases where:

(a) Denmark notifies its decision not to implement the content of the implementing measures; or

(b) Denmark does not make a notification within the 30-day time-limit set out in paragraph 2, this Agreement shall be considered terminated unless the parties decide otherwise within 90 days. Termination shall take effect three months after the expiry of the 90-day period.

6. Legal proceedings instituted and documents formally drawn up or registered as authentic instruments before the date of termination of the Agreement as set out in paragraph 5 are not affected hereby.
7. If in exceptional cases the implementation requires parliamentary approval in Denmark, the Danish notification under paragraph 2 shall indicate this and the provisions of Article 3(5) to (8) shall apply.
8. Denmark shall notify the Commission of texts amending the items set out in Article 2(2)(g) to (j) of this Agreement. The Commission shall adapt Article 2(2)(g) to (j) accordingly.

Article 5

International agreements which affect the Brussels I Regulation

1. International agreements entered into by the Community based on the rules of the Brussels I Regulation shall not be binding upon and shall not be applicable in Denmark.
2. Denmark will abstain from entering into international agreements which may affect or alter the scope of the Brussels I Regulation as annexed to this Agreement unless it is done in agreement with the Community and satisfactory arrangements have been made with regard to the relationship between this Agreement and the international agreement in question.
3. When negotiating international agreements that may affect or alter the scope of the Brussels I Regulation as annexed to this Agreement, Denmark will coordinate its position with the Community and will abstain from any actions that would jeopardise the objectives of a Community position within its sphere of competence in such negotiations.

Article 6

Jurisdiction of the Court of Justice of the European Communities in relation to the interpretation of the Agreement

1. Where a question on the validity or interpretation of this Agreement is raised in a case pending before a Danish court or tribunal, that court or tribunal shall request the Court of Justice to give a ruling thereon whenever under the same circumstances a court or tribunal of another Member State of the European Union would be required to do so in respect of the Brussels I Regulation and its implementing measures referred to in Article 2(1) of this Agreement.
2. Under Danish law, the courts in Denmark shall, when interpreting this Agreement, take due account of the rulings contained in the case law of the

Court of Justice in respect of provisions of the Brussels Convention, the Brussels I Regulation and any implementing Community measures.

3. Denmark may, like the Council, the Commission and any Member State, request the Court of Justice to give a ruling on a question of interpretation of this Agreement. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata.
4. Denmark shall be entitled to submit observations to the Court of Justice in cases where a question has been referred to it by a court or tribunal of a Member State for a preliminary ruling concerning the interpretation of any provision referred to in Article 2(1).
5. The Protocol on the Statute of the Court of Justice of the European Communities and its Rules of Procedure shall apply.
6. If the provisions of the Treaty establishing the European Community regarding rulings by the Court of Justice are amended with consequences for rulings in respect of the Brussels I Regulation, Denmark may notify the Commission of its decision not to apply the amendments in respect of this Agreement. Notification shall be given at the time of the entry into force of the amendments or within 60 days thereafter.

In such a case this Agreement shall be considered terminated. Termination shall take effect three months after the notification.

7. Legal proceedings instituted and documents formally drawn up or registered as authentic instruments before the date of termination of the Agreement as set out in paragraph 6 are not affected hereby.

Article 7

Jurisdiction of the Court of Justice of the European Communities in relation to compliance with the Agreement

1. The Commission may bring before the Court of Justice cases against Denmark concerning non-compliance with any obligation under this Agreement.
2. Denmark may bring a complaint before the Commission as to the non-compliance by a Member State of its obligations under this Agreement.
3. The relevant provisions of the Treaty establishing the European Community governing proceedings before the Court of Justice as well as the Protocol on the Statute of the Court of Justice of the European Communities and its Rules of Procedure shall apply.

Article 8

Territorial application

1. This Agreement shall apply to the territories referred to in Article 299 of the Treaty establishing the European Community.
2. If the Community decides to extend the application of the Brussels I Regulation to territories currently governed by the Brussels Convention, the

Community and Denmark shall cooperate in order to ensure that such an application also extends to Denmark.

Article 9

Transitional provisions

1. This Agreement shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.
2. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Agreement, judgments given after that date shall be recognised and enforced in accordance with this Agreement,

(a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State of origin and in the Member State addressed;
(b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in this Agreement or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

Article 10

Relationship to the Brussels I Regulation

1. This Agreement shall not prejudice the application by the Member States of the Community other than Denmark of the Brussels I Regulation.
2. However, this Agreement shall in any event be applied:

(a) in matters of jurisdiction, where the defendant is domiciled in Denmark, or where Article 22 or 23 of the Regulation, applicable to the relations between the Community and Denmark by virtue of Article 2 of this Agreement, confer jurisdiction on the courts of Denmark;
(b) in relation to a lis pendens or to related actions as provided for in Articles 27 and 28 of the Brussels I Regulation, applicable to the relations between the Community and Denmark by virtue of Article 2 of this Agreement, when proceedings are instituted in a Member State other than Denmark and in Denmark;
(c) in matters of recognition and enforcement, where Denmark is either the State of origin or the State addressed.

Article 11

Termination of the agreement

1. This Agreement shall terminate if Denmark informs the other Member States that it no longer wishes to avail itself of the provisions of Part I of the Protocol on the position of Denmark, in accordance with Article 7 of that Protocol.

2. This Agreement may be terminated by either Contracting Party giving notice to the other Contracting Party. Termination shall be effective six months after the date of such notice.
3. Legal proceedings instituted and documents formally drawn up or registered as authentic instruments before the date of termination of the Agreement as set out in paragraph 1 or 2 are not affected hereby.

Article 12

Entry into force

1. The Agreement shall be adopted by the Contracting Parties in accordance with their respective procedures.
2. The Agreement shall enter into force on the first day of the sixth month following the notification by the Contracting Parties of the completion of their respective procedures required for this purpose.

Article 13

Authenticity of texts

This Agreement is drawn up in duplicate in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovene, Slovak, Spanish and Swedish languages, each of these texts being equally authentic.

Done at Brussels on the nineteenth day of October in the year two thousand and five.

III. PROCEDURE AND JUDICIAL ASSISTANCE

– Instrument of Ratification of the Agreement between the Kingdom of Spain and the People's Democratic Republic of Algeria on judicial assistance in criminal matters, done at Madrid on 7 October 2002 (*BOE* 65, 17/3/05).
Entry into force: 26 March 2005.

– Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commerciall matters
(Official Journal L 300, 17/11/2005)

Article 1

Aim

1. The aim of this Agreement is to apply the provisions of the Regulation on the service of documents and its implementing measures to the relations between the Community and Denmark, in accordance with Article 2(1) of this Agreement.

2. It is the objective of the Contracting Parties to arrive at a uniform application and interpretation of the provisions of the Regulation on the service of documents and its implementing measures in all Member States.
3. The provisions of Articles 3(1), 4(1) and 5(1) of this Agreement result from the Protocol on the position of Denmark.

Article 2

Cooperation on the service of documents

1. The provisions of the Regulation on the service of documents, which is annexed to this Agreement and forms part thereof, together with its implementing measures adopted pursuant to Article 17 of the Regulation and – in respect of implementing measures adopted after the entry into force of this Agreement – implemented by Denmark as referred to in Article 4 of this Agreement, and the information communicated by Member States under Article 23 of the Regulation, shall under international law apply to the relations between the Community and Denmark.
2. The date of entry into force of this Agreement shall apply instead of the date referred to in Article 25 of the Regulation.

Article 3

Amendments to the Regulation on the service of documents

1. Denmark shall not take part in the adoption of amendments to the Regulation on the service of documents and no such amendments shall be binding upon or applicable in Denmark.
2. Whenever amendments to the Regulation are adopted Denmark shall notify the Commission of its decision whether or not to implement the content of such amendments. Notification shall be given at the time of the adoption of the amendments or within 30 days thereafter.
3. If Denmark decides that it will implement the content of the amendments the notification shall indicate whether implementation can take place administratively or requires parliamentary approval.
4. If the notification indicates that implementation can take place administratively the notification shall, moreover, state that all necessary administrative measures enter into force on the date of entry into force of the amendments to the Regulation or have entered into force on the date of the notification, whichever date is the latest.
5. If the notification indicates that implementation requires parliamentary approval in Denmark, the following rules shall apply:

(a) legislative measures in Denmark shall enter into force on the date of entry into force of the amendments to the Regulation or within 6 months after the notification, whichever date is the latest;
(b) Denmark shall notify the Commission of the date upon which the implementing legislative measures enter into force.

6. A Danish notification that the content of the amendments have been implemented in Denmark, in accordance with paragraph 4 and 5, creates mutual obligations under international law between Denmark and the Community. The amendments to the Regulation shall then constitute amendments to this Agreement and shall be considered annexed hereto.
7. In cases where:

(a) Denmark notifies its decision not to implement the content of the amendments; or
(b) Denmark does not make a notification within the 30-day time limit set out in paragraph 2; or
(c) legislative measures in Denmark do not enter into force within the time limits set out in paragraph 5,

this Agreement shall be considered terminated unless the parties decide otherwise within 90 days or, in the situation referred to under (c), legislative measures in Denmark enter into force within the same period. Termination shall take effect three months after the expiry of the 90-day period.

8. Requests that have been transmitted before the date of termination of the Agreement as set out in paragraph 7 are not affected hereby.

Article 4

Implementing measures

1. Denmark shall not take part in the adoption of opinions by the Committee referred to in Article 18 of the Regulation on the service of documents. Implementing measures adopted pursuant to Article 17 of that Regulation shall not be binding upon and shall not be applicable in Denmark.
2. Whenever implementing measures are adopted pursuant to Article 17 of the Regulation, the implementing measures shall be communicated to Denmark. Denmark shall notify the Commission of its decision whether or not to implement the content of the implementing measures. Notification shall be given upon receipt of the implementing measures or within 30 days thereafter.
3. The notification shall state that all necessary administrative measures in Denmark enter into force on the date of entry into force of the implementing measures or have entered into force on the date of the notification, whichever date is the latest.
4. A Danish notification that the content of the implementing measures has been implemented in Denmark creates mutual obligations under international law between Denmark and the Community. The implementing measures will then form part of this Agreement.
5. In cases where:

(a) Denmark notifies its decision not to implement the content of the implementing measures; or
(b) Denmark does not make a notification within the 30-day time limit set out in paragraph 2,

this Agreement shall be considered terminated unless the parties decide otherwise within 90 days. Termination shall take effect three months after the expiry of the 90-day period.

6. Requests that have been transmitted before the date of termination of the Agreement as set out in paragraph 5 are not affected hereby.
7. If in exceptional cases the implementation requires parliamentary approval in Denmark, the Danish notification under paragraph 2 shall indicate this and the provisions of Article 3(5) to (8), shall apply.
8. Denmark shall communicate to the Commission the information referred to in Articles 2, 3, 4, 9, 10, 13, 14, 15, 17(a) and 19 of the Regulation on the service of documents. The Commission shall publish this information together with the relevant information concerning the other Member States. The manual and the glossary drawn up pursuant to Article 17 of that Regulation shall include also the relevant information on Denmark.

Article 5

International agreements which affect the Regulation on the service of documents

1. International agreements entered into by the Community when exercising its external competence based on the rules of the Regulation on the service of documents shall not be binding upon and shall not be applicable in Denmark.
2. Denmark will abstain from entering into international agreements which may affect or alter the scope of the Regulation on the service of documents as annexed to this Agreement unless it is done in agreement with the Community and satisfactory arrangements have been made with regard to the relationship between this Agreement and the international agreement in question.
3. When negotiating international agreements that may affect or alter the scope of the Regulation on the service of documents as annexed to this Agreement, Denmark will coordinate its position with the Community and will abstain from any actions that would jeopardise the objectives of a coordinated position of the Community within its sphere of competence in such negotiations.

Article 6

Jurisdiction of the Court of Justice of the European Communities in relation to the interpretation of the Agreement

1. Where a question on the validity or interpretation of this Agreement is raised in a case pending before a Danish court or tribunal, that court or tribunal shall request the Court of Justice to give a ruling thereon whenever under the same circumstances a court or tribunal of another Member State of the European Union would be required to do so in respect of the Regulation on the service of documents and its implementing measures referred to in Article 2(1) of this Agreement.

2. Under Danish law, the courts in Denmark shall, when interpreting this Agreement, take due account of the rulings contained in the case law of the Court of Justice in respect of provisions of the Regulation on the service of documents and any implementing Community measures.
3. Denmark may, like the Council, the Commission and any Member State, request the Court of Justice to give a ruling on a question of interpretation of this Agreement. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata.
4. Denmark shall be entitled to submit observations to the Court of Justice in cases where a question has been referred to it by a court or tribunal of a Member State for a preliminary ruling concerning the interpretation of any provision referred to in Article 2(1).
5. The Protocol on the Statute of the Court of Justice of the European Communities and its Rules of Procedure shall apply.
6. If the provisions of the Treaty establishing the European Community regarding rulings by the Court of Justice are amended with consequences for rulings in respect of the Regulation on the service of documents, Denmark may notify the Commission of its decision not to apply the amendments under this Agreement. Notification shall be given at the time of the entry into force of the amendments or within 60 days thereafter.

In such a case this Agreement shall be considered terminated. Termination shall take effect three months after the notification.

7. Requests that have been transmitted before the date of termination of the Agreement as set out in paragraph 6 are not affected hereby.

Article 7

Jurisdiction of the Court of Justice of the European Communities in relation to compliance with the Agreement

1. The Commission may bring before the Court of Justice cases against Denmark concerning non-compliance with any obligation under this Agreement.
2. Denmark may bring a complaint before the Commission as to the non-compliance by a Member State of its obligations under this Agreement.
3. The relevant provisions of the Treaty establishing the European Community governing proceedings before the Court of Justice as well as the Protocol on the Statute of the Court of Justice of the European Communities and its Rules of Procedure shall apply.

Article 8

Territorial application

This Agreement shall apply to the territories referred to in Article 299 of the Treaty establishing the European Community.

Article 9

Termination of the Agreement

1. This Agreement shall terminate if Denmark informs the other Member States that it no longer wishes to avail itself of the provisions of Part I of the Protocol on the position of Denmark, in accordance with Article 7 of that Protocol.
2. This Agreement may be terminated by either Contracting Party giving notice to the other Contracting Party. Termination shall be effective six months after the date of such notice.
3. Requests that have been transmitted before the date of termination of the Agreement as set out in paragraph 1 or 2 are not affected hereby.

Article 10

Entry into force

1. The Agreement shall be adopted by the Contracting Parties in accordance with their respective procedures.
2. The Agreement shall enter into force on the first day of the sixth month following the notification by the Contracting Parties of the completion of their respective procedures required for this purpose.

Article 11

Authenticity of texts

This Agreement is drawn up in duplicate in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovene, Slovak, Spanish and Swedish languages, each of these texts being equally authentic.

Done at Brussels on the nineteenth day of October in the year two thousand and five.

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND DECISIONS

(see sections II and III, *supra*)

V. INTERNATIONAL COMMERCIAL ARBITRATION

VI. CHOICE OF LAW: SOME GENERAL PROBLEMS

VII. ALIENS, REFUGEES AND CITIZENS OF THE EUROPEAN COMMUNITY

– Agreement between the Kingdom of Spain and the Swiss Confederation on the readmission of persons in irregular situations and Protocol for its application, done at Madrid on 17 November 2003 (BOE 17, 20/1/05).
Entry into force: 12 January 2005.

– Entry into force of the Agreement between the Kingdom of Spain and the Republic of Bulgaria on the regulation of migratory flows of workers between the two States, done at Madrid on 28 October 2003 (*BOE* 81, 5/4/05).
Entry into force: 19 February 2005.
Provisional application: as from 27 November 2003 (*BOE* 299, 15/12/03).

– Entry into force of the Agreement between the Kingdom of Spain and the Republic of Peru for cooperation in matters of immigration, done at Madrid on 6 July 2004 (*BOE* 159, 5/7/05).
Entry into force: 31 May 2005.
Provisional application: as from 5 August 2004 (*BOE* 237, 1/10/04).

VIII. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

IX. FAMILY LAW

X. SUCCESSION

XI. CONTRACTS

XII. TORTS

XIII. PROPERTY

XIV. COMPETITION LAW

XV. INVESTMENTS AND FOREIGN EXCHANGE

– Agreement between the Kingdom of Spain and the Syrian Arab Republic for the promotion and protection of investment, done at Damascus on 20 October 2003 (*BOE* 42, 18/2/05).
Entry into force: 14 December 2004.

– Agreement between the Kingdom of Spain and the Kingdom of Morocco on reciprocal promotion and protection of investment, done *ad referendum* at Madrid on 11 December 1997 (*BOE* 86, 11/4/05).
Entry into force: 13 April 2005.

XVI. FOREIGN TRADE LAW

XVII. BUSINESS ASSOCIATION/CORPORATION

XVIII. BANKRUPTCY

XIX. TRANSPORT LAW

– Agreement between the Kingdom of Spain and the Republic of Bulgaria on international transport of passengers and goods by road, done at Sofia on 1 September 2003 (*BOE* 66, 18/3/05).
Entry into force: 12 March 2005.

XX. LABOUR LAW AND SOCIAL SECURITY

– Administrative agreement for application of the Social Security Convention between the Kingdom of Spain and the Republic of Tunisia of 26 February 2001 and Special agreement annexed to the Administrative agreement on reimbursement of health care expenses, done at Tunis on 9 September 2004 (*BOE* 24, 28/1/05).
Entry into force: 1 January 2002.

– Social Security Convention between the Kingdom of Spain and the Republic of Peru, done *ad referendum* at Madrid on 16 June 2003 (*BOE* 31, 5/2/05).
Entry into force: 1 February 2005.

– Entry into force of the Agreement on labour between the Kingdom of Spain and the Kingdom of Morocco, done at Madrid on 25 July 2001 (*BOE* 114, 13/5/05).
Entry into force: 1 September 2005.

– Provisional Application of the Supplementary Protocol to the Social Security Convention between the Kingdom of Spain and the Argentine Republic, signed on 28 January 1997, done at Buenos Aires on 21 March 2005 (*BOE* 122, 23/5/05).
Provisional application: as from 1 April 2005.

– Provisional Application of the Supplementary Agreement to the Social Security Convention between the Kingdom of Spain and the Oriental Republic of Uruguay on 1 December 1997, done at Segovia on 8 September 2005 (*BOE* 287, 1/12/05).
Provisional application: as from 1 October 2005.

XXI. CRIMINAL LAW

– Entry into force of the Agreement between the Kingdom of Spain and the Republic of Latvia on cooperation in matters of combating terrorism, organized crime, illegal trafficking in narcotics, psychotropic substances and precursors, and other offences, done at Madrid on 24 November 2003 (*BOE* 170, 18/7/05).
Entry into force: 31 May 2005.
Provisional application: as from 24 December 2003 (*BOE* 32, 6/2/04).

– Entry into force of the Agreement between the Kingdom of Spain and the Republic of Paraguay on cooperation in matters of prevention of the consumption of and control of illegal trafficking in narcotics and psychotropic substances, done at Asunción on 1 August 2003 (*BOE* 194, 15/8/05).
Entry into force: 4 September 2005.

– Protocol amending the Extradition Convention of 23 July 1892 between the Kingdom of Spain and the Republic of Colombia, done *ad referendum* at Madrid on 16 March 1999 (*BOE* 219, 13/9/05).
Entry into force: 17 September 2005.

XXII. TAX LAW

– Convention between the Kingdom of Spain and the Republic of Latvia to avoid double taxation and prevent tax evasion in matters of income and property taxes, done at Riga on 4 September 2003 [*BOE* 8, 10/1/05 and *BOE* 57, 8/3/05 (correction of errors)].
Entry into force: 14 December 2004.

– Convention between the Kingdom of Spain and the Republic of Estonia to avoid double taxation and prevent tax evasion in matters of income and property taxes, done at Tallinn on 3 September 2003 (*BOE* 29, 3/2/05).
Entry into force: 28 December 2004.

– Provisional Application of the Exchange of Notes of 26 November 2004 and 18 February 2005, constituting an Agreement on the taxation of savings income between the Isle of Man and the Kingdom of Spain (*BOE* 154, 29/6/05).
Provisional application: as from el 1 July 2005.

– Provisional Application of the Exchange of Notes of 26 November 2004 and 14 February 2005, constituting an Agreement on the taxation of savings income between the Kingdom of Spain and the island of Jersey (*BOE* 155, 30/6/05).
Provisional application: as from 1 July 2005.

– Provisional Application of the Exchange of Notes of 26 November 2004 and 17 February 2005, constituting an Agreement on the taxation of savings income between the Kingdom of Spain and the Island of Guernsey (*BOE* 155, 30/6/05).
Provisional application: as from 1 July 2005.

– Convention between the Kingdom of Spain and the People's Democratic Republic of Algeria to avoid double taxation and prevent tax evasion in matters of income and property taxes, done *ad referendum* at Madrid on 7 October 2002 (*BOE* 174, 22/7/05).
Entry into force: 6 July 2005.

Spanish Municipal Legislation Concerning Matters of Public International Law, 2005

This material has been selected, compiled and commented on by a team from the Department of Public International Law of the University of Malaga, 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 of Public International Law.

This survey covers aspects of Spanish municipal legislation relating to Public International Law. Only relevant passages are quoted or mentioned, with an unofficial translation or a reference to the *Boletín Oficial del Estado* (Official Journal of the State).

I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

– Resolution of 23 January 2005, passed by the Spanish Technical Secretariat-General on implementation of article 32 of Decree 801/1972, regulating the activity of the State Administration regarding international treaties (*BOE* 34, 9.02.05).
Note: This Resolution provides for publication, in the public interest, of communications of third States actions regarding multilateral treaties to which Spain is party, and received by the Spanish Ministry of Foreign Affairs and Cooperation from 1 September to 31 December 2004.

– Resolution of 9 June 2005, passed by the Spanish Technical Secretariat-General on implementation of article 32 of Decree 801/1972, regulating the activity of the State Administration regarding international treaties (*BOE* 152, 27.06.05).
Note: This Resolution provides for publication, in the public interest, of communications of third States actions regarding multilateral treaties to which Spain is party, and received by the Spanish Ministry of Foreign Affairs and Cooperation from 1 January to 30 April 2005.

– Resolution of 4 October 2005, passed by the Spanish Technical Secretariat-General on implementation of article 32 of Decree 801/1972, regulating the activity of the State Administration regarding international treaties (*BOE* 248 and 258, 17 and 28.10.05).
Note: This Resolution provides for publication, in the public interest, of communications of third States actions regarding multilateral treaties to which Spain is

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party, and received by the Spanish Ministry of Foreign Affairs and Cooperation from 1 May to 30 August 2005.

III. THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

IV. SUBJECTS OF INTERNATIONAL LAW

V. THE INDIVIDUAL AND INTERNATIONAL LAW

1. Nationals

– Act 3/2005 of 18 March providing economic support for citizens of Spanish origin who were displaced abroad as minors as a result of the Spanish Civil War and who have spent most of their life abroad (*BOE* 68, 21.03 and 80, 4.04.05).
Note: The purpose of this Act is to provide economic support for those citizens of Spanish origin who were displaced abroad as minors between 18 July 1936 and 31 December 1939 as a result of the Spanish Civil War and who have lived most of their life abroad.

– Order TAS/1967/2005 of 24 June laying down the provisions for the implementation and enforcement of Act 3/2005 of 18 March providing economic support for citizens of Spanish origin who were displaced abroad as minors as a result of the Spanish Civil War and who have spent most of their life abroad (*BOE* 151, 25.06.05).

– Royal Decree 1612/2005 of 30 December, amending Royal Decree 728/1993 of 14 May, setting up old age pensions for Spanish emigrants (*BOE* 313, 31.12.05).

2. Aliens

– Royal Decree 2393/2004 of 30 December, adopting the Regulation of Organic Act 4/2000 of 11 January, on the Rights, Freedoms and Social Integration of Aliens in Spain (*BOE* 6, 7.01 and 130, 1.06.05).
Note: In light of the number of illegal foreign residents in Spain this Royal Decree, in addition to implementing the regulation laid down in Organic Act 4/2004 of 11 January, also provides extraordinary measures for regulation of the status of foreign nationals residing in Spain with no authorisation. Without denying that the admittance of foreign nationals is linked to the filling job openings, it gives foreign nationals, on an exceptional basis, three months during which to legalise their resident status. It requires employers to submit the authorisation request form along with a labour contract which is binding in the event the authorisation is granted.

– Order PRE/140/2005 of 2 February, lays down the procedure for regularisation of aliens as provided in the third transitional provision of Royal Decree 2393/2004 of 30 December, adopting the Regulation of Organic Act 4/2000 of 11 January, on the Rights, Freedoms and Social Integration of Aliens in Spain (*BOE* 29, 3.02.05). *Note*: Employers may apply for the regularisation of foreign nationals providing they comply with the following requirements: one – that the foreign national in question was registered at his/her local town hall of residence at least six months prior to the entry into force on 7 February 2005 of Royal Decree 2393/2004; two – that a labour contract has been signed by the employer and the employee, which will become applicable if authorisation is granted, for a minimum duration of six months with the exceptions foreseen in this regulation.

– Resolution of 15 April 2005 of the Under-Secretariat providing for the publication of the Resolution of 14 April 2005 delivered by the Chair of the National Statistics Institute and by the Directorate-General for Local Cooperation issuing technical instructions to Town Halls for the processing of registration certificates attesting to the residence prior to 8 August 2004 of foreign nationals affected by the regularisation proceeding who registered subsequent to that date (*BOE* 91, 16.04.05).

– Order TAS/1745/2005 of 3 June, regulating the certification proving compliance with the requirement laid down in Art. 50(a) of the Regulation of Organic Act 4/2000 of 11 January, on the Rights, Freedoms and Social Integration of Aliens in Spain, approved by Royal Decree 2393/2004 of 30 December (*BOE* 140, 13.06.05).

– Resolution of 12 August 2005 issued by the Secretariat of State for Immigration and Emigration calling for the publication of the Cabinet Agreement taken on 15 July 2005 establishing the Instructions determining the procedure to be followed in granting residence status and the undertaking of professional sports activities in the case of foreign nationals (*BOE* 200, 22.08.05).

– Royal Decree 1288/2005 of 28 October, approving the regulatory rules applying to a direct subsidy to the Spanish Red Cross for provision of medical services to immigrants arriving to the beaches along the Andalusian and Fuerteventura coasts in 2005 (*BOE* 259, 29.10.05).

VI. STATE ORGANS

1. Central organs

– Royal Decree 1009/2005 of 1 August, declaring an official period of mourning for the death of His Majesty the King Fahd Bin Abdulaziz Al-Saud of Saudi Arabia (*BOE* 183, 2.08.05).

Note: Official mourning was declared owing to the deep historic ties of friendship and solidarity between the Royal Families, the Governments and the Peoples of the Kingdoms of Saudi Arabia and Spain.

– Royal Decree 755/2005 of 24 June, amending Royal Decree 1416/2004 of 11 June, modifying and setting out the basic organisational structure of the Ministry of Foreign Affairs and Cooperation (*BOE* 151, 25.06 and 217, 10.09.05).
Note: This Royal Decree establishes the Directorate-General of International Affairs relating to Terrorism, Non-Proliferation and Disarmament: the former Directorate-General of International Affairs relating to Terrorism, the United Nations and Multilateral Organizations is now the Directorate-General of the United Nations, Human Rights and Multilateral Organizations.

It likewise establishes the Directorate-General for Planning and Evaluation of Development Policies.

The Under-Secretariat of Administration and Administrative Control was divided into a new Under-Secretariat General of Financial Administration and an Administrative Control Division.

– Order AEC/2699/2005 of 20 July establishing the makeup of the Diplomatic Career staff and breakdown into the different diplomatic categories (*BOE* 198, 19.08.05).
Note: In order to avoid a backlog in the promotion of career diplomats, the total number of officials will break down as follows, maintaining the eight categories of civil servants:

Three percent Spanish Ambassadors.
Nine percent First Ministers.
Eleven percent Second Ministers.
Fourteen percent Third Ministers.
Twenty-two percent Embassy Counsellors.
Nineteen percent First Secretaries.
Fourteen percent Second Secretaries.
Eight percent Third Secretaries.

– Royal Decree 938/2005 of 29 July, laying down the rules concerning the monitoring and accounting application of the funds earmarked for external services (*BOE* 212, 5.09.05).

2. Diplomatic Relations

– Royal Decree 2400/2004 of 30 December, setting up the Section of Economy and Trade of the Spanish Permanent Diplomatic Mission in Lithuania (*BOE* 14, 17.01 and 29, 3.02.05).

– Royal Decree 2401/2004 of 30 December, setting up the Section of Economy and Trade of the Spanish Permanent Diplomatic Mission in Kazakhstan (*BOE* 14, 17.01.05).

– Royal Decree 369/2005 of 8 April, setting up the Section of Tourism of the Spanish Permanent Diplomatic Mission in the Republic of Ireland (*BOE* 95, 21.04 and 102, 29.04.05).

– Royal Decree 959/2005 of 29 July, regulating Defence Attachés (*BOE* 211, 3.09.05). *Note*: The purpose of this Royal Decree is for Ministry of Defence representations abroad to integrate their functions in the most suitable way possible, to better coordinate their activities, better administer available material and human resources and to increase overall efficacy and functionality. They are vouchsafed, both organisationally and functionally, to the Secretariat-General of Defence Policy of the Ministry of Defence, without prejudice to the administrative and coordination responsibilities of the Diplomatic Mission heads.

– Order AEC/3472/2005 of 18 October, creating the Technical Cooperation Office of the Spanish International Cooperation Agency at Spain's permanent diplomatic mission in the Federal Democratic Republic of Ethiopia (*BOE* 268, 9.11.05).

– Royal Decree 1457/2005 of 2 December, setting up the Permanent Diplomatic Mission of Spain to the Republic of Afghanistan (*BOE* 299, 15.12.05).

3. Consular Relations

– Orders creating the following Honorary Consular Offices:

Comoros:
– Moroni, Order AEC/1352/2005 of 27 April (*BOE* 117, 17.05.05).

Croatia:
– Dubrovnik, Order AEC/703/2005 of 4 March (*BOE* 70, 23.03.05).
– Rijeka, Order AEC/704/2005 of 4 March (*BOE* 70, 23.03.05).

Morocco:
– Alhucemas and Oujda, Order AEC/1005/2005 of 4 April (*BOE* 93, 19.04.05).

New Zealand:
– Wellington, Order AEC/225/2005 of 28 January (*BOE* 36, 11.02.05).

Paraguay:
– Concepción, Order AEC/2155/2005 of 28 June (*BOE* 161, 7.07.05).

Turkey:
– Izmit, Order AEC/3455/2005 of 17 October (*BOE* 267, 8.11.05).

– Order AEC/3654/2005 of 2 November, creating a Consular Office together with the General Consulate in Beijing (People's Republic of China) (*BOE* 282, 25.11.05).

VII. TERRITORY

1. Air

– Order PRE/1841/2005 of 10 June, partially amending the Order of 18 January 1993 of the Ministry of Relations with the Courts and of the Government Secretariat on prohibited and restricted flight zones (*BOE* 144, 17.06.05).
Note: Prohibited and restricted air space over the National Parks included in the Order are established without affecting scheduled commercial flights due to the restricted vertical limits of the prohibition.

– Order PRE/2428/2005 of 26 July, amending the Order of 18 January 1993 of the Ministry of Relations with the Courts and of the Government Secretariat on prohibited and restricted flight zones (*BOE* 178, 27.07.05).
Note: Prohibited and restricted air space is created in the vicinity of the Marivent Palace, traditional summer residence of the Spanish royal family. This does not affect scheduled commercial flights due to an upper altitude limit of 3,000 feet.

VIII. SEAS, WATERWAYS, SHIPS

IX. INTERNATIONAL SPACES

X. ENVIRONMENT

1. Seas

– Royal Decree 276/2005 of 11 March, implementing Art. 2 of 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* 61, 12.03.05).

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

1. General provisions

– Royal Decree 1412/2005 of 25 November, regulating the Interministerial Commission for International Cooperation (*BOE* 303, 20.12.05).

2. Cultural Cooperation

– Order ECI/1711/2005 of 23 May, amending the Order of 23 September 1998 on the adoption of collaboration agreements with educational institutions which have schools abroad (*BOE* 138, 10.06.05).

– Royal Decree 760/2005 of 24 June, creating the Board of Trustees of the General Archive of the Indies (*BOE* 151, 25.06.05).
Note: The General Archive of the Indies was created by Carlos III in 1786 for the conservation of documents pertaining to the Indies and Spanish oversees possessions up until the last piece of documentation brought by the Harbourmaster-General of Havana in 1888–1889.

– Royal Decree 717/2005 of 20 June, regulating the curricula at schools party to the agreement between the Ministry of Education and Science and the British Council (*BOE* 160, 6.07.05).

– Order ECI/2363/2005 of 1 July, rectifying Order ECI/1711/2005 of 23 May, on the adoption of collaboration agreements with educational institutions which have schools abroad (*BOE* 173, 21.07.05).

– Order DEF/3182/2005 of 20 September, creating the Ministerial Commission for the commemoration of the bicentennial of the Battle of Trafalgar (*BOE* 247, 15.10.05).

– Order DEF/3183/2005 of 20 September, creating the Ministerial Commission for the commemoration of the bicentennial of the War of Independence (*BOE* 247, 15.10.05).

– Act 27/2005 of 30 November, fostering the education and culture of peace (*BOE* 287, 01.12.05).
Note: According to point A(2) of the Declaration and Programme of Action on a Culture of Peace adopted by the General Assembly of the United Nations by Resolution 53/243 on 13 September 1999, this Act provides for a series of measures targeting the fields of education and research with a view to establishing a culture of peace and non-violence worldwide.

– Royal Decree 1551/2005 of 23 December, regulating the direct awarding of subsidies to the International Information and Documentation Centre in Barcelona and to the European Academic Foundation of Yuste for the advancement of the principles and values of the Alliance of Civilizations and for the fostering of social and cultural values in the European integration process (*BOE* 309, 27.12.05).

3. Economic Cooperation

– Royal Decree 937/2005 of 29 July, creating the Spanish coordination committee for the International Year of Microcredit (*BOE* 213, 6.09.05).

4. Tariffs and Trade Cooperation

– Resolution of 30 December 2004, passed by the Spanish Customs and Special Taxes Department of the National Tax Administration Agency updating the Applicable Integrated Tariff (TARIC) (*BOE* 12, 14.01.05).

– Resolution of 26 December 2004, of the Presidency of the National Tax Administration Agency creating the International Relations Coordination Unit (*BOE* 18, 21.01.05).

– Resolution of 11 January 2005, passed by the Spanish Customs and Special Taxes Department of the National Tax Administration Agency updating the Applicable Integrated Tariff (TARIC) (*BOE* 18, 21.01.05).

– Resolution of 16 February 2005, passed by the Spanish Customs and Special Taxes Department of the National Tax Administration Agency updating the Applicable Integrated Tariff (TARIC) (*BOE* 48, 25.02.05).

– Resolution of 22 March 2005, passed by the Spanish Customs and Special Taxes Department of the National Tax Administration Agency updating the Applicable Integrated Tariff (TARIC) (*BOE* 78, 01.04.05).

– Resolution of 15 April 2005, passed by the Spanish Customs and Special Taxes Department of the National Tax Administration Agency updating the Applicable Integrated Tariff (TARIC) (*BOE* 96, 22.04.05).

– Order EHA/1646/2005 of 31 May, establishing rules regarding the import/export of rough diamonds in connection with the implementation of the International System of the Kimberley Process Certification Scheme (*BOE* 135, 7.06.05).

– Resolution of 31 May 2005, passed by the Spanish Customs and Special Taxes Department of the National Tax Administration Agency amending the Resolution of 15 December 2003 on Instructions for the Implementation of the Single Administrative Document (SAD) (DUA) (*BOE* 156, 1.07.05).

– Resolution of 20 June 2005, passed by the Spanish Customs and Special Taxes Department of the National Tax Administration Agency updating the Applicable Integrated Tariff (TARIC) (*BOE* 156, 01.07.05).

– Order ITC/2880/2005 of 1 August, regulating the processing procedure for administrative export authorisation and for preliminary export notifications (*BOE* 224, 19.09.05).

– Royal Decree 1165/2005 of 30 September, amending the organisational structure of the Spanish External Trade Institute (*BOE* 246, 14.10.05).

– Royal Decree 1223/2005 of 13 October, amending Royal Decree 417/1996 of 1 March, regulating the makeup and functions of the Advisory Council for the Promotion of Trade with Western Africa (*BOE* 257 and 287, 27.10 and 1.12.05).

5. Financial and Tax Cooperation

– Order EHA/748/2005 of 21 March, approving corporate tax and non-resident income tax forms corresponding to permanent establishments and to entities operating under an income attribution regime constituted abroad and present in Spain for the tax period from 1 January through 31 December 2004, issuing instructions on filing and payment procedures, establishing general conditions and telematic filing procedures and issuing specific instructions on the fractioned payment of the aforementioned taxes (*BOE* 75, 29.03 and 90, 15.03.05).

6. Sea Traffic and Transport

– Royal Decree 2319/2004 of 17 December, laying down container safety rules in compliance with the International Convention for Safe Containers (*BOE* 12, 14.01.05).

7. Air Traffic and Transport

– Order FOM/4338/2004 of 22 December, partially replacing annex I of Decree 1675/1972 of 26 June on air navigation assistance tariffs (Eurocontrol) (*BOE* 4, 5.01.05).

– Order FOM/134/2005 of 25 January, replacing annex I of Decree 1675/1972 of 26 June on air navigation assistance tariffs (Eurocontrol) and amending the late payment interest rate on the payment of such tariffs (*BOE* 28, 2.02.05).

– Order FOM/2141/2005 of 29 June, partially replacing annex I of Decree 1675/1972 of 26 June on air navigation assistance tariffs (Eurocontrol) (*BOE* 160, 06.07.05).

– Order PRE/2912/2005 of 19 September introducing technical amendments in the Air Traffic Regulation approved by Royal Decree 57/2002 of 18 January, on aerial navigation, the use of secondary radar transponders and phraseology and the undertaking of special operations with fixed wing aircraft (*BOE* 227, 22.09.05).

8. Labour, Social Security and Immigration

– Order TAS/1713/2005 of 3 June, regulating the makeup, powers and operational regime of the Tripartite Immigration Labour Commission (*BOE* 138, 10.06.05).
Note: This Order creates a Tripartite Immigration Labour Commission, a collegiate ministerial body comprised of the most representative, state-wide trade unions and employer's organisations and whose purpose is to advise the Ministry of Labour and Social Affairs in actions undertaken regarding the management of migratory labour flows.

– Royal Decree 822/2005 of 8 July, regulating the terms and conditions for inclusion in the General Regime of the Social Security System of the clergy of the Russian Orthodox Church of the Moscow Patriarchy in Spain (*BOE* 176, 21.07.05).

9. Recognition of Qualifications

– Royal Decree 309/2005 of 18 March, amending Royal Decree 285/2004 of 20 February, on conditions for recognition and equivalence of foreign university qualifications and studies (*BOE* 67, 19.03.05).

– Order ECI/1712/2005 of 2 June, amending Order ECI/3686/2004 of 3 November, laying down the rules for the enforcement of Royal Decree 285/2004 of 20 February, regulating the conditions for recognition and equivalence of foreign university qualifications and studies (*BOE* 138, 10.06.05).

10. Civil and Criminal Cooperation

– Royal Decree 54/2005 of 21 January, amending the Regulation of Act 19/1993 of 28 December on measures for the prevention of money laundering, approved by Royal Decree 925/1995 of 9 June, and other regulatory norms applicable to the banking, financial and insurance systems (*BOE* 19, 22.01 and 22, 26.01.05).

– Organic Act 3/2005 of 8 July, amending Organic Act 6/1985 of 1 July of the Judiciary providing for the extraterritorial pursuit of the perpetrators of feminine genital mutilation (*BOE* 163, 9.07.05).
Note: Article 23(4) of Organic Act 6/1985 of 1 July is worded as follows:

> "4. Likewise, the Spanish courts will have the authority to prosecute crimes in the following categories according to Spanish criminal law, committed by Spaniards or foreign nationals outside of national territory:
>
> a) Genocide.
> b) Terrorism.
> c) Piracy and illegal seizure of aircraft.
> d) Counterfeiting of foreign currency.

e) Crimes relating to prostitution and the corruption of minors or the mentally handicapped.
f) Illegal trafficking in psychotropic, toxic and narcotic drugs.
g) Crimes related to feminine genital mutilation, provided that the parties responsible are found in Spain.
h) And any other crime that, in accordance with international treaties or conventions, should be pursued in Spain".

– Order PRE/2193/2005 of 8 July, making public the Cabinet Agreement paying homage to and in solidarity with the victims of the terrorist attack perpetrated in London on 7 July 2005 (*BOE* 163, 9.07.05).
Note: "1. To bear witness to the profound sorrow and solidarity of the Spanish nation with the victims of the attack, with the city of London and with the citizens of the United Kingdom.

2. To publicly express this testimony, as from 13:00 on 8 July to 00:00 on 10 July 2005, the National Flag shall fly at half-mast on all public buildings and navy vessels".

– Act 16/2005 of 18 July, amending Act 1/1996 of 10 January, on free legal assistance to regulate special civil and commercial cross-border disputes in the European Union (*BOE* 171, 19.07.05).

– Order EHA/2963/2005 of 20 September, regulating the Central Body for the prevention of money laundering at the General Notary Council (*BOE* 229, 24.09.05).

– Organic Act 4/2005 of 10 October, amending Organic Act 10/1995 of 23 November on the Criminal Code regarding crimes of reckless endangerment involving explosives (*BOE* 243, 11.10.05).
Note: This Act introduces three new paragraphs numbered 2, 3, and 4 in Art. 348 of the Criminal Code to stiffen the sanction for illegal conduct by those responsible for the surveillance, control and use of explosives and reads as follows:

"Article 348.

1. Those who, in the manufacture, handling, transport, possession or commercialisation of explosives, flammable, corrosive, toxic or asphyxiating substances, or any other materials, devices or artifices capable of causing destruction, violate established safety rules putting the life, physical integrity or health of persons or the environment at risk, shall be punished with a prison sentence of between six months and three years and fined between twelve and twenty-four months and shall be banned from public employment or office, profession or trade for between six and twelve years.
2. Those responsible for the surveillance, control and use of explosives capable of causing damage who, in violation of the law concerning explosive

material, facilitate their loss or extraction shall be punished with a prison sentence of between six months and three years and fined between twelve and twenty-four months and shall be banned from public employment or office, profession or trade for between six and twelve years

3. The upper half of the sentences laid down in the foregoing paragraphs shall be administered in the case of directors, administrators or those entrusted with the enterprise, company, organisation or holding. In these cases, the judicial authority may additionally order one or several of the measures envisaged in Art. 129 of this Code.
4. Those responsible for factories, workshops, means of transport, tanks and other establishments relating to explosives which may cause damage shall be punished with a prison sentence of between six months and three years and fined between twelve and twenty-four months and shall be banned from public employment or office, profession or trade for between six and twelve years if they are found to have:

a) Hampered the work government inspectors responsible for explosive safety.
b) Falsified or concealed relevant information from the government concerning compliance with compulsory safety measures regarding explosives.
c) Disobeyed explicit government orders meant to remedy the serious problems detected concerning explosive safety.

XII. INTERNATIONAL ORGANIZATIONS

XIII. EUROPEAN UNION

– Royal Decree 5/2005 of 14 January, calling for a national consultative referendum on the ratification of the Treaty establishing a Constitution for Europe (*BOE* 13, 15.01.05).
Note: In accordance with the terms of Art. 92 of the Spanish Constitution, the following question was submitted to a consultative referendum: "Do you approve of the Treaty establishing a Constitution for Europe?".

The referendum was scheduled for 20 February 2005 and the electoral campaign was from 4 to 18 February.

– Royal Decree 7/2005 of 14 January, regulating certain aspects of the electoral proceedings applicable to the referendum on the Treaty establishing a Constitution for Europe (*BOE* 13, 15.01.05).

– Royal Decree 6/2005 of 14 January, regulating the granting of special assistance to political groups with parliamentary representation in the Congress of Deputies to defray the costs related to the explanation and dissemination of the Treaty establishing a Constitution for Europe (*BOE* 15, 18.01.05).
Note: Special subsidies are granted to defray the costs borne by political groups with parliamentary representation in the Congress of Deputies relating to informa-

tion and didactic activities and public dissemination of the Treaty establishing a Constitution for Europe.

– Order FOM/22/2005 of 17 January, laying down the rules on postal service collaboration in the referendum on the European Constitution (*BOE* 16, 19.01.05).

– Order INT/31/2005 of 17 January, establishing the type of voting facilities and electoral forms to be used for the referendum on the Treaty establishing a Constitution for Europe (*BOE* 18, 21.01.05).

– Organic Act 1/2005 of 20 May, authorizing the ratification by Spain of the Treaty establishing a Constitution for Europe, done at Rome on 29 October 2004 (*BOE* 121, 21.05.05).

– Resolution of 28 February 2005, passed by the Spanish Secretary of State on Territorial Cooperation, publishing the Agreements dated 9 December 2004 adopted by the Conference on Questions Concerning the European Communities (*Conferencia para Asuntos Relacionados con las Comunidades Europeas, CARCE*) (*BOE* 64, 16.03.05).
Note: These agreements establish the modalities of participation of the Spanish Autonomous Communities (*Comunidades Autónomas*) in the working-groups of the Council of the European Union, and regulate the system of representation into some of the configurations of this Council of the European Union.

– Order EHA/3784/2005 29 November, determining the issue, minting and circulation of commemorative coins marking the 20th anniversary of the accession of Spain and Portugal to the European Communities (*BOE* 291, 6.12.05).

– Organic Act 6/2005 of 22 December, authorizing the ratification by Spain of the Treaty of Accession to the European Union of the Republic of Bulgaria and the Republic of Romania (*BOE* 306, 23.12.05).

XIV. RESPONSIBILITY

XV. PEACEFUL SETTLEMENT OF DISPUTES

XVI. COERCION AND THE USE OF FORCE SHORT OF WAR

– Royal Decree 2394/2004 of 30 December, establishing the Protocol for the recuperation, identification, transfer and burial of the mortal remains of members of the Armed Forces, the Civil Guard and the National Police Force who perished in operations outside of Spain (*BOE* 13, 15.01.05).

– Royal Decree 1015/2005 of 18 August, declaring an official period of mourning for the death of 17 Spanish soldiers in an air accident which occurred while carrying out a peace mission in Afghanistan (*BOE* 198, 19.08.05).

– Organic Act 5/2005 of 17 November of the National Defence (*BOE* 276, of 18 November 2005).
Note: The following is a transcription of the most significant articles:

Article 4. The Cortes Generales.

1. The Cortes Generales are responsible for:

a) Issuing preliminary authorisations for State consent to be bound by international treaties and conventions and any other authorisations provided for in Art. 94(1)(b) of the Constitution.

2. The Congress of Deputies has the specific duty of issuing preliminary authorisation for the participation of the Armed Forces in missions outside of national territory in accordance with the provisions of this Law.

Article 15. Missions [of the Armed Forces].

3. The Armed Forces contribute militarily to the security and defence of Spain and its allies within the framework of the international organisations to which Spain is party and to peacekeeping missions, stability and humanitarian assistance.
4. The Armed Forces may likewise conduct missions to evacuate Spanish nationals residing abroad when the instability of a given country puts their lives or interests at great danger.

Article 16. Types of operations.

The Armed Forces, in compliance with their missions and their complementary or subsidiary contribution to public interest, are called upon to undertake different types of operations, in national territory and abroad, which can give rise to conflict prevention or deterrence, peacekeeping missions, crisis intervention and, where appropriate, response to aggression. Operations may specifically include:

a) Surveillance of maritime areas as a contribution to the State's efforts at sea, surveillance of Spanish air space and any other activities intended to guarantee the sovereignty of Spain and to protect the lives of its citizens and their interests.
b) Collaboration in international peacekeeping and stabilisation operations in areas of conflict, reconstruction of security and government and the rehabilitation of a specific country, region or area in accordance with established treaties and commitments.
c) Provision of support for the state police and security forces in combating terrorism and those institutions and bodies responsible for land, sea and air search and rescue services.

d) Military response to aggression by use of aircraft for terrorist purposes endangering the lives of the population and their interests. In this connection, the Government shall appoint a responsible national authority and the Armed Forces shall establish the pertinent operational procedures.
e) Collaboration with the different public administrations in the case of grave hazards, catastrophes, calamities and other public needs in accordance with the provisions of applicable laws.
f) Participation with other national and international bodies to protect the safety and well-being of Spanish citizens abroad in accordance with the coordination and allocation of responsibility criteria established.

Article 17. Authorisation of the Congress of Deputies.

1. Before ordering operations abroad which are not directly related with the defence of Spanish territory or of national interests, the Government shall make a preliminary consultation and shall obtain the authorisation of the Congress of Deputies.
   Note: "or of national interest" added. Moreover, the preliminary draft states: "the Government shall make a preliminary consultation to obtain the views of the Congress of Deputies".
2. In the case of missions abroad which, in accordance with international commitments, require a swift and immediate response to certain situations, the preliminary consultation and authorisation formalities shall be conducted by way of an emergency proceeding in order to comply with the said commitments.
3. In the cases envisaged in the foregoing section, when it is impossible to conduct the preliminary consultation for reasons of maximum urgency, the Government shall submit the decision it has adopted to the Congress of Deputies as soon as possible for ratification, if relevant.

Article 18. Operation monitoring.

The Government shall inform the Congress of Deputies on a regular basis, at least once yearly, as to the development of the Armed Forces' operations abroad.

