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Spanish Questionnaire on the Principle of Integration

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I. HOW TO UNDERSTAND THE INTEGRATION PRINCIPLE OF ART. 6 EC (TO BE INTRODUCED BY INVITED SPEAKER; HOWEVER ALL OF THE PARTICIPANTS SHOULD PREPARE AND SUBMIT THEIR OWN VIEWS)

The reading of the integration principle (hereinafter IP) in Article 6 EC makes it clear that it covers both policies and activities and also the definition and implementation of *any* policies, provided they are under EC competence, albeit the reach of Community powers may be wider than previously thought bearing in mind their continuous expansion and also the impact of Community law principles. It should be noted that although nuclear energy is basically covered by the Euratom Treaty, it is also subject to IP.

IP cannot be confined within the limits of EC law, that is to say it cannot be restricted to the EC level. It was moved away from Article 174 and placed in Article 6, the very frontispiece of the Treaty. Therefore, as it happens with other environmental principles, enshrined in Article 174 EC, it can be regarded as a general principle of Community and also Member State law. For instance, humanitarian or development law of the Member States may be also subject to IP. In fact the Community has adopted rules on this field that should satisfy the burden imposed by Article 6 EC. Other policies may be also subject to IP. This may be the case of town and country legislation, a field not yet transferred to the Community (Article 175(2)(b)(first indent)) since it is subject to unanimity. However, the Community has already imposed constraints on this policy by resorting to other rules, i.e., nature conservation.

As to the addressees, IP is basically for the Community institutions, the Commission in the first instance, to give expression to the principle but it cannot be denied that it also pervades the activities of the Member States and also of any authorities within the Community. This includes the judiciary since judges can also take into account this principle while reviewing its application at national level.

This leads to a further matter, the exact reach of IP. Whilst it is a binding obligation as previously stated by the ECJ in Case C-62/88, *Greece v. Council*, its depth is far from clear. Certainly, environmental requirements must be integrated into the other policies. However, the Treaty does not provide guidance as to the extent of the integration. In fact, the preambles to Community rules merely refer to this principle as a tag, similarly to that concerning the

respect of human rights or the principle of subsidiarity. Whether that tag is truly reflected in the text is a different matter and it may be finally open to review by the ECJ.

The Treaty does not set out the final objective of IP. It merely says that it is to *promote* "in particular" sustainable development (whatever this expression may mean since the Treaty lacks any definition).

Arguably, IP does not merely *enable* authorities, first and foremost Community ones, to restrict economic activities; it also forces them to do so if necessary. However, they are required to carry out a balance exercise. Similarly to the achievement of a high level of environmental protection, integration does not necessarily mean prevalence over the other policies.[1] One of the key matters is the meaning of "economic activities" since all Member States and certainly the Community institutions assume that there are activities that cannot be forbidden (for the time being) despite their negative effects on the environment, e.g., use of cars, activities emitting CO_2, materials with a very short life-cycle, GMOs. It is for this reason that IP may justify constraints for the development of other policies but it is doubtful whether those constraints may force the Community institutions to ban them.

It is undeniable that IP does embrace procedural considerations, as reflected in the EIA process. However, apart from those very evident cases, the Community has not yet designed procedural rules to make the most of the IP principle.

Another key factor is the extent of judicial review in the light of IP. Since there is a margin of appreciation as to the exact balance between environmental and other concerns, it is likely that judges may merely consider whether it has been taken into account, so as to avoid interference with politicians. In this sense, the trouble with IP is that it may become a burden to be complied with but it may not fulfil the expectations that pervaded its enactment in the EC Treaty. Of course this opinion is subject to the practice in the Member States but the ECJ may not develop a thorough analysis of its application as it has already done with the subsidiarity principle.[2] As in the case of sustainability, its achievements may only come to fruition in a distant future.

IP can become an effective tool for environmental protection provided it is developed through a whole range of various instruments, such as EIA, but at every possible decision-making level. Unlike the US National Environmental Policy Act (1969), the Community has not yet adopted a Directive requiring the Member States to carry out an EIA of policies. Likewise, there are no rules on environmental accounts.[3] Therefore, governments are not under any obligation, when providing data on gross domestic product, to discount the environmental damage caused by economic growth (arguably because it would otherwise be negative).

[1] See *Germany v. Parliament and Council*, Case C-233/94 (on consumer law).

[2] *Germany v. Parliament and Council*, Case C-233/94 (1997) REC 2405; *Alemania v. Parlamento y Consejo*, asunto C-376/98 (2002) REC I-8419; *Países Bajos v. Parlamento y Consejo*, asunto C-377/98 (20001) REC I-7079; *The Queen y Secretary of State for Health*, ex parte: *British American Tobacco (Investments) Ltd e Imperial Tobacco Ltd*, asunto C-491/01 (2001) REC I-11453.

[3] See, however, Commission Recommendation 2001/453, of 30 May 2001, on the recognition, measurement and disclosure of environmental issues in the annual accounts of and annual reports of companies.

