ESPAGNE
SPAIN

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1. TREATIES

1.1. The Conclusion of Treaties

1.1.1. Which organ(s) of the State has the power to conclude treaties (where necessary, give separate replies in respect of the different types of international agreements as distinguished by domestic law)?

In Spanish Law, according to the internal norms in force (arts. 63-2, 93-97 and 149-1-3 of the Constitution of 27 December 1978; arts. 154-160 of the Regulations of Congress of 24 February 1982; arts. 144-147 of the Senate Regulations of 26 May 1982; article 10-5 of our Law on the Juridical System of the State Administration of 26 July 1957; arts. 4, 5, 13, 16 and 23 of the Decree 801/1972, of 24 March on the activity of the Administration in the field of international treaties), the substantive competence to conclude international treaties, that is to say, to decide upon the binding of the State of Spain by means of such treaties, really belongs to the Government of the Nation (Council of Ministers), though the formal faculty of conclusion — by signature, interchange of documents, ratification or adherence — may be attributed to the Head of State, the President of the Government, the Minister of Foreign Affairs or even any other representative of the State of Spain with full powers to do so (arts. 4, 6 and 7 of Decree 801/1972).

The necessary participation of Parliament (Congress and Senate) through a prior authorization to conclude certain international treaties (arts. 93 and 94-1 of the SC) — a question that we shall consider in 1.1.2.— constitutes a constitutional requirement of validity for the conclusion of the treaty. But Parliamentary participation binds only in one way: the denial of authorization prevents the treaty from being concluded; on the other hand, granting the authorization does not necessarily lead to the conclusion of it. In last instance, it is always the Government, that decides on the conclusion of a treaty, as well as the appropriate moment to do it

P. M. Eisemann (ed.),
L'integration du droit international et communautaire dans l'ordre juridique national, 183–240.

(though Parliament may remove its prior authorization if the treaty is not concluded after a reasonable period of time).

At this point we can state that Parliament's authorization, in cases set by the Constitution, constitutes a prior requirement for the conclusion of international treaties, though it is clear that in no way we can properly speak of a Parliament's genuine faculty to conclude international treaties.

Finally, in order to prevent any misunderstanding, we cannot forget that when art. 63-2 SC says that:

> "It is incumbent on the King to express the consent of the State to obligate itself internationally through treaties in conformity with the Constitution and the laws"

it is speaking of a formal faculty — which as we have already seen may also be vested in the President of the Government, the Minister of Foreign Affairs and any other representative of the State with full powers to do so — and not of a substantive faculty that may only be vested in the Government with Parliament's participation in cases established by the Constitution. Our Constitution allows the participation of other members than the Head of State in the conclusion of a treaty (see art. 4, 6 and 7 of the Decree 801/1972). Although it is a preconstitutional norm, practice since the Constitution shows that it is still in force as far as this point is concerned. It would be hardly realistic to say that all the State declarations at the international level must be made by the King. But going back to practice based on the Constitution, it is evident that: a) in those international treaties where the State's agreement is expressed by means of ratification or adherence after Parliament's authorization, it is always the King who signs the documents; b) in those treaties where the State's agreement is expressed by means of ratification or adherence but without Parliament's authorization, it is also the King who participates because of the way of conclusion; c) in international treaties with a simplified way of conclusion that also require Parliament's authorization the King does not participate because of the way of conclusion; and d) in international treaties with a simplified way of conclusion that do not require Parliament's authorization, the King does not participate either.

In short, practice based on the Constitution shows that the King's participation only takes place when international treaties are solemnly concluded. A recent judgment by our Constitutional Court (11 April 1991) has held this practice consistent to the Constitution, when asked if a Spanish-German interchange of documents enlarging the bilateral agreement of extradition to financial offences was part of our domestic law in spite of the absence of the King's signature. This Court said in firm terms that:

> "neither does art. 63.2 require that it should be always the King who must conclude international treaties; nor does art. 94.1 compel the King to participate when Parliament authorizes the conclusion of an international treaty".

To conclude, the King's faculties relate basically to those set in art. 91 SC and his ratification, when occurring, answers to a controlled competence, having to be countersigned by the Minister of Foreign Affairs (arts. 56-3 and 64 SC).

1.1.2. Does this organ (or organs) have full or limited treaty making powers?

The substantive competence of the State to conclude international treaties is limited in two ways.

On one hand, art. 95-1 SC says that:

> "The conclusion of an international treaty which contains stipulations contrary to the Constitution shall require a prior constitutional revision".

The first limitation would thus be the prohibition on concluding international treaties in conflict with the Constitution. Such a conflict must be stated by the Constitutional Court at the request of the Government or either one of the Chambers of the Parliament (Congress-Senate). In this sense, art. 95-2 SC says that :

> "The Government or either of the Chambers may request the Constitutional Court to declare whether or not such a contradiction exists".

This article has been developed by norms of lower standing which specify that the petition has to be made by Congress, at the request of two Groups of Parliament or one-fifth of its members (art. 157-1 RC) or by the Senate, at the request of one Group of Parliament or 25 senators (art. 147 RS). This demand to the Constitutional Court at once stops proceedings under the prior authorization. These proceedings will begin again only when this Court has stated the conformity of the stipulations of that international treaty with the Constitution (art. 157-2 RC and 147 RS). If the Constitutional Court states the existence of a conflict between the stipulations of an international treaty and the Constitution, that treaty cannot be concluded without the prior revision of the Constitution (arts. 95-1 SC and 157-3 RC); this revision will have to be made according to Title X of the Constitution (arts. 166-169 SC). The possible demand to the Constitutional Court must be made before the conclusion of the treaty, since the Constitutional Court has to decide:

> "... on the existence or non-existence of a contradiction between the Constitution and the stipulations of an international treaty whose text is already fixed, but has not yet been ratified" (art. 78-1 CCOL).

A double aim is pursued with this limitation, as the Constitutional Court has stated in a Declaration of 1 July 1992:

> "Through art. 95-2, the Constitution attributes to the Constitutional Court a double task: to preserve the Constitution and to guarantee the security and stability of the international engagements arranged by Spain. In its task of interpretation, this Court has to decide upon a possible contradiction between the Constitution and an international treaty whose text,

> though already fixed, has not yet been concluded (art. 78-1 CCOL). If the contradiction is stated, such a treaty cannot be ratified without a prior revision of the Constitution (art. 95-1 SC). In this way, the Constitution, by means of the proceeding set in Title X, retains its primacy, at the same time as the treaty analyzed achieves full legal stability because of the binding judgment of the Court (art. 78-2 CCOL)".
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> Altough the above-mentioned primacy may also be ensured by the treaties' impugnment (arts. 27-2-c, 31 and 32-1 CCOL) or lack of conformity with the Constitution question (art. 35 CCOL) it is evident that such a solution causes obvious disorder to the State's international relations. And it is this disorder that our Constitution tries to avoid. This double aim must therefore be taken into account when interpreting both art. 95 SC and 78 CCOL in order to determine the object of our decision, its scope and the role played in its adoption by both this Tribunal and the legitimate organs to request it and be heard in the requests demanded by others".

On this first limitation, see also, *infra*, 1.1.5.

The second limitation consists in the necessity to get Parliament's authorization in order to conclude certain treaties. This authorization may adopt two different forms : on one hand, Parliament must authorize through an organic law (art. 93 SC) the ratification of treaties that attribute to international organisations or institutions the exercise of competences established by the Constitution. The approval of such a law requires an absolute majority of Congress in a final vote on the whole bill (art. 81-2 SC). A recent judgment of our Constitutional Court (Judgment 28/1991, of 14 February) described art. 93 SC as a "constitutional norm of an organic-procedural character", adding that this article:

> "has several contents: a) the conclusion of certain kinds of international treaties may only be authorized through an Organic Law; b) such treaties 'are those ones by which competences established by Constitution are attributed to international organisations or institutions'; and c) 'the performance of those treaties as well as that of the decisions coming from international organisations' will be guaranteed by either the Parliament or the Government, according to the circumstances.
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> In accordance with this article, the Organic Law 10/1985, of 2 August, authorized the ratification of the Adherence Treaty of Spain to the European Communities, signed the previous 12th of June that would come into force on January 1st, 1986".

Moreover, in a Declaration of 1 July 1992, our Constitutional Court related to art. 93 SC in the following terms:

> "article 93 allows the attribution of the 'exercise of competences derived from the Constitution', which implies a limit to the competences of Spanish public powers (limit to the 'sovereign rights', in terms of the European Communities Court of Justice, *Costa/Enel*, Judgment of 15 July 1964). To make this limit work, a real transfer of the exercise of competences to international organisations or institutions is necessary ...".

According to the Constitutional Court, the extraordinary system of prior authorization set by art. 93 SC stands only for international treaties by which the exercise of competences established by the Constitution is transferred to international organisations; the Spanish State therefore remains the holder of such competences. From a constitutional point of view, such a transfer is not definite, as the Court of Justice of the European Communities has already said; the transfer of the exercise — and not the property — of those competences leaves open the possibility of bringing them back through a simple renunciation of the treaties.

Second, art. 93 does not finish its task with the authorization of Spanish adherence to the European Communities. It is true that this was the only aim pursued with the insertion of this article in the Constitution, but nowadays we can keep in mind other considerations. Article 93 would be the way to transfer the exercise of competences established by the Constitution not only to the European Communities, but also to any other international organisations. Though it has not occured yet, this possibility was defended by important political parties, such as the Spanish Socialist Workers' Party — at that time an opposition party and now in power — regarding our adherence to the North Atlantic Treaty, that did finally take place under art. 94-1 instead of art. 93 SC.

For the same reasons, we can not think that art. 93 SC achieved its pursued aim with Organic Law 10/1985, of 2 August, authorizing the ratification of the Adherence Treaty of Spain to the European Communities. That Organic Law was not intended to obviate Parliament's authorization of art. 93 when ratifying treaties of amendment or modification of the European Communities' constitutive treaties. In the case of the European Single Act, which also followed art. 93 SC and whose parliamentary authorization was granted by Organic Law 4/1986, of 26 November, which authorized the ratification of the European Single Act, signed in Luxemburg on 17 February 1986, it was explained that:

> "... modification of certain stipulations of the constitutive Treaties of the European Communities, ratification of and adherence to which were authorized by Organic Law 10/1985, of 2 August, according to art. 93 SC, requires a new declaration authorized by the same procedure".

Our Constitutional Court has also stated, in its Declaration of 1 July 1992, that art. 93 should be followed by Parliament when authorizing the ratification of the European Treaty of Union, made in Maastricht on 7 February 1992.

Nevertheless, the Spanish Government is not limited by art. 93 SC in concluding international treaties which imply a modification or an amendment of "primary or original" EC law, but only by those that imply a transfer of the exercise of competences established by the Spanish Constitution. Not in the other way. For example, the conclusion of the Joining Treaty of certain organs belonging to the three Communities, if occurred today, would not require the procedure of art. 93 SC, but that of art. 94-1 SC, since it would not mean a transfer of the exercise of competences established by the Constitution; this is the case, for example, of the Euro-

pean Electoral Act, ratification of which was authorized under the procedure of art. 94-1 and not of art. 93 SC.

As we have already seen, there is a second kind of prior authorization by Parliament. According to art. 94-1 SC Parliament's prior authorization is also necessary to conclude treaties of a political or military character, treaties related to the territorial integrity of the State or fundamental rights and obligations, treaties that will involve financial obligations for the Public Finance or will imply modification or abolition of a law or will require legislative measures for their performance (art. 94-1 SC). In this kind of treaties, Parliament's authorization must be obtained through a majority of votes in both Chambers: Congress and Senate (art. 74-2 SC). The other international treaties, that is to say, the ones that remain outside arts. 93 and 94-1 SC do not need Parliament's prior authorization for their conclusion. Government's report to Parliament immediately after conclusion is enough (art. 94-2 SC).

1.1.3. Do the entities making up the State have treaty making powers or are they associated with the conclusion of treaties?

As seen in 1.1.1. the substantive competence to conclude treaties is vested in the Government.

Nevertheless, we could say that whenever Parliament's prior authorization is needed, such a competence is shared with both Chambers.

From this point of view, Parliament's authorization, when required by Constitution (art. 93 and 94-1 SC) would be a constituent element of the State's agreement; that shared substantive competence does not imply Parliament's transformation into an organ of the State with treaty-making powers. Though it is true that denial of authorization blocks the possibility of conclusion, Parliament's grant of authorization does not imply the conclusion of the treaty; it is therefore the Government that decides this point in the last instance.

On the other hand, considering the complex configuration of the Spanish State, made up of Autonomous Communities (arts. 2 and 143-158 SC) — totalling 17 and waiting for the definite territorial organisation of Ceuta and Melilla, as well as of Gibraltar we can wonder about the role that such Communities and their organs (Legislative Assemblies and autonomous Governments) play in the treaty-making process.

According to art. 149-1-3ª SC, the State (through its central organs) has sole competence in the field of international relations. Autonomous Communities, lack therefore the *ius contrahendi*, that is to say, the right to conclude international treaties. We should remember, in this sense, the Constitutional Court Judgment 137/1989, of 20 July, nullifying the "Collaboration Agreement" between the Autonomous Community of Galicia and the Danish Government. In this judgment, the Constitutional Court stated that:

> "... we must start by saying that all competence over international relations belongs only to the central organs of the State. This exclusive cha-

> racter has already been declared by this Court in Decisions 44/1982 and 154/1985.
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> ... The question here discussed is whether art. 149-1-3 SC prevents the Autonomous Communities from having any form of *ius contrahendi*. If it were so, any Convention or Agreement made by these entities with an international organisation or a foreign State would not be in accordance with the Constitution, no matter what competence that entity could have in that specific field.
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> In the field of *Constitutione ferenda* this constitutional point of view has been criticized, since it does not take into account the diversity of international relations nowadays; anyway, it is clear, in the field of *Constitutione lata* that the State is the exclusive holder of competence to conclude international Treaties or Conventions. No exception to this principle is brought up by our Constitution.
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> The conclusion that treaty-making power belongs only to the State is not only shown by art. 149-1-3 SC, but also by other articles of the SC, as well as its background and the interpretation made by the legislator of the Autonomous Statutes regarding this point".