Article 19. Conditions.

The following conditions must be met if the Armed Forces are to undertake missions abroad which are not directly related with the defence of Spain or national interests:

a) Action taken must be at the explicit request of the Government of the State in whose territory the mission is to be undertaken or it must be authorised by resolution of the United Nations Security Council or agreed, if relevant, by international organisations to which Spain is party, particularly the European Union or the North Atlantic Treaty Organisation (NATO), within the framework of their respective competences.

b) Missions must comply with defensive, humanitarian, stabilisation or peace-keeping aims envisaged and ordered by the aforementioned organisations.
c) Missions must conform to the United Nations Charter and must not contravene or violate the principles of conventional international law which Spain has incorporated into its legal system in accordance with Art. 96.1 of the Spanish Constitution.

XVII. WAR AND NEUTRALITY

Spanish Municipal Legislation Concerning Matters of Private International Law Published in 2005

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I. SOURCES OF PRIVATE INTERNATIONAL LAW

II. INTERNATIONAL JURISDICTION

– Organic Law 3/2005, of July 8, amending Organic Law 6/1985, of 1 July, on the Judiciary, to extraterritorially prosecute the practice of female genital mutilation (*BOE* 163, 9.7.05).
NOTE: This provision adds a new section to Art. 23.4 of the Organic Law on the Judiciary, regulating the international jurisdiction of Spanish courts in criminal matters.

III. PROCEDURE AND JUDICIAL ASSISTANCE

– Law 5/2005 of the Autonomous Community of Galicia, of 25 April, regulating the appeal for cassation in Galician civil law matters (*BOE* 135, 7.6.05).

– Law 4/2005 of the Autonomous Community of Aragon, of June 14, on cassation in the Autonomous Community of Aragon (*BOE* 201, 22.8.05).

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS AND DECISIONS

V. INTERNATIONAL COMMERCIAL ARBITRATION

VI. CHOICE OF LAW: SOME GENERAL PROBLEMS

VII. NATIONALITY

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– Royal Decree 1553/2005, of 23 December, regulating issuance of the national identity document and electronic signature certificates (*BOE* 307, 24.12.05).
NOTE: Of interest to this chronicle is Art. 1.2, that establishes that the national identity document is sufficient to accredit the holder as a Spanish national.

VIII. ALIENS, REFUGEES AND CITIZENS OF EUROPEAN COMMUNITY

– Royal Decree 2393/2004, of 30 December, approving the Regulation of Organic Law 4/2000, of January 11, on the rights and freedoms of aliens in Spain and their social integration (*BOE* 6, 7.1.05; correction of errors *BOE* 130, 1.6.05).
NOTE: This abolishes the previous Regulation of Organic Law 4/2000, approved by Royal Decree 864/2001, of 20 July (see Section VIII of the chronicles in the 2001 and 2002 Yearbooks). On Organic Law 4/2000 and subsequent modifications, see Section VIII of the Chronicles for 1999, 2000 and 2003.

– Resolution of 10 January of 2005, by the Secretariat of State for Immigration and Emigration, on the delegation of jurisdiction over admission, transfer, release and extension of stay in Migration Centres (*BOE* 18, 21.1.05).

– Order PRE/140/2005, of 2 February, establishing the procedure applicable to the normalisation process provided for in the Third transitory provision of Royal Decree 2393/2004, of 30 December, approving the Regulation of Organic Law 4/2000, of 11 January, on rights and freedoms of aliens in Spain and their social integration (*BOE* 29, 3.2.05).
NOTE: For Royal Decree 2393/2004, see above in this section.

– Resolution of 4 February 2005, by the Office of the Deputy Secretary, which provides for publication of the collaboration agreement between the Secretariat of State for Immigration and Emigration, the Secretariat of State for Social Security and the Office of the Deputy Secretary for Public Administrations on the implementation of the process of normalising alien labour status (*BOE* 31, 5.2.05).

– Resolution of 4 February 2005, of the Office of the Deputy Secretary providing for the publication of the Agreement of the Council of Ministers of 30 December 2004, extending the validity of the Agreement of 19 December 2003, determining the contingent of alien non-community workers in Spain for 2004 (*BOE* 31, 5.2.05).
NOTE: On the Agreement of December 2003, published under the Resolution of 29 December 2003, see Section VIII of the chronicle in the 2003 Yearbook.

– Resolution of 23 December 2004, of the Directorate General for Civil Aviation, authorizing onboard flight mechanics with licenses issued in the European Union to citizens thereof to act as members of flight crews on board aircraft registered in Spain (*BOE* 35, 10.2.05).

– Order TAS/244/2005, of 10 February, creating cash payment desks at refugee lodging centres and temporary immigrant centres (*BOE* 37, 10.2.05).

– Royal Decree 118/2005, of 4 February, approving the General Statutes for Associations of Commercial Agents of Spain and their General Council (*BOE* 40, 16.2.05).
NOTE: Of interest to this chronicle, is Art. 3.3, which establishes the requirements for nationals of countries of the European Economic Space and third-country citizens to join national professional associations.

– Resolution of 8 February 2005, on the Public Service of State Employment, establishing the procedure for constituting the Catalogue of Hard-To-Fill Occupations regulated under Article 50. a) of the Regulation of Organic Law 4/2000, of 11 January, on rights and freedoms of aliens in Spain and their social integration, approved by Royal Decree 2393/2004, of 30 December (*BOE* 47, 24.2.05).
NOTE: For Royal Decree 2393/2004 see above in this section.

– Royal Decree 309/2005, of 18 March, amending Royal Decree 285/2004, of 20 February, regulating the conditions for homologation and validation of foreign higher education degrees and courses of study (*BOE* 67, 19.3.05).

– Resolution of 26 May 2005, by the Office of the Deputy Secretary, providing for the publication of the Resolution of 28 April 2005, by the National Statistics Institute and the Directorate General for Local Cooperation, setting forth technical instructions to municipal government on the procedure by which to determine the expiration of the registration of non-community aliens lacking permanent residence permits that are not renewed every two years (*BOE* 128, 30.5.05).

– Order ECI/1711/2005, of 23 May, amending the Order of 23 September 1998, on entering into collaboration agreements with educational institutions that own educational centres located abroad (*BOE* 138, 10.6.05).
NOTE: This provision is based on Royal Decree 1027/1993 (see Section VIII of the chronicle in the 1993 and 1994 Yearbooks).

– Order ECI/1712/2005, of 2 June, amending Order ECI/3686/2004, of 3 November, setting forth rules for the application of Royal Decree 285/2004, of 20 February, regulating the conditions for homologation and validation of foreign higher education degrees (*BOE* 138, 10.6.05).
NOTE: For Royal Decree 285/2004 and Order ECI/3686/2004, see Section VIII of the chronicle in the 2004 Yearbook.

– Order TAS/1745/2005, of 3 June, regulating certification accrediting compliance with the requirement in Article 50.a) of the Regulation of Organic Law 4/2000, of 11 January, on the rights and freedoms of aliens in Spain and their social integration, approved by Royal Decree 2393/2004, of 30 December 30 (*BOE* 140, 13.6.05).

NOTE: Art. 50.a), of the Regulation refers to the national employment circumstances allowing for alien workers to be recruited. For Royal Decree 2393/2004, see above in this section.

– Royal Decree 652/2005, of 7 June, amending Royal Decree 2062/1999, of 30 December, regulating the minimum level of training for maritime occupations (*BOE* 143, 16.6.05).
NOTE: Amendments on recognition of professional degrees granted by the authorities of other countries were necessary owing to the changes in community rules in this area.

– Law 30/2005, of 29 December, on the General State Budget for 2006 (*BOE* 312, 30.12.05).
NOTE: Additional provision number thirty-six establishes the percentage of the transport subsidies for Spanish citizens, citizens of the other European Union member states, of States belonging to the European Economic Space and Switzerland who are resident of the Canary Islands, the Balearic Islands, Ceuta and Melilla.

IX. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

– Instruction of 10 February 2005, of the Directorate General for Registries and Public Notaries, approving the multilingual form of the Life Certificate set forth in Convention, 27 of the International Commission on Civil Status (*BOE* 57, 8.3.05).

– Circular of 11 January 2005, of the Directorate General of Registries and Public Notaries on the parties to the Conventions of the International Commission on Civil Status to which Spain is a party (*BOE* 138, 10.6.05).

– Law 24/2005, of 18 November, on reforms to boost productivity (*BOE* 277, 19.11.05).
NOTE: Among others, a provision of interest to this Chronicle is the Additional Provision Seven (amendment of Art. 16 of the Law on the Civil Registry on registration of international adoptions and births abroad), and Additional Provision Eight (amendment of Art. 18.2 of the Law on the Civil Registry, relating to the Central Civil Registry's keeping of books made up of duplicates of consular registrations).

– Royal Decree 1553/2005, of 23 December, regulating the issue of the national identify document and its electronic signature certificates (*BOE* 307, 24.12.05).
NOTE: Of interest for this chronicle are Art. 2.1, which establishes the right and obligation to obtain the identify document, and Art. 5.1.d), which determines the requirements for issue to Spaniards living abroad.

X. FAMILY LAW

– Law 13/2005, of 1 July, which amends the Civil Code regarding the right to marry (*BOE* 157, 2.7.05).
NOTE: This provision basically introduces into Spanish law the possibility of marriage between persons of the same sex. See below the Circular Resolution of 29 July 2005, by the Directorate General for Registries and Public Notaries.

– Circular Resolution of 29 July 2005, by the Directorate General of Registries and Public Notaries, on civil marriage between persons of the same sex (*BOE* 188, 8.8.05).
NOTE: See Law 13/2005 above.

– Law 24/2005, of 18 November, on reforms to encourage productivity (*BOE* 277, 19.11.05).
NOTE: Among others, of interest to this chronicle is Additional Provision Seven (amendment of Art. 16 of the Law on the Civil Registry regarding registration of international adoptions and of births abroad).

– Circular Resolution of 31 October 2005, by the Directorate General for Registries and Public Notaries on international adoptions (*BOE* 308, 26.12.05).

XI. SUCCESIONS

XII. CONTRACTS

– Law 26/2005, of 30 November, amending Law 49/2003, of 26 November, on the lease of undeveloped property (*BOE* 287, 1.12.05).
NOTE: By virtue of paragraph Four of the Single Article, new language is provided for Art. 9 of the Law on the Lease of undeveloped property, paragraph 2 of which regulates the conditions in which foreign persons and entities may be lessees.

– Law 30/2005, of 29 December, on the General State Budget for 2006 (*BOE* 312, 30.12.05).
NOTE: Additional Provision Twenty-Four establishes the maximum limit for the 2006 fiscal year of coverage for new export credit insurance subscriptions, excluding the modality of open export management (PAGEX), the 100 Policy and the Master Policy, that may be insured and distributed by the *Compañía Española de Seguros de Crédito a la Exportación, Sociedad Anónima (CESCE)* (Spanish Export Credit Insurance Company, Inc.).

XIII. TORTS

XIV. PROPERTY

– Royal Decree 5/2005, of 11 March, on emergency reforms to encourage productivity and improve public contracting (*BOE* 62, 14.3.05).
NOTE: For the purposes of this chronicle it is important to refer to Art. 17, which sets forth the law applicable to financial guarantees established for securities represented by annotation in account.

– Royal Decree 1414/2005, of 25 November, regulating the procedure for processing applications for registration in the community Registry of protected origin denominations and geographical indications, and opposition thereto (*BOE* 293, 8.12.05).

XV. COMPETITION LAW

– Law 2/2005 of the Autonomous Community of Extremadura, of 24 June, on the creation of the Panel in Defence of Competition in Extremadura (*BOE* 180, 29.7.05).
NOTE: Art. 1.1 establishes the scope of application, referring to acts in violation or potentially in violation of competition that may take place throughout or in part of the territory of the Autonomous Community, with no economic impact whatsoever on the rest of national territory.

XVI. INVESTMENTS AND FOREIGN EXCHANGE

– Resolution of 30 November 2004, of the Directorate General for Registries and Public Notaries, regarding compliance with the Instruction of 10 December 1999, on the obligations of Public Notaries and Property and Business Registrars in regard to prevention of money laundering (BOE 3, 4.1.05).

– Royal Decree 54/2005, of 21 January, amending the Regulation of Law 19/1993, of 28 December, on certain money laundering prevention measures, approved by Royal Decree 925/1995, of 9 June, and other financial and banking system regulations (BOE 19, 22.1.05; correction of errors BOE 22, 26.1.05).

– Order EHA/2963/2005, of 20 September, regulating the Central Agency for the Prevention of Money Laundering within the General Council of Public Notaries (BOE 229, 24.9.05).
NOTE: See Law 19/2003 on the legal system for capital movements and economic transactions abroad and certain measures to prevent money laundering, Law 19/1993 on certain measures to prevent money laundering and Royal Decree 925/1995 which approves the Regulations under Law 19/1993 (see section XVI of the chronicle in the 2003, 1993–1994 and 1995–1996 Yearbooks respectively).

– Royal Decree 1310/2005, of 4 November 4, which partially implements Law 24/1988, of 28 July, on the Securities Market, regarding admission for trading of securities in official secondary markets, public sale or subscription offers and the brochures required for such purpose (BOE 274, 16.11.05).

XVII. FOREIGN TRADE LAW

– Royal Decree 58/2005, of 21 January, adopting measures to Protect against the introduction and dissemination in national territory and the European Community as well as export or transit to third countries of organisms harmful to plants and plant products, (BOE 19, 22.1.05).

– Royal Decree 11/2005, of 14 January, modifying Royal Decree 1785/2000, of 27 October, on intra-community circulation of medical drugs for use in humans (BOE 24, 28.1.05).

– Resolution of 26 January 2005, by the Presidency of the State Agency for Tax Administration, on preparation of statistics on trade in goods among Member States (Intrastat) (BOE 33, 8.2.05; correction of errors BOE 62, 14.3.05).

– Order APA/431/2005, of 18 February, which amends the annexes to Royal Decree 58/2005, of 21 January, by which measures are adopted to protect against the introduction and dissemination in national territory and the European Community, and the export or transit to third countries of organisms harmful to plants and plant products (BOE 49, 26.2.05).
NOTE: For Royal Decree 58/2005 see above in this section.

– Order APA/1439/2005, of 17 May, amending the Order of 17 May 1993, standardising plant health passports for the circulation of certain plants, plant products and other objects within the Community and establishing procedures for issuance of such passports and the conditions and procedures for their replacement (BOE 122, 23.5.05).

– Order APA/1440/2005, of 17 May 17, amending certain annexes of Royal Decree 58/2005, of 21 January, adopting measures to protect against the introduction and dissemination in national territory and the European Community and the export and transit to third countries of organisms that are harmful to plants or plant products (BOE 122, 23.5.05; errata correction BOE 143, 16.6.05).

– Order EHA/1646/2005, of 31 May, establishing certain rules on the import and export of rough diamonds for the application of the Kimberley Process International Certification Scheme (BOE 135, 7.6.05).

– Order EHA/1755/2005, of 6 June, establishing the applicable rules for favourable tariff treatment of certain goods by reason of kind or special use (BOE 141, 14.6.05).

– Resolution of 31 May 2005, by the Department of Customs and Excise Taxes of the State Agency for Tax Administration, modifying the Resolution of 15 December 2003, on instructions for the formalization of the Single Administrative Document (BOE 156, 1.7.05).
NOTE: For the Resolution of 15 December 2003 see Section XVII of this chronicle in the 2003 Yearbook.

– Order EHA/2566/2005, of 20 July, authorizing Loterías y Apuestas del Estado (State Lottery and Wagering Agency) to market and operate their products through the internet and other interactive systems (BOE 187, 6.8.05).
NOTE: Paragraph Three establishes special provisions to prevent cross border wagers.

– Resolution of 29 August 2005, by the Presidency of the State Tax Agency, modifying the resolution of 26 January 2005, on preparation of statistics on the exchange of goods among Member States (Intrastat System) (BOE 215, 8.9.05).

– Royal Decree 1085/2005, of 16 September, establishing animal health rules for the import and transit through Spain of certain live *ungulates* from third countries (BOE 229, 24.9.05).

– Law 24/2005, of 18 November, on reforms to promote productivity (BOE 277, 19.11.05).
NOTE: Among other provisions, of interest to this chronicle is the Additional Provision Six [Regulation of the guarantees required to grant Development Aid Fund (DAF) credits].

– Order EHA/3798/2005, of 29 November, establishing advance declaration in the circulation of ethyl alcohol in internal territory, modifying Order HAC/2696/2003, of 27 August, which established the advance warning system for the intracommunity circulation of certain products subject to Manufacturing Excise Tax (BOE 292, 7.12.05).

– Order EHA/4040/2005, of 21 December, setting thresholds relating to statistics on the exchange of goods among European Union Member States for 2006 (BOE 308, 26.12.05).

– Law 30/2005, of 29 December, on the General State Budget for 2006 (BOE 312, 30.12.05).

NOTE: Additional Provision Fifty-Seven amends the Additional Provision Eighteen of Law 46/1985, and prohibits the circulation, trade, holding or production of any means in support of games of chance or similar activities.

– Order ITC/4112/2005, of 30 December, establishing rules applicable to intracommunity and international exchanges of electrical energy (BOE 313, 31.12.05).

Also see above Section XXIII (Tax Law) in this chronicle on Private International Law.

XVIII. BUSINESS ASSOCIATION / CORPORATIONS

– Correction of errors in Legislative Royal Decree 6/2004, of 29 October, approving the reconsolidated text of the Law on the regulation and supervision of private insurance (BOE 28, 2.2.05).
NOTE: For Legislative Royal Decree 6/2004 see Section XVIII of the chronicle in the 2004 Yearbook.

– Circular 1/2005, of 1 April, of the National Securities Market Commission, amending the forms for periodic public reporting by securities issuing entities listed on securities exchanges (BOE 82, 6.4.05).

– Law 5/2005, of 22 April, on supervision of financial conglomerates and amending other financial sector laws (BOE 97, 23.4.05).
NOTE: Of interest to this Chronicle is Art, 3, which establishes the scope of application of the Law, namely, which financial conglomerates are subject to this Law (certain entities with corporate domicile in Spain or abroad).

– Law 19/2005, of 14 November, on European corporations domiciled in Spain (BOE 273, 15.11.05).

– Law 20/2005, of 14 November, on the creation of the Registry of Insurance Contracts covering death (BOE 273, 15.11.05).
NOTE: Art. 5.1.3 establishes that the obligation to register such insurance contracts in the General Registry of Last Wills and Testaments is applicable to both Spanish insurers and insurers domiciled in a country belonging to the European Economic Space with activity in Spain in accordance with the rules on the right to establishment or the rules on free-lance provisions of services.

– Royal Decree 1337/2005, of 11 November, approving Regulations for foundations acting nationwide (BOE 279, 22.11.05).
NOTE: For the purposes of this chronicle, special reference is made to Art. 2.1.b) (application of the Regulation to, *inter alia*, delegations of foreign foundations acting principally in the territory of more than one autonomous community, regarding

their assets in Spain and all activities carried out on national territory), and Art. 4 (regulations on delegations in Spain of foreign foundations).

– Law 25/2005, of 24 November, regulating venture capital entities and their management companies (BOE 282, 25.11.05).
NOTE: Of interest to this chronicle are the following provisions: Art. 3. 3.i), Art. 10.2.b), Art. 18.3.a), Arts. 19 and 20, and Additional Provision 4.

Also see above Section XXIII (Tax Law) in this chronicle on Private International Law.

XIX. BANKRUPTCY

– Law 6/2005, of 22 April, on reorganization and disposal of credit-granting entities (BOE n. 97, 23.4.05).
NOTE: For the purposes of this chronicle, special reference is made to Art. 2 (scope of application), Art. 6 (competence of Spanish authorities to determine the application to credit-granting entities authorised to operate in Spain of reorganization and disposal measures, and the obligation to report to the competent supervisory authorities of the Member States), and Arts. 7, 8 and 21 (law applicable to reorganization measures).

XX. TRANSPORT LAW

– Law 28/2005, of 26 December, on health measures in respect of tobacco use and regulating the sale, supply, use, and advertising of tobacco products (BOE 309, 27.12.05).
NOTE: Art. 7.g) sets forth a total prohibition of smoking in aircraft leaving from or arriving in domestic territory and on all flights of Spanish carriers, including code-share flights with foreign carriers.

XXI. LABOUR LAW AND SOCIAL SECURITY

– Law 3/2005, of 18 March, providing economic benefits to citizens of Spanish origin sent abroad as minors because of the Civil War, who lived most of their lives outside Spanish territory (BOE 68, 21.3.05).
NOTE: See below in this section Order TAS/1967/2005, of 24 June. See also below in this section Law 30/2005 on the General State Budget for 2006.

– Order TAS/1464/2005, of 20 May, regulating the procedure to issue and circulate settlement forms for expenses derived from the application of community regulations on workplace accidents and occupational diseases, as regards provision in kind of healthcare services (BOE 124, 25.5.05).

– Order TAS/1967/2005, of 24 June, establishing the provisions to implement and apply Law 3/2005, of 18 March, providing for economic benefits for citizens of Spanish origin sent abroad as minors because of the Civil War, and who spent most of their lives outside national territory (BOE 151, 25.6.05).
NOTE: On Law 3/2005 see above in this section.

– Resolution of 12 August 2005, by the Secretary of State for Immigration and Emigration, providing for publication of the Agreement by the Council of Ministers of 15 July 2005, approving the Instructions on the procedure for authorising the residence and employment in professional sports of foreigners (BOE 200, 22.8.05).

– Royal Decree 1041/2005, of 5 September, modifying the General Regulations on registration of companies and membership, enrolment, withdrawal and changes in employee data in the Social Security system; on contribution and payment of other benefits by the Social Security system; on collection by the Social Security system and on collaboration by Social Security in mutual workplace accident and occupational disease insurance companies, in addition to the Royal Decree on the assets of the Social Security system (BOE 222, 16.9.05).
NOTE: Of interest to this chronicle is Art. 1.10, which provides a new text for Art. 42 (membership and enrolment of aliens the Social Security system) of the General Regulations on company registration and membership, enrolment, withdrawal and changes in employee data in the Social Security system, approved by Royal Decree 84/1996.

– Royal Decree 1335/2005, of 11 November, regulating Social Security family benefits (BOE 279, 22.11.05).
NOTE: Of relevance to this chronicle are Arts. 20.1 and 22.1 (requirement of birth or formal adoption for entitlement to certain benefits), and Art. 28, paragraphs. 3 and 4 (ways to accredit residence in Spanish territory for entitlement to certain benefits).

– Law 30/2005, of 29 December, on the General State Budget for 2006 (BOE 312, 30.12.05).
NOTE: Additional Provision Fifty-one establishes certain provisions on old-age welfare pensions for Spanish emigrants. Additional Provision Fifty-Two regulates some aspects of the economic benefits established in Law 3/2005, entitling some citizens of Spanish origin sent abroad to an economic benefit (sea above in this section).

– Royal Decree 1612/2005, of 30 December, modifying Royal Decree 728/1993, of 14 May, establishing old-age welfare pensions for Spanish emigrants (BOE 313, 31.12.05).

XXII. CRIMINAL LAW

XXIII. TAX LAW

– Royal Decree 161/2005, of 11 February, modifying Royal Decree 1326/1987, of 11 September, establishing the procedure for applying European Community directives on exchange of tax information (BOE 37, 12.2.05).

– Order EHA/748/2005, of 21 March, approving the forms for Corporate Tax and Non-Residents Income Tax returns corresponding to permanent establishments and entities under the system of attributing foreign-constituted income with presence on Spanish territory, for the 1 January to 31 December 2004 fiscal year, setting forth instructions on submitting returns and effecting payment, general conditions and procedures for on-line submission and instructions regarding payment in instalments of said tax (BOE 75, 29.3.05; error correction BOE 90, 15.4.05).

– Royal Decree 687/2005, of 10 June, modifying the Regulation on the Personal Income Tax, approved by Royal Decree 1775/2004, of 30 July, to regulate the special taxation system for the Tax on the Income of Non-Residents, and raising the percentage for standard expense deduction for farmers and livestock breeders under the simplified direct estimation system (BOE 139, 11.6.05).

– Order EHA/1731/2005, of 10 June, approving the form for Personal Income Tax return for taxpayers pertaining to the special taxation system through Tax on the Income of Non-Residents, as well as the form for use in reporting choice of tax option for said system, and modifying provisions on other return forms related to the application of this special system (BOE 139, 11.6.05).

– Resolution of 10 June 2005, by the Department of Customs and Excise Taxes of the State Tax Agency, modifying the Resolution of 16 September 2004, establishing the rules for filling out the accompanying documents regarding the circulation of products subject to excise tax on manufactured goods, the system for electronic transmission of certain documents, and the forms used for excise taxes, and approving form 511 (BOE 156, 1.7.05).

– Order EHA/2339/2005, of 13 July, approving form 299, which is the annual declaration of certain income obtained by individuals residing in other Member States of the European Union and in other countries and territories with which an information exchange agreement is in force, the hardware and software for computer-readable submission, and the procedure for on-line submission through the Internet and teleprocessing and modification of the Order of 21 December 2000, establishing the procedure for submission by teleprocessing of forms 187, 188, 190, 193, 194, 196, 198, 296, 345 and 347 and other rules relating to the issuance of fiscal residence certificates (BOE 171, 19.7.05).

– Royal Decree 939/2005, of 29 July, approving the General Regulation on Collection (BOE 210, 2.9.05).
NOTE: Art. 5 regulates the collection of resources of other national or foreign Public Administrations, and other international or supranational entities.

– Royal Decree 1122/2005, of 26 September, modifying the Regulations on Corporate Income Tax, approved by Royal Decree 1777/2004, of 30 July, in relation to coverage of credit risk coverage by financial entities, and Royal Decree 1778/2004, of 30 July, establishing reporting obligations regarding preferential shares and other debt instruments and certain income obtained by individuals who are residents of the European Union (BOE 239, 6.10.05).

– Royal Decree 1309/2005, of 4 November, approving the Regulations for Law 35/2003, of 4 November, on collective investment institutions, and adapting the tax scheme applicable to collective investment institutions (BOE 267, 8.11.05; errata correction BOE 301, 17.12.05).
NOTE: Of interest to this chronicle, are Art. 19 (marketing in Spain of foreign collective investment institutions), Art. 20 (marketing abroad of shares and participation in Spanish collective investment institutions), Art. 77 (authorisation of collective investment institution management companies subject controlled by foreign individuals), and Arts. 85 to 90 (cross-border actions).

– Law 22/2005, of 18 November, incorporating into the Spanish legal system a number of community directives on the taxation of energy products and electricity, and the common tax scheme applicable to parent companies and subsidiaries of different member states, and regulating the tax scheme for cross-border contributions to pension funds within the European Union (BOE 277, 19.11.05).
NOTE: Of interest to this chronicle are Chapter III (transposition of Directive 2003/123/CE of the Council, of e 22 December 2003, modifying Directive 90/435/CEE, on the common tax scheme applicable to parent companies and subsidiaries of different Member States) and Chapter IV (Tax scheme of cross-border contributions to pension funds within the European Union).

Also see above Section XVII (Foreign Trade Law) in this chronicle on Private International Law.

XXIV. INTERLOCAL CONFLICT OF LAWS

– Law 1/2005 of the Autonomous Community of Cantabria, of 16 May, on common law marriages in the Autonomous Community of Cantabria (BOE 135, 7.6.05).
NOTE: Art. 4.1 establishes that couples in which at least one of the parties is registered as a resident in any municipality of Cantabria may register in the appropriate Registry of Common Law Marriages.

– Law 26/2005, of 30 November, modifying Law 49/2003, of 26 November, on Leasing Undeveloped Property (BOE 287, 1.12.05).
NOTE: Paragraph Fourteen of the Single Article provides a new text for Art. 29 of the Law on Leasing Undeveloped Property, whereby, in the absence of express agreement, of regional privileges or special rights or custom, the arrangement shall be governed by certain provisions of the Law on Leasing Undeveloped Property.

Spanish Judicial Decisions in Public International Law, 2005

The team which selected these cases was directed by Professor Fernando M. Mariño (University Carlos III) and coordinated by M. Amparo Alcoceba (Contracted Professor Doctor of International Public Law, University Carlos III). It includes the following lecturers of the University Carlos III: A. Díaz, J. Escribano, L. Jerez, A. Manero, D. Oliva, B. Olmos, R. Rodríguez Arribas, F. Vacas, P. Zapatero Miguel.

I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

III. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

Constitutional Court Decision (CCD) 155/2005 of 9 June
Constitutional Jurisdiction
Appeals alleging unconstitutionality nos. 3247/1999 and 73/1999

Constitutionality appeals brought by over fifty Deputies belonging to the Socialist Parliamentary Group of the Congress of Deputies against Royal Decree Law (RDlaw) 14/1998, of 9 October, on Spain's accession to a number of International Monetary Fund Agreements, especially referring to Arts. 2 and 3 (of the Constitution), and against Law 13/1999, of 21 April, on Spain's accession to a number of International Monetary Fund Agreements, especially referring to Arts. 2 and 3 (of the Constitution): provision of the consent of the Kingdom of Spain to bind itself internationally to a number of International Monetary Fund Agreements: the legal invalidity of the decree-law as an instrument for incorporating international agreements into domestic law: such a law not being lawfully able to provide the constitutionally-required authorization for creating national law under Arts. 94.1 and 74.2 of the Spanish Constitution (SC). The appeal was partially admitted.

Legal Grounds:

"(. . .) 5 Beginning with consideration of the appeal against *Royal Decree-Law 14/1998 (RCL 1998, 2489, 2574)*, it should be kept in mind that the challenged law is a legal norm with the force of law to which the provisions set forth in Art. 86.1 of the Spanish Constitution (SC) do not apply. This is not, however, the only limitation to which the decree-laws are subject under the

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Constitution, since all the reservations established by the Constitution regarding certain matters and favouring specific forms and procedures are clearly in force here. One of such reservations is the one established by Art. 94.1 of the Constitution (RCL 1978, 2836) on providing the consent of the State in order to enter into binding agreement through treaty or agreement, requiring the provision of consent to be authorised by the Spanish Parliament in certain cases. This therefore excludes the possibility of such consent being provided with no prior parliamentary authorization or under authorization from another body. It is therefore clear that the Decree-Law is a legal format that is not valid for the authorization required by SC Art. 94.1. This is, first, because SC Art. 86.1 only provides for the Decree-Law as a way to make "legislative provisions", a legal category different from authorizations, and therefore it cannot be considered a suitable instrument for granting authorisation.

Second, an authorisation clearly cannot be granted by the entity needing to be authorised. Lastly, the Decree-Law is a source of regulation for use by the Government that only requires passage by the Congress of Deputies, not the two Chambers of the Spanish Parliament, for it to enter into law. Therefore, not even after parliamentary validation is the Decree-Law a legal format able for granting authorization, something only the full Spanish Parliament (Cortes Generales) is able to do, since validation by the Congress of Deputies could never amount to validation by the complex body in which it is a part together with the Senate, making it impossible to view validation as an act equivalent to the authorisation required under SC Art. 94.1.

Another argument must be added to the above, since authorisation under SC Art. 94.1 must be prior to the provision of consent, meaning that if the authorisation contained in the Decree-Law is only complete with congressional validation, the Decree-Law in and of itself cannot authorise the provision of consent and would not be in full effect as from publication, which can hardly be reconciled with being an instrument for urgent legislation. The alternative would be to consider the authorisation contained in the Decree-Law as sufficient before it is validated, in other words, strictly governmental authorisation, which would be manifestly contrary to the requirement for authorisation by the full Spanish Parliament (Cortes Generales) and must be granted in all cases before the State makes international commitments under the premises set forth in SC Art. 94.1. Lastly, to accept that the not-yet-validated Decree-Law would be initially sufficient for authorising the granting of consent but that, nonetheless, the authorisation only becomes perfected after validation of the text by the Government, would lead, ultimately, to allowing a treaty to be entered into before effective parliamentary authorisation (albeit incomplete, owing to the exclusion of one of the Chambers).

6 Therefore, *Royal Decree-Law 14/1998 (RCL 1998, 2489, 2574)* cannot be used as a legal format for granting the constitutionally required authorisation to bind the State internationally by means of treaty or agreement in accordance with *SC Art. 94.1 (RCL 1978, 2836)*. The question that arises immediately,

therefore, is to determine whether Arts. 2 and 3 of said Royal Decree-Law refer to any agreement or treaty of the type, as the appellants allege, referred to in paragraph d) of SC 94.1, namely, "treaties or agreements which imply financial liabilities for the Public Treasury."

With regard to Art. 2 of Royal Decree-law 14/1998, the appellants maintain that accession to the New Agreements for obtaining loans from the International Monetary Fund establishes a new agreement framework obligating the Spanish public treasury to put financial resources at the disposal of the IMF by granting loans of up to 672 million special drawing rights. The State Lawyer, on the other hand, considers this to be a situation for standard implementation of the International Monetary Fund's Articles of Agreement, signed by Spain in 1958, whose Art. VII, Section 1, establishes a special system for obtaining resources for which the New Arrangements, to which Art. 2 of Royal Decree-Law 14/1998 refers, only provide specific implementation. Furthermore, the State Lawyer alleges that no financial obligation is assumed by the Public Treasury, since providing amounts as a loan only requires a management operation of the reserves account by the Bank of Spain.

The appellants are correct in maintaining that Art. 2 of the Royal Decree-Law refers to international commitments involving financial liabilities for the Public Treasury. Under the New Arrangements approved by the IMF Board of Governors Decision of 27 January 1997, signatory countries acquire an unequivocal commitment to provide the Fund with the loans it needs in order to provide third parties with needed financial recourses. It is evident that the amounts made available to the Fund will be recorded in the Bank of Spain's assets account, as the State Lawyer pointed out, but this is a logical result of the prior commitment to make this available which, if implemented requires the appropriate monetary provision, that the State is obligated to make.

It is important to point out that the immediate party to which Art. 2.1 of the Royal Decree-Law refers is the Kingdom of Spain, which therefore holds the commitment established by the second sub-paragraph of Art. 2.1. Sub-paragraph 2 of said article attributes the decision-making for the implementation of the New Arrangements to the Ministry of Economy and Finance. The public treasury's involvement is therefore undeniable, whether or not further instrumentation of the commitment is performed by the Bank of Spain in the terms set forth in the First Final Provision.

The New Arrangements referred to in Art. 2 of the Royal Decree-Law are not, on the other hand, a mere result of routine implementation of the International Monetary Fund Articles of Agreement as the Government representative alleges. Art. 3 of the so-called New Arrangements makes it clear that accession to same is not obligatory for the Member States of the International Monetary Fund, but rather that accession thereto can be by depositing "an instrument setting forth that it has adhered in accordance with its law and has taken all steps necessary to enable it to carry out the terms and conditions of this decision" [paragraph c)]. This is in strict application of Art. VII, Section 1,

of the Articles of Agreement, in accordance with which the New Arrangements were adopted, whereby the measures that can be taken to replenish Fund holdings in the general resources account include the granting of loans by Member States, with the understanding that said Member States are not under obligation to grant them. The Member States of the Fun do not therefore assume an obligation under Art. VII Section 1, of said Articles solely by entering into the Articles of Agreement. Obligations of this type require specific acceptance on a case-by-case basis. This is set forth in Art. 3 c) of the New Arrangements, and the financial dimension of the obligation assumed by the Spanish public treasury by acceptance of these New Arrangements, is what makes prior authorization by the full Spanish Parliament (Cortes Generales) a requirement.

This is not a case, therefore, of an obligation assumed immediately upon acceding to the Articles of Agreement, nor in response to the need to unfailingly comply with a commitment acquired through adopting the ordinary International Monetary Fund decision-making process through the Articles of Agreement. This is a new commitment in the framework of a prior commitment, of sufficient magnitude from the perspective of the Articles of Agreement themselves to require an express statement of acceptance. Aside from the use in Title III, Chapter Three of the Constitution of the terms treaty or agreement, the decisive factor is the existence of an agreement ["whatever its particular designation", as provided in Art. 2.1 a) of the Vienna Convention on the Law of Treaties, of 23 May 1969, to which Spain acceded by Instrument of 2 May 1972], which binds the (Spanish) State as concerns other States in the framework of International Law, and amounts to an assumption of liability which, to the extent that the free exercise of the faculties of any sovereign State can be committed, is only in accordance with the Constitution when dealing with the matters set forth in Arts. 93 and 94.1 SC with the intervention of the full Spanish Parliament (Cortes Generales), as the representative of the Spanish people (SC Art. 66.1). It is constitutionally irrelevant whether this commitment is set forth expressly in a treaty or in the accession to an obligation arising from a treaty making it possible but not necessary; the determining factor is that the State commits to something which it was not required to do at all up to that point; and such is the case with the obligations referred to in Art. 2 of the Royal Decree-Law under review.

Therefore, Art. 2 of *Royal Decree-Law 14/1998 (RCL 1998, 2489, 2574)* is unconstitutional because it violates Art. 94.1 d) of the *Constitution (RCL 1978, 2836)*.

7 Art. 3 of the Royal Decree-Law is also found to be unconstitutional because it authorises ratification of an amendment (Fourth) of the International Monetary Articles of Agreement themselves. This is not, as in Art. 2, a question of committing the State to specific obligations in the framework of a general obligation, but rather of modifying the legal text of that which precisely gave rise to the latter, namely, the Agreement that Spain acceded to in 1958. However difficult it may be at times to determine whether it is a matter of inter-

national commitments that are a mere specification of prior or more general commitments, the assumption of which is involved in having assumed the former, or rather obligations which, because they involve essentially what has already been committed, requiring specific, express consent, it must be pointed out that modification by means of amendment of an agreement already in force in the Spanish legal system under SC Art. 96 *(RCL 1978, 2836)*, is something that can only be done under the conditions required for assuming a new commitment; namely, under the same terms under which the Agreement being modified was accepted or those demanded by the Constitution in force for the enactment of an agreement of the same characteristics, an agreement such as provided under SC Art. 94.1.

The characteristics of this agreement make the Decree-Law an improper formula for authorising the provision of the consent of the State for a revision of the kind undertaken by the Fourth amendment, an impropriety that must not have gone unnoticed by the government when it initiated the procedure under SC Art. 94.1 before enacting *Royal Decree-Law 14/1998 (RCL 1998, 2489, 2574)* and proceeded with it even after enactment.

The legal difference between the passage of Laws and parliamentary authorisation for international treaties is expressly confirmed by Constitutional Court Decision *CCD 114/1991, of 11 April (RTC 1991, 114 AUTO)*, F. 3 *in fine*, where it says that "the approval of Laws which form the *de facto* premise of such a provision [referring expressly to SC Art. 91], is an essentially different legal rule than parliamentary authorisation for international treaties, as regulated by Art. 94 of our Law of Laws."

Art. 3 of *Royal Decree-law 14/1998 (RCL 1998, 2489, 2574)* is, therefore, also unconstitutional as it violates SC Art. 94.1 d) *(RCL 1978, 2836)*.

(. . .)

The constitutionality issues posed in relation to Law 13/1999 have to do, on the one hand, with its appropriateness for repairing the constitutional defects of Royal Decree-Law 14/1998 and, on the other, with it being a law capable of providing the parliamentary authorisation required by SC Art. 94.1. The solution of both issues is clearly determined by the fact that, as we have just argued, the matter subject to regulation by Arts. 2 and 3 of Royal Decree-law 14/1998, and the same articles of Law 13/1999, must be in the context of "treaties or agreements involving financial liabilities for the Public Treasury" [SC Art. 94.1 d)]. This, as regards the first question posed, means that Law 13/1999 is absolutely unable to repair the fundamental defect of Royal Decree-Law 14/1998, the expression of a will that in no way can be attributed to the full Spanish Parliament (Cortes Generales), but rather solely to the Government or perhaps, subject to appropriate validation, to one of the Chambers that makes up the Spanish Parliament (Cortes Generales). To accept anything else would mean that the full Spanish Parliament (Cortes Generales) would be validating a measure that had already been authorised by the Government, which, once validated, had been in full effect from the start and therefore sufficient to make it

possible to enact an international agreement into law, so that it became part of the legal system prior to the authorisation by Parliament. The full Spanish Parliament (Cortes Generales) would not be authorising enactment in advance, as sought by SC Art. 94.1, but rather validating an enactment already authorised by the Government and accepted by the Congress of Deputies. Therefore, as the appellant Deputies state, in addition to depriving the full Spanish Parliament (Cortes Generales) of its exclusive jurisdiction for authorising the enactment of certain pieces of international law prior to their actually being applied, it would seriously compromise the design for preventive monitoring of the constitutionality of treaties established by SC Art. 95, since the full Spanish Parliament (Cortes Generales) would only be able to seek a decision from the Court regarding the constitutionality of the treaty after it had already been committed to by the Government under International Law, and not before, as would be appropriate for preventive monitoring.

9 *Law 13/1999 (RCL 1999, 1013)* is the result of the will of the full Spanish Parliament (Cortes Generales). It is therefore a law that arises out of the same will as required by SC Art. 94.1 *(RCL 1978, 2836)* for prior authorisation for providing the international consent of the State. The exclusive jurisdiction of the Spanish Parliament (Cortes Generales) to grant this consent is not what is impaired by using a Law, in contrast to cases of urgent government legislation. However, in any case, as derived from SC Art. 74.1, it must be pointed out that the prior authorisation by the full Spanish Parliament (Cortes Generales) set forth in SC Art. 94.1 corresponds to the exercise of a power that the Constitution specifies as non-legislative, whereby the use of the constitutional channel to exercise a jurisdiction that is constitutionally set aside for a different channel, is constitutionally relevant. The issue is not, therefore, whether the intervention of an institution has been dispensed with or not, but rather whether the specific jurisdiction of such institution was exercised through the channel specifically provided for such purpose under the Constitution. Clearly, on the authorisation required for assuming international commitments the Constitution imposes not only an institutional but also a procedural reservation owing to the fact that different constitutional jurisdictions are being exercised.

For authorisations as set forth under SC Art. 94.1, Art. 74.2 of the Spanish Constitution establishes a specific parliamentary procedure that is different from that of ordinary or common legislation, and differentiated by the fact that the role of the Senate is defined in terms of greater equality as opposed to what is customarily the case in the Congress of Deputies. Thus, while in legislative procedure the rule is that, in accordance with SC Art. 90.2, discrepancies between the two Chambers may be ultimately resolved by a simple majority of the lower Chamber – also in the case in which the Senate exercises a veto which in reality only delays the sufficiency of a simple majority of the Congress of Deputies by two months – Art. 94.1 provides that discrepancies be overcome by means of a "joint Committee made up by an equal number of Deputies and of Senators", the proposal from which must be must be approved by a majority in

each Chamber, with the decision of the Congress of Deputies ultimately prevailing, but solely by absolute majority, if the discrepancy continues (SC Art. 74.2).

This strengthening of the role of the Senate, in comparison to the lesser importance it is given in legislative procedure, to the point of significantly bringing its position in line with that of the Congress' – whose rejection by simple majority can only be overcome by a qualified majority – determines the process of the parliamentary decision-making in terms which diverge from everything that is otherwise commonplace in the procedures of the full Spanish Parliament (Cortes Generales), and gives the participation of the higher chamber in the process truly special relevance in our parliamentary system in terms that are different than the norm in the Spanish Parliament (Cortes Generales) on the whole, as it is characterised by obvious imperfect bicameralism. Along these same lines of the diversity in the respective constitutional channels in the exercise of different powers, we must refer to the divergent type of intervention by the King in sanctioning and enacting Laws and in manifesting the consent of the State for entering into international obligations by means of treaties, set forth respectively in SC Art. 62 a) and Art. 63.2, along with potential advance monitoring of unconstitutionality as provided in *SC Arts. 95.2 CE and 78 (RCL 1979, 2383)*, regarding treaties but not laws. In sum, the procedure set forth in SC Art. 74.2 offers relevant characteristics allowing it to be able to be considered a reservation for the adoption of the agreement required by SC Art. 94.1, making it mandatory, in principle, to understand that the advance parliamentary authorisation prior to providing the State's international consent must be obtained through this specific procedure.

This is not a question of a potential defect in legislative procedure, regulated by infra-constitutional rules, as in the case salvaged in *STC 97/2002, of 25 April (RTC 2002, 97)*, but rather of inappropriate selection of a procedure established directly by the Constitution itself.

SC Art. 74.2 cannot allow for anything other than the strict authorisation set forth in of SC Art. 94.1, which is totally unaccepting of the formation of other parliamentary decisions, particularly legislative per se. Arts. 2 and 3 of Law 13/1999 authorise Spain to accede to certain International Monetary Fund Agreements and ratify the Fourth amendment to the IMF Articles of Agreement, but Art. 2 and especially the other parts of the Law contain other provisions whose content is not limited to that contained in the simple authorisation to incorporate foreign rules. In particular, these include rules that are purely internal in nature and necessary for the proper inclusion in the legal system of the rules being authorised, but they are substantially different and, above all, set forth in a legal format (Law) that is different from the regulatory formats included (New Arrangements and the Fourth amendment), along with what that involves in terms of regulating the relations of one form and the other within domestic Law, based on respect for the Law as a norm offered as an expression of a parliamentary desire insofar as it exceeds the strict authorization set forth in SC Art. 94.1.

In fact, Art. 4 of Law 13/1999 empowers the Government to assume commitments with respect to the International Monetary Fund for amounts up to $3,000 million, while under Art. 5, and in accordance with Art. 107 of the General Budgetary Law, the State guarantee to the Bank of Spain to back Spain's participation in a multilateral aid operation through the Bank for International Settlements was granted up to a maximum amount of 170,000 million pesetas. These are decisions for which the integration of prior international agreements or provisions is not authorized, but rather that represent an internal desire to make a international commitment, through an internal rule that is valid under the legal system in the form of a law, which is the expression of the general will as represented by the full Spanish Parliament (Cortes Generales) (SC Art. 66 CE). These measures are therefore agreed in the context of an aid operation in the international financial environment under the auspices of the IMF, hence the instrumental connection to the authorisation under SC Art. 94.1 granted in Arts. 2 and 3 of the law in question, including a provision referred to the Minister of Economy and Finance, which also differs from the appropriate framework of such authorisations.

Therefore, no matter how minimal the regulatory content the full Spanish Parliament (Cortes Generales) may consider necessary to accompany the prior authorisation it is required to give under SC Art. 94.1 CE, the appropriate parliamentary procedure would be the common or special legislative procedure imposed, as necessary, by the matter to which such content refers. Such has been the practice up until now of the Spanish Parliament (Cortes Generales) in regard to the various increases in Spain's quota in the International Monetary Fund. *Law 73/1980, of 16 December (RCL 1980, 2827), Law 28/1983, of 12 December (RCL 1983, 2823)*, and *Law 16/1992, of 16 June (RCL 1992, 1401, 1566)*, approved Spain's concurrence with the seventh, eighth and ninth increases in quota, respectively, adding to the authorisation in accordance with SC Art. 94.1 a series of internal organizational provisions that were not fully covered by the special procedure set forth under SC Art. 74.2.

(. . .)

In this case, the economic pledge made by the State must be made a full commitment, and cannot be reversed in order to avoid the harm which would otherwise be caused to the International Monetary Fund and other States.

While the unsuitability of the specific procedure followed by the Spanish Parliament (Cortes Generales), is as serious as any violation of the Constitution, it is sufficiently sanctioned by the declaration of the unconstitutionality of the provision arising from this procedure, without adding nullification which, in addition to not repairing the harm caused in its entirety, would add harm to that which was already caused by the review of an international commitment that is incontestable from a perspective of Treaty Law.

As regards its effect on Art. 3, we must point out a special fact that necessarily warrants our reaching a different judgment conclusion than as regards the previous article. In this regard, it is important to point out that before the Law

was approved, the authorisation contained in Art. 3 had already been granted by the full Spanish Parliament (Cortes Generales) as established under SC Art. 74.2 *(RCL 1978, 2836)*. In fact, such authorisation was provided by the Congress of Deputies and the Senate on 12 November and 9 December 1998, respectively, so the inclusion in Spanish law of the Fourth amendment to the Articles of Agreement of the International Monetary Fund was made effective through the procedure mandated by Art. 94 of the Spanish Constitution.

That said, the fact that *Law 13/1999 (RCL 1999, 1013)* reiterates an authorisation that already existed legally and therefore did not arise *ex novo* in said Law, may be considered unnecessary or even anomalous; but not therefore inevitably unconstitutional. To save the reiterative authorisation in the Law from constitutional censure it is sufficient to state that the legal status of prior authorisation was no longer dependent, which is where, under SC Art. 94.1, the reason for prohibiting it being granted for ordinary legislative procedure lies, and the inclusion of the authorisation in the legal text together with the specific rules to make it effective in the same legal context, however questionable from a technical regulatory standpoint, cannot be qualified as unconstitutional.

Therefore, the appeal for unconstitutionality is dismissed as regards Art. 3 of Law 13/1999.

DECISION

In consideration of all the above, the Constitutional Court, BY THE AUTHORITY BESTOWED UPON IT BY THE *CONSTITUTION (RCL 1978, 2836)* OF THE SPANISH NATION,

Has decided

1° To consider appeal for unconstitutionality no. 73/99, against Articles 2 and 3 of *Royal Decree-law 14/1998, of 9 October (RCL 1998, 2489, 2574)*, on accession by Spain to different International Monetary Fund Agreements, and hereby declare such precepts unconstitutional and null and void.

2° To partially consider appeal for unconstitutionality no. 3247/99, brought against *Law 13/1999, of 21 April (RCL 1999, 1013)*, on accession by Spain to different International Monetary Fund Agreements through Art. 2 of said Law, and to declare said article unconstitutional, with the effect defined in Legal Ground 10 of this Decision, dismissing the appeal on all other matters."