II. TO WHAT EXTENT HAS THE INTEGRATION PRINCIPLE BECOME PART OF THE CONSTITUTION OR GENERAL PRINCIPLES AND PRACTISES OF LAW-MAKING IN YOUR MS?

1. Spanish Constitution of 1978

The Spanish Constitution enshrines the protection of the environment in Title I, Chapter III (Article 45). This means that, strictly speaking, it cannot be regarded as a human right, unlike those included in Chapter II. However, it must be employed by Parliament and judges as a guiding principle ("principio informador"). This means that in order to determine its reach it is necessary to consider how it is enshrined in the different Acts of Parliament. Although it is undeniable that environmental concerns are becoming more important in both legislative and judicial practice, the still weak position (at least formally) of Article 45 in the Constitution led the Constitutional Court to declare in 1984 that general prohibitions on the carrying out of mining activities, due to environmental concerns, breach other constitutional principles, such as economic development.[4] However, this particular judgment should be read with caution. It was delivered at a time where environmental considerations were not as important as they are nowadays. It should be noted that at that time Spain had not even become member of the European Communities. In fact, in a different judgment the Constitutional Court acknowledged that specific prohibitions regarding mining activities could be adopted provided they affected particular areas, e.g., nature reserves.[5] Nevertheless, the Constitutional Court has also declared that economic growth may be limited due to environmental factors. This is applicable in the case of the right to carry out economic activities (Article 38) since the Constitution provides that burdens, i.e., environmental ones, may be imposed by law. They must be coomplied with before beguinning an activity either industrial or commercial. So far, the Court has not had the opportunity to set out clear principles on this matter since no fundamental cases have been brought to its attention. However, the Court upheld a prohibition adopted by an Autonomous Community on the commercialisation of crayfish taken to impede deterioration of local species. The Court held that the purposes of the measure were included within Article 45 of the Constitution and also that the measures had complied with the principle of proportionality.[6] The Constitutional Court has also rejected the adoption of interim measures in cases dealing with the distribution of powers between the State and the Autonomous Communities if the measures put into question by central government concern the environment, save where they reduce the level of protection already adopted by the Spanish Parliament.

2 References on IP in Constitutional Court's case-law

A basic reference concerning IP can be found in Constitutional Court judgment 102/1995 where the Court declared that the environment has horizontal effects over the other policies that may be pursued by public authorities. Having said that, the Court has traditionally adopted a cautious approach by declaring that environmental measures are only those whose direct objective is the preservation or improvement of the environment and that it lacks expansive effects (*vis expansiva*) over the other policies.[7] This criterion has been employed to decide on cases confronting two different powers attributed to either the State or the Autonomous Communities (e.g., fisheries policy *versus* nature protection, Constitutional

[4] Constitutional Court Judgment 62/1984.
[5] Constitutional Court Judgment 170/1989.
[6] Constitutional Court Judgment 66/1991.
[7]

Court judgment 38/2002; agriculture versus the environment in a case concerning the combat against plagues affecting pines). In other cases the Court has declared that the Autonomous Communities are entitled to adopt environmental measures while exercising their exclusive powers in a different policy (country planning; river fishing).[8]

The ECHR has a direct influence over constitutional case-law regarding the environment in cases concerning private life (noise, waste emissions, electromagnetic waves, construction works) or access to information. However, strictly speaking ECHR does not grant a human right to the environment nor to IP, and its influence under this domain is limited.

3. Legislative practice

From a constitutional viewpoint it is difficult to draw clear conclusions regarding the integration of environmental concerns into the other policies adopted by public authorities. Even though the Constitutional Court has acknowledged the horizontal effects of the environment, there is not an express mandate in the Constitution and Parliaments or governments are not necessarily obliged to implement IP in every piece of legislation or rule they may adopt. Hence, an Act of Parliament cannot be declared unconstitutional if it ignores IP. It is true, however, that environmental constrains limit the adoption of measures that may otherwise affect the environment but, broadly speaking, Parliament is not obliged to justify whether it has taken IP into account. In fact, the Spanish Parliament has not adopted a general environmental Act and it is doubtful whether it may do it in the future due to the complexities of the distribution of powers between the State and the Autonomous Communities. Rather, central Parliament tackles the environment on a case-by-case basis and not many Acts include horizontal requirements into order fields. This trend is, however, changing. First, the Autonomous Communities have adopted general environmental Acts that include basic environmental law principles, such as sustainability (Andalusia, 1994; Galicia, 1995; Basque Country, 1998, Catalonia, 1998, La Rioja, 2002, Navarre, 2005). Secondly, although it may too early to say, climate change may serve as a flagship for the adoption of further measures tackling horizontal matters, e.g., taxation of cars to encourage those emitting less CO_2 per kilometre. Third, town planning matters, i.e., corruption cases, and over exploitation of land use, have forced Parliament to adopt more stringent rules trying to preserve the natural environment and the already deteriorated coastline.

