

**QUESTIONNAIRE SUR LES QUESTIONS DE DROIT INTERNATIONAL PRIVÉ RELATIVES AU
STATUT DES ENFANTS, NOTAMMENT CELLES DÉCOULANT DES CONVENTIONS DE
MATERNITÉ DE SUBSTITUTION À CARACTÈRE INTERNATIONAL**

établi par le Bureau Permanent

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**QUESTIONNAIRE ON THE PRIVATE INTERNATIONAL LAW ISSUES
SURROUNDING THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM
INTERNATIONAL SURROGACY ARRANGEMENTS**

drawn up by the Permanent Bureau

*Document préliminaire No 3 d'avril 2013 à l'attention
du Conseil d'avril 2014 sur les affaires générales et la politique de la Conférence*

*Preliminary Document No 3 of April 2013 for the attention
of the Council of April 2014 on General Affairs and Policy of the Conference*

**QUESTIONNAIRE SUR LES QUESTIONS DE DROIT INTERNATIONAL PRIVÉ RELATIVES
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INTRODUCTION

This Questionnaire is addressed to Members of the Hague Conference and other interested States in fulfilment of the mandate provided by the Council on General Affairs and Policy of the Conference ("the Council") in April 2012, following consideration of Preliminary Document No 10 of March 2012.¹ The Council requested that the Permanent Bureau "continue the current work under the 2011 Council mandate and further prepare and distribute a Questionnaire in order to obtain more detailed information regarding the extent and nature of the private international law issues being encountered in relation to international surrogacy arrangements, as well as in relation to legal parentage or "*filiation*" more broadly. The Questionnaire shall seek views on the needs to be addressed and approaches to be taken. The Permanent Bureau is invited to present its final Report to the Council in 2014".²

A detailed chronology of the background to this project is available on the website of the Hague Conference < www.hcch.net >, under "The Parentage / Surrogacy Project", then "Chronology of the Project (including relevant documentation)".

This Questionnaire has **five parts**:

- **Part I** contains questions on the internal law concerning the establishment and contestation of legal parentage in Member and interested States;
- **Part II** looks to the private international law ("PIL") and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage;
- **Part III** addresses the particular challenges concerning International Surrogacy Arrangements³ ("ISAs");
- **Part IV** considers the current bilateral or multilateral instruments in the field; and
- **Part V** asks for thoughts on possible future work in this area.

Please note that the Permanent Bureau has used the same terminology in this Questionnaire as that which was used in the **Glossary** annexed to Preliminary Document No 10 of March 2012. This Glossary is accessible on the webpage of the project, "The Parentage / Surrogacy Project", then "Chronology of the Project (including relevant documentation)" and then "2011 – 2013".

The Permanent Bureau invites responses to the Questionnaire (in either English or French) by no later than **1 August 2013** in order to allow the Permanent Bureau sufficient time to consider the responses and to prepare the final Report requested by Members for the Council of 2014. Answers should be sent by e-mail to < secretariat@hcch.net > with the following heading and indication in the subject field: "Questionnaire – Parentage / Surrogacy – [name of Member, State or territorial unit, where applicable]".

It is acknowledged that this is a detailed Questionnaire and that, due to the legal position in some States, it may not be possible for Members and interested States to respond to all of the questions. The Permanent Bureau is extremely grateful for any information which may be provided. It is also hoped that the detailed information in the responses to this Questionnaire may be of use to Members beyond this project: for example, where consideration is being given, now or in the future, to domestic legislation in any of the areas considered below.

¹ Prel. Doc. No 10 of March 2012, "A Preliminary Report on the issues arising from international surrogacy arrangements", drawn up by the Permanent Bureau. See also the earlier Prel. Doc. No 11 of March 2011, "Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements", also drawn up by the Permanent Bureau.

² Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference, 17-20 April 2012, para. 21. The "2011 Council mandate" referred to therein can be found at paras 17 to 20 of the Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference, 5-7 April 2011.

³ See the **Glossary** annexed to Prel. Doc. No 10 of March 2012 (see note 1) for the definition of the terms used in this paper.

