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THE CONSTITUTIONAL COURT  
For the Transition Period

SENTENCE NO. 025-10-DTI-CC

CASE NO. 0028-10-TI

The provisions contained in the Agreement on Social Security between the Kingdom of Spain and the Republic of Ecuador, entered into by Ecuador on December 4, 2009, in the city of Madrid, Spain, are compatible with the Constitution of the Republic of Ecuador; as a result, the Court declares that the agreement is constitutional.

Quito, Metropolitan District, July 22, 2010

SENTENCE NO. 025-10-DTI-CC

CASE NO. 0028-10-TI

THE CONSTITUTIONAL COURT  
for the transition period

Presiding Constitutional Judge: Dr. Patricio Herrera Betancourt

#### I. BACKGROUND

Dr. Alexis Mera Giler, in his capacity as the Legal Secretary of the President of the Republic of Ecuador, by way of Official Letter No. T.5237-SNJ-10-726, dated May 5, 2010, notified the Plenary of the Constitutional Court for the Transition Period of the Agreement on Social Security between the Kingdom of Spain and the Republic of Ecuador, an international agreement entered into in order to ensure that persons from each State who are employed or have been employed in the other State enjoy a more complete guarantee of their rights.

The communication states that the objective of the Agreement is to ensure that persons from each member State, as well as their families or beneficiaries, enjoy the same Social Security benefits and in the same conditions that they would enjoy in their home State, in the territory of the other State, without prejudice to the specific provisions contained in the Agreement.

The communication indicates that, according to the provisions set forth in Article 419, numeral 4, of the Constitution of the Republic, the ratification of international agreements requires the prior approval of the National Assembly, when such agreement deals with rights and guarantees established in the Constitution.

As a result, the office of the President of the Republic requests that, in accordance with Article 438, numeral 1, of the Constitution of the Republic, the Constitutional Court issue a binding resolution in respect of the constitutionality of the international agreement, prior to its submission for approval to the National Assembly, and that the corresponding resolution be issued.

Text of the Agreement on Social Security between the Kingdom of Spain and the Republic of Ecuador

“AGREEMENT ON SOCIAL SECURITY BETWEEN THE KINGDOM OF SPAIN AND THE REPUBLIC OF ECUADOR

The Kingdom of Spain and the Republic of Ecuador, hereafter referred to as the Contracting Parties, being desirous of regulating the relationship between their two countries in the field of Social Security, have agreed as follows,

Considering the importance of ensuring that persons in each of the two States who are employed or have been employed in the other State enjoy a better guarantee of their rights,

Recognizing the bond of friendship that unites the two States,

Have determined to enter into this Agreement, under the following terms:

PART I

GENERAL PROVISIONS

Article 1

Definitions

1. For purposes of this Agreement, the expressions and terms listed below shall have the following meanings:

a) "Laws" means the laws, regulations and other provisions relating to Social Security that are specified in Article 2, which are in force in the territory of either Contracting State;

b) "Competent Authority" means,

as regards Spain, the Ministry of Labor and Immigration;

as regards the Republic of Ecuador, the Ecuadorian Institute of Social Security.

c) "Competent Institution" means the institution that is responsible, according to the legislation of each of the Contracting Parties, for the recognition of rights and the rendering of payment.

d) "Liaison Agency" means the organization that coordinates the flow of information among the institutions of each of the Contracting Parties, which is involved in the application of this Agreement and in providing information to interested parties in respect of their rights and obligations derived therefrom.

e) "Worker" means any person who, as a result of carrying out or having carried out professional activities, whether from employment or self-employment, has been subject to the laws enumerated in Article 2.

f) "Pensioner" means any person who, as a result of the legislation of one or both Contracting Parties, receives a pension.

g) "Family member or beneficiary" means those persons recognized as such by the applicable legislation of one of the Contracting Parties.

h) "Residence" means the legally established habitual period of stay.

i) "Stay" means the temporary residency in the territory of a Contracting Party of a person who has his or her permanent residence in the territory of the other Contracting Party.

j) "Period of coverage" means a period of payment of mandatory or voluntary contributions, as defined or recognized as a period of coverage by the laws under which such period has been completed or is considered to have been completed, or any similar period insofar as it is recognized by such laws as equivalent to a period of coverage.

k) "Economic benefit" and "Pension" mean all cash payments and pensions provided for by law that, in accordance with Article 2, are included in this Agreement, as well as any increases due to revalorization, complements or supplements thereto.

2. Any other expression or term used in this Agreement shall, for that Contracting State, have the same meaning as under its laws.

## Article 2

### Areas of Objective Application

1. The present Agreement shall apply:

A) As regards Ecuador:

To such laws relating to those payments made to the Mandatory General Insurance fund, administered by the Ecuadorian Institute of Social Security, in respect of:

- a) Maternity insurance.
- b) Insurance for illness.
- c) Disability, old age and life insurance, which include survivors' pensions for widows and orphans.
- d) Employment insurance, in respect of occupational accident or illness.
- e) Funeral expenses.

B) As regards Spain:

To such laws relating to those payments made to the Spanish Social Security System, excepting those special policies applicable to public servants, both civilian and military, in respect of:

- a) Temporary disability in cases of commonailment and off-the-job accidents.
- b) Maternity and at-risk pregnancies.
- c) Permanent disability, retirement and survivors' insurance.

d) Life insurance.

2. The present Agreement shall apply equally to future laws which supplement or amend the laws specified in the preceding paragraph.

3. This Agreement shall apply to the legislation of a Contracting Party that extends the applicable laws to a new group of persons, provided that the Competent Authority of the other Party does not oppose such extension within three months of receiving notification of such legal provisions.

4. The present Agreement shall apply to such legislation that establishes a new Special Regulation of Social Security or a new branch thereof, provided that the Parties agree to such change.

5. Those periods that, in accordance with other agreements on social security equivalent to this Agreement, are taken into account for purposes of the adherence of a right to payment under the legislation of a Contracting Party shall not be included.

### Article 3

#### Areas of Subjective Application

The present Agreement shall apply to workers and pensioners who are or have been subject to the laws enumerated in Article 2, in the territory of one or both Contracting Parties, as well as in each case to their family members and beneficiaries.

### Article 4

#### Equality of Treatment

Those nationals of each Contracting Party, as well as their family members or beneficiaries, shall be subject to and shall benefit from Social Security in the territory of the other Contracting Party, under the same conditions as the nationals of that Contracting Party, without prejudice to the specific provisions set forth in this Agreement.

### Article 5

#### Accumulation of Periods of Coverage

1. When the legislation of a Contracting Party subordinates the acquisition, reservation or recuperation of a right to economic payments in the form of a contribution at the end of a determined period of coverage, the Competent Institution shall take into account for such purposes, as necessary, the coverage periods completed in accordance with the laws of the other Contracting Party, as if they were coverage periods completed in accordance with the laws of the first Contracting Party, provided that such periods do not overlap.

2. When the accumulation of periods of coverage completed in both Contracting Parties must be analyzed in order to establish the right to payment, the following rules shall apply:

a) When a mandatory coverage period coincides with a voluntary coverage period or its equivalent, the mandatory coverage period shall be taken into account.

b) When two voluntary coverage periods applicable in the territories of both Contracting Parties coincide, each Party shall take into account the voluntary coverage period completed in its own territory.

c) When it is not possible for a Contracting Party to specify the time during which certain periods of coverage were completed, it shall be assumed that such periods do not overlap with those coverage periods completed in the territory of the other Contracting Party.

3. If coverage periods are required for affiliation with voluntary coverage or continuous provision of coverage, the coverage periods covered for the worker under the laws of one Contracting Party, shall be accumulated, if necessary, with the coverage periods covered under the laws of the other Contracting Party, provided that such periods do not overlap.

## Article 6

### Payment of economic benefits to beneficiaries abroad

1. Unless otherwise provided in this Agreement, economic benefits shall not be subject to reduction, modification, suspension or retention due to the fact that the beneficiary is present in or residing in the territory of the other Contracting Party, and any corresponding payments shall be made by the Contracting Party that has granted such benefits, to the financial entity designated by the beneficiary.

2. The preceding paragraph shall not apply to economic benefits in case of temporary disability.

3. Pensions that are granted based on this Agreement to beneficiaries residing in a third country shall be effected, taking into account the provisions of the preceding paragraphs, in the same conditions and to the same extent as to the nationals of such Contracting Party who reside in a third country.

## PART II

### PROVISIONS REGARDING APPLICABLE LEGISLATION

## Article 7

### General Standard

Those workers to whom the present Agreement applies shall be subject exclusively to the Social Security laws of the Contracting Party in whose territory they carry out their employment activities, without prejudice to the provisions set forth in Article 8.