As indicated before some acts of the Spanish Parliament have included rules that are related to IP:

(a) Industry Act 21/1992 declares that one of its objectives is to make compatible industrial activities with the protection of the environment. Public authorities may suspend any activity provided they discover deficiencies that may imply clear and present danger for human beings, fauna, flora or the environment.
(b) Water Act (adopted by Royal Legislative Decree 1/2001). This Act also enshrines sustainability, apart from regulating the use of water resources, including discharges into the aquatic environment. Any authorisation that may affect water resources is subject to a prior report on those effects and on measures to avoid them.
(c) Noise Act 37/2003 does not mention sustainability or IT. However, it requires public authorities to take into account its requirements into town and country planning.

[8] Orders 5/2002 and 314/2004, among others.

(d) Forestry Act 43/2003 (as amended by Act 10/2006) includes several provisions on the conservation of biodiversity and in particular, on the integration of climate change requirements into forestry policies.
(e) Town planning Act 8/2007. It enshrines sustainability as one of the key principles of the Act. Policies dealing with town and country matters must reconcile the use of the land with *inter alia* the protection of the environment and of fauna and flora. Likewise, the protection of Natura 2000 sites is also tackled by the Act which adopts restrictive rules concerning the declassification of those sites.
(f) Biodiversity Act 42/2007 follows the path of the previous Act 4/1989 (already repealed) and remarks the pre-eminence of nature protection plans over town and country plans. The latter must be modified in order to comply with the provisions of the former plans. Likewise, any other plans and programmes cannot contradict the rules set out in those plans. They may only circumvent its provisions if there are reasons of overriding public interest.
(g) Rural development Act 45/2007 enshrines as a basic principle the sustainable development of rural communities. One of its basic purposes is to achieve a high level of environmental protection, avoiding deterioration of biodiversity. However, it should be noted that this Act requires several plans and programmes to be adopted by the Autonomous Communities to specify those general objectives. Therefore, it is not clear whether they will be achieved bearing in mind the traditional slowness

However, other Acts still lack proper mechanisms to apply IP. This is the case of Public Procurement Act 30/2007.

Ancillary rules have also adopted measures implementing IP:

(a) Royal Decree 1955/2000, on information to be granted to the public regarding the consumption of energy and of its impact on the environment.
(b) Royal Decree 708/2000 on good agricultural practices.
(c) Royal Decree 4/2001 on aids for the use of agriculture production processes compatible with the environment.
(d) Royal Decree 1369/2007, on the ecological design of products using energy. This rule implements Directive 2005/32.

4. Role of the judiciary in implementing IP

The judiciary[9] is much more active in dealing with the review of decisions adopted by public authorities. Nevertheless, most judgments do not quash decisions due to the breach of IP but because of the infringement of environmental requirements demanded by either Acts of Parliament, by ancillary administrative rules, i.e., EIA, or by ECHR (noise cases under Article 8 ECHR; Article 18.1 of the Spanish Constitution).[10] Broadly speaking, judges are becoming more aware of the environmental implications of cases but the reasoning they usually employ do not necessarily invoke IP. Landmark cases regarding the protection of nature, such as the *Itoiz dam* case have not invoked that principle. Nevertheless, a recent case delivered by the High Court of the Autonomous Community of Castilla-León (8 January 2008) has received ample attention. The case concerned the amendment of a plan for the protection of a nature reserve allowing the construction of a ski resort. The Court quashed the reform declaring that it contradicted Community legislation on nature protection. It also rejected the allegation brought forward by the regional Government that the project was going to promote economic

[9] Please note that the Constitutional Court is not part of the judiciary.
[10] Supreme Court Judgment of 26 october 2006.

development of the local municipalities. In addition, the Court held that the amendment did not provide sufficient protection for the area by merely demanding the carrying out of EIA of any project, and that the regional government had not provided sufficient reasons to justify why the amendment was necessary. Climate change matters also were considered by the court although they did have a leading role in the reasoning.

So far the judiciary has not paid close attention to the obligations derived from EC legislation. It should be noted, for instance, that the first ever preliminary question on an environmental case was requested by a Spanish administrative court last year (!). Needless to say, it was not the Supreme Court but a lower court. Most judges ignore the implications of the *Kraaijeveld* case,[11] even though Act 29/1998, on administrative-law courts contains very similar rules to those held in that case. Further procedural complexities hamper proper analysis of decisions affecting the environment and consequently the application of IP. The Spanish Supreme Court has repeatedly declared that the environmental assessment carried out by public authorities cannot be appealed in isolation.[12] That assessment is a decision in itself but since it represents a prior step in an authorisation procedure it can only be appealed against with the final decision on the plan or project. Judges have so far been lenient with the conclusions reached by public authorities when assessing the environmental impact of projects and they do not normally carry out thorough analysis of assessments, even though the latter do not always cover all the items of information required by law or postpone their findings to future studies that sometimes are never carried out. However, this position contradicts recent EC case-law on EIA,[13] and demands a change of attitude on the part of administrative-law courts. A remarkable case was the Supreme Court judgment of 7 July 2004 concerning a plan on the management of Barcelona's airport adopted in 1999 but not subject to EIA despite the existence of an SPA adjacent to the airport. The Court simply held that at that time there was no legislation implementing Directive 2001/42 and consequently there was no need to carry out an assessment because EIA rules on projects were not applicable to plans or programmes. Needless to say, the judgment grossly ignored Article 6(3) of the Habitats Directive. The European Commission did not find expedient to initiate an infringement procedure under Article 226 EC.