Please note: the Permanent Bureau intends, except where expressly asked not to do so, to place replies to this Questionnaire on the website of the Hague Conference.

Identification

Name of State (or territorial unit, where applicable): **SPAIN**

Information for follow-up purposes

Name and title of contact person: Francisco Javier Forcada Miranda, General Directorate of International Judicial Cooperation's legal advisor.

Name of Authority / Office: Spanish Ministry of Justice.

Telephone number: +34913904539

E-mail address: javier.forcada@mjusticia.es

QUESTIONNAIRE

Note: wherever possible, please provide a copy of, or a web-link to, any legislation, rules or case law mentioned in your response, along with a translation into English or French.

Part I: Internal law concerning the establishment and contestation of legal parentage

A. Birth registration

1. Please indicate which authorities in your State are responsible for registering the birth of a child:

Spanish Civil Registry authorities

2. Please briefly describe the procedure for birth registration in your State, indicating whether such registration is mandatory⁴ and providing details concerning any specific rules which must be complied with (e.g., within what timeframe must a birth be registered, who can register a birth and where must the birth be registered):

In Spain the birth registration is mandatory. This obligation affects to blood relatives up to four degree (father, mother, grand-father, grand-mother, uncle and aunt, and cousins) and to in-law relatives up to second degree (sister-in-law and brother-in-law) and concerning the timeframe within must a birth be registered, the timelimit in Spain to register a birth goes from 24 hours after the birth to 8 days, and between that 8 days and until 30 days an additional motivation should be argued to obtain the inscription. Beyond the so indicated 30 days, it is needed to transmit an specific procedure to register the birth in front of the person in charge of the Civil Registry. The birth must be registered in the Civil Registry Office located in the place where the birth took place or in the residence of the progenitor. Every person having notice of a birth is allowed to ask for registering the birth of a child.

3. Please explain what proof (evidence), if any, of legal *maternity* is required by the authorities in your State in order to register a putative⁵ legal mother:

Please tick all which apply:

- a) Hospital birth record (stating the name of the woman who gave birth to the child)
- b) Sworn statement by the putative legal mother stating that she gave birth to the child
- c) Signed statement by the putative legal mother stating that she gave birth to the child
- d) DNA test to prove a genetic link between the putative legal mother and child
- e) Other: please explain To register a putative legal mother are needed the following documents: In case of matrimonial children the declaration of the person having known of the birth, the hospital birth record, the D.N.I. of both progenitors and the Family book or document duly legalized accrediting the marriage. In the case of non matrimonial children is needed the declaration of both progenitors in person and added documentation to the previously

⁴ See Art. 7 of the United Nations Convention on the Rights of the Child ("UNCRC"), 20 November 1989, which states that, "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."

⁵ "Putative" means "generally considered or reputed to be" and, in this document, is taken to mean the woman or man *claiming or claimed* (where it is not the individual him or herself making the assertion) to be the legal mother or father, respectively, of the child.

indicated: The civil status of the mother should be declared and if there is a previous marriage it should be ruled out the legal paternity presumption supplying the documents concerning marriage certificate and judicial final judgment concerning the divorce or separation. In case of a factual separation, two added witnesses are needed.

4. Please explain what proof (evidence), if any, of legal *paternity* is required by the authorities in your State in order to register a putative legal father:

Please tick all which apply:

- a) Formal acknowledgement⁶ by the putative legal father
- b) Formal acknowledgement by the putative legal father, with the legal mother and / or the child's evidenced consent: please specify
- c) Judicial decision (court order) establishing or confirming legal paternity
- d) Sworn statement by the putative legal father stating that he is the genetic father
- e) Signed statement by the putative legal father stating that he is the genetic father
- f) Signed agreement between the legal mother and putative legal father
- g) DNA test to prove a genetic link between the putative legal father and child
- h) Other: please explain The same as in previous question.

5. What are the legal consequences in the internal law of your State of registering persons in the State records⁷ as the parents of a child?

- a) Those persons are the legal parents of the child for all purposes, unless and until the record is contested, and all the legal consequences which flow from legal parentage in your State will automatically follow (e.g., duty to provide maintenance, inheritance rules, naming rules, etc.):
- b) Other: please explain

6. Are there any penalties for failing to comply with the rules concerning birth registration in your State: for example, misrepresenting to the authorities who are / is the legal parent(s) of the child?