## Article 8

### Special and Exceptional Provisions

1. In respect of the provisions set forth in Article 7, the following are established as specific and exceptional standards:

a) Where a salaried employee who is covered under the laws of one Contracting State in respect of work performed for a firm in the territory of that Contracting State is sent by that firm to work

temporarily in the territory of the other Contracting State, the person shall be subject to the laws of only the first Contracting State in their totality, provided that the period of work in the territory of the other Contracting State is not expected to exceed three years, and that the person has not been sent as a replacement for another worker whose transfer period has been completed.

b) If the period of work to which the previous paragraph refers is prolonged due to unforeseen circumstances for more than three years, the employee shall continue to be subject to the laws of the first Contracting Party in their entirety for the new period, not to exceed two years, on the condition that the Competent Authority of the second Party, or the body that it designates, gives its consent.

c) A person who normally carries out his or her activities with respect to self-employment in the territory of one Contracting Party, in which he or she is covered, and who begins to carry out the same type of work in the territory of the other Contracting Party, shall continue to be subject to the laws of only the first Contracting Party, provided that the foreseeable duration of the work in the territory of the second Contracting Party is not to exceed three years.

d) If the period of work to which the previous paragraph refers is prolonged due to unforeseen circumstances for more than three years, the self-employed person shall continue to be subject to the laws of the first Contracting Party in their entirety for the new period, not to exceed two years, on the condition that the Competent Authority of the second Party, or the body that it designates, gives its consent.

e) Traveling employees of air transportation companies who perform work in the territories of both Contracting States shall be subject to the laws of only the Contracting State in the territory of which the firm has its home office.

f) A salaried employee working as an officer or member of a crew on a vessel which flies the flag of one Contracting State shall be subject to the laws of only the Contracting State whose flag the vessel flies.

However, when such employee is remunerated for his or her work by a company or a person domiciled in the territory of the other Contracting Party, such employee should be subject to the laws of the second Contracting Party, if he or she resides in the territory of the second Contracting State. The company or person who remunerates the employee shall be considered as a business for purposes of the application of such laws.

g) A national of one Contracting Party who is employed in and resides in the same Contracting Party and is employed by a mixed fishing enterprise domiciled in the Other Contracting Party and on a vessel that flies the flag of the other Contracting Party, shall be considered to be an employee of the parent company domiciled in the country of which he or she is a national and in which he or she resides, and therefore, such employee shall be subject to the laws of the first Contracting Party, with the parent company to assume obligations in respect of such employee as his or her employer.

h) An employee who works in loading, unloading, reparation of vessels and port security shall be subject to the laws of the Contracting Party in whose territory the port in which he or she works is located.

i) The members and private employees of a Diplomatic Mission or a Consular Office shall be subject to the provisions of the Vienna Convention on Diplomatic Relations of April 18, 1961, and the Vienna Convention on Consular Relations of April 24, 1963, without prejudice to the following:

The administrative and technical personnel and service personnel of Diplomatic Missions and Consular Offices in the territory of each of the Contracting Parties, as well as persons privately employed by the members thereof, may choose between the application of the laws of either Contracting Party, provided that such persons are nationals of or have been subject to the laws of the State sending the Diplomatic Mission or Consular Office.

This option shall be exercised within three months of the entrance into force of the present Agreement, or, as the case may be, within three months of the beginning of the person's employment in the host State.

j) Public employees of a Contracting Party who are not covered by the provisions of paragraph i), who are sent to the territory of Contracting Party, shall be subject to the laws of the Contracting Party to which the Administration that employs such persons pertains.

k) Those persons sent by one of the Contracting Parties on cooperative missions into the territory of the other Contracting Party shall be subject to the Social Security system of the Contracting Party sending such persons, except as otherwise provided in the respective cooperation agreement.

2. The Competent Authorities in each Contracting Party, or such Entities or Institutions as they designate, may, by common agreement, determine other exceptions or modify the exceptions set forth in the preceding paragraphs.

### PART III

#### PROVISIONS REGARDING BENEFITS

##### CHAPTER I

###### Economic benefits for temporary disability, maternity and at-risk pregnancy

###### Article 9

###### Covered conditions

Economic benefits for temporary disability as a result of common ailments or an off-the-job accident, as well as benefits for maternity and at-risk pregnancies, shall be granted by the Competent Institution of the Contracting Party whose legislation is applicable to the employee, in accordance with Articles 7 and 8 of this Agreement.

##### CHAPTER 2

###### Economic benefits for permanent disability, retirement and survivors

###### Section 1

###### General provisions

## Article 10

### Determination of coverage and calculation of economic benefits

An employee who has been subject to the laws of both Contracting Parties, shall be entitled to the economic benefits covered under this Chapter in the following circumstances:

1. The Competent Institution of each Contracting Party shall determine the coverage and shall calculate the economic benefit, taking into account only those periods of coverage accredited by such Contracting Party.

2. In addition, the Competent Institution of each Contracting Party shall determine the employee's coverage in respect of such economic benefits, accumulating the periods of coverage completed while under the laws of each Contracting Party. The scope of coverage shall be determined through such accumulation, and the following rules shall apply to the calculation of the economic benefit:

a) The amount of the economic benefit to be paid to the interested party shall be determined as if all completed periods of coverage had been completed under the laws of the Contracting Party's own legislation (theoretical pension).

b) The amount of the economic benefit shall be established by applying the same ratio to the theoretical pension as that between the period of coverage completed under the laws of that Contracting Party and the accumulation of all periods of coverage completed under the laws of both Contracting Parties (pro rata temporis pension).

c) If the laws of either of the Contracting Parties requires a maximum duration of periods of coverage in order to recognize the completion of a period of coverage, the Competent Institution of such Contracting Party shall take into account when calculating the pension only those coverage periods in the territory of the other Contracting Party that are necessary in order to reach the complete pension. The foregoing shall not apply to economic benefits that are not accounted for in terms of periods of coverage.

3. Once the economic benefit has been determined in accordance with the foregoing paragraphs 1 and 2, the Competent Institution of each Contracting Party shall recognize and pay out the economic benefit that is determined to be more favorable to the interested party, independently of any resolution adopted by the Competent Institution of the other Contracting Party.

## Article 11

### Amounts owed in respect of periods of voluntary contributions

In order to calculate the theoretical pension as the effective amount of the economic benefit in accordance with paragraph 2 of Article 10, the rules established in Article 5 shall apply.

The amount effectively owed, calculated in accordance with the provisions of paragraph 2 of Article 10, will be increased by the amount corresponding to those periods of voluntary contributions that have not been calculated in accordance with the provisions of paragraph 2, letter a), of Article 5. This increase shall be calculated according to the laws of the Contracting Party, in accordance with which the period of voluntary contribution was completed.

## Article 12 Second Supplement to Official Register No. 247, Year I



Quito, Friday, July 30, 2010

THE CONSTITUTIONAL COURT  
For the Transition Period

SENTENCE NO. 025-10-DTI-CC

CASE NO. 0028-10-TI

The provisions contained in the Agreement on Social Security between the Kingdom of Spain and the Republic of Ecuador, entered into by Ecuador on December 4, 2009, in the city of Madrid, Spain, are compatible with the Constitution of the Republic of Ecuador; as a result, the Court declares that the agreement is constitutional.

Quito, Metropolitan District, July 22, 2010

SENTENCE NO. 025-10-DTI-CC

CASE NO. 0028-10-TI

THE CONSTITUTIONAL COURT  
for the transition period

Presiding Constitutional Judge: Dr. Patricio Herrera Betancourt

## II. BACKGROUND

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The communication indicates that, according to the provisions set forth in Article 419, numeral 4, of the Constitution of the Republic, the ratification of international agreements requires the prior approval of the National Assembly, when such agreement deals with rights and guarantees established in the Constitution.

As a result, the office of the President of the Republic requests that, in accordance with Article 438, numeral 1, of the Constitution of the Republic, the Constitutional Court issue a binding resolution in respect of the constitutionality of the international agreement, prior to its submission for approval to the National Assembly, and that the corresponding resolution be issued.