The only exceptions that our Constitutional Court recognize to the exclusive *ius contrahendi* of the central organs of the State come from their own will and not from the Autonomous Communities. This is the case of the Organic Laws that delegate to the Autonomous Communities competences whose holder is the State (art. 150-2 SC) and that could be applied to "international relations" in certain cases. Nevertheless, this route has not been followed yet. Every time the Spanish State has concluded international treaties that impacted to the territory of a certain Autonomous Community, it has been the central organs of the State — and not those of the Autonomous Community affected — that have concluded the treaty, as occurred with the Treaty concluded between Spain and the Intergovernmental Office on Information, for the development of Technology in the Valencian Autonomous Community, on 31 October 1984.

The second exception that the Constitutional Court points out to the exclusive *ius contrahendi* of the central organs of the State is wrongly attributed to Comparative Law and not to International Law. It seems the Constitutional Court is indirectly alluding to the European Convention on interborder cooperation between authorities and territorial groupings, adopted in the Council of Europe on 21 May 1980. Though it is true that the State of Spain ratified this Convention in 1990, it made its real application depend upon the prior conclusion of intergovernmental agreements with the other interested party. Such a conclusion has not arrived yet, which has prevented other kinds of interlocal agreements set in the above mentioned Convention from being concluded. On the other hand, on 5 November 1983, the Spanish Autonomous Communities next to the Pyrenees, the French regions and Andorra created the Working Community of the Pyrenees. This association was not created, in fact, by an international treaty, and does not have *ius ad tractatum*. It aims to increase

regional interborder cooperation by means of political and not juridical methods (conclusion of international treaties).

As the Constitutional Court stresses in the above mentioned judgment, a different question from the Autonomous Communities' *ius contrahendi* is their participation "in the internal proceedings of elaboration and execution of international treaties". In this sense, it is possible to speak of a sort of participation, though limited, by the Autonomous Communities in the negotiation's proceedings of international norms.

Our Constitution does not say anything regarding this point, and there does not exist a lower norm regulating completely the different kinds of participation by Autonomous Communities in the external action of the State of Spain. This blank is being covered through the frequent allusions by our Constitutional Court to the obligation of cooperation between the central organs of the State and the Autonomous Communities relating to international nomogenetic proceedings. In Judgment 18/1982, of 4 May, this Court declared that this obligation of cooperation "does not need a concrete justification" since "it is implied in the territorial organisation established by the Constitution". In Judgment 252/1988, of 20 December, the same Court said that:

> "The need for cooperation between the Central and the Autonomous Administrations arises from both the systematic interpretation of the Constitution and its primacy over the Statutes of Autonomy; this cooperation may in many cases require — especially relating our inclusion in the European Economic Community — ways of articulation that only an inadequate interpretation of the constitutional and statutary norms may hinder".

Examples of this generic obligation to cooperation have arisen from the different Statutes of Autonomy of the Autonomous Communities. Almost all of them (with the exception of the Valencian Community and La Rioja) do admit their participation in the negotiation of treaties (which is the competence of the Foreign Affairs Ministry and must be authorized by the Council of Ministers: art. 9-1 and 2 of the Decree 801/1972). Autonomous Communities' participation in the negotiation of international treaties differs from one Statute to another, yielding the following classification:

a) Statutes that admit the right to ask the Government for the negotiation of a certain kind of international treaties and the right to receive information on those treaties that relate to matters of "specific interests" for the Autonomous Community (Andalusia, Aragon, Asturias, Catalonia and The Basque Country);
b) Statutes that only admit the right to ask for negotiation (The Baleric Islands, Cantabria, Castile-Leon, Castile-La Mancha, Estremadura and Galicia);
c) Statutes that only admit the right to information (The Canary Islands, Madrid, Murcia and Navarre);
d) Statutes that remain silent on this point (Comunidad Valenciana and La Rioja).

In short, Autonomous Communities do not have treaty-making powers but they do play a larger or smaller role in the negotiation process, either asking the Government to begin it or receiving information on its development.

The right to ask for the negotiation of treaties compels the Government to start such negotiations or, if not performed, to justify its denial or impossibility. Notwithstanding, the recognition of this right has a limited scope, since it does not relate to all international treaties. It is limited to treaties whose aim is the establishment of cultural relations with other States where social groups of the same origin live (Statute of The Basque Country, Catalonia, Galicia and Andalusia); to treaties that aim at collaboration by people of the Autonomous Community who live abroad in the social and cultural life of their place of birth (Statutes of Galicia, Asturias, Cantabria and The Balearic Islands); to treaties that aim at special assistance of the emigrants from that Autonomous Community (Statutes of Andalusia and Castile-La Mancha); and finally to all treaties related to "matters of interest for Aragon" and especially to those "regarding its geographical location as a border region" (Statute of Aragon).

On the other hand, the regulation on the right to receive information amounts to very little. In eight out of nine Autonomous Communities that do have this right recognized in their Statutes of Autonomy, it is limited to the elaboration of international treaties "that relate to matters of their specific interests"; this right is even more limited for Murcia, where it is restricted to "treaties that relate to matters of its competence".

No legal norm in our domestic law establishes when the Government has to inform the Autonomous Communities: whether it is while the treaty is being negotiated or when the text is already authenticated but not yet ratified. In this sense, we must say that the right to information compels the Government to notify the negotiation or adoption of an international treaty to the Autonomous Community affected, but it does not include the right of that Community to reply to that information or the binding of the Government to that answer. When the Constitution and the Statutes of Autonomy were written, amendments asking for a right to be heard were refused, leaving only the already known right to information. The only exception to this rule was the Canary Islands Statute of Autonomy, where it is said:

> "Once the information is received, the Government of the Autonomous Community will give an answer, if needed" (art. 37-1).

Even in this way, such an opinion will not have a binding character.

Finally, the Autonomous Community Statutes do not speak about the direct participation of their representatives in negotiating the treaty. Nevertheless, there is no problem in this as far as the Government considers it appropriate to the circumstances.

This possibility was contemplated in the Draft Autonomous Statute of Galicia and The Canary Islands, but it was ruled out in Parliament. Anyway, it may still occur by means of *ad hoc* decisions of the Government in this sense or by a modification of Decree 801/1972, 24 March, on

the activity of the Administration in the field of international treaties in order to achieve a real right of co-negotiation.

Many of the doubts caused by the lack of regulations have been overcome by practice. Negotiations of the Adherence Treaty of Spain to the European Communities stand as a clear example. Although no representative of the Autonomous Communities participated in the negotiation of the treaty, the Government, through the Secretary of State for relations with the European Communities, reported not only to those Autonomous Communities whose Statutes demanded it, but to all of them. Between January 1983 and 1 October 1985, it had 273 reporting meetings with the different autonomous governments: 17 with Andalusia; 14 with Aragon; 16 with Asturias; 13 with the Balearic Islands; 10 with the Canary Islands; 16 with Cantabria; 19 with Castile-La Mancha; 13 with Castile-Leon; 21 with Catalonia; 12 with Estremadura; 23 with Galicia; 12 with La Rioja; 18 with Madrid; 16 with Murcia; 18 with Navarre; 20 with Valencia; and 15 with The Basque Country. These figures show that not even those Autonomous Communities with an explicit right to information had more meetings with the above mentioned Secretary, and that absolutely all of them had a chance not only to receive information, but also to give their opinion; these meetings took place during the negotiation, at a time the Government could include their opinions with those of the national delegation; their frequency implied that Autonomous Communities could follow and control the negotiation; and finally, that their participation became a necessary step, though not binding. In this sense, we may consider the Report of the Canary Islands Parliament to Congress of 22 June 1985, against the Draft Organic Law authorizing the adherence of Spain to the European Communities.

1.1.4. Are there any organs exercising a consultative role in the domestic procedure for making treaties?

Art. 107 SC says that "the Council of State is the highest consultative body of the Government". It is reasonable then for the Government to ask for its advice when concluding international treaties.

Nevertheless two questions arise from this legal opinion: a) its compulsory character and. b) its value.

According to art. 22-1 of the Organic Law on the Council of State of 22 April 1980, consultation of the Permanent Commission of the Council of State by the Government "on the necessity of Parliament's authorization" is compulsory for all treaties, which means a prior classification of international treaties. If it states the need for Parliament's authorization for the conclusion of the treaty, it is significant, though not definite that such treaty will belong to those included in art. 93 or 94-1 SC. This norm has been extensively criticized because the obligation to ask the Permanent Commission of the Council of State in all kinds of treaties whether or not prior Parliamentary authorization is required creates an administrative step that often unnecessarily delays the internal procedure for

concluding a treaty. It has thus been suggested that the Permanent Commission of the Council of State need not be asked at any time when the Government is sure of the need for Parliamentary authorization. On the other hand, it has also been criticized that the above mentioned article only states the necessity for the Permanent Commission of the Council of State to declare whether or not a certain treaty requires Parliament's prior authorization, without saying, if so, what kind of prior authorization is required. The Commission should have said if Parliamentary authorization must be granted by means of an organic law (treaties of art. 93 SC) or by the voting proceeding of art. 74-2 SC (treaties of art. 94-1 SC).

In short, the Government's consultation of the Permanent Commission of the Council of State is compulsory for all kinds of treaties in order to determine the necessity of a Parliamentary authorization for their conclusion. But the Government, according to the law, will be free to follow such advice or not; it is therefore compulsory but not binding; the Government may keep a treaty outside the scope of Parliamentary authorization against the opinion of the Permanent Commission of the Council of State. But this is unusual. This advice does not bind Parliament either, which implies that even though the Government follows it, Parliament may not agree afterwards. It is even possible for the Permanent Commission of the Council of State to state that a certain treaty does not require Parliament's authorization (art. 94-2), for the Government to reclassify it as one of those that require it (art. 93 or 94-1 SC) and for Parliament, though in accordance with the Government's opinion, to decide on a different kind of prior authorization. This potential case is, however, unlikely to happen in practice.

1.1.5. Is there any procedure, prior to ratification of a treaty, to ensure its conformity with the constitution?

Until recently, there have been two procedures, prior to ratification of a treaty, to ensure its conformity with the Constitution.

The first one, which relates to all sort of treaties — arts. 93, 94-1 and 94-2 SC —, is found in art. 95-1 SC, which says:

> "The conclusion of an international treaty which contains stipulations contrary to the Constitution shall require a prior constitutional revision".

If there are doubts on the conformity of a certain treaty with the Constitution, art. 95-2 says that:

> "The Government or either of the Chambers may request the Constitutional Court to declare whether or not such a contradiction exists".

It is therefore the Constitutional Court which, at the request of the Government or Parliament, in the last instance checks the conformity of a treaty with the Constitution before its ratification.

After the request regulated by art. 95-2 SC the Constitutional Court "will make a binding statement according to art. 95 SC" (art. 78-2 CCOL). This recourse to art. 95 SC has been demanded only once in our fifteen

years of democratic life. Taking advantage of this opportunity, our Constitutional Court described the legal nature of the request in the following manner:

> "... the object of the request is a declaration, a judgment and not a legal opinion; the request reveals a reasonable doubt, and we are not asked for an opinion to solve it, but for a binding judgment.
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> For this reason, and even when the judgment does not have a litigious nature, the Constitutional Court's position as the highest interpretative authority of Constitution is not affected by this circumstance. Here, the Constitutional Court acts as the jurisdictional organ it is, and its declaration has to be based therefore on legal reasonings. It will examine the extent of agreement between the Constitution and the stipulations of the treaty submitted to a prior control, since art. 95-1 SC has only attributed to Government and both Chambers of Parliament the faculty to request of the Constitutional Court a judgment whenever doubts arise on the conformity of a certain treaty's stipulations with the Constitution. The initiative does not belong to the Court *ex officio*. Nevertheless, this Court may demand information according to art. 78-3 CCOL.
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> But, in any case, whether this Court states the conventional norm conforms with the Constitution or not, in either case the resolution adopted will have force of law. Although that resolution cannot be properly called a "judgment" (art. 86-2 CCOL), it is a jurisdictional decision of a binding character (art. 78-2, *id.*) and it has therefore *erga omnes* effects (art. 164-1 *in fine* CE); whether it be negative or exclusive, which would prevent the stipulation from being transferred to this Court through the declaration of non-conformity with the Constitution proceedings, or whether it be positive, which would compel the public powers to respect and follow our declaration; for example, if its content was that a certain stipulation is contrary to Constitution, the executive immediate and direct effect should be the revision of the Constitution before the treaty's approval" (Declaration of 1 July 1992).

The origin of this judgment was the Government's consent of 24 April 1992, to request from the Constitutional Court a statement on the existence or nonexistence of a conflict between article 8B, 1st paragraph of the EEC Constitutive Treaty in the new wording of article G (C), of the European Treaty of Union made in Maastricht on 7 February 1992 and art. 13-2 SC that admits "the right of foreigners to vote in local elections" in the terms established by treaty or law. Our Constitutional Court clearly said that the conventional stipulation:

> "is not in conformity with art. 13-2 of the Constitution regarding the attribution of a passive suffrage right in local elections to the citizens of the European Union that were not Spanish nationals".

Leaving aside the Government's proposals to resolve such a contradiction, the Court stated that the procedure to be followed in this case to revise the Constitution is the ordinary one, established in art. 167 SC. The first partial reform of the Constitution of 1978 was made by virtue of this

article to add "and passive" in the expression "right to active suffrage in municipal elections" of art. 13-2 SC.

The second procedure prior to ratification of a treaty to ensure its conformity with the constitution was to question before the Constitutional Court the organic law that authorizes — according to art. 93 SC — the conclusion of a treaty which attributes to international organisations or institutions the exercise of constitutional competences by means of a request for a statement of lack of conformity with the Constitution (art. 79 of CCOL of 3 October 1979). This procedure was only related to those treaties included in art. 93 SC where Parliament's prior authorization must be adopted by means of an organic law and relates neither to treaties included in art. 94-1 — where Parliament's authorization is adopted by the majority vote of both Chambers — nor to those included in art. 94-2 which do not require a prior authorization of Parliament. In this procedure the active right to request a statement of lack of conformity with the Constitution was broader than in the case of art. 95 SC, since it rested with the President of Government, the People's Defensor (Ombudsman), 50 members of Congress, 50 senators, the executive organs of the Autonomous Communities and, in certain cases, their Assemblies (art. 162 SC and art. 79-2 CCOL). Nevertheless, no statement of lack of conformity with the Constitution has been requested before 1985 and, afterwards, this procedure was no more available as art. 79 CCOL was abrogated by the Organic Law 4/1985, of 7 June 1985.

1.1.6. Are the rules relating to the treaty making power varied in practice?

The substantive competence to conclude international treaties rests with the Spanish Government.