In case of false evidence the person is subject to the civil, criminal and administrative consequences in each case foreseen by law.

7. Is it possible to give birth anonymously in your State?

- Yes
- No

If so, please explain any rules which apply to such an anonymous birth and state what will appear on the child's birth record and / or birth certificate:⁸

⁶ In some States, this is called a "recognition" of paternity: the term "acknowledgement" is used in this document to avoid confusion with the private international law concept of "recognition". See further **Questions 11 et seq.** below.

⁷ It is acknowledged that there are different methods of recording births (and therefore legal parentage) across States, as well as different rules concerning matters such as when birth certificates will be issued, what information should be contained within the certificate and their constitutive value. Where applicable, please provide information concerning the rules in your State.

⁸ In this document, the "birth record" is taken to mean the information concerning the child's birth (including legal parentage) which is stored in the records of the relevant State authority (usually a registry). In contrast, the "birth certificate" is taken to mean the extract from this birth record which is usually given to the legal parent(s) to keep. In some States it may be that the information contained within the birth record is comprehensive (e.g., if the child has been adopted, the birth record will identify the birth parent(s)), whereas the birth certificate may provide only a limited part of this information. See also *ibid.*

B. Establishment of legal parentage

8. Who, upon the birth of a child, is the legal mother *by operation of law* in your State (i.e., with no need for the woman to take any steps to establish her legal maternity)?

- a) The woman who gives birth to the child
- b) The genetic mother (i.e., the woman whose gamete (egg) created the child)
- c) There is no legal mother *by operation of law*: please explain
- d) Other: please explain

9. Who, upon the birth of a child, is the legal father *by operation of law* in your State (i.e., with no need for the man to take any steps to establish his legal paternity)?

- a) The husband of the woman who gave birth is *presumed* to be the legal father
- b) The male partner of the woman who gave birth is *presumed* to be the legal father – please provide any conditions (e.g., the couple must be cohabiting, etc.)
- c) The genetic father (i.e., the man whose gamete (sperm) created the child)
- d) There is no legal father *by operation of law*: please explain
- e) Other: please explain According articles 115 to 119 Spanish Civil Code, On determination of matrimonial filiation:

Article 115. Maternal and paternal matrimonial parentage shall be legally determined:

1. By registration of the birth together with that of the parents' marriage.

2. By a final judgment.

Article 116. Children born after the marriage is made and before three hundred days after the dissolution thereof, or after the legal or de facto separation of the spouses, shall be presumed to be children of the husband.

Article 117. If the child should be born within 180 days following performance of the marriage, the husband may destroy the presumption by declaring otherwise in a public instrument executed within six months of his becoming aware of the birth.

The cases where he should have expressly or implicitly acknowledged his paternity, or should have been aware of the woman's pregnancy prior to performing the marriage shall be excepted from the foregoing, save when, in the latter case, such declaration in a public instrument should have been executed, with the consent of both spouses, prior to the marriage or subsequently thereto, within six months following the birth of the child.

Article 118. Even in the absence of the presumption of paternity of her husband as a result of the spouses' legal or de facto separation, parentage may be registered as matrimonial with the consent of both.

Article 119. Filiation shall become matrimonial from the date of the marriage of the parents, when the latter should take place subsequently to the birth of the child, provided that the fact of the parentage should be legally determined in accordance with the provisions of the following section.

The provisions of the preceding paragraph shall, as the case may be, benefit the descendants of the deceased child.

According articles 120 to 126 Spanish Civil Code on the determination of non-matrimonial parentage:

Article 120. Non-matrimonial parentage shall be legally determined:

1. By recognition before the officer in charge of the Civil Registry, in a will or in another public document.
2. By resolution issued in proceedings processed in accordance with the Civil Registry legislation.
3. By final judgment.
4. In respect of the mother, where maternal filiation should be provided in the registration of birth performed within the requisite period, in accordance with the provisions of the Civil Registry Law.