5. Role of governmental institutions

5.1. Consultative commissions

In the last years, the Autonomous Communities and also the central government have created consultative commissions dealing with the development and implementation of environmental legislation. They have a consultative role but due to the complexity of legislative or rule-making procedures, it is difficult to assess whether they have a real impact on the preparation of new legislative proposals and particularly on the day-to-day management of environmental policy. Their inner activities are badly known save when there is frontal opposition on the part of the NGOs to accept new proposals. The commissions are mainly composed of members of

[11] *Kraaijeveld*, at paragraphs 57-58: "where, by virtue of national law, courts or tribunals must, of their own motion, raise points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned. The position is the same if national law confers on courts and tribunals a discretion to apply of their own motion binding rules of law. Indeed, pursuant to the principle of cooperation laid down in Article 5 of the Treaty, it is for national courts to ensure the legal protection which persons derive from the direct effect of provisions of Community law." See for instance the judgment of the Spanish Supreme Court of 7 July 2004 grossly distorting the application of Directive 92/43 in the case of an airport. The Commission did not find expedient to open an infringement procedure.

[12] Judgment of 17 November 1998.

[13] See the examination of environmental studies by the ECJ in case C-304/05, *Commission v. Italy*.

the public authorities but also NGOs. Arguably, those commissions are created mainly for PR purposes rather than for proper integration of different views steaming from society with the aim of improving the activities of Parliament and/or public authorities.

5.2. Observatories

The same could be said in the case of other commission whose role is mainly to analyse how environmental legislation and practice is being carried out, so-called observatories. It has become a well established custom in Spain to create these commissions that may publish reports with their findings. Even though this may serve to highlight deficiencies in law and policy, it should be borne in mind that their conclusions are based on consensus, thus they may shade off any real problems concerning the application of the law or of environmental law principles such as IP.

5.3. Environmental strategies

Some regional governments, among others, Catalonia, Castilla-León, Madrid, Basque Country, Valencia, Andalusia, have also adopted several strategies on the environment, following the example of EU environmental action programmes. In this particular case specific objectives are to be attained but it is doubtful whether a citizen or an NGO could demand compliance or even liability before the courts for the breach of those objectives. So far, there has not been any case demanding proper consideration of IP. Overall, it is difficult to assess the achievements of those strategies for various reasons:
(a) draft versions are prepared by consultancies that may lack sufficient knowledge of the matter; in certain occasions those drafts compile information but do not provide clear strategies for the integration of environmental law requirements.
(b) governments may not be willing to adopt horizontal measures having real impact on the different policies they carry out, e.g., transport, energy, waste and the like. For instance not a single Autonomous Community has so far banned plastic bags or traditional bulbs, adopted environmental criteria for their accounts, or even think about imposing a tax on the use of vehicles in cities. Droughts affecting several territories have led the regional authorities to impose fines for the over-use of water, but this measure has not been motivated by IP.
(c) even though drafts may be subject to prior scrutiny and participation, governments have the last word on the final decision.

Local authorities have also adopted so-called Local Agenda 21, following the example of Agenda 21 set out in the Rio Conference in 1992. These instruments apply IP principles to the policies pursued by these authorities. They mainly relate to waste, water, noise and energy consumption, but also to housing matters. It is still intricate to assess the real impact of these agendas, particularly because the policies implemented by local authorities are greatly influenced by the Autonomous Communities (including their financial support).

5.4. Administrative organisation of Governments

Most governments, either central or autonomous, have created a department for the environment and, in some cases, agencies specifically dealing with this matter. However, the environment is usually entrusted to a minister but it has never been attributed to a vice-presidency. This situation shows that despite publicised opinions regarding the importance of environmental protection, they have not real impact on the administrative workings of the public authorities since no administrative tools or horizontal mechanisms for its proper integration in the different areas of activity of governments exist.

After the general elections held on 9 March 2008 the Socialist Party has decided to merge the departments of agriculture and the environment in a single department but it is still too early to say whether this may serve to foster environmental purposes or simply to stump them. Nevertheless, it should be noted that the previous minister for agriculture is now in charge of the new department whilst the former minister for the environment has been removed from government. This may be a signal that environmental concerns may not have a strong voice despite official statements stressing the importance of climate change concerns in the development of future governmental activities.

A further matter to consider is the power environmental committees may exercise to impose their views on well-established ones i.e., town planning, agricultural or industrial. In few cases environmental considerations adopt an overriding role in administrative procedures.[14] It is for this reason that in the case of EIA few decisions have dismissed applications for development consent. Rather, they have been inclined to adapt environmental demands to the characteristics of particular projects.