IV. SUBJECTS OF INTERNATIONAL LAW

1. The State

a) Universal Jurisdiction for international crimes

STC 237/2005 of 26 September
Constitutional Jurisdiction

Appeals for reversal nos. 1744/2003, 1755/2003 y 1773/2003
Proponent: Judge Guillermo Jiménez Sánchez

Two central issues are decided in this Decision: First, the issue of the Jurisdiction of Spanish courts under Art. 23.4 of the Law on Judicial Procedure (LOJP) to judge facts classified as genocide, terrorism and torture involving the universalisation of the jurisdiction of States and their entities for judging certain facts; second, that of the protection in this context of the fundamental right to the effective protection by judges and courts. The Decision rules on several appeals for reversal entered against the Decision of 25–02–2003 by the Second Chamber of the Supreme Court, which partially considered the motion to vacate brought against the Ruling of 13–12–2000, by the Plenary Criminal Chamber of the National Court, and against the latter, claiming a violation of the fundamental right to the effective protection of the court, and granting the reversal.

Legal Grounds:

"(. . .) 4 As stated previously, the National Court decision subject to appeal, supported by prior decisions of the same court, is based on the *Convention on Genocide (RCL 1969, 248)*, specifically its Art. VI, and concludes by affirming the effective subsidiarity of Spanish jurisdiction over territorial jurisdiction. Said article provides:

> "Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

The National Court decision is based on the concept that the above mentioned provision establishing the obligation of the States on whose territory the act takes place to prosecute in no way prohibits other Signatories from establishing extraterritorial jurisdictional criteria in respect of genocide; as it eloquently set forth by citing prior decisions, such a limitation would be contrary to the "spirit of the Convention, which seeks the commitment of the Contracting Parties, by using their respective penal codes, to pursue genocide as a crime under international law and prevent impunity in relation to such a serious crime." Notwithstanding the above, the decision concludes that Article VI of said Convention imposes jurisdictional subsidiarity on jurisdictions other than those contemplated therein.

Excepting the fact that the appealed decision did not explain the reasons for arriving at its conclusions, and that the subsidiary relationship is inferred from the reference to the criteria of territoriality (reference to an international criminal court), we must start by stating that there undeniably exist important procedural and political-criminal reasons to support priority being given to *locus delicti* and that are part of classical international criminal law. On this basis, and returning to the issue at hand, certainly from the point of view of its theoretical formulation the principle of subsidiarity would not need to be con-

sidered a rule that is in opposition or divergent from what is introduced by the so-called concurrence principle, because in the presence of concurrent jurisdiction, and in order to avoid any potential duplication of proceedings and subsequent violation of the *ne bis in idem* principle, there has to be a priority rule. In the presence of a common commitment of all States (at least in principle) to prosecute such heinous crimes affecting the international community, elementary procedural and political-criminal reasonability would of necessity give priority to the jurisdiction of the State where the crime took place.

That said, it must also be stated that the issue at hand is of some constitutional consequence, since what is ultimately under discussion both by the appellants and the Public Prosecution Service, and the Supreme Court decision in disagreement with the criteria applied by the National Court in confirming the priority of the subsidiarity principle, are the terms in which such a rule or principle is applied; more specifically, the greater or lesser number of requirements relating to the passivity of the State where the facts of the case took place. The appealed National Court decision, reproducing the doctrine established by the Decisions of 4 and 5 November 1998, defines the terms of application of the subsidiarity rule as follows: "the courts of a State should abstain from exercising jurisdiction over acts constituting genocide being tried by the courts of the country in which they took place or by an international court". Abiding by a literal interpretation of said statement, the abstention of the courts of a third State would only be required when proceedings had begun in the territorial jurisdiction or in an international court; or, in any event, reasonable modulation of the rule of subsidiarity would also amount to abstaining from exercising extraterritorial jurisdiction when effective prosecution of the crime is foreseeable within a short period of time. On the other hand, however, to activate universal extraterritorial jurisdiction it would therefore be sufficient for a court or a plaintiff to provide reasonable serious indications of judicial inactivity showing lack of either the will or the capability to effectively prosecute the crime. Notwithstanding the Decision of December 2003, containing a very restrictive interpretation of the rule of subsidiarity established by the National Court, it goes further and requires the accusers to fully accredit the legal impossibility or prolonged inactivity by the court, to the extent of requiring proof of the effective rejection by the Guatemalan Courts.

The restrictive assumption of the international jurisdiction of Spanish Courts as established in Art. 23.4 of the Law on the Judiciary *(RCL 1985, 1578, 2635)* violates the right to access to jurisdiction acknowledged in SC Art. 24.1 *(RCL 1978, 2836)* as a primary expression of the right to effective protection by Judges and the Courts. On the one hand, and as the Public Prosecutor denounces in his statements, the requirement of negative proof makes it necessary for the plaintiff to provide something that is impossible to provide, to offer *probatio diabolica*. Furthermore, it jeopardises the very purpose of the universal jurisdiction enshrined in Art. 23.4 of the Law on Judicial Procedure and in the Convention on Genocide, whereby it is precisely the inactivity of the courts

in the State where the facts took place, by not responding to a complaint entered and thereby preventing the proof required by the National Court, that would block the international justice of a third State from taking place, and lead to the impunity of genocide. In summary, such a narrow limitation of universal jurisdiction is in clear contradiction with the hermeneutic rule of *pro actione*, subject to constitutional reproach owing to the violation of SC Art. 24.1.

5 As expressed in detail in grounds, the Supreme Court bases its denial of Spanish jurisdiction on arguments that are different from those of the National Court, relating specifically to the intrinsic limits of application of the rule on universal jurisdiction set forth in Art. 23.4 of the Law on Judicial Procedure *(RCL 1985, 1578, 2635)*. First, the appealed Decision makes the applicability of the cited provision dependent on the fact that an international convention to which Spain is a party supports such an extension of jurisdiction. As regards the crime of genocide (on which it focuses its arguments), despite finding initially against the criteria of the plaintiffs, that the Convention, while "it does not expressly establishing universal jurisdiction, neither does it deny it", actually ends by stating the contrary, that Article VIII "does not authorise each State to institute its own jurisdiction under the principle of universal jurisdiction, but rather that it envisions a different way of reacting to the commission of this crime, outside its own territory, by expressly establishing recourse to the competent UN agencies for them to adopt the appropriate measures in each case" (seventh legal ground).

Therefore, the conclusion reached by the Supreme Court would be that, only when Convention law expressly authorises recourse to unilateral universal jurisdiction would this be legitimate and applicable under both SC Art. 96 and Art. 27 of the Convention on the Law of Treaties *(RCL 1980, 1295)*, according to which the agreements reached in international treaties must be complied with by the internal legislation of each State Party.

It would be an extremely strict interpretation, and also lacking in argumentative support to conclude that the reference to only some of the potential mechanisms for prosecuting genocide and the silence of the Convention on international extraterritorial jurisdiction infer prohibition directed at States Parties to the Convention (that paradoxically, would not apply to non-parties) for including other tools for prosecuting crime in their national legislation, in compliance with the mandate in Art. I. From the unilateral standpoint of the States and leaving aside the reference to International Courts, what Art. VI of the Convention *(RCL 1969, 248)* provides is the minimal obligation that commits States to prosecute a crime under International Law within their territory. In these terms, that is, having accepted that this Convention does not contain a prohibition but rather leaves up to the signatory the possibility of establishing further mechanisms to prosecute genocide, Art. 27 of the Convention on the Law of Treaties cannot be considered an obstacle to assumption by Spanish courts of jurisdiction regarding the facts allegedly committed in Guatemala; especially when the objective pursued by the Convention on Genocide is seen more as an obligation than as a prohibition of intervention.

In fact, the absence of authorisation found by the Supreme Court in the Convention on Genocide for a State to unilaterally exercise international jurisdiction is not consistent with the principle of universal enforcement and prevention of the impunity of this crime against International Law which, as affirmed, guides the spirit of the Convention and forms part of International Customary Law (and even of *ius cogens*, as stated by the best doctrine) but rather collides with it head on. In fact, it is counter to the very existence of the Convention on Genocide, and the purpose and goals which inspire it, for signatory parties to agree to renounce a way of prosecuting the crime, especial keeping in mind that the priority criteria of jurisdiction (territorial) would in many instances be diminished in its possibilities of effectivity by circumstances that may enter into play in different cases. Just as it is counter to the spirit of the Convention of which it is part, it also provides a limitation of possibilities to fight crime that non-signatory States would not have, insofar as they would not be bound by this supposed, questionable prohibition.

6 Since in the view of the Supreme Court universal jurisdiction is not recognized by the Convention on Genocide, the Second Chamber of this Court maintains that unilateral assumption of such jurisdiction under domestic law should therefore be limited by other principles, such as is getting to be the rule under international custom. This would lead to a restriction in the scope of application of Art. 23.4 of the Law on Judicial Procedure *(RCL 1985, 1578, 2635)*, and its entry into play would require certain "linkages," such as the alleged perpetrator being in Spanish territory, the victims being Spanish citizens, or there being another direct point of connection with national interests. The Decision in subject to analysis bases the use of such corrective criteria on international custom and reaches the conclusion that it is not up to each State individually to take it upon itself unilaterally to establish order, and that the exercise of universal jurisdiction would only be legitimate when the above-mentioned point of direct linkage exists, which, as emphasized in the appealed decision, must be of a significance that is equivalent to the criteria recognised in domestic law or Treaty Law, to allow for jurisdiction to be extended extraterritorially.

In support of the original premise, namely, the narrowing of the scope of the principle of universal justice in international custom, the Supreme Court invokes certain third-country judicial and international court decisions; it cites in particular a number of decisions by the German Federal Supreme Court, the decision by the Belgian Court of Cassation in the *Sharon* case, and the resolution of the International Court of Justice of The Hague of 14 February 2002 *(Yerodia case)*, in which Belgium was ruled against for issuing an international arrest warrant against the Minister of Foreign Affairs of the Democratic Republic of the Congo.

Therefore, the first thing we must point out is whether or not this is the rule in international custom is quite questionable, in particular since the selection of the jurisprudential references by the Supreme Court in support of such theory leads not to such a conclusion but rather to the opposite conclusion. In this regard, it should not be necessary to provide extensive argumentation in view

of the fact that the dissenting opinion on the appealed decision, signed by seven Magistrates (the importance of which cannot be overlooked), convincingly refutes the purported validity of the resolutions cited in theoretical support of the position taken by the Second Chamber, by providing other references to the contrary. As stated by the Magistrates in opposition to the majority, the German decisions cited do not represent the *status quaestionis* in that country, insofar as German Constitutional Court decisions issued after the decisions cited by the appealed decision support a principle of universal jurisdiction without requiring linkage to national interest (citing as an example the Decision of 12 December 2000, that ratified the conviction for the crime of genocide issued by the German Court against Serbian citizens for crimes committed in Bosnia-Herzegovina against Bosnian victims). As regards the Decision of the International Court at The Hague in the *Yerodia* case, it must be concluded that this cannot be used as a precedent for the intended restrictions to universal jurisdiction, since it limited its discussion to the issue of whether the international rules on personal immunity had been violated, not passing judgment on universal jurisdiction in regard to genocide, since that was what the Democratic Republic of the Congo has expressly requested in its complaint. The same came be said in regard to the Decision of the Belgian Court of Cassation of 12 February 2003, the content of which is referred to by the Supreme Court only in regard to the aspects relating to the immunity of state representatives in office, but omitting any reference to the express recognition in said decision of universal jurisdiction under Belgian law.

If to the above we add the fact that there are many precedents in International Law that would support a position contrary to that held by the Supreme Court on the matter, the premise on which the Supreme Court decision sustains its restrictive interpretation of Art. 23.4 of the Law on Judicial Procedure (the existence of a general limitation of the principle of universal justice in International Customary Law) is left without a large part of its support, keeping in mind particularly that the selection of references is not exhaustive and does not include some that are significantly in opposition to the position maintained. In this respect it is questionable that the Decision fails to mention that, in contrast to what might be inferred by reading it, Spanish Law is not the only national legislation that includes the principle of universal jurisdiction without linkage to national interests, since references can be made to countries such as Belgium (Art. 7 of the Law of 16 July 1993, amended by the Law of 10 February 1999, that extends universal jurisdiction to include genocide), Denmark (Art. 8.6 of its Penal Code), Sweden (Law relating to the Convention on Genocide of 1964), Italy (Art. 7.5 Penal Code) and Germany, all of which are States that, more or less extensively, provide for prosecution of different crimes against the international community in their scope of jurisdiction, without restrictions based on national linkage. As a significant example, it is sufficient to indicate that the Supreme Court Decision cites the Decision by the German Federal Supreme Court of 13 February 1994 but makes no mention of

Art. 6 of the German Penal Code nor of the Code on Crimes under International Law of 26 June 2002 (enacted for the purpose of adapting the German Penal Code to the Statute of the International Criminal Court) the first article of which provides that its provisions shall apply to the offences contemplated therein (genocide, crimes against humanity and war crimes included in the Statute of the Court) "even when the offence is committed abroad and bears no relation to Germany".

7 *Supreme Court Decision (RJ 2003, 2147)* also includes a list of international treaties signed by Spain on the prosecution of offences relevant to the international community in order to show, on the one hand, that in none of the treaties was universal jurisdiction established expressly and, on the other, that they establish the classic formula *aut dedere aut iudicare* as the form of collaboration, namely, that States have the obligation to try perpetrators of offences covered by such treaties when they are in their territory and have not granted the extradition requested by another State with mandatory jurisdiction under the provisions of the respective treaty. On this area of International Law, the Supreme Court deduces that there is need and legitimacy in restricting the scope of application of Art. 23.4 of the Law on Judicial Procedure *(RCL 1985, 1578, 2635)* to cases in which the alleged perpetrator is in Spanish territory, under SC Art. 96 *(RCL 1978, 2836)*, subparagraph g) of Art. 23.4 of the Law on Judicial Procedure, and the already cited Art. 27 of the Convention on the Law of Treaties *(RCL 1980, 1295)*, according to which the parties to a treaty cannot invoke their domestic law to justify non-compliance with a treaty.

Independently from what we may state later, the interpretation used by the Supreme Court to justify such restrictive criteria regarding the law must be rejected for methodological reasons. To begin with, the so-called systematic reference to subparagraph g) of Art. 23.4 of the Law on Judicial Procedure cannot serve to extend the conclusions of the Supreme Court to the other offences contained in the preceding paragraphs of the text. This is because the closing clause inserted in subparagraph g) extends universal jurisdiction to other offences not included in the previous paragraphs of Art. 23.4 of the Law on Judicial Procedure which, should be prosecuted in Spain under international treaties or conventions. In other words, while subparagraphs a) to f) of Art. 23.4 of the Law on Judicial Procedure establish a catalogue of offences declared prosecutable *ex lege* in Spain despite having been committed abroad by foreigners, subparagraph g) specifically grants the possibility, if agreed to in an international treaty, of prosecuting offences other than those expressly included in the provision in Spain. Therefore, it is not at all clear that the application of the limitations or conditions that are predicated on the interpretation of the different international treaties referred to in the Decision, is analogous to same. This analogous application, in addition to being contrary to the principle of *pro actione* by ostensibly reducing plaintiff access to jurisdiction, is not supported by sufficiently identical reasoning, as just stated.

Referring to Art. 27 of the Convention on the Law of Treaties to support this line of argument is also very debatable, owing to the fact that neither in the Convention on Genocide, as stated previously, nor in the Treaties referred to in the appealed Decision, is there any prohibition of exercising unilateral universal jurisdiction that could be considered as not complied with under the provision of Spanish Law.

Certainly, the presence of the alleged perpetrator in Spanish territory is an essential requirement for bringing same to trial and ultimately convicting, given the non-existence of trials *in absentia* under Spanish legislation (except in cases not relevant to the issue at hand). Therefore, legal measures such as extradition are fundamental to effectively achieve the purposes of universal jurisdiction: the prosecution and punishment of crimes that, because of their nature, affect the entire international community. But this conclusion must not lead to this circumstance becoming a *sine qua non* requisite for the exercise of jurisdiction and the commencement of proceedings, especially when proceeding in this manner would subject severely restrict access to universal jurisdiction in a manner not provided under the Law; such restriction would furthermore be contradictory to the inherent fundament and aims of the institution.

8 Together with the alleged perpetrator's presence in Spanish territory, the appealed Decision introduces two other linkages: personal subjection, making universal jurisdiction dependant upon the Spanish citizenship of the victims, and the linkage of the offences committed to other relevant Spanish interests, which is merely a generic reformulation of the principle of protection or defence. Such restrictions seem to be obtained once again from international custom, referring with no further specificity, to the fact that "a major part of the doctrine and some national Courts" have decided to recognise the relevance of certain linkages.

In this regard, we must state, however, that such a radically restrictive interpretation of the principle of universal jurisdiction found in Art. 23.4 of the Law on Judicial Procedure *(RCL 1985, 1578, 2635)*, which would have to be described as a teleological reduction (as it goes beyond the grammatical sense of the provision), goes beyond the limits of what is constitutionally admissible from the framework establishing the right to effective judicial protection set forth in SC Art. 24.1 *(RCL 1978, 2836)*, to the extent that it is a reduction *contra legem* based on corrective criteria that cannot even implicitly be considered as present in the Law and that, furthermore, is shown to be openly contrary to the objective inspiring the institution, and alters the principle of universal jurisdiction as understood in International Law to the point of making it become unrecognisable, and having the effect of reducing the scope of application of the provision to an extent virtually amounting to a *de facto* abolition of Art. 23.4 of the Law on Judicial Procedure.

In fact, the right to effective judicial protection, in regard to access to jurisdiction, was diminished in this case because an interpretation in accordance with the *telos* of the precept would involve satisfying the fundamental right of access to procedure and would therefore be fully in accordance with the *pro*

actione principle, and because the literal sense of the text analysed leads without any type of interpretational manipulation to compliance with such purpose and, therefore, safeguards the right enshrined in SC Art. 24.1. Therefore the forced and unfounded interpretation to which the Supreme Court subjects the principle amounts to an illegitimate restriction of the fundamental right, as it violates the requirement that "judicial bodies, when interpreting legal procedure requirements, must take into consideration the relationship between the rule and the objective of keeping formalities or unreasonable understandings of procedural rules from preventing the judgment of the substance of the matter, violating the requirements of the principle of proportionality" (*Constitutional Court Decision STC 220/2003, of 15 December [RTC 2003, 220]*, F. 3), by constituting a "denial of access to jurisdiction as a result of an excessively strict consideration of the applicable rule." (*STC 157/1999, of 14 September [RTC 1999, 157]*, F. 3).

9 The restriction based on victim nationality therefore adds another requirement not set forth in the Law, and is also not based on teleological grounds, especially as regards genocide, as it contradicts the very nature of the offence and the shared aim of universal pursuit, leaving same virtually disarmed. According to Art. 607 of the Penal Code *(RCL 1995, 3170 y RCL 1996, 777)* (PC) the crime of genocide is legally characterised by the victim or victims belonging to a national, ethnic, racial or religious group and the acts carried out being for the specific purpose of destroying said group, focussing especially on linkages to such group. The interpretation used by the Supreme Court Decision would therefore imply, that the crime of genocide would only be relevant to Spanish courts when the victim has Spanish citizenship and, furthermore, when the act is motivated for the purpose of destroying the Spanish national group. The unlikelihood of such a possibility is evidence enough that this was not what the Legislator sought in including universal jurisdiction in Art. 23.4 *LOPJ (RCL 1985, 1578, 2635)*, and it is not an interpretation that is in line with the fundamental goal of the institution.

The same must be concluded with regard to the criteria of national interest. Overlooking the fact, referred to by the Public Prosecution Service in its report, that the reference to national interest in the appealed decision is only nominal, and lacks the minimal development permitting specification of its content, the fact is that its inclusion practically voids Art. 23.4 of the Law on Judicial Procedure of content, since it reorients it towards the rule on jurisdiction set forth in the previous paragraph. As was already stated, the key issue is whether subjecting jurisdiction for trying international crimes such as genocide or terrorism to the concurrence of national interests as set forth by the Decision, is not appropriately reconcilable with the principle of universal jurisdiction. International and cross-border enforcement seeking to impose the principle of universal jurisdiction is based exclusively on the special features of the crimes subject thereto, the injuriousness of which (paradigmatically in the case of genocide) transcends its specific victims and extends to the international

community as a whole. Consequently, prosecution and sanction of such crimes is not only a commitment but also in the mutual interest of all States (as stated in *STC 87/2000, of 27 March [RTC 2000, 87]*, F. 4), and its legitimacy therefore does not depend on any of their private interests. Likewise, the concept of universal jurisdiction in current International Law does not derive from linkages based on a specific interest of the State, as shown in Art. 23.4 of the Law on Judicial Procedure, the aforementioned German Law of 2002 and, another example, the Decision issued by the Institute of International Law in Krakow on 26 August 2005 in which, after setting forth the previously mentioned commitment of all States, defines universal criminal jurisdiction as "the ability of a State to prosecute alleged criminals, and, if finding them guilty, to punish them, independent of the place where the crime was committed and without considering any linkage of active or passive citizenship or other criteria for jurisdiction recognised by International Law".

In this regard, the Supreme Court's concept of universal jurisdiction, to the extent it aspires to join "the common interest of preventing impunity for crimes against Humanity to the specific interest of the State to protect certain assets" (tenth legal ground) is built on purposes that are hard to reconcile with the fundamental principle of the same institution, that would, as stated, lead to a virtual *de facto* abolition of Art. 23.4 of the Law on Judicial Procedure. Furthermore, the excessive rigor with which such criteria are applied by the Supreme Court would lead to its decision being incompatible with the right to effective judicial protection as regards access to jurisdiction, since it requires that the linkage with national interests be directly related to the crime taken as a basis for attributing the jurisdiction, expressly excluding the possibility of less strict interpretations (and, therefore, more in line with the *pro actione* principle) of such criteria, such as that of connecting linkage with national interests with other crimes linked thereto, or, more generically, with the context surrounding same.

10 From all the above it can be concluded that both the Decision of the National Court of 13 December 2000 and the *Supreme Court Decision of 25 February 2003 (RJ 2003, 2147)* violated the plaintiff's right to effective judicial protection (SC Art. 24.1 *[RCL 1978, 2836]*) in regard to access to jurisdiction, and it is therefore in order to grant the reversal, nullify the decisions and turn the proceedings back to the time immediately before the nullified National Court Decision was written, but not consider the complaints of violation of other fundamental rights made in the action, in order to preserve the subsidiary nature of the appeal for reversal.

DECISION

On the basis of the above, BY THE AUTHORITY VESTED IN IT BY THE CONSTITUTION OF THE SPANISH NATION, the Constitutional Court,

Hereby decides

To grant the appeal entered by Ms. Rigoberta M.T. and others, the Association for Human Rights of Spain and by the Free Association of Lawyers and others, and therefore to:

1° Declare that it violates the right of the appellants to effective judicial protection in respect of access to jurisdiction (SC Art. 24.1 *[RCL 1978, 2836]*).
2° Re-establish such rights in full and, for such purpose, nullify the Decision of the National Court Plenary of 13 December 2000 and the *Supreme Court Decision of 25 February 2003 (RJ 2003, 2147)* reverting back to the time immediately prior to the publication of the National Court Decision for the purpose of issuing a new decision in respect of the fundamental right that was violated."

NATIONAL COURT DECISION 16/2006 of 19 April
Jurisdiction: Criminal

In Madrid, on nineteenth April two thousand five, the case against Adolfo Schilingo for the crimes of genocide, terrorism and torture was tried in open public court. The central issue is the defendant's criminal liability for crimes against Humanity.

Legal Grounds:

"(. . .) 5 ON THE GENERAL APPLICABILITY OF CRIMES AGAINST HUMANITY

1 The competence of Spanish jurisdiction in the case can be examined from the dual perspective under which it is being considered, a perspective of international law, and a perspective of domestic law. While national rules provide for extraterritorial jurisdiction to criminally prosecute a crime committed in the territory of another State (Art. 23.4 and 5 *Law on Judicial Procedure [RCL 1985, 1578 y 2635]*), for there to be international legitimacy we feel it needs to be recognized therein. This case, as we have been stating all along, is a matter of individual responsibility for crimes against Humanity and the possibility of any other State exercising criminal prosecution is recognised.

2 In this regard, the arguments of Argentine Judge Cavallo in the decision of 6 March 2001, which declared null and void the Full Stop and Due Obedience Law, have been innovative. This decision contains important considerations to which we subscribe fully:

"(. . .) The *ius cogens* and *erga omnes* consideration given to some behaviour considered crimes against the Law of Nations. A first consequence that arises in the face of conduct of this nature is that Mankind as a whole confirms its criminal nature even when the domestic law of the State or States where the acts took place does not consider them as crimes (. . .). Conduct such as that described affects all Mankind alike and therefore its criminal nature is not subject to the will of a particular State or States, but is defined in a context in which individual states have joined with others in

affirming the principles and rules that must prevail in a State, on certain occasions even against its own will. The interest in bringing such crimes to judgment and applying criminal sanctions against the perpetrators (individual responsibility) does not remain with the State on whose territory the facts occurred. To the contrary, all Mankind and the States into which Mankind is divided have an equal interest in trying and criminally sanctioning the perpetrators or participants. To ensure that such interest is effectively satisfied, the Law of Nations assigns jurisdiction to all States to judge crimes committed against such interest (universal jurisdiction) (. . .) When the State tries and sanctions (even the State where the facts took place) it is acting in the interest of the international community as a whole, a higher interest than its own."

3 When analysing the elements involved in the definition of crimes against Humanity, we see that one of the requirements in the crime is that there has been an attack against civilian population, which requires at that time action in conformance with State policies or the policies of a non-State organization exercising "de facto" political power. There is also the requirement of massive or systematic attack or attacks in a political framework or under a state-wide plan.

This circumstance or characteristic of the active perpetrator of the crime, namely, a group in power or acting from a position of power, or which has the capacity to neutralise legitimate power, is one of the elements that internationalises this type of offences, making them crimes against Humanity. The reason crimes against Humanity exist is precisely to ensure that they are prosecuted, especially owing to the extreme difficulty or impossibility of domestic prosecution of this type of crime and the interest of the international community in prosecution and punishment, and so its specific definition being covered under national law is not as important as establishing an effectively persuasive international system.

Proof of this is that, while the *ICC Statute (RCL 2002, 1367 y 1906)* established the principle of complementarity of action, the circumstance of prosecution at the domestic level does not enter automatically, but rather procedurally, as an exception in Arts. 17 and 18 requiring in all cases proof that effective prosecution that does not involve fraud.

Finally, from our point of view one of the essential characteristics of crimes against Humanity which truly makes them unique is their international prosecutability beyond the principle of territoriality. It is true that the most neutral and less complex from a standpoint of international relations among States is for a general International, or "ad hoc" Court to be the one to prosecute. However, we would reiterate that the essential thing is that such international prosecution take place, be it complementary or subsidiary to ineffective or non-existent pursuit, so that when it does not take place, either through non-existence or for another reason owing to the action of an international court, the principle of necessary prosecution and the possibility of international prosecution of such crimes is safeguarded, whereby it would be appropriate that in such

cases a national instead of an international jurisdiction would act with the functions of the latter. In essence, there are few basic or substantial differences between one situation and the other, since what is absolute is the international nature of the crime and the need understood by the international community for it to be prosecuted, and if the international community does not make this possible directly, and does not abolish these basic principles of peaceful co-existence, it can be said that it accepts such action by national jurisdictions on an international level not only *de facto*, but also *de iure*, at least in this specific area relating to the mission of defending and protecting human rights against the most barbarous attacks to which they are subject. It is necessary to acknowledge that, while "the international sphere" certainly has some aspects that are more pragmatic and less principled in nature, referring to the requirements for good international relations among States, there are inadmissible situations which cannot be considered as interference by a State in the affairs of another, but rather involvement of the International Community itself, which furthermore is concerned with establishing the pure and simple individual liabilities of the subjects.

We find, therefore that cases in which a State assumes the defence of the interests of the International Community and criminally prosecutes individuals under the principle of individual responsibility are legitimate.

In addition to all this is an important contributing factor of extraordinary importance in this case, the defence of one's own interests through the defence of one's nationals who were victims of the crime. In our view there is no justification for impunity in the international sphere. (. . .)

DECISION

1° CONVICTION OF Emilio as a perpetrator responsible for the commission of a crime against Humanity: 1. For causing 30 deaths with malice aforethought, to 30 sentences of 21 years of imprisonment each; 2. Also for false arrest, to a sentence of 5 years' imprisonment; 3. For causing grave torture, to a sentence of 5 years' imprisonment.

As an accessory to the above sentences, to full disqualification during the duration of the sentences.

2° The above sentences shall be subject to the service limits set forth in Art. 70.2 of the *Penal Code, Consolidated Text of 1973 (RCL 1973, 2255)*, in force at the time the facts took place."

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. Human rights and fundamental freedoms

a) Right to the presumption of innocence

NATIONAL COURT DECISION 39/2005 OF 30 NOVEMBER
Jurisdiction: Criminal

Madrid, on 30 November of two thousand five. The case of reference, emanating from Central Examining Court no. 2 through ordinary proceedings no. 12/2003 Chamber Roll 30/2003, on two counts of attempted terrorist murder and a count of terrorist destruction, in which the public plaintiff was the Public Prosecution Service, represented by Mr. Juan del Moral de la Rosa. The Court confirmed the pertinence of the DNA evidence for weakening the presumption of innocence.

Legal Grounds:

"FIRST. (. . .) To summarize, the right to the presumption of innocence rests on two fundamental pillars:

First, the principle of free consideration of evidence by the judicial body in the exercise of its jurisdictional authority as attributed exclusively to it under SC Art. 117.3 and, second, the need for a guilty verdict to have its factual grounds based on authentic pieces of evidence, consistent with sufficient evidentiary activity and in accordance with law, that invalidates such presumption regarding the existence of a punishable act and the defendant's participation in same.

In conclusion, as shown repeatedly in case law (see., *TS 2ª SS 2085/2001, of 30 Oct. (LA LEY JURIS. 1835/2002)* and *17 Jan. 2003 (LA LEY JURIS. 11570/2003)*) in order to weaken the constitutional principle of presumption of innocence, the prosecution must provide evidence which the sentencing Court (SC *31/1981, of 28 Jul. [LA LEY JURIS. 819750/1981]*, expressed as "minimally probatory", and then as "sufficient"), in conditions of procedural and constitutional regularity, that is incriminatory in nature and wherein the guilt of the defendant can be concluded, leading the judge to conviction of the defendant. This must be done through externalized, legal, logical and coherent reasoning, which is the only possible control in an appeal to a higher court, since the assessment of the evidence is consubstantial with immediacy, as it is composed of elements as subjective as those of credibility and conviction (Art. 741 LECrim.).

Evaluation of evidence is not, however, exempt of subjectivity, but the important thing is that the historical facts be assembled in an adequately logical and rational way, extracted from the results of elements of proof that are expressed in the form of rational, understandable discourse, with the assurance that the judicial assessment of the evidence is understood and shared fundamentally by the social community to which it belongs, aided by science, experience and reason, abstaining from arbitrariness, supposition and conjecture. Evidence for the prosecution shall be such evidence as reasonably leads to accepting the facts that incriminate the defendant as truth, including the very existence of the criminal act and the guilt of the defendant, in the sense of having participated in the criminal act and not in the regulatory sense of criminal-legal reproach.

In this case, in respect of defendants Miguel, José Carlos, Luis Pablo, Juan Alberto – as later will be shown in regard to each – prosecution evidence,

direct evidence, does exist, such as DNA evidence, in addition to which – in the terms to be analysed below – there are their own statements, witness statements, expert evidence and the various visual inspections carried out. The pieces of evidence are of sufficient importance to weaken the presumption of innocence of said defendants, just as – in the understanding of the Court – there also exists sufficient incriminating evidence with regard to defendant Oscar in terms that will be considered. However, the Court does not consider there to be sufficient incriminating evidence against Gustavo to do overcome his basic right to the presumption of innocence.

Regarding the gathering of samples containing alleged biological samples for obtaining DNA, we must distinguish between two points in time:

1. First, samples gathered ("evidence", according to the police report) at the scene of the crime; and
2. Second, quite a while after the first instance, "evidence" was gathered from the defendants when they were being held for other charges (as in the cases of Miguel, José Carlos, Juan Alberto and Oscar) and surveillance was carried out by police agents in order to obtain the sample (as in the case of Luis Pablo).

1 As regards the first of the points in time of reference, the defence lawyers consider that the gathering of the evidence at the scene of the crime – Portugalete – should have been ordered by the appropriate judicial authority. Such a premise cannot be successful as it must be recalled that the Judicial Police, – in the case at hand, the Ertzaintza (Police Force of the Basque Country) –, under Arts. 282 Law on Criminal Procedure, 11 LOFCSE, 443 and successive, the Law on the Judiciary and Articles 1 and 28 of Royal Decree 769/1987, of 19 June, regulating the Judicial Police, has the power to perform all procedures necessary in order to gather all effects, instruments or evidence of a crime (see *Constitutional Court S 303/1993 (LA LEY JURIS. 2390–TC/1993)* and *Supreme Court 2ª SS 112 (LA LEY JURIS. 43057/2000)* and *996/2000 (LA LEY JURIS. 9639/2000)*, of 26 Jan. and 30 May, respectively, and 30 Jun. 2005). In this case, the conduct of the law enforcement agents was correct in gathering suspected traces of the commission of a crime without acting under court order and, as we will discuss, reporting it later when it was found that they had found biological material in the samples taken, as it was a matter of an investigation in which there was a real danger of evidence disappearing. The dismissal of the complaint means that the right to effective judicial protection invoked over lack of judicial control at the time the samples were gathered at the scene of the crime was found not to have been violated.

Such police work is also valid after the reform of Art. 326 of the Law on Criminal Procedure implemented by Organic Law 15/2003. After said reform, the third paragraph of said provision states: "When prints or traces are found whose biological analysis could contribute to clarifying the fact being investigated, the Examining Judge shall take or order the Judicial Police or the

Forensic Surgeon to take the necessary steps to verify that such samples are gathered, stored and examined in conditions guaranteeing their authenticity, without detriment to the provisions of Art. 282". Clearly, this does not prevent – in the terms already discussed in subparagraph II.1 – police agents from acting on their own authority.

In addition to the above – counter to what was alleged by the defence lawyers – the biological samples gathered in this way from sleeves, hoods and other elements used by the aggressors to hide their faces – in a cowardly fashion – to keep from being identified – by either the Ertzaintza (Police Force of the Basque Country) or by private citizens – can be dubitative samples (when it is not known to whom they belonged) and not dubitative (origin fully identified) as they state. An important fact is discussed below.

As regards the rest and with all the more reason, there was no discussion in the plenary of the existence of the garments found at the scene of the crime, basically the genetic traces found on such garments (t-shirts, sweaters, etc.) used as a balaclava, we repeat, in a cowardly way, in order to cover the face of the assailants while they took part in the acts subject to judgment in this proceeding.

2 The second instance of samples being gathered (the so-called "evidence") came much later. Regarding this instance, the defence lawyers of defendants Miguel and José Carlos alleged, – and were joined later by two other defence lawyers – the violation of the right to defence in terms of the right not to testify, the right not to enter a guilty plea and the right not to testify against oneself inasmuch as the defendants refused to submit to DNA testing (José Carlos – f. 2.433 – refused to provide a sample of saliva and Miguel – f. 3.756 – refused "to have a DNA sample taken").

The Court also denies this allegation. In order to analyse the issue posed by the defence lawyers we must distinguish between two premises, one, in which the use of physical force or any other type of coercion is necessary and one where the use of such force is not necessary:

2.1 Only in the first premise, in which physical force is needed to obtain DNA (drawing a blood sample, pulling out a hair or using a swab to obtain saliva, for example), does the Court find judicial authorisation necessary and would therefore invalidate any such sample obtained without such authorisation. Therefore, submitting to a procedure involving an invasion of the suspect's bodily integrity, such as drawing a blood sample or taking a sample of any other bodily tissue or substance to be scientifically analysed, collides with respect of bodily integrity and with the right of any defendant not to collaborate with investigative authorities and not to facilitate evidence that might incriminate him/her, in the terms as stated by the defence lawyers.

This issue has given rise to an interesting debate from the standpoint of safeguarding the rights of any person involved in criminal proceedings, and has been resolved in differing ways by the different legal systems pertaining to our legal and cultural environment. In any case, it must be specified that in the case

at hand no force was used to obtain the DNA samples.

Clearly, Articles 15 and 18.1 of the Constitution do not expressly provide for the possibility of legitimately sacrificing the right to physical integrity and privacy (in contrast, for example, to what is the case with the rights to the inviolability of the home or communication secrecy – Art. 18.2 and 3 CE) –, but this does not mean they are absolute rights, since they may be diminished through well-grounded reasons of general interest as set forth by Law, undoubtedly including *ius puniendi* actions by the State (*SC 37/1989 (LA LEY JURIS. 116723–NS/0000)*, FD 7th and 8th).

Thus, the public interest in the investigation of a crime and, more specifically, the determination of the facts relevant for criminal proceedings, is certainly legitimate cause to justify carrying out a bodily intervention, provided such measure is provided for under the law, which refers us to the next constitutional requirement indicated above. In this regard it is advisable to keep in mind the requirements of constitutional doctrine [see, for all *CT SS 29 Nov. 1984 (LA LEY JURIS. 9401–JF/0000)*, 7/1989, 19 Feb. 1992 and *7/1994 (LA LEY JURIS. 2274–TC/1994)* and TS 2nd *SS 4 Feb. 2003 (LA LEY JURIS. 1547/2003)* and *19 Apr. 2005 (LA LEY JURIS. 1491/2005)*] on proportionality, which can be summarized as follows:

> the measure limiting the fundamental right must be established by law;
> it must have been adopted by specially justified court order; and
> be suited, necessary and proportionate in relation to a constitutionally illegitimate purpose.

Added to these are two more requirements, derived from physical integrity being involved: that the procedure must be performed by medical or health care personnel, and that in no may it case endanger health or cause inhumane or degrading treatment.

Specifically, the DNA test cannot be accepted as valid when the subject on which the test is to be performed does not give his/her consent and it is not backed by court order that is duly justified and strictly proportional to the nature of the crime subject to prosecution and the means available for investigation, as explained above.

Currently, since the reform of the Law on Criminal Procedure by Organic Law 5/2003, by addition of a second paragraph to Art. 363, this doctrine has acquired legal coverage from case law establishing that if the Examining Judge finds the specific concurring circumstances to so warrant he/she may, in a justified resolution, order biological samples considered indispensable for determining the suspect's DNA profile to be obtained from same.

In any case, it must be recalled that the European Court of Human Rights (Dec. 8 Feb. 1996, Murray case) maintains that, when refusal to submit to DNA testing is lacking in sufficient justification or explanation, keeping in mind that the test does not cause any physical harm and has an ambivalent effect, meaning that it can be incriminating or totally exculpatory, nothing impedes a

rational, logical assessment of such an attitude as an element which, although it has no probatory value, can be taken into consideration with the rest of the evidence to reinforce conclusions obtained by the court.

2.2 In the second case, since there is no need to use physical force or coercion to obtain DNA – which is the premise in the proceedings –, the Court considers a court order not to be necessary. The samples were acquired from cigarette butts thrown to the floor by José Carlos, Juan Alberto and Miguel and from the glass used by Luis Pablo on dates quite a long time after the acts subject to judgment. This is under the terms set forth in Decision 1311/2005 of *14 Oct. (LA LEY JURIS. 1935/2005)* of the Second Chamber of the Supreme Court on the issue of surreptitious evidence gathering derived from a voluntary act of disposal – or, in this case, leaving behind – of organic matter by the subject of investigation, with no use of invasive methods or practices as regards bodily integrity.

Just as in the case analysed previously – biological samples left at the crime scene on hoods, sweaters and other garments – we feel it was not necessary to have a court order to gather the DNA samples, we consider that it also did not require a court order to take of objects (cigarette butts) from the above mentioned José Carlos, Juan Alberto and Miguel when they were under arrest, and from Luis Pablo (glass) when he left the bar where he had drunk from the glass, for the following reasons:

1° It was not necessary to use force, coercion or any other type of physical bodily handling to obtain the objects containing the biological samples. The objects – specifically the cigarette butts – were thrown down, left – by their owners, converting them into *res nufflus*; lacking ownership, to be picked up and taken away by anyone (in this case, by police officers). The glass used by Luis Pablo was left in the bar when he left, and picked up by police officer no. NUMO07, after identifying himself to the owner of the establishment. In summary, and as stated in Decision *1311/2005 of 14 Oct. (LA LEY JURIS. 1935/2005)* of the Second Chamber of the Supreme Court, "the consolidated doctrine of requiring court intervention in certain cases, to authorize potentially banal, non-aggressive intervention is not required."

2° Both the cigarette butts and the glass were left behind by their respective owners or user, and the defendants were in no way compelled either to use them or to throw them to the floor or, as the case may be, to leave them. The defendants' biological material was obtained totally unexpectedly. Whether the material belonged or not to the defendant is a matter of admission of evidence – not the issue at hand – to be dealt with later on.

3° It would make no sense to seek a court order regarding something already abandoned by its owner (cigarette butts) or user (glass): What would be authorized in gathering such objects? Who would attest to the fact that

the objects belonged to the persons who threw them down (cigarette butts) or left them (glass) since the Court Clerk can only attest to the fact that such objects were in a specific place, not as to who left them there or used them, as the Court Clerk did not see them?

4° In any case, and in summary, what Judge should be one authorising any gathering of such objects? Should it be the first to oversee the proceedings regarding the facts that took place in Portugalete two years before and were provisionally dismissed, while the persons taken into custody were not going to be made available to him because until the DNA test was performed there was nothing linking them to the case? Or, should it be the Judge in whose custody the subjects were when under arrest and not yet made available to the court? Furthermore, with regard to the individuals who were allowed to stay free without being subject to the custody of the court, who should be the one to authorise taking samples under the terms as considered (without violence or any type of coercion)?

5° They were not sent to the laboratory as certain evidence (that is to say, with the identification of owner) as stated in the plenary record by the police officers who testified and by the laboratory technicians themselves, who went on to state that if they had been submitted with identification they would have been rejected for breaching the rules of the laboratory. They stated that they only had a reference number.

6° The samples were not reconstituted evidence, with status as prior case evidence, as both the police officers who gathered them and the persons who compared the two – dubitative – samples appeared as witnesses before the full court.

7° In this case – and in contrast to the premise alleged by the defence and dealt with in the Decision of the Second Chamber of the Supreme Court of 19 Apr. 2005 *(LA LEY JURIS. 1491/2005)* – the actual gathering of the objects from which DNA samples were obtained was documented and not in violation of Art. 292 of the Law on Criminal Procedure as in the other case. It is true that there was poor police work, almost surely for simple reason of convenience and economy, in not documenting the gathering of the samples – cigarette butts and glass – until a number of months later when the laboratory reports were received showing a positive match with the samples gathered at the scene of the crime subject to judgment. However, poor police work should not be reason for nullification, as moved by the defence, especially since the officers who collected the objects (cigarette butts and glass) took the witness stand in plenary court and documented it – albeit late –, in compliance with the constitutional principles of public, oral trial, the right of parties to contest, and right to have direct access to the Court. It is a matter, therefore, of the Court's assessment of credibility but, again, not a cause for nullification.

8° Also, we must remind ourselves that taking fingerprints from a detainee, something that requires physically compelling the individual and is a

procedure with reliability equal to or greater than the DNA test, does not require a court order. When fingerprints are taken they are sent to the police laboratory to be checked against the data base and to see if the individual in question has participated in other investigated crimes; only if there is a positive match with other fingerprints taken where other investigated acts took place is the fact made known to the Judicial Authority for appropriate action, with a copy inserted in the pertinent police and judicial reports. Just as the case with police ballistics services, to which all firearms, bullets and casings found at the crime scene are sent for analysis against their data base and to determine whether the weapon was used in any other criminal act, if the finding is positive, the competent Judicial authority is informed thereof.

9° While it is true that Art. 363 of the Law on Criminal Procedure, even before the reform instituted under Organic Law 15/2003, provided that chemical analysis must be ordered by the Court "... solely in cases in which it is considered absolutely necessary for the investigation and the proper administration of justice", we should not overlook the date this Law came into effect, 1882, a time when the scarcity of means needs to be taken into account, and the fact that the articles immediately preceding same, (Arts. 356 to 362) determine the procedure for appointing experts and how "chemical analysis" is to be performed (Art. 356), and fact that it was absolutely unthinkable that police officers would have access to such experts – Art. 356 refers to "Doctors of Medicine, Pharmacy, or Physical-Chemical Science or Engineers who specialise in Chemistry." Furthermore, the fact that chemical analysis may be ordered by the Judicial authority under the terms stated does not rule out such testing being able to be ordered by the competent police authority, provided persons are not compelled as set forth above and prior to the above-mentioned reform of the Law on Criminal Procedure."

b) Right to not be discriminated against on the basis of gender

Constitutional Court Decision 182/2005 of 4 July
Jurisdiction: Constitutional
Appeal for reversal no. 2447/2002
Rapporteur: Ms. María Emilia Casas Baamonde

The Decision sets forth circumstances that constitute proof of discrimination on the basis of gender and grants the appeal for reversal.

"(...)

5 The specific prohibition in the Spanish Constitution of discrimination on the basis of gender means that there is direct violation of SC Art. 14 *(RCL 1978, 2836)* when the prohibited factor is accredited to have been the basis for undervaluation or injury in employment, and the concurrence of other grounds that might justify the measure aside from the discriminatory result has no legitimating value in such cases.

To resolve the issue set forth in this appeal for reversal we must begin with the proven facts, since a simple reading of the allegations of the different parties in the case reveals strong discrepancies as to what took place. It is therefore necessary to clarify the situation by specifying the facts that have actually been proven, the invariability of which is imposed by Art. 44.1 b) of the Law on the Constitutional Court *(RCL 1979, 2383)*, since any review of judged fact is prohibited in our jurisdiction, as we have repeatedly said since the beginning in Constitutional Court Decisions *2/1982, of 29 January (RTC 1982, 2)*, and *11/1982, of 29 March (RTC 1982, 11)*.

Leaving aside the assessments by the parties and the judicial bodies regarding the facts, the incidents that took place over the course of the complainant's employment by Red Eléctrica de España, SA, as taken from the factual account in the Labour Court Decision maintained by the appeal decision challenged herein, that are important in resolving this case are the following:

a) The complainant's children were born in October 1995, October 1996 and January 2000.
b) The complainant's last promotion was granted by the company in July 1994. In 1997, 1998 and 1999 the complainant's two work colleagues were promoted.
c) In the 1995 evaluation the complainant received the same rating as her colleague who was working for the company, and Ms. Z's boss' comments in the evaluation showed clear satisfaction with Ms. Z's work despite her recent maternity.
d) In subsequent evaluations – 1996 to 1999 – the complainant received lower ratings than her colleagues, except in 1998.
e) In 1996 Ms. Z acknowledged in her report that, because of her personal situation of having had two children in a short period of time and finishing a Master's program on the Environment, she had had a more limited area of responsibility. The complainant stated her disagreement with the criteria used to distribute duties for the first time, stating that in 1995 she was studying the same Master's program and on maternity leave for more days and nonetheless given greater responsibility in her work, that she performed to the great satisfaction of the employer, as gathered from the evaluation from the previous period. In the 1997 evaluation, the employee once again stated her discontent with the distribution of work, focusing on the economic repercussions arising from the circumstances. She reiterated this complaint in the 1998 evaluation.
f) On 28 September 1999, the employee sent a letter to the President of the company describing her situation, which she characterised as discriminatory on the basis of gender and derived from her pregnancies, announcing her desire to claim her rights, even in court if necessary. The President called for an investigation, of which there is no reported result.
g) On 26 October 1999 the claimant entered a complaint with the Labour Inspection Service alleging discrimination on the basis of gender. The complaint resulted in a finding of infraction and a proposed sanction, finding that the

employee had been subject to discriminatory decisions regarding her professional promotion and remuneration, and also related to her transfer to another department of the company. In its allegations, Red Eléctrica de España, SA, provided a certificate from the Chief of the Labour Relations Service of the Directorate General for Labour of the Community of Madrid, under which the administrative sanction was dismissed.

h) The employee's evaluation in 1999 – completed in May 2000 following her return to work after having her third child – showed a much lower rating than her two colleagues in the Legal Department. Her boss stated that her performance had dropped owing to her lack of job satisfaction.

i) On 5 May 2000 the employer sent the claimant a letter notifying her of a change in her employment. This letter stated that the complaints contained in her letter to the President had turned out to be unfounded and further announced that a meeting was scheduled to be held two months hence to assess the level of satisfaction in her new position. It also stated that the measure taken to move her had arisen out of conversations with the Labour Inspection Service, although the proven fact – based on page 82 of the case filed – is that the fifth legal ground in the Decision states that this information is not true, since the change was not promoted by the Inspection, contrary to what was alleged by the employer.

j) There is a psychiatric report of August 2000 that diagnoses the employee as suffering a personality disorder, anxiety and anguish, along with lack of appetite related to the injurious employment situation, stating that after returning to her job the condition showed a worsening in anxiety and depression.

k) The hours not worked by the employee for reason of illness, holidays and maternity leave were set forth for the record, as was the difference in pay between the 12-B and the 17-C level accorded to her colleagues.

l) Staring in 1995 the company was involved in a period of change and adaptation to the market, but did not give the complainant any work relating to the new strategic challenges.

m) Also proven was:

   1) That the employer fundamentally opposed the complaint, alleging that the different professional treatment was due to the fact that the male colleagues in the legal department were taking on more responsibility in their work than the complainant could objectively take on, and more than the complainant was willing to take on, and that her transfer to another job was based on the suggestion made by the Labour Inspection.
   2) That, based on the functions set forth by the company organizational chart, little or no legal work was being in the new department to which the employee was transferred [Legal Grounds 3 c) and 7]. The appealed Decision states that the premise of the original Decision cannot be accepted, but that is not an evaluation of the judge from which the case was removed, but rather a statement with real value based on the

employer's organizational structure, which was not reviewed under Art. 191 b) of the *Law on Labour Procedure (RCL 1995, 1144, 1563)* in the appeal process.