Text of the Agreement on Social Security between the Kingdom of Spain and the Republic of Ecuador

## “AGREEMENT ON SOCIAL SECURITY BETWEEN THE KINGDOM OF SPAIN AND THE REPUBLIC OF ECUADOR

The Kingdom of Spain and the Republic of Ecuador, hereafter referred to as the Contracting Parties, being desirous of regulating the relationship between their two countries in the field of Social Security, have agreed as follows,

Considering the importance of ensuring that persons in each of the two States who are employed or have been employed in the other State enjoy a better guarantee of their rights,

Recognizing the bond of friendship that unites the two States,

Have determined to enter into this Agreement, under the following terms:

### PART I

#### GENERAL PROVISIONS

##### Article 1

##### Definitions

2. For purposes of this Agreement, the expressions and terms listed below shall have the following meanings:

a) "Laws" means the laws, regulations and other provisions relating to Social Security that are specified in Article 2, which are in force in the territory of either Contracting State;

b) "Competent Authority" means,

as regards Spain, the Ministry of Labor and Immigration;

as regards the Republic of Ecuador, the Ecuadorian Institute of Social Security.

c) "Competent Institution" means the institution that is responsible, according to the legislation of each of the Contracting Parties, for the recognition of rights and the rendering of payment.

d) "Liaison Agency" means the organization that coordinates the flow of information among the institutions of each of the Contracting Parties, which is involved in the application of this Agreement and in providing information to interested parties in respect of their rights and obligations derived therefrom.

e) "Worker" means any person who, as a result of carrying out or having carried out professional activities, whether from employment or self-employment, has been subject to the laws enumerated in Article 2.

f) "Pensioner" means any person who, as a result of the legislation of one or both Contracting Parties, receives a pension.

g) "Family member or beneficiary" means those persons recognized as such by the applicable legislation of one of the Contracting Parties.

h) "Residence" means the legally established habitual period of stay.

i) "Stay" means the temporary residency in the territory of a Contracting Party of a person who has his or her permanent residence in the territory of the other Contracting Party.

j) "Period of coverage" means a period of payment of mandatory or voluntary contributions, as defined or recognized as a period of coverage by the laws under which such period has been completed or is considered to have been completed, or any similar period insofar as it is recognized by such laws as equivalent to a period of coverage.

k) "Economic benefit" and "Pension" mean all cash payments and pensions provided for by law that, in accordance with Article 2, are included in this Agreement, as well as any increases due to revalorization, complements or supplements thereto.

2. Any other expression or term used in this Agreement shall, for that Contracting State, have the same meaning as under its laws.

## Article 2

### Areas of Objective Application

1. The present Agreement shall apply:

A) As regards Ecuador:

To such laws relating to those payments made to the Mandatory General Insurance fund, administered by the Ecuadorian Institute of Social Security, in respect of:

- a) Maternity insurance.
- b) Insurance for illness.
- c) Disability, old age and life insurance, which include survivors' pensions for widows and orphans.
- d) Employment insurance, in respect of occupational accident or illness.
- e) Funeral expenses.

B) As regards Spain:

To such laws relating to those payments made to the Spanish Social Security System, excepting those special policies applicable to public servants, both civilian and military, in respect of:

- a) Temporary disability in cases of common ailment and off-the-job accidents.
- b) Maternity and at-risk pregnancies.
- c) Permanent disability, retirement and survivors' insurance.

d) Life insurance.

2. The present Agreement shall apply equally to future laws which supplement or amend the laws specified in the preceding paragraph.

3. This Agreement shall apply to the legislation of a Contracting Party that extends the applicable laws to a new group of persons, provided that the Competent Authority of the other Party does not oppose such extension within three months of receiving notification of such legal provisions.

4. The present Agreement shall apply to such legislation that establishes a new Special Regulation of Social Security or a new branch thereof, provided that the Parties agree to such change.

5. Those periods that, in accordance with other agreements on social security equivalent to this Agreement, are taken into account for purposes of the adherence of a right to payment under the legislation of a Contracting Party shall not be included.

### Article 3

#### Areas of Subjective Application

The present Agreement shall apply to workers and pensioners who are or have been subject to the laws enumerated in Article 2, in the territory of one or both Contracting Parties, as well as in each case to their family members and beneficiaries.

### Article 4

#### Equality of Treatment

Those nationals of each Contracting Party, as well as their family members or beneficiaries, shall be subject to and shall benefit from Social Security in the territory of the other Contracting Party, under the same conditions as the nationals of that Contracting Party, without prejudice to the specific provisions set forth in this Agreement.

### Article 5

#### Accumulation of Periods of Coverage

1. When the legislation of a Contracting Party subordinates the acquisition, reservation or recuperation of a right to economic payments in the form of a contribution at the end of a determined period of coverage, the Competent Institution shall take into account for such purposes, as necessary, the coverage periods completed in accordance with the laws of the other Contracting Party, as if they were coverage periods completed in accordance with the laws of the first Contracting Party, provided that such periods do not overlap.

2. When the accumulation of periods of coverage completed in both Contracting Parties must be analyzed in order to establish the right to payment, the following rules shall apply:

a) When a mandatory coverage period coincides with a voluntary coverage period or its equivalent, the mandatory coverage period shall be taken into account.

b) When two voluntary coverage periods applicable in the territories of both Contracting Parties coincide, each Party shall take into account the voluntary coverage period completed in its own territory.

c) When it is not possible for a Contracting Party to specify the time during which certain periods of coverage were completed, it shall be assumed that such periods do not overlap with those coverage periods completed in the territory of the other Contracting Party.

3. If coverage periods are required for affiliation with voluntary coverage or continuous provision of coverage, the coverage periods covered for the worker under the laws of one Contracting Party, shall be accumulated, if necessary, with the coverage periods covered under the laws of the other Contracting Party, provided that such periods do not overlap.

## Article 6

### Payment of economic benefits to beneficiaries abroad

1. Unless otherwise provided in this Agreement, economic benefits shall not be subject to reduction, modification, suspension or retention due to the fact that the beneficiary is present in or residing in the territory of the other Contracting Party, and any corresponding payments shall be made by the Contracting Party that has granted such benefits, to the financial entity designated by the beneficiary.

2. The preceding paragraph shall not apply to economic benefits in case of temporary disability.

3. Pensions that are granted based on this Agreement to beneficiaries residing in a third country shall be effected, taking into account the provisions of the preceding paragraphs, in the same conditions and to the same extent as to the nationals of such Contracting Party who reside in a third country.

## PART II

### PROVISIONS REGARDING APPLICABLE LEGISLATION

## Article 7

### General Standard

Those workers to whom the present Agreement applies shall be subject exclusively to the Social Security laws of the Contracting Party in whose territory they carry out their employment activities, without prejudice to the provisions set forth in Article 8.

## Article 8

### Special and Exceptional Provisions

1. In respect of the provisions set forth in Article 7, the following are established as specific and exceptional standards:

a) Where a salaried employee who is covered under the laws of one Contracting State in respect of work performed for a firm in the territory of that Contracting State is sent by that firm to work

temporarily in the territory of the other Contracting State, the person shall be subject to the laws of only the first Contracting State in their totality, provided that the period of work in the territory of the other Contracting State is not expected to exceed three years, and that the person has not been sent as a replacement for another worker whose transfer period has been completed.

b) If the period of work to which the previous paragraph refers is prolonged due to unforeseen circumstances for more than three years, the employee shall continue to be subject to the laws of the first Contracting Party in their entirety for the new period, not to exceed two years, on the condition that the Competent Authority of the second Party, or the body that it designates, gives its consent.

c) A person who normally carries out his or her activities with respect to self-employment in the territory of one Contracting Party, in which he or she is covered, and who begins to carry out the same type of work in the territory of the other Contracting Party, shall continue to be subject to the laws of only the first Contracting Party, provided that the foreseeable duration of the work in the territory of the second Contracting Party is not to exceed three years.

d) If the period of work to which the previous paragraph refers is prolonged due to unforeseen circumstances for more than three years, the self-employed person shall continue to be subject to the laws of the first Contracting Party in their entirety for the new period, not to exceed two years, on the condition that the Competent Authority of the second Party, or the body that it designates, gives its consent.

e) Traveling employees of air transportation companies who perform work in the territories of both Contracting States shall be subject to the laws of only the Contracting State in the territory of which the firm has its home office.

f) A salaried employee working as an officer or member of a crew on a vessel which flies the flag of one Contracting State shall be subject to the laws of only the Contracting State whose flag the vessel flies.