5.5. Participation before Parliaments to foster IP

Parliament should provide a forum for discussion on IP as well as on other topics. Even though parliamentary internal rules provide for the participation of experts their option is rarely employed. Decisions are usually taken outside Parliament. Spanish parliaments, either central or regional, do not frequently invite third parties to give evidence on matters affected by IP. Piecemeal approaches tend to dominate the current workings of parliaments. This can be explained by the fact that Spain lacks a coherent environmental policy and it merely follows the initiatives adopted in Brussels.

III. HOW HAS THE SEA DIRECTIVE 2001/42/EC BEEN IMPLEMENTED IN YOUR COUNTRY?

1. Was the SEA directive properly been transposed into national law? (see e.g. C-108-06)

EC Directive 2001/42, on "Strategic" EA (for plans and programs) was transposed in Spain by an Act of the national Parliament: Act 9/2006, of 28 April 2006[15]. This was a late transposition of the directiev, and in fact the Commission opened an infringement procedure against Spain. An application was eventually filed before the ECJ on February the 1st, 2006 (Case C-52/06). After Spain passed the national statute, the Commission waived the procedure (Decision of the Presidente of EJC of 25 July 2006, on the termination of the case, OJ C294, of 2 December 2006).

In most part of its text, the Spanish statute follows almost literally the wording of the SEA directive. That means that the 2006 Act is not really operational in practical terms, since il only regulates the basic documents, administrative roles and organisational aspects of the SEA. Moreover, the Act itself states that the sectoral legislation will establish the actual procedure and operational details in each sector of Administrative action (for instance, town and country planning, agriculture, energy, etc). Thus, Act 9/2006 may be considered to be the "formal" transposition of the SEA directive, but the "real" and "complete" transposition is to

[14] See for instance the decision of the department of the environment of the Basque Country of 23 March 2006 declaring the incompatibility of a wind farm project with Natura 2000 requirements. This decision was binding on the department of industry.

[15] *Ley 9/2006, de 26 de abril, sobre evaluación de los efectos de determinados planes y programas en el medio ambiente.*

be found in several pieces of legislation governing the different sectors where the government (either at the local, regional or state level) drafts "plans" or "programs". If we take into consideration that in most of this fields both executive and legislative powers are vested on the seventeen Autonomous Communities, and not on the central government itself, then the resulting picture is that the complete "transposition" of the SEA directive will be made of serveral dozens of different statutes and regulations.

2. In Art. 2 (a) there is a broad definition for 'plans and programmes'. How has this definition been adopted ? Copied and pasted, or with some more words attached to them and even extending the scope? and
3. What is the general understanding of the concept of the 'authority' ...
(These questions are answered jointly since they are closely related)

As said before, the wording of the Spanish follows that of the SEA directive. Consequently, the general or abstract definition of "plans and programs" in art. 2 (a) of the directive was litteraly reproduced in the Statute. Moreover, the definition incorporated in the Spanish statute does not make any difference (in the same way as the directive) between "plans" and "programs", that is, there is not one definition for plans and another for programs.

However, the concept of *plans* and *programs* in the Spanish statute presents some differences and problematic points:

.- (1) First, the definition of plans and programs in the Spanish statute (to be found also in art. 2,a!) defines them as "strategies, directions and proposals foreseen by a governmental unit to satisfy social needs, which are not directly feasible, but by means of a group of projects" ("*estrategias, directrices y propuestas que prevé una administration pública para satisfacer necesidades sociales, no ejecutables directamente, sino a través de su desarrollo por medio de un conjunto de prouectos*"). This legal definition is somehow problematic because some plans do not really fit in that. For instance, a town planning instrument may be directly "enforceable" and "feasible". What is more, in Spain town planning instruments have the legal nature of a general, administrative rulemaking. Another insatisfactory point is that under Act 9/2006 (art. 3), the plans and projects that are covered by the Act are those whose drafting and approval is required by a statute or an administrive rule, or by a decision of the Council of Ministers of the Regional Council. Again, town planning instruments seem not to follow this legal definition, because they are not obligatory and they are drafted and sometimes finally adopted by the local government.

.- (2) There are also differences between the scope of art. 2,a of the Directive and art. 3 of Act 9/2006. For instance, in the first indent of art. 2, the directive states that plans and programmes "*... shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them: which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption"*. However, in Spanish law all this wording has been reduced to the very short expression "plans that are made or approved by a public Administration" (una administración pública). In our view, the statute is more restrictive than the directive in the sense that the latter uses the term "authority", which is wider than the expression "public Administration" or "government" (in the "organic" sense). This means that the plans which are worked out or approved by certain instrumental bodies of the government, or even private organisations discharging duties or activities of general interest, are not covered by the Act. This conclusion is especially clear in the light of the expansive ECJ case-law on the concept of "Authority" in EC-National Law.

4. In Art. 3 (2) there is a special list of issues, which provide the automatic application of SEA. Is there any debate related to the content of this list ? Is it understood as a limitation of the definition of Art. 2 (see the different wording in Art. 3 (2): "and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC") ?