3) That there are contradictions in the statements by the claimant's superiors on the reasons for not assigning certain responsibilities to her and that, in particular, the employer's legal representative expressly acknowledged that the claimant's absences were the reason she was not assigned such responsibilities.

6 The remaining elements entered into evidence at different times in the prior and Constitutional proceedings were either not proven facts but rather legal opinions, or represented mere discrepancies by the parties regarding the unchanged narration of the facts.

Specifically, to the contrary of what is alleged, it is of particular importance to underline:

1) It is not proven that the employer assessed job knowledge and professional willingness of its employees to assume new responsibilities.
2) It has not been declared proven that the assignment to a new job was due to the employer's organizational needs. In fact, the respondent employer alleged that there were other reasons for this (suggestion by the Labour Inspection Service, which was stated to be false).
3) It is not proven that the claimant did not show a willingness to participate in the most recent needs of the legal department, or that her willingness was less than that of her department colleagues. Neither was it proven that the promotion of said colleagues was based on facts, such as greater dedication or effort, that proved that the distribution of the work by the superiors was inconsequential regarding functional and remunerative outcomes.
4) Also, there is no proven fact whatsoever, nor statement with value as fact from which it can be concluded that maternity leave made it objectively impossible for the claimant to undertake the more responsible or more substantial duties. In fact, in 1995, despite her pregnancy, Mrs. Z's work and effort received high ratings.
5) There is no element at all from which to conclude that the claimant's job dissatisfaction might have led her to prefer the change of job that was effected, nor any basis on which to conclude that the indication contained in the notification of 5 May 2000, in which the employer announced that a meeting was scheduled to be held two months after the change in employment went into effect, that it amounted to agreement by the employer to conciliate with the employee definitive measures to be adopted in order to resolve the conflict.

Finally, it must be stressed that we cannot take into consideration any other elements that ensued and were alleged in the proceedings under Art. 52 Law on *Organic Law on the Constitutional Court (RCL 1979, 2383)*, not because they

do not necessarily prove what they claim to prove, but rather because, as stated, under Art. 44.1 b) Organic Law on the Constitutional Court we must limit ourselves to the proven facts in the decisions handed down in the proceedings giving rise to this appeal for reversal.

7 All the above leads unequivocally to the conclusion, as maintained by the Public Prosecution Service, that the claimant's successive pregnancies and periods of maternity leave caused her not to be assigned the more important legal duties, detriment in her financial improvement, and her final transfer to a different job in a different department from the department she was in originally, characterised by little or no legal content.

In effect, the connection in time of the maternity leave and the disputed measures; the low consideration of the claimant's effort, acknowledged by her superiors in different evaluations; the contradictions of these same superiors; the fact that the employer's alleged reasons for the change in job are not the real ones (at the alleged suggestion or mediation of the Labour Inspection Service) and the fact that the decision to move her was taken right after the claimant made a formal complaint regarding the situation she regarded as discriminatory, can all be considered indications of discrimination as denounced by the claimant. Beyond that, however, the confession by the employer's legal representative, – referred to by the ruling Judge – clearly reveals the motivation behind the employer's decision to relegate the employee.

It is not a matter, therefore, of the appellant having shown a scenario indicating the alleged damage, but rather of full accreditation of a causal connection between the facts denounced and the legally relevant motivation on which they were based (three pregnancies). This is seen from the facts provided that we have just reiterated to clarify any doubt, just as with the statements of fact contained in the *ratio decidendi* by the original decision, not revised at the next level of jurisdiction. It is relevant, indeed, that aside from the criteria and the reasoning contained in the decision subject to appeal for reversal, the Labour Section of the High Court of Justice maintained unchanged the narration of the proven facts, therefore leaving as definitively established the causal connection between the challenged employer's decisions and their motivation, as seen in the above legal grounds.

By acting in this way, the appeals Court maintained the analysis of constitutional violations denounced by the employee in the context of Art. 20 of the *Law on Workers' Statute (RCL 1995, 997)*, overlooking thereby that to exclude discrimination it is required that when difference in treatment is alleged before a judicial body based on the circumstances set forth in Art. 14 *SC (RCL 1978, 2836)* that are considered discriminatory – in this case, gender – and such allegation is by a person belonging to the group traditionally affected by such discrimination – in this case a female employee-, the court cannot limit itself to determining whether the different in treatment denounced is objectively and reasonable justified in the abstract, as if dealing with a problem relating to the

general equality clause, but rather it should analyse more specifically, whether what seems to be a formally reasonable differentiation does not hide, or allow to be hidden, discrimination in violation of SC Art. 14 (in this regard, *SSTC 145/1991, of 1 July [RTC 1991, 145]*, F. 2, and *286/1994, of 27 October [RTC 1994, 286]*, F. 3).

In other words, it cannot be maintained, as in the appealed resolution, that there is no discrimination owing to the fact that the employer is acting as permitted under labour law. We have said that, even when the legal cause is present, business freedom does not allow for unconstitutional results (for all, *SSC 87/2004, of 10 May [RTC 2004, 87]*, F. 2), and it is not admissible for there to be an underrating or harm in working conditions immediately associated to maternity, since this would constitute direct discrimination by reason of gender (Art. 14 SC). Therefore, any employer behaviour based on factors expressly prohibited, such as gender, cannot be assessed as an act of freedom or the exercise of lawful powers, just as the underlying business interest in this type of decision, whatever it may be, cannot be legitimised through measures contrary to the constitutional mandate prohibiting discrimination against women.

In reality, no evidence was presented that reasonably or rationally breaks the causal nexus set forth between the employee being undervalued at the workplace and her three pregnancies, that would place the business decisions above any discriminatory motivation. On the contrary, in the case judged there is evidence of application of a criteria of professional and economic relegation and a unfavourable order of functional mobility by reason of the employee's successive pregnancies and maternity leaves. Therefore, an argument such as the one maintained by the Labour Court in the appealed decision brings about, in substance, the effect of denying the judicial protection sought on the basis of principles of ordinary legality, that must not in any way neutralise proven reality – and the effects – of employer violation of the complainant's fundamental right (in this regard, *CCD 173/1994, of 7 June [CCA 1994, 173]*, F. 4). If the contrary is accepted, some of the most notorious effects of discrimination, a social ill to be eradicated by constitutional mandate, would be left without protection, (in this case, continuity and the normal progress of a professional career in conciliation with the free decision to be a mother) and, furthermore, Spain's aforementioned international commitments in this area would be left virtually void of any content.

In summary, the employer's decision was discriminatory on the basis of gender, in violation of SC Art. 14, and as it was not corrected by the Labour Court Decision appealed herein, the pronouncement provided under Art. 53a) of the Law on the Constitutional Court *(RCL 1979, 2383)* is in order, together with the statement declaring the Decision by Labour Court No. 33 of Madrid as firm, setting forth the violation of SC Art. 14 and the related consequences.

(. . .)

DECISION

On the basis of the above, the Constitutional Court, BY THE AUTHORITY VESTED IN IT BY THE CONSTITUTION OF THE NATION OF SPAIN,

Has decided

To partially accept the appeal for reversal submitted by Ms. Enriqueta G.S. and therefore:

1° Acknowledge her right not to be discriminated against by reason of gender (Art. 14 *SC [RCL 1978, 2836]*).
2° Repeal the Decision of the Fifth Section of the Labour Court of the High Court of Justice of Madrid, dated *23 April 2001 (AS 2001, 737)*, in Appeal No. 688–2001 for protection of fundamental rights, declaring Labour Court No. 33 of Madrid's Decision of 31 October 2000 as firm."

2. Right of foreign nationals

a) Right to enter Spain

CCD 72/2005 of 4 April
Jurisdiction: Constitutional
Appeal for Reversal No. 5291/2001
Rapporteur: Francisco José Delgado Barrio

Appeal for reversal against the Decision by the Chief of the Almeria Border Station of 26 August 2000, that denied the appellant entry into national territory and ordered the appellant to be returned to place of origin; against the Decision by Administrative Court No. 1 of Almeria of 26–03–2001, that dismissed the administrative appeal entered against said Decision; and against the Decision by the Administrative Court of the High Court of Justice of Andalusia (Granada) (First Section), of 30–07–2001, that dismissed the appeal against said court order. The Court denied the appeal.

"(. . .)

4 And, lastly, we must consider the alleged violation of Art. 19 SC *(RCL 1978, 2836)*. There are two rights recognized in this constitutional provision which, *prima facie*, might have been violated in the case of a foreign subject who was denied entrance into national territory and was ordered to be returned to where he had come from: the right to enter Spain and freedom of residence.

It must be pointed out, however, that the two rights, recognised in SC Art. 19 are – evidently – two different rights with different content, notwithstanding their potential interrelationship. For persons outside Spain – without needing here to refer to those who have this right, an issue to be dealt with later on- the right to enter national territory protects the specific act of going from being outside our borders to being inside national territory. Freedom of residence, on the other hand, protects the right of individuals to "choose their place of resi-

dence freely within Spanish territory": it is "the subjective, personal right to freely choose the place or places one wishes to reside temporarily or permanently" in Spain (CCD *28/1999, of 8 March [RTC 1999, 28]*, F. 7, quoting CC Order *227/1983, of 25 May [RTC 1983, 227 AUTO]*, F. 2).

The specific, detailed text of SC Art. 19 requires precise interpretation in order to determine the scope that is constitutionally protected by such rights, despite the potential area of overlap between the two, in order to determine protected behaviours and avoid such overlap.

A foreigner who – such as the appellant – has never been in Spain, cannot invoke freedom of residence – the right to choose the place or places one desires to live temporarily or permanently in Spanish territory – to protect an act that falls in the area defined by a different right: that of entry into national territory. For the foreigner, the circumstance of *already being* in Spain is a logical prerequisite – and, in this case, also a chronological one – upon which residence in national territory may be considered. Until such time as one has entered Spain it is not possible to exercise the right to choose a place of residence therein, nor is it possible to accept that the potential impediments or obstacles placed by the public powers in the way of a foreigner's intentions as violations of the right to residence guaranteed by SC Art. 19. In such cases, other rights would be violated. A different matter would arise hypothetically if the foreigner had obtained a residence permit prior to entering Spain, owing in this case, to the fact that it is not necessary to already be in Spanish territory to get one. This hypothesis cannot be ruled out altogether but, it is not the circumstance in the case at hand and this would be not a matter of a right to freedom of residence under SC Art. 19, but rather a simple administrative authorisation, or at most, the exercise of a legal and not a constitutional right: ultimately, when the subject tried to return to Spain he would not be exercising his right to choose residence, but rather the right to enter, albeit in such a case it may serve as support to the latter. In any case, as said before, the case at hand in this appeal for reversal is very different: it deals with a foreigner who, having acknowledged never having been in Spain, cannot allege freedom of residence in Spain, in support of a supposed right to enter Spain, when, as clearly seen in the grounds of the case, he can only aspire to residence if he is in Spanish territory.

Therefore, although the appeal for reversal in citing SC Art. 19, refers to the right to reside in Spain, it should be underscored that the right the Moroccan citizen entering the appeal sought to exercise and was prevented from doing so by the administrative decision denying him entry into national territory and ordering his return, was specifically the right to enter Spain that is recognised in the same constitutional provision. This brings us face-to-face with the issue of whether foreigners have a fundamental right to enter Spain. It must be noted, however, that the arguments and conclusion reached, written in very general terms, do not affect nor do they extend to concrete cases in which specific circumstances are present that alter the situation, such as: the legal rules

governing the right to asylum (subject to specific regulation contained in SC Art. 13.4); the right of citizens of the European Union to enter Spain as regulated by international treaties or by other rules distancing it substantially from the conditions applicable to other foreigners; the situation of foreigners who already reside legally in Spain and seek to enter national territory after having left temporarily, a situation which is not the one offered by the appeal; and the premise of reuniting families, also alien to the case that was the subject of this judgment of constitutionality.

5 SC Art. 19 *(RCL 1978, 2836)* acknowledges "Spaniards" as having four different basic rights: the right to freely choose their place of residence, the right to move freely within national territory, the right to freely enter and the right to freely leave Spain. Despite the fact that a literal interpretation of this constitutional provision would explicitly allude solely to Spanish citizens as the holder of these fundamental rights, the jurisprudence of this Court establishes that the conclusion that foreigners cannot hold the fundamental rights guaranteed by this constitutional provision cannot be concluded there from: "literal interpretation of SC Art. 19 is insufficient because this provision is not the only one to be considered; others must be considered alongside it that determine the legal status of foreigners in Spain, including SC Art. 13" [SCD *94/1993, of 22 March (RTC 1993, 94)*, F. 2; *116/1993, of 29 March (RTC 1993, 116)*, F. 2; *242/1994, of 20 July (RTC 1994, 242)*, F. 4, and 169/2001, *of 16 July (RTC 2001, 169)*, F. 4 a)], whose paragraph 1 provides that "aliens shall enjoy the public freedoms that are guaranteed by the present Title, under the terms to be laid down by treaties and the law."

Therefore, since under our legal system the only fundamental rights are those recognised as such by the Constitution, "it is appropriate to remember that an interpretation of the Constitution that leads to a result other than its literal interpretation can only be accepted when there is ambiguity therein, or lack of systematic consistency among constitutional provisions (*CCD 72/1984, of 14 July [RTC 1984, 72]*, F. 6)" (*CCD 215/2000, of 18 September [RTC 2000, 215]*, F. 6).

We must start, therefore, from a literal reading of SC Art. 13.1 and then consider the result of systematic interpretation of the provision. SC Art. 13.1 only refers to the public freedoms of foreigners "in Spain", with two specifications: a) it does not refer to all the rights of foreigners in Spain, but rather only to fundamental rights; and b) in the context of such rights it does not include all their fundamental rights, but only those rights of Spanish nationals – Arts. 19, 23, etc., – that are extended by SC Art. 13.1 to foreigners in Spain, since they have most of the other fundamental rights, – right to life, freedom of religion, personal freedom, due process of law, etc. – without requiring the extension set forth in SC Art. 13.1, that is, without any need of treaty or law establishing them.

6 More specifically, we must remember that SC Art. 13.1 *(RCL 1978, 2836)* is the provision "in our Constitution that establishes the subjective limits determining the extension of fundamental rights to non-nationals" [Constitutional Court Statement of de 1 July 1992, F. 3 B)]. The text of paragraph 1 of SC Art. 13, which refers to the terms under which foreigners enjoy the rights under SC Title I "in Spain", shows that the regulation of this constitutional right is not for the purpose of recognizing the general rights of the billions of foreign nationals in other countries, nor, more specifically, of making possible entry into Spain by all the aliens outside our country who reach our borders a fundamental right, but rather, precisely, to regulate the legal position of aliens already in Spain. The right holder to which SC Art. 13.1 refers is not just any alien, but rather any alien *in Spain*, an alien who has *already entered our country*, which is the prerequisite circumstance for the extension of rights set forth in SC Art. 13.1.

Therefore, a literal reading of SC Art. 13.1 does not project over any of the fundamental rights – the right to enter Spain – that are recognised in SC Art. 19, meaning that only Spanish nationals would have this fundamental right, with the exceptions referred to in the last paragraph of Legal Ground 4, which do not affect this premise. The fundamental right of the Spanish national to be accepted by the State, and therefore, to be able to enter his country, is one of the essential aspects of nationality and, therefore, one of the basic legal differences between the personal status of nationals and aliens. This "traditional distinction" is only now being subject to partial alteration in the framework of "incipient European citizenship" [Constitutional Court Declaration of 1 June 1992, F. 3 A)].

It is therefore clear that a literal, unambiguous reading of SC Art. 13.1 does not include the right to enter Spain as a fundamental right of aliens.

7 As regards systematic interpretation, when clarifying to what extent SC Art. 19 applies to aliens, we must keep in mind not only that SC Art. 13.1 refers expressly to treaties in force, but also more importantly that SC Art. 10.2 establishes a very relevant criterion for a systematic interpretation of the Spanish Constitution by referring in this context of fundamental rights to the international treaties and agreements on this subject that have been ratified by Spain: the terms contained therein thus acquire "interpretive transcendence for all intents and purposes" (CCD *242/1994, of 20 July [RTC 1994, 242]*, F. 5).

We begin by examining the International Covenant on Civil and Political Rights *(ICCPR, of 19 December 1966 (RCL 1977, 893)*. Under the terms of Arts. 12 and 13 this Court has declared that aliens lawfully in Spain "have the right to reside in Spain, and enjoy the protection of SC Art. 19, albeit not in terms identical as those of Spanish nationals", and that they hold the fundamental right not to be deported from national territory except for reasonably applied legal cause and with essential due process guarantees – in the terms set forth by Art. 13 ICCPR CCDs *94/1993, of 22 March [RTC 1993, 94]*,

FF. 3 and 4; *242/1994, of 20 July [RTC 1994, 242]*, FF. 4 and 5; and *24/2000, of 31 January [RTC 2000, 24]*, F. 4).

We must now look closely at the rights guaranteed by ICCPR Arts. 12 and 13 and other international treaties on the same subject in order to use such regulation as an adequate path of interpretation for the purpose of answering the question of whether aliens have a fundamental right to enter Spain. ICCPR Art. 12 acknowledges the right of any person who is lawfully within the territory of a State, therefore aliens are also included- to "have the right to liberty of movement and freedom to choose his residence", along with the right of all persons to "to leave any country, including his own." This provision also ensures that no one shall be "arbitrarily deprived of the right to enter his own country." Furthermore, ICCPR Art. 13 acknowledges, in the terms already set forth, the right of aliens lawfully in the territory of a State to be expelled there from "only in pursuance of a decision reached in accordance with law." Careful analysis of the provisions cited show with no shadow of doubt that the right to enter a country is only recognized in the ICCPR for nationals of said country.

The same conclusion is reached through the provision under the *Universal Declaration of Human Rights (LEG 1948, 1)* (to which SC Art. 10.2 expressly refers), that recognises every person's right to leave any country, but only guarantees the right to enter one's own country – "Everyone has the right to leave any country, including his own, and to return to his country" – (Art. 13); and, even the provision of Protocol. 4 to the *European Convention on Human Rights (RCL 1999, 1190, 1572)* (signed but not yet ratified by Spain) also guarantees anyone in a lawful situation in Spain the right to freedom of movement and to choose residence, as well as the freedom to leave any country (Art. 2) and not be expelled "from the territory of the State of which he is a national" (Art. 3.1); but the right to enter is only recognised for "the territory of the State of which he is a national." (Art. 3.2)

Therefore, there is no ambiguity in a literal reading of SC Art. 13.1 nor in any systematic interpretation projecting over SC Art. 19 in relation to international treaties on fundamental rights, and we therefore must conclude that the fundamental right to enter Spain only pertains to Spanish nationals and not to aliens.

8 This issue has no bearing on the categorical statement that, generally speaking, fundamental rights are binding upon Spanish public powers independently of whether they act "in Spain" or not. One thing is to define the subjective scope of the extension of certain fundamental rights for which it is relevant to be a Spanish national or an alien. – such is the issue regulated by SC Art. 13.1 – and quite another is to set forth the territorial scope in which fundamental rights are in force for the Spanish public powers. The obligation of all Spanish public powers to respect fundamental rights, without limitation to any territorial context, is established in SC Art. 53.1; and all persons are entitled as an attribute of their human dignity to a large part of the fundamental rights – where it is irrelevant whether one is a Spanish national or an alien

(CCDs *107/1984, of 23 November [RTC 1984, 107]*, F. 3, and *95/2000, of 10 April [RTC 2000, 95]*, F. 3).

Furthermore, no contradiction exists between the above and the statement contained in our jurisprudence referring to the fact that "paragraph 2 of SC Art. 13 only sets aside for Spanish nationals entitlement to the rights recognised in SC Art. 23" (CCDs *94/1993, of 22 March [RTC 1993, 94]*, F. 2; and *242/1994, of 20 July [RTC 1994, 242]*, F. 4, which cites the Statement by this Court of 1 July 1992). Careful reading of said Declaration of 1 July 1992 shows that the constitutional reservation for Spanish nationals of a certain fundamental right – specifically the right to passive suffrage in municipal elections, which was the right the Court was ruling on in that case and which gave rise to the Constitutional reform of 27 August 1992 – referred to a fundamental right which by constitutional mandate could only be exercised by Spanish nationals, thereby prohibiting that by law or by treaty it could be granted to other subjects. The Declaration of 1 July 1992 dealt with a constitutional rule contained in SC Art. 13.2 "that reserves for Spanish nationals the entitlement and exercise of very specific fundamental rights, such as the passive suffrage in the case at hand, that cannot be granted by law or treaty to anyone not possessing such status; namely, that can only be granted to foreign nationals by reforming the Constitution." (F. 5)

This is not at all the case with entry into Spain. This right is held solely by Spanish nationals as a fundamental right guaranteed by SC Art. 19, but, -in contrast to passive suffrage in municipal elections – the legislator can grant this right to aliens who meet the requirements established by law. The fact that the Constitution does not set forth a fundamental right of aliens to enter Spain does not mean, obviously, that the right of an alien to lawfully enter our country is not protected: it enjoys the protection of rights granted by law and, specifically, that aliens do have – even if they have not entered (in the strict legal sense) Spain, but only are in Spain *de facto*, in a situation, therefore, of "subjection (. . .) to Spanish public power" [CCD *53/2002, of 27 February (RTC 2002, 53)*, F. 4 a)] – the fundamental right to effective due process – SC Art. 24.1 – (CCDs *99/1985, of 30 September [RTC 1985, 99]*, F. 2, and *115/1987, of 7 July [RTC 1987, 115]*, F. 4) in defence of the right to consider themselves protected by Spanish judges and courts.

It is therefore lawful to state that the right to enter Spain – "acknowledged solely for Spanish nationals in the Constitution" (CCD *53/2002, of 27 February [RTC 2002, 53]*, F. 4), as expressed by this Court in an incidental statement – is not a fundamental right to which aliens are entitled under SC Art. 19, although, obviously, whosoever is actually in Spain can seek protection of this right from Spanish Judges and Courts, that must protect it in accordance with the requirements set forth in SC Art. 24, that does provide for rights that aliens are entitled to.

9 In the case set forth by the appeal for reversal, if the appellant's defence was not channelled through the special process for protection of the fundamental

rights of the individual, but rather entered as an Administrative appeal not limited with respect to the subject of judicial cognition, it could have obtained a court response on the issue of whether the border authorities might be unaware of the presumption of validity and effectiveness of an administrative declaration of rights, given the seriousness of the defect of nullity incurred – as alleged by State Lawyer – or if, on the contrary, to eliminate the effect of this administrative measure it was necessary to pursue any specific administrative review or effect extinction procedure. The judicial body of the ordinary jurisdiction would have provided the protection applicable to the rights of aliens, resolving this issue, in principle, outside the jurisdiction of this Court.

The pronouncement provided in Art. 53.b) Law of the Constitutional Court *(RCL 1979, 2383)* is therefore called for.

DECISION

On the basis of the above, the Constitutional Court, by the AUTHORITY VESTED UPON IT UNDER THE CONSTITUTION OF THE SPANISH NATION,

Has decided

To refuse the appeal for reversal entered by Mr. Yahya R".

Spanish Judicial Decisions in Private International Law, 2005

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I. SOURCES OF PRIVATE INTERNATIONAL LAW

II. INTERNATIONAL JURISDICTION

1. Expressed and tacit referral

– SAP Madrid, Section 18 of 17 May 2005 (Ref. Aranzadi JUR 2005/166439) *International jurisdiction. Expressed referral*

"Legal Grounds:

. . . Two. Given the form in which this appeal has been lodged, reiterating the initial argument against the international jurisdiction of the Court of Alcobendas to hear the litigious issue in the form laid down in Art. 66.2 LEC, an analysis must first be made of the reality expressly admitted and figuring in the case file that in the contract amendment of 30 October 1989 concluded on 10 May 1995 it was specifically established that "Any litigation, difficulties in enforcement or interpretation concerning the leasing contract signed on 30 October 1989, additional agreement No. 1 of 16 January 1992 and the present additional agreement will be the exclusive competence of the commercial courts of Versailles, FRANCE."

Therefore, given the date of the agreement, the dispute settlement should comply with our law currently in force as laid down in Art. 21 LOPJ determining that Spanish civil jurisdiction is determined by the provisions of the said law as well as by the international treaties to which Spain is party. In this connection, of those agreements the one which is directly and especially applicable to the case at hand and which is prior to EC Regulation 44/2001 of 22 December 2000 (although this fact in no way alters the issue) is the 27 September 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters whose Art. 17, in the draft of the Convention held in San Sebastian on 26 May 1989, provides that "when at least one of the parties has its legal domicile in a contracting state and it has been agreed that a court or the courts of one of the contracting States have jurisdiction to hear any litigation arising or which could arise in connection with a

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determined legal relationship, the said court or courts shall be the only competent courts". Thus the Convention, as well as the current Art. 23 of the aforementioned EC Regulation 44/2001 providing for the exclusive competence of the bodies before which the case was filed unless specifically agreed otherwise, set the stage for the principle of admission of forum except in cases involving specific matters and circumstances known as "exclusive competence" which is not the case here. Admission of forum can be done in writing or verbally with written confirmation "in a way which is in line with the working habits established between the parties" or "in the case of international commerce, in a way conforming to the uses which the parties are familiar with or should be familiar with and which, in the said commerce, are well know and regularly observed by the parties in similar contracts in the commercial sector considered", Art. 17 of the Brussels Convention and Art. 23 of the aforementioned EC Regulation.

In the case at hand there is no doubt as to the existence of and the parties' subscription in writing to the said clause in a clear and perfectly comprehensible manner. A simple reading points to the exclusive submission to the Commercial Courts of Versailles (France) in the event of any litigation, difficulty in the execution or interpretation linked to the cited contract and its amendments. There are no doubts nor do any difficulties arise in the interpretation and it is therefore fully valid pursuant to the legal rules cited in both the Convention and the Regulation.

Three. Based on the foregoing, it would be difficult to take any stance short of strict enforcement and would be even more difficult to consider this agreement nothing more than a privilege which could be renounced by either of the parties or specifically by the complainant given that the said consideration does not figure in the agreement nor is it alleged but actually quite the opposite by the party which, in the subjective opinion of the claimant, would benefit by waiving this clause. The agreement, as the rest of the contract, is based on the consent freely given by the contracting parties such that, once mutual acceptance is agreed, the latter binds both parties equally unless it is agreed that a party may unilaterally renounce the agreement and in this case, the said renouncement would also form part of the agreement as an expression of the wills of the parties facilitating future action. Expressed submission was not explicitly expressed, or at least was not agreed in the contract, as a right of the claimant which the latter was free to renounce, but rather as a clause binding both parties, and the claimant is not entitled to interpret the will of the defendant nor act as the protector of the latter's subjective rights. That right could indeed be renounced but by both parties jointly by drawing up a new agreement or successively in the legal proceedings, i.e. the claimant filing suit in Spain and the defendant tacitly subjecting itself to the said submission by simply responding to the complaint without taking any legal action other than the questioning of the jurisdictional issue; in other words, just the opposite of what actually took place. It would not be right to hold that the defendant lacks

defendable legitimate interest in a case such as this where both parties agreed to the exclusive enforcement of French law for the resolution of litigation deriving from the contact. It is therefore obvious that he has the right to defend his legal position through the direct enforcement of French law without having to accredit the reality and applicability of the said law by litigating in Spain which would be tantamount to an added procedural burden which would obviously be imposed upon the claimant as well with the difference that the latter took on this burden freely by filing suit in Spain but the defendant did not take this burden on voluntarily.

In opposing the appeal the claimant states that the agreement does indeed envisage his renouncement as long as the latter is to the benefit of the defendant, an assertion completely void of all legal or conventional grounds. This frequently cited clause actually does not consider the possibility of renouncement and the latter would therefore only be admissible if it were joint, simultaneous or successive but the subjective assertions made by the complainant regarding the benefits that his renouncement has for the defendant cannot be accepted when the alleged beneficiary denies any such benefit.

The fact that there are other legal rules cited in the appeal regarding the possibility of filing suit in another member state where the parties have legal domicile or where the contract is applied does not affect the arguments outlined above given that the said rules would only apply in the absence of submission, i.e. when there is no submission pact or when the jurisdiction in a specific case or matter is not renewable which is obviously not the case here.

– STS. 27 October 2005 (Ref. Aranzadi RJ 2005/8153)
International jurisdiction: tacit submission of the defendant. Declinatory plea filed in response to the complaint and not as an incident concerning a prior decision.

"Legal Grounds:

One. In response to the claim, opposition was expressed in the preliminary comments and in section I of the legal grounds a "Declinatory objection based on lack of jurisdiction" was formulated. In other words, an international jurisdiction declinatory objection was raised. In light of this first ground, the issue which needs to be examined at the appeal stage is whether the latter was formulated properly from a procedural point of view. The procedural treatment of that incidental plea of defence is that of a plea to the jurisdiction of the tribunal due to lack of territorial competence and, pursuant to the Code of Civil Procedure applicable to this case, it should be addressed as a preliminary incident and anything outside of the plea to the jurisdiction of the tribunal is tacit submission. If it is addressed as a peremptory plea, even if it is intended as a plea to the jurisdiction of the tribunal, it implies submission (. . .).

In conclusion, in this case the defendant responded to the claim and listed as the first of the legal grounds the plea to the jurisdiction of the tribunal due to lack of competence with this literal formulation and in so doing filed an international declinatory plea. However, the plea was not filed properly, as a

preliminary incident, which means that tacit submission to Spanish jurisdiction and the competence of the court before which the claim was filed had already taken place".

2. Family

– SAP of Tarragona, Section 1 of 25 April 2005 (EDJ 2005/112819)
International jurisdiction. Separation and divorce. Enforcement of the LOPJ.

"Legal Grounds:

. . . Two. The appeal invokes, introducing it in this instance in light of its default in the previous one, the lack of jurisdiction of the Spanish courts given that both spouses were of Algerian nationality.

It should first of all be pointed out that the claim was filed on 16 May 2003 and therefore prior to the amendment of Civil Code Arts. 9 and 104 brought about by Organic Law 11/2003 of 29 September 2003 and therefore, in accordance with Art. 769.1 of the Code of Civil Procedure and Art. 22.3 of the L.O.P.J., the Spanish courts have jurisdiction to hear this case in the absence of expressed or tacit submission, if the defendant has legal domicile in Spain and, in absence of those criteria in separation matters, when both spouses are habitually residing in Spain at the time the claim is filed. This was the criteria followed by Additional Provision 1 of Law 30/81. Court records show that the spouses are registered in the municipality of Tortosa, that they have been habitually residing in Spain for a number of years and their child was born in Spain in 1997. This ground was thus rejected."

– SAP of Las Palmas, Section 5 of 20 May 2005 (EDJ 2005/88755)
International jurisdiction. Claim for separation. Judgment basing jurisdiction on Civil Code Art. 107. Dissenting opinion invoking Community regulations.

"Legal Grounds:

. . . Two. Concerning the alleged lack of jurisdiction of the Spanish courts to hear the claim filed, reference must be made to Civil Code Article 107 of the version applicable to this case and to the version preceding the one currently in force according to which, having accredited the habitual residence of the spouses in Spain, Spanish judges are competent to hear the case. In respect of the rules applicable to the substantive legal relationship, in light of the provisions of Civil Code Art. 9.2 (also in the version immediately preceding the one in force today), the conflict rule laid down in the legislation which incorporates the place of habitual residence of the spouses subsequent to marriage must be enforced. The merely indicative criteria set forth in documents submitted by Mr. Oscar should not be considered as evidence due to the importance of the documentary evidence submitted by the other party, basically focusing on the location of the marital domicile, the place where the marriage was celebrated, and the place where the couple's child was born, all in Spain.

(. . .)

Dissenting Opinion

Las Palmas de Gran Canaria, on 20.05.05

DISSENTING OPINION FORMULATED BY THE JUDGE Ms. Mónica García de Yzaguirre REGARDING JUDGMENT 000290/2005 ISSUED IN REMEDY OF APPEAL No. 0000836/2004.

The heading and the pleas of fact of the said Judgment are accepted but ground No 2 is not.

The view of the Judge, endorsing the admissible legal basis, is as follows:

Legal Grounds

Sole. Disagreement with the criterion applied in the Court's judgment derives from the rule applicable to the legal jurisdiction of Spanish legal bodies and specifically that of the judge of the municipality of San Bartolomé de Tirajana to hear the separation claim. In this case the criterion should not be Civil Code Article 107 but rather Council Regulation (EC) 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and of parental responsibility for joint children published in OJEC 160/2000 of 30 June 2000 in force in Member States (thus including Spain and Austria) as of 1 March 2001 and therefore in force at the time the original claim was filed on 1 February 2002, even though the said Regulation has been revoked and replaced by EC Regulation 2201/2003 in force as of 1 March 2005.

Although the result is the same with respect to the competence of the judge a quo, this distinction is important in terms of the judgment's compliance with the criteria laid down in the Regulation and therefore in terms of respect for Article 7 regarding the exclusive nature of international legal jurisdiction criteria provided for in Articles 2 to 6 of the Regulation, and likewise the ex officio examination provided for in Article 9 in the event that either of the parties intends a future recognition or declaration of enforceability within the European Union and specifically Austria, the defendant's country of nationality and where he currently resides, especially given that the judgment orders the father to pay child support for his son, still a minor, residing in Spain.

To this end and pursuant to Article 3 of the Regulation, the common child resides with his mother in Spain in the town of San Bartolomé de Tirajana.

The jurisdiction criterion complies with the provisions of Article 1a) of the Regulation because it has been proven that the claimant's domicile was the last habitual residence of the spouses and the claimant continues to reside there. In any case, this situation complies with the requirement of being the habitual residence of the claimant who has resided there since at least 1998 together with their common child, a fact accepted by the defendant himself.

In respect of the rest of the legal basis of the judgment I remit to the judgment delivered by the Court with which I am in agreement."

– AAP of Cadiz of 15 September 2005. (Ref. Aranzadi JUR 2006/30518)
International jurisdiction of Spanish judges in matters involving divorce, child support and precautionary measures. Divorce judgment delivered in England.

Legal Ruling:

. . . Three (. . .) the jurisdiction of the Spanish courts is in line with the provisions of Article 22.3 of the Judiciary Act (Organic Law): Spanish claimant with habitual residence in Spain. The same is true of Regulation 2201/2003 and of Regulation 2000 currently in force. Regulation 44/2001 grants the judge corresponding to the legal domicile of the child support creditor the jurisdiction to hear his appeal or grants the competent body jurisdiction to hear the suit concerning the status of the persons (. . .).

Six. Another reason to dismiss the appeal is that Rubén accepted the jurisdiction of the Spanish courts by filing a counterclaim in the divorce proceedings under way here and which concluded with a judgment delivered on 14 June 2004 and where child support reduction took place which is the objective of this proceeding and whose enforcement is being called for. Article 24 of Regulation 44/2001 states that the court of the Member State before which the defendant appears will have jurisdiction unless the latter is simply contesting the said jurisdiction or there is some other exclusive jurisdiction in accordance with Art. 22 whose section 5) rules, concerning the enforcement of legal judgments, in favour of the courts of the Member State where the judgment is to be enforced.

– AAP of Barcelona of 25 October 2005 (Ref. Aranzadi JUR 2006/43171)
Jurisdiction in legal separation matters concerning spouses who do not have Spanish nationality. Reference to Art. 22.3 LOPJ and Arts. 9.2 and 107 of the Spanish Civil Code.

"Legal Grounds:

One. The court order under appeal fails to admit the claim filed for separation by mutual consent on the grounds that neither of the two litigants have Spanish nationality and therefore ruling that there is a lack of international jurisdiction to hear this claim (. . .).

Two. (. . .) The alleged infraction should be admitted based on Civil Code Art. 107.2.b) invoked, in the wording provided by Organic Law 11/2003 of 29 September regarding specific measures concerning citizen safety, domestic violence and the social integration of foreign aliens. It should, however, be pointed out that Section 2 of Civil Code Art. 9 must first be applied. This is a specific rule in the Spanish private international law system which, in matters concerning legal separation, divorce or annulment (the latter incorporated after the amendment) makes expressed remittal to Art. 107 of the same text (. . .). Here we would add that even in the absence of the said amendment of the Civil Code it should also be admitted based on the Judiciary Act (Organic Law), Art. 22.3 which states that "in civil matters, Spanish courts and tribunals shall have

jurisdiction: . . . in matters concerning the personal and patrimonial relations between spouses, marriage annulment, separation and divorce when both spouses have habitual residence in Spain at the time the claim is filed or the claimant is Spanish with habitual residence in Spain and likewise when both spouses have Spanish nationality regardless of their place of residence providing they are filing the claim by mutual accord or with the consent of the other party". We would likewise highlight, as is the case with this claim, the provisions of section 2 of the said Article which provides that "In general terms, when the parties have expressly or tacitly subjected themselves to the Spanish courts or tribunals . . ."

3. Contractual obligations

– STSJ of Castilla-La Mancha, Social Affairs Court of 18 July 2005 (Ref. Aranzadi AS 2005/2583)

International jurisdiction. Individual labour contract. Professional football players.

"Legal Grounds:

. . . Four. Since the suit is filed against two entities of different nationalities, in virtue of Art. 6.1 of the Brussels Convention the claimant may file the claim before the courts of either of the two States corresponding to the defendants; in this case Spain and Italy. Since the case was filed before the Spanish courts, the latter have jurisdiction to hear this litigation regardless of the subsequent withdrawal at the conclusions stage of the complaint against Albacete Balompié SAD, the fact on which the first instance judge based his ruling regarding the lack of jurisdiction of the Spanish legal bodies.

Will all due respect for the first instance judge, this court does not share his view because it holds that jurisdiction, essential to the orderly and harmonised exercise of the parties' rights in the proceedings, is determined at the moment when the claim is filed, regardless of whether this is analysed ex officio or upon request by the party. This jurisdiction can therefore not be changed even if, during the course of the proceeding, some of the elements which contributed to determining the said jurisdiction have changed (domicile, residence, etc.). In short, *perpetuatio jurisdictionis* is simply a rule by virtue of which the elements determining jurisdiction must be considered just as they are presented at the time the claim is filed, assuming that the latter is admitted, and any change which these elements may undergo during the course of the proceeding will not affect the determination of jurisdiction which must therefore be considered fixed at the moment of lis pendens (Art. 411 of the Code of Civil Procedure), the determination of which does not entail any problems in this case provided that the fact which sparked the hypothetical lack of jurisdiction of the Spanish courts – withdrawal of the claim against the Spanish entity – took place at the end of the conclusions stage, i.e. clearly removed in time from admission of the claim, the citation of the defendant and any other of the key moments described in Art. 30 of the Regulation. In this case, the filing of the claim

against two companies of different nationality one of which was Spanish, Spain has clear jurisdiction which cannot be modified by a subsequent withdrawal, unless it is a case of legal fraud in which the claim is filed against a natural or legal person with the exclusive purpose of establishing the jurisdiction of the judges and courts of the State corresponding to that person's domicile in accordance with Art. 6.1 of the Brussels Convention.

Nine. (. . .) In cases where there are successive labour relations with different entrepreneurs deriving from business contracts or agreements with legitimate vested business interests and whose consequence for the worker is having to deal with different national legislations in accordance with which the worker must assume a series of rights and duties, this is an interpretation which better guarantees those rights given that the latter can be protected by the courts of any of the States in which one of the entrepreneurs involved has legal domicile or concerning which liability may be derived in compliance with acquired rights provided that there is a link between the right exercised and the legal body, as in this appeal. It should not be forgotten that Art. 5 of the Brussels Convention is included among the special forums by reason of the matter addressed or forums protecting the weaker party as is the case with the forum envisaged for consumers or insurees. In consequence and for the reasons set out in the foregoing, this Court holds the view that the Spanish courts have jurisdiction to hear this case in accordance with Art. 5.1 of the Brussels Convention."

– STS. 29 September 2005 (Ref. Aranzadi RJ 2005/7156)
International jurisdiction. Maritime transport and insurance. Expressed submission to the Dutch courts. Plea to the jurisdiction of the tribunal.

"Legal Grounds:

One. Jurisdictional submission to foreign courts was based on the clause included in the bill of lading where it is specifically stated that any differences or disputes will be settled in accordance with Dutch law and before the court of justice (Arrodissementrechtbank) of Amsterdam (legal domicile of the chartering company), carriers and traders being subject to its exclusive jurisdiction. In accordance with the definition laid down in the bill of lading, the term trader includes the charterer, the receiver and the consignee, the holder and owner of the cargo who would be jointly and severally liable. The term carrier refers to the company or line on whose behalf the bill of lading was signed, the existence of which is not a matter of dispute.

Two: Ground three points to the infringement of Articles 5 and 6 of the Brussels Convention of 27 September 1968 (RCL 1991, 217, 1151 and LCEur 1989, 1327) basing its argument on the failure to enforce Art. 17 and eliminating those assumed violated and which refer to the competent body which, if there is no submission agreement, in contract matters is the court of the place where the obligation should be undertaken and when there are several defendants, the competent court can be that of the legal domicile of any one of them."

– AAP of Barcelona. 17 November 2005 (Ref. Aranzadi JUR 2006/49102)
International jurisdiction. Contract matters. Plea to the jurisdiction of the tribunal. Interpretation of Art. 5.1.a) of EC Regulation 44/2001 and of Art. 22.3 of the LOPJ.

"Legal Grounds:

1. Council Regulation (EC) 44/2001 of 22 December 2000:

This Regulation focusing on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provides in its recital 11 that "The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction" and recital 12 states that: "In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action in order to facilitate the sound administration of justice".

In accordance with these provisions, Art. 2.1 contains the general rule, i.e. that concerning the jurisdiction of the defendant's domicile in stating that: "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State". The exception invoked by the claimant and the appellant in this case is that contained in Art. 5.1.a) which states: "A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question".

Paragraph b of that same article provides that:

"(b) for the purpose of this provision and unless otherwise agreed, said place shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered;
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;

3. Interpretation of Article 5.1.a) of the Regulation in Matters Relating to a Contract":

As was already alluded to, the said provision is an exception to the general rule favouring the jurisdiction of the domicile of the defendant allowing the defendant to be sued in another State "in matters relating to a contract, in the courts where the obligation was or should have been performed". The decision being appealed reasons that the SJCE of 05.02.04 supports the thesis of that

under appeal here in declaring that: "article 5(1) of the Convention should be interpreted in the sense that the concept of 'matters relating to a contract' does not include the obligation, compliance with which legally requires a guarantor who has paid customs duties by virtue of a contract drawn up with the carrier company subrogating the duties of the customs administration within the framework of a reimbursement to the owner of the imported goods if the latter, who was not party to the guarantee contract, did not authorise the signing of the said contract". Said interpretation cannot go forward if, in the case under scrutiny, the guarantor undertook to reimburse and subrogated in the customs duties which had not signed a contract with the alleged debtor while the claimant subrogated in the duties of the Spanish contractor and is suing the party deemed non-compliant. In the aforementioned judgment of 13.10.93, the Supreme Court also pointed out that if the insurer was only able to undertake a repetitive action, it would be an independent action for which the insured would be liable but as was stated above the insurer, by virtue of the legal subrogation, is in the same position as the insured and therefore, given that this is a "matter relating to a contract", it should be determined whether the rest of the suppositions apply.

4. Determination of the Place Where the Obligation Was or Should Have Been Undertaken:

. . .

The practical application of the foregoing jurisprudence regulatory context to the case under scrutiny prompts acceptance of the appeal. In the statement of case there is a description of contract violation related to the supply of materials for installation at Montcada i Reixac. Although the contract has been contested by the defendant, this has been done in a very general way without any indication of what would be the proper qualification of the contract. However, the important issue here is that in order to determine jurisdiction, the focus must be on the location where the obligation which is the basis for the legal action was undertaken, i.e. the alleged infringement of a work contract involving the supply of materials; circumstance defining the jurisdiction of the Spanish courts and tribunals in accordance with Art. 22.3 LOPJ.

6. Concerning the Representations of the Appellee Supporting Application of Italian Law:

An allusion is made to this circumstance, holding that this is an additional element linking the case to the Italian courts but the fact is that the Rome Convention open for signature on 19–6–1980 states in Art. 1 that: "The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries", and a plea to the jurisdiction of a tribunal is not the process by which to determine the law applicable to the substance of the issue, especially bearing Art. 3(2) in mind which admits that: "The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under

this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties".

– AAP of La Coruña. 13 December 2005 (Ref. Aranzadi JUR 2006/13046)
International jurisdiction. Loan contract drawn up in Argentina by Argentineans, with an expressed submission clause to the courts of the city of Buenos Aires.

Legal Grounds:

One. (. . .) Expressed submission by the contracting parties to Spanish courts or tribunals is clear and this case therefore addresses whether submission to the jurisdiction of foreign Courts can be accepted once the suit has been filed before Spanish courts when one of the defendants is a foreign national with legal domicile in Spain by means of the plea to the jurisdiction of a tribunal (. . .).

For all of the foregoing, the remedy of appeal lodged by the representative of Mr. Jose Pedro cannot be admitted because this case does not focus on matters under the exclusive jurisdiction of the Spanish courts and the contracting parties of Argentinean nationality freely stipulated in the contract signed in Argentina expressed submission to the courts of the city of Buenos Aires whose validity and efficacy is not under question and therefore the solution handed down in the appealed decision is in accordance with our legal system".

4. Non-contractual obligations

– SAP of Barcelona, Section 11 of 16 June 2005 (Ref. Aranzadi JUR 2005/176231)
International jurisdiction. Traffic accident. Application of the Hague Convention of 4 May 1971.

"Legal Grounds:

. . . One. The appellant bases his appeal on the following representations: – Lack of jurisdiction or international jurisdiction, cause of automatic nullity of the decision delivered in first instance in accordance with the provisions of Art. 225.1 of the LEC. The appellant claims that the Hague Convention provides the general forum to be the domestic law of the place where the accident occurred and that this rule is applicable to the case at hand. A compensation claim was filed for the traffic accident death of Mrs. María Angeles by her husband. It is a proven fact that on 19 August 1994, Mrs. María Angeles died in a traffic accident in Morocco while travelling in the vehicle N-. . . .-NC insured by the defendant. As a general rule concerning civil jurisdiction, Art. 22 of the LOPJ attributes jurisdiction to the Spanish courts when the defendant has his legal domicile in Spain, and in respect of non-contractual obligations when these cannot be determined by application of the general rule, and the incident occurs

outside of Spain, when the perpetrator and the victim have legal domicile in Spain. But concerning traffic accidents occurring outside of Spain, in accordance with the provisions of Art. 36 LEC, in relation with Art. 1.5 of the Civil Code and Art. 96 of the Constitution, in determining whether Spanish courts are competent to hear the claim filed by the claimant, the specific regulation dictating jurisdiction to hear such cases is contained in the Convention of 4 May 1971 on the law applicable to traffic accidents done at The Hague, ratified by Spain and published in the Official State Gazette (Spanish acronym BOE) on 4 November 1987. Art. 3 of the said Convention provides that applicable law be the domestic law of the state in whose territory the accident occurred but with the exceptions described in Art. 4 concerning accidents involving a single vehicle which seems to be the case according to the documentation furnished. In this case, applicable law is the law of the state where the vehicle is registered. The victim who was a passenger in the vehicle was a habitual resident in a state other than the one where the accident occurred. The vehicle involved in the accident was registered in Spain and the victim, the claimant's wife, was a resident of Spain according to the documentation furnished, f 60, social security card, where she figures as a beneficiary. Therefore, Spain has jurisdiction to hear the appeal filed by the claimant meaning that the first of the grounds of the appeal cannot be accepted.

5. Bankruptcy proceedings

– AAP of Las Palmas. 17 November 2005 (Ref. Aranzadi JUR 2006/35343)
International jurisdiction. Bankruptcy law. Location of the debtor's principal interests.

"Legal Ruling:

. . .

Three. . . . In these proceedings and in accordance with documentation furnished, it is perfectly reasonable that the "focal point of the petitioner's main interests", i.e. the place where he habitually and openly (recognised by third parties) manages his interests, be considered Germany or Belgium. This is determined by the fact that all of his creditors are foreign nationals (German and Belgian) domiciled outside of Spain for business reasons and therefore having no Spanish connection. Moreover, in Spain he does not possess any patrimonial asset whatsoever and it is not known whether he has assets in other countries (he claims he does not) and, more relevant still, the petitioning company has its banking activity domiciled in Germany (in Gangelt and Wuppertal). With financial operations established in Germany (it is there that he manages his bank accounts and receives the corresponding information), it must be assumed that that country, considering the rest of the circumstances as well, is where he habitually exercises the administration of his interests (recognisable by third parties). Even if it were not Germany, the focal point of the petitioner's

interests would have to be considered Kinrooi, Belgium because that is where publicity services were engaged and catalogues supplied for the company's activity and it is the current place of residence of the administrator, Ms. Estíbaliz, according to the power of attorney and the report which she submitted".

6. Precautionary measures

– AAP Cadiz. 15.09.05 (Ref. Aranzadi JUR 2006/305180)
International jurisdiction regarding matters of divorce, child support and precautionary measures. British divorce judgment.

"Legal Ruling: . . .