- Article 121. Recognition made by incapable persons or persons who cannot marry by reason of their age shall require judicial approval, after hearing the Public Prosecutor, to be valid.
- Article 122. When a parent should recognize a child separately, he shall not be entitled to declare the identity of the other parent therein, unless this should already be legally determined.
- Article 123. Recognition of a child who is of legal age shall not be effective unless the latter's express or implied consent is obtained.
- Article 124. The effectiveness of recognition by a minor or incapable person shall require the express consent of his legal representative or judicial approval, after hearing the Public Prosecutor, and of the legally recognized parent.
- No consent or approval shall be necessary if recognition should have been made by will or within the period provided to register the birth. The registration of paternity thus practiced may be suspended at the mere request of the mother during the year following the birth. If the father should request confirmation of the entry, judicial approval, after hearing the Public Prosecutor, will be required.
- Article 125. When the minor's or incapable person's parents should be siblings or consanguineous relatives in direct line, upon legal determination of filiation in respect of one, such filiation may only be legally determined in respect of the other prior judicial authorization, which shall be granted, after hearing the Public Prosecutor, when it should be in the interest of the minor or incapable person. When the latter should reach full capacity, he may, pursuant to statement in a public instrument, invalidate this last determination if he should not have consented to it.
- Article 126. Recognition of a child already deceased shall only be effective if his descendants should consent to it, by themselves or by means of their legal representatives.

If legal presumptions operate in your State, please specify in what circumstances, if any, it is possible to "rebut" these presumptions: See previous answer.

10. a) Is it possible in your State for a non-contentious (*i.e.*, unchallenged) application to be made to the relevant State authorities for a decision (sometimes called a "declaration") establishing or confirming the legal parentage of a child?

- Yes – go to **Question 10 b).**
- No – go to **Question 11.**

- b) Please explain to which State authorities such an application should be made:

- i. The authority responsible for birth registration (see **Question 1** above)
- ii. The judicial authorities (*i.e.*, the courts): please specify
- iii. Other State administrative authorities: please specify
- iv. Other: please explain

- c) Please explain who may bring such an application:

- i. Only the individuals currently considered to be the legal mother and / or father and / or the child
- ii. Any person claiming to be the legal mother and / or father of a child
- iii. Any person determined by the State authorities to have sufficient interest to bring a claim: please explain how the authorities determine this question:
- iv. Any person
- v. Other: please explain

- d) Is there a timeframe within which such an application must be made?

- Yes, please specify:
- No
- In certain situations: please explain

11. Is it possible in your State for a putative legal father to "voluntarily acknowledge"⁹ his legal paternity (if his legal paternity has not arisen by operation of law - see **Question 9** above)?

- Yes
- No

If so, please explain (1) if there are any restrictions placed upon who may undertake such an acknowledgement (e.g., it must be the genetic father, the man must be over a certain age, etc.), (2) the procedure for undertaking such an acknowledgement, and (3) whether the consent(s) of the mother and / or child are required:

See answer to questions 8 and 9

In particular, please state whether it is possible for an individual to acknowledge legal paternity to representatives of your State authorities in another country (e.g., usually to the consulate or embassy in that State). Please explain the procedure and whether there are any conditions which must be fulfilled:

12. Is it possible in your State for a putative legal mother to "voluntarily acknowledge" her legal maternity?

- Yes
- No
- Not applicable - legal maternity always arises by operation of law (see **Question 8** above).

If so, please explain (1) if there are any restrictions placed upon who may undertake such an acknowledgement (e.g., it must be the genetic mother, the woman must be over a certain age, etc.), (2) the procedure for undertaking such an acknowledgement, and (3) whether the consent(s) of any others is / are required:

See answer to question 8

In particular, please state whether it is possible for an individual to acknowledge legal maternity to representatives of your State authorities in another country (e.g., usually to the consulate or embassy in that State). Please explain the procedure and whether there are any conditions which must be fulfilled:

13. Please explain the legal consequences in your State of a "voluntary acknowledgement" of legal parentage:

- a) Once the acknowledgement is authenticated by the State authorities, the author of the acknowledgement is considered a legal parent of the child for all purposes
- b) The acknowledgement is merely a declaration by the author