The SEA directive uses a very ample and exhaustive terminology at art. 3.2, and as a matter of fact only those plans covering a reduced extension or consisting of minor modifications are excluded. In Spain there has not been a substantive debate about this, and this is not understood as a limitation of the definition of art. 2 of the SEA directive, but a specification or "clarification" on what matters (materias) are those plans supposed to deal with. In reality, it is hard to think about a governmental plan or program which does not set the framework for future specific projects. The list of issues or matters in art. 3.2 of the directive has been duly followed (reproduced) in art. 3 (too) of the Act 9/2006.

5. In what way does the outcome of the SEA procedure affect the final decision-making? (see Art. 4 (2))

The Spanish "version" of the SEA procedures has established two different moment and decisions in the SEA preocedure: the report on environmental sustainability (*informe de sostenibilidad)* has to find out and to establish the different repercussions that the plan or program is supposed to have on the environment. This document has to be carried out by the "promoter body" (*órgano promotor).* After the public participation process, a second document has to be made, named "memoria ambiental" (environmental statement or memorandum). This document has to be produced in a way that is not clearly regulated by the Law, which only states that it will be performed with the agreeement or consent of the organ or body established in the sectoral law performing competences in the domain of environmental protection. That is why this organ is called the "environmental organ" (*el órgano ambiental*) by the 2006 statute. The above introduction is necessary to understand how the outcome on the SEA procedure affects the final decision-making. The Act 9/2006, as said before, is rather vague in most aspects, and this is one of them. The only general provision of the law is that the findings and determinations of the environmental memorandum must be incorporated into the proposal of the plan (art. 12). Consequently, the question of how the outcome of the SEA procedure is supposed to affect the final decision-making has to be clearly regulated in the sectoral law.

For instance, in the domain of drafting and approving town planning instruments, the regional law in this field generally describes the environmental memorandum (performed by the regional ministry on the environment) as "obligatory" and "binding" on the local authority which wants to have a plan approved by the government of the autonomous community.

6. If you have had personal experience with SEAs or if there are reports on how SEA was used in practise: what are the conclusions, and do they encourage to extend the instrument to further sectors and even to law-making and sublegal rule-making in general ?

The only domain where there is a certain experience with SEA in Spain is town and country planning. No noticeable report on how SEA has been used in practice has been released or published. Extending the instrument to further sectors (and even law-making and

rule-making) is not an issue in Spain, for it remains to be seen whether the sectors already covered by the law (either national or regional) are fully and duly implemented.

A matter that should be observed is that final decisions on SEA do not usually go deep in detail regarding the integration of environmental requirements into the decision-making procedure despite the wording of Article 9 of the Directive. As in other cases, these obligations are complied with in a rather formalistic way and the suspicion remains that, in fact, authorisation and assessment procedures run parallel without real interaction. It may not be redundant to recall Euclid's theorem according to which parallels only collide in the infinite.

7. Were there/or are there any similar requirements in force in your county before/since the entering into force of the Directive? In case of a positive answer, please provide a short introduction, mainly in connection with the relationship of the two types of requirements

Before the entering into force of the directive, town and country planning was the only field where there were some legislation and practice on assessing the environmental effects of plans. As a matter of fact, before the Act 9/2006 there was no national legislation requiring environmental impact assessment of land use plans in Spain, but many Autonomous Regions preceded state legislation and introduced this requirement in their statutes on town planning and land use. The Autonomous Community of the Balearic Island was the first to introduce the prior environmental assessment for town planning instruments. The Region of Valencia introduced this instrument in 1989, the Region of Murcia in 1995, etc.

On the other hand, before Directive 2001/42 some "environmental" assessment of certain plans was accomplished in Spain under the legislation on environmental impact assessment for projects: in 1986, a Legislative Decree transposed in Spain EC Directive 85/335, on EIA for projects (Currently this text has been repealed and replaced by a new legislative text of 11 January, 2008). Several "projects" included both in annex I and II have a very close connection with town planning instruments. For instance, industrial and recreational parks, tourist resorts, or residencial projects.

8. Do you have any information on any ongoing cases or judicial decisions in connection with the implementation of SEA requirements ? Please, provide a summary, if there is any example!

Under Spanish Law, SEA is nowadays obligatory and compulsory for many different types of plans. In the specific domain of town and country planning, this obligation is established by several rules: The Act 9/2006 of course, but also by the Act 8/2007, on Land (see infra) and by the legislation of the Autonomous Communities in the domain of environmental protection and on town and country planning. Consequently, if a plan or a project is approved without such EIA, it may be declared illegal and annulled by the courts.

So far, no judicial decisions have been rendered in connection with the Act 9/2006 yet, basically for two reasons: (a) as said before, the Act is not applicable as such, it is not a self-executing piece of legislation. It needs to be supplemented by administrative regulations that have not been promulgated so far, and the "real" regulation of SEA must be found in the sectoral legislation. So far, only the law on town and country planning has been "adapted" to the national legislation of SEA; (b) Justice is outrageously slow in Spain, so we need to wait

some time until the first decisions are rendered by the lower courts, and ten years in average until we have a reasonable bunch of decisions from the highest court (Supreme court).