Seven. (. . .) Art. 31 of Regulation 44/2001 provides: "A request for provisional or precautionary measures provided for under the law of a Member State may be filed before the authorities of that State even if, by virtue of this Regulation, the court of another Member State were to have jurisdiction to rule on the substance of the case."

7. International lis pendens

– SAP Barcelona, Section 11 of 16 June 2005 (Ref. Aranzadi JUR 2005\176231)
International lis pendens. Lack thereof.

"Legal Grounds:

. . . One. (. . .) Lis pendens cannot be claimed because, as has frequently been pointed out in jurisprudence, it requires the identification of persons and the object and cause of the petition in the two proceedings in light of the connection between lis pendens and res judicata (Arts. 421 and 222 LEC) but in this case the first requirement, perfect subjective identification in the two proceedings, was not met. Judging from the documentation submitted, this was confirmed by the Moroccan court decisions delivered in first instance and in the appeal which based their dismissal of the claim on the fact that it was impossible to properly identify the insurance company meaning that an element is missing in the determination of subjective identity and therefore res judicata is not concurring because the substance of the claim is not analysed. No formal errors were found which could lead to dismissal and lack of lis pendens and therefore no other resolution was called for. The judge is under no obligation to admit documentation submitted by the claimant subsequent to the hearing (Art. 435 LEC) especially considering that the said documentation failed to determine the existence of lis pendens or res judicata and refusal to admit a final proceeding did not give rise to the defencelessness of the defendant (. . .)."

– SAP of Madrid, Section 19 of 19 July 2005 (EDJ 2005/151410)
International lis pendens. Lack thereof. Lack of identification of object.

"Legal Grounds:

... Four. (...) One cannot speak of lis pendens or res judicata as viable exceptions given that the Monza proceedings being heard by this court do not have the same objective given that in ordinary lawsuit 724/2002 a damages compensation claim was filed for breach of a deposit, storage and physical distribution of goods contract but in Monza a claim was filed by Micys against Comercial Erradue SA for unpaid invoices corresponding to the last phase of the distribution contract of 2–11–1995. That being so, we are in the process of delving into the very characterisation of the lis pendens and res judicata exceptions in the new law, profusely dealt with in scientific doctrine and recently the object of jurisprudence, especially at the provincial court level. One can therefore not speak of international lis pendens forming part of the 27 September 1968 Brussels Convention or the 16 September 1988 Lugano Convention. It is true that the parts of the proceeding done at Monza and at ordinary declaratory action 724/02 are partially identical but the objects, the identity of the object itself are different in the sense that partial breach of the exclusive distribution contract resulting from several pending invoices has nothing to do with the damages claim for breach of the 26.02.01 contract. Now that the exceptions forming part of the appeals have been dismissed, we can turn to the study of the different grounds on which the appellants based their claims but not before highlighting the existence of the exclusive distribution contract and its importance for the parties, and specifically the concept of clientele for the distributor."

III. PROCEEDINGS WITH ELEMENTS INVOLVING ALIENS AND INTERNATIONAL LEGAL COOPERATION

1. Proceedings with elements involving aliens

– STC, Chamber two of 31 January 2005 (EDJ 2005/1013)
Aliens. Right to effective protection of the courts. Access to Spanish courts.

"Legal Grounds:

... Three. ... And lastly, the fact that the appellant is a citizen of Indian nationality in no way relieves this court of its obligation to guarantee the fundamental right invoked here. As already stated in STC 95/2003 of 22 May, "It must be realised that this Court, as of STC 99/1985 of 30 September, echoing STC 115/1987 of 7 July, has acknowledged the right of aliens, regardless of their legal status, to effective protection of the courts".

– STS. of 10 October 2005 (Ref. Aranzadi RJ2005/8768)
Use of foreign documents as evidence. International maritime transport insurance. Lack of validity of a foreign language bill of lading without translation and without the signature of the vessel's master.

"Legal Grounds: . . .

Three . . . Art. 601 is clear and compliance cannot be assumed by submitting, as the claimant did, the translation at the time of appearance at the small claims hearing because the defendant had already responded to the complaint highlighting the infraction and the translation was submitted at the improper time in the proceeding. (. . .)

The bill of lading was submitted in a foreign language without translation and without the signature of the master, legally required by Arts. 706, 707 and 709, and therefore is not valid".

– ATS. 22 November 2005 (Ref. Aranzadi JUR 2006/26613)
Inadmissibility of the suspension of proceedings resulting from the filing of an extraordinary appeal in the State of origin against the judgment in the process of being recognised. Appealability of decisions in connection with recognition and execution. Primacy of conventional and institutional systems.

"Legal Grounds:

. . .

3. The basis for the conclusion reached concerning the appealability of decisions delivered regarding matters of recognition and execution of judgments, in accordance with the Brussels and Lugano Conventions and Community Regulations 1347/2000 (now replaced by 2201/2003) and 44/2001, as expressed in the judgment of this Court dated 12 March 2002 (motion for reconsideration of denied appeal 75/2002) and of 23 November 2004 (appeal 1981/2001), extends beyond the provisions contained in national procedural rules and is rather rooted in the primacy of supranational rules integrated into the community acquis vis-à-vis domestic production which, in the case of international conventions signed to meet Community aims, has a dual basis: on the one hand their very nature and origin (Spanish Constitution Art. 93) and, on the other hand, their conventional nature (Spanish Constitution Art. 96). Together with that primacy, a characteristic of certain Community rules, particularly Community Regulations, is their direct applicability or direct effect. The consequences of the principles of primacy and direct effect of Community rules not only spells the non-enforceability of domestic rules which are incompatible or run contrary to Community rules, but also prevent the valid enactment of subsequent regulations which are incompatible with the latter and oblige law enforcers to guarantee full enforcement of supranational rules, giving rise to an interaction between domestic and Community law translating into, prima facie, the interpretation of domestic legality in accordance with Community law (. . .).

7. The foregoing establishes two conclusions. The first is that the ruling delivered by Section four of the Provincial Court of Malaga is subject to a Supreme Court appeal, regardless of its form, which must be lodged through the channels laid down in section 3 of Art. 477.2 of the LEC with the unavoidable consequence of having to comply with the legal requirements and those established by virtue of jurisprudence determining the propriety of an appeal lodged

through these channels. The second is that no extraordinary appeal based on a procedural infraction may be lodged, regardless of the outcome of the supreme court appeal.

– SAP of the Balearic Islands, Section 5 of 22 February 2005 (EDJ 2005/24749)
Power of attorney granted abroad. Legal regime. Acceptability in Spanish procedure.

"Legal Grounds:

... Two. ... Procedural law is therefore required to determine competence (mandate), the formalities to be followed before the authorising Notary Public and the Spanish courts where in this case the laws are to be enforced. It is also responsible for determining the sufficiency of the power of attorney and its content, who should be granted the faculties of the granters, title and time limit of the grantee's duties, acts authorised, the nature of the issues and for how long and without having to strictly follow that laid down in the Notary Regulation (in this connection Arts. 156 to 169 EDL 1944/33 apply), superseding the doctrine concerning requirements established by this Provincial Court in its Judgment of 7 February 2001, reflecting the related Supreme Court decision of 23.06.77 and 17–6–1983. And we would insist that, despite compliance with applicable provisions for its formalisation in Belgium, it is the responsibility of our Courts to judge the sufficiency of the power of attorney and its content.

Once the power of attorney is presented in Spain, it is Spanish law which governs and decides whether it complies with our procedural rules and this determination is not limited to whether or not it has the apostille required by the Hague Convention of 5 October 1961.

(...)

In accordance with lex fori it must be determined whether representation by Procurator in the proceeding is compulsory, the format of the power of attorney and its very existence, content and effects regarding the proceeding."

– SAP of Madrid, Section 21 of 17 May 2005 (EDJ 2005/87353)
Translation of foreign documents into Spanish.

"Legal Grounds:

... Three. (...) The claim giving rise to this proceeding does not lack clarity or precision in the determination of the parties or petitions and therefore the incidental plea of defence under scrutiny and which is the object of this remedy of appeal was rightly rejected by the "a quo" judge. If the claimant fails to submit the translation of the documents drafted in a foreign language as called for by Art. 144 of the Code of Civil Procedure, the consequence is the lack of probative value of the untranslated documents and not the incidental plea of defence claiming a legal defect in the way the claim was filed".

– AAP. of the Balearic Islands. 11 October 2005. (Ref. Aranzadi JUR 2005/248332)
Acceptability of a foreign public document. Competence of the requested body. Public deed bearing witness to a debt: Debtor subject to immediate settlement, all assets being valid for payment regardless of their location: assets located in Spain.

"Legal Grounds:

. . .

Two. (. . .) The only issue subject to the decision of this court is the determination of the place of execution in order to rule on the territorial jurisdiction of the First Instance Court of Palma, the place of execution which, as pointed out by this court in its decision of the 4th of this month, "is not synonymous with the place of observance of the contract because in the text of the Convention itself (in reference to the Brussels Convention of 27 September 1968 now replaced by Regulation 44/01) these two expressions are used with their own different meanings. Thus, Art 5.2 refers to the place where the obligation is or should be observed (. . .), reaching the conclusion that in the Brussels Convention the 'place of observance of the contract' is different from the 'place of execution'", the latter being the place where the decision is judicially executed which, in light of its material connection with the object of the litigation, leads to the concept of forum conexitatis and brings us to the location of the debtor's assets. Art. 39.2, however, establishes territorial jurisdiction for execution as the legal domicile of the party against whom the suit was filed or the place designated by the parties in the contract, otherwise resorting to the determination of the place of execution in compliance with the rules of private international law of the forum (. . .). Moreover, in the public deed of the debt, the debtor was subject to immediate execution of the debt against all of his assets regardless of their location, the only known assets being those in the judicial circumscription of Palma and therefore there does not appear to be any doubt as to its territorial jurisdiction to enforce the said executive public instrument (. . .)."

– RDGRN 4 July 2005 (EDJ 2005/127271)
Translation of foreign documents into Spanish.

"Legal Grounds:

. . . One. The first issue emerging in this appeal is whether the sworn translator's signature must be validated or not in the case of a document drafted by the said translator and submitted to the registry. Art 37 of the Mortgage Regulation points to the need for translation of documents drafted in a foreign language stipulating that the translation be done by the Office for language interpretation or by competent officials authorised by virtue of law or international convention or, if appropriate, by a Notary Public. The Registrar may, under his responsibility, forego the translation when he knows the language in question. In the case of translators with an official Spanish degree, the

Regulation of the Language Interpretation Office of the Ministry of Foreign Affairs refers to sworn translators. In accordance with Art. 13 of the said Regulation, the translation done by the latter is considered official and stipulates that they must certify the accuracy of their work with their signature and seal.

In this case, the document was signed and sealed and the pertinent administrative resolution bestowing the title of sworn translator on the person signing the document was likewise submitted. Therefore, the official status of the translation and of the translator has been proven. Hence, on this point the appeal must be upheld.

Two. The second of the defects raises the question of whether the signature stamped on a certificate of law issued by the German Consulate must be legalised. The letters P.O. precede the signature on that certificate (it is assumed that they stand for *por orden* in Spanish which means "by order of") and it is followed by the words "the deputy-consul". The document also bears the seal of the Consulate General of Germany in Barcelona. Art. 36 of the Mortgage Regulation refers to other means by which to accredit a foreign regulation, i.e. affirmation and report by a diplomat, consul or competent civil servant of the country of the applicable legislation. In this particular case it must be assumed that the foreign consulate from which the document was issued had applied its own domestic procedural rules regarding the signing by the Deputy-consul. Therefore, assuming that the document was signed by a consular agent, the 7 June 1968 European Convention applies meaning that legalisation is not required of a document issued by a consular agent of Germany given that this formality was eliminated in the case of documents issued in an official capacity by a consular agent of a contracting state competent to do so in another contracting state. Hence, on this point the appeal must be upheld as well.

Three. The third defect addressed in this appeal refers to the possible nonvalidity of the power of attorney conferred by the intervening credit institution in light of its status under German law. The documentation furnished clearly indicates the concession of faculties by the said credit institution to its representative to conduct the act in question. One must bear in mind that in matters of voluntary representation, Art 10.11 of the Civil Code remits to the Law under which the faculties of the represented party are exercised, namely Spanish law, given that this is not a case of organic but rather voluntary representation. Under Spanish law, the representative authority granted by the power of attorney and ratification thereof in the file is clearly sufficient. Hence, on this point the appeal must be upheld as well."

2. International Legal Cooperation

– STC. 12 September 2005 (Ref. Aranzadi RTC 2005/221)

Infringement of the right to effective protection of the courts. Citation by public notice in a civil litigation case without having first made every effort to personally issue the citation at the domicile of the foreign subject (in England).

Legal Grounds:

5 (. . .) it cannot be said that the judicial body acted with due diligence in the proper constitution of the procedural relationship when it decided, upon request by the claimant, to issue a citation by public notice to the party who is now the appellant, considering the latter's whereabouts to be unknown after a single unsuccessful citation at the building giving rise to the litigation, despite statements made by the person serving that citation and the information discovered by the police of Javea, clearly indicating that the appellant resided in England and that the documentation (deeds and mortgage) attached to the complaint, forming part of the case record, featured the appellant's address as 52 New Road, Worthing, West Sussex. Moreover, this was the address appearing on the mortgage deed for the purpose of payment of mortgage instalments and therefore is the address where debt payment notice must be sent pursuant to Art. 1171 of the Civil Code . . . In assessing the degree of diligence employed by the judicial body in the correct formation of the legal-procedural relationship, one must consider the moment of citation.

– STS, Chamber 1, 4 March 2005 (EDJ 2005/23801)
Serving of documents abroad. Citation by public notice. Validity.

"Legal Grounds:

. . . Two. The attitude adopted by Mr. Pedro at the ordinary claim of dominion hearing where he made not the least effort to have the stakeholders personally called to take part in the proceeding comes as quite a surprise when compared with the zeal he exhibited at the time of enforcement of the judgment, even requesting a few days in the month of August to take advantage of the visit in Piñar of the spouses Felipe and María Esther (fs. 77 to 80). This negative behaviour is even more reproachable considering that if the aforementioned spouses could not be summoned because they were abroad, nothing stood in the way of at least trying to determine their place of residence through their daughter Rebeca residing at No. 001 of PLAZA 001 and therefore adjacent to building (No. 1) where the unsuccessful citation was served. Moreover, Rebeca occupied one of the warehouses involved in the litigation thus making it even more surprising that now he is basing rejection of the hearing on the circumstance that the spouses (allegedly) knew (or should have known) from their daughter that the legal proceeding was under way.

And if this were not enough, it could also be pointed out that all possible efforts to contact the spouses personally were not made because the legal domicile of the defendants abroad could have easily been determined by simply going to the Town Hall or the census office where they are registered as absent residents living in Enschede (Netherlands). In light of all of this, the argumentation presented in the appealed decision is flawed when it refers to extra-procedural awareness of the existence of the proceeding, especially considering that this argument is based on conjectures with no solid backing, i.e. no effort was made to corroborate the claimants testimony used to accredit that they had

not visited the village over the previous several years (corroboration which should have been undertaken in line with jurisprudence doctrine set out in the Judgments of 3 October 1988, 18 November 1991, 8 May, 1992 and others). Knowledge that the daughter may have had is insufficient and, in any case, no attempt was made in the proceeding to prove her knowledge of the transmission to her parents.

This reasoning leads us to the overwhelming conclusion that the citation was not properly conducted because citation by public notice is subsidiary in nature and it was not reasonable to assume that it was impossible to locate the specific domicile of the defendants thus resulting in malicious concealment of the proceeding which is fraud as specified in the claim. It is therefore not necessary to examine the first ground of the Supreme Court appeal, its second and third grounds being sufficient to completely annul the appealed judgment and to admit the claim with assignment of court costs to the defendant Peter in light of his reckless opposition given the circumstances and in compliance with Arts. 1.1715.2 and 782, paragraph 2, LEC.

The solution adopted in the appeal proceeding is fully in line with Constitutional Court doctrine and the jurisprudence of this Chamber which can be summarised in the following paragraphs:

1. It has been established time and again by this court that, to initiate and undertake judicial proceedings in full compliance with the right to effective protection of the courts in the absence of defencelessness (Art 24.1 Spanish Constitution), a proper and scrupulous constitution of the legal-procedural relationship must be established and in so doing an instrument of major importance is the procedural regime relating to summons, citations and notifications of the parties taking part in the different actions forming part of legal proceedings because this is the only way by which to guarantee the indispensable principles of contradiction and equality between parties in litigation (SSTC 268/2000 of 13 November; 34/2001 of 12 February; 99/2003 of 3 June);
2. In order to achieve this full effectiveness of the right to defence, Art. 24.1 of the Spanish Constitution specifically refers to preventing situations of defencelessness thus allowing for a hearing in which the parties can defend their legitimate rights and interests. This compels judicial bodies to personally summon, cite and notify defendants, this being the normal means of communication whenever feasible, thus assuring that the parties are given the chance to appear before the court to defend their positions vis-à-vis the claimant (SSTC 216/2002 of 25 November; 99/2003 of 2 June; 19/2004 of 23 February);
3. Special diligence is required when undertaking tasks of procedural communication to assure, as far as possible, that the said communication reaches the addressee giving the latter the opportunity to defend himself and preventing defencelessness (SSTC 18/2002 of 28 January; 6/2003 of 20 January);

4. Citation by public notice (which is strictly subsidiary in nature: SSTC 185/2001 of 17 September; to be used only as a last resort, complementary and extraordinary reserved for extreme cases where it is impossible to locate the defendant: STC 42/2001 of 12 February) requires first having used all other ordinary means of communication offering greater guarantees and security of reception by the addressee, and the conviction, based on reasonable criteria of the judicial body ordering its use due to the fact that the domicile or whereabouts of the interested party are unknown, that other means of procedural communication are futile and useless (SSTC 216/2002 of 25 November; 220/2002 of 25 November; 67/2003 of 9 April; 138/2003 of 14 July; 181/2003 of 20 October; 191/2003 of 27 October; 162/2004 of 4 October and 225/2004 of 29 November);
5. This requirement of trying all other forms of communication set out in the foregoing refers both to the court (judicial bodies must use all other reasonable means by which to inform the defendant of the existence of a proceeding) as well as to the claimant (who has the duty to collaborate with the judicial body by facilitating any data which could help in locating the defendant) (SSTC 134/1995 of 25 September; 268/2000 of 13 October; 42/2001 of 12 February; 87/2002 of 22 April); although an inordinate investigative effort which could cause undue restriction of the rights of defence of those taking part in the proceeding is not called for (SSTC 268/2000 of 13 November; 18/2002 of 28 January);
6. To be able to file a complaint concerning the improper use of citation by public notice, effective or material (not simply formal) defencelessness must have occurred (SSTC 26/1999 of 8 March; 197/1999 of 25 October; 162/2002 of 16 September; 6/2003 of 20 January); and such defencelessness cannot be claimed if, in light of the circumstances surrounding the case the interested party had, or could have had by making a minimum effort, extra-procedural knowledge that there was litigation pending and was privy to this information at a point in time allowing him to appear before the court to defend his rights and interests (SSTC 26/1999 of 8 March; 77/2001 of 26 March). Protection cannot be afforded to those who have not made a diligent effort to protect their rights and interests either by remaining at the margin of the proceeding by taking a passive attitude with a view to gaining an advantage or when it can be concluded that they had extra-procedural knowledge of the existence of the litigation in which they were not personally cited to appear (SSTC 36/2001 of 12 February; 87/2002 of 24 April; 6/2003 of 20 January; 44/2003 of 3 March; 90/2003 of 19 May; 99/2003 of 2 June; 181/2003 of 20 October);
7. The burden of proof concerning extra-procedural knowledge is on the party making that allegation (STC 26/1999 of 8 March) because the person claiming defencelessness cannot be called upon to prove his own diligence because of the principle of presumption of unawareness of litigation (SSTC 161/1998 and 126/1999 of 28 June). Accreditation must be verifiable (SSTC

70/1998 of 30 March; 122/1998 of 15 June; 26/1999 of 8 March) and although the sufficient proof requirement does not exclude the human criteria rules governing proof of presumption (STC 102/2003 of 2 June) and although it is sufficient if, from an examination of the actions, knowledge of the litigation or knowledge by making a minimum effort can be sufficiently and reasonably deduced (SSTC 86/1997; 113/1998; 26/1999), extra-judicial knowledge based on mere conjecture cannot be presumed because the presumption is (as already stated) that the party in question has no knowledge of the litigation if the latter so alleges (SSTC 161/1998 of 14 July; 219/1999 of 29 November; 99/2003 of 2 June; and 102/2003 of 2 June EDJ2003/15670);

8. An interpretation must be made of the rules governing some appeal processes of final judgments in the most favourable sense with a view to permitting, at the jurisdictional stage, protection of fundamental rights (SSTC 185/1990; 289/1993 of 9 October);
9. Case Law issued from this Civil Court (not free of deviation) especially in respect of the rule regarding Art. 24.1 of the Spanish Constitution EDL 1978/3879, rigorously outlawing any form of defencelessness, has consistently conceded hearing in default to defendants cited by public notice when no efforts were undertaken to make personal contact at the latter's' known domicile or when their whereabouts could be discovered by making normal efforts (SS. of 3 October 1990, 17 October 1991, 19 February 1994, 3 October 1995, 15 April 1996, 26 February 2002; and in the same regard SSTC 186/1991 of 3 October; 301/1993 of 21 October; 15/1996 of 30 January; 42/2001 of 12 February).

From the foregoing it can be concluded – ratifying what has already been reasoned – that a thorough effort was not made to issue an ordinary citation and improper use was made of the citation by public notice. The judicial body failed to comply with its investigative duty because since the case file showed that the defendants were working abroad it could and should have gathered information on their place of residence from the census office – where their address was indeed on file. – The claimant likewise failed to fulfil his duty to collaborate in good faith as he is required to do given that it would have been extremely easy for him to have found the exact information allowing for personal citation of the defendants."

– SAP of Las Palmas, Section 4 of 26 May 2005 (EDJ 2005/121605)
Citation abroad. The Hague Convention of 15 November 1965. Need to guarantee the exercise of the right to a hearing.

"Legal Grounds:

... Two. (...) The said citation was conducted in accordance with the Hague Convention of 15 November 1965 on the service abroad of judicial documents which allows, given the lack of specification, the remittal of the documentation

(the citation) to be verified "according to legal procedures" (Art. 5(1)(a)), i.e. "in accordance with the procedures prescribed in the law of the requested State for the notification or service of documents issued in that country and addressed to persons residing within its borders". The request for service of documents was thus executed (page 218) on 25 February 2000 by post to the postal office of Frankfurt in compliance with declaration 17) of the aforementioned Convention made by Germany which states in paragraph one that: "Requests for the service of notification of documents shall be sent to the central authority of the Land in which the request is to be carried out (. . .). The central authorities shall be deemed competent to channel notification requests directly by post if notification conditions are met in accordance with paragraph Art. 5(1)(a) of the Convention. In this case, the competent central authority will deliver the document to the postal authorities for notification or service. In all other cases, the Local Court (Amtsgericht) in whose district the notification or service of documents is to occur, shall be deemed competent to carry out notification requests. Actual notification shall be undertaken by the Secretariat of the Local Court." On 11 April 2000 the defendant appeared before the court claiming to have been cited on 6 March 2000 (page 248) irregardless of which, by order of 16 June 2000 the period for citation was declared closed precluding the reply formality given that, according to the Letter Rogatory, the citation had been served on 25 February. An appeal for reversal was lodged and subsequently dismissed by order of 31 July (page 275) insisting on that argument. A remedy of appeal was then lodged against this latter order.

This Chamber cannot share the reasoning laid down by the a quo Court to deny the defendant the possibility of procedural contradiction due to the passing of the period for citation. As stated in the foregoing, the request for the serving of the citation was indeed executed on 25 February 2000 but not by means of personal delivery but rather by a new remittal to a post office for subsequent delivery to the addressee. This means that the date appearing on the service certification cannot be taken as the effective "notification or service of document" and therefore the a quo judge should have acted in accordance with Art. 16 of the aforementioned Convention which provides: When a writ of summons or an equivalent document has to be transmitted abroad for the purpose of service, under the provision of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant form the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled:

a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and
b) the defendant has disclosed a *prima facie* defence to the action on the merits. An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Since the citation was not actually delivered on the date of execution (25 February) but rather the remittal by post and in light of the plausibility of the defendant having received the notification on 6 March given the time taken for ordinary postal deliveries although there is no documentary evidence proving this date, the judicial body should have protected the defendant's right to reply and defence by admitting the defendant as party and giving her a period of time to formulate a reply. In fact, the evidence submitted clearly shows that remittal by the central competent authority of Germany (Ministry of Justice of Hessen) took place on 25 February 2000 and was collected by the addressee (the defendant) on 6 March 2000 (pages 285–288, copy and translation; pages 380–381 original), meaning that her appearance in the proceeding on 11 April of that year was within the time period established under the citation order.

Depriving the defendant of her right to submit her allegations in rebuttal of the facts put forward by the other party, i.e. deprival of the right of rebuttal-hearing of a party who appeared before the court within the legally stipulated period of time, is a violation of effective protection of the courts giving rise to effective defencelessness (Art. 238.3 L.O.P.J.). Therefore, in accordance with the request formulated, the appeal is admitted due to procedural defect without the need to go into the other issues addressed, this court declaring the nullity of the actions subsequent to the order of 16 June 2000 and returns the proceeding to that point giving the defendant a period of nine days to present her rebuttal. The proceeding will then continue its legal course and, despite the nullification ordered, evidence already submitted which is invariable will not be affected."

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND DECISIONS

1. General principles

– ATS, Civil court, Section 1 of 19 April 2005 (EDJ 2005/63772)
Exequatur of judgment nullifying a Venezuelan marriage. No agreement with Venezuela. Requirements.

"Legal Grounds:

. . . (. . .) Given that there is no treaty with the Republic of Venezuela nor any applicable international rules governing matters of recognition and enforcement of judgments, the general regime of article 954 LEC (of 3 February 1881 should apply – still in force in accordance with the provisions of Sole Repeal Provision, paragraph one, exception three of the LEC 1/2000 of 7 January – since negative reciprocity has not been detected (article 953 of the aforementioned law of 1881) and given that the petitioner filed request for the homologation of the effects of the judgment notwithstanding the provisions of Art. 84.1 of the Civil Registry Regulation.

Two. According to the law of the state of origin applicable to the case, the judgment is final. This finality, the aim of the exequatur, is a prerequisite regardless of the recognition regime, laid down in article 951 (of the aforementioned 1881 law – 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.

Three. Requisite No. 1 of article 954 of the aforementioned LEC of 1881 should be considered fulfilled in light of the personal nature of the action taken.

Four. As for requirement No. 2 of the same article 954, it has been accredited that the divorce proceeding was initiated by common accord of the spouses.

Five. As for requisite No. 3 of article 954, there is full conformity with the Spanish legal system in an international sense: article 85 of the Civil Code envisages the possibility of divorce regardless of the nature or duration of the marriage.

Six. The authenticity of the resolution as required by article 954(4) is guaranteed by the apostille with which it has been processed as verified in the court record.

Seven. There is no reason to suspect that the jurisdiction of the Republic of Venezuela was born of the parties' search for a fraudulent forum of convenience. Article 6(4) of the Civil Code and 11.2 LOPJ; Articles 22.2 and 3 of the LOPJ do not establish forums of exclusive jurisdiction the way article 22.1 of the same Organic Law does but in this case there are no circumstances in favour of the jurisdiction of the Spanish courts. Quite to the contrary, there are clear connections which cannot be overlooked such as the Venezuelan nationality of the wife and residence of the spouses in the Republic of Venezuela when the divorce case was filed before the Venezuelan courts and the place where the marriage took place, reasons supporting the competence of the courts of origin and thus excluding fraud in terms of the law applicable to the substance of the case, an issue linked to the former."

– ATS, Court 1 of 17 May 2005 (EDJ 2005/72797)
Recognition and enforcement of foreign judgments. Access to Supreme Court appeal. Convenience of such appeal.

"Legal Grounds:

. . . One. The first comment which must be made has to do with the examination of the appealability of the ruling delivered by the Provincial Court of Malaga settling the remedy of appeal lodged against the ruling by the first instance judge granting the recognition and enforcement requested regarding the foreign judgment delivered on 9 March 1994 by the High Court of Justice Queens Bench Division of the United Kingdom and which must be undertaken from the perspective of the provisions of Art. 477.2 LEC 2000 according to which Supreme Court appeals are limited to judgments delivered in second instance which therefore always excludes *Autos* (initial rulings). This would mean that, in principle, the *auto* which is the object of this appeal would not, in any case,

be a candidate for a Supreme Court appeal. It is also obvious that an extraordinary appeal for reason of procedural infraction would also be out of the question, especially in light of section two of final provision sixteen of LEC 2000 declaring unenforceable, inter alia, Art. 468 of LEC 2000 by virtue of which "The civil and criminal chambers of the High Courts of Justice will act as civil courts in the case of procedural infraction appeals lodged against judgments and rulings delivered by Provincial Courts bringing the second instance to a close".

However, the general conclusion reached must be clarified in line with the ruling of this court delivered on 19 November 2002 in appeal case 539/2002, ratified in subsequent rulings on 21 January 2003, appeal 841/2002 and 25 May 2004, appeal 1456/2001 justifying appealability to the Supreme Court under exceptional circumstances in the case of *Autos* delivered by Provincial Courts, resolving the appeal for reversal lodged against the denial or granting of recognition and enforceability of a foreign judgment in the following terms:

"In general terms and in relation to the appealability of decisions delivered in accordance with the Brussels and Lugano Conventions or EC Regulations 1347/200 and 44/2001, attention must be drawn to an exception to the general rule according to which, pursuant to Art. 477.2 LEC 2000, the Supreme Court appeal – and therefore, in the applicable transitory scheme, the extraordinary appeal for procedural infraction – is limited to judgments delivered in second instance which always exclude *Autos*. This exception derives from the particularity of the recognition and execution proceeding itself laid down in the aforementioned international instruments.

These international instruments regulate an exequatur proceeding whose aim is to provide complete and autonomous regulation applicable to requests for execution and recognition. Now this affirmation, normally applying to the resource system laid down by those instruments, is more of a declaration of principle which should not be interpreted in the literal sense of the word because it is clear that the Brussels Convention as well as Community Regulations leave certain aspects of the proceeding to the regulation of national laws.

In Spain, the legal regime applicable to the exequatur proceeding is found in Arts. 954 et. seq. of the LEC of 1881 which remains current despite the entry into force of LEC 2000 pursuant to the provisions of Sole Repeal Provision 1(3) by virtue of which the International Legal Cooperation Act is not enacted. As it is clear that the said domestic regime is not capable of bridging all of the gaps produced when international instruments are applied, especially at the appeal stage envisaged therein, integration mechanisms in LEC 2000 itself based on international objectives and the system of international instruments themselves must be found.

The exequatur proceeding is divided into two differentiated stages. At the first which is implemented in Spain before a First Instance Judge, there is no contradiction per say: the request is examined by the judge who simply verifies whether recognition conditions are met and then issues a decision either autho-

rising or denying the applicability of the foreign decision. It is, therefore, at the appeal stage provided for against the preceding decision where the contradiction actually occurs between the party seeking a declaration of enforceability and the party requesting the exequatur.

As provided by the foregoing and by analogy with the provision of Art. 956 of the LEC of 1881, the type of decision delivered by the First Instance Judge either in favour or against the requested recognition and execution is that of *Auto*. There is no unanimity, however, regarding the type of decision which should be taken in determining the remedy of appeal – with opposition between the parties – lodged against judgments.

Be this as it may, the particularity of the proceeding itself is what determines whether an exception can be made concerning the rigor of Art. 477.2 LEC. It is possible to lodge an appeal for legal protection from the said precept despite the fact that the appeal was decided by *Auto* rather than by a Judgment, by drawing a comparison between the final judgments referred to in Art. 477.2 LEC 2000 to the decisions – regardless of whether these are in the form of *Auto* or judgment – regarding the appeals lodged on matters of recognition and execution of foreign judgments in accordance with the Brussels Convention of 27 December 1968 and the Lugano Convention of 16 September 1988 (Arts. 36, 37.1 and 40) and with EC Regulations 1347/2001 (Arts. 20.1 and 26) and 44/2000 (Art. 37.1 and 43).

Notwithstanding the above, exceptional appealability in *Autos* delivered by the provincial court as part of an exequatur should be limited exclusively to the *Auto* on the contradictory appeal and may not extend to any other than the one related to the resolution of the contradiction at hand because in the absence of that contradiction between parties, the basis for the exception advocated is missing.

For that reason, the exceptional grounds for supreme court appeal – and for a procedural infraction in the transitory regime – only in the case of judgments delivered by provincial courts, may not be extended to just any type of *Auto* delivered by the provincial courts in exequatur proceedings but rather must be limited to the resolution of the contradictory appeal envisaged in international instruments".

From the foregoing it can therefore be concluded that here we are dealing with a proceeding in which the decision delivered is indeed appealable, the access to the appeal in cassation being ordinal No. 3 of Art. 477.2 LEC 1/2000, bearing in mind the distinctive and exclusionary nature of the three ordinal numbers of Art. 477.2 LEC 2000, calling for accreditation of the existence of reversal interest in line with the repeated criteria of this Chamber in numerous motions for reconsideration of denied appeals in cassation and upheld by the Constitutional Court in Decisions 191/2004 of 26 May, 201/2004 of 27 May and 208/2004 of 2 June and in Judgments 150/2004 of 20 September, 164/2004 of 4 October, 167/2004 of 4 October and 3/2005 of 17 January. These decisions

have established that the said criteria, adopted by the General Assembly of Magistrates on 12 December 2000, does not constitute a violation of Art. 24 of the Spanish Constitution.

The appellant filed a Supreme Court appeal in accordance with ordinal number 2 and 3 of Art. 477.2 of LEC 2000 and, having cited as infringed legal precepts Arts. 46.2, 33.3 and 27.2 with regard to Art. 34.2 of the Brussels Convention, claimed that the proceeding surpassed the twenty-five million peseta level and therefore presented reversal interest for opposition to Supreme Court jurisprudence citing, in this regard, the judgments delivered by this Chamber on 6 and 21 July 2000, 19 September 2000 and 26 February 2001 which rendered null and void the enforcement decreed by the court of first instance due to failure to submit the document accrediting the delivery or service of the citation.

It should be pointed out that the avenue opened by ordinal No. 2 of Art. 477.2 of the LEC was closed as of the moment in the proceeding when it was processed by virtue of the matter and not the amount, improperly using the avenue corresponding to ordinal No. 2 of the aforementioned Art. 477.2 in the preparatory brief. The fact that the economic value of the case, followed by the matter addressed, exceeds the sum of 25 million pesetas in no way means that accreditation of reversal interest can be ignored as a prerequisite for appealability and therefore, in the preparation of the appeal, Art. 477.2–2 LEC 2000 cannot be invoked. Therefore, the determining factor in gaining access to a Supreme Court appeal in these cases is accreditation of the appealability of reversal interest". Despite having also used the avenue of reversal interest in the preparatory brief to gain access to an appeal, this latter avenue is indeed the correct one bearing in mind that the proceeding was substantiated by virtue of the matter.

Two. Notwithstanding the above, the Supreme Court appeal is not admissible due to the provisions of Art. 483.2, 3, indent two of LEC 2000. It would suffice to examine the appealed decision to see that it does not contradict allegedly violated Supreme Court doctrine given that the decision is based on specific circumstances alluded to by the appellant; namely that from the case file documents, specifically the certification issued by the High Court of Justice, Division Queens Bench, it can be deduced that the aforementioned defendant was duly notified on 11 February 1994 of the claim giving rise to the said proceeding via the postal service (substitute notification) and the defendant was also notified in due form of the judgment subsequently delivered which is the object of enforcement in this case in accordance with Order 65, rule 5. Thus, the defendant was aware of the existence of the suit, of the proceeding to which the latter gave rise, of the Court where the case was heard and finally, of the judgment delivered as pointed out in Legal Ground one of the ruling delivered by the first instance judge, to which legal ground five of the decision delivered by the provincial court refers.

Insofar as this is the case, the appealed decision does not contradict the Judgments delivered by this chamber which were cited as examples of infringement in the preparatory brief; judgments which rendered null and void the enforcement decreed by the instance court due to failure to submit the document accrediting the delivery or service of the citation at the request or substantiation stages.

In this respect, we should not lose sight of the fact that reversal interest arises from the legal conflict produced by the infraction of a substantive rule applicable to the object of the proceeding (the ground for the Supreme Court appeal), contradicting the doctrine of this chamber (constituting a supposition of the appeal) making it clear that this conflict must really exist and be accredited by the party; any appeal attempt invoking "reversal interest" appearing as merely nominal, crafty or instrumental being considered inadmissible, the aim of the appeal, namely the upholding or reasoned change of the jurisprudence which was contradicted, being impossible to achieve.

In this case, reversal interest represented by the said contradiction of Supreme Court jurisprudence does not refer to the way the issue was resolved based on elements of fact and judicial assessments forming part of the judgment based on the said elements but rather is projected towards an assumption different from the one envisaged in the judgment, completely divorced from the facts and legal consequences deriving from the latter. This is, therefore, an example of a merely instrumental rule violation and thus a feigned reversal interest, i.e. non-existent, unable to unify the jurisprudence which is one of the characteristics of an appeal as of the moment at which it addresses a situation which is different from the one dealt with in the appealed decision (AATS, inter alia, of 14 September, 26 October and 10 November 2004, in appeal proceedings 2340/2001, 2139/2001 and 2261/2001)."

– ATS, Court 1 of 28 June 2005 (EDJ 2005/117330)
Exequatur. Failure to personally serve notice of the judgment. Denied.

"Legal Grounds:

... One. Given that there is no treaty with the Dominican Republic regarding recognition and enforcement of judgments, the general regime of article 954 LEC (of 3 February 1881 should apply – still in force in accordance with the provisions of the second Transitory Provision of Art. 2 LEC 1/2000 and which remains current in any case following the entry into force of the new procedural law in accordance with its Sole Repeal Provision, paragraph one, exception three since negative reciprocity has not been detected (article 953 of the aforementioned law).

Two. From among the requirements to which an official statement of acknowledgement is subject, article 954–2 of the LEC of 1881 requires that the enforceable judgment "must not have been delivered in default". In light of this requirement, the aim of which is to prevent the enforcement of judgments delivered in proceedings in which the defendant has not appeared before the court

and therefore has been unable to adequately exercise his right to defence, this Court has identified the different possible types of default of appearance based on the different reasons for the latter and has thus distinguished among the cases in which the defendant, duly cited and summoned (i.e. in line with legal proceeding guidelines and allowing time to build a defence) fails to appear before the court: voluntary default of appearance because he does not recognise the authority of the judge, because it is an inconvenience or simply because he lets deadlines pass, and those other cases in which default of appearance of the defendant is due to not knowing that a proceeding is under way, this latter circumstance, due to its repercussions in terms of respect of the right to defence, posing an obstacle to the recognition of the foreign judgment (AATS 28–10–97, 23–12–97, 17–2–98, 7–4–98, 2–2–99, 22–6–99, 7–9–99, 28–9–99, 16–5–2000, 3–10–2000, 23–1–2001, 27–3–2001, 10–4–2001, 24–4–2001, 18–9–2001, 30–10–2001, 6–11–2001, 29–1–2002, 30–4–2002, 14–5–2002, 18–6–2002, 25–6–2002, 2–7–2002, 17–9–2002, 20–10–2002, 5–11–2002, 11–2–2003, 11–3–2003, 20–5–2003, 1/3/2005, and others).

Based on the above it should be indicated that in the case at hand and based on the documentation in the case file and a statement by the clerk of the court of origin to the effect that "having been impossible to verify the domicile, residence or whereabouts of the defendant, given that the latter was not found at his last place of residence, he shall be summoned by the fixing of a copy of this document on the door of the municipal court, leaving it in the hands of the public prosecutor of Espaillat and having failed to appear in person a judgment was delivered in his absence". Thus there was no evidence of any citation or summons at the hearing of origin nor notification of the judgment whose recognition is the object of this discussion. These circumstances indicate this his failure to appear before the court are not due to reasons of personal inconvenience, the only form of the said failure to appear which would not represent an obstacle to the recognition and enforcement of the judgment delivered by the Dominican courts. The request for exequatur must therefore be denied since the claimant failed to accredit that the defendant had knowledge, in time and form, of the legal action taken against him. Nor was there any expressed statement of conformity from the defendant in this exequatur which would have remedied the defencelessness characterising the litigation at origin.

– AAP Madrid, Section 9 of 16 May 2005 (Ref. Aranzadi JUR 2005/156261)
Recognition and execution of foreign decisions. Regulation 44/2001. Extension of enforcement to third parties not included in the corresponding case. Inadmissibility. Territorial competence to enforce decisions.

"Legal Grounds:

. . . Three. Regarding the background issue addressed in the remedy of appeal concerning the decision delivered against the *Banco Nacional de Cuba* on 15 April 2003 by the High Court of Justice calling for extension of the enforcement of the said decision to the Cuban nation, the appealed decision

should be upheld given that the issue addressed in requesting the extension of the enforcement of the decision delivered exclusively against the *Banco Nacional de Cuba* does not deal with whether the said Bank or even the country of Cuba enjoys jurisdictional immunity in the case under scrutiny but rather whether enforcement of a specific decision delivered by a European Community court against a legal person can be extended to another different legal person with ties or relations with the former.

In respect of this issue, Regulation 44/2001 of the European Union, regulating the recognition and enforcement of judicial decisions in Member States different from the ones in which they were delivered, does not regulate the specific rules of enforcement but rather, once enforcement has been agreed, it must be undertaken in accordance with the domestic rules of each country.

Art. 558.2 of the LECiv defines the persons against whom decisions may be enforced and specifically Art. 558.2.1 provides that decisions may be enforced against the party appearing as the debtor in the document serving as the basis for enforcement.

The foregoing indicates that the Spanish court which recognised and enforced the decision delivered by the British court can in no way extend the said enforcement to subjects or persons different from those appearing in the said decision given that this would be an infringement of Art. 38.1 of the Regulation in the sense that enforcement must be undertaken in the terms and against the persons who were convicted in the enforced decision but not in different terms or against different persons regardless of their ties with the person convicted by the court delivering the decision. Moreover, it would be inadmissible to extend enforcement to a third party who was not a party to the proceeding in which the decision was delivered and therefore was not convicted in the decision dated 15 April 2003 delivered by the High Court of Justice.

Four. A remedy of appeal was lodged on behalf of the *Banco Nacional de Cuba* against the decision dated 15 September 2003 claiming lack of territorial competence of Spanish courts and tribunals to rule on the enforcement of decisions against the said entity based on Art. 39.2, 60 of Regulation 44/2001.

As argued in the appeal brief, Art. 39.2 of Regulation 44/2001 provides that competence shall be determined either by the domicile of the party against whom enforcement is undertaken or by the place of enforcement.

As for the determination of domicile for the purpose of establishing the territorial jurisdiction of Member States, Art. 60 of the aforementioned Regulation refers back to the domestic law of each State and includes some special rules relating to legal persons in Art. 60, allowing for litigation against the latter at the location of statuary headquarters, general administrative office or centre of main activity while Art. 51 of LECiv provides, as the general forum of legal persons, their legal domicile but litigation may also be initiated against the latter at the place where the situation or legal relationship arose or should be enforced provided that it has a premises open to the public or an authorised representative to act on behalf of the company.

This case does not meet the requirements laid down in Art. 60 of Regulation 44/2001 or of Art. 51 of the LECiv necessary for Spanish courts to have territorial jurisdiction bearing in mind that the *Banco Nacional de Cuba* does not have its legal domicile in Spain, nor are any of the fora which, by connection, would permit attribution of the said territorial jurisdiction to the Spanish courts applicable.

The second criteria established under Art. 39 of Regulation 44/2001 in the determination of territorial jurisdiction is the place of enforcement. In this connection once again, Spain cannot be considered the place of enforcement of the judgment delivered by the British court given that neither the call for enforcement nor any other document forming part of the case file serves as evidence or points to the existence of any type of assets of the person against whom enforcement in Spanish territory is initiated, the appellant party himself acknowledging the entity's situation of utter insolvency.

And lastly we would point out that, in accordance with the enforcement proceeding envisaged under Regulation 44/2001, the person against whom request was filed for the recognition and enforcement of a judgment or executive order delivered in another Member State of the EU may claim lack of territorial jurisdiction in lodging his remedy of appeal against the ruling calling for recognition and enforcement given that this is the only moment at which the said Regulation allows the enforcee to oppose the enforcement and address all of the issues surrounding the said enforcement.

– SAP Alicante, Section 5 of 25 May 2005 (Ref. Aranzadi JUR 2005/203985)
Enforcement of foreign judgments. Courts costs. Fees not included in the decision. Denial.

"Legal Grounds:

. . . Two. In the appeal proceeding filed before this Court, request was made for the nullification of the court's decision based on the fact that the foreign decision is not enforceable in accordance with the provisions of Art. 38, nor was it completed, ex officio or upon request by the claimant, in accordance with Arts. 54 and 55 of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It also denounces infringement of Spanish law enforcement based on the ordering of enforcement of non-existent fees.

This challenge should be upheld without getting into the validity and finality of the judgment delivered by the foreign court because the scope of its enforceability does not include the concept of costs with regard to which there is only a generic assignment which is not specified in the decision except for the reference to Art. 700 mentioned above of the New French Civil Code of Civil Procedure but no other reference is made in accordance with the proceeding established in Arts. 701 and 702 (on settlement of costs) and 704 and subsequent of the same provision (on verification and payment of costs). Therefore, the issue is not one of refusing to validate the judgment submitted by the

person requesting its enforcement but rather, in accordance with the provisions of Art. 523.1 of our Code of Civil Procedure, there is a lack of sufficient jurisdiction for enforcement in the terms in which it was drafted according to the Brussels Convention and the broad interpretation given to the latter's enforcement by this Court which has already been expressed in its 24.07.97 judgment (Section 4) stating that all decisions are enforceable, independent of their denomination and finality, although they must be enforceable in the State in which they are delivered, requirements not fulfilled in respect of the fees of the claimant's French lawyer. In this regard it would suffice to recall that Art. 32 of the said Regulation 44/2001 provides that "for the purposes of this Regulation, 'resolution' shall be taken as any decision adopted by a court of a Member State regardless of the term used to describe it, be that ruling, judgment, order or enforcement mandate, and as the act by which the court clerk settles procedural costs"; without the inclusion of fees in any of the said decisions.

Moreover, the subsidiary request formulated by the filing party cannot be admitted in this second instance requesting validation of the fee, given the fact that this is a new issue impossible for this judicial body to rule upon and the enforcement under scrutiny here cannot be extended to a resolution which, where appropriate, should be addressed to and resolved by the foreign court which delivered the judgment and by the procedural rules applicable there.

– AAP Valencia, Section 11 of 27 May 2005 (Ref. Aranzadi AC 2005/1291)
Enforcement of foreign judgments. Criminal prejudiciality. Suspension.

"Legal Grounds:

... Three. (...) It is indeed true, as claimed by the appellant, that Council Regulation 44/2001 does not provide for the suspension of the enforcement of foreign decisions on civil or commercial matters for reason of criminal prejudiciality, but it is equally true, by way of example, that it likewise fails to define the contradictory procedure which should be employed in the case of an appeal before the Provincial Court against a ruling calling for enforcement and in both cases, as in others where a procedural gap exists in the said Regulation, it is obvious that subsidiary application of LECiv is called for, specifically regarding matters covered in the aforementioned Art. 569 of the LECiv, perfectly applicable to the enforcement process".

– SAP Asturias, Section 5 of 29 July 2005 (EDJ 2005/137596)
Exequatur. Acts of voluntary jurisdiction. Lack of necessity.

"Legal Grounds:

... Three. (...) Not requiring the statement of heirs in the exequatur formality as the Supreme Court has had the occasion to declare, inter alia, in its ruling of 29.09.98 where it indicates that "this Court has been denying recognition of acts of this nature through the exequatur procedure regulated in

Arts. 951 and subsequent of the Code of Civil Procedure. For quite some time now (e.g. ATS of 7 February 1955), the unique difference between decision delivered in voluntary jurisdiction cases and judgments issued in contentious litigation have been highlighted (see AATS of 16 July 1996, 16 September 1997, 21 October 1997 and 10 March 1998). These differences are evident both in the cause and the form in which jurisdictional action is taken as well as in the function that the law reserves for the intervention of the jurisdictional body and in the effects that one or the other type of decisions have. These differences preclude any attempt that is even comparable to the proceeding envisaged in articles 951 and subsequent of the LECiv and shift responsibility for the official recognition of acts of voluntary jurisdiction to the body or authority before which the request was filed for the recognition of the particular effects derived from such acts which, in addition to verifying the requirements set out in articles 600 and 601 of LECiv/1881, must also consider those set out in Spanish conflict regulations (article 9.8 CC) including any possible international agreements to which Spain is party and which are applicable based on the subject matter.

– AAP of the Balearic Islands. 4 October 2005 (Ref. Aranzadi JUR 2005/234635) *Acceptability of a foreign public document. Competence of the requested body. Exequatur of a notarised German document with executive power: place of execution of the contract and place of enforcement of the judgment.*

"Legal Grounds: . . .

Four. . . . It is clear that in the Brussels Convention the 'place of fulfilment of the contract' and the 'place of execution' are different concepts, the latter being the place where the resolution in question is enforced judicially.

Having established that, it is difficult to understand how the claimant would be free to file for enforcement in any location when he should file his request before the judge of the place related to the object of the litigation, leading to the concept of forum conexitatis taking us to the location of the assets of the debtor who is trying to block this process.

Five: Arts. 32 and subsequent of the Brussels Convention provide for a specific procedure for the enforcement of decisions with its own system of resources excluding that regulated in domestic law.