But practice shows that the formal act of conclusion may be attributed to the Head of State (art. 63-2 SC: "It is incumbent on the King to express the consent of the State to obligate itself internationally through treaties..."), to the President of the Government, to the Foreign Affairs Minister or to any other representative of the State with full powers to do so.

As we already saw in 1.1.1. post-constitutional practice in this subject shows that: a) in those international treaties where the State's agreement is expressed by means of ratification or adherence subject to Parliament's authorization, it is always the King who participates; b) in those treaties where the State's agreement is expressed by means of ratification or adherence but without Parliament's authorization, it is also the King who participates with regard to the procedure of conclusion; c) in international treaties with a simplified procedure of conclusion that also need Parliament's authorization, the King does not participate; and d) in international treaties with a simplified way of conclusion that do not need Parliament's authoritation, the King does not participate either.

Another example where practice is modifying our domestic law regarding the conclusion of international treaties is the way how treaties are being concluded. According to Decree 801/1972, of 24 March, on the activity of the Administration in the field of international treaties, the conclusion of a treaty may only be made by means of signature, ratification, or adherence to the treaty, whenever the treaty states so or it is said by any other means (arts. 15, 16 and 22 respectively). On the other hand, Spain adhered to the Vienna Convention of 23 May 1969, on the Law of Treaties, and thus it is obvious that all the ways of conclusion set out in art. 11 (signature, exchange of instruments constituting a treaty, ratification, approval, adherence or any other ways agreed) are possible in our domestic law. Our highest Court has explicitly stated so; on 11 April 1991, it said that:

> "The central authorities are not limited only ... to the ways of conclusion regulated in the Decree on the activity of the Administration of 1972. They may also act through the more flexible ways authorized by the Vienna Convention, part of our domestic law, on the law of treaties ...".

In this sense, we may mention that in recent Spanish conventional practice a new way has appeared not explicitly included either in the Vienna Convention or in the Decree of 1972. It consists in the communication to the other Negotiating Parties of the completion of the necessary proceedings of our domestic law for the conclusion of an international treaty. This new way takes place when the treaty's entry into force depends on the notification of the Negotiating Parties' fulfilled proceedings.

1.1.7. Does the organ(s) with treaty making powers have the power to conclude secret treaties?

The Spanish Constitution totally prevents the conclusion of secret treaties.

First, because those treaties included in arts. 93 and 94-1 SC need Parliament's prior authorization for their conclusion, and such an authorization could be adopted, at most, in a confidential way and according to the Chambers' Regulations.

Second, because Government must report to Parliament the conclusion of the other treaties (art. 94-2 SC) and the report includes, as Parliament's Regulations determine, the treaty's contents, which allows a check on conformity with the constitution (art. 159 Regulations of Congress).

Third, because the treaty's official publication is a requirement for its application (art. 96-1 SC and 1-5 Civil Code).

And fourth, because in our domestic law, the Decree 801/1972 established two ways to ensure the necessary publicity for international treaties concluded by Spain. First of all, art. 28 ordered as an obligation of the State the registration of every international treaty concluded by Spain in the UNO Secretariat:

> "The Foreign Affairs Ministry will adopt the necessary measures to ensure the fulfilment of art. 102 of the United Nations Charter regarding

registration in the Organisation's Secretariat of those treaties concluded by Spain".

And in second place, art. 34 regulates an internal census of international treaties when it says that:

"Regardless of its publication in the OBS, in order to encourage among all the Administrative organs as well as people in general, knowledge of international obligations contracted by Spain, the Foreign Affairs Ministry will adopt the necessary measures to make possible: a) the periodic publication of collections of treaties ratified by Spain. b) the periodic publication of a list of treaties in force and binding for Spain. c) the establishment of databases regarding treaties".

The prohibition of secret treaties is therefore implied in the Constitution, though it does not contain a specific disposition similar to art. 76 of the Republican Constitution of 9 December 1931, which said:

"Secret Treaties and Conventions and secret stipulations of any treaty will not bind the Nation".

1.1.8. What sanction exists for failure to observe domestic rules relating to the treaty making power?

Two points of view should be considered.

From an international point of view, art. 46-1 of the Vienna Convention — which Spain adhered to on 16 May 1972 — states that "[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance". Therefore, any clear violation of an important domestic norm relative to the competence to conclude treaties will result in the nullification of such a treaty.

Not all violations of internal law concerning the competence to conclude treaties may affect the validity of the State's consent. To have an effect on it, such an infringement must be first of all clear, evident; and then it must be related to fundamental norms.

From a national point of view we can query where we are to find such fundamental norms of internal law relating to the competence to conclude treaties whose evident violation entails the treaty's nullification.

As we already saw in 1.1.1. such norms are mainly located in the Spanish Constitution and in Royal Decree 801/1972.

In short, from a domestic point of view we have to answer the following question: what is the sanction for failure to observe constitutional dispositions relating to the treaty-making power? or, in other words, what is the sanction for a treaty's ratification without Parliament's prior and necessary authorization requested by arts. 93 and 94-1 SC or without Parliament's immediate report after conclusion in cases set by art. 94-2?

The answer to these questions leads us to speak of these treaties as lacking a formal conformity with the Constitution. This would be the

case of a treaty which, being among those regulated by art. 94-1 SC, was qualified by the Government afterwards as one of those included in art. 94-2, leaving it thus outside Parliament's authorization; or the case of a treaty implying a transfer of competences established by Constitution to an international organisation which would follow the procedure set in art. 94-1 or 94-2 SC instead of the one set in art. 93 SC; or finally the case of those treaties regulated neither in art. 93 nor in art. 94-1 SC which the Government did not report to Congress and Senate, according to art. 94-2 SC, right after conclusion. At this point we have to take into account that though there is no disposition explaining what we have to understand by "immediately", it is obvious that such information will have to be passed on before the publication of the treaty's text in the OBS.

But going back to the initial question, the consequence — in our domestic law — of the violation of the constitutional requirements for the treaties' conclusion is — taking into account that there is no specific legal sanction — the declaration of a lack of conformity with the constitution. Art.27-2-c) CCOL includes international treaties among the texts that admit this declaration. The declaration of the treaty's lack of conformity with Constitution by virtue of substantive failures in its ratification may be achieved by two means:

a) a request for a statement of lack of conformity with the Constitution, made by the President of the Government, the Nation's defensor (Ombudsman), fifty members of Congress or fifty senators, and the Autonomous Communities' Assemblies whenever the treaty is related to them, within three months from its official publication (arts. 29-1, 31 and 34 of the Constitutional Court Organic Law).

b) the question of lack of conformity with the Constitution can be raised by a judge or court, on his or its own initiative or at the request of one of the parties at any time he considers the norm applicable to the case contrary to the Constitution , once the proceedings are finished and before verdict is passed (arts. 29-1, 35 and 37 of the Constitutional Court Organic Law).

The Constitutional Court's statement of a lack of conformity with the Constitution entails the nullification of the norms contrary to the Constitution and binds all Public Powers (arts. 38 and 39 of the Constitutional Court Organic Law).

In short, according to art. 46-1 of the Vienna Convention of 1969, the consequence of the violation of internal norms related to the conclusion of treaties, whenever it is clear and affects fundamental norms, is the nullification of such a treaty. In our domestic law, the consequence of the violation of constitutional norms relating to the conclusion of treaties is a declaration of lack of conformity with the Constitution, which implies the nullification of the treaty concluded without observing our Constitution.

We will go over this second point in 1.2.7. Finally, it is necessary to say that according to art. 29 CCOL an appeal based on a formal lack of conformity with the Constitution does not prevent another one based on substantive reasons from being lodged.

1.1.9. Do the national rules regarding the conclusion of treaties conform with the Vienna Convention on the Law of Treaties?

The answer is positive.

The adherence of Spain to the Vienna Convention of 23 May 1969, in force since 27 January 1980, took place on 16 May 1972. Before this, Decree 801/1972 of 24 March on the activity of the Administration in the field of international treaties was published. Its Preamble states that:

> "... the Administration's need for regulations in the field of international relations has grown taking into account the progressive development and codification of international norms on treaties, which has led to the adoption of the Vienna Convention. For all these reasons regulations are necessary to control the activity of the Administration in this field taking into account the requirements of the Administration itself as well as those of international practice".

In short, Decree 801/1972 is inspired by the Vienna Convention and agrees with it.

Nevertheless, such a preconstitutional Decree was not completely in accordance with the Constitutional requirements, and for this reason Titles V and VI were abolished. It is highly desirable there should soon be published a law on treaties that, in conformity with the Constitution, could replace Decree 801/1972.

Although we do not properly consider it as something contrary to the Vienna Convention of 1969 on the Law of Treaties, it is excessive to consider as representatives of the State of Spain persons without full powers to act as such. According to art. 5 of Decree 801/1972, the following subjects may act as representatives of the State of Spain:

> "a) The Head of State, the President of the Government and the Foreign Affairs Minister to execute any international act regarding a treaty; b) the Chiefs of the diplomatic missions and those of permanent missions in international organisations, for negotiation, adoption and authentication of the treaty's text between Spain and the State or international organisation where they have been accepted; c) the Chiefs of special missions sent to one or several foreign States for the negotiation, adoption and authentication of a treaty's text between Spain and any other State where the mission has been sent; d) the representatives accepted in an international meeting or organisation or one of its organs for the negotiation, adoption and authentication of the treaty's text elaborated in that meeting, organisation or organ".

If we compare this article with art. 7-2 of the Vienna Convention, it is clear that also Chiefs of special missions are supposed to have full powers under our domestic law. According to paragraphs b) and d) of the same article, that extension also stands for a treaty's act of authentication.

Other specifications are also in conformity with the Vienna Convention though it does not say anything about them, as the one established by a Letter of the Foreign Affairs Ministry (No. 2882) of 28 November

1977 saying that bilateral treaties ratified by Spain should be authenticated in Spanish, though other languages may be also authentic.

1.2. The Intervention of Parliament

1.2.1. Is the participation of Parliament mandatory or optional to enable the State to assume international obligations?

Parliament's participation is a mandatory requirement for the conclusion of treaties included in arts. 93 and 94-1 SC.

Congress and Senate do not participate in the conclusion of other treaties (those included in art. 94-2 SC), but they receive reports concerning the treaties afterwards.

Parliament's compulsory participation, when required by Constitution (arts. 93 and 94-1 SC), takes the form of prior authorization.

1.2.2. Can such participation be only tacit?

Our Constitution does not admit Parliament's "tacit" authorization for those treaties which require it (by tacit authorization we understand Parliament's implied agreement when no debate or proposals for rejection, postponement, or reservation are reglamentarily required within a certain time from the treaty's deposition in the Chambers). Furthermore, the Constitution prevents such a solution by excluding the possible delegation of bills or proposals of international affairs from the Plenary sessions of the Chambers to the Permanent Legislative Commisions (art. 75-3 SC).

On the other hand, in the debates of 1981 on the Draft Regulations for Congress a request was made for the inclusion of tacit authorization — Parliament's implied agreement if no answer was given in sixty days from the demand for authorization — for treaties listed in art. 94-1 SC, but this proposal was rejected on the grounds of incompatibility with art. 74-2 SC, which implies an obligation for explicit authorization at least for treaties listed in art. 94-1 SC. Congress was requested, in consideration of this, to take a decision in such terms (art. 155-4 Regulations for Congress). Authorization must be also explicit for treaties mentioned in art. 93 SC.

In short, the Spanish Constitution does not admit tacit authorization. Parliament's authorization, when required by the Constitution (arts. 93 and 94-1 SC), must be always explicit and granted as we shall see in 1.2.3.

1.2.3. If not, what form does Parliamentary participation take (type of law, secondary legislation, etc.)?

Parliamentary authorization modalities differ between treaties of art. 93 SC and treaties of art. 94-1 SC.

In the first case, Parliamentary authorization must be granted by means of an organic law.

In the second case, Parliamentary authorization is to be adopted according to art. 74-2 SC.; no legislation is required here. It is a simple parliamentary act of approval.

1.2.4. What are the technical means for adoption of the Parliamentary decision (majority, possibility of amendment, etc.)?

Authorization to conclude treaties listed in art. 93 SC must be adopted by means of an organic law.

Neither the Constitution nor Parliamentary Regulations establish any special voting procedure for these organic laws of authorization. On the contrary, art. 154 of the Regulations of Congress explicitly says that procedure for organic laws of authorizaton will be identical to those of the same normative rank. Therefore, the steps will be: 1) consent in a final vote on the whole bill by absolute majority of the members of Congress (art. 81-2 SC); 2) transfer of the bill to the Senate so that the Senate may — if it wishes — veto it or propose modifications within two months from reception (twenty days in the case of a declaration of urgency). To pass a veto proposal, an absolute majority of senators is needed; and 3) return to Congress in case of veto or modifications. According to art. 90 SC a simple majority is needed to overcome the modification proposals and an absolute majority is needed to overcome a veto within the first two months; after two months, a simple majority is enough.

Authorization to conclude treaties included in art. 94-1 SC will be adopted according to a special procedure regulated by art. 74-2 SC.

According to art. 74-2 SC the Congress and Senate will separately grant authorization for conclusion by simple majority; in case of disagreement, a mixed Commission will be formed to present a new text to both Chambers; if not passed, Congress will decide by an absolute majority.

Finally, we may underline the comparative absurdity produced in the case of differences between the Chambers. If it is the case of an international Convention that has to follow the steps of art. 93 SC, an absolute majority of Congress members is required for its prior authorization; but if the Senate differs from the Congress, the Congress will decide in last instance by a simple majority. On the contrary, in cases of treaties listed in art. 94-1 SC a simple majority of both Chambers is required, and in case of differences, the Congress will decide by absolute majority.

This last hypothesis may lead us to a limit situation produced when the Congress, by simple majority, decides upon a treaty's ratification; the Senate also decides the treaty's ratification but with a reservation; afterwards, the Mixed Comission does not come to an arrangement; and Congress does not achieve an absolute majority either for the simple authorization or for the authorization with a reservation; in this case, Parliament's prior authorization should be denied.

1.2.5. Is Parliament informed of reservations or interpretative declarations which are to be made by the executive?

The Congress and Senate, when parliamentary authorization is required, do have the right to be informed of the Government's possible reservations or interpretative declarations to that treaty, as implied in art. 20-3 and 26 of Decree 801/1972 and art. 155-2 of the Regulations of Congress. According to the first of them, both Chambers have also the right to be informed of the reservations already made by the other States.

The Government must therefore provide such information.