However, when such employee is remunerated for his or her work by a company or a person domiciled in the territory of the other Contracting Party, such employee should be subject to the laws of the second Contracting Party, if he or she resides in the territory of the second Contracting State. The company or person who remunerates the employee shall be considered as a business for purposes of the application of such laws.

g) A national of one Contracting Party who is employed in and resides in the same Contracting Party and is employed by a mixed fishing enterprise domiciled in the Other Contracting Party and on a vessel that flies the flag of the other Contracting Party, shall be considered to be an employee of the parent company domiciled in the country of which he or she is a national and in which he or she resides, and therefore, such employee shall be subject to the laws of the first Contracting Party, with the parent company to assume obligations in respect of such employee as his or her employer.

h) An employee who works in loading, unloading, reparation of vessels and port security shall be subject to the laws of the Contracting Party in whose territory the port in which he or she works is located.

i) The members and private employees of a Diplomatic Mission or a Consular Office shall be subject to the provisions of the Vienna Convention on Diplomatic Relations of April 18, 1961, and the Vienna Convention on Consular Relations of April 24, 1963, without prejudice to the following:

The administrative and technical personnel and service personnel of Diplomatic Missions and Consular Offices in the territory of each of the Contracting Parties, as well as persons privately employed by the members thereof, may choose between the application of the laws of either Contracting Party, provided that such persons are nationals of or have been subject to the laws of the State sending the Diplomatic Mission or Consular Office.

This option shall be exercised within three months of the entrance into force of the present Agreement, or, as the case may be, within three months of the beginning of the person's employment in the host State.

j) Public employees of a Contracting Party who are not covered by the provisions of paragraph i), who are sent to the territory of Contracting Party, shall be subject to the laws of the Contracting Party to which the Administration that employs such persons pertains.

k) Those persons sent by one of the Contracting Parties on cooperative missions into the territory of the other Contracting Party shall be subject to the Social Security system of the Contracting Party sending such persons, except as otherwise provided in the respective cooperation agreement.

2. The Competent Authorities in each Contracting Party, or such Entities or Institutions as they designate, may, by common agreement, determine other exceptions or modify the exceptions set forth in the preceding paragraphs.

### PART III

#### PROVISIONS REGARDING BENEFITS

##### CHAPTER I

###### Economic benefits for temporary disability, maternity and at-risk pregnancy

###### Article 9

###### Covered conditions

Economic benefits for temporary disability as a result of common ailments or an off-the-job accident, as well as benefits for maternity and at-risk pregnancies, shall be granted by the Competent Institution of the Contracting Party whose legislation is applicable to the employee, in accordance with Articles 7 and 8 of this Agreement.

##### CHAPTER 2

###### Economic benefits for permanent disability, retirement and survivors

###### Section 1

###### General provisions

## Article 10

### Determination of coverage and calculation of economic benefits

An employee who has been subject to the laws of both Contracting Parties, shall be entitled to the economic benefits covered under this Chapter in the following circumstances:

1. The Competent Institution of each Contracting Party shall determine the coverage and shall calculate the economic benefit, taking into account only those periods of coverage accredited by such Contracting Party.

2. In addition, the Competent Institution of each Contracting Party shall determine the employee's coverage in respect of such economic benefits, accumulating the periods of coverage completed while under the laws of each Contracting Party. The scope of coverage shall be determined through such accumulation, and the following rules shall apply to the calculation of the economic benefit:

a) The amount of the economic benefit to be paid to the interested party shall be determined as if all completed periods of coverage had been completed under the laws of the Contracting Party's own legislation (theoretical pension).

b) The amount of the economic benefit shall be established by applying the same ratio to the theoretical pension as that between the period of coverage completed under the laws of that Contracting Party and the accumulation of all periods of coverage completed under the laws of both Contracting Parties (pro rata temporis pension).

c) If the laws of either of the Contracting Parties requires a maximum duration of periods of coverage in order to recognize the completion of a period of coverage, the Competent Institution of such Contracting Party shall take into account when calculating the pension only those coverage periods in the territory of the other Contracting Party that are necessary in order to reach the complete pension. The foregoing shall not apply to economic benefits that are not accounted for in terms of periods of coverage.

3. Once the economic benefit has been determined in accordance with the foregoing paragraphs 1 and 2, the Competent Institution of each Contracting Party shall recognize and pay out the economic benefit that is determined to be more favorable to the interested party, independently of any resolution adopted by the Competent Institution of the other Contracting Party.

## Article 11

### Amounts owed in respect of periods of voluntary contributions

In order to calculate the theoretical pension as the effective amount of the economic benefit in accordance with paragraph 2 of Article 10, the rules established in Article 5 shall apply.

The amount effectively owed, calculated in accordance with the provisions of paragraph 2 of Article 10, will be increased by the amount corresponding to those periods of voluntary contributions that have not been calculated in accordance with the provisions of paragraph 2, letter a), of Article 5. This increase shall be calculated according to the laws of the Contracting Party, in accordance with which the period of voluntary contribution was completed.

## Article 12



#### Coverage periods of less than a year

1. Without prejudice to the provisions of Article 10, paragraph 2, when the total duration of the coverage periods completed under the laws of a Contracting Party is less than a year, and, in accordance with the laws of such Contracting Party, no entitlement to economic benefits therefore adheres, the Institution of such Party shall not recognize any economic benefits for the period in question.

The Institution of the other Contracting Party shall take into account the aforementioned coverage periods, as necessary, for purposes of the establishment of coverage and the determination of the amount of the pension according to its own laws, but it shall not apply the provisions of paragraph 2 b) of Article 10.

2. Notwithstanding the provisions of the previous paragraph, accredited periods of less than one year under the laws of both Contracting Parties may be accumulated by that Party in which the interested party meets the requirements in order for economic benefits to adhere. If the interested party has the same rights under the laws of both Contracting Parties, such rights shall only be recognized by that Contracting Party in which the worker has accredited his or her final coverage periods. The provisions set forth in Article 10, paragraph 2 b), shall not be of application in respect of the payment of pensions.

#### Article 13

##### Specific provisions in respect of the recognition the right to economic benefits

1. If the laws of one Contracting Party subordinate the concession of economic benefits regulated under this Chapter to the condition that the employee have been subject to its laws at the time that the event that gave rise to the economic benefit occurred, such condition shall be considered to have been met if at such time the worker was insured under the laws of the other Contracting Party, or, if this condition cannot be met, when the worker was receiving an economic benefit from such Party, based on its own periods of coverage.

For the recognition of survivors' benefits, if necessary it shall be taken into account whether the employee giving rise to such benefits was employed or was a pensioner in accordance with the laws of the other Contracting Party.

2. If for the recognition of an economic benefit the laws of a Contracting Party require that coverage periods have been completed within a certain time period immediately prior to the event giving rise to the economic benefit, such condition will be considered to have been met if the coverage period immediately prior to the recognition of economic benefits in the other Contracting Party has been accredited.

3. Reduction, suspension or suppression clauses set forth in the laws of one Contracting Party in respect of pensioners who carry out employment activities shall be applicable even if the case that such pensioners carry out employment activities in the territory of the other Contracting Party.

#### Article 14

##### Computation of coverage periods under Special Regimens or for determined professions

If the laws of one of the Contracting Parties establish as a condition for the award of certain benefits that periods of coverage be completed in a profession subject to a Special Regimen or in a specific profession or occupation, the periods completed under the laws of the other Contracting State shall not be taken into account for the awarding of these benefits unless those periods were completed under a corresponding system or, failing that, in the same profession or occupation, as the case may be.

If, taking into account the periods thus completed, the interested person does not meet the required conditions for entitlement to these benefits under a Special Regime, these periods shall be taken into account for the awarding of benefits under the general system or under another Special Regime to which the interested party may have acquired benefits.

## Article 15

### Determination of degree of disability

1. In order to determine the extent of a worker's disability in respect of the authorization of the corresponding economic benefits for disability, the Competent Institution of each of the Contracting Parties shall undertake its evaluation in accordance with the applicable laws.

2. For purposes of the provisions set forth in the previous paragraph, the Competent Institution of each of the Contracting Parties shall take into account medical reports and administrative data forwarded by the Institutions of the other Contracting Party. Nevertheless, each Institution shall have the right to arrange for the worker to be examined by a physician of its choice and hired by such Institution.

## Section 2

### Application of Spanish Law

## Article 16

### Computation base for economic benefits

1. In calculating the benefit computation base, the Competent Institution shall only take into account those coverage periods completed in accordance with its laws.

2. In calculating the benefit computation base, when Article 10, paragraph 2, is applicable, the following rules shall apply:

a) The calculation of the Spanish theoretical pension shall be based on the actual computation basis of the insured person in Spain during the years immediately prior to the payment of the final economic benefit under Spanish Social Security.

b) The amount of the pension shall be increased in accordance with the amount of such increases and revaluations calculated for each later year in respect of pensions of the same type.

## Section 3

### Application of Ecuadorian law

## Article 17

Economic benefits for disability, old age and death shall be authorized based on the provisions set forth in the Social Security law, its General Regulation and those Resolutions issued by the Executive Council in respect of this matter, subject to amounts effectively received.

The minimum pension shall be proportional to the period during which contributions were made to the Ecuadorian Institute of Social Security.

Pro rata temporis pensions shall in no case exceed the maximum applicable amount.

## CHAPTER 3

### Economic benefits for Occupational Accidents and Occupational Diseases

## Article 18

### Determination of the right to economic benefits

The right to economic benefits as a result of occupational accidents or occupational disease shall be determined in accordance with the laws of each Contracting Party in which the worker was subject to at the time of the accident or illness.

## Article 19

### Aggravation of effects of an occupational accident

If the worker who is a victim of an occupational accident suffers an aggravation of the effects of the accident while subject to the laws of the other Contracting Party, such economic benefits as may be available to such worker as a result of the aggravation of his or her condition shall be the responsibility of the Competent Institution of the Contracting Party in which the worker was covered at the time that the accident occurred.

## Article 20

### Professional ailments

1. Economic benefits for occupational diseases shall be regulated in accordance with the laws of the Contracting Party that were applicable to the worker at the time in which he or she was undertaking that activity that subjected him or her to the occupational disease, even if he or she was first diagnosed while subject to the laws of the other Contracting Party.

2. If the worker has undertaken such activity successively or alternatively as between the territories of the Contracting Parties and being successively alternatively subject to their respective laws, his or her rights shall be determined in accordance with the laws of the last Party in which he or she was covered for purposes of the activity giving rise to the occupational disease. If no economic benefits are available under the laws of such Party, the laws of the other Party shall apply.

## Article 21

### Aggravation of occupational disease

1. In the event that a occupational disease gives rise to the concession of economic benefits by one of the Contracting Parties, such Contracting Party shall be responsible for any aggravation of the ailment that may arise, even in the case that the worker is subject to the laws of the other Contracting Party, in the case that the activity undertaken in the other Contracting Party does not pose the same risk. If, on the other hand, the activity undertaken in the territory of the other Contracting Party poses the same risk as that which gave rise to the prior occupational disease, the worker shall be subject to the laws of the latter Contracting Party.

2. If, once the Competent Institution of a Contracting Party has authorized a pension due to permanent disability due to occupational disease, the interested party undertakes an activity susceptible of aggravating the occupational disease from which he or she suffers, while subject to the laws of the other Contracting Party, the Competent Institution of the first Contracting Party shall continue to fund the pension it authorized, without taking into account the aggravation to the ailment, and in accordance with the provisions of its laws. The Competent Institution of the second Contracting Party, to whose laws the interested party was subject when the aggravation of the ailment occurred, shall authorize an economic benefit the amount of which shall be the difference between the amount of the economic benefit to which the interested party has a right in respect of the aggravation, and the amount of the economic benefit to which the interested party would have a right under the laws of such Contracting Party, before the aggravation occurred.

#### Article 22

Regarding effects of prior workplace accidents or occupational diseases

In order to calculate disability derived from an occupational accident or a occupational disease, the effects of any prior occupational accidents or a occupational diseases that the worker may have suffered shall be taken into account, even in the case that such accidents or ailments may have occurred while the worker was subject to the laws of the other Contracting Party.

#### CHAPTER 4

Death and funeral benefits

#### Article 23

Death and funeral benefits

The concession of death and funeral benefits shall be governed by the laws that were applicable to the worker at the date of his or her death.

1. In the case of pensioners who had the right to economic benefits due to the application of the laws of both Contracting Parties, the authorization of such benefit shall be regulated by the laws of the Contracting Party in which the insured person resided.

2. If the residence of the pensioner was in a third country, in the case that such pensioner was entitled to economic benefits from both Contracting Parties, the benefit shall be authorized by the Contracting Party in which the insured party was last present.

#### PART IV

MISCELLANEOUS, TRANSITIONAL AND FINAL PROVISIONS

## CHAPTER 1

### Miscellaneous provisions

#### Article 24

##### Powers and responsibilities of the Competent Authorities

1. The Competent Authorities of both Contracting Parties shall have the power to enter into any Administrative Agreement necessary to implement the present Agreement.

2. The Competent Authorities of each Contracting Party shall:

a) Designate their respective Liaison Agency.

b) Communicate to the other Contracting Party those internal measures adopted in respect of the implementation of this Agreement.

c) Notify the other Contracting party of all provisions, both legislative and regulatory, that modify the provisions set forth in Article 2.

d) Provide the broadest technical and administrative cooperation possible in respect of the implementation of this Agreement.

e) Interpret by mutual agreement those provisions of this Agreement that may give rise to doubts by the Competent Institutions.

3. A mixed Commission overseen by the Competent Authorities of each Contracting Party may be called to order at the request of either Contracting Party, in order to examine any problems that may arise in respect of the implementation of the present agreement or any Administrative Agreement.

#### Article 25

##### Presentation of documents

1. Those applications, declarations, claims and other documents that, for purposes of the application of the laws of a Contracting Party, must be presented within a determined time period before the corresponding Authorities or Institutions of such Contracting Party, shall be considered to have been duly presented if presented within the same time period before the corresponding Authorities or Institutions of the other Contracting Party.

2. Any application for economic benefits presented in accordance with the laws of a Contracting Party shall be considered to be an application for the corresponding benefit under the laws of the other Contracting Party, provided that the interested party expressly states, or it can be deduced from the documentation presented, that he or she has carried out employment activities or has been covered in the territory of such Contracting Party.

3. The interested party may expressly request that the payment of an economic benefit be postponed in accordance with the laws of either Contracting Party.

## Article 26

### Administrative assistance among Institutions

1. The Competent Institutions of each of the Contracting Parties may request, at any time, medical certificates, or confirmations of the facts and actions from which the acquisition, modification, suspension, suppression, extinction or continuance of entitlement to economic benefits arose. The expenses that arise as a consequence thereof shall be reimbursed, without delay, to the Competent Institution that requested the declaration or the confirmation, upon receipt of documents that justify any such expenses.

2. If the Competent Institutions of each of the Contracting Parties finds, at the time of payment or review of an economic benefit in accordance with the provisions of Part III of this Agreement, that it has paid the economic benefits to the beneficiary in excess of what was due, it may request that the Competent Institution of other Contracting Party that owes economic benefits of the same nature of the same beneficiary, the retention from the first payment to the beneficiary of those sums corresponding to periodic payments of the amount paid in excess, within the limitations established by the laws of the Contracting Party that will realize such retention. This latter Institution shall transfer the retained sum to the creditor Institution.

## Article 27

### Exemptions through acts and administrative documents

1. Any entitlement to an exemption from registration, writing, postage, consular fees or other similar fees provided for by the laws of one of the Contracting Parties shall be extended to the certificates and documents issued by the Administrations or Competent Institutions of the other Contracting Party, in application of the present Agreement.

2. All administrative acts or documents that are issued in application of the present Agreement shall be exempt from legal requirements.

## Article 28

### Updates or revaluation of economic benefits

Economic benefits authorized in respect of the provisions of Part III of this Agreement shall be updated or revalued in accordance with the internal laws of each of the Contracting Parties, and shall take into account the provisions of the present Agreement.

## Article 29

### Methods and guarantees of payment of economic benefits

1. The Competent Institutions of each Contracting Party shall be released from liability in respect of any payments made in implementation of the present Agreement, when such payments are made in the legal currency of such Institution's country.

2. If either Contracting Party passes legislation that restricts currency transfer, both Parties shall immediately adopt the necessary measures in order to guarantee the effective enjoyment of the rights provided for in this Agreement.

## Article 30

### Dispute resolution

1. The Competent Authorities shall attempt to resolve through negotiation any controversies or differences in interpretation of the present Agreement and its Administrative Agreement that may arise.

2. If a controversy cannot be resolved through negotiation within a period of six months from the beginning of such negotiations, such controversies may be submitted to an arbitral tribunal, whose composition and procedures shall be determined by the Contracting Parties' mutual agreement. The decision of the arbitral tribunal shall be final and binding.

## CHAPTER 2

### Transitional Provisions

## Article 31

### Computation of coverage periods prior to the entrance into force of this Agreement

Coverage periods completed in accordance with the laws of either of the Contracting Parties prior to the date on which this Agreement enters into force shall be taken into consideration in the determination of entitlement to benefits and the amount of economic benefits that shall be authorized in respect thereof.

## Article 32

### Events occurring prior to the entrance into force of this Agreement

1. The application of this Agreement shall authorize the entitlement to economic benefits for events occurring prior to the date of entrance into force of this Agreement. However, the payment of such economic benefits shall in no case be made at a time prior to the entrance into force of this Agreement.

2. Pensions that have been paid by one or both Contracting Parties or entitlements to pensions that have been denied prior to the entrance into force of this Agreement may be revised in accordance with its terms and with the legal procedures established applicable in the territory of each Contracting Party, at an interested party's request. Entitlement shall attach as of the date of the request, except in the case of more favorable provisions under the laws of such Contracting Party.

Economic benefits paid out in a single lump sum are not eligible for revision under this Agreement.

## CHAPTER 3

### Final Provisions

## Article 33

### Validity of the Agreement

1. This Agreement is of indefinite duration, and may be renounced in whole or in part by either of the Contracting Parties with due notification to the other. In this case, the Agreement will cease to be valid or enforceable as of the date six months after the delivery of such notification.
2. In the event that the Agreement is renounced, the provisions hereof shall continue to be applicable to those entitlements acquired hereunder. Also, the Contracting Parties shall agree to measures that shall guarantee any entitlements acquired during the coverage periods completed prior to the date of the Agreement's termination.

## Article 34

### Termination of prior agreements

1. The General Agreement regarding Social Security between Ecuador and Spain, of April 1, 1960, and the Additional Agreement to the General Agreement regarding Social Security between Ecuador and Spain, dated May 8, 1974, shall cease to have any effect whatsoever as of the date of entrance into force of the present Agreement.
2. The present Agreement shall guarantee any entitlements acquired under the agreements referred to in the previous paragraphs.

## Article 35

### Entrance into force

The present agreement shall enter into force on the first day of the second month following the month in which each Contracting Party has received written notice from the other Contracting Party confirming that each Party has complied with all constitutional, legal and regulatory requirements in order for the Agreement to enter into force. Therefore, the authorized representatives of each Contracting Party in good faith sign the present Agreement.

In Madrid, on December 4, 2009, in two copies in the Spanish language, with each version an identical original.

For the Kingdom of Spain

Miguel Ángel Moratinos Cuyaubé  
Minister of Foreign Affairs and Cooperation

For the Republic of Ecuador

Fander Falconi Benítez  
Minister of Foreign Affairs, Commerce and Integration

## II. CONSIDERATIONS AND LEGAL BASIS OF THE COURT

Jurisdiction of the Constitutional Court



The Plenary of the Constitutional Court for the transition period is competent to head and hand down the respective ruling on the matter before it, in accordance with the provisions set forth in Article 438, numeral 1, of the Constitution of the Republic, which provides that the Constitutional Court shall issue a prior and binding decision in respect of the constitutionality of International Instruments, prior to their submission for the approval of the National Assembly, whose jurisdiction is in turn established by Article 108 of the Organic Law of the Legislative Branch.

In accordance with the provisions set forth in Article 109 of the Organic Law of Judicial Guarantees and Constitutional Control, the General Secretary of the Constitutional Court, in accordance with the assignment by lottery of the case, remitted the case designated as Nº 0028-10-TI to Dr. Patricio Herrera Betancourt as Presiding Judge, who, in accordance with the provisions of Article 107, numeral 1, Article 108 and Article 109 of the Organic Law of Judicial Guarantees and Constitutional Control, assumed jurisdiction for purposes of constitutional control in respect of a sentence deciding the necessity of legislative approval of International Treaties and Agreements.

The matter at hand relates to an agreement in respect of the extension of benefits under the Spanish social security system in respect of: temporary disability for common ailments, maternity, at-risk pregnancies, permanent disability, retirement, survivors, economic benefits derived from occupational accidents, occupational diseases and death insurance for Ecuadorian workers who live in Spain; and on Ecuador's part, the extension of benefits to Spanish workers located in Ecuador, in respect of: maternity, illness, disability, old age and death, including survivors' benefits for widows and orphans, workers' risk insurance and funeral insurance. This agreement falls within those cases that require prior legislative approval from the National Assembly, as per the provisions set forth in Article 419, numeral 4, of the Constitution of the Republic, which refers to those rights established by the Constitution, including the right to health and to social security.

A report issued by the Presiding Judge declares that the international agreement in question requires legislative approval prior to its ratification. Therefore, its publication in the Official Register and on the electronic portal of the Constitutional Court was ordered, in accordance with the provisions of Article 111, numeral 2, paragraph b, of the Organic Law of Judicial Guarantees and Constitutional Control, as noted on page 32 of the record.

As a result, the action before the Court has been processed in accordance with constitutional and legal procedure applicable to the case, and is therefore declared admissible.

In its analysis and study of the constitutionality of the agreement in question, the Constitutional Court will take into as context and immediate precedent Sentence No. 0005-09-DTI-CC, in respect of Case No. 0003-09-TI, related to the "Multilateral Iberian-American Social Security Agreement," entered into by the Republic of Ecuador on April 7, 2008, in the city of Madrid, Spain.

#### Considerations and Legal Principles

In order to enter into the material, we will look to some definitions and principles at international law, such as the sovereign equality of States, according to which, a State, for the reason of its statehood, is sovereign. We would say that sovereignty is a collection of powers attributed to the State at international law, enforceable independently of and with equality in respect of other States,

with the most important element of international relations being “the capacity of States to enter into obligations with other States and to be held liable at international law in the case of breach.”<sup>1</sup>

#### The State as subject to laws

Given that international law is a collection of norms that govern the conduct of States in their mutual claims, as subject to international law, currently, contemporary international law has concerned itself with international institutions and organizations, and with individuals; from this we can see that States are not the only subjects of international law, also it should be specified that this law owes its origin to the existence of the State, which is, in reality, the only entity capable of possessing all the characteristics that a subject of international law must possess.

Being subject to international law, or being a legal person according to the rules of the international law system, implies three essential elements: the subject must have obligations and incur liability; the subject must be capable of claiming the benefits of its rights; and the subject must be capable of entering into contractual relationships or relationships of any other legal character, with other entities recognized as legal persons.<sup>2</sup>

The international legal framework recognizes the capacity of States to exercise their sovereign authority fully, exclusively and autonomously.

#### Treaties as agreements among States parties

In accordance with doctrine, a distinction is made between contractual agreements and legislative agreements. The latter establish general standards of agreement that govern international society—a distinction that refers to the content of agreements, not to their form—and to contractual agreements in which States mutually agree to give and to receive, which constitutes evidence of the sovereignty and autonomy of States, and acknowledges the nature of relationships of global exchange, to the effect that international instruments become a framework for integration and cooperation between two or more countries.

Although there is no precise nomenclature for international instruments, the denominations “treaty,” “convention,” “agreement” or “protocol” are often used as synonyms. The definition of such terms and their application varies, changing from one country to another and from one constitution to another. “At international law it can be concluded that even treaties vary amongst themselves: each treaty is a type of microcosm that establishes within its final terms the laws that govern its own existence, on its own terms.”<sup>3</sup>

One of the main principles of treaty doctrine is that of *pacta sunt servanda*, which makes reference to the fact that contracts, from the time at which they enter into force, must be complied with and become binding law for the parties thereto. This therefore means that treaties must be faithfully observed, are binding on the parties thereto and must be complied with by such parties in good faith, with “Party” being understood as a State that has consented to be bound under a treaty that is

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<sup>1</sup> Antonio Ramiro Brontos, in his work *International Law*, McGraw-Hill/Interamericana de España. SAU, Madrid, 2003, p. 75.

<sup>2</sup> Max Sorenson 1, *Manual on Public International Law*, London. 1968, p. 261.

<sup>3</sup> Paul Reuter, *Introduction to Treaty Law*, Substance of Mexican Economic Culture, 2001, p. 47.

in force.<sup>4</sup> In respect of this common law principle, which has been codified by Article 26 of the Vienna Convention on the Law of Treaties, no party may raise objections to the application of a treaty based on conflicts with its internal laws as a justification for failure to comply with a treaty, except in the case that: it is physically impossible to apply the treaty; it is morally objectionable to apply the treaty in the case that to do so would put the very existence of the State at risk; the *rebus sic stantibus* clause; and unilateral revocation. As a result, from the moment that a State signs a treaty or convention, that State is aware that it must comply with it, both in international and domestic spheres.

Treaties, in addition to expressing the will of the parties, must determine the object and purpose of the agreement, and it is through treaty interpretation that the intention of the parties is determined. In the case at hand, the analysis of the intention of the parties must look to the Preamble of the Agreement on Social Security between the Kingdom of Spain and the Republic of Ecuador, which states that: "Considering the importance of ensuring that persons in each of the two States who are employed or have been employed in the other State enjoy a better guarantee of their rights." That is, the intention of this international agreement is to extend insurance coverage authorized by the Mandatory General Insurance administered by the Ecuadorian Institute of Social Security, and the Spanish system of Social Security, to nationals of one Party who are employed in the territory of the other.

#### Applicable international law

In relation to the subject matter of the Agreement on Social Security between the Kingdom of Spain and the Republic of Ecuador, it should be noted that Articles 16, 21 and 26 of the Inter American Convention on Human Rights provide for the progressive duty of States Parties to guarantee Economic, Social and Cultural Rights (ESCR). Although the Convention is not a treaty, Advisory Opinion 10 has established that the Declaration thereto does constitute a source of international responsibility, with the States Parties assuming the common obligation to respect the fundamental rights of persons and to apply them directly. In relevant part, Article 26 of the IACHR provides for this progressive right, with respect for a minimum standard of social rights, with which States Parties have a good faith obligation to comply.

The San Salvador Protocol in another specific international instrument that must be observed in respect of the direct application of ESCR. In the case at hand, Article 10, on social security, and Article 6, on employment, are particular points of reference. In this context, it should be noted that Article 2, numeral 1, of the International Covenant on Economic, Social and Cultural Rights establishes that: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources."

General Obligation No. 3, point 2, of the Committee on Economic, Social and Cultural Rights establishes that: "a reasonably short period should be adopted" for the incorporation of ESCR into the national framework; the Committee also establishes the State's duty to protect the right to equal access to health services (GO 14, point 35).

According to the Committee, a State in which a significant number of individuals are deprived of essential primary health care is failing, *prima facie*, to comply with its obligations. The Committee has tried to define the basic content of some of the rights set forth by the Pact. Among these basic

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<sup>4</sup> Cesar Montaña Galarza, Manual on International Tax Law, National Eds. Corporación, Quito, 2007, p. 34.

obligations, in respect of health, is the guarantee to access to medical facilities, medicine and health services, on a non-discriminatory basis, and particularly for vulnerable or marginalized groups.<sup>5</sup>

According to the Maastricht Principles: Principle 20 deals with vulnerable groups that suffer a proportional harm due to violation of their ESCR, and which include migrants.

The Ecuadorian State has ratified international obligations, which enjoy direct and immediate application under domestic law. In addition, we note that those treaties in respect of human rights enjoy Constitutional supremacy, in accordance with the provisions set forth by Article 424 of the Constitution in force, in light of which judicial officers must directly apply international law in respect of the protection of constitutional rights.

In this manner, we hope to make a connection between ESCR (health and social security) and rights such as life, equality and freedom from discrimination, among others, with the purpose of providing more efficient medical attention, as well as access to adequate medical technologies and medicines.

These rights—life, equality, health and social security—are directly related to the right to human dignity. Finally, international jurisprudence provides us with the case *Paschim Banga Khet Mazdoor Samity*,<sup>6</sup> from India, which held that the failure to provide urgent medical services violated the victim's rights to life and human dignity.<sup>7</sup>

#### Constitutional control in respect of international instruments

One of the fundamental pillars on which international constitutional law rests consists in what is referred to as constitutional control, a task that has been assigned to the technical control entities of each State, which, depending on their characterization and the powers that their respective constitution authorizes to them, are generally referred to as a Constitutional Court or Tribunal.

Constitutional control within the judicial framework of each State is fully justified, and also extends over international law, and specifically to international treaties and conventions. Although in general terms, constitutional control mechanisms have been instituted in order to limit the powers of the legislative, executive and judicial branches, the subject matter or themes dealt with in the international instrument must also be examined in light of basic standards in order to determine if they are in conformance with such standards, and particularly in respect of the set of fundamental rights that are guaranteed to the citizens of a State Party.

#### Principles of international relations in the Constitution

In the case of Ecuador, respect for the provisions of the Constitution provides the main source of legitimacy at the time at which an international treaty or convention is ratified. As such, in order for a treaty or convention to be valid in its full scope, it must be formally signed and ratified, which requires the prior approval of a constitutionality analysis.

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<sup>5</sup> Abramovich, Victor, and Courtis, Christian. "Social rights as enforceable rights," Eds. Trotta, Madrid, 2002, p. 89.

<sup>6</sup> Abramovich, Victor; Courtis, Christian; *ob. cit.* p. 202.

<sup>7</sup> Sentence: 0005-09-DTI-CC, of the Constitutional Court, May 14, 2009.

In respect of domestic law, the Constitution contemplates some general principles, such as the supremacy of the Constitution, from which a hierarchy of laws applicable to the entire legal framework can be deduced. Specifically, the Constitution states: "International treaties ratified by Ecuador shall be subject to the Constitution."

In Title VIII, Article 416, in reference to international relations, the Constitution of the Republic has defined several principles of international relations, among which we highlight:

1. Declares the judicial independence and equality of the State, the peaceful coexistence and the self-determination of the people, as well as cooperation, integration and solidarity.
6. Establishes the principle of universal citizenship, the freedom of movement of all inhabitants of the world, and the progressive termination of the condition of "migrant" as an element giving rise to unequal relationships between nations, particularly in the Northern-Southern context.

#### Scope of the constitutional analysis

In the case at hand, the Court will be exercising an abstract constitutional control, to the extent that the purpose is to guarantee the harmony and consistency of the legal framework, of which international treaties ratified after the elimination of procedural and substantial normative unconformities with constitutional standards, form a part.

#### Formal control

In the case at hand, the President of the Republic has requested a sentence in respect of the constitutionality of the Agreement on Social Security between the Kingdom of Spain and the Republic of Ecuador, in accordance with the provisions set forth in Article 438, numeral 1. Therefore, the Plenary of the Constitutional Court for the Transition Period, shall decide if the Agreement on Social Security between the Kingdom of Spain and the Republic of Ecuador, signed in Madrid on December 4, 2009, does or does not require legislative approval.

The text of the aforementioned agreement appears on pages 1 to 24 of the record.

The Plenary of the Constitutional Court for the Transition Period is competent to hear and issue the corresponding sentence, in accordance with the provisions set forth in Article 438, numeral 1, of the Constitution of the Republic, which states that the Constitutional Court shall issue a prior and binding declaration in respect of the constitutionality of international instruments, prior to the approval of such instruments by the National Assembly, in accordance with Article 75, numeral 3, paragraph d, and Article 107 of the Organic Law of Judicial Guarantees and Constitutional Control, and Article 71 of the Regulation on the Rules of Procedure of the Constitutional Court, which establishes the methods of constitutional control in respect of international instruments, among which reference is made to prior constitutional control.

Constitutional control in respect of international instruments must be undertaken prior to their perfection and ratification by the National Assembly. Article 419, numeral 4, of the Constitution is applicable to the case at hand. Such control is comprehensive, given that the Court must analyze the procedural and substantive impacts of the "Agreement," in the context of the Constitution, and decide whether or not the agreement is compatible with the Constitution in order for the Assembly to proceed to approve or not to approve its ratification, which eliminates the possibility of a *post facto* analysis through a public unconstitutionality action. Finally, it should be noted that this control mechanism is automatic and unavoidable due to the constitutional mandate set forth in Article 438,

which provides for this control mechanism prior to submission to the National Assembly for its approval, in accordance with Article 108 of the Organic Law of the Legislative Branch, which states that: The ratification or rejection of treaties or other international instruments shall require the prior approval of the National Assembly, in those cases in which:

Art. 419, numeral 4, of the Constitution of the Republic.- Referring to those rights and guarantees established in the Constitution.

#### Material control

The Court will take into account the following considerations in respect of its constitutionality analysis of the "Agreement on Social Security between the Kingdom of Spain and the Republic of Ecuador," noting in principal part that:

In accordance with Articles 417, 424 and 425 of the Constitution, the principle of supremacy of the Constitution establishes the supremacy of the Constitution of the Republic in respect of international agreements, which, with the exception of international agreements on human rights, shall be subject to the constitutional normativity of Ecuador.

Given that all persons, authorities and institutions are subject to the Constitution, and all judges, administrative authorities and public servants are required to directly implement its provisions and those provided for in international human rights instruments, it is this Court's duty to compare the Constitution of the Republic to the content of the provisions of the Agreement signed between the Kingdom of Spain and the Republic of Ecuador.

One of the State's primary responsibilities is to: 2.- Guarantee, with no discrimination whatsoever, the effective enjoyment of the rights set forth in the Constitution and international instruments, in particular the rights to education, health, food, social security and water for the State's inhabitants.

In accordance with this mandate, Article 11 of the Constitution of the Republic provides that:

"2.-All persons are equal and shall enjoy the same rights, duties and opportunities." (Art. 11.2.) The State shall adopt affirmative action measures that promote real equality for the benefit of the rights-bearers who are in a situation of inequality."

Article 3 states that: "The State's primordial duties are:1. Guaranteeing without any discrimination whatsoever the true possession of the rights set forth in the Constitution and in international instruments, especially the rights to education, health, food, social security and water for its inhabitants [...]."

"Article 10.-Persons, communities, peoples, nations and communities are bearers of rights and shall enjoy the rights guaranteed to them in the Constitution and in international instruments [...]."

"Article 11.- The exercise of rights shall be governed by the following principles:

"4. No legal regulation can restrict the contents of rights or constitutional guarantees.

"9. The State's supreme duty consists of respecting and enforcing respect for the rights guaranteed in the Constitution."

Article 32 states that: “Health is a right guaranteed by the State, the fulfillment of which is linked to the exercise of other rights, among these, the right to water, food, education, sports, work, social security, healthy environments and others that support well-being.”

“The State shall guarantee this right by means of economic, social, cultural, educational, and environmental policies; and the permanent, timely and non-exclusive access to programs, actions and services promoting and providing integral healthcare, sexual health, and reproductive health. The provision of healthcare services shall be governed by the principles of equity, universality, solidarity, multiculturalism, quality, efficiency, effectiveness, prevention, and bioethics, with a gender and generational approach.

“Article 33. Work is a right and a social duty, as well as an economic right, source of personal fulfillment and the basis for the economy. The State shall guarantee full respect for the dignity of working persons, a decent life, fair pay and retribution, and performance of a healthy job that is freely chosen and accepted.

“Article 34. The right to social security is a right of all persons and it cannot be waived, and it shall be the State that must bear the prime duty and responsibility to guarantee this right. Social security shall be governed by the principles of solidarity, obligation, universality, equity, efficiency, subsidiarity, adequacy, transparency and participation, to meet individual and collective needs.

“The State shall guarantee and ensure the full and effective exercise of the right to social security, which includes persons who carry out unpaid work in households, livelihood activities in the rural sector, all forms of self-employed and who are unemployed.”

The preceding transcription of the Ecuadorian constitutional normativity demonstrates that one of the fundamental principles of the new constitutional framework is respect for and the guarantee of persons’ rights. Among these is the right of Ecuadorian citizens working in Spain to the protections provided by this Agreement, through which they will be able to access economic benefits from the Spanish social security system, such as: a) Temporary disability benefits in cases of illness and off-the-job accidents; b) Maternity and at-risk pregnancy benefits; c) Permanent disability, retirement and survivors’ benefits; d) Economic benefits derived from occupational accidents and occupational diseases; and e) death benefits. On the other hand, Spanish citizens who work in Ecuador will have access to benefits provided by the Mandatory Social Security system administered by the Ecuadorian Institute of Social Security, such as: a) Maternity benefits; b) Illness benefits; c) Disability, old age and death benefits, including survivors’ pensions for widows and orphans; d) Workplace Risk Insurance in the case of workplace accidents and occupational diseases; and e) funeral benefits.

It is important to note the provisions of Article 4, on equality of treatment, which states that: “Those nationals of each Contracting Party, as well as their family members or beneficiaries, shall be subject to and shall benefit from Social Security in the territory of the other Contracting Party, under the same conditions as the nationals of that Contracting Party, without prejudice to the specific provisions set forth in this Agreement.”

Article 5, in respect of the accumulation of coverage periods, states that: “1. When the legislation of a Contracting Party subordinates the acquisition, reservation or recuperation of a right to economic payments in the form of a contribution at the end of a determined period of coverage, the Competent Institution shall take into account for such purposes, as necessary, the coverage periods completed in accordance with the laws of the other Contracting Party, as if they were coverage periods completed in accordance with the laws of the first Contracting Party, provided that such periods do not overlap...”

Article 6 refers to the payment of economic benefits to beneficiaries abroad, stating that: “1. Unless otherwise provided in this Agreement, economic benefits shall not be subject to reduction, modification, suspension or retention due to the fact that the beneficiary is present in or residing in the territory of the other Contracting Party, and any corresponding payments shall be made by the Contracting Party that has granted such benefits, to the financial entity designated by the beneficiary.”

These provisions emphasize that the worker, and his or her family members or beneficiaries, shall be subject to the same benefits and conditions as those workers who are nationals of the other Contracting Party, and establishes that the calculation of economic benefits shall be accounted for based on the totality of coverage periods completed in accordance with the laws of the other Contracting Party.

Finally, the Miscellaneous Provisions (Article 24), Transitional Provisions (Article 31) and Final Provisions (Article 33) are consistent with the text of the Ecuadorian Constitution.

#### Constitutionality of the Agreement

Among the fundamental responsibilities of the Ecuadorian State is to: “Guarantee, without any discrimination whatsoever, the effective enjoyment of the rights set forth in the Constitution and international instruments, in particular the rights to education, health, food, social security and water for the State’s inhabitants [...],” as per the provisions of Article 3, numeral 3, of the Constitution of the Republic, which applies the *pro homine* principle, in respect of which all legal standards, both domestic as well as those arising from international instruments to which our country is a party, must be consistent with the Constitution, and particularly in respect of the fundamental guarantees and rights of persons. It is evident that in handing down the present sentence, which deals with the highly important right to social security, it is the State’s duty to provide the appropriate mechanisms to provide for the full exercise of this right, and more so when taking into account that some of the beneficiaries of this Agreement are our compatriots.

The objective of the Agreement on Social Security between the Kingdom of Spain and the Republic of Ecuador is to ensure that all workers of each of the two States who exercise or have exercised a professional activity in the other State, a more complete guarantee of their rights. This objective is framed as such in Official Letter No.T.5237-SNJ-10-726, from the National Legal Secretary, which states: “the objective of the Agreement is to ensure that nationals of each Contracting Party, as well as their family members or beneficiaries, shall be subject to and shall benefit from Social Security in the territory of the other Contracting Party, under the same conditions as the nationals of that Contracting Party, without prejudice to the specific provisions set forth in this Agreement.”

It is important to note that the right to social security is a right that is interrelated with other fundamental rights that are also protected by the Constitution of the Republic, primarily such rights as: the right to a dignified standard of living; the right to equality; the right to health; the right to work; and the right to social security.

For the reasons set forth above, and considering that one of the primary responsibilities of the State of Ecuador is to guarantee, with no discrimination whatsoever, the effective enjoyment of the rights set forth in the Constitution, in which social security plays an important role for the effective enjoyment of the right to well-being (*el buen vivir*), and that the provisions contained in the present Agreement do not restrict the content of any other constitutional rights or guarantees, the Constitutional Court has performed its interpretative analysis of the Agreement in respect of the



interest of citizens both foreign and national, who, as employees, have the right to live with dignity and to receive benefits from an adequate social security system.

### III. DECISION

In light of the foregoing, in service of the administration of justice and by the authority vested in it by the Constitution of the Republic of Ecuador, the Constitutional Court for the transition period issues the following:

#### SENTENCE:

1.- Whereas, the Agreement on Social Security between the Kingdom of Spain and the Republic of Ecuador requires the prior approval of the National Assembly, given that it is encompassed within the cases contemplated by Article 419, numeral 4, of the Constitution of the Republic.

2.- The provisions contained in the Agreement on Social Security between the Kingdom of Spain and the Republic of Ecuador, signed by Ecuador on December 4, 2009, in the city of Madrid, Spain, are compatible with the Constitution of the Republic of Ecuador; as a result, the constitutionality of the Agreement is hereby declared.

3.- The record of the proceedings shall be sent to the President of the Republic.

4.- So notified, so published, so ordered.

Signed.) Dr. Patricio Pazmiño Freire, President.

Signed.) Dr. Arturo Larrea Jijón, General Secretary.

Confirmation: I hereby confirm that the preceding Decision was approved by the Plenary of the Constitutional Court for the Transition Period, with seven votes in favor of the following judges: Luís Jaramillo Gavilanes, Patricio Herrera Betancourt, Hernando Morales Vinuesa, Nina Pacari Vega, Ruth Seni Pinoargote, Edgar Zárate Zárate y Patricio Pazmiño Freire, with Alfonso Luz Yunes and Manuel Viteri Olvera not being present, in the court's session of Thursday, July 22, 2010. I hereby certify.

Signed.) Dr. Arturo Larrea Jijón, General Secretary.

CONSTITUTIONAL COURT.- This is a faithful copy of the original.- Reviewed by \_\_\_\_\_ -  
Signed.) Illegible signature.- Quito, July 28, 2010.- Signed.) The General Secretary.

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