Insofar as the court ruling which is the object of this challenge does not dismiss the request for enforcement but rather limits its scope to declaring its lack of objective competence, this decision should likewise be limited to revoking the said ruling denying competence and declare that the instance court is indeed objectively competent to rule on the enforcement and it is incumbent upon the first instance body to examine, ex officio, compliance with the requirements laid down in the Brussels Convention for the enforcement of the communication subject to the proceeding envisaged in that Convention".

– AAP of the Balearic Islands. 24 November 2005 (Ref. Aranzadi AC 2005/2192) *Concession of exequatur of a foreign judgment. Adoption of precautionary measures; seizure order.*

"Legal Grounds:

Two. (. . .) The decision delivered by the instance court is in no way beyond the scope of the enacting terms of the judgment being enforced, limiting the said scope to calling for the enforcement of a final judgment delivered by the Provincial Court of Osnabrück (Germany) in accordance with Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and in the absence of any of the circumstances described in Arts. 34 and 35 of the said Regulation which would preclude recognition in Spain. It also calls for the precautionary measure of a seizure order of the specific assets of the defendant inscribed in the Land Registry of Ibiza which the executive deed itself identifies with a credit in favour of the claimant for a sum of 131,418.82 and therefore it is not clear what the appellant is referring to when he denounces that enforcement extends beyond the scope of the judgment".

2. Family

– ATS, Civil Court, Section 1 of 17 May 2005 (Ref. Aranzadi JUR 2005/150613) *Recognition or enforcement of foreign judgments regarding child support. The Hague Convention of 2 October 1973. Failure to appear in court. Lack of defencelessness. Time bar of the action. Autonomy and independence of the recognition. Concession of exequatur.*

"Legal Grounds:

. . . Five. Focusing on the requirement laid down in Art. 5(2 and 6) of the multilateral Convention, i.e. 'the safeguarding of procedural guarantees in the original proceeding', and in light of the defendant's opposition to recognition claiming lack of notification of the decision and that he was summoned in absence (appearing in the heading of the decision), the said opposition should be dismissed because the defendant failed to point out, as was indicated by the public prosecutor, that the judgment whose exequatur has been requested was delivered in the settlement of a remedy of appeal lodged by the defendant himself represented by a Procurator and assisted by an Attorney. In terms of the appellee's (Sonia) failure to appear before the court, she also appeared along with her representatives and has, in fact, initiated this proceeding concerning which, in accordance with reiterated criteria of this Chamber, all of the guarantees relating to the right to defence and the time bar relating to defencelessness must be satisfied (AATS of 24–3–98, 31–3–98, 7–4–98, 26–1–99, 134–99, 28–3–2000, 4–7–2000, 14–11–2000, 30–1–2001, 20–2–2001, 13–3–2001, 30–10–2001, 6–11–2001, 28–12–2001, 22–01–2002, 16–7–2002, 15–10–2002,

26–11–2002, 29–4–2003, 15–7–2003, 23–9–2003, 25–5–2004, 23–11–2004, 28–12–2004 and 18–1–2005, among others).

For all of the above, ground five of the opposition should likewise be dismissed.

Six. (. . .) The opposing party holds that the time bar had elapsed regarding the enforcement of the foreign judgment based on the time limits laid down in the Spanish legal system. In seeking to reject the exequatur based on the above argument he is confusing this proceeding either with the one undertaken at origin and which ended with the decision for which recognition has now been requested or with the proceeding to achieve the full and definitive enforceability of the provisions of the foreign judgment once recognised. As indicated in the rulings of this Chamber on 23 May and 6 June 2000 and 9 July 2002 settling a comparable claim against recognition, the exequatur proceeding is characterised by its focus on the standardisation of the effects of the foreign decision, especially procedural effects – res judicata, executive, preclusive – seeking a resolution which, without getting into the merits of the case beyond that called for by legislative competence control, where applicable, and by law enforcement of the forum – in the international sense – authorising the enforceability of the decision and making it effective in Spain with the same scope and extension as at origin without any corrective measures other than those deriving from lack of familiarity with the forum or mandatory respect for law enforcement. The decision taken with regard to the exequatur, therefore, is merely constitutive-procedural in nature insofar as its aim is the homologation of the procedural effects of the foreign judgment and the proceeding to which it applies is different from the one at origin and the one which can be instituted in Spain once the foreign decision has been recognised and declared enforceable, to achieve enforcement of the provisions of the sentence. Therefore, the action undertaken to uphold the right to recognition – the action of recognition – is different from and should not be confused with the action taken in the litigation at origin giving rise to the judgment for which recognition is being sought, nor with the action of enforcement of this one, either in the State of origin or the forum once it is recognised. This autonomy and independence of the recognition action compared with others, also highlighted by this Chamber on previous occasions (see AATS of 21–4–98, 5–5–98, 8–9–98, 27–4–99, 23–5–00 and 9–7–2000), is what determines rejection of the argument. The time bar invoked is not the one which, if relevant, could apply to the action of recognition but rather that which is tied to the enforceability of the rights surrounding the pretensions deduced from the proceeding at origin or, to state this in another way, that which determines the enforceability of the rights declared or recognised in the foreign judgment with regard to which the exequatur proceeding is a necessary requirement. A time bar blocking the exequatur would have to be related to, if it were effectively admitted, the right to the recognition of the foreign decision and this is not what the opposing party has done and that is sufficient reason to dismiss this ground for opposition (. . .)."

– ATS, Court 1 of 19 July 2005 (EDJ 2005/145400)

Recognition and enforcement of an Argentinean divorce judgment. Lack of a bilateral convention with Argentina. Conditions regime under the LEC of 1881.

"Legal Grounds:

. . . One. Given that there is no treaty with the Republic of Argentina nor any applicable international rules governing matters of recognition and enforcement of judgments, 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).

Two. According to the law of the state of origin applicable to the case, the judgment concerning which this exequatur is sought is final. This is a prerequisite, regardless of the recognition regime, laid down in article 951 (of the aforementioned LEC 1881) – in this regard not solely pertinent to the conventional regime if it is read jointly with the following precepts – and doctrine established by this court.

Three. Requisite No 1 of article 954 (of the aforementioned LEC of 1881) should be considered fulfilled in light of the personal nature of the action taken.

Four. Regarding requirement 2 of the same Art. 954, it has been established from information on foreign law obtained in similar past cases, pursuant to Art. 214 of the Argentinean Civil Code, that the only requirement to grant a divorce (arising from a prior mutual accord separation filed before the courts of the State of origin) is the passing of three years from the date of the final separation decision.

Five. As for requisite of article 954, there is full conformity with the Spanish legal system in an international sense: article 85 of the Civil Code envisages the possibility of divorce regardless of the nature or duration of the marriage.

Six. The authenticity of the resolutions as required by article 954(4) is guaranteed by the apostille with which the case has been processed as verified in the court record.

Seven. There is no reason to suspect that the international jurisdictional competence of the Argentinean courts was born of the parties' search for a fraudulent forum of convenience (Article 6.4 of the Civil Code and article 11.2 LOPJ); Arts. 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 there are no circumstances favouring the jurisdiction of the Spanish courts. Quite to the contrary, there are clear connections which cannot be ignored such as the Argentinean nationality of the wife and the place where the marriage took place; reasons supporting the competence of the courts of origin and therefore excluding fraud in terms of the law applicable to the substance of the case, an issue linked to the former.

Eight. There are no indications of contradiction or substantive incompatibility with judicial decisions delivered or cases pending in Spain."

3. Successions

– ATS, Civil Court, Section 1 of 14 March 2005 (Ref. Aranzadi JUR 2005/98790)
Exequatur concerning a French succession judgment. Spanish-French Convention of 1969.

"Legal Grounds:

One. The Convention between Spain and France on the recognition and enforcement of judicial and arbitral decisions and authenticated acts in civil and commercial matters of 28 May 1969 ratified on 15 January 1970 and published in the BOE of 14 March 1970 is applicable to this case in accordance with Art. 1 in light of the nature and substance of the act whose exequatur has been requested.

Two. International jurisdiction (Art. 3.1), the definitive nature of decisions (Art. 3.2), the law applied to the merits of the case (Art. 5 enshrining the equivalency of results principle), conformity with the law enforcement measures of the requested State (Art. 4.2), guarantees of hearing and defence in the proceeding at origin (Art. 4.3 and 15), Lis pendens or decisions delivered in the requested State or another (Art. 4.4) and minimum formal requirements (Art. 15) are controlled by the said Convention. All of the requirements laid down in the bilateral treaty have been duly respected."

4. Bankruptcy proceedings

– AJMER of Malaga. 2 September 2005 (Ref. Aranzadi AC 2005/1250)
Recognition and enforcement of judicial decision delivered in England in a Community insolvency proceeding.

"Legal Grounds: . . .

Two. (. . .) Thus, having established the liquidator's power of attorney and proof of appointment (Arts. 18 and 19 of the Regulation) and having submitted the documents referred to in the aforementioned statement, recognition is granted without any further formalities or hearings involving either of the parties. The petitioner has submitted all of the documentation duly legalised and stamped with the apostille (although not required by the Regulation).

The particularity of the English law's Bankruptcy Order On Creditor's petition is the existence of a prior decision acknowledging the debt with opposition of the debtor and subsequent resolution of insolvency. Both form a common block although they are formally separated and should be recognised as indicative of a State of Insolvency".

V. INTERNATIONAL COMMERCIAL ARBITRATION

– ATS, Court 1 of 31 May 2005 (EDJ 2005/101333)
Recognition and enforcement of foreign arbitral awards. Lack of arbitration. Defencelessness deriving from procedural defects. Infringement of law and order.

Nullity of arbitral agreement due to inclusion in general conditions. Dismissal of grounds for opposition. Concession of exequatur.

"Legal Grounds:

. . . Two. In light of the circumstances, it must be assumed that the party requesting the exequatur duly complied with Art. (IV)(2)(b) of the New York Convention as well as with Art. II of that same supranational regulation in analysis of which this Chamber has consistently declared that the determining factor in terms of complying with recognition is the will of the parties to subject disputes surrounding the validity, enforceability or compliance of a given business issue to arbitration and that is the purpose of the burden of attaching to the request for exequatur the documents referred to in section two of Art. II of the Agreement in relation with, if relevant, Art. 1(2)(a) of the European Convention on International Commercial Arbitration of 21 April 1961 which is purely instrumental with respect to the said obligation.

Proof of this will is found here in the documentation furnished which does not prevent it from coming from a *per relationem* stipulation, when the incorporation of the general conditions in the contract, including the arbitration clause, was specifically envisaged and concerning whose content the externalised will of the signers of the contract is projected, relegating the issue of the enforceability of the submission clause agreed as such, to the analysis of the rest of the cases of recognition already subject to the allegation and challenge of the opposing party already verifiable ex officio.

Furthermore, an examination of the difficulties of the arbitration proceeding reflected in the arbitral decision itself, and which the party opposing the exequatur does not challenge, demonstrates that the latter went to arbitration defended by Counsel to request the suspension of the exequatur in light of the imminence of an agreement to bridge the differences between the two parties from which one can also infer this unequivocal will to be subject to arbitral decisions constituting the essence of the proposal for the homologation of the decision under examination which can be deduced from the behaviour exhibited by the defendant during the course of the arbitral proceeding as this Chamber has indicated on preceding occasions (AATS 14–4–2000, in exequatur 3536/99, and 13–3–2001, in exequatur 3625/99, and others).

Three. The company concerning which enforceability of the decision is sought first of all claimed that the said decision was delivered in its absence and without even the knowledge that an arbitration proceeding was under way. This allegation coincides with the ground for opposition to the exequatur contained in Art. V(1)(b) of the New York Convention according to which recognition shall not be granted when the party against whom the arbitral decision is invoked has not been duly notified of the designation of the arbitrator or of the arbitration proceeding or has not been able, for any other reason, to properly defend himself.

Moreover, and from a different standpoint, this links up with the supposition of adapting the arbitral decision – specifically its effects – to domestic law and

order or, more exactly, to law and order in the international sense as this Chamber has been alluding to.

This allegation, however, lacks the consistency needed to prevent recognition of the enforceability of the foreign arbitral resolution. In the procedural background of the decision it was specifically indicated that on 15 January 2003 the defendant was sent, by means of an arbitral agent, "the formal acknowledgement of receipt of the arbitration via fax and courier service" along with the pertinent documentation including a copy of the AFMA international arbitration rules and that on 12 February 2003 the same agent notified the parties of the appointment of the arbitrator who, on 14 March 2003, also via registered post and fax, sent notice of the arbitration hearing adding that the said communication was sent to the defendant on 17 March 2003 and was signed by Mr. Llovera as the receiving party.

It is then indicated that on 10 April 2003, immediately prior to the date set for the arbitration hearing, the defendant sent the arbitrator, via fax and post, a communication in which he requested the indefinite suspension of the arbitration proceeding, affirming that the controversy was being resolved through efforts of a third party intermediary. Along with the request for exequatur, a copy of the communication sent by the arbitral agent to the defendant via fax informing of the initiation of the arbitral proceeding and the list of arbitrators was also furnished. Also included in the case file is the decision delivered by the High Court of the State of California of Los Angeles County dated 8 October 2003 confirming the instance arbitral decision at the request of the filing party with the participation of the latter's attorney and that of the defendant company.

In this context, and considering that the party opposing the exequatur does not deny the circumstances described, the fact that the arbitral resolution was delivered in his absence and without his knowledge is nothing more than a defence allegation which is actually based on the unenforceability included in the submission to arbitration agreement, but this is not grounds to deny the enforceability of the decision based on unawareness of the existence of the arbitral proceeding and, in short, on the lack of due guarantees to fully defend oneself. It is therefore not possible to reject the exequatur on the ground laid down in Art. V(1)(b) of the New York Convention to prevent the enforcement of the arbitral decision nor was there any violation whatsoever of any law and order proceeding which would stand in the way to recognition of its effects and enforceability, the initial absence of the defendant due exclusively to his strategy in the original proceeding motivated by his belief that this would render the arbitral decision unenforceable.

Four. The essence of the opposition to the exequatur derives from the alleged nullity of the arbitration agreement given that it is included in some general conditions which were not negotiated individually by the company now opposing it but were rather imposed unilaterally by the claimant and are considered abusive and damaging in that they subject contract related disputes to institu-

tional arbitration to be held before an association representative of the interests of film producers of which the claimant is one.

In this respect we would mention that the New York Convention has devised an exequatur refusal system which places the burden of establishing the unenforceability of the arbitration agreement on the party opposing the recognition of the foreign decision in accordance with the law to which the parties are subject or, if nothing has been stipulated in this connection, by virtue of the law of the country in which the arbitral judgment was delivered (Art. V(1)(a)).

Thus, this exequatur rule is, by nature, a conflict rule and entails the need to justify the alleged unenforceability in accordance with the law to which the connections envisaged in the precept refer and hence prevents the affirmation of the inadmissibility of recognition by automatic invocation of internal production rules or other supranational rules such as those comprising Community acquis insofar as enforcement is not mandated by the aforementioned conflict rule.

There is no evidence here that the parties had subjected the contract or the arbitral agreement, in its autonomy, to Spanish legislation (whose imperative rules, such as those contained in Law 7/1998 of 13 April are therefore not applicable in light of the provisions of Art. 3.2 of the said Law) and therefore the examination of the issue of recognition now under scrutiny must be undertaken in accordance with the legislation of the State where the decision was delivered and, pursuant to the said legislation, it is not duly established that the arbitral agreement should be deemed inapplicable.

From the perspective of law and order control in the analysis of this ground for opposition to the exequatur, it should also be concluded that there is no reason to prevent the enforceability of the foreign decision. The fact is that the submission to arbitration clause is contained in a stipulation included within a set of general conditions to which the contract concluded by the parties remits as a whole and which was, in turn, included as an annex and the imbalance, along with the need to prevent abuse of dominant position claimed by the petitioner are not enough to render the decision unenforceable. Moreover, it is not at all clear that the defendant is in a situation of inferiority vis-à-vis the claimant given that, on the one hand, he cannot be considered a consumer in the sense attributed by the Community rule and domestic legislation (basically Directive 93/13/EEC of 15 April, the General Consumer (and User Defence) Act and Law 7/1998 of 13 April on General Contract Conditions) whereby protection is by law and order imperative insofar as the interests of the latter have contributed to the concept of law and order in the aforementioned international sense given the existence of two commercial companies concerning which the only imbalance is their position in the market and, as a result, as concerns their contractual position, that deriving from the mere affirmation of the party opposing recognition. On the other hand, it is commonly accepted practice in international commerce to turn to general conditions which facilitate contracts and which embrace habitually used commercial practices.

It should likewise be indicated that there is no real evidence that the agreed institutional arbitration favoured one institution which, in exclusively representing the interests of film producers, rendered abusive the arbitral clause as an impediment to law and order for recognition. But not even from this perspective (or from a procedural standpoint) were the rights of an individual to effective protection of his legitimate interests by means of a decision delivered by an impartial body violated because there is no solid basis on which to reject the presumption of impartiality attributable to an arbitral institution intervening as such in a judicial proceeding. It is likewise difficult to understand the opposition to the arbitral court and the behaviour of the opposing party throughout the arbitration proceeding where at no time did an argument of this nature arise when the claimant appeared before the said court to request suspension of the proceedings or before the State court of origin which confirmed the decision and no doubts whatsoever were even expressed concerning the impartiality of the arbitral court deriving from the affirmed link between the Association and the interests of the claimant.

– ATS. 15 November 2005 (Ref. Aranzadi JUR 2006/26635)
Minimum intervention of judges in arbitration procedure. Non-appealability of a decision concerning the annulment of an arbitral award. New York Convention of 1958. Effective protection of the courts.

"II. Legal Grounds:

A) To begin with, stock must be taken of the special function of the arbitral institution and the negative effect of the arbitral agreement which, in principle, prevents the intervention of the courts in the establishment of an out-of-court dispute settlement scheme within which the action of the courts is circumscribed to support or control actions expressly envisaged in the institution's regulating law (see Art. 7 LA). Minimum intervention of the courts is therefore inherent to arbitration by virtue and in favour of the autonomy of the will of the parties, (. . .) D). In further support of the above we would point out that recognition in Spain of a foreign decision delivered in a proceeding concerning the annulment of a foreign arbitration award, be this incidental or automatic, in the combined application of Art. V(1)(a) of the New York Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards and Art. IX of the Geneva Convention of 21 April 1961 on international commercial arbitration, in the examination of the grounds for opposition to the exequatur consisting in the annulment of the arbitral award, either directly or in an "ad hoc" proceeding, is also subject to single hearing rules and thus the inability to lodge an appeal against the decision declaring the foreign judgment enforceable (Art. 956 of the LEC of 1881 whose currency is upheld by virtue of the Single Repeal Provision, exception three of LEC 1/2000).

3. The legal grounds of this decision cannot be concluded without alluding to the right to effective protection of the courts and particularly to the right to gain access to and use the appeal system envisaged in Art. 24 of the Spanish

Constitution. In this regard we would say that no fundamental right has been violated by the fact that the legislator has excluded judgments regarding the annulment of an arbitration award from all appeals insofar as the said exclusion is a legitimate legislative option and insofar as, as the Constitutional Court has stated time and again, outside of the sphere of criminal proceedings, there is no constitutional right to appeal or to a particular type of appeal (. . .)".

VI. CHOICE OF LAW: SOME GENERAL ISSUES

1. Proof of foreign law

– STS, Court 1 of 10 June 2005 (EDJ 2005/103454)

Proof of foreign law. Ex officio enforcement of the dispute rule. Enforcement of "lex fori" in absence of proof of the content and currency of foreign law.

"Legal Grounds:

One. The content and currency of foreign law must be proven in order to permit its enforcement in proceedings (judgments of 11 May 1989, 7 September 1990, 23 March 1994, 25 January 1999, and many others). This is a result of the fact that neither the Court nor the parties can be held liable for knowing foreign law in contrast to what occurs with respect to Spanish law in accordance to the *iura novit curia* rule (Arts. 1.7 and 6.1 of the Civil Code).

And while foreign law is not on a par with lex fori in terms of the knowledge the court is expected to have of it, the same holds true regarding its introduction into the proceeding with the so-called procedural facts, i.e. those underlying the circumstance described in the rule whose enforcement is sought by the parties.

Indeed, facts are governed by the rule concerning the parties furnishing facts (quod non est in actis non est in mundo), while in our legal system, the court has the authority to use whatever means it deems necessary for the enforcement of foreign law (Art. 12.6.2 of the Civil Code, draft previous to the Code of Civil Procedure, Law 1/2000 of 7 January which was in force at the time the claim was filed, and Art. 281.2 of this latter Law), meaning that it should be applied if it is known and, in short, the furnishing of this information by the party is only necessary to supplement that information.

Moreover, the foreign law is designated by the forum dispute rule which belongs to the legal system which the Court must apply ex officio (Art. 12.6 of the Civil Code).

Therefore, foreign law does not have to be claimed in the proceeding by the parties in order that the judge bear in mind the designation made therein regarding the dispute rule regardless of whether the purpose is to afford the proper procedural treatment.

What the parties should claim, however, are the facts that, due to the concurrence of foreign elements, should be considered under the dispute rule. A

claim of this nature would suffice in order that, as an effect of the said rule, it be considered that the litigation should be resolved in accordance with the foreign law designated.

In accordance with this doctrine, the first ground of the Supreme Court appeal lodged by Ms. Flora against the judgment dismissing her claim should not be upheld. In that ground the appellant points to what she considers a defect of incongruence in the judgment delivered by the Provincial Court (Arts. 1692.3 and 359 of the Code of Civil Procedure of 1881) in insisting that one of the factors determining dismissal was the absence of proof of Belgian law regarding the settlement of post-conjugal communities and that that law had not be claimed by either of the parties to the proceeding.

(. . .)

Three. In exercise of the complementary function within the legal system vouchsafed to this court by virtue of Art. 1.6 of the Civil Code, it ruled that when the content and currency of foreign law are not proven by the parties and are not studied by the court to the degree necessary to resolve the conflict of interests addressed and the dispute rule does not stipulate anything different, lex fori is applicable as the subsidiarily competent rule (judgments of 11 May 1989, 7 September 1990, 23 March 1994, 25 January 1999, 5 June 2000, 13 December 2000, and others).

Said doctrine (which Constitutional Court judgment 155/2001 of 2 July, in its examination of the issue within the purview of its competence in the interpretation of Art. 24.1 of the Spanish Constitution, considered to be more respectful of the content of the said precept than the dismissal of the complaint defended by one part of the doctrine) must be considered in examining the third and last of the grounds of the claimant's Supreme Court appeal.

– SAP of the Balearic Islands, Section 5 of 26 April 2005 (Ref. Aranzadi AC 2005/819)
Proof of foreign law in divorce proceedings.

"Legal Grounds:

One. . . . The lack of evidence submitted in relation to applicable law was notorious, limited to the pure and simple transcription of the legal texts deemed applicable and no evidence whatsoever was submitted concerning jurisprudence or the principal criteria followed in their enforcement, especially in terms of the economic regime applicable to the marriage. Moreover, the photocopies submitted do not establish the currency of foreign law."

– SAP of Alicante, Section 4 of 12 May 2005 (EDJ 2005/127792)
Proof of foreign law. Enforcement of "lex fori" in absence of proof of its content and currency.

"Legal Grounds:

. . . Two. . . . even though, in principle, German law was applicable and the latter's content and currency should have been proven by the appellants, jurisprudence states that when there is lack of proof of the content of the for-

eign law invoked by one of the parties, the Spanish courts may not abstain from hearing the issues which are within the scope of their competence and must deliver judgment in accordance with Spanish law (Supreme Court judgments of 5 June and 13 December 2000, 17 July 2001 and 5 March 2002)."

– SAP of Malaga, Melilla, Section 7 of 13 May 2005 (Ref. Aranzadi JUR 2005/163244)
Proof of foreign law. Marriage separation. Application of the law of the common nationality of the spouses. Non-application of Spanish law. Need to apply the legal system designed by the dispute rule.

"Legal Grounds:

One. (. . .) The facts are that the litigants and their children are of Moroccan nationality and are currently residing in Spain, that the litigants were married in their country of origin in accordance with the legislation in force there, and that the litigants reside with their children in Spain in the same domicile.

Having established that, in accordance with Art. 107 of the Civil Code, separation and divorce shall be governed by the national law common to the spouses at the time the claim was submitted. This means that Moroccan legislation is applicable to the marriage separation case of the litigants. The criteria set forth is especially important with respect to the pretension deduced by the claimant regarding the custody of the children and use of the family home and, given that it has been established that the litigants live under the same roof together with their children, the said pretensions can only be envisaged through the corresponding marriage separation proceeding. With respect to the custody of the children and in light of the lack of the basic requirement called for in Art. 159 of the Civil Code, delivery of a judicial decision without the corresponding marriage separation is only possible if the spouses do not live together and the same must be said with regard to the use of the family home which only finds support within the sphere of marriage based on Art. 91 of the Civil Code.

As a result of the foregoing, the request filed regarding custody of the children, granted by the instance judgment based on Spanish legislation regarding marriage separation, violates the provisions of Art. 107 of the Civil Code and therefore must be revoked without prejudice to the claimant's seeking protection under the law applicable by reason of the common nationality of the litigants, i.e. Moroccan law, before Spanish courts as authorised under Arts. 21 and 22 of the LOPJ".

– RDGRN of 1 March 2005 (EDD 2005/23779)
Proof of foreign law in awarding of inheritance proceedings.

"Legal Grounds:

. . . Two. . . . The basic element of any qualification whose purpose is the validation of registry of acts must be applicable law and when the latter is foreign there is an exception to the "iura novit curia" principle thus justifying the need to establish the said validity.

In short, just as foreign law must be proven in the ambit of procedure (see Art. 281.2 of the Code of Civil Procedure), it must also be proven when it comes to the registry (Decision of 17 January 1955, 14 July 1965 and 27 April 1999) unless the Registrar, given his familiarity with the applicable foreign legislation, decides under his own responsibility to forego this proof as allowed by Art. 36 of the Mortgage Regulation but an entry must be made bearing witness to this circumstance.

Three. It should also be mentioned that while the regulatory norm itself refers to the means by which one can accredit the legality of the documents and forms or the capacity of individuals when under the mandate of foreign legislation, its solutions likewise appear to be perfectly applicable to the accreditation of the material validity of the act or business being registered Even, as indicated in the last of the decisions cited, a report tends to be more practical for that purpose than a simple certificate of the literal content of the foreign legislation which is often difficult to decipher and frequently subject to inappropriate interpretation.

And it must not be forgotten that among those means is the assertion or report of the Spanish notary public, and so an action in that sense by the appellant if, as can logically be deduced from the arguments contained in the appeal, he has sufficient knowledge of that applicable legislation, would be sufficient, thus assuming a responsibility which it appears the registrar is undertaking when, as was stated, this is not the case."

2. Public order

– RDGRN of 24 January 2005 (TOL 599872)

Authorisation of civil marriage between a Spanish man and a transsexual foreign national. Enforceability of Spanish law. Public order.

"Legal Grounds:

... III. The legal situation of the transsexual continues to escape consideration, at least in the civil sphere, by the Spanish legislator, although this gap is filled by Supreme Court jurisprudence which, in the judgments cited, admits entry in the Civil Registry of a different sex due to psychological and social considerations in tune with the principle of the free development of one's persona set out in Art. 10.1 of the Constitution.

(...)

There is no doubt that 'sex change' is a basic irrenouncable principle of Spanish civil law and therefore, by virtue of the 1978 Spanish Constitution protecting the 'free development of one's persona' all individuals, whether Spanish or foreign nationals, must have the possibility of changing their sex. When foreign law, (Costa Rican law in this case), does not envisage sex change under any circumstances, the said law should not be enforced by Spanish courts (Art. 12.3 Cc) and Spanish law should be applied in its place."

– RDGRN. 18 November 2005 (Ref. Aranzadi RJ 2006/221)
Marriage between foreign nationals in Spain. Legislation applicable to marital status and consent. Exception to law and order regarding matters of simulated consent. Registry issues. Authorisation on file prior to the marriage.

"Legal Grounds: . . .

Six. The foregoing should not, however, lead to the conclusion that the foreign law comprising the personal statute of the marriage partners should be applied across the board but rather in the execution of the rule of exception of public international order – which operates with greater intensity when the aim is to create or constitute a new legal situation (in this case a marriage yet to be celebrated) in contrast to cases in which what is being assessed is the possible application of the foreign law regarding an already perfected legal relationship in accordance with the said law – the foreign law should not be applied when it can be concluded that the said application would give rise to an infringement of essential, basic and irrenounceable principles of our legal system (. . .).

Seven. In this case the issue concerns a request filed by two Nigerians residing in Spain for authorisation to celebrate a civil marriage ceremony in Spain in accordance with our country's legislation. The order issued by the person responsible for the Civil Register, omitting any mention of the rules of private international law and implementing the so-called "concealed international public order", denied the request based on the assertion, like the public prosecutor, that there was a lack of will to contract a true marriage. This set of facts leads to the conclusion that the marriage sought pursues an aim other than that enshrined in the institution of marriage.

3. Referral

– SAP Asturias 1 September 2005 (Ref. Aranzadi JUR 2005/220269)
Law applicable to inheritance succession. Application of Spanish law. Lack of allegation and proof of foreign law and exclusion of referral.

"Legal Grounds: . . .

Two. (. . .) Three, even from a purely dialectical standpoint, given that we do not know if the deceased in this case had any nationality other than Spanish by right of origin (Art. 17 C.C.), and assuming that they could also have US nationality with last residence registered in the United States (Art. 9.9 C.C.), given the prevalence in countries of Anglo-Saxon law in succession cases of the criteria of diversification of regimes according to whether assets are moveable or fixed subjecting the latter to the succession law of the country in which they are located (in this regard STS 15.11.96 and 23.09.02), given that all of the assets are located in Spain, in accordance with the universalist principle that, in contrast, prevails in our succession law, and the possible referral of the foreign rule to the domestic one (Art. 12.2 C.C.), all successions should be regulated by our national law (STS of 23.09.02)".

VII. NATIONALITY

– STS (C-Admin. Chamber, Sect. 6), of 25 January 2005 (Ref. Aranzadi RJ 2005/1511)
Acquisition of Spanish nationality by virtue of residence.

"Legal Grounds:

. . . Four. In a Judgment delivered on the third of May two thousand and one, this Chamber and Section stated that 'the expression "legal residence" should be used provided that such residence met the requirements laid down by the Law regarding rights and freedoms of aliens in Spain referred to by that Judgment. If the relevant period in the country elapsed before Organic Law 7/1985 came into force, then the concept of 'legal residence' must be interpreted in the terms laid down in Decree 522/1974 of 14 February (arts. 14 et seq.), and if the period elapsed later the relevant provision will be art. 13.2 of Law 7/1985, whereunder: Residence by aliens shall be authorised by the Ministry of the Interior in the light of the individual circumstances of each case, taking into account whether or not the applicant has a criminal record and whether he or she has means enough in Spain to live during the length of time for which application is made. When it is intended to reside in Spain and live by carrying on paid employment or professional or other remunerated activity, the granting of a residence permit shall further be subject to the provisions of Title III.

(. . .)

This Chamber and Section also stated, in a Judgment delivered on the twenty-second of February two thousand and three, that 'the period of twelve years during which the applicant seeking Spanish nationality resided in Spanish territory cannot be ignored simply by virtue of the fact that the term of validity of some residence permits expired before she applied for their renewal when it has been clearly demonstrated – and this is no mere presumption as the State Attorney claims – that during those twelve years she possessed seven consecutive residence permits, of which six were for one year and one for two years while the last one was issued for five years; it is therefore enough to add up the time during which these permits successively warranted the residence of this foreign citizen in Spain to conclude that her residence was legal, continuous and immediately prior to her application for nationality, as required by the cited article 22 of the Civil Code, even although on four occasions the applicant was several months late in applying to renew the previous permit, for as the challenged judgment quite rightly states, her will to regularise her situation is plainly manifested by conclusive facts, and therefore, the court *a quo* taking the view that the requirement of legal residence in Spanish territory is met, she is not in breach of the cited article 22 of the Civil Code or of article 1253 of the same Code'."

– SAN, Contentious-Administrative Chamber, Section 3, of 18 January 2005 (EDJ 2005/150623)
Existence of criminal record. Evaluation for purposes of granting nationality.

"Legal Grounds:

. . . Two. (. . .) On the contrary, police and criminal records, whether cancelled or not, are merely indicative of a citizen's conduct and cannot by themselves constitute a bar to the granting of Spanish nationality (TS Judgment of 5/11/2001 appeal in cassation no. 5912/1997). It is therefore necessary to evaluate the personal history of the applicant as a whole (e.g., facts of allegedly antisocial behaviour, assumption of social values and norms of coexistence, habitual nature of conduct and persistence over time, how far removed in time from the application, positive elements that might offset negative aspects, etc.)."

– SAN, Contentious-Administrative Chamber, Section 3, of 24 June 2005 (EDJ 2005/167891)

Sahara. Whether or not considered Spanish territory.

"Legal Grounds:

. . . Two. (. . .) In light of the foregoing, the core issue is to determine whether the Sahara ought or ought not to be considered Spanish territory for the purposes of article 22.2.a) of the Civil Code, a question already settled by a judgment dated 7/11/1999 in which the Supreme Court said the following (relating to the point here at issue): The conducting thread that will bring us to a proper understanding of the problem concerning us is the fact that the expression 'Spanish territory' is used in a dual sense in positive law: there is a broad sense referring to all those physical areas which are under the authority of the Spanish State and subject to its laws – this meaning includes 'possessions' – and a restrictive meaning which if we wish to be precise we ought strictly speaking to call 'national territory', which does not include colonies, possessions or protectorates. – Guinea, Ifni, and Sahara, then, were Spanish territories which were not part of the national territory. And this is precisely the reason why the integrity of the national territory was not breached by the legal and political acts which produced the independence of Guinea (up to that moment a Spanish dependency), the cession – or if you like the 'return' – of Ifni to Morocco, and the initiation of the self-determination process in the Sahara. The fact is that a territory can only be considered 'national territory' if it is peopled by a group of Spanish citizens in full possession of their rights, constitutes an administrative unit of the Spanish local administration – or of part of such an administration as the case may be – and, however organised, possesses no international personality or other right of self-determination other than that possessed by the nation as a whole. We repeat: despite being called a province, the Spanish Sahara – and the same applies to Ifni and Equatorial Guinea – was a Spanish territory – that is, a territory subject to the authority of the Spanish State – but it was not national territory. D. At this point we come to analyse the case of concern here: that is, the scope that must be attributed to the expression 'Spanish territory' as used in article 22 of the Civil Code in point 1 of the third paragraph. We already noted that the expressions 'Spanish territory' and 'national territory' have tended to be used loosely in Spanish legislation. Where

this occurs in statutes promulgated after Spain ceased to have colonies, possessions or protectorates, there is no great problem. The two terms may be used interchangeably. Take for instance the case of Organic Law 7/1985 of 1 July on Rights and freedoms of Aliens in Spain, article 11 of which uses the term 'Spanish territory' in paragraph 1 and 'national territory' in paragraph 3. Where a problem arises is when, as in the present case, the rules to be applied are coetaneous with the cited situations of territorial heterogeneity (not to be confused with geographic dispersal). The challenged judgment denies the appellant recognition of his right to acquire Spanish nationality by virtue of one year's residence on the ground – lifted from the preamble to the Sahara (Decolonisation) Act, Law 40/1975 of 19 November – that this territory 'was never part of Spanish territory'. Leaving aside the fact that this is an attempt to attribute normative force to the preamble of a law, such an interpretation contradicts something that can be demonstrated – as we have seen – by a careful analysis of the legal situation of the Sahara in the three phases alluded to earlier on. During the three phases (colonisation, 'provincialisation', decolonisation) the Sahara was – as defined by Chapter XI of the United Nations Charter – a 'non-autonomous territory', that is, one of those 'territories whose peoples have not yet attained the fullness of self-government' (art. 73) – i.e., a territory not identical to the 'national territory' in the restricted sense. Bearing this in mind along with all the other points we have considered in this connection, there are more than sufficient grounds to conclude that the interpretation of the court *a quo* should be rejected and, to the extent that the said interpretation caused the appellant to be denied the nationality to which he is entitled –, the second 'subground' that we have examined must be admitted and the judgment must be overturned; and in effect this Chamber hereby annuls that judgment. As a result of the application of the doctrine we have just transcribed, the present appeal is upheld, as this Court has had occasion to do in previous similar cases (e.g., judgment of 11/22002), so that we may further invoke the principle of unity of doctrine (which is additionally supported by the principles of legal security and equality in the application of the law), for the term of one year's residence stipulated in article 22.2.a) of the Civil Code is indeed applicable to the case and the appellant had satisfied that requirement at the time of submitting his application, and he was therefore entitled to be granted Spanish nationality."

– RDGRN, 22 April 2005 (EDD 2005/68142)

Attribution of Spanish nationality by virtue of birth in Spanish territory. Non-attribution of nationality to a child in accordance with the laws of the parents. Retroactive effect.

"Legal Grounds:

... Five. It is indeed the case that attribution *jure soli* of Spanish nationality as a legal instrument to prevent statelessness of children born in Spain to

alien parents if none of the laws of the latter attribute nationality to the child, became part of our legal system through a redrafting of art. 17 of the Civil Code by the Law of 13 July 1982, that is at a date subsequent to the birth of the applicant.

The fact is that according to the doctrine of this Department, the new rule has retroactive effect in respect of births occurring in Spain prior to its entry into force as the purpose of the rule is to avoid situations of statelessness. Such attribution of Spanish nationality was therefore available where applicable to persons born in Spain who lacked a nationality when the 1982 Law came into force. And although such retroactive effect does not apply to cases where at the time Law 51/1982 of 13 July came into force a child born in Spain already possessed its parents' nationality *jure sanguinis*, this exception does not apply in the present case, where if the applicant had acquired Colombian nationality she could not have done so before 1985 when she moved her place of residence to Colombia, that is after the cited legal reform came into force.

– RDGRN, 11 July 2005 (EDD 2005/237181)

Consolidation of Spanish nationality by a native of the Sahara. Failure to satisfy requirements.

"Legal Grounds:

. . . Three. It is the case that in exceptional circumstances concerning a native of the Sahara, the Supreme Court ruled on 28 October 1998 that the appellant had consolidated his Spanish nationality. However, the doctrine contained in that judgment is not applicable to the present case since there are fundamental differences between the facts of the case examined in that judgment and those here at issue.

In effect, unlike the case of the cited judgment, the applicant has not proven that his parents and he resided in the territory of the Sahara at the time the Royal Decree referred to was in force, and therefore they are *de facto* barred from opting for Spanish nationality. On the contrary, the fact is that at the time, the father did not take up the option of Spanish nationality on behalf of his son as permitted by the cited Royal Decree of 1976, and although according to article 18 of the Civil Code "the continuous possession and use of Spanish nationality for ten years, in good faith and on the basis of a right registered in the Civil Register, causes consolidation of nationality even if the right on which such possession is based is annulled", the truth is that this provision is of no use to the applicant since, other reasons apart, he was two years old when Spain abandoned the territory of the Sahara in 1976, and since that date he has never been in possession of documentation showing Spanish nationality; and therefore, the ten-year period required by the cited article 18 for possession and use of Spanish nationality is not satisfied. Indeed, at this time the applicant is domiciled in Spain as an Algerian citizen, with an Algerian passport."

– RDGRN, 31 October 2005 (EDD 2005/206736)
Application of art. 17.1.c) of the Civil Code to extra-marital children of Moroccan parents.

"Legal Grounds:

. . . Five. Until its Decision of 27 October 1998, this Department had maintained that art. 17–1–c of the Civil Code was not applicable to the children of Moroccan fathers because in accordance with Moroccan law the children of Moroccan fathers enjoyed Moroccan nationality by right of birth, and whether or not such filiation was marital was a matter of indifference for purposes of attribution of Spanish nationality *jure soli* (. . .).

Six. The above doctrine underwent a first shift with Decision 15–5 of February 1999, whereby in light of the proof of foreign law furnished by the applicants along with their writ of appeal, the Department reached a different conclusion from that which it had maintained hitherto. According to the evidence of Moroccan law, a child born to Moroccan citizens abroad can only be considered to possess that nationality if it is born within a marital union that is valid under Moroccan law. Hence, a marriage entered into abroad must be contracted in accordance with the rules applying to the personal status of the Moroccan partner.

Consequently, children born of a non-marital or illegitimate relationship cannot be considered Moroccan; this was applicable to a civil marriage celebrated in Spain which, it is stated, was not valid according to the father's personal law, and therefore under that law any children of such a marriage cannot be considered Moroccan, and hence the appeal should be upheld. The evidence adduced in the appeal that prompted Decision 15–5 of February 1999 matched the content of the certificate issued by the Moroccan Consulate-General in Madrid (attached to the present record), namely that according to the Moroccan Civil Code, 'any person born of a Moroccan father, regardless of the mother's nationality or the place of birth, is considered Moroccan if born within wedlock in accordance with the laws in force in Morocco'.

The parallel assumption that for Moroccan nationality to be attributable through non-marital paternal filiation, the event determining such filiation must be valid according to the Moroccan legal system, taken together with the fact that Moroccan law does not apply the *locus regit actum* rule to these matters so that the means of determining paternal filiation in accordance with the laws of Spain has no validity in Morocco, was accepted by this Department, in line with the previous Decisions, as constituting a bar on the acquisition of the father's Moroccan nationality by right of birth, despite the existence of a formal act of recognition in accordance with Spanish law (cf. Decision 16–1 of January 2002). Moreover, the fact that the father was known, albeit the filial tie was not legally established for the purposes of Moroccan law, barred the child from acquiring Moroccan nationality by way of maternal filiation, which is only possible where the father is unknown. As a result, one and the same solution came to be applied to cases of non-marital paternal filiation where the recogni-

tion by the father was not deemed valid by Moroccan law and to cases of marital filiation where it was the marital tie itself that was not recognised by the said law.

Seven. However, in its most recent decision – 5–4 of February 2002 – this Department performed a volte-face and reverted to its pre-1999 doctrine for cases of marital filiation, affirming that despite the cited earlier Decision having reached the opposite conclusion, "in light of the more precise understanding of the Moroccan laws since acquired, the Department's earlier doctrine must be confirmed – namely that a child born to a Moroccan father outside Morocco and related by marital filiation possesses its father's Moroccan nationality *de jure* from birth, regardless of any *de facto* difficulties that the child may encounter at the Moroccan Consulate in obtaining documentary evidence of being a Moroccan national and in having his father's marriage recognised. Also, in this case there are no insurmountable difficulties in the way of a civil marriage celebrated in Spain between a Muslim and a Christian being recognised as valid in Morocco".

But again, this conclusion is qualified as regards cases where the civil marriage was celebrated in Spain between two Moroccans, since it acknowledges that such a marriage is not valid in Morocco (cf. Decision 16–8 of September 2002).

Taking a line from the cited Decision 5–4 of February 2002 and extending its conclusions to take in non-marital paternal filiation, the most recent Decision, 26–1 of January 2004, denies that a child born out of wedlock to a Moroccan father and Colombian mother is Spanish *jure soli*. The same doctrine must now be confirmed in the present case, involving a female child born in Spain, out of wedlock, to a Moroccan father and a Colombian mother, particularly in view of the amendments regarding filiation introduced in the Moroccan Family Code (Mudawana) by Dahir no. 1.04.22 of 3 February 2004, enshrined in Law no. 70.03. This law has to be taken into account by virtue of art. 9 nos. 1 and 4 of the Civil Code, whereby the determination and substance of filiation is a matter for the child's personal law.

However, given that art. 17–1–c of the Civil Code is applicable in situations where Spanish nationality may have to be invoked to avert a condition of statelessness for the minor, the ensuing situation is rendered paradoxical by a "double-mirror" effect between arts. 17(1)c and 9(1) and (4) of the Civil Code, in which the child's nationality and filiation are each prior issues in respect of the other, so that neither can be defined without the other being determined first: the child is a Moroccan national if its filiation can be established in respect of a Moroccan father; but to determine such filiation, the child's personal law must be applied, and that is determined by its nationality, which in turn cannot be determined without the filiation being known first.

Eight. In a first approximation to the subject from the standpoint of Private International Law, we note that art. 9(4) of the Civil Code contains a legal lacuna in that it refers only to the nature and substance of filiation but not to

its "determination". In order to fill this gap, having ruled out *lex fori* as lacking legal foundation, the scientific doctrine at large and the official doctrine of this Department has opted for application by analogy of the same art. 9(4) cited above (cf. Decisions of 29 April 1992 and 18 September 1993, *inter alia*), an approach recently also adopted by the Supreme Court in a judgment of 22 march 2000, which means that the national law of the child is invoked for determination and accreditation of filiation, regulation of the means of proof, and actions to challenge or claim filiation.

Nine. The fact is that, the question being one of determining the validity of transmission of nationality according to whether filiation is marital or non-marital, depending on the substantive differences between the two as defined by Moroccan legislation (according to art. 148 of the Mudawana illegitimate filiation has none of the effects of legitimate filiation as regards the father), and in light of the principle of equality before the law and the prohibition of all discrimination by reason of filiation laid down in arts. 14 and 39 of our Constitution, both principles legally implemented in our system since Law 11/1981 of 13 May, the reference to that legislation made by article 9(4) of the Civil Code may be derogated by applying the constitutional filter through the Spanish international public policy clause, following the example of the Constitutional Court in its Judgment 141/2000 of 29 May, where it states that "the legal status of the minor is undoubtedly a rule of public policy that must be observed by all public authorities" (Legal Ground no. 5).

The Constitutional Court has likewise applied this idea in practice to reject the invocation of a foreign law that prohibits actions for filiation by the child, applying the Spanish law subsidiarily in its place and thus putting into practice the terms of art. 12(3) of the Civil Code (see Judgment 7/1994 of 17 January). Similar effects are produced by the existence of imperative material norms in Spanish law which limit the scope of the rules of conflict mentioned earlier, for instance the Minors (Judicial Protection) Act, Organic Law 1/1996 of 15 January, art. 1 of which states that the Act is applicable to all persons aged under 18 who are in Spain, whether Spanish nationals or aliens.

As the *lex fori*, Spanish law is likewise applicable if we accept the idea that, filiation being a prior issue bearing upon the nationality of the minor, the settlement of the question of establishment of a filial tie must be predicated on the premise that the child's nationality is indeterminate; this means that the nexus must be the latter's habitual place of residence (cf. arts. 9(4) and (10) CC), which in the present case, as we have seen, refers back to Spanish law as that bearing most closely on the matter of fact (*lex fori*, law of the birthplace and habitual place of residence of parents and child).

Finally, in this complex process of interpretation, carrying on with the above-noted solution, it is of decisive importance to weigh up the principle of *favor filiationis*, which likewise favours application of the law that recognises filiation as the legal tie consequent upon the biological fact of procreation (Spanish law) and ignores the law that denies such a tie (Moroccan law).

Ten. The above conclusions would be unaffected even if the foregoing methodological approach to the subject were to be deemed inappropriate where the point is to examine the question of the determination of filiation as a prior issue to application of art. 17(1)c of the Civil Code, for if the result of disqualifying the foreign legislation is admission of the filial tie for purposes of Spanish law and consequently – and logically from the standpoint of our legal system – affirmation of the child's Moroccan nationality, the end result will be to defeat the ultimate purpose of the provision – namely to avoid statelessness – unless the conclusion produced by the Moroccan legislation as to the child's nationality is the same, which will clearly not be the case given that it is founded on the premise of inapplicability.

This would produce precisely the outcome of statelessness that it was sought to avoid. Viewed from this perspective, in order to achieve the end pursued by the rule, it would be necessary to admit an exception to the exception – in other words inapplicability of the public policy clause to the case – and therefore the issue of the minor's filiation must be analysed solely from the standpoint of Moroccan law.

In this connection there is no question but that for Moroccan law the transmission of nationality *jure sanguinis* is the preferential criterion (see art. 6 of Dahir no. 250(58)1 of 6 September 1958), albeit this is founded on a principle basic to Islamic family law, namely that kinship is transmitted via the male line, and hence the transmission of nationality via the female line is only allowable if the identity of the father is unknown. The legitimacy of filiation is consequently contingent upon evidence of the blood tie between father and child.

The Law presumes filiation *juris tantum* where the child is born within wedlock or soon enough after dissolution of the marriage for conception within wedlock to be a reasonable assumption (cf. arts. 152 to 154 of the Mudawana). This is consistent with the substance of the information furnished by the Ministry of Foreign Affairs and Cooperation of the Kingdom of Morocco in a verbal note in 1994, which stated that the proof of paternity was dependent on there being a valid marriage in the eyes of Moroccan law.

However, taken out of its proper legal context, at this point in time such an assertion constitutes a species of 'legal synecdoche' in which a part is taken for the whole, for the legal measures available to determine paternal filiation are not confined solely to the legal presumption deriving from matrimony but also include recognition and cohabitation (cf. art. 152 of the reformed Mudawana), the last of which has the same probative effects as marriage while a legally recognised child has the same rights and duties as a child born within wedlock (cf. art. 157 of the reformed Mudawana). In light of this new legal situation, the solution applied to the case of paternal filiation within wedlock must be extended to cases of civil marriages contracted abroad (which marriages in Spain carry a presumption of cohabitation: art. 68 CC), and to cases of non-marital filiation where recognition valid in Morocco or cohabitation is demonstrated. We must stress regarding marriages contracted by Moroccan citizens outside

Morocco that the new Moroccan Family Code admits marriages celebrated in the local form of the country where both parties are habitually resident, and hence in such matters Moroccan law now accepts the *locus regit actum* rule subject to the obligation of depositing a copy of the marriage certificate with the Moroccan Consulate serving the place of celebration (cf. arts. 14 and 15). Furthermore, art. 157 of the new Code also admits the establishment of filiation in cases of void or contestable marriages, or even in instances of so-called 'erroneous relationship' (see art. 152(3)).