We may wonder if our Legislative Chambers have only a right to be informed or have also competences regarding reservations and formulation of declarations, contents, etc, in relation to treaties whose conclusion requires Parliament's authorization.

1.2.6. Has Parliament any power in respect of such reservations?

Our Constitution does not clearly say anything on this subject. Nevertheless, according to the democratic spirit of the Constitution, there are no reasons to consider a Government's exclusive competence in this matter. Furthermore, the unilateral character of reservations, as well as the moment for presenting them — at the conclusion of the treaty — favour Parliamentary participation in the determination of their number and content, whenever the Chambers' authorization is required.

Two cases should be considered:

a)Parliament's participation in reservations made by the Government.

Parliament must be notified of such reservations, and it must be supplied with the treaty's text and the other documents needed for beginning the parliamentary process (arts. 20-3 and 26 of Decree 801/1972 and 155-2 of the Regulations of Congress).

Reservations may be discussed according to the procedure for discussing bill's articles. Art 156-3 of the Regulations of Congress says that:

> "proposals of members of Congress or parliamentary groups will be considered amendments when they intend to achieve the abolition, addition or modification of the Government's reservations".

Although the Regulations of the Senate do not include a similar and complementary regulation, senators may discuss the reservations and declarations already passed by the Congress. In case of disagreement, a solution will be taken according to constitutional mechanisms.

b)Proposals of reservation presented by members of the Congress and Senate once the treaty has been transferred to Parliament.

Such a right is regulated by the Regulations of the Congress (art. 156-2 and 3) and the Regulations of the Senate (art. 144-1 and 3). Two procedures are distinguished:

- if the reservation proposed is allowed by the treaty, it will be considered an amendment to the articles of the treaty (art. 156-2-2 Regulations of the Congress).
- if the reservation proposed is not allowed by the treaty, it will be considered an amendment to the whole treaty (art. 156-3-2 Regulations of the Congress).

On the other hand, art. 144-3 of the Regulations of the Senate says that "reservation proposals can only be formulated to those treaties or conventions that do allow them" and must follow "the established system for all amendments under the ordinary legislative procedures".

The Regulations of the Senate do not mention the forbidden reservation proposals, but the same objective is aimed at with the so-called no ratification proposals (art. 144-1 Regulations of Senate), that is to say, the denial of the authorization demanded by Government.

Finally, once the treaty's conclusion has been decided by the Government, it must be done with the reservations and declarations passed by Parliament, with no omission, modification or addition.

All this only relates to treaties listed in arts. 93 or 94-1 SC, where Parliamentary authorization is an essential requirement for their conclusion.

1.2.7. What sanction exists for failure to observe the rules requiring Parliamentary participation in the treaty making process?

This question has been already seen in 1.1.8.

A treaty may violate the constitutional norms or the norms of development that regulate Parliament's participation in the conclusion of treaties — internal norms of great importance, especially when Parliament's authorization is required by the Constitution (arts. 93 and 94-1). From an international point of view, such a violation, if clear, entails the nullification of that treaty (art. 46-1 of the Vienna Convention of 23 May 1969).

From a national point of view, such a violation implies a demand for a statement of lack of conformity with the Constitution from the Constitutional Court (arts. 27-2-c. and 29 of the Constitutional Court Organic Law). It is called formal lack of conformity with the Constitution.

It is necessary to distinguish between a substantive lack of conformity with the Constitution — which admits a prior control over the treaty's conclusion according to art 95-2 SC (see 1.1.5.) — and a formal lack of conformity with it, which may only be checked after the treaty's conclusion.

As we saw in 1.1.8. such a declaration may be requested by two means: either an appeal or a suit for a statement of lack of conformity with Constitution. In both cases, an affirmative judgment entails the nullification of the articles contrary to it, binding all public powers (arts. 38 and 39 CCOL).

In short, failure to observe constitutional norms that regulate Parliament's participation regarding the conclusion of treaties takes us to a possible declaration of lack of conformity with the Constitution, which

means the nullification of every treaty concluded without observing the requirements set by the Constitution. This would be the case of a treaty being concluded without Parliament's authorization — if required — or with Parliament's simple agreement when an organic law is required.

1.3. The Intervention of the Electorate

1.3.1. In what circumstances may the electorate participate in the procedure for the conclusion of treaties?

The Spanish Constitution does not explicitly regulate the electorate's participation in the conclusion of treaties.

According to art. 92 SC, the King, at the request of the President of Government, will be able to submit political decisions of special importance to a referendum. Anyway it is an optional consultation whose result does not bind the Government.

At any time the conclusion of a certain treaty is considered "a political decision of special importance", art. 92 SC will come into application.

A referendum will be called only at the request of the President of the Government. There is no organ set by the Constitution with the power to oblige the President of the Government to propose a referendum or to take the initiative in his stead. Notwithstanding, such an initiative is not unlimited. First, because the President's proposal for a "consultative referendum" must be authorized by agreement of the Council of Ministers; second, because holding this kind of referendum requires also Congress's authorization by an absolute majority, at the request of the President of the Government. And that request will contain the exact content of the consultation (arts. 2 and 6 of Organic Law 2/1980, of 18 January, on the regulation of the different kinds of referenda).

In short and considering the domestic regulation on this subject (art. 92 SC; Organic Law 2/1980, of 18 January, on the regulation of the different kinds of referenda, partially modified by the Organic Law 12/1980, of 16 December) we can state that:

1) There is no obstacle to call a referendum on a decision of special importance related to foreign policy, since no matter has been previously excluded;

2) The doctrinal determination of a certain decision as a "question of special importance" has no practical interest, since any question that the President of the Government decides to submit to a referendum with the consent of Congress will be considered of "special importance";

3) The initiative only rests with the President of the Government, whose judgement of opportunity cannot be replaced by any other organ. Practice shows that since the adoption of the Constitution in 1978 we have adopted only once a "consultative referendum" under art. 92 SC and in that instance the "political decision of special importance" was related to an international treaty. The last Government of

U.C.D. (Central Democratic Union) did join Spain to the North Atlantic Treaty Organisation (NATO) on 30 May 1982. Five months later, Government was assumed by the SWSP (Spanish Workers' Socialist Party) that had previously criticized our NATO entrance. For this reason, on 31 January 1986 the Council of Ministers passed the President of the Government's proposal about a consultative referendum on the continuance of Spain in that Organisation, and it asked Congress for parliamentary authorization afterwards.

The question asked in the referendum indicated the great discretional power of the President of the Government. In fact, the question was not a simple yes or no vote on NATO, as the important opposing parties had demanded. Instead, the question read as follows:

"The Government considers appropriate for Spain to remain in the Atlantic Alliance and it considers that such a continued presence should be maintained on the following conditions: 1) Our participation will not include incorporation into the military structure. 2) The prohibition of installation, storage or introduction of nuclear weapons into Spanish territory will be maintained. 3) A progressive reduction of the military presence of the United States in Spain.

Do you consider it appropriate for Spain to remain in the Atlantic Alliance on the terms arranged by the Government of the nation?".

Congress granted its prior authorization on 5 February 1986, and the voting took place on 12 March. Results favoring the Government's opinion (Yes votes, 52,49%; No votes, 39,84%; blank votes, 6,53%; invalid votes, 1,11%) show that if a hypothetical "no" had been achieved a second popular consultation would have had to be made in order to determine whether full incorporation or abandonment of the Atlantic Alliance was wanted.

On the other hand, the internal ratification procedure for the European Treaty of Union, signed in Maastricht on 7 February 1992, has clearly shown that it is only the President of the Government who has the power to call a "consultative referendum". In spite of the demand of a political party represented in Parliament for a referendum on this treaty, the President of the Government refused its request, even though recognized that it was a political decision of special importance.

1.3.2. What sanction exists for failure to observe the rules requiring the participation of the electorate?

Taking into account the referendum's optional and non-binding character, no legal sanction is attributed to the violation of such norms. Any possible sanction would have only a political character.

1.4. Matters Subsequent to the Entry into Force of a Treaty

1.4.1. Are there specific domestic rules relating to the adoption of amendments to a treaty?

Spanish Law does not specifically regulate the adoption of amendments once the treaty is in force. Therefore, arts. 39-41 of the Vienna Convention of 23 May 1969 should be applied.

Art. 96-1 SC, admitting the normative supremacy of international treaties, says that:

> "Their provisions may only be abolished, modified or suspended in the manner provided for in the treaties themselves or in accord with general norms of international law".

There is a clear reference to international regulation in this matter.

When an amendment is made to those treaties that need Parliament's authorization — those listed in arts. 93 or 94-1 SC — must such amendment follow the same parliamentary procedure as that required for the treaty's conclusion?

Although our domestic law says nothing on this point — except the general references of art. 96-1 — we have to take into account that treaties' amendments or modifications must also be inserted into a treaty of amendment or modification. Both treaties, as with any other international treaty concluded by Spain, are submitted to the requirements of art. 93 and 94 SC. We may therefore classify them as those of art. 93 SC (extraordinary authorization by means of an organic law), art. 94-1 SC (simple authorization by decision of both Chambers) or art. 94-2 SC (later report to both Chambers). This classification is different and independent from the one already made for the main treaty. Thus, in 1.1.2. we have already stated that not every treaty of amendment or modification of another treaty concluded as said in art. 93 SC must follow the same procedure; that will only occur when the treaty of amendment or modification attributes "to an international organisation or institution the exercise of competences derived from the Constitution". For the same reasons, for a treaty amending or modifying another previously concluded treaty (as laid down in art. 94-1 SC) also to be concluded by the same procedure, it must be first classified as one of the kinds set in art. 94-1 SC; otherwise, a later report to the Chambers — as required in art. 94-2 SC — will be enough.

1.4.2. What domestic rules govern the denunciation or suspension of a treaty?

It is art. 96 SC that regulates both questions.

Art. 96-1 SC says that treaties' provisions "may only be [...] suspended in the manner provided for in the treaties themselves or in accord with general norms of international law". Our domestic legal order refers the whole question to international regulation.

Art 96-2 says that "[t]o denounce international treaties and agreements, the same procedure established for their approval in Article 94 shall be used."

The existence of art. 96-2 SC is positive in spite of its bad drafting. Literally, art. 96-2 only relates to the denunciation of treaties included under art. 94 SC, without saying anything about those listed in art. 93 SC.

Therefore, according to art. 96-2 SC denunciation of treaties listed under art. 94-1 SC must follow the same parliamentary procedure and requirements set by the Constitution that we have already seen for passing them (art. 74-2 SC) (See, *supra*, 1.2.4.).

The same way, denunciation of treaties whose conclusion was not submitted to Parliament's authorization, must be immediately reported to the Chambers (art. 94-2 SC).

As far as denunciation of treaties included in art. 93 SC is concerned, art. 160 of Regulations of Congress should be considered in an interpretative way. Without distinguishing between the different kinds of treaties, it states that "when denunciation of a treaty or Convention occurs, the same procedure as for concluding it must be followed", which means that denunciation of treaties included in art. 93 SC has to be authorized by an organic law.

A short mention of art. 32-3 of Decree 801/1972 must be made. According to it:

> "The Foreign Affairs Ministry must adopt the necesary measures to publish in the OBS ... any other international act regarding the amendment, modification, termination or suspension of the application of those treaties ratified by Spain".

Finally, the Government and Parliament — when its authorization is needed — have to take into account that according to art. 96-1 SC the stipulations of those treaties part of our domestic law "may only be abolished ... in accordance with those treaties' rules or with the general norms of international law", and therefore any denunciation that violates such norms will be illicit and contrary to the Constitution.

1.5. The Insertion of Treaties into Domestic Law

1.5.1. Does a regularly concluded treaty automatically become part of domestic law or is an express act required?

The Spanish system of reception could be classified as one of "moderate dualism". It is dualist because it requires a material act of reception so that a treaty may become part of our law. And it is moderate because for such an act of reception, publication in the OBS is enough — no transformation into a domestic law is required.

This system is clearly stated by Constitution in art. 96-1 SC when it says that:

"Validly concluded international treaties once officially published in Spain shall constitute part of the internal legal order".

Art. 1-5 of our Civil Code also says that:

"international treaties' juridical norms will not be directly applied in Spain until they become part of internal law through their publication in the Official Bulletin of the State".

As we shall see *infra* in 1.5.2. the value attributed by our case law to the treaties' official act of publication makes our domestic system of insertion qualified, though formally dualistic, with monistic characters in practice.

1.5.2. Assuming an express act is required, what is the nature of this act?

According to art. 96-1 SC treaties' official publication is ordered to insert their juridical norms into our domestic law, making possible their direct application in Spain, as art. 1-5 CC establishes. In no way must this official publication be identified with a transformation of the treaty into an internal law. As far as the Supreme Court's case law is concerned, though treaties' publication attributes to them "full effects in our domestic law" (Judgment of 30 September 1982), the Spanish system should be named as of "automatic reception" (Judgments of 19 May 1983 and 30 April 1986).

According to art. 1-5 CC, treaties not published in the OBS should not be applied in Spain. Nevertheless, practice shows that administrative bodies of the State have been applying a great number of international treaties in force and binding on Spain in spite of their absence or late publication in the OBS, thus paying attention to art. 27 of the Vienna Convention of 1969 when it says that: "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

Furthermore, Spanish courts will also apply those treaties that despite their non-publication, are known by other means or by the particulars' proof of existence and validity -through certification of the Foreign Affairs Ministry for example. That is to say, since a treaty's lack of official publication does not prevent the Administration from applying it, likewise, non-publication will not be an obstacle for its application by the Courts either. At most, they may ask the person who invokes it to give proof of its existence and force.

On the other hand, and as a citizens' guarantee, the Supreme Court's case law has stated that no sanction may be imposed for not observing a right contained in a treaty not published yet. In this sense, a Judgment of 12 March 1985 nullified a sanction imposed on a citizen that was based on nonobservance of a disposition that had not been published in the OBS.

In short, domestic practice — administrative or judicial — shows that official publication is only a requirement for application whenever that treaty contains dispositions that imply citizens' obligations or affect their rights or interests. In this case the official publication of such treaties is a requirement for their application.

1.5.3. What criteria are used by the judge to determine whether a treaty provision is directly applicable?

As already seen *supra* in 1.5.2. and from a formal point of view (art. 1-5 CC.), international treaties' legal norms must be published by the OBS in order to be directly applied in Spain. Neither judges nor courts can apply a conventional norm if it has not been previously published in the OBS.

Nevertheless, as also seen in 1.5.2., practice shows that courts, in accordance with the Supreme Court's case law, have been applying those international treaties concluded by Spain and not published whose existence, contents and validity are proved by the interested party, with the sole exception of those treaties that relate to citizens' obligations; in this case, the treaty's lack of publication may be cited to question its applicability.

1.5.4. When domestic measures to implement the treaty are required, at what stage in the procedure and by what type of legislation (primary or secondary) are they adopted?

The direct application of conventional norms of international treaties requires, in the first instance, the treaty's international enforcement and publication in the OBS, but the application depends, above all, on the treaties' self or non self-executing character.

In the first case they will be directly applied with no need for other executing measures.

In the second case, despite their inclusion in our domestic law from the treaty's official publication, those non-executing norms need a legal or/and reglamentary implementation to be applied. Therefore, when conventional dispositions are not "self executing", their application requires the adoption and publication of lower laws and norms which develop them. In our domestic legal order, in spite of the precedent history of our Constitutions, there is no norm saying when those legal or reglamentary dispositions must be adopted. In this sense, we may underline art. 65-2 of the Republican Constitution of 12 December 1931, which says:

> "After ratifying an international Convention which affects the legal organisation of the State, the Government will hand to Congress the necessary draft laws needed for the execution of its norms *in a short period of time*".

Generally speaking, the adoption of such executing measures will take place after the treaty's enforcement and publication in the OBS, but it is also possible to require the adoption of such measures before becoming a party to that treaty.

Art. 93 SC shows the existence of "non self-executing" conventional norms or treaties in our law when it says:

> "It is the responsibility of the Cortes Generals [Parliament] or the Government, depending on the cases, to guarantee compliance with

these treaties [those which attribute to international organisations or institutions the exercise of competences derived from the Constitution] and the resolutions emanating from the international or supranational organisations who have been entitled by this cession".

Likewise, among the treaties which require prior parliamentary authorization for their conclusion, art. 94-1 e) SC includes those which will require legislative measures for their execution.

On the other hand, the attribution of the above mentioned guarantee to Government or Parliament, according to the cases, not only refers to treaties which transfer to international organisations or institutions the exercise of constitutional competences, as seen in art. 93 SC, but also refers to any other treaty with the same executing problems.

As a general rule, legislative measures of execution are adopted by Parliament while reglamentary ones are adopted by the Government.

Finally, Parliament may delegate to the Government the execution of treaties, in the terms set by art. 82-3 SC: this delegation must be non-transferable, express, concrete, and time-limited. A good example is Law 47/1985 of 27 December on the delegation to Government of the adaptation of our law to the obligations arising from the Spanish adherence to the European Communities. It was granted for six months and it was restricted to a list of legal texts numbered in the enclosed documents.

On the other hand, problems between the legal or reglamentary implementation of conventional dispositions are not only produced between Parliament and the Government. We have to take into account the complex territorial structure of the Spanish State which derives from the Constitution of 1978. Art. 96-1 SC establishes treaties' immediate reception and direct application in the whole national territory once officially published. But when conventional dispositions are not self-executing, it is necessary to count on the governmental and assembly organs of the Autonomous Communities.

Our Constitution does not explicitly recognize Autonomous Communities' competence to execute international treaties. An indirect recognition does exist in art. 93 SC, last paragraph. This article states that, depending on the case, it is Parliament or Congress which will vouchsafe the performance of treaties and international organisations' resolutions. But the safeguarding of performance by the central organs of the State (Parliament or the Government) does not necessarily imply that it is them who must fulfil such norms.

For this reason, the Autonomous Communities assumed competences in the execution of international treaties when the seventeen Statutes of Autonomy were passed. Nevertheless, the final result shows a great diversity of treatment in the drafting of the seventeen Statutes. In general, there exist seven Statutes of Autonomy in our country that attribute to their Autonomous Communities plenary competences in the execution of international treaties (The Basque Country, Catalonia, Andalusia, Aragon, Castile-La Mancha, Canary Islands and Madrid). There also exist six Autonomous Communities whose Statutes attribute to them

limited competences in the execution of treaties, generally subordinated to the State's legislation and reglamentation (Asturias, Navarre, Estremadura, Balearic Islands, Castile-Leon and Murcia). Finally, there are also four Autonomous Communities that do not say anything explicitly on this subject (Galicia, Cantabria, La Rioja and Valencia). Making it more difficult to understand, two of the already mentioned Statutes of Autonomy do explicitly contemplate the execution of international organisations' resolutions.

This situation immediately produced a debate on the Autonomous Communities' role in the execution of international norms. For a certain part of our doctrine, it is only those Autonomous Communities which explicitly regulate the competence to execute international norms in their Statutes of Autonomy that may do so. But another part of our doctrine, more and more important, says that it really depends on the competence of that Autonomous Community in the field of the treaty; if it were so, it could develop it by legislative or reglamentary means, no matter whether or not it had expressly recognized the competence to execute international norms. This discussion came to an end when our Constitutional Court, in Judgment 252/1988, of 20 December, stated that:

> "it is the domestic norms that must solve conflicts between the State and Autonomous Communities, who cannot enlarge, for this reason, the scope of their competences by means of an international link. Statutory norms, like art. 27-3 of the Statute of Automy of Catalonia which rules that the Autonomous Community will adopt the necessary measures for the execution of international treaties relative to matters in its field of competence are not norms which attribute a new competence, different from the one that as already stated in other norms is held by the Generalitat".

In short, the execution of a treaty by means of law, regulation, legislative delegation, etc., belongs not only to the State, but also to the Autonomous Communities. In addition to the example given, we may mention the Basque Parliament's Law 2/1986, of 19 February, on the reception of the European Communities' law in the Basque Autonomous Community, or the Catalonian Parliament's Law 4/1986, of 10 March, for the adaptation of Catalonian laws to EC law.

On the other hand, when Autonomous Communities with competence in that field refuse to execute an international treaty, or do execute it but in the wrong way or too late, apart from the strong measures of control (harmonization laws, art. 150-3 SC; measures of obligatory performance, art. 155 SC, etc.), the State's law prevails and supplies Autonomic law according to art. 149-3 SC. Thus, the State's possible international responsibility for a hypothetical lack of performance by an Autonomous Community is avoided.

1.5.5. When an express act is required and has not taken place in respect of a duly ratified treaty, what effect, if any, does the treaty have in domestic law?

As seen *supra* in 1.5.1. a treaty's lack of publication, when it has been validly concluded by the Spanish State and internationally enforced does not prevent its application at a national level. The Supreme Court's case law, observing art. 27 of the Vienna Convention of 1969 and also trying to avoid the international responsability of Spain, labels our international law reception system as of "automatic reception".

We have also noted that a great number of international treaties have been applied by administrative bodies of the State despite their lack of publication in the OBS.

Spanish courts have done likewise after the party's proof of existence, contents and validity. An exception must be made for those treaties which imply citizens' obligations. Here, if the application is considered harmful, citizens may successfully cite the lack of official publication.

In short, according to Spanish practice, the lack of official publication only implies the citizens' opposition when this is stated by them.

1.5.6. Does the executive determine the date on which the treaty takes effect in domestic law? If so, what means does it employ to this end?

If from a formal point of view, and according to art. 1-5 CC, the direct application of the legal norms contained in international treaties depend on their publication in the OBS, it is clear that it is the Government, when deciding upon the treaty's publication date, which also decides its date of application in our domestic law. This means that the Government, once the treaty is internationally enforced, could deliberately delay its publication in the OBS, delaying therefore its direct application in our internal law.

Nevertheless, apart from the practical problems of synchronization between the international enforcement of a treaty and its official publication which such a delay would create, an attitude of this sort is also contrary to arts. 26 and 27 of the Vienna Convention of 1969, which says that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith" with no possibility of invoking "the provisions of its internal law as justification for its failure to perform a treaty". Besides, though our system of reception should be considered according to arts. 96-1 SC and 1-5 CC as a system of "moderate dualism", from a practical point of view — in fact — it works as an automatic reception system, as the Supreme Court's case law has stated. In consequence, the treaty's effects do start from the international enforcement date notwithstanding its date of publication.

Therefore, the Government's delaying of the official publication of a treaty internationally in force will not prevent it from being applied in our internal law.

In this sense, art. 31 of Decree 801/72 says that apart from the treaty's text and complementary documentation there must be published

"... a communication indicating the treaty's binding date signed by the General Secretary of the Foreign Affairs Ministry".

From such an article we can deduce that the enforcement date is identical to the application date. In this way it is usual to see published in the OBS the treaty's text with the mentioned communication where the treaty's binding date appears (which will always precede the publication date).

Similar dispositions also exist for treaties whose application is partially or completely provisional. In this case, the treaty's text must be published with the communication of the General Secretary of the Foreign Affairs Ministry stating the date of its provisional application. Later on, the date of its full application or the date of the end of its provisional application, as appropriate, will be published (arts. 30 and 31 of Decree 801/72).

A different point is, as mentioned before, that the Government is not obliged to ratify the treaty after Parliament's prior authorization. The only risk is Parliament's withdrawal of its authorization. In this way the executive may condition the start of a treaty's direct application in Spain, since without its approval, the treaty will not be in force for Spain.

1.5.7. Is there any requirement that the treaty should be published officially or given publicity by some other means?

See *supra* 1.5.1. and 1.5.6. as far as official publication of treaties is concerned (arts. 96-1 SC and 1-5 CC).

Art. 29 of the Decree 801/72 says:

"Those treaties to which Spain is a party will be published in the OBS. Publication will take place: 1. Through the insertion of the whole text of ratification or adherence to that treaty. 2. Through the insertion of the whole text of the treaty (be it a unique instrument or connected instruments) as well as the reservations or declarations adopted and any other complementary document".

According to art. 31 of the same Decree, after the texts mentioned in art. 29, a communication with the treaty's binding date signed by the General Secretary of the Foreign Affairs Ministry must also be published.

Second, according to art. 32 of Decree 801/72, the General Secretary of the Foreign Affairs Ministry will periodically publish in the OBS communications relating to: a) other States' participation in multilateral treaties signed by Spain, including where appropriate those States' reservations and the objections made by Spain to them; b) the removal of Spanish or other States' reservations to multilateral treaties ratified by Spain; and c) any other international act relative to the amendment, modification, termination or suspension of the application of treaties ratified by Spain.

Third, and regardless of its publication in the OBS, the Foreign Affairs Ministry has three tasks (art. 34 of Decree 801/72): a) the periodical publication of treaty collections ratified by Spain (it is carried on by

means of yearly census of treaties ratified by Spain); b) the periodical publication of a list of treaties in force and mandatory for Spain (this task is not carried out because of its technical difficulties); and c) the establishment of databases relative to treaties (this task is developed by the Treaties Registration Office of the Foreign Affairs Ministry).

Finally, and regardless of the previous internal ways of achieving publicity for treaties, art. 28 of Decree 801/72 states the obligation of the Foreign Affairs Ministry to follow art. 102 of the United Nations Charter regarding the registration of treaties concluded by Spain at the Organisation's Secretariat.

1.5.8. What sanction exists for lack of publicity?

As already seen, the lack of publication of an internationally enforced treaty does not prevent it from being applied. Its only effect is the inapplicability of such a treaty to citizens whenever it implies duties or obligations for them.

In fact, publication is only a condition of application of such treaties to citizens.

1.5.9. By what methods or procedures are interested parties informed of various matters regarding the application of a treaty, for example, entry into force, parties to a treaty, reservations, or suspension or termination of a treaty, etc.?

In Spanish Law, it is the Foreign Affairs Ministry that must take care of the publicity for every question relating to those treaties ratified by Spain (see arts. 31, 32 and 34 of Decree 801/72).

According to art. 31 of the same Decree, there must also be published, after the text of the treaty, a communication with the treaty's binding date signed by the General Secretary of the Foreign Affairs Ministry.

On the other hand, art 32 says:

> "The Foreign Affairs Ministry will take the necessary steps to publish in the OBS communications signed by the General Secretary of the Foreign Affairs Ministry relative to: 1. The foreign participation in those multilateral treaties ratified by Spain as well as those States' reservations and the Spanish position towards them. 2. The withdrawal of Spanish or foreign reservations from those multilateral treaties ratified by Spain. 3. Any other international act regarding the amendment, modification, postponement or termination of treaties ratified by Spain".

Finally, art. 34 states:

> "Despite their publication in the OBS, in order to facilitate citizens' knowledge of international obligations assumed by Spain, the Foreign Affairs Ministry must take the necessary steps to achieve: a) the periodical publication of a compilation of treaties ratified by Spain. b) the periodical publication of a list of enforced treaties binding for Spain. c) the establishment of databases relating to treaties".

1.5.10. What place does the treaty have in the domestic legal hierarchy?

Art. 96-1 SC says that international treaties' norms, when validly concluded by Spain

> "may only be abolished, modified or suspended in the manner provided for in the treaties themselves or in accord with general norms of international law".

This article therefore sanctions the treaties' supremacy over any internal regulation of lower rank than the Constitution, be it prior or subsequent to them.

This last sentence of art. 96-1 SC is very important because it shows that the abolition, modification or postponement of a treaty cannot be achieved by means of a law or a normative disposition of lower rank.

In short, in our law, international treaties hold the highest normative rank (above national ordinary or organic laws) after the Constitution — "[t]he conclusion of an international treaty which contains stipulations contrary to the Constitution shall require a prior constitutional revision" (art. 95-1 SC) —.

Finally, both the Constitutional and the Supreme Court have confirmed "the superior hierarchical rank" of international treaties.

In addition to this, we have to stress that the Spanish Constitution attributes a higher value to a certain kind of international treaties. According to art. 10-2:

> "The norms relative to basic rights and liberties which are recognized by the Constitution, shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain".

We may conclude from this disposition that all treaties on human rights ratified by Spain have a double value: on one hand, and according to art. 96-1 SC, they are international treaties, part of our domestic law with a higher rank than that held by norms with force of law; on the other hand, they are interpretative criteria of the Spanish Constitution.

Right after the adoption of the Constitution of 1978, our Supreme Court's case law misunderstood the scope of art. 10-2 SC, since it only attributed an interpretative value to those treaties, leaving aside their supralegal rank. This mistake was immediately corrected by the Constitutional Court, who interpreted in a broad sense art. 10-2 SC, recognizing such an interpretative value for different resolutions on human rights of several international organisations, that differed from the Universal Declaration. Nevertheless, and in at least two recent judgments (Judgments 64/1991, of 22 March, and 145/1991, of 1 July) our Constitutional Court has made the same mistake that it had previously corrected recognizing for arts. 40-3-2 and 119 of the EEC Constitutive Treaty only an interpretative value of the SC, by virtue of art. 10-2, forgetting their character as conventional norms.

1.5.11. What is the general attitude of judges towards international treaty obligations? Is there a distinction between different types of court?

The attitude of Spanish judges and courts, without distinction of courts, towards international provisions of a conventional character that entail the State is of complete observance and strict application.

It is known that according to art. 96-1 SC "[v]alidly concluded international treaties once officially published in Spain shall constitute part of the internal legal order". In consequence, from that moment (official publication) onwards, their provisions must be known and applied by courts, especially taking into account their normative rank, as stated in art. 96-1 SC.

In this sense, art. 1-5 CC alludes to the direct application of international treaties' legal norms in Spain after their complete publication in the OBS.

Therefore, according to art. 96-1 SC. and art. 1-5 CC Spanish judges and courts must know and apply international treaties validly concluded by the State after their official publication.

We can raise the question whether Spanish judges and courts have a duty to apply the provisions of those treaties that though validly concluded by the Spanish State and internationally enforced, have not yet been officially published.

Practice shows that judges and courts, following the Supreme Court's case law and in accordance with art. 27 of the Vienna Convention of 1969 and also to prevent international responsibility of the State, have been applying, despite the lack of official publication, those treaties internationally in force for Spain, with the sole condition of proof of their existence, contents and validity through Foreign Affairs Ministry certification or by any other legal means.

Furthermore, Spanish judges and courts cannot avoid the application of an internatinal treaty's provisions on grounds of lack of official publication, since the Vienna Convention of 1969, adherence to which by Spain took place on 16 May 1972 and internationally in force from 27 January 1980 prohibits in art. 27 the invocation of norms of domestic law (in this case lack of publication) to justify the nonobservance of a treaty. Such a Convention is part of our internal law since its publication in the OBS (13 June 1980) and may be therefore directly applied in Spain according to art. 1-5 CC.

Thus, arts. 96-1 SC and 1-5 CC take an approach to the application of an international conventional provision that paradoxically excludes the possibility of citing the articles quoted and the lack of official publication in last instance as a justification for violating an international treaty in force for Spain.

1.5.12. Does the judge check the constitutional regularity of the conclusion of the treaty?

Whenever Spanish judges and courts have doubts on the conformity with Constitution of a certain international treaty's provisions whose application and validity relate directly to the judgment, they can request from the Constitutional Court a declaration of conformity with the Constitution for such provisions (art. 163 SC and arts. 27-1 c; 29-1 b and 35 of the Constitutional Court Organic Law).

Questions promoted by judges or courts may involve either a material lack of conformity of a treaty with the Constitution (whenever its provisions violate the substantive contents of the Constitution) or a formal one (whenever the constitutional proceeding of parliamentary authorization for those treaties included in arts. 93 and 94-1 SC is not observed).

1.5.13. Is the judge able to declare that a question arising in respect of a treaty is non-justiciable?

Despite the non existence of a specific norm in our domestic law, the answer must be negative according to art. 1-7 of the Civil Code, which says:

> "Judges and courts must always solve every case that they acknowledge, following the established system of sources".

Therefore, even when doubts on an international treaty arise from a litigious question, Spanish judges will have to solve it. A different question would be the possibility for those judges to stop the judicial proceedings in course so that another entity may participate, whether through the question of conformity with the Constitution or through the prejudicial question or through the mechanisms of "inquiries for a better providing".

1.5.14. What procedure applies for the interpretation of a treaty in the context of domestic litigation (request to the executive, interpretation by the judge, referral to another court)?

The interpretation of an international treaty's provisions in case of internal litigation, of an administrative or judicial nature, must be done in accordance with the rules set by the Vienna Convention of 1969; all the more so as Spain is a party to it.

a) Interpretation by judicial bodies. Spanish judges and courts have stated for a long time their competence to interpret international treaties; such an interpretation must be undertaken according to arts. 31-33 of the Vienna Convention. Such a wide freedom of Spanish judges and courts to interpret conventional provisions does not prevent them from using the "inquiries for better providing" to request from the Foreign Affairs Ministry or other Departments — such as the Justice Ministry — documents or information that may facilitate it.

In any event, the interpretation of international treaties in case of internal judicial litigation concerns in last instance the judicial court that has to resolve such litigation. It is not possible either to refer it to the executive power or to leave it up to anyone else, with the exception of the

"prejudicial questions" referred to the Court of Justice of the European Communities for the interpretation of EC law (art. 177 of the European Economic Community Treaty and art. 150 of the European Atomic Energy Treaty).

In this sense we must stress the insistence of our Constitutional Court on stating that it is not its function to control the adjustment of certain domestic normative acts to EC law. In Judgment 64/1991, of 22 March, it said:

> "The State's lawyer is right when he says that the Constitutional Court does not have to control the adjustment of the national public powers' activity to EC law. This control falls in the competence of the ordinary judiciary organs since they have to apply EC law and in last instance to the Court of Justice of the European Communities through an appeal over lack of fulfilment (art. 170 EECT). The task of guaranteing the correct application of EC law by national public powers is therefore a question that does not fall within the Constitutional field. As this Court recently stated, Spanish integration into the European Community 'does not mean that through art. 93, EC norms have achieved a constitutional rank or force and either does it mean that a possible violation of those norms by a Spanish disposition always involves a violation of art. 93 SC' (Judgment 28/1991 of the Constitutional Court)".

b) Interpretation by administrative bodies. Their power of interpretation and later administrative application is limited by means of the necessary consultation of the Council of State in plenary session, as art. 21-3 and 4 of Organic Law 3/1980, of 22 April on the Council of State, establishes:

> "The Council of State, in plenary session must be consulted on: ... 3) doubts and differences in the interpretation or performance of treaties, conventions or international agreements of which Spain is a party; 4) juridical problems in the interpretation or performance of acts and agreements of international or supranational organisations ...".

In short, we can state that judicial bodies do have the competence to interpret international treaties by themselves (see *infra* 1.5.16.), while administrative ones must consult the Council of State in plenary session whatever doubts or differences may arise when interpreting treaties.

1.5.15. When a provision of domestic law is challenged in a court as contrary to a treaty, do the proceedings or the court's order have a suspensive effect (as to the application of the law generally, or only inter partes)?

Taking into account the supremacy of international conventional norms over those ones of domestic law (art. 96-1, last sentence, SC.), two solutions may be adopted in case of mutual contradiction:

a) Inapplicability of the internal norm contrary to the international conventional norm.

In this case, the suspensive effect produced by the nonapplication of the internal norm is only effective for that litigation — since such a nonapplication does not mean its abolition — and does not therefore have a general character.

b) Request for a statement of lack of conformity with the Constitution from the Constitutional Court through the "question of lack of conformity" (art. 163 SC., arts. 29-1 b and 35 of the Constitutional Court Organic Law), on grounds of violation of the constitutional principle of normative hierarchy regulated by art. 96-1, last sentence SC. (treaties' supremacy over domestic law).

In this case the Constitutional Courts's statement of lack of conformity of the internal norm with the Constitution will bind all Public Powers and will produce general effects (declaration of the nullity of the internal norm impugned: suspension of its validity and application) from its publication in the OBS (arts. 38-1 and 39-1 of the Constitutional Court Organic Law).

1.5.16. By what methods does the judge interpret treaties?

Spanish judges and courts must interpret international treaties according to arts. 31-33 of the Vienna Convention of 23 May 1969, ratified by Spain. In consequence, they must take into account the unilateral interpretative declarations formulated at the text's authentication or at the treaty's conclusion, as well as the formal acts where Parliament's prior authorization, constitutionally required for conclusion, is shown. On the other hand, among the complementary means of interpretation, they must also take into account the agreement's background (for example, the debates prior to Parliament's authorization) and the development and implementation laws and regulations that have also to be interpreted according to the treaty.

1.5.17. What weight is given to the translated text of a treaty into the national language, when the only authentic versions are in other languages?

According to art. 33-2 of the Vienna Convention of 23 May 1969, "[a] version of a treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree".

Nevertheless, practice shows that administrative and judicial bodies interpret treaties according to the Spanish translation published in the OBS even when it is not one of the authentic texts at an international level. The reason is not only their lack of knowledge of foreign languages but also the legal norms' requirement for translation of foreign documents into Spanish in order for them to be applied by the judicial and administrative bodies.

In our case this problem has little importance. The real importance of the Spanish language, one of the most widely spoken in the world and

even an official language in the United Nations determines that only a small number of multilateral treaties are not authenticated in Spanish. On the other hand, a Letter of the Foreign Affairs Ministry of 28 November 1977 (No. 2882) said that all bilateral treaties concluded by Spain should be authenticated in Spanish, although other languages could be also considered as authentic.

1.5.18. What attitude does the judge adopt when confronted with successive or conflicting treaty obligations?

According to a joint interpretation of arts. 30 and 59 of the Vienna Convention on the Law of Treaties, in case of successive treaties relating to the same subject-matter, the earlier treaty's provisions will only be applied if they are compatible with the later treaty's ones; in case of lack of conformity — impossibility of applying both treaties at the same time — the earlier treaty should be considered as terminated and its provisions tacitly abolished.

Such an interpretation may be perfectly adopted by Spanish judicial bodies in the case of contradictory successive international conventional obligations on the same matter.

Nevertheless, in spite of the validity of that interpretation, sometimes differences between the provisions of an earlier and a later treaty do not imply an absolute contradiction; in some cases, the continuity in force of an earlier treaty's provisions could be justified by the circumstances or the parties' intention. Therefore, it will first be necessary to know the parties' will. In short, the lack of conformity of successive conventional provisions relating to the same subject-matter will always imply the later treaty's application as far as the parties' will does not clearly differ or it is not possible to determine it.

2. THE ACTS OF INTERNATIONAL ORGANISATIONS AND THE EUROPEAN COMMUNITIES

2.1. Is it necessary to distinguish domestic law derived from EC law and that derived from other international organisations?

There are clear differences between EC derived Law (normative acts of EC institutions) and the acts of other international organisations to which Spain also belongs.

In 2.2 and 2.3 *infra* we shall consider those differences that come from the different degree of integration of Spain in various international organisations. Integration into the European Communities is greater since it involves: a) a real sovereignty transfer to the EC Institutions, supranational bodies to which Spain attributes the exercise of exclusive compe-

tences and b) the recognition of EC law's supremacy, its direct and immediate effectiveness.

That level of integration is not achieved in other international organisations to which Spain also belongs.

2.2. Law derived from International Organisations (other than the European Communities)

2.2.1. Is law derived from international organisations part of the domestic legal order? If yes, how does it become part of domestic law?

Apart from the European Communities, acts of those international organisations to which Spain belongs and which are directly obligatory for all member States by virtue of their own constitutive treaties do become part of our domestic legal order. Proof of this explanation is art. 21-4 of Organic Law 3/1980, of 22 April, of the Council of State. According to it:

> "Plenary session of the Council of State must be consulted over the following matters: legal problems on the interpretation or application of acts and resolutions from international or supranational Organisations".

It is clear that if the highest consultative body of the Spanish executive power must be consulted on how to interpret and/or fulfil normative acts of international organisations which are mandatory for the Spanish State, it is because those acts and resolutions are part of our domestic legal order.

But in this legal order neither the Constitution of 1978 nor other norms of lower rank explicitly regulate how to integrate international organisations' acts. Because of this normative blank, several authors understand that by means of an analogical interpretation with what is said about treaties in art. 96-1 SC and 1-5 Civil Code, we may conclude that international organisations' acts, directly mandatory by virtue of the same constitutive treaty, will become part of our domestic legal system once they have been completely published in the OBS; from that moment onwards they may be directly applied to citizens by the national judicial and administrative bodies even when the official publication has taken place before the constitutive treaty of the organisation.

These doctrinal ideas are based on the Spanish Constitution, since only by acting that way could we fulfil art. 9-3 SC, which says:

> "The Constitution guarantees the principle of legality, the normative order, the publication of the norms, the non-retroactivity of punitive provisions which are not favorable to, or which restrict individual rights; juridical security and the interdiction of arbitrariness of public powers".

Nevertheless, we must say that it is the only norm in our whole legal system that speaks of the necessity of publishing binding normative acts adopted by international organisations to which Spain belongs. In these conditions, and following the usages prior to the Spanish Constitution, Spanish practice shows that none of these normative acts is officially pub-

lished. This practice is not in accordance with the requirement of art. 9-3 SC requesting publicity for the norms.

Since they are not officially published, their integration into our domestic legal order is produced in several ways. For example, in the summer of 1979, the State's General Prosecutor filed a criminal complaint against the Spanish enterprise Barreiros Hermanos Internacional S.A., for a supposed violation of the ban on supplying weapons to South Africa. In January of 1983, the Council of Ministers denied a public enterprise called Bazán authorization to negotiate supplying weapons to this country whose value was 300 million dollars. In both cases, the Government's decisions were only justified by the necessity of fulfilling the agreed arms embargo imposed by Security Council Resolution 418 (1977) of 4 November 1977. This example clearly shows the existing monism in the integration of those acts into our domestic legal order, since the Security Council Resolution was not officially published in Spain and its content was neither reproduced nor developed by a domestic legal norm.

Another interesting case took place by virtue of the UN Security Council resolutions regarding the Persian Gulf crisis. Resolutions 661 (6 August 1990), 665 (25 August 1990) and 670 (25 September 1990) imposed an economic embargo on Iraq, ordering the suspension of all economic operations with Iraq, Kuwait or enterprises from these countries, freezing their economic assets abroad and ordering a total blockade by land, air or sea. None of these resolutions were published in Spain. In fact, before the adoption of the first one of them, the Spanish Ministry of Economy and Finances adopted an Order, dated 4 August 1990, establishing several restrictions on economic operations with Iraq, Kuwait and the enterprises of both countries. This Order was not confirmed by a legal norm after the adoption of the above mentioned resolutions by the Security Council. Later on, another Order of 6 August 1990, established new restrictions on economic operations with Iraq, Kuwait and their enterprises freezing the economic assets of both States in Spain. This order, in spite of its coincidence with the first resolution, did not bear any reference to Resolution 661 and did not reproduce its content either. That is to say, that it was automatically received in our domestic law with no necessity of publication.

On the other hand, from Resolution 661 it was understood that it related to competences attributed by Spain to European Communities, fulfiling at a domestic level the economic sanctions imposed by the UNO through EEC Regulation 2340/90, of 8 August 1990 on trade prevention between the Community and Iraq and Kuwait and through Decision 90/414/CECA. As we shall see later on, normative acts of European Communities are not officially published in Spain and both normative texts were adopted saying explicitly that they were executing the commercial embargo on Iraq and Kuwait agreed by Security Council Resolution 661 of 7 August 1990. Right afterwards, Spain adopted an order on 10 August 1990, relating to the administrative authorization needed to export food products for humanitarian purposes. This new order did not refer at all to

Security Council Resolutions, and was complementary to EEC Regulation 2340/1990.

These examples demonstrate the automatic reception of binding normative acts of international organisations in our domestic legal order. In none of the mentioned cases were resolutions of the Security Council officially published in Spain. Only if needed did our Government adopt by itself or by the European Communities, domestic normative acts of execution.

Nevertheless, it has been said that this official publication is not really needed since the OBS had previously published the constitutive treaties of the international organisation. But though Spain accepted the UN Charter on 14 December 1955, that Charter was officially published in the OBS on 16 November 1990, with an errata list published in the OBS of 28 November 1990. In short, the lack of publication of Security Council Resolutions could not be overcome by the Charter's publication since it was published after it.

On the other hand, the second condition required by our State to conclude treaties, that is to say, Parliament's prior authorization according to arts. 93 and 94-1 SC, does not take place in practice for binding normative acts of international organisations either.

2.2.2. Is there any requirement that law derived from international organisations should be published officially at a national level?

As seen *supra* in 2.2.1., the acts of international organisations, according to an analogical interpretation of arts. 96-1 SC and 1-5 CC, must be officially published in the OBS in order to be directly applied to citizens by judicial or administrative bodies.

2.2.3. What place in the domestic legal hierarchy is accorded to law derived from international organisations?

Binding acts adopted by an international organisation form a sort of "derived law" or "secondary norms" with regard to the organisation's constitutive treaty, which gives them a normative value. Therefore, once those acts become part of our domestic law through their publication in the OBS, they acquire the same rank as that of the international treaty which constitutes their juridical base. That is to say, they have a higher rank than domestic norms and it is also possible to apply art. 96-1, last sentence, SC analogically regarding international treaties. In consequence, binding acts adopted by international organisations may be abolished, suspended or modified only by virtue of other acts also adopted by that organisation and never through domestic laws or other internal provisions.

2.2.4. How does the judge give effect to law derived from international organisations?

The application by Spanish judges and courts of those acts of international

organisations forming part of our domestic law will have to observe the above mentioned rules when speaking of the judicial application of international conventional provisions. In short: official publication in the OBS in order to be applied to citizens and acquire their supralegal rank.

The judicial application of acts of international organisations is the same as the judicial application of treaties. There are no differences in this matter.

A different question is the value granted by our case law to certain non-mandatory acts of international organisations on human rights. Art. 10-2 SC says:

> "The norms relative to basic rights and liberties which are recognized by the Constitution, shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain".

This norm attributes to a non-binding resolution of the UN General Assembly, by direct allusion, and international treaties on human rights binding for Spain an added value: they constitute interpretative criteria of the SC, regardless of those treaties' binding character in our domestic law, by virtue of art. 96 SC.

About art. 10-2 SC, our Constitutional Court has adopted a broad interpretation granting this interpretative value of the Constitution not only to the Universal Declaration of Human Rights (see Judgment 62/1982, of 5 October), but also to other non-binding acts of international organisations related to human rights. For example, it stated in a judgment of 23 November 1981 that:

> "The International Labour Organisation's recommendations, differing from agreements and not directly mentioned in art. 10-2 SC, are orientative texts that, though not binding, may be qualified as interpretative criteria of agreements".

An interpretative value of the Constitution has also been attributed to Resolution 11 (65) of the Council of Europe (Judgment 41/1982, of 2 July), to Report 36 of the Trades Union Freedom Committee of the Administrative Council of the International Labour Organisation (Judgment 53/1982, of 22 July and 65/1982 of 10 November), etc.

We must consider that though by means of art 10-2 SC, non- binding normative acts on human rights coming from international organisations may assume the role of interpretative criteria, it does not mean that they also achieve mandatory force in our domestic law. As our Constitutional Court stated in judgment 36/1991, of 14 February:

> "... we must nevertheless specify what international dispositions must we take into account in order to fulfil the content of art. 10-2 of our Constitution, since not all the questions mentioned are treaties or international agreements ratified by Spain. That is the case of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, of 29 November 1985, also called Beijing Rules (...) or the Recommendation of the Council of Ministers of the Council of Europe of 17 September 1987

(R-87-20). Both cases express a generally accepted doctrine that must surely inspire the action of the public powers but that does not bind the legislator".

2.3. *European Communities Law*

2.3.1. Is EC law part of the domestic legal order? If yes, how does it become part of domestic law?

EC derived Law is part of our domestic law and its reception is automatically produced by means of the Spanish Act of Adherence to the European Communities.

Art. 93 SC allows the attribution of competences derived from the Constitution to the European Communities, as occurs in almost all member States' Constitutions.

The European Communities' Constitutive Treaties became part of our domestic law from the date established in the Adherence Treaty of Spain and Portugal: 1 January 1986, and this took place at the moment of their publication in the OBS. On 12 June 1985, the Treaty of Adherence was adopted and on 2 August Parliament authorized the adherence by Organic Law 10/1985, which was unanimously voted in both chambers. This organic law was the formal procedure which allowed the Spanish Government to deposit the adherence instruments to the European Coal and Steel Community and the ratification documents for the EEC and the EAEC. These international instruments, as well as those of the other eleven States (ten former member States and Portugal) produced the adherence of Spain to the European Communities on 1 January 1986, and simultaneously the reception and entry into force for Spain of all its original and derived law in force to that date.

The approval of the Constitutive Treaties implies the acceptance of the derived law that will be adopted from 1 January 1986 onwards with the mandatory and legal effect set out in the constitutive Treaties.

2.3.2. Is there any requirement the law should be published officially at the national level?

EC derived Law does not need an internal official publication — in the OBS — to be directly applied.

The requirement for official publication of treaties set out in art. 96-1 SC, broadened by the doctrine to international organisations' normative acts, does not stand for EC derived law for two different reasons. First of all, the publicity requirement of art. 96-1 SC would not stand for the "*acquis communautaire*" because of the *lex specialis* nature of art. 93 SC. That is to say, the official publication requirement of art. 96-1 SC would be among the constitutional competences attributed to the European Communities. Second, because art. 96-1 SC requires the official publication and not internal publication in the OBS. In this sense, it is not contrary to art. 96-1 SC that the Constitutive Treaties establish that normative

acts of the European Institutions must not be published in Spanish and only in the European Communities' Official Journal (ECOJ hereinafter). By both ways the official publication in the ECOJ guarantees the publicity principle set out in art. 9-3 SC.

Acts of Community Institutions that may not be directly applied — those that require later measures of normative implementation and internal execution — do not require an internal official publication either. The OBS will not publish directives, recommendations or decisions, but internal norms that develop them.

On the other hand, in order to insert into our domestic legal order the "*acquis communautaire*" prior to adherence, that had already been published in the ECOJ in other languages, a special and official publication in Spanish was made in the ECOJ listing by topic all normative acts that were in force on 1 January 1986. Nevertheless the application of those acts will be gradual, according to the calendar established in the Adherence Act, till 31 December 1995.

2.3.3. What place in the domestic legal hierarchy is accorded to the different types of EC law?

EC derived law has a supralegal rank as a whole.

The primacy of EC norms (constitutive Treaties and derived law) over national ones is not based on constitutional provisions relative to their reception and hierarchy in our domestic law, but on the special character of EC law as an autonomous law different from member States' domestic law, that is also above their jurisdictions (arts. 5 EECT, 86 ECSCT and 192 EAECT); it is a consequence of the transfer of sovereignty to the EC Institutions through the act of adherence.

Our Constitution does not say anything on the reception of international organisations' acts — by extension also those of EC derived law — or on their hierarchy. Applying the same analogical interpretation of the last sentence of art. 96 SC which allowed us to state the higher normative rank of the binding acts adopted by international organisations (see *supra* 2.2.1. and 2.2.3.) to normative acts of EC Institutions, we can state that their abolition, suspension or modification may only be achieved by other acts of the same Institutions and never through domestic laws or other internal provisions. The higher status of EC derived law relative to domestic law is thus implicitly recognized, also at a constitutional level.

2.3.4. Is the interpretation of EC law subject to special rules in the domestic court?

The interpretation of EC derived law, as well as its application, must be done in accordance with the uniformity principle. There are no specific norms on it.

Mention must be made of arts. 164 and 177 of the European Economic Community Treaty with regard to the competences of the Court of

Justice when interpreting the Treaty's provisions and the acts adopted by Community institutions.

2.3.5. How does the judge give effect to EC law?

It is the judicial body of each member State that must guarantee the correct performance of EC law. This implies the strict observance of the supremacy, direct effect, and uniform application principles that constitute the heart of such a law.

Spanish judges and courts must therefore not only know the laws (original and derived) but also ECCJ's case law when interpreting and applying EC norms.

On the other hand, the control of EC law application by Spanish judges and courts is closely related to a special judicial proceeding called "interlocutory question" (art. 177 of the European Economic Community Treaty and art. 150 of the European Atomic Energy Treaty) whose aim is to get the necessary knowledge for the correct application of EC norms and to find out if the national norm is compatible with them. In case of doubts over the treaties' interpretation and the validity and interpretation of acts of the institutions of the Communities, the national court or tribunal may request the Court of Justice to give a ruling thereon if it considers that a decision on the question is necessary to enable it to give judgment. Where any such question is raised in a case pending before a court or tribunal, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

In short, Spanish judges and courts must apply EC law taking into account the basic principles already mentioned and ECCJ's case law, requesting the interlocutory question when needed.

A quick analysis of Spanish judicial practice immediately after our adherence to the European Communities shows how fast our judges are incorporating EC law, through the interlocutory question of art. 177 EECT, as well as by the comprehension of the specific notes of EC law.

With regard to interlocutory questions, we observe that none of them has been asked on "the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide" (art. 177-1 *c* EECT). Nevertheless, questions have been often raised about the other paragraphs of the same article. Among these requests for interpretation of the EEC Treaty (art. 177-1 *a* EECT) we may mention the one dated 21 March 1986 of the Central Labour Court (ECCJ Judgment of 29 September 1987, case 126/86); another dated 15 June 1988 of the Territorial Audience of Valencia (ECCJ Judgment of 11 July 1989, case 170/88); another dated 7 November 1989 of the Higher Court of Justice of Catalonia (ECCJ Judgment of 25 July 1991, cases C-1/90 and C-176/90); etc. On the other hand, with regard to the "validity and interpretation of acts of the institutions of the Community" (art. 177-1 *b* EECT) we may mention one judgment of 13 March 1989 of the court of First Instance of Oviedo (ECCJ Judgment of 13 November 1990, case C-106/89); another of 11 June 1990

of the Higher Court of Justice of Andalusia (ECCJ Judgment of 25 July 1991, case C-202/90); two of 11 and 12 September 1990 of the Penal Court of Alicante; etc. We may also mention the one about the interpretation of the EEC Treaty as well as derived law of 1 December 1990 of the Higher Court of Justice of Cantabria (case C-369/90, not yet published).

Therefore, as we have already seen, those interlocutory questions have been raised by judicial Spanish organs in cases "pending before a court or tribunal (...) against whose decisions there is no judicial remedy under national law" according to art. 177-3 EEC (for example, the above mentioned cases of 21 March 1986 of the Central Labour Court or of 7 November 1989 of the Higher Court of Justice of Catalonia, etc.) or, under art. 177-2 EECT, whenever there are such remedies. The Resolution of the Economic and Administrative Central Court of 29 March 1990 determined that:

> "... the Economic and Administrative Courts constitute, according to art. 177 of the Treaty of Rome, 'jurisdictional courts' and are competent, in consequence, to raise the above mentioned interlocutory appeal".

We may also note that at least in three cases (Supreme Court Judgments of 14 May 1987 and of 10 October 1989) where the final decision did not admit another judicial remedy according to art. 177-3 EEC, Spanish courts did not accept the interlocutory questions raised. Nevertheless, in all cases a correct application of ECCJ Judgment 283/81 of 6 October 1982, *Sté C.I.L.F.I.T./Ministère de la Santé* (*Rec.* 1982, 3431-3432) was made, where the ECCJ decided that a national court of last instance is not obliged to raise an interlocutory question when:

> "the correct application of EC law is so clear that it abolishes all reasonable doubt; the existence of such a case must be determined according to the specific notes of EC law, the peculiar difficulties that its interpretation brings up and the risk of differences in case law inside the Community".

On the other hand, in relation to the character of the European norms that become integrated into our domestic legal order (direct effect, supremacy), we acknowledge a correct application of them by Spanish judges and courts in general. It is true that there were mistakes at the beginning: for exemple when the Court of Chiva judgment of 18 December 1987 recognized a direct effect to art. 2-1 of the Council's Directive 87/344/CEE of 22 June on Legal Defence Assurance though its expiry date did not come till 1 January 1990, or when the Supreme Court Judgment of 21 December 1988 that did not recognize a direct effect to arts. 9-1 and 12 of the EEC Treaty, forgetting that art. 12 was the first norm of the Community whose direct effect was explicitly recognized by the ECCJ in the well known *Van Gend en Loos* case of 5 February 1963. It went even further in denying EC law's primacy when it stated that:

> "Spain's adherence (...) does not mean (...) a tacit annulment of domestic legislation in force".

But apart from these isolated cases, Spanish judicial organs have made a correct application of EC law. Thus, a Supreme Court Judgment of 28 April 1987 attributed correctly to EC law:

> "... direct effect and prevailing character by virtue of the partial transfer of sovereignty that the adherence of Spain to the Community, authorized by Organic Law 10/1985, of 2 August, implies according to art. 93 of our Constitution".

Concerning the direct effect of EC norms and concretely of primary law of the European Communities, we may allude to a Judgment of the Territorial Audience of Barcelona, of 16 December 1986, that attributed direct applicability to arts. 7, 52 and 60 of the EEC Treaty. The direct effect of Regulations has been explicitly recognized by the Supreme Court. It stated in a Judgment of 17 April 1989:

> "By their nature and function, Regulations do produce immediate effects (ECCJ Judgment of 14 December 1971) simultaneously and uniformly for all member States".