However, in the domain of town and country planning we have already a reasonable set of decisions on the environmental assessment of town planning instruments, because, as said before, those plans where subjected to such assessment under the legislation on EIA for projects or by the regional legislation. In general terms, this case-law is very clear and environmentally oriented in the sense that the lack of performing and EA of the plan renders the plan void. Lawsuits against municipal land use plans are often filed on grounds of lacking an assessment of its environmental effects. The plaintiff (usually an NGO) claims the city council has violated the statute that establishes the obligation to perform aSEA (or a EIA) for town planning instruments. In that scenario, administrative courts may declare illegal and void land use plans which infringe those laws and regulations. Administrative courts may strike down plans or real estate projects that have been approved without performing a strategic EIA as required by the law, or neglecting the "environmental" reports required by the law.

Several successful cases may be cited here.

.-(a) In 1996, the regional government of Murcia (in the south-east of the country) approved the modification of the "master" plan of the city of Cartagena, on request of the city council. The new plan envisaged the development of 469 hectares of land, some of which belonged to a protected site. No EIA was performed, as required by the law. For that main reason, a local NGO ("Anse") filed a lawsuit against the plan, and the High Court of Murcia declared illegal and void the approval decisions.[16] The Supreme Court confirmed the judgement.

.-(b) In another 2006 case, the Supreme Court (Admininistrative Chamber) declared illegal and annulled a town planning instrument approved by the city council of Miranda de Ebro (in Castilla-León), because the approval had been made without taking into consideration the EIA of the plan (decision of 15 march 2006).

.-(c) For what concerns "international" judgments in this area, Spain itself, as a member state of the EU, was also condemned by the ECJ in 2006 because a major real estate project was approved and built in Paterna (in the Region of Valencia) without an EIA, then in violation of EC Directive 85/337.[17]

In a nutshell, the EA is already producing successful results in town planning and land development litigation, and its relevance will grow in the future, in the wake of the new legal context.

IV. Where do you see deficiencies of environmentally remote legislation and implementation with regard to environmental concerns, and what legal rules and institutions could improve the situation?

.-(1) Member state legislation

The field of Town and Country Planning is a good example of formerly remote legislation with regard to environmental concerns, which step by step has became more and more aware of environmental protection and has integrated environmental concerns. As a matter of fact, in the last twenty years Spain has experienced a pattern of accelerated urban growth. In the wake of the social and political concerns about this problem, new laws and regulations governing the urban process have been approved. Some of them are inspired by the integration principle. In fact, the role of the IP in town planning policy has been

[16] Decision of the Administrative Chamber of the High Court of Murcia of 29 September 2000 (appeal number 437/1997).

[17] Case C-332/04 Commission v. Spain (2006) ECR I- 40

dramatically stressed by the now-in-force Act on Land of 28 May, 2007.[18] This new statute is applicable in the whole country, and binds regional law. In its explanatory memorandum, this statute states that, in future, urban growth must be in harmony and shoul integrate the requirements of environmental protection. Article 2.2 of the statute states that public policies in this domain must ensure the rational use of all natural resources and the conciliation of the requirements of the economy, the employment and the protection of the environment (among other factors). Article 10 (c) lays down some general principles in the field of town planning, for instance it states that the agencies and governmental units having competences in the domain of land use policy and town planning must pay attention to the principle of prevention and protection against pollution. Finally, article 15 establishes some provisions having a procedural character and which in our view may be more directly applicable. Namely, it states that land use plans are subject to environmental impact assessment (EIA), but it should be remarked that that obligation was already in force by virtue of the national Act 9/2006, of 28 April 2006, which transposed EC Directive 2001/42, on "Strategic" EIA (for plans and programs).

In other domains of environmental and land use legislation it also possible to see the impact of the integration principle in the last years:

.-(a) *Integration of nature conservation in town planning*

In the domain of nature conservation, environmental protection values can be seen to prevail over land development, at least in the book of laws. According to the main national statute on nature conservation and bio-diversity defense, passed in 2007, and repealing a 1989 statute, the most important preserved areas, called "Parques" (*protected parks*) must be managed and preserved on the basis of a complex set of planning documents,[19] which may involve the territory of several cities or towns. Those documents determine and regulate in a highly precise manner all human and economic activity having a direct or indirect impact on those areas, and of course land development and building do not escape from that "environmental" planning.

The Act establishes clearly that a conservation plan which has been approved for a protected area prevails over any land development plans or real estate projects. In practical terms, it means that the local governments affected by those conservation and management plans cannot approve land use plans or real estate projects which run contrary to them. In that case, the land development plan is illegal and could be annulled by the administrative courts. As for pre-existing land use plans, the law states that they must be amended or rectified in due time and manner, but legal, existing or in-progress buildings and developments are respected.

.-(b) *Noise control and air pollution.*

The national legislation on the prevention and control of ambient noise makes reference to the relation between the policies on noise reduction and town planning. The key national rule in the field is the Act of 17 November 2003, which is the result of transposing EC Directive 2002/49. This statute obliges the local governments of large municipalities to perform a sort of "acoustic" zoning, and to elaborate "noise management plans" whose provisions and determinations will prevail over municipal land use plans.[20] On the other hand, a new national law on air quality (2007) puts conditions on urban growth in noisy areas.