Eleven. Regarding these means of proof of non-marital filiation, we cannot ignore the fact that entry of the birth in the Spanish Civil Registry is itself proof of filiation (cf. arts. 113 CC and 2 and 41 LRC) and is especially important when registration has been sought by the father and the mother together, as in the present case, and has been effected within the legal term (cf. arts. 120 (1) and 124 CC), provided that the father's paternity is not biologically impossible and that no other paternity is accredited (cf. art. 113 *in fine* CC), and also provided that there is no possible doubt as to the authenticity of recognition. The provisions of Spanish law cited on this point are not invoked as regulating the merits of the recognition (in this case there is no question of a need for additional consents or of other possible legal obstacles) – an aspect regarding which there are cases in the jurisprudence of registration where there is some dispute as to their acceptance by the scientific doctrine – but rather as bearing on the *form* of the recognition, and hence they can be defended as pertinent *in casu* pursuant to the rules laid down in art. 11 of the Civil Code (cf. Decision of 25 March 1985).

Finally, in these matters it is important to stress the fact that Moroccan law embraces the principle of *favor filiationis*, establishing a presumption that 'filiation in respect of the father and the mother is legitimate absent evidence to the contrary' (see art. 143). If, then, the filial tie between the Moroccan father and his child is admitted, then the latter acquires his father's Moroccan nationality by right of birth.

Twelve. Therefore, since the purpose of art. 17(1)c of the Civil Code is to avoid situations of statelessness at origin, which is not the case here, the child cannot be attributed Spanish nationality given that the claim and the subsequent appeal are based on a consular certificate which can in no way substantiate such a situation since that certificate only partially conveys Moroccan law on the attribution of nationality; and furthermore, this conclusion is unaffected by the fact that Colombian law does not attribute the mother's nationality to the child, since in this case there is no question of statelessness."

VIII. ALIENS, REFUGEES AND NATIONALS OF MEMBER COUNTRIES OF THE EUROPEAN UNION

1. Aliens regime

– STC, Chamber no. 1, 4 April 2005 (EDJ 2005/20109)
Aliens. Right of entry to Spain. Nature thereof.

"Legal Grounds:

... Eight. (...) It therefore follows that the right of entry to Spain – which is 'only recognised constitutionally for Spanish nationals (STC 53/2002 of 27 February, FJ 4), as this Court has had occasion to state in an incidental assertion – is not a fundamental right available to aliens in pursuance of art. 19 CE, although evidently any person actually in Spain may apply for protection of that right to the courts and judges of Spain, who are bound to safeguard it as required by art. 24 CE, which does enshrine a right that is available to aliens."

– STS, Chamber 3, Section 5, 26 January 2005 (EDJ 2005/5002)
Right of minors to be, grow and be brought up with their mother. Expulsion order on the mother. Alien mother of a Spanish minor.

"Legal Grounds:

... Six. (...) 1. (...) It is therefore fair to say that, although the rules do not so state in so many words (but that is their spirit), the primordial right of a child is to be, grow, be brought up and be educated with its mother. This is a right rooted in nature itself and hence stronger and more elementary than any other right of a legal kind. It is moreover a right that is reflected in concrete legal precepts (e.g., article 110 of the Civil Code, whereby the father and the mother, even if not in a position of parental authority, are obligated to safeguard and maintain their children; article 143(2) of the same Code, whereby ancestors and descendants are mutually bound to maintain one another; article 154, whereby parents are duty bound (and entitled) to safeguard their children, keep them in their company, maintain them, bring them up, provide them with a comprehensive education, etc).

2. The laws of Spain do not permit the expulsion of Spanish citizens from the national territory. (The commission of a criminal or an administrative offence by a Spanish national is subject to certain penalties or sanctions but can never be punished by expulsion from the national territory; except in the event of precautionary measures or penal sanctions, "Spanish nationals are entitled freely to choose their place residence and to move about the national territory" according to article 19 of the Spanish Constitution.)

3. The expulsion order served on the mother, which is here appealed, implies either the expulsion of son, who is Spanish (which is in breach of the cited principle or non-expulsion of nationals), or the certain break-up of the family given that the expulsion as ordered inevitably entails separation of the son from his mother (which is in breach of the precepts we have cited regarding protection of the family and of minors).

Neither the rules governing aliens nor simple common sense can conceive that the mother of a Spanish national is entirely alien and may be treated as such – that the Spanish child may have every right and the mother none whatsoever and that the mother may consequently be expelled from Spain as a mere alien while the child remains in Spain, with all its rights but alone and separated from its mother."

– STSJ, Canary Islands (Las Palmas), Contentious-Administrative Chamber, Section 2, of 20 January 2005 (EDJ 2005/9507)
Visa. Requirement. Cohabitation without marriage. Equal treatment of marriage and de facto union.

"Legal Grounds:

. . . Three. Regarding considerations as to whether cohabitation *more uxorio* is sufficient cause to warrant exemption from the visa requirement, Constitutional Court judgment 222/1992 of 11 December 1992 maintains that . . . it does not necessarily follow from the non-equivalence of marriage and *de facto* cohabitation that any measure solely affecting spouses and excluding persons living together in stable *de facto* unions is always and in every case compatible with equality before the law and the prohibition of discrimination guaranteed by the Constitution in art. 14.".

In line with this principle, the most recent jurisprudence asserts that marriage and *de facto* union may be treated as equivalent where the purpose is to apply rules which deal solely or preponderantly with the situation of cohabitation and emotional life.

In this connection the Supreme Court judgment of 1 June 1999 argues that the distinction between a spouse and a *de facto* cohabitant rests on the determination of their legal treatment, given that from a legal/formal point of view marriage is not equivalent to *de facto* union; however, that does not justify the distinction in cases dealing exclusively with aspects relating to the actual situation of cohabitation and emotional ties of the partners. In accordance with these principles, since the ruling of 7 July 1989, issued in connection with appeal 941/1988, the Supreme Court has been allowing that where there is a stable, continuous *de facto* union similar to a conjugal relationship, irreparable harm may ensue from expulsion given the applicant's roots in Spain, as a consequence of the break-up of the family unit, sufficient according to the jurisprudence to meet the conditions required by article 122 of the Law regulating the Contentious-administrative Jurisdiction of 27 December 1956 (judgment of 11 October 1999 and 15 November 1999).

The cited judgments, then, declare that the break-up of a relationship characterised by the existence of ties of affection and cohabitation within a stable *de facto* union between two persons, even if they have not contracted marriage, produces irreparable harm to those affected (consisting, as the first of the cited judgments says, 'in the break-up of the personal relations maintained by the partners'). For precisely the same reason the Supreme Court admits that the will

to maintain or restore the stable couple's family unit is sufficient cause or exceptional circumstance to warrant exemption from the residence visa requirement for a person demonstrably in such a situation.

The situation of stable cohabitation with a legal resident and a common child is substantiated as claimed. The appeal must therefore be upheld."

– STSJ Madrid, Contentious-Administrative Chamber, Section 1, of 19 February 2005 (EDJ 2005/41699)

Expulsion of alien. Attendant bar on entry to national territory.

"Legal Grounds:

. . . Three. (. . .) It being established that the sanction of expulsion as imposed is in accordance with the law, the fact is that in the challenged judgment the lack of any explanation accompanying the secondary measure prohibiting entry to Spanish territory for five years, to show that there is a reasonable correlation between the seriousness of the administrative offence and the extent of the sanction imposed constitutes a breach of the principle of proportionality in the determination of the sanction of expulsion. Consequently the present appeal is partially upheld; the determination of the duration of the secondary measure prohibiting entry is declared void, and such duration is now set at the minimum term, namely three years."

– STSJ Valencia, Contentious-Administrative Chamber, Section 3, of 30 May 2005 (EDJ 2005/142300)

Aliens. Treaty of Cooperation and Friendship between Spain and Uruguay, 1992. Treaty of Recognition, Peace and Friendship signed between Spain and Uruguay on 19 July 1870. Interconnection.

"Legal Grounds:

. . . Four. In short, what this appeal asks of the Court is that it determine in what form, manner and extent the 1992 General Treaty of Cooperation and friendship between Spain and Uruguay has affected the substance and interpretation of the Treaty of Recognition, Peace and Friendship between Spain and Uruguay of 19 July 1870, which was ratified on 28 January 1883.

Certainly art. 18 of the General Treaty of Cooperation and Friendship between the Kingdom of Spain and the Oriental Republic of Uruguay, with the Annex and Economic Agreement constituting part of it (BOE 131/1994, 2 June 1994), states that prior Treaties and Agreements remain in force insofar as they are compatible, which means that the 1870 Treaty is still valid; in connection with the 1992 Treaty, the Attorney-General's Office states that the law has changed and the only commitment that the Spanish State will make regarding Uruguayans in Spain in art. 14 is '. . . Subject to its own legislation and in accordance with international law, either Party shall provide the nationals of the other with such facilities for the undertaking of professional or other remunerated activities on their own account or as employees, in equal conditions to

nationals of the State where they reside or work as may be necessary for the conduct of such activities.

The issuance of labour or professional work permits for employees shall be free of charge . . .,' – in other words, to provide 'facilities'. On the other hand, to apply the full force of the aliens legislation cannot be described as providing 'facilities' to Uruguayans; providing 'facilities' would mean granting them work and residence permits save in exceptional circumstances such as criminal activities or the like. In other words, if we analyse art. 8 of the 1870 Treaty and article 14 of the 1992 Treaty together, the Government cannot refuse a work and residence permit to a Uruguayan merely on the basis of certification of the existence of demand for work in the domestic employment sector; it must be remembered that art. 14 in relation to art. 8 of the 1870 Treaty says '. . . in equal conditions to nationals of the State where they reside or work as may be necessary for the conduct of such activities . . .'. Moreover, the Court takes the view that the 1992 Treaty goes further than the mere provision of facilities to Uruguayans; in fact if we analyse it as a whole we find that it seeks to afford Uruguayan nationals a legal treatment similar to that afforded to citizens of Member States of the European Union, at least in matters of work and residence permits, and the proof of this can be found in art. 15 of the 1992 Treaty'.

Spanish and Uruguayan nationals may vote in the municipal elections of the State where they reside and of which they are not nationals, subject to the laws of that State . . .'; while this provision requires a supplementary agreement between the two States, we can see that the perspective is more than that of a simple Treaty of Friendship and Cooperation. And likewise in the sense of providing 'facilities' and tending to treat Uruguayan citizens in the same way as other European Union citizens, we would cite the Instrument of Ratification of the Social Security Convention between the Kingdom of Spain and Oriental Republic of Uruguay, done at Montevideo on 1 December 1997 (BOE 47/2000, 24 February 2000), or the provision in art. 13 '. . . in countries where there are no consular offices of one of the Parties, its nationals may go to the other's consular office and request assistance . . .', in connection with mutual consular assistance.

In short, having examined the rules cited by the Attorney-General's Office, this Court takes the view that the challenged judgment must stand despite the 1992 Treaty analysed above."

– STSJ Madrid, Contentious-Administrative Chamber, Section 2, of 8 June 2005 (EDJ 2005/128544)

Aliens. Application for work permit. Spanish nationals seeking employment in domestic service.

"Legal Grounds:

. . . Three. In fact, in the concrete instance under consideration here, the Government has refused an application for a work permit on the ground that there is demand for employment in the activity that the alien worker seeks to

undertake, and this, as expressly stated in the challenged judgment, is in turn based on a report issued by the Employment Office of the Department of Employment of the Madrid Region which, according to the cited judgment, states that there are Spanish nationals seeking employment. However, that report does not specify how many of the persons seeking employment in domestic service have requested employment entailing staying overnight at the employer's domicile, a condition for which the appellant had specifically offered his services, but simply quotes a list of occupations and the number of applicants registered in each category (document 2 in the government file). No real proof has therefore been offered as to the existence of applications for employment registered at the Employment Offices of the Madrid Region for the specific activity and occupation that is offered with the requirements specified in the offer of employment. Therefore, given the special nature of the employment concerned – domestic service – entailing as it does a degree of trust between employer and employee in which the preference for applications of Spanish nationality takes second place to the employer's entitlement to choose the person who will serve in the family home, this appeal is upheld."

2. Right of asylum

– STS, Chamber 3, Section 5, of 3 March 2005 (EDJ 2005/33680)
Asylum. Rules. Burden of proof for purposes of granting.

"Legal Grounds:

... Four. (...) For the rest, the consolidated jurisprudence of this Supreme Court interprets the rules of Asylum and Refuge in such a way as to infer therein a tendency to alleviate the burden of proof but not to remove it entirely. In fact, for asylum to be granted it is enough that there be reasonable indications that the applicant has a well-grounded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions. Reasonable indications, then, are enough; but they must exist, and the burden of providing them lies with the appellant (...)."

– STS, Chamber 3, Section 5, of 19 April 2005 (EDJ 2005/62664)
Asylum. Grounds for denial.

"Legal Grounds:

... Five. (...) This Chamber has repeatedly stated that an application for asylum must be admitted for consideration when the causes adduced are such as to warrant recognition of refugee status, unless they are manifestly false, implausible or out of date, and in that part of the procedure there is no need to furnish evidence or indications of the existence or reality of such causes, which evidence or indications are only required for the decision on whether or not to grant asylum. Nevertheless, in the resolution denying admission of the asylum application for consideration, the Government claims in a general way and with

no further explanation or clarification that the causes adduced by the asylum applicant are implausible in that the facts as claimed contradict the available information, which information is neither to be found in the file nor argued or justified in any way.

These arguments, which have been repeatedly presented in similar resolutions to the one under consideration here, as we have found in considering numerous appeals in cassation against judgments declaring that administrative resolutions denying admission of asylum applications for consideration are legally sound, demonstrate that the asylum application was not examined individually as required by article 5(6) of the Asylum Act and articles 17(1) and 20(1)c of the Asylum Regulations, which means that these provisions were infringed (. . .)."

– STS, Chamber 3, Section 5, of 6 October 2005 (EDJ 2005/162034)
Right of asylum. Granting. Causes.

"Legal Grounds:

. . . Four. (. . .) From this analytical perspective we must remember that there is consolidated jurisprudence – consolidated to the extent that it is superfluous to cite concrete cases – declaring that refugee status and the attendant right of asylum is properly to be granted to anyone having well-grounded fears of persecution in his or her country for reasons of race, religion, nationality, membership of a particular social group or political opinions, not only when such persecution is exercised by the Authorities of the country of origin, but also when it is exercised by sectors of the population whose conduct is deliberately tolerated by the authorities or the latter prove incapable of affording effective protection.

It follows from this that the reference in the asylum application to a situation of alleged persecution, for reasons warranting protection, by social sectors whose conduct is deliberately tolerated by the country's authorities or against which these authorities take no action, may be considered as coming within the meaning of the legal reasons warranting asylum, and hence it may be sufficient grounds on which to admit the case for consideration if the facts as related in the asylum application make express reference to such passivity on the part of the authority (. . .)."

– STS, Chamber 3, Section 5, of 11 October 2005 (EDJ 2005/171780)
Right of asylum. Granting. Domestic violence.

"Legal Grounds:

. . . Three. (. . .) From the events as related by Amparo (transcribed elsewhere), it is readily deducible that the violence from her husband of which she has been a victim is not merely another instance of domestic violence but had political roots. In her account she stated that her 'husband belongs to the P.D.G. and in 1993 he discovered that the applicant belonged to the P.P. and began to ill-treat her', so there is no doubt that the ill-treatment began as a consequence

of the applicant's political ideas, and that constitutes persecution qualifying for protection in the form of asylum, according to article 3(1) of the Asylum Act, Law 5/84 of 26 March, as it relates to article 1–A-2) of the Geneva Convention Relating to the Status of Refugee of 28 July 1995.

Set against this, the question of whether or not the applicant's husband occupies a senior position in the Guinean Government is unimportant, for even if he does not (and that is the strength of the report from the Spanish Embassy in Malabo, folio 3.8 of the administrative record), he can still subject her to molestation and ill-treatment, against which she will presumably be able to offer little defence given his membership of the party in government (the violence has reached such a pitch that he sent people to stab the applicant's sister, in whose house she had taken refuge, which gives some measure of the extent of the violence and ill-treatment) (. . .)."

– SAN, Contentious-Administrative Chamber, Section 1, of 9 March 2005 (EDJ 2005/159903)

Asylum application. Authorisation to remain in Spain for humanitarian reasons.

"Legal Grounds:

. . . Four. Finally, the request invokes humanitarian reasons as defined in article 17(2) of Law 5/1984, which provides that 'Notwithstanding the terms of the foregoing paragraph, a person whose application has not been admitted for consideration or has been rejected may, for humanitarian reasons or for reasons of public interest, be authorised, within the terms of the general aliens legislation, to remain in Spain, particularly in the case of persons who have been forced to abandon their country as a consequence of serious political, ethnic or religious conflicts or disturbances and do not meet the requirements referred to in article three first paragraph of this Act'.

As noted in a recent judgment handed down by this Chamber and Section on 2 March 2005 (Appeal 862/2001), 'For obvious reasons of material justice (art. 1(1) CE) and protection of the fundamental right to life (which contains an implicit mandate not to return: see *inter alia* ECHR Judgments in Jabari v. Turkey, 11 July 2000; Hilal v. the United Kingdom, 6 March 2001 and Dougoz v. Greece, 6 March 2001 and STC 32/2003), authorisation to remain in Spain for humanitarian reasons must be based upon a 'real risk to the appellant's life and physical integrity' (art. 31(3) of the Asylum Act Regulations as set forth in Royal Decree 3393/2004 of 30 December), which means that the danger effectively existing for Carlos Antonio should he return to his country at the present time must be analysed.

It is common knowledge that the current situation in Iraq is one of absolute insecurity, with frequent attacks – for example, on 1 March 2005 the national dailies reported an attack causing 125 deaths – and hence, as we noted in the above-cited judgment of 2 March 2005, the appellant cannot properly be returned to his country of origin, and therefore he must be authorised to remain in Spain for humanitarian reasons."

3. Nationals of Member States of the European Union

– STSJ, Canary Islands (Santa Cruz), Contentious-Administrative Chamber, Section 2, of 28 February 2005 (EDJ 2005/22158)
Relatives of Community residents. Requirement of residence via.

"Legal Grounds:

. . . Two. This Chamber has repeatedly ruled that applicants for Community resident relative's cards should not be required to produce a residence visa. (. . .) Hence, if the Government did not have the power to decide on exemption from the visa requirement because one of the decisive elements therefor (compulsoriness of a visa) was lacking, then the act is void – not because the visa was refused, but because the Government did not even possess the power to rule on the matter (. . .)."

IX. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

X. FAMILY

1. Adoption

– SAP Valencia, Section 10, of 14 March 2005 (TOL 644596)
International adoption of Ukrainian child. Suitability to adopt.

"Legal Grounds:

. . . Two. As this Chamber observed in a recent judgment (99–05), 'to resolve the delicate issue of whether or not certain persons are suited to become adoptive parents according to article 176 of the Civil Code, the circumstances of the case must be carefully weighed in order to avoid either admitting persons who do not possess the right qualities for this mode of filiation, or frustrating legitimate aspirations to become a father or mother – which comes within the meaning of the right to free development of the personality enshrined in article 10 of the Constitution – and the prospects of success of an adoption, which could be spoiled by an over-strict judgment of the peculiarities of human beings'.

– SAP Málaga, Section 6, of 6 April 2005 (TOL 691591)
International adoption.

"Legal Grounds:

. . . Two. . . . Following a close analysis of the two reports extant in the record of proceedings, this court of appeal has reached exactly the same conclusion as the original court as to the suitability of the applicants for international adoption of a minor, on the understanding that the minor will be aged over 7. Both reports conclude that neither of the partners suffers from a psychological disorder of any kind. And again from a social standpoint the couple

presents no dysfunction of any kind; furthermore, this Chamber views it as particularly significant and revealing that Fátima has long experience of motherhood, having had two children by a previous marriage, her partner in which died, and indeed that motherhood has proven a success in terms of the children's upbringing and education. Moreover, the testimony of the witnesses extant in the record of proceedings indicates quite clearly that both spouses are well integrated, without problems of any kind, in the social milieu in which they live; both demonstrate a strong desire to adopt, and that, combined with the expert evidence furnished to the effect that they are fully capacitated for that purpose in both psychiatric and psychological and emotional terms, leads this Chamber to conclude that the original court was quite right in upholding the objection and overturning the administrative resolution of unsuitability. The appeal is therefore dismissed and consequently the appealed judgment sustained."

– RDGRN of 4 July 2005 (TOL 702785)
Registration of an Argentine adoption.

"Legal Grounds:

... III. ... In the present case, an examination of the file does not reveal the claimed equivalence of effects. If we consider that the sole category of adoption contemplated by the Spanish Civil Code causes the adoptee to become a full member of the adopter or adopters' family in every way and as a general rule causes the severing of all ties to the previous family (cf. arts. 108, 176 and 178 CC), whereas an Argentine adoption, of the simple kind as in this case, does not create family ties between the adoptee and the adopter's biological family except for certain purposes; the rights and duties attendant on the biological tie are not extinguished by the adoption other than parental authority and usufruct of the minor's goods; and as for rights of succession, there are certain legal limitations or reservations regarding the goods of the adoptee, and also differences as regards succession to the adopter's forebears, such that neither the adoptee nor his or her descendants are heirs by automatic right; and finally, Argentine adoption in its simple form is revocable, albeit a judicial order is required. We must therefore conclude that the Argentine adoption at issue here does not share points of identity with adoption as defined in the Spanish Civil Code and cannot be included in the list of registrable events set forth in art. 1. of the Civil Registry Act without risk of serious confusion as to the efficacy of the adoption as registered."

2. Legal abduction of minors

– AAP Lugo, Section 1, of 18 July 2005 (EDJ 2005/150203)

"Legal Grounds:

One. The appeals formulated by the Public Prosecution Service and the State Attorney were grounded on infringement of art. 12 of the Hague Convention,

infringement of article 13–2 b) of the same Convention, and the impossibility of taking account of the child's views given his age.

As far as the civil aspects of international child abduction are concerned, the intent of the Convention of 25 October 1980, ratified by Spain, and the Instrument of 28 May 1987, is immediate return of children to their prior situation when a right of custody has been violated. The Convention itself interprets this last aspect as arising by operation of law or by reason of a judicial or administrative decision or by reason of 'an agreement having legal force under the law of that State'.

It is not controversial that Luis Miguel and Celestina held what is known in Brazilian law as 'temporary custody' of the child, and that the child's biological mother took advantage of a visiting right granted by the court to take him to Spain.

This occurred before one year had elapsed, and therefore the child should in principle be returned forthwith according to art. 12.

However, article 13 of the Convention also contemplates exceptions, and at the outset, reference was made in the first hearing to a serious risk of the child's being exposed to physical or psychological harm or otherwise being placed in an intolerable situation.

And another exception is if the child itself objects 'and has attained an age and degree of maturity at which it is appropriate to take account of its views' (article 13 section b).

The term used is not serious psychological harm but a serious risk. And this Chamber naturally considers that the harm must indeed be serious.

However, it is not possible to prognosticate loss of psychological stability with absolute certainty on the basis of an expert's report. The expert stated that she could not tell exactly how seriously the child might be affected by a return to his former family and social situation in Brazil; she stressed that the child is emotionally stable in Spain and expressed her suspicion – which is substantiated by the video – that he was always in contact with his biological mother.

In view of this, the court could request new evidence of all kinds (in view of the documentary evidence added after the visits), which would work against the rapidity required by the Convention and might well produce more information on questions not germane to the actual solution of the issue, which should be where the child is best off and under whose custody he would most benefit.

The fact is, however, that in its preamble the Convention states that the interests of children are of paramount importance, as does article 1905 of the LEC [Civil Procedure Act] of 1881 in the version of LO 15/96, while the temporary custody is currently in dispute in Brazil; and what is more, according to the photocopy of a certificate – which was remitted to the parties without eliciting any objection – the foster mother, Rebeca, died on 12/03/2005.

Given the circumstances, one cannot rule out the possibility of psychological harm to the child, who is currently living in Spain with his mother and his two biological siblings (and the mother's present husband), were he return to

Brazil with the foster parent. Note that the biological mother consistently refused to give him in adoption and would only allow the child to stay temporarily in the home of the foster parents (with whose family she had worked as a domestic employee) until she should return from Spain and find work. For the rest, the child's preference also seems clear from the hearing and examination of him. The Convention does not stipulate a specific age for his views to be taken into account, and the psychologist judged that the child was bright and mature despite his tender age.

All of which prompts us to confirm the challenged decision."

– AAP Guipúzcoa. 14 September 2005 (Ref. Aranzadi JUR 2006/3992)
International child abduction. Refusal of return of a wrongfully removed child.

"Legal Grounds: . . .

. . . Four. (. . .) However, as we said, proof of unlawful transfer does not always necessarily cause the return of the child; in the case at issue reasons for refusal of return were identified, albeit we do not share the view of the court *a quo* that the risk to the child's emotional stability inherent in going back to London was sufficient cause to warrant its non-return. The Convention clearly adopts a restrictive approach in this regard, using the terms grave risk of physical or psychological harm. It does not refer merely to any risk or nuisance but to situations which it describes as 'intolerable'; and we cannot ignore the tendency in intra-Community relations to restrict the application of this cause, as exemplified by Council Regulation 2201/2003 of 27 November on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. The psychosocial report gives no indication of what risk, other than the upset attendant on a change of habits and surroundings, could ensue from his move to London – he had after all suffered the same upset before when we moved here to Tolosa. To say that it is advisable for changes in the situation of children to be kept to a minimum is not at all the same as to say that these entail a grave risk, which is what the Convention refers to. And that certainly does not seem to be the case when the psychologist himself says in point five of the conclusion to his report that he sees no harm in the children living in London, nor is there any reason to believe that the children's relationship with their father is harmful to them or that there is no assurance of its progressing in suitable conditions (. . .).

3. Matrimony

a) Celebration and registration.

– RDGRN of 5 May 2005 (TOL 647878)
Registration of marriage celebrated in Cuba between a Spanish and a Cuban national. Requirement of hearing.

"Legal Grounds:

. . . II. For a marriage – in this case between a Spanish and a Cuban citizen – to be registered with the Spanish Civil Registry, the parties must each separately undergo a confidential examination (cf. art. 246 RRC) to ensure that there are no impediments to the union 'or any other legal obstacle to its celebration'. The importance of this procedure was underlined in the cited Instruction of 9 January 1995, rule 5, where it was defined as 'an essential procedure, which may not be dispensed with nor conducted as a mere matter of form'. It is therefore an indispensable procedure which must be carried out by the examining magistrate with the assistance of the Clerk, for the purposes provided in the Regulations."

– RDGRN of 1 June 2005 (TOL 652835)
Nullity of consular marriage in Spain between a Spanish and an Ecuadoran national at the Consulate of Ecuador in the region of Murcia.

"Legal Grounds:

. . . II. As article 49 of the Civil Code now clearly states, and as the official doctrine of this Department has repeatedly declared, in Spain a Spanish national must contract matrimony either before a Judge, a Mayor or other official as designated in the cited Code, or else through a religious ceremony as prescribed by law. Consular marriage, which may be validly contracted by two aliens in Spain as long as the personal law of either party so allows (cf. art. 50 CC), is not however a valid form if one of the parties is a Spanish national, so that in this second case the marriage is void under article 73(3) of the Civil Code."

– RDGRN of 7 June 2005 (TOL 662871)
Registration of marriage by proxy celebrated in Lima (Peru) between a Peruvian and a Spanish national.

"Legal Grounds:

. . . VII. There does not appear to be any obstacle to the Registrar's assessing the possibility of the power of attorney having been revoked, although the real test of its validity is to determine whether there is true consent to matrimony. In what is known as marriage by proxy, the attorney does not act as a genuine voluntary representative but acts as a mere vehicle to convey the consent to marry – as a simple *nuntius* or bearer of a declaration of another's intent entirely determined beforehand by the principal. That is how the most reliable doctrine interprets the expression 'special power of attorney' in article 55 part one of the Civil Code and the mandate that 'the power of attorney shall specify the person with whom marriage is to be contracted, detailing such personal information as is required to establish their identity' (second paragraph). From this conclusion it follows in turn that it is immaterial whether the proxy or *nuntius* lacks the requisite capacity to contract marriage (cf. art. 46 CC) or is the subject of any bar to contracting marriage (cf. art. 47 CC) or any of the defects

of intent that may cause the nullity of a marriage (cf. art. 73(1)4 and 5 CC). In short, for the purposes of the present case the essential point is that the only capacity and the only consent that matter in marriage by proxy are those of the principal."

– RDGRN of 13 June 2005 (TOL 673635)
Application for registration of marriage between a Spanish and a Moroccan national celebrated in Morocco according to Moslem rite.

"Legal Grounds:

. . . Three. As to the merits, it must be said first of all that any Spanish national may contract matrimony abroad in the form established by the law of the place of celebration (cf. art. 49–II CC); however, while the form may be valid, for the marriage to be registrable a check is necessary to ensure that the legal requirements for validity of the union are met (cf. art. 65 CC). This may be done by examination of the 'certificate issued by an authority or official of the country of celebration' (cf. art. 256(3) RRC) in the conditions laid down in the cited regulation, or else, failing adequate documentary support, through the procedure provided in art 257 of the Civil Registry Regulations.

Four. . . . In short, it is akin to the possibility of registering births and deaths without a record as provided in art 23–II of the Civil Registry Act and art 85 of the Civil Registry Regulations, which allow entry in the Spanish Civil Registry, without a record and accepting certificates of entries in foreign registries as registrable documents 'as long as there is no doubt as to the reality of the event and its legality under Spanish law', which permission is now also extended to marriages celebrated abroad.

That said, in any case art 256 of the Regulations, without going into the question of legality, is careful to exclude certain cases from the mandate for direct registration of certificates issued by a competent authority or official, among them that of article 252 of the Regulations, according to which when a Spanish national wishes to contract marriage abroad in the form established by the law of the place of celebration and that law requires presentation of a certificate of marriageable status, the preliminary procedure prior to the marriage, when one of the parties is domiciled in Spain, must be conducted through the Civil Registry of domicile according to the general rules, and an essential part of that is the confidential examination of each party separately (cf. art. 246 RRC).

Five. What has happened in this case is that the Spanish party – about whose nationality there is no doubt in view of his birth certificate which bears an annotation on the margin attesting to the grant of Spanish nationality by reason of residence by virtue of a Decision of the Department of Registries and Notaries Offices dated 27 March 1998 – has been considered Moroccan and not Spanish by the Moroccan authorities responsible for authorising the marriage, as they do not recognise the party's renunciation of Moroccan nationality which was formalised for purposes of his acquisition of Spanish nationality; however,

that view carries no weight whatsoever with the Spanish authorities, since in such cases of *de facto* dual nationality where a Spanish national also possesses another nationality not recognised as compatible in our laws or in international treaties, the Spanish nationality will prevail in every case (cf. art. 9(9)9 CC).

Hence, as far as the Spanish legal system is concerned, this qualifies as a case of marriage contracted by a Spanish national abroad with a foreign partner, in which case, given that the local – Moroccan – law requires submission of a certificate of marriageable status by the alien, a simple certificate from the foreign authority cannot be accepted as a registrable document, and therefore, assuming that art 256(3) of the Civil Registry Regulations does not exceed the limits set by art 73 second paragraph of the Act, application of that provision collides with the exception recognised in art 252 of the Regulations, which for the cases contemplated therein, in which category the case here at issue is subsumed, requires prior completion of registration procedures to certify the marriageability of the Spanish party; and this holds regardless of whether it is considered that the cited art 252 of the Regulations is a material rule applying inversely or *ad intra* to the international eventualities that it contemplates so that the rules of foreign legal systems requiring certification of marriageability are 'internalised', or whether it is considered that, the party being in possession of Spanish nationality, the requirements for celebration of the marriage in accordance with the *lex loci* have not been satisfied in due form."

– RDGRN of 20 September 2005 (TOL 709788)

Authorisation of civil marriage between a Spanish and Moroccan national united by Moslem marriage celebrated in Morocco.

"Legal Grounds:

... II. Marriage cannot be contracted by persons already united in matrimony (cf. art. 46(2) CC), and if contracted nonetheless, such a marriage would be void under the provisions of article 73(2) CC. Therefore, such marriages must not be authorised, and if they should be authorised unduly, they may not be registered in the Civil Registry.

(...)

III. ... It follows from this that the claimed marriage cannot be authorised owing to failure to demonstrate the absence of an impediment to marriage. This conclusion is unaffected by any doubts that may arise as to the validity or otherwise of the Moroccan marriage under Spanish law, given that, insofar as it is entitled to the presumptions implicit in the principle *favor matrimonii*, that marriage bars proof of the parties' freedom to marry."

– RDGRN of 26 October 2005 (TOL 776068)

Civil marriage between persons of the same sex, of Spanish and Indian nationalities. Law applicable to the personal status of the alien party.

"Legal Grounds:

. . . III. Within the framework of the constitutional principles of equality, non-discrimination and free development of the personality (cf. arts. 9(2), 10(1) and 14 of the Constitution). the recent Act, Law 13/2005 of 1 July, amending the Civil Code as regards the right to contract marriage introduces an innovation in our legal system by allowing marriage to be contracted between persons of the same sex in full equality of requirements and effects. Such is the substance of the second paragraph added to article 44 of the Code, whereunder 'The requirements for and effects of marriage shall be the same whether the parties are of the same sex or different sexes'. However, the cited Law 13/2005 does not introduce any changes in the rules of Spanish Private International Law, and that raises the question of what law will be applicable to mixed marriages between Spaniards and aliens with regard to capacity to marry, particularly in connection with the possibility of identity of sex constituting an impediment – in other words whether the permission that Spanish law vouchsafes to same-sex marriages still applies where alien personal elements are involved, that is where one or both of the parties is a foreign national.

(. . .)

VII. . . . And from the perspective of article 9 paragraph 1 of the Civil Code, it expresses a general principle of Law which as such cannot operate exclusively, but only in conjunction with other legal principles and values, which must be applied together and not in isolation in order to arrive at the solution properly applicable to the case.

The only solution to such a lacuna, as asserted by this Department in a recent Circular/Decision of 29 July 2005, is to admit the applicability of the material Spanish law, in view of the following arguments in that direction: a) analogy with the concept of '*de facto* homosexual couples' as recognised and regulated by numerous Spanish regional laws, which preferentially take the administrative neighbourhood – a concept linked to the habitual place of residence of its members – either as a connecting criterion or as a factor delimiting their scope; b) proximity between *forum* and *jus*; c) the general principle of *favor matrimonii* operating in Spanish Civil Law; d) the status of *jus nubendii* as a fundamental right in the Spanish Constitution (art 32) as it relates to the extension of the prohibition of any form of discrimination to cover instances of discrimination by reason of 'sexual orientation', a novelty introduced by article 21 of the Charter of Fundamental Rights of the European Union of 7 December 2000 as a separate category distinct from the prohibition of discrimination by reason of sex, which the jurisprudence of the European Human Rights Tribunal had traditionally associated with gender discrimination (judgments in Rees v. United Kingdom, 17 October 1986; Cossey v. United Kingdom, 27 September 1990; Smith & Grady v. United Kingdom, 27 September 1999) up until its judgments in Salgueiro Da Silva Mouta v. Portugal, 21 December 1999 and A.D.T. v. United Kingdom, 31 July 2000, which

acknowledged violation of articles 8 and 14 of the Convention in view of discrimination by reason of 'sexual orientation'; e) the link between effective exercise of the right to marry and the principle of free development of the personality recognised in article 10(1) of the Constitution; f) The need to interpret the laws in accordance with the 'social reality of the times in which they must be applied' (art. 3 CC), in recognition of the fact that at the present time Spain is experiencing at once developments in the social recognition of highly diverse forms of family constitution and the absorption of large numbers of immigrants, whose integration demands that the legal scope for recognition of personal status on the basis of the habitual place of residence be broadened, as exemplified in the recent reform of article 107 of the Civil Code introduced by Law 11/2003 of 29 September on the law applicable to separation and divorce; and finally f) this was also the solution arrived at by the jurisprudence of the Spanish Supreme Court during the years when the Divorce Act of 2 March 1932 was in force, to allow divorce by Spanish nationals married to nationals of countries which at that time did not recognise it (cf. judgments of 27 January 1933, 10 July 1934 and 4 December 1935)."

b) Marriages of convenience.

– RDGRN of 13 June 2005 (TOL 673634)

Marriage of convenience. Genuine consent. Importance of the examination procedure for detection of fake consent in international marriages.

"Legal Grounds:

... II. One of the essential procedures in the official preliminaries before the marriage is celebrated is a confidential personal examination of each party separately, to be conducted by the Examining Magistrate with the assistance of the Clerk, to ensure that there are no impediments to the union or any other legal obstacle to its celebration (cf. art. 246 RRC).

III. This procedure has become increasingly important in recent years inasmuch as it can on occasions serve to uncover fraudulent intent in parties who in reality wish not to be joined in matrimony but to avail themselves of the appearance of matrimony to secure the advantages that matrimony brings to the alien. If by means of this procedure or other objective means the Registrar is persuaded of the existence of simulation, he must not authorise such a marriage, which is void due to lack of genuine consent to marry (cf. arts. 45 and 73(1) CC). However, the practical difficulties entailed in proving simulation are perfectly well known. There is normally no direct evidence of this, and therefore it is almost always necessary to resort to a test of probabilities – that is, deduce the absence of consent that it is sought to prove from a demonstrable fact or facts, by showing a precise, direct connection according to the rules of human judgement (cf. art. 386 LEC) – to which end it is extremely important that the aforementioned confidential examinations be conducted with great care.

(...)

VI. . . . Any act by the authorities of the forum where it is proposed to celebrate the union tending to authorise a marriage which is either against the will or without the genuine consent of the parties is therefore inadmissible, which means that the authorisation of a marriage must be rejected if there is simulation, even if the parties' personal status entitle them to laws which allow a species of abstract consent in marriage, rootless or bereft of any link with the institutional purpose of matrimony (cf. art. 12(3) CC), in such a way as to render the institution liable to use as an instrument of legal fraud in connection with the rules governing nationality or aliens or others of various kinds. But important as this last point may be, it is not the decisive consideration determining non-applicability of the foreign law; the decisive consideration is that simulated consent is indicative of absence of the will to marry, inasmuch as the declared will does not match the inner will, and in such cases there is a conscious mismatch whose consequence is the absolute and irremediable nullity *ipso jure* of the marriage that is celebrated (cf. art. 74 CC), irrespective of the *causa simulationis* or practical purpose pursued *in casu*, which is a vehicle of civil unlawfulness not warranting the legal protection that the *jus nubendi* vouchsafes to a genuine will to marry."

– RDGRN of 18 November 2005 (Ref. Aranzadi RJ 2006/221)
Marriage between aliens in Spain. Laws applicable to marital status and consent. Public policy exception in matters of faked consent. Aspects relating to registration. Authorisation in pre-marital procedure.

"Legal Grounds: . . .

Four. However, having regard to instances of marriages celebrated abroad by two non-Spanish nationals where, the marriage subsisting, at least one of the spouses subsequently acquires Spanish nationality, in which case the Spanish Civil Registry becomes the competent authority for registration of the marriage (cf. art. 15 LRC), the official doctrine of this Department has been and continues to be that in such cases it is inappropriate to attempt to apply the Spanish rules on absence of consent to marry, as there are no points of connection to warrant such application given that the capacity of the parties at the time their marriage was celebrated, which is the relevant moment for these purposes, is a matter of their previous personal law (cf. art. 9(1) CC), and therefore the marriage may properly be registered. However, having said that, it is also true – and this has been repeatedly stated in Decisions by the Department on the subject – that the same doctrine requires that there be no doubts that the formal and material requirements laid down by the applicable foreign law have been complied with in the contracting of the marriage, which compliance is in principle assumed to have been accepted by the competent foreign registering authorities who first authorised and then registered the marriage (. . .).

Six. However, it must not be concluded from the foregoing that the foreign law to which the parties' personal status entitles them must necessarily be applied always and in every case. In fact according to the rule of exception in

international public policy – which operates all the more strictly when it comes to creating or constituting a new legal situation (in this case a marriage yet to be celebrated), as opposed to cases in which the object of evaluation is the applicability of the foreign law in respect of a legal relationship formalised under that law – the foreign rule must cease to apply when it becomes clear that such application would cause a violation of essential, basic and inalienable principles of our legal system (. . .).

Seven. The present case concerns an application for authorisation to contract civil marriage in Spain in accordance with Spanish law, submitted by two Nigerian nationals residing in Spain. The order issued by the Registrar, who has omitted any mention of the rules of Private International Law, hence setting in motion what is known as 'latent international public policy', denies the application on the ground, also invoked by the Public Prosecution Service, that there is no intent to contract genuine marriage, a conclusion prompted by the following facts: he does not know when she arrived in Spain; they disagree as to when they first met – he says that it happened in Seville three years ago and she that it was in Nigeria in 1994; she says that neither of the two have relatives in Spain, whereas he says that his fiançée has a cousin living in Mallorca; he does not know the names of her two siblings and gives a different number of siblings from her; she does not know the ages of his siblings or the names of some of them; to all of which we must add the fact that her situation in Spain is irregular. This set of facts lead us to conclude that the object of the marriage it is proposed to contract is not that proper to this institution".

c) Effects.

– SAP, Madrid. 21 October 2005 (Ref. Aranzadi JUR 2005/251861)
Law applicable to the effects of marriage. Public order exception. Preliminary issue: determination of the existence of community of acquisitions for dissolution of the marital regime.

"Legal Grounds: . . .

Four. Citing the common Equatorial Guinean nationality of the litigants at the time of marrying, which according to the rule of conflict in article 9(2) of the Civil Code determines that the effects of the marriage must be governed by the laws of that country, the appellant alleges that there never was a community of acquisitions. (. . .). For the reasons given, in the case at issue there was no requirement to accredit the spouses' non-Catholicism, and therefore, in the hypothetical event that in referring to the Spanish legislation in force on 12 October 1968 the laws of Equatorial Guinea should still have retained the conditions of the former as examined above, this would collide squarely with certain ineluctable constitutional principles, thus rendering it inapplicable to the case as contrary to public policy in pursuance of article 12(3) of the Civil Code.

(. . .) All the foregoing reasons suffice to determine that this marriage was celebrated in compliance with all the legal requirements and hence is absolutely valid. And certain effects thereof must stand despite circumstances, such as

those cited by the appellant, which could neither be duly substantiated by the simple opinion of a jurisconsult without documentary evidence of the interpretative criteria applied by Guinean jurisprudence, nor otherwise cause the legal effects pursued, which conflict with internal public policy in alignment with internationally-accepted principles barring the application of a foreign rule which, if as described by the appellant, would violate basic constitutional rights".

d) Separation.

– SAP Málaga, Section 6, 10 February 2005 (EDJ 2005/74095)
Law applicable to separation of Moroccan spouses.

"Legal Grounds:

... Two. This Chamber is bound to point out first of all that since this case concerns an application for separation between spouses of Moroccan nationality, it is indeed the case that *prima facie* art. 107 CC refers to the laws of the Kingdom of Morocco as the applicable law, and that art. 12 CC requires that the party bringing the action duly accredit the substance and validity of that foreign law, by the means of evidence permitted by Spanish law. Nonetheless, it is appropriate – as the court *a quo* has done – also to consider the circumstance of the conjugal place of domicile, the spouses being habitually resident in the town of Fuengirola, since under art. 769(1) LEC, as it relates to art. 22(3) LOPJ, if the common place of residence of the litigants at the time the application for separation is brought is in Spain, then the Spanish courts have jurisdiction. That said, the interpretation favouring the *lex civilis fori* of the place of domicile over the common national law would not be complete without at the same time determining whether it is reasonable to introduce the exception of art. 12(3) CC if application of the foreign law should prove to violate public policy, to be understood as a set of public and private political, socio-economic, moral and even religious principles which, as parameters of the reality normally experienced and perceived in accordance with current collective criteria, are considered to be absolutely essential for the preservation of a society at a given time. This view is supported by the jurisprudence, for instance STS 5 April 1996, but it must always be resorted to with prudence and restraint, otherwise the application of foreign laws or the enforcement of decisions of foreign courts might eventually become impossible.

e) Divorce.

– RDGRN of 6 May 2005 (TOL 652833)
Registration of Portuguese divorce decree in the Civil Registry.

"Legal Grounds:

... III. This decision to deny is confirmed, but for reasons other than the ones stated in the order here challenged. Marginal annotations concerning divorce are allowable, where applicable, on the basis of a foreign divorce

decree provided that this is first recognised in Spain in accordance with the laws of procedure, by application for *exequatur* to the competent Court of First Instance, after which the judgment takes effect in the Spanish legal system (cf. arts. 76 LRC, 265-II RRC, 955 LEC of 1881 and sole repeal provision, section 1, exception 3 of the Civil Procedure Act of 2000 and Organic Law 19/2003 of 23 December amending the Judiciary Act, Organic Law 6/1985 of 1 July).

IV. Admittedly the cited Regulation of the Council of the European Union, which came into force on 1 March 2001, provides for the abolition of the said *exequatur* formality in connection with judicial decisions in marital matters, but such abolition applies only to 'legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to settlements which have been approved by a court in the course of proceedings after its entry into force' and to 'judgments given after the date of entry into force of this Regulation in proceedings instituted before that date', which are to be recognised and enforced in accordance with the provisions of chapter III of the Regulation (cf. art. 42(1) and (2) of the Regulation). In this case the dates of both institution of the action and the judgment are prior to the Regulation's entry into force. However, even if this were not so, in this case in addition, at the time the appealed order was issued, the formal requirements laid down by the cited Community Regulation had not been met either, namely that for foreign decisions on matters of separation to be recognised in other States, the documents which were cited in the second of these legal grounds, failure to present which caused the denial by the investigating judge (cf. arts. 32 and 33 EC Regulation) must be presented at the appropriate Registry Office – and that ignoring the question of translations, as these had not been requested. Finally, we would note that the cited Regulation is not retroactive and hence cannot be invoked in support of the appellant's claim in connection with a judgment delivered in 1997, to which it is not applicable for the reasons given, and hence recognition must be via *exequatur*."

4. Maintenance

– SAP Málaga, Melilla, Section 7, 13 May 2005 (Ref. Aranzadi JUR 2005/163244)

Legal regime governing maintenance in Spain. Hague Convention of 2 October 1973.

"Legal Grounds:

... Two. The solution is different as regards the application for maintenance for the children to be provided by the father, inasmuch as there is an appropriate channel independent of the separation proceedings, namely article 143(2) et cetera of the Civil Code, and it is expressly covered in the Hague Convention of 2 October 1973, in force in Spain since 1986 and applicable to the case at issue. According to article 1 of the Convention, then, both the wife and the children are actively entitled to demand the fulfilment of maintenance obligations,

and the defendant and father of the children for whom maintenance is petitioned is passively entitled. On the other hand, according to article 11 of the Convention, the needs of the creditor and the resources of the debtor shall be taken into account in determining the amount of maintenance (. . .)."

XI. SUCCESSION

– STS of 13 October 2005 (Ref. Aranzadi RJ 2005/7233)
Appeal in cassation for infringement of the Codice Civile. Intestate succession of spouse of Italian national: applicability of provisions of the Codice Civile.

"Legal Grounds:

One. (. . .) the deceased being of Italian nationality, the Italian Civil Code of 1942 applies – its applicability is not in doubt according to article 9(1) of the Civil Code, both parties also acquiescing, although it had been disputed at the outset, and its rules are accredited in the original proceedings. (. . .) The issue, then, is one of intestate succession, which both the Spanish and the Italian civil codes call *legitima*; this is not to be confused with *forzosa* – referring to the part of the estate reserved to the compulsory heirs (*rectius legitimarios*) – as it is called in the Spanish *Código Civil*, and *reserva* in the Italian *Códice civile*. The *legítima* (in Spain), or the *reserva* (in Italy) is simply a limitation on the power to will to certain relatives or spouses, who are the heirs at law [Sp. *Legitimarios*] and have a legal claim upon the deceased's estate. Hence, when one of them is the heir *ab intestato*, the *legitima* or *reserva* to which he is entitled is embedded in the estate. This does not mean that the said *legitima* can be ignored, for he can always demand the portion to which he is entitled thereby if the quantum of the intestate inheritance that he receives is less (for instance because of large gifts, which does not apply here), nor can it be dispensed with if there is an assignation (for example a legacy, which does apply) in payment thereof. Therefore articles 536 *et sequitur* (in the chapter *Dei legittimari*), and naturally 540 (*riserva a favore del coniuge*) do not apply, the applicable articles being 565 *et sequitur* (in the title *Delle successioni legittime*, meaning intestate succession) and fundamentally article 582, which provides that the portion of the widowed spouse in intestate succession where there are surviving siblings of the deceased is two-thirds of the estate.

Two. Thus, the present case is one of intestate succession, called *legittime* in the Italian civil code, which allocates to the surviving spouse in any event (article 565) a variable portion depending on the existence of certain relatives (articles 581 *et sequitur*), and if there are siblings of the predeceased spouse, the surviving spouse receives two-thirds and such siblings the remaining third (article 582). (. . .) Regarding the *reserva* as it is called in the Italian civil code, or the *legítima* in Spanish law, which in neither case is to be confused with intestate succession (which they call *legitimate succession*), that is forced succession, there is nothing to say as that portion remains embedded in the inheritance *ab intestato* of the spouse.

The first ground of the appeal in cassation must therefore be admitted. This was formulated under article 1692 paragraph 4 of the Civil Procedure Act, for infringement of article 582 of the Italian *Codice civile*. The judgment *a quo*, handed down by Section 4 of the Provincial High Court of Barcelona, infringes that article in that instead of applying it to the appellant as heir *ab instestato*, it applied article 540, which refers to the *reserva*, that is to forced succession, and wrongly apportioned him half of the estate. The applicable article is 582 on intestate succession; the appellant's spouse having left a surviving sister, he is entitled to two-thirds thereof".

– SAP Las Palmas, Section 4, 22 July 2005 (EDJ 2005/147875)
Succession. Law applicable to the form and substance of a testamentary provision.

"Legal Grounds:

... Two. Having brought the issue submitted to examination in this appeal into proper focus, we note that under article 9(1) of the Civil Code, the personal law attaching to natural persons is determined by their nationality, and that law governs succession *mortis causa*, while section 8 of that article specifies that such matters are to be governed by the national law of the deceased at the time of death. For its part, article 11 of the Civil Code directs that the form and solemnities of wills are to be governed by the law of the country in which they are made. It follows from this that the national law applies in general to all matters attendant on succession such as determination of the moment of death, administration of the estate, rules on reservation of portions or similar institutions designed to protect the family, etc. The medium used to express and exteriorise the will of the deceased, on the other hand, must be that provided in the *lex loci actus*. This can give rise to situations where different laws are applicable to the form and the substance, as in the present case where the testator was a Jordanian national and made his will in Spain."

– SAP Asturias, Section 5, 29 July 2005 (EDJ 2005/137596)
Applicable law. Succession. Dual nationality: art. 9(9) CC. Law applicable to rights of the widowed spouse. Transitional law.

"Legal Grounds:

... Three. ... Having regard to the first argument of the appealed judgment, it is the view of this Chamber that under art. 9 paragraphs 8 and 9 of the Civil Code the succession of the late Gabino must be governed by Venezuelan law, as Gabino possessed dual nationality as contemplated in art. 24 of the Civil Code, given that there is no record of his having renounced his Spanish nationality when he acquired Venezuelan nationality, the latter being the most recently acquired and coinciding with his habitual place of residence – art. 9(9) CC. Consequently, it is to that law that we must turn for testamentary matters, and in the present case the record shows that the deceased's children were declared his successors in accordance with the laws of Venezuela.

(. . .) It is true that art. 9(8) *in fine* provides that 'the rights which the law vouchsafes to the surviving spouse shall be governed by the same Law as regulates the effects of the marriage, other than the portions of the estate reserved to the descendants'; and according to art. 9(2) of the Civil Code, the law regulating the effects of the marriage is Spanish law. However, the fact is that this paragraph was introduced by the Civil Code Reform Act, Law 11/90, and Gabino died in 1988 – that is before the cited reform of the law – and hence this does not apply in the present case. Also in this connection, a decision of the Department of Registries and Notaries Offices of 11/3/03 rules that 'the absence of a transitional rule on this point in Law 11/90 determines . . . . . the subsidiary application of the rules contained in the Civil Code; and as the case concerns rights of succession, specifically Transitional Provision 12 applies, whereby the applicable law is that in force at the time of acceptance of the succession'. In fact the Law in force at the time of such acceptance did not contain the derogation introduced by Law 11/90, and it therefore follows that the succession in its entirety must be governed by the Law of Venezuela; and in that connection the decision of the Department of Registries and Notaries Offices of 11/3/03 states 'in order to resolve the issue, the solution must be based on the principle of unity and universality of succession characterising our system, which is founded on the concept of nationality like the laws of other Southern European countries that have suffered intense emigration, and this is set out in article 9(9) of the Civil Code. The first section of this article establishes that succession *mortis causa* is to be governed by the national law of the deceased at the time of death, regardless of the nature of the goods and the country where they are situate.

The later exception, based on the principle of preservation of business succession – *favor testamenti* – does not affect the imperative nature of the rights of the heirs at law, which are governed by the universal law of succession. (Cf. STS 21 March 1999 confirming the precedence of uniformity of succession, and the precautions applicable to successions – in the present case secondary referral from English to Spanish law.)

It is in this systemic context that we must read paragraph 3, referring to the law applicable to the rights of the widowed spouse in succession, as introduced by Law 11/90. And since the appellant has not proven that she would have been deprived of any right of succession under the Law of Venezuela, her appeal must be dismissed."

– SAP, Asturias. 1 September 2005 (Ref. Aranzadi JUR 2005/220269)
Law applicable to intestate succession. Applicability of Spanish law. Absence of invocation and proof of foreign law and exclusion of referral.

"Legal Grounds:

Two. . . . must be governed by the relevant material rule indicated by the Spanish rule of conflict (STS 29/02/98, 30/11/99 and 24/09/02); secondly, returning to the statement that the appellants based their claim on their condition as heirs,

the rule of conflict applicable to hereditary succession according to our Private International Law is that of the national law of the deceased (art. 98 CC), (. . .) and according to the Law of the State of Pennsylvania, his children have equal shares in the succession, but the invocation and proof of this foreign law cannot be taken into consideration owing to failure to demonstrate the standing of the parties and hence it cannot be applied; and according to the jurisprudential doctrine referred to, that means that this point of conflict must be resolved in accordance with Spanish law . . .;

Three. If purely for the sake of argument, as we do not know whether the deceased persons concerning whom the appellants are acting possessed any nationality other than Spanish, which is attributable to them as their nationality of origin (art. 17 CC), supposing that they might also have possessed US nationality and given that their last place of residence was in the USA (art. 9(9) CC), in countries possessing Anglo-Saxon law the prevailing criterion in succession is the application of diverse rules depending on whether goods are movable or immovable, and in the latter case the law of the country where they are situate is applicable (in this connection see STS 15/11/96 and 23/09/02). And since all the goods in this estate are situated in our country, according to the principle of universality prevailing in our Law of succession, the result of referral of the foreign rule to our national law (art. 12.2 CC) is that the entire succession must be governed by Spanish law (STS 23/09/02 cited above)".

– RDGRN, 5 February 2005 (EDD 2005/16176)
Law applicable to international succession.

"Legal Grounds:

One. The issue raised in the ruling that prompted this appeal is whether or not it is necessary to accredit the conformance of the act which it is proposed to register with the laws applicable to it when these laws – and this is not in question – are foreign.

Admittedly the note is somewhat confused, and a superficial reading of it might give the impression that there are two points of legality to be determined:

One, that the document of succession – the testament drawn up by the deceased, a British national, before a Spanish notary – contains her last will, that is that it is her last testamentary provision.

And two, that the documents referred to in the ruling do not express that will in a manner consonant with the applicable laws, that is the national laws of the deceased. However, a closer reading of the note, and particularly of the substance of the defending report – which adds nothing new but does clarify its scope – confines the issue to the second aspect. Of the reasons listed in support of such determination, neither the one relating to the place of death nor the one relating to the time elapsed since the will was made are relevant. The testator's acknowledgement that she has two children to whom she wills nothing is only relevant if the rules governing her succession constrain her freedom to testate in such circumstances, and therefore the really relevant factor is

assuredly the deceased's nationality, as this determines that the applicable rules of succession are those of her personal law (cf. art. 9(8) of the Civil Code).

XIV. FORM OF ACTS

– RDGRN of 7 February 2005 (TOL 599884)
Legal regime governing the form of acts.

"Legal Grounds:

. . . The core of the DGRN's position is rooted in the fact that in Spain, when a notary authorises a public document, he must verify its legality, as provided in article 17 *bis* of the Notaries Act and implementing provisions, and hence in the obligation of the notary to satisfy the requirements laid down in the law for the drafting and authorisation of public documents. The Spanish notary is required by law to be familiar with and to apply these and a foreign notary is not; furthermore, for administrative purposes a Spanish notary answers to his hierarchical superiors in Spain and a foreign notary will answer to the authorities of his country if appropriate, but not to the Spanish authorities. The issue raised in the appeal very clearly has a bearing on the question of maintenance of public policy.

Therefore, the DGRN, which neither can, should nor does deny validity in Spain to any public document authorised by a foreign notary (for which reason the need to legalise foreign documents was abolished and the Hague Convention of 1961 on the Apostille was signed), is now obliged to distinguish between documents that are fully enforceable as they are and documents in respect of which the application of the *locus regit actum* rule and the rules of referral in the applicable international laws make it necessary not to treat the equivalence of forms as an absolute criterion, since the form may comprise the substance in essence; this applies when it comes to accepting a public document issued in a foreign country and containing a transmission of ownership or of a right *in rem* in immovable property as enforceable in Spain and allowing registration thereof in the Spanish Intellectual Property Registry.

For that reason in the two decisions here examined the DGRN says that 'The problems relating to matters of form in private international situations have prompted a process of normative evolution subject to the precautions necessary in legal life, with particular solutions taking precedence over general ones, and thus substantially relativising the traditional *locus regit actum* rule, as a simple comparison of the first and second sections of article 11 of our Civil Code will show. (. . .) The form may be understood simply as the perceptible means of exteriorising a willingness or consent to do business, so that in principle any form could serve, by reason of the place where the act took place or in consideration of any other connection, as proof for procedural purposes of such willingness or consent in order to safeguard the existence of the business. Spanish law in this respect places spirit above form, so that no one form can be considered exclusive in demonstrating consent. However, the fact that an act is at times

subject to certain formalities can operate as a form of control, imposed for reasons of legislative policy in pursuit of certain ends, and in that case underlying the form, aside from consent, there is also a basic requirement affecting the business: a form of control transcending the scope of private rights, as an unavoidable condition of certain legal effects. This dual scope or meaning of form is perceptible in the current article 323 of the Civil Procedure Act'".

XV. RIGHTS IN *REM*

– RDGRN of 7 February 2005 (TOL 599884)
Registration of public document notarised abroad.

"Legal Grounds:

. . . 1. The appeal raises the question of whether or not it is possible to register in the Spanish Property Registry the sale of a property situate in Spain which was formalised before a German notary by a seller and a buyer both of German nationality and not resident in Spain, upon attachment of the Apostille of the Hague Convention (RCL 1978, 2059).

(. . .)

3. . . . Without prejudice to its value as satisfactory proof of the authenticity of the consent and its contractual value as binding the parties thereto (or their successors), the notarised German document, denial of registration whereof prompted this appeal, does not constitute valid assignment or effective transfer of ownership and hence does not render it registrable under the Spanish legal system, which vouchsafes to notaries a control function, a presumption of legality in their acts and a duty to cooperate with the Public Authorities, which are not extensible to foreign notaries. The validity of conveyance provided in article 1462(2) of the Civil Code and the effect of transferring ownership deriving therefrom is applicable solely to Spanish public documents. A sale recorded in a German notarised document cannot have the same force in Spain. It cannot do so according to Spanish law, and indeed it cannot do so even according to German law. The reference to the German system of transfer of ownership in the note of refusal, criticised by the appellant, is therefore not without relevance. One of the objectives of the protection of international legal business may be to prevent any or excessive loss of the force of documents when they cross frontiers, but it would be absurd to seek to enhance their force and vouchsafe to a transferred document more force abroad than it has in its country of origin."

– RDGRN of 20 May 2005 (Aranzadi Ref. RJ 2005/5645)
Registration in the Property Registry of a contract of sale formalised before a foreign notary.

"Legal Grounds:

One. The appeal first raises the issue – already addressed by this Department in a Decision of 7 February 2005 – of whether or not it is possible to register in the Spanish Property Registry the sale of a property situate in Spain which was formalised before a German notary by a German seller and an Austrian buyer, neither resident in Spain, upon attachment of the Apostille of the Hague Convention . The case is therefore one of intra-Community external sale of a property situate in Spain, which poses a problem in determining whether the form applicable to the substance of the business is appropriate for purposes of producing certain legal effects, in this case particularly recognition of the contract of sale as formalised abroad as sufficient on its own to serve as a certificate of transfer of ownership and be registered as such in the Spanish Property Registry.

The problems relating to matters of form in private international situations have prompted a process of normative evolution subject to the precautions necessary in legal life, with particular solutions taking precedence over general ones and thus substantially relativising the traditional *locus regit actum* rule, as a simple comparison of the first and second sections of article 11 of our Civil Code will show. The dispersal and the special nature of the rules governing form in the sphere of private international law as defining the force or the legal effects of each act or transaction is largely a consequence of the polysemic meaning of the word 'form' when applied to legal relationships, produced by the functional versatility of form as a requirement of legal acts or business.

The form may be understood simply as the perceptible means of exteriorising a willingness or consent to do business, so that in principle any form could serve, by reason of the place where the act took place or in consideration of any other connection, as proof for procedural purposes of such willingness or consent, in order to safeguard the existence of the business. Spanish law in this respect places spirit above form, so that no one form can be considered exclusive in demonstrating consent. However, the fact that an act is at times subject to certain formalities can operate as a form of control, imposed for reasons of legislative policy in pursuit of certain ends, and in that case underlying the form, aside from consent, there is also a basic requirement affecting the business: a form of control transcending the scope of private rights, as an unavoidable condition of certain legal effects. This dual scope or meaning of form is perceptible in the current article 323 of the Civil Procedure Act.

When the question of form is no more than a problem of the dependability of a given form of expression and satisfactory proof of consent, and of the authenticity and capacity of the person giving it, the intervention of a foreign authority certifying this, when the event takes place abroad, must logically merit the same consideration as the form taken by the intervention of an authority of the forum, and so this Department has repeatedly sustained, accepting such an equivalence of forms in matters relating to powers of attorney

formalised before foreign authorities (see Decisions of 1 June 1999 and 21 April 2003).

To determine an equivalence of forms is more problematical, however, when the intervention of a given authority of the forum, such as a notary, is required for the act of be enforceable, in order to protect certain interests of the forum (for instance in cases of transfer of ownership and *in rem* rights in immovable goods), for equivalence will then be determined by the law governing its effects. When the formality required is imposed as a means of control (rather than as a form of consent), such equivalence of forms is debatable given the presumable absence here of equivalence between authorities; the foreign authority is not dependent on or subject to any State other than its own, nor can it be expected to be familiar with or properly apply a foreign legal system which is outside its sphere of competence. The interests of the forum in certain formalities, which are protected by means of a formal control exercised by an official of the State itself who guarantees the full legality of the act for the purposes of that State system, cannot therefore be considered equally assured if the person intervening in the act is a foreign official lacking the necessary training and authority to control a legality outside his sphere of competence and under no obligation to cooperate with a public authority of which he is not a part.

Whereas the authenticity of any notarised document as a form of consent may be recognised across borders, the scope of the control of legality exercised by the notary is restricted to the laws applicable in the State to which he belongs, so that the presumption of the legality of a document authorised by him, which is relativistic by nature, is not a common denominator but a differentiating feature distinguishing it from any other foreign document that is notarised or certified by the authorities of other States with different legal systems.

For that reason, when the Spanish legislator regulates the force and the effects of a public document, meaning a document authorised 'by a notary or competent public official' (art. 1216 of the Civil Code), it has in mind a Spanish notary or public official, just as article 117 of our Constitution, when it embraces the principle of unity of jurisdiction and provides that only Judges and Magistrates are empowered to judge and order the enforcement of judgments, refers exclusively to the courts of Spain. As this Department's Decision of 18 January 2005 (Notary System) puts it, 'when the Law imposes a general requirement for the intervention of a notary, this means a Spanish notary, the only notary qualified to judge legality in terms of our legal system'.

Only documents carrying a presumption of legality may be accepted by the Registry in order to confer the same virtue on the entry, and that is the basis of what is called the principle of 'standing for purposes of registration'. The Spanish notary must certify (pursuant to art. 17 bis of the Notaries Act) that the assent which he authorises is in compliance with the Spanish legal system, a judgement that a foreign notary is not qualified to make.

Only documents carrying a presumption of legality may be accepted by the Registry in order to confer the same virtue on the entry, and that is the basis

of what is called the principle of 'standing for purposes of registration'. The Spanish notary must certify (pursuant to art. 17 bis of the Notaries Act) that the assent which he authorises is in compliance with the Spanish legal system, a judgement that a foreign notary is not qualified to make.

Two. (. . .) A foreign notary would lack the same means of exercising control as satisfactorily over all these details, and a general qualification to advise the parties on the legal and fiscal consequences of a property conveyance within the framework of the applicable legal system, in this case the Spanish system (art. 10(1) of the Civil Code), which lies outwith the sphere of his competence and his legal expertise. The vulnerability of the buyer in the foreign notarised document is further aggravated by the fact that unlike a Spanish notary, a foreign notary does not have direct telematic access to the Property Registry to inquire into the history of ownership of and burdens on the property, nor can he take preventive action by ordering a preliminary registration based on his intervention (see this Department's Decision of 15 March 2000). Admittedly the interested party may always excuse the authorising notary from gathering that registration information or from ordering a preliminary registration via telematic media, but a notarial form carrying a waivable right is not the same as a form carrying no right at all. This lack of equivalence is still more pronounced in cases of property agreements, where digital signatures are available for accessing not only the Registry but also the Cadaster and other public offices.

But the notary acts to safeguard not only the interests of the contracting parties but also those of third parties. The drafting of a public document produces effects not only between the parties but also – as article 1218 of the Civil Code says – 'against third parties'. The triple effect of the drafting of a deed of sale of property obliges the Spanish notary to take numerous precautions for the sake of third parties, such as annulment of the titles of the transferor immediately following his intervention (articles 1219 of the Civil Code and 174 of the Notaries Regulation), and many more. Examples include mandatory notification of the lessee if the property is leased, or verification of the administrative authorisation before division or parcelling (it is not so long since the days of clandestine parcelling), or again consideration of the possibility of the property's being included in areas designated for pre-emptive purchase by the Local Authority, and numerous other aspects that the Spanish notary must verify, quite apart from administrative verifications on property matters such as the Architect's or Site Manager's licence, or a ten-year insurance policy in legally satisfactory terms to cover the value of the dwellings when notarising a declaration of new building work, or again in a subsequent property sale drawing up the appropriate caution in case any of these details should not be regularised, not to mention the important subsidised housing market with controlled prices, limitations on utilisation or the possibility of declassification, of which the notary must keep track.

Among the third parties protected by notarial intervention in matters of property are the public authorities themselves, and of these particularly the Treasury. A foreign notary is not bound by the same obligations to cooperate with the

Spanish State as a Spanish notary. Nor does he have the necessary grounding or the means to correctly judge the correlation between prices and values, the danger of fraud, tax evasion or money laundering through real estate. When a property situate in Spain is sold by a non-resident (as in the case giving rise to the present appeal), the Spanish notary must verify whether or not the buyer is required to have withheld five per cent of the price for direct payment of taxes. He must also verify the levy of Value Added Tax on transactions where this is required. In any transfer of real estate it is compulsory (and essential for the operation of the tax system) to enter the technical cadastral reference of the property, for which purpose Spanish notaries can now establish direct telematic communication with public cadastral offices. Spanish notaries are obliged to notify the Inland Revenue, by forwarding periodic indices, of all notarised documents representing taxable events, and to send the notices to Local Authorities for settlement of capital gains tax. This informational cooperation helps prevent tax obligations from lapsing. Consequently, according to the new article 50(4) of the Transfer and Stamp Tax Act, (contained in Law 53/2002 of 30 December), 'in cases of public documents authorised by foreign officials, the limitation period shall be calculated as from the date of its presentation to any Spanish authority'.

At the present stage of evolution of the European States, where there is still considerable heterogeneity of legal systems, a Spanish and a foreign notary are not yet sufficiently comparable in terms of their capacity to act as agents in the control of legal traffic for the safeguarding of the interests of contracting parties and third parties which are at stake in the conveyance of a property situate in Spain. Although the foreign notarial form (subject to certain formalities) may assure the authenticity of consent to do business, it does not guarantee the other controls as satisfactorily as does the intervention of a Spanish notary, absent which the act would lack efficacy in a way not remediable by acceptance for registration, the scope and substance of which are not the same as those of notarial intervention. The dual control exercised by notary and registry over legality in the trade in property in Spain does not allow for discrimination, and there is no cause for any dispensation such that foreign documents should be subject to a less strict control of legality than those of the forum in order to achieve the equivalent legal effect. Even when the business is done outside, with payment in the exterior, the trade in property is always essentially an internal market.

Three. Regardless of the efficacy of a contract as a source of obligations between the parties, its value as a title of transfer of ownership goes beyond the bounds of the law governing contracts, since *in rem* rights are enforceable *erga omnes* and hence are beyond the scope of private autonomy. Every State has its own separate way of regulating the timing or the system of transfer of ownership of goods located in its territory. For that reason article 9(6) of the Rome Convention ('LCEur 1998\\241', F.3) on the law applicable to contractual obligations (ratified by Spain) recognises the *vis attractiva* of the *lex rei sitae*

and provides that a contract whose subject matter is a right in immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated, in a manner similar to article 10(1) of our Civil Code, whereunder ownership and other rights in immovable property, including the publication thereof, are subject to the law of the place where they are situated.

The transfer of ownership in Spanish law is the outcome of the sum of title and mode, whose symbiosis renders the public document valid for purposes of conveyance (art. 1462(2) of the Civil Code), so that upon registration – registration being unsuitable as a mode of transfer – the *in rem* right is already preconstituted in the registrable document as a title which at the same time incorporates the mode – the term 'title' meaning, for the purposes of registration, the public document in which the right is immediately enshrined (article 33 of the Mortgage Regulation).

The public deed of sale formalised before a Spanish notary is the instrument of a contract, but it is also the title representing transfer of ownership and will operate as such in legal business. And it is also the title registrable in the Property Registry. On the other hand, a foreign notarised document of the sale of a property situate in Spain may serve at best as the instrument of a contract, the source of obligations between the parties according to the law governing contracts, but not as a title having immediate efficacy in the transfer of ownership, lacking as it does the equivalent legal force to a Spanish deed, as a title and mode of transfer of ownership; and by the same token it is not a registrable title (art. 4 of the Mortgage Act), as it is insufficient on its own to warrant immediate registration (art 33 of the Mortgage Regulation).

Without prejudice to its value as satisfactory proof of the authenticity of the consent and its contractual value as binding the parties thereto (or their successors), the notarised German document, denial of registration whereof prompted this appeal, does no constitute valid assignment or effective transfer of ownership and hence does not render it registrable under the Spanish legal system, which vouchsafes to notaries a control function, a presumption of legality in their acts and a duty to cooperate with the Public Authorities, which are not extensible to foreign notaries. The validity of conveyance provided in article 1462(2) of the Civil Code and the effect of transferring ownership deriving therefrom is applicable solely to Spanish public documents. A sale recorded in a German notarised document cannot have the same force in Spain. It cannot do so according to Spanish law, and indeed it cannot do so even according to German law. The reference to the German system of transfer of ownership in the note of refusal, criticised by the appellant, is therefore not without relevance. One of the objectives of the protection of international legal business may be to prevent any or excessive loss of the force of documents when they cross frontiers, but it would be absurd to seek to enhance their force and vouchsafe to a transferred document more force abroad than it has in its country of origin.

The sale formalised in the foreign notarised document will enable the contracting parties to compel one another, in performance thereof, to draw up the appropriate public document before a Spanish notary to serve as a title of transfer of ownership susceptible of registration in the Registry, which all the contracting parties must authorise unless the contract includes a clause of power of attorney for that purpose (normally in favour of the buyer). The efficacy of this is beyond doubt, at least *inter vivos*, as it is contained in a foreign notarised document possessing full force as a form of consent.

There is likewise little to be said for the appellant's reference to the rules of foreign investment introduced by Royal Decree 664/1999 of 23 April, in an argument based upon the abolition of the need for a Spanish commissioner of oaths in matters of foreign investments; the fact that such intervention is no longer required merely because a foreign investment is involved does not mean that the obligation to notarise an event, whether it involves a foreign investment or not, cannot be imposed for some other reason."

XVI. INTANGIBLE GOODS

– STS. 17 October 2005 (Ref. Aranzadi RJ 2005/8594)

Industrial property: Establishment sign: denial of registration: features whose phonetic or graphic resemblance to others already registered may lead to error or confusion in the market: different commercial activity.

"Legal Grounds: . . .

Two. (. . .) The question that the Chamber has to judge is whether the contending registrations, establishment sign no. 258,391 'RR REISEN, SL' (mixed) and the opposing R R (graphic) trade marks, are compatible as asserted by the Spanish Patent and Trade Mark Office, or on the contrary they are incompatible as asserted by the appellant in support of its petition for annulment of the challenged decisions. (. . .)

Four. (. . .) In the second legal ground, the Chamber *a quo* set forth a plausible interpretation of the clause contained in article 85 of the Trade Marks Act, Law 32/1988 of 10 November, whereby 'the rules of this Act relating to trade marks shall be applicable to establishment signs insofar as they are not incompatible with the nature thereof', which allows the decision on registration of establishment signs to be submitted preferentially to the evaluation criteria laid down in article 12(1.a) of the Trade Marks Act, for the purpose of preserving the distinctiveness of the establishment sign vis-à-vis others intended for identical or similar activities, and only secondarily and incidentally allows examination of the legality of administrative decisions from the standpoint of infringement of article 13c) of the Trade Marks Act. (. . .)

Six. (. . .) The Chamber must reject the second ground of appeal based on infringement by the court *a quo* of the prohibition laid down in article 13c) of the Trade Marks Act, intended to prevent the registration of establishment signs

which constitute undue appropriation of the reputation of other registered signs or media, there being no record from which it might be inferred, even *prima facie*, that the owner of the candidate establishment sign sought to misappropriate the credit, fame or reputation of the appellant's distinguishing sign in connection with the specific characteristics of the services offered".

– SAP Las Palmas, 25 November 2005, no. 569/2005 (no Aranzadi Ref.)
Industrial property. Trade marks. Infringement of exclusive right to market a product imported from abroad.

"Legal Grounds:

One. (. . .) 5. Question of merits regarding infringement of art. 32(1) of the Trade Marks Act. As regards violation of art. 32 of the Trade Marks Act, there is no legal dispute, as both parties quite naturally accept the interpretation arrived at by the jurisprudence of Spanish and international courts on the scope of trade mark exhaustion – and non-exhaustion – depending on whether the first commercialisation was undertaken by its owner inside the European Economic Area – in which case it is exhausted throughout all the territories comprising the Area and the product incorporating the mark can be used by third parties for second and successive commercialisations by resale – or was undertaken by the owner of the trade mark outside the European Economic Area, in which case the right in the trade mark is not exhausted in the said Area and its owner can oppose the introduction of such products without his consent or authorisation (. . .).

XXII. TRANSPORT LAW

– SAP, Madrid, 13 December 2005 (Ref. Aranzadi JUR 2006/34315)
International transport agreement. Irregular waybills. Contractual title. Mercantile commission.

"Legal Grounds:

. . . Two. (. . .) When the judge *a quo* decided on the object of the suit, he established two factors: that the consigner was Poliseda and the carrier was a different entity other than the plaintiff. Moreover, given that the latter was an intermediary between the consigner and the carrier and that the defendant was not mentioned in the waybills as a contracting party in its own name, the reference to a mercantile commission only concerns one of the possibilities, requirements or details included in these waybills, which incidentally ought to have complied with the terms of article 144(1) of the LEC, without prejudice to what is alleged by the defendant. But what is certain is that the CMR documents numbers SK0943939 and CZ 0897354 constituted the respective contracts for international transport of goods between Spain and Hungary, and they contain no reference to CARGO SERVICES, S.A.".

XXIII. LABOUR AND SOCIAL SECURITY LAW

1. Individual contract of employment

– STS, Social Chamber, 17 January 2005 (TOL 556953)
Law applicable to a contract of employment between a Spanish bank and a Spanish citizen for service in Germany, when the contract predates the Rome Convention and contains no agreement on that point.

"Legal Grounds:

. . . Three. . . . As from the entry into force of the Rome Convention, its terms must take precedence over those of the national rule; however, there are basic principles to the effect that the parties may choose the law that is to apply to all or part of the contract (article 3), and absent such choice, in the case of a contract of employment the applicable law is that of the place where the work is carried out. As the employment relations between the parties were already governed by Spanish law, the entry into force of the Treaty does not entail a change of the applicable law unless the parties should have expressly agreed thereto. It must be borne in mind that according to article 17 of the Convention, it is to apply in a Contracting State to contracts made after its entry into force with respect to that State."

– ATS. 15 September 2005 (Ref. Aranzadi JUR 2005/236044)
Law applicable to individual contract of employment.

"Legal Arguments: . . .

Two. (. . .) At the pleading stage of the proceedings, the debate hinged on the applicable law, which is deemed necessarily to be Spanish law pursuant to art. 7 of Regulation (EEC) No. 1612/1968 of 15 October and art. 6 of the Rome Convention, since the choice of a given law is only allowable in connection with employment contracts when it entails greater benefits for the employee, but never when it is restrictive as it is in the present case, given that the law of the United Kingdom contemplates the renunciation of any claim relating to unfair dismissal and allows a contract to be temporary without good cause. On that basis, the court takes the view that the contract must be governed by the law of the place where the employee has habitually worked, namely Spain, whose law is in any case more favourable, and consequently the dismissal is ruled unfair, with the legal consequences attendant on such a ruling.

(. . .) As stated in the order of 9 June 2005 opening the procedure for non-admission, the cases listed do not share the threefold identity of laws which would warrant a positive judgment of contradiction *ex* art. 217 of the LPL, since the applicable rules of conflict are different, as are the terms of the relationships through which rulings are made on the most favourable law and the minimum guarantees. The case of the judgment here appealed concerns a conflict between English and Spanish law; this is resolved under the rules of

conflict contained in Regulation (EEC) No. 1612/1968 and in the Rome Convention, by means of a ruling on the most favourable law and evaluation of the degree of security thereof, resulting in favour of Spanish law. In the case of the reference judgment, the conflict was between Spanish and Swiss law and was resolved in favour of Swiss law, under the rules of conflict of private international law as set forth in the Spanish Civil Code, and by a ruling on the more favourable law, which was deemed to be the Swiss. And furthermore, in support of this be it noted that the situations thus related are disparate: the reference judgment determines renvoi to Swiss law, which is also more favourable to the employee; where the problem arises is with the effects of absence of proof of the applicable foreign law, which in the view of the Chamber ought to cause dismissal of the defendant's appeal from the original judgment. In the judgment challenged here, there is proof of the foreign (British) law and the issue is whether it ought to be applicable despite the fact that it is more restrictive than that of the country where the employee carried out his duties. In conclusion, it only remains to note that the most recent doctrine of this Chamber amends the earlier position – set forth in the judgment of this Chamber confirming the reference judgment – which had hitherto been maintained in connection with the effects of absence of proof of the applicable foreign law, bringing the criterion for resolution into line with the doctrine of the Constitutional Court".

– STSJ Canary Islands, Social Chamber, 7 March 2005 (EDJ 2005/38880)
Law applicable to contracts of employment. Employment in extra-territorial marine fishing.

"Legal Grounds:

... Three. ... It is clear from the foregoing that these proceedings concern a case of labour leasing, unsanctioned by any internal or international rules and therefore only classifiable as illegal leasing of manpower, in which a company whose principal place of business is in Spain ('IFM, SA') engages Spanish workers in Spain and assigns them to a Moroccan company in the fisheries sector ('MARONA, SA') which employs them abroad (on vessels flying a foreign flag, whose home port is abroad and which fish in international waters and national waters of other countries). In our system of labour law, only temporary employment agencies are allowed to lease manpower, and hence if what the employing company is doing is simply to supply manpower and nothing else, then that activity is illegal.

(...)

It is on that basis that we define the sea fishing employment as extra-territorial, a situation which poses complex problems in the resolution of conflicts arising from what are known as international seafarers' company service contracts, due to the tendency of shipowning companies to adopt complex forms of incorporation (combining factors such as nationality of the enterprise, country of registration of the vessel and the vessel's flag); this is true of joint

ventures, used by Spanish shipowners as a means to get around problems of access to fishing grounds, and in many cases to evade Spanish labour law, which is considerably stricter than that of the third countries with which they enter into fishing agreements and under whose nationality such joint ventures are formally registered.

In view of this, the legislator on the one hand and the doctrine and case-law on the other both seek criteria through which to prevent such evasion of the law affording most protection, and also strive to keep up the social protection of workers through maintenance of the legal system with which there is a genuine connection.

In this respect, to get round the obstacles raised by taxative application of the so-called 'flag principle', which is decisive for deciding on the applicable law, the doctrine postulates application of:

a) the methods habitually devised by the jurisprudence for these purposes (lifting of the veil); these are extremely useful for resolving points of conflict not ordinarily provided for by the legislator and which, along with other specific tools – e.g., the flag of convenience doctrine – are intended to prevent application of the criterion of the law of the flag country working to the detriment of the employee;
b) in this line of social protection, the actual laws concerning joint ventures have tended to establish that, in order to guarantee their Social Security rights, Spanish nationals who go to work for such companies shall do so as employees of one of the Spanish companies participating in the venture (art. 7 Royal Decree 830/85);
c) the jurisprudence generally applies the same criteria, and hence has tended to apply the labour law of the State other than the flag State when most of the elements of the seafarer's company service contract link that employment relationship to the law of that State (see Supreme Court judgments of 9/5/88 and 7/1/99 and High Court of the Canary Islands judgment of 17/7/92).

(. . .)

The Chamber is thus obliged to clarify the normative framework in which we must situate ourselves in order to locate the State laws which will be invoked to regulate the merits of the contract in question. And to that end, what better than to transcribe the precept of Spanish law which has been used to solve such problems since 1993, when Spain ratified the 1980 Rome Convention on the law applicable to contractual obligations. This is article 2 of the Convention, which clearly establishes the *erga omnes* or universal force of its articles, providing that 'Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State'.

(. . .)

In the light of these considerations, it is the Chamber's view that the only possible conclusion is the applicability of the clause established as the princi-

pal right by article 3 of the 1980 Rome Convention, namely freedom of choice, given that at the time of making the two employment contracts connecting them, the parties expressly chose the law of Spain as the law to be applied to the performance thereof."

– STSJ Madrid, Social Chamber, Section 1, 29 June 2005 (Ref. Aranzadi AS 2005/1659)

Applicable law. Individual contract of employment. Rome Convention of 19 June 1980. Applicability of the law of the country where work is carried out, absent express choice.

"Five. Having established the foregoing – that is that the employees were engaged to work abroad and hence are excluded from the Single Convention, we must now stress that their contracts make no provision whatsoever regarding the substantive law applicable to the employment relationship between them and the defendant ministerial department, and therefore we must turn to article 6(2) of the 1980 Rome Convention, according to which: 'Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or
(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated; unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country'. In short, there being no *pactum de lege utenda*, that is no agreement as to the law of which country is to be applicable, the appropriate forum is that of the country where the work is carried out, which is also the forum prescribed by article 10(6) of the Civil Code; the criterion being that of the connection with the *locus laboris*, in the present case that means Italian labour law."

– STSJ Madrid, Social Chamber, Section 1, 18 July 2005 (Ref. Aranzadi JUR 2005/2905)

Applicable law. Individual contract of employment. Rome Convention of 19 June 1980. Choice of law. Partial exclusion of foreign law. Applicability thereof in view of subsidiary point of connection.

"Legal Grounds:

... Three.... The 'Rome Convention' is therefore the rule that determines the law applicable to an employment contract with an alien element; as the Supreme Court stated in a judgment of 29/9/98, that Convention '... universally regulates and determines the law that is to govern a legal relationship in which there

are points of connection with the laws of different States. According to article 2, any law that is specified by it is to be applied preferentially whether or not it is the law of a Contracting State; thus, the rules of private international law contained in chapter IV of the Preliminary Title of the Civil Code are rendered residual and only applicable to contractual modes not included in the Rome Convention (article 1(1)) and contracts made prior to its entry into force". The Constitutional Court mentions the application of the Rome Convention in judgment 172/04. In order to determine which law is to be applied by Spanish courts under the Treaty of Rome, we must look to articles 3 and 6 thereof, which respectively lay down the provisions recounted hereafter. Art. 3 provides that '1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract. 3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules"'. Art. 6 provides that '1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice. 2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed: (a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country . . .'. It therefore follows from these rules that for the present purposes, if the contracting parties have expressly or tacitly chosen to apply the law of a given country, the employment contract will be governed by the chosen law provided that this does not imply the renunciation of mandatory rules of the law that would be applicable in the absence of such choice. In the absence of choice, the applicable law is that of the country where the employee normally carries out his work.

Four. The appellant authority, while admitting the applicability of the Italian 'Discipline' referred to, claims not to be bound by the obligation to make an extra payment laid down in art. 25 thereof, asserting that since the contracts of three of its employees establish an annual salary equivalent to thirteen ordinary monthly payments, this decision expresses the will of the contracting parties that this aspect of salaries be regulated by the contract itself and not by Spanish or Italian law, and that decision must be respected under the principle of autonomy of the parties according to a judgment of this Court dated 7/7/03 (appeal 1180/03). It is further asserted that the rule cited applies to employees who have only a verbal and not a written contract since their salary is the same as that

of the others who do possess written contracts. In other words, according to the appellant it is the will of the contracting parties, in obedience to the principle of autonomy enshrined in art. 3 of the Treaty of Rome, to agree to partial exclusion from Italian law, to which they have agreed to submit, in order to obviate the extraordinary June payment laid down in the cited 'Discipline'. How-ever, in the opinion of this Chamber, under the rules indicated, the applicable law is Italian labour law as cited above in cases of employees possessing either a written or a verbal contract; for as we have seen, absent express choice, the general rule is that the applicable law is that of the country where the employee carries out his work."

XXV. INTER-REGIONAL LAW

– STS, First Chamber, 11 February 2005 (TOL 590997)

Inter-regional law. Determination of marital economic regime according to regional citizenship of spouses.

"Legal Grounds:

... Three. ... A judgment of 6 October 1986 stated that prior to the cited reforms the Civil Code provided that, in obedience to the principle of family unity, spouses were subject to the marital economic regime determined by the regional citizenship of the male, and it added that the 1974 reform had maintained the husband's personal law at the time of marrying as the point of connection, to be applied in the absence of a marriage contract and of a common national law during the time of marriage; and it concluded that the male's regional citizenship inviolably determined and fixed forever – absent a marriage contract – the marital economic regime.

(...)

Four. ... After the reform of 1973–1974, art. 9(3) provided that a change of nationality would not alter the martial economic regime unless the spouses so agreed, while art. 16(1) referred to Chapter IV (Rules of Private International Law, arts. 8 to 12) for the settlement of any conflicts of laws that might arise from the coexistence of different civil laws within the national territory.

Since the enactment of Law 11/1990 of 15 October (and likewise since Law 11/2003 of 29 September), art. 9(2) determines what laws are to govern the effects of marriage in each case. Under this article, absent a common law or the choice of another designated by the spouses in a certifiable document prior to the contracting of marriage, the applicable law will be that of the common habitual place of residence immediately following celebration of the marriage, and failing that the law of the place where the marriage was held.

Art. 16(3) provides in turn that the effects of marriage between Spanish nationals are to be regulated by the Spanish law that is applicable according to the terms of art. 9, and failing that by the Civil Code. (...)"

– STSJ Catalonia, Administrative Chamber, Fourth Section, 4 February 2005 (TOL 664026)
Legal regime governing succession. Special regional citizenship of Navarra.

"Legal Grounds:

. . . Three. . . . The will, made on 13 December 1988 (folio 45 et seq.), states that Pedro Antonio was a citizen of Burguete (Navarra) and that he declared himself a native of Barcelona, where he was born, that he was married for the second time, to Silvia, and had no direct descendants from either of his marriages, and that 'before his present marriage he acquired the special regional citizenship of Navarra, whose law is to regulate his succession.'

– SAP Barcelona, Section 16, 3 June 2005 (EDJ 2005/111013)
Rights of surety. Catalan rules on the subject.

"Legal Gounds:

. . . Two. (. . .) But what we cannot agree with is the withholding of the vehicle by the repair shop. A footnote on the repair form mentions withholding of the vehicle as surety for payment and states that this is pursuant to article 1600 of the Civil Code. However, this provision is no longer applicable in Catalonia since there are regional laws applying preferentially to objects situated in that Autonomous Community, pursuant to article 10(1) of the Civil Code. The law referred to is the 'Rights of Surety In Rem Act', Law 10/2002 of 5 July."

– RDGRN 24 January 2005 (EDD 2005/71355)
Declaration of preservation of Catalan regional citizenship.

"Legal Grounds:

. . . Three. The solution to the issue raised lies in the interpretation of section 5 of article 14 of the Civil Code, especially the last paragraph thereof. This section refers to the acquisition of regional citizenship and provides in that respect that there are two possible ways of acquiring regional citizenship: either through continuous residence for two years, provided that the interested party states that such is his will (no. 1), or through continuous residence for ten years without making any declaration to the contrary during that time (no. 2). The section further adds that 'both declarations must be registered in the Civil Registry and do not need to be reiterated'.

The issue, then, lies in the scope we are to attribute to the expression 'both declarations'. In the view of this Department, for the present purposes the cited expression must be taken to include the express declaration needed to acquire regional citizenship through two years' residence, and the declaration, again to be made expressly, of non-acquisition of regional citizenship through ten years' residence – that is, a declaration of the desire to retain an existing regional citizenship, failure to make which will cause the acquisition of the new regional citizenship by reason of ten years' residence, and the consequent loss of the

citizenship held up until then (cf. art. 225 RRC paragraph one). Once such a declaration of preservation of citizenship – in other words a declaration contrary to the acquisition of a new citizenship through continuous residence – is made, there it no need to reiterate it".

Spanish Literature in the Field of Private and Public International Law and Related Matters, 2005

This survey, prepared and compiled by B. Arp and Dr. E. Crespo Navarro (Assistant Lecturers in Public International Law), and Dr. M. Guzmán Peces (Assistant Lecturer in Private International Law) and Dr. J.I. Paredes Pérez, (Associated Lecturer 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]

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[1] The enormous volume of works published on EC Law has made it necessary to select only those on general Community Law. We have been careful to include the works of Spanish authors who lecture in the fields of Public International Law, International Relations, and Private International Law.

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The world economy, as it is today, is the product at once of technological progress and liberalisation of trade and investment and of the establishment of enterprises in foreign countries. This situation has further boosted flows of direct investment overseas (DIO), and this in turn has prompted the development of mechanisms to achieve stability and legal security. In this book the author analyses the legal instruments available for the assistance and protection of Spanish investors overseas, viewed from a cross-disciplinary perspective. An examination of the Bilateral Investment Treaties concluded by Spain – more than 60 – highlights the rights of investors and the scope of the international protection available to them. This book is of particular interest and relevance at the present juncture in view of the various unilateral actions being taken by some countries where Spanish firms have investments.

The author, a Lecturer in Private International Law at the Universidad de Alcalá (Madrid), has divided the book into five chapters, supplemented by 12 appendices. The first chapter deals with three issues prior to addressing the book's central topic. These are: an analysis of the factors in the world economy that have influenced the rejection of multilateralism and encouraged bilateralism in investment; a brief economic note indicating – on the basis of an analysis of the statistics on Spanish overseas investment and on Spain abroad – that the existence of a BIT does not necessarily imply an increase or a substantial improvement in investment in the country with which there is a bilateral agreement; and lastly, the difficulties involved in marking the boundaries between an investment agreement and linked agreements, to which the author devotes some space in order to address a number of problems of international jurisdiction and applicable law.

Dr. García Rodríguez observes the role of overseas investment from the perspective of the Spanish legal system, and hence in Chapter II she examines the

evolution and the substance of Spanish laws on overseas investment. That leads into Chapter III on the specific regulation, which is essentially constituted by BITs. This chapter exhaustively examines these international agreements from all the relevant angles: personal, substantive, territorial and temporal. Chapter IV then looks at the scope and substance of the protection afforded by the BITs concluded by Spain, differentiating between clauses protecting implementation of the agreement – the *favor inversionis* principle and stabilisation and *rebus sic stantibus* clauses – and clauses protecting the investor's economic interests from non-economic risks such as expropriation or equivalent measures and internal or international conflicts. This chapter further deals with protection of returns on investment and the clauses of general international law that are used – fair and equitable treatment, national treatment and most favoured nation treatment.

The last two chapters constitute what is perhaps the essential core of Dr. García Rodríguez's book, as BITs contain an implicit recognition by the States of international *jus standi* for investors of the other contracting State in the bilateral agreement. In this connection, Chapter V deals with the means of settling the kinds of inter-State and mixed disputes envisaged in BITs – that is, amicable negotiation and if need be recourse to inter-State arbitration when the States are unable to agree or differences arise regarding the interpretation or application of the BIT – and the possibility of an investor suing the State receiving the investment if they are unable to reach an amicable settlement of the differences or disputes between them. The book is completed by a series of brief conclusions and by a final Chapter VI which, in a more practical vein, highlights some of the arbitral praxis in these matters.

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VÁZQUEZ RODRÍGUEZ, M.A., *El título ejecutivo europeo*, (The European enforcement order), Colex, Madrid 2005, 148 p.

A lecturer at the Universidad de Sevilla, Rodríguez Vázquez addresses a particularly important aspect of international civil procedural law in her monograph entitled *El título ejecutivo* [The enforcement order]. This is a study of the novelty and the specific features of Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, and of the repercussions that its implementation will have in Spanish law. To that end, the book is formally divided into four chapters, while substantively there is a striking multiplicity of methodological approaches. Dr. Rodríguez Vázquez's basic method is the analytical, whereby she gives a systematic account of the rules on the subject which is undoubtedly of use both for study and for practical purposes. At the same time, this is supplemented by historical and comparative analyses, in order to understand the regulatory context in which the Regulation referred to exists, and also to deal with the problems of adaptation that arise when the Regulation is applied to Spanish civil procedural law.

This monograph begins with an *Introduction* on the drafting of the Regulation, its justification and its meaning. Here, Dr. Rodríguez Vázquez stresses that what is new in the Community regulations – abolition of *exequatur* for a certain type of decisions – should not be viewed in isolation but as the evolved product of a lengthy regulatory process. She therefore believes that the time has come to examine the evolution and the present situation of the European enforcement order, from general aspects to particular. More specifically, from an examination of the list of regulations resulting from the communitarisation of judicial cooperation in civil matters, the author deduces the general rule governing extra-territorial enforceability of foreign judicial decisions within the European judicial area, namely simplification, rather than elimination, of *exequatur*. Nevertheless, this should not be allowed to efface the efforts of the EU authorities to promote the principle of mutual recognition of judicial decisions as a cornerstone of judicial cooperation in civil matters within the European Union. Indeed, the measures taken by the Council to that end include the creation of a European enforcement order for uncontested claims, the basis of the current Regulation 805/2004. The author engages in a searching examination of the legislative procedures leading up to approval of that Regulation, and of other legislative initiatives in the field by the Community legislator – e.g., the draft Regulation of the European Parliament and of the Council establishing a European monitoring process.

Chapter I commences with a searching analytical examination of Regulation 805/2004. Having first drawn attention to the benefits conferred on the European market by the elimination of *exequatur* in these matters, to the fact that Regulation 805/2004 is based on the principle of mutual trust in the administration of justice in the Member States and to the fact that it is optional, Dr. Rodríguez Vázquez examines the premises or requirements that ought to be met for a judicial decision (judicial transaction or enforceable public document) to be certifiable in the

Member State of origin as a European enforcement order and hence to benefit from the elimination of *exequatur*. In that context the author conducts a painstaking review of the distinctions between the terms 'judicial decision', 'enforceable public document' and 'judicial transaction' from the standpoint of the various ambits of application of the Regulation and the need for those to be enforceable in the State of origin. Specifically with regard to judicial decisions, the author stresses the requirement that a debt be uncontested and the *ex legis* requirements (compatibility with the rules of jurisdiction laid down in sections 3, 5 and 6 of EC Regulation No 44/2001 and observance of the minimum standards in Chapter III regarding the debtor's right of defence) for certification of a European enforcement order. And finally she carefully examines every separate aspect of the certification of a European enforcement order depending on whether it is a judicial decision, a judicial transaction or an enforceable public document.

In her analysis of the minimum standards applicable to procedures for contested debts in *Chapter II*, the author notes that these standards make up a particularly important block of the Regulation – Arts. 12 to 19 – and that their purpose is to guarantee both the efficacy of jurisdictional protection and the debtor's right of defence in cases where the lack of contestation is due to passivity on the latter's part, either because he did not contest the debt in accordance with the *lex fori* within the framework of judicial proceedings, or else because he neither appeared nor was represented at the hearing following an initial challenge. This is the case as long as such conduct is tantamount to tacit acceptance of the debt or of the facts as stated by the creditor in accordance with the law of the State of origin. But in view of the consequences of non-conformance of a Member State's laws with the said minimum standards – failure to certify a decision delivered in that State as an enforcement order – the author conducts a detailed study of their repercussion in our legal system. In particular, following the steps marked out by the minimum standards, Dr. Vázquez Rodríguez examines such important issues as the procedures for notification of debtors, the substance of the notice and of the information that the debtor should receive, remedying of failure to comply with the minimum standards and reviewing of certification in exceptional cases where the debtor is not at fault.

Finally, given that the Regulation enshrines the principle of mutual recognition and abolition of the mechanisms for control of foreign judgments since the enforcement procedure will be governed by the law of the enforcing Member State, *Chapter III* is devoted firstly to an examination of the documents that the creditor must furnish to the competent enforcing authorities, the prohibition of *cautio iudicatum solvi*, the grounds for refusing enforcement and the circumstances warranting suspension or limitation of enforcement, and secondly to aspects relating to application of a European enforcement order in the Spanish legal system and to the special features of the judicial transactions and enforceable public documents that are included.

Briefly, then, this is a highly thought-provoking book, well-executed and subtle as regards both doctrine and praxis, and we therefore have no hesitation in recommending it here. J.I. Paredes.

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