A judgment of 24 April 1990 of the same Court stated that such effects, in cases of Regulations that require a domestic normative implementation, begin from the Regulations' enforcement and not from the adoption of a domestic norm of execution. The direct effect doctrine has been correctly applied in Spanish case law. Another judgment of the Higher Court of Justice of La Rioja of 27 February 1990 applied a Directive's disposition — that was not inserted in our domestic law order yet though its execution deadline had already run out — against what was established in the Workers' Statute.

EC law's primacy over domestic law was clearly stated by a Supreme Court Judgment of 24 April 1990 which said:

> "... prior (domestic) norms contrary to EC law will be annulled and later ones also contrary will not be in accordance with the Constitution — arts. 93 and 96-1 SC, but the ordinary judge is not obliged to raise the question of lack of conformity with the Constitution (art. 163 SC) in order to stop the application of the domestic norm, because it is entailed by the Court of Justice's case law that has established the principle *pro comunitate*".

Furthermore, primary EC law's primacy has also been stated by Spanish case law by virtue of its conventional character. This way, a Resolution of the Economic and Administrative Central Court of 5 April 1990 stated that:

> "The Spanish Treaty of Adherence to the European Communities, like any other treaty, becomes part of our domestic legal order from its publication and its dispositions will only be modified, suspended or annulled according to the treaties themselves; therefore, it is evident that this norm is in force and it is applicable in Spain from 1 January 1986, abolishing explicitly all national dispositions, regardless of their rank, previous to the treaty's publication".

The Regulations' primacy has been stated in several occasions by Spanish case law (for example, Supreme Court Judgment of 17 April 1989).

Our Constitutional Court, in Judgment 28/1991 of 14 February, alluded to the possible contradiction between an EC norm and a later domestic law, confirming Spanish judges and courts' capacity not to apply legal dispositions contrary to EC law. In this judgment, as well as in Judgment 64/1991 of 22 March, the Constitutional Court affirmed its lack of competence to control the adjustment of the activity of Spanish Public Powers to EC law, considering also that such a control belongs to ordinary judges and courts as well as to the ECCJ. But, whenever national acts of application of an EC norm are not in accordance with fundamental rights and freedoms regulated in our Constitution, the Constitutional Court comes close to the decision of the German Federal Constitutional Court *Solange I* (1974) stating that fundamental rights are an essential part of the Bonn Fundamental Law. In the above mentioned Judgment 64/1991, the Constitutional Court said that:

> "In short, it is a competence of this Court to recognise the impeachment of a public power's act made in execution of EC law on grounds of contradiction with human rights, no matter what may be its rank according to art. 10-2 of the Constitution.
>
> In this case it is not a competence of this Court to decide whether the public powers' impugned activity is in accordance with EC law. The only problem we have to decide upon is whether the domestic norm and the applied acts of execution do respect the equality and non-discrimination principles of art. 14 of the Constitution".

3. UNWRITTEN INTERNATIONAL LAW (INTERNATIONAL CUSTOM AND GENERAL PRINCIPLES)

3.1. Do international custom and the general principles of international law form part of the domestic legal order?

Our domestic law — whether the current Spanish Constitution or the norms of lower rank — does not explicitly regulate the integration or reception of international customary norms (international customs). Our constitutional history shows that only the Republican Constitution of 1931 expressly mentioned the integration of international custom into our domestic law stating in art. 7 that "the State of Spain will observe the universal norms of international law, integrating them into our domestic law".

In any event, the absence of a specific constitutional provision on the integration of international general law does not mean the exclusion of its reception. In this sense, when art. 96-1 SC says that the provisions of

international treaties validly concluded "may only be abolished, modified or suspended [...] in accord with general norms of international law" it is implicitly recognizing that international customs prevail over domestic laws in case of termination, modification or suspension of treaties. It may be analogically stated that this solution stands for all cases, which means that international customs do have a supralegal rank in Spanish Law.

Another case of automatic legal integration of unwritten international law is set out in art. 21-2 of the Judicial Power Organic Law that establishes in our law the jurisdictional immunities that derive from norms of public international law.

Therefore, although the Spanish Constitution does not mention international custom, it may be included in the constitutional framework by means of the reference of art. 96-1 to the "general norms of international law".

On the other hand, general principles of law constitute a normative regulation of both domestic and international law. They are first formulated in domestic law and applied afterwards at international level when similar problems arise. They appear in art. 38-1 of the Statute of the International Court of Justice (ICJ hereinafter) under the reference to "general principles of law recognized by civilized nations".

General principles of international law — also called structural principles — are included in domestic legal orders since they inspire the international norms of customary or conventional character that are later on received by national laws.

In conclusion, international custom as well as general principles of law are inserted into our domestic legal order.

3.2. *What is the general attitude of judges towards unwritten international law?*

In spite of the constitutional silence on the application of international customs in our domestic law, Spanish judges and courts have applied them without requiring a special act of reception (see Judgments of the Supreme Court of 16 December 1927 and 19 June 1967). It is clear, therefore, that for Spanish judicial organs such norms form part of domestic law. Another question is the difficulties that Spanish courts find in applying them because of their unwritten character. In this sense, we may recall a Supreme Court judgment of 5 January 1965, in which the Court denied immunity from penal jurisdiction to the wife of a member of a diplomatic mission of the United States in Spain denying that such an immunity from jurisdiction was an international custom, with the explicit indication that "it is based on simple opinions of authors of International Law".

After the Spanish Constitution of 1978 we can state regarding the reference of art. 96-1 to the "general norms of international law" that international custom is integrated into our domestic law from its formation and may be therefore applied by judges and courts. Such an integration is

not only imposed by case law, but also by the coherence principle of the State's activity, since when the Spanish State is internationally bound by custom, the same binding should affect it at a national level; the opposite would be to admit the State's responsibility for nonobservance of international obligations.

3.3. In practice what place do international custom and general principles of international law have in judicial decisions?

According to Spanish case law, even before the Constitution of 1978, international custom is integrated into our domestic law from its formation and may thereafter be applied by national judges and courts. For this reason it is their duty to determine the existence of any international practice, binding for the State, that becomes a custom. In conclusion, judicial decisions may be based on international custom.

As far as general principles of law are concerned, they are inserted into our domestic legal order and though they cannot be properly invoked as "applicable law" they do contribute to the application of international custom.

A recent example of Spanish case law is found in Constitutional Court Judgment 36/1991 of 14 February. Questioned about international treaties on human rights ratified by Spain, which according to art. 10-2 SC had to be taken into account in the interpretation of minors' constitutional right to an effective judicial defense, the Court said:

> "Dispositions that have to be taken into account are contained in the International Covenant on Civil and Political Rights and in the Rome Convention, as well as, authorized by the *iura novit curia* principle, those contained in the United Nations Convention on the Rights of the Child of 20 November 1989, that was ratified on 31 December 1990".

3.4. Are the criteria of international law adopted by domestic law to identify international custom or general principles of international law? If not, how does domestic law identify international custom or general principles?

The reception or integration of international custom and general principles of international law into our domestic legal order is made following the international formulation.

Therefore Spanish judicial bodies must follow international rules when they try to identify international or general principles.

The task of national judges and courts to determine the existence of an international practice, binding for the Spanish state, must also be done in accordance with international law.

Regarding general principles of international law, we must take into account that, since they are principles inserted into several national legal

orders, they will also form part of the Spanish one, as we have already seen in the above mentioned example (*supra* 3.3.).

3.5. Once identified, do international custom or general principles automatically become part of domestic law? If not, what is the procedure by which international custom or general principles are made part of domestic law?

Summing up from 3.1. to 3.4. we can state that:

1) the integration of international custom into our domestic law is automatically made, with no need for an express act of reception;
2) the integration has a general scope of application with regard to the whole international general law, be it existing norms when enforcing the Constitution or new customs formed later on;
3) international custom is integrated from its formation in international law.

4. INTERNATIONAL LEGAL SITUATIONS

4.1. Are there any preliminary questions (recognition of States, parties to treaty, membership of international organisations, state of war, etc.) which the national judge must or may refer to the executive? If so, is the judge free to disregard the executive's advice?

This question is closely linked to the interpretation of international norms by national judicial bodies for their later application.

It is clear that Spanish judicial bodies — to whom art. 117-3 SC attributes the exclusive exercise of the jurisdictional power — can neither take the place of the Executive Power (Government) in foreign policy direction nor get for themselves specific competences from it in the field of international relations.

Anyway it is necessary to say that Spanish judges and courts have the absolute power to interpret and apply international norms in our domestic law with no other limits than the observance of the interpretation rules of arts. 31-33 of the Vienna Convention of 1969 on the Law of Treaties, ratified by Spain.

Our law does not regulate a possible participation of the Executive Power, whose interpretation would be imposed on the Judicial Power. As seen *supra* in 1.5.14. Spanish judges and courts — as case law shows — have for a long time considered themselves competent to interpret international norms with no need to refer to the Executive Power, which does not prevent them from using the legal mechanism of the "inquiries for better providing" to request from the Foreign Affairs Ministry documents

or reports of any outstanding preliminary questionning in order to adopt a certain decision.

In any case it is important to make clear that:

a) the request to the Foreign Affairs Ministry through the mechanism of "inquiries for better providing" is optional for the judicial bodies;

b) the opinion of that institution does not bind them though it is usual to follow it.

Finally, when interpretation and later application of international norms in our domestic law is made by administrative — and not judicial — bodies, Spanish law requires the consultation of the Council of State in plenary session (art. 21-3 and 4 of the Organic law on the Council of State) (see *supra* 1.5.14.). Its legal opinion does not bind the Administration, but it is usually followed.

5. FOREIGN AND INTERNATIONAL CASE LAW

5.1. When giving effect to international law does the domestic court take account of foreign or international case law?

International case law is more and more taken into account by Spanish judicial bodies as the "authentic" interpretation whenever it comes from International Courts whose binding jurisdiction is recognized by Spain (International Court of Justice, European Court of Human Rights and Court of Justice of the European Communities).

In this sense and within the framework of the European Convention on Human Rights, our national bodies have frequently invoked the jurisprudence of the European Court of Human Rights (hereinafter ECHR) to determine the scope and real contents of such rights according to art. 10-2 SC which says that norms regarding fundamental rights must be interpreted in accordance with international treaties and agreements ratified by Spain. A kind of automatic binding status is thus recognized to ECHR case law, to which the States have on the other hand attributed the Convention's interpretation and application by virtue of art. 45.

In this way the Constitutional Court's broader interpretation of art. 10-2 SC is also confirmed, since whenever an international agreement on human rights admits the existence of a jurisdictional organ of control, the interpretation of the Constitution has to be made taking into account international case law brought up in application of that specific con-ventional text. That is the case of the European Convention on Human rights as well as ECHR case law. A Constitutional Court Judgment, of 14 July 1981, said:

> "It is in the sense of art. 6-1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that 'everyone is entitled to a fair and public hearing within a reasonable time by an independant and impartial tribunal...' This reasonable period was inter-

> preted by the European Court of Human Rights first of all for penal proceedings (*Neumeister* and *Ringeisen* cases) and later on for the proceedings of administrative jurisdictions (*König* case), in the sense that the reasonable period of a proceeding must be assessed according to the circumstances of each case and taking into account 'that case's difficulties, the applicant's own conduct and the manner in which that case has been handled by the administrative and judicial authorities' (ECHR, *König* case, Judgment of 28 June 1978, Series A, N° 27, p. 34).
>
> (...) Art. 10-2 of the Constitution establishes that ' norms regarding fundamental rights and freedoms recognized by the Constitution must be interpreted in accordance with the Universal Declaration of Human Rights and international treaties and agreements on those subjects ratified by Spain. This article allows us to use König's case law to determine whether the requirements of the case submitted to this constitutional jurisdiction are fulfilled in order to qualify as constitutionally harmful the activity of the organ of the judicial power".

The same could be said of the ECCJ case law, holder of interpretative competence for EC law. It is true that Spanish judicial organs have shown great receptivity regarding ECCJ case law in the application of fundamental principles of EC law (direct effect, supremacy) or in the interpretation of substantive law. In several judgments our Constitutional Court referred to ECCJ case law, using interpretative criteria of EC law to resolve questions put to it. We partially reproduced in 2.3.5. a Supreme Court Judgment of 24 April 1990 where it was stated that Spanish judges "are bound by ECCJ case law".

5.2. *How are the decisions of international courts (the ICJ, ECJ, ECHR, etc.) given effect in the domestic legal order?*

First of all we have to say that the "*exequatur*" is an appropriate mechanism to execute foreign judgments, but not international ones.

The importance of this execution in our domestic law lies in the Spanish admission of the binding jurisdiction of the ICJ, — according to art. 36-2 of its Statute —, of the ECHR — according to art. 46-1 of the Rome Convention — and of the ECCJ — according to the Act of adherence.

According to arts. 59 and 60 of the ICJ Statute the Court's decisions have binding force between the parties and are final and without appeal.

On the other hand, arts. 52 and 53 of the Rome Convention state that judgments of the ECHR shall be final and that the States undertake to abide by the decisions of the Court in any case to which they are parties.

Finally, art. 187 of the European Economic Community Treaty and art. 159 of the European Atomic Energy Treaty state that ECCJ's judgments shall be enforceable.

In conclusion, we can generally affirm that judgments passed by international courts whose binding jurisdiction has been admitted by the Spanish State do have a final character and material force of law in our

domestic legal order. Such judicial decisions therefore bind the Spanish State. All its organs, which must recognize as valid and "authentic" the interpretation of international regulations made by them, have to give effect to those judgments with no other control than that relative to their authenticity.

Execution must be according to the terms of the judgment otherwise the State will fall into international responsibility. But it is also true that States have great freedom in the adoption of the means necessary to execute international judgments except when the ECHR decides to allow a financial compensation to the injured party (art. 50 of the Rome Convention of 4 November 1950).

In any case, if such a compensation is not explicitly allowed, international judgments will have to be executed on their own terms.

ABBREVIATIONS

CC	Civil Code
CCOL	Constitutional Court Organic Law
EAEC	European Atomic Energy Community
ECCJ	European Communities Court of Justice
ECHR	European Court of Human Rights
ECOJ	European Communities Official Journal
EEC	European Economic Community
ICJ	International Court of Justice
OBS	Official Bulletin of the State
RC	Regulations of Congress
RS	Regulations of Senate
SC	Spanish Constitution

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