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[18] *Ley 8/2007, de 28 de mayo, de suelo*. This statute was published in the national Official Journal (*Boletín Oficial del Estado)* of 29 May, 2007. The electronic version of the statute (in Spanish) may be retrieved at the website of such gazette : www.boe.es

[19] Those documents are basically two : the P.O.R.N (*Plan de Ordenación de Recursos Naturales)* and the P.R.U.G (*Plan rector de uso y gestión).*

[20] This Act of Parliament was supplemented by Royal Decree 1367/2007, of 19 October 2007, which sets precise rules and technical annexes for the implementation of the Act.

Under the new Act, big cities are obliged to draft air pollution management plans, whose determinations would also guide local land use plans

.-(c)Integration of environmental protection into the building regulation and activity.

A new national regulation (Royal Decree of 17 march 2006), in force since September 2006, establishes a complex set of detailed, technical and architectural requirements for any new construction, house or apartment building. In particular, new homes must now have panels for solar energy and must comply with minimum requirements on noise isolation and energy efficiency.

.-(2) EC Legislation : Fisheries

Even though fisheries policy is an exclusive EC competence it does contain apparent loopholes concerning environmental protection. First, the system of captures (Total Allowable Catches, TACs)) does not by itself guarantee that stocks may be maintained at sustainable level. TACs are fixed on an annual or bi-annual basis. Even though the Community institutions consult the International Council for the Explotation of the Sea (ICES) which provides information on stocks in the north-east Atlantic, and also the Scientific, Technical and Economic Committee for Fisheries made up of national experts, and representatives from the fishing industry and other stakeholders, these consultations are subject to a wide range of interests that may not give environmental concerns a proper position in the decision-making process.

Secondly, the EC still lacks a proper inspection system. Needless to say, this mechanism is central to a policy that is being carried out worldwide and that embraces a great number of operators, i.e., vessels. The Commission has acknowledged that the variety of national enforcement services lead to differences in monitoring priorities, prosecution proceedings and outcomes. Even though the Community has increased the number of legal instruments dealing with this matter, including the creation of a fisheries Agency (Regulation 768/2005**)**, successive reports make it clear that deficiencies are not corrected. In this respect, the Court of Auditors has indicated that quota monitoring is deficient because the data on which it is based are of doubtful quality, subject only to limited checks by the Commission and without any real possibility of coercive action. Furthermore, administrative checks, even if they are efficient, do not always guarantee the substance of the information in declarations. They must be supplemented by physical inspections.[21] In several Member States there is no central computerised repository for all the information relating to fisheries offences and perpetrators of them. For this reason, prosecuting authorities are not able to base their decision on complete knowledge of the previous history. Moreover, due to the lack of information about the penalties awarded for each type of offence it is not possible to evaluate the effectiveness of inspection activities and that same lack is therefore an impediment to good strategic planning and appropriate targeting of inspections.[22]

Member States are under the obligation to impose fines for the breach of fisheries rules, in particular in the case of quotas. However, the Commission has acknowledged in a 2006 report that although statistics show that more than 10% of the vessels has been sanctioned, the amount paid by the fisheries industry as a consequence of sanctions imposed in 2004 (€ 13,8 millions) is roughly equal to 2 thousandths of the 2003 landing value. According to the Commission: 'Such an amount entails the risk that fishing industry may consider penalties imposed for infringements to the CFP rules *just as an ordinary running cost* of the enterprise

[21] Special Report 7/2007, at paragraph 51.
[22] Special Report 7/2007, at paragraph 91.

and see no real incentive to be compliant.'[23] In 2005, the Commission declared that the amount of the sanctions applied across the Community did not seem to have a deterrent effect. The amount paid by the fisheries industry as a consequence of sanctions imposed in 2003 (€ 28,7 millions) was roughly equal to 4 thousandths of the 2002 landing value.[24]

In the last years the Community has adopted some international law instruments to strengthen the protection of certain species, e.g., Decision 2005/26/EC on the signing, on behalf of the European Community, of the Convention for the strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica (Antigua Convention).[25] In December, the Council also adopted Decision 2005/938/EC on the approval on behalf of the Community of the Agreement on the International Dolphin Conservation Programme; [26] Regulation 1185/2003 on the removal of fins of sharks on board vessels.[27]

[23] COM(2006) 387 final, Communication from the Commission to the Council and he European Parliament. Reports from Member States on behaviours which seriously infringed the rules of the Common Fisheries Policy in 2004, at 8, emphasis added.
[24] COM(2005) 207 final, Communication from the Commission to the Council and the European Parliament. Reports from Member States on behaviours which seriously infringed the rules of the Common Fisheries Policy in 2003, at 7.
[25] [2005] OJ L15/9. Adopted on 25 Oct. 2004. Antigua Convention, Washington D.C. (USA), 14 Nov. 2003, published on the Internet at: http://www.iattc.org.
[26] [2005] L348/26.
[27] [2003] OJ L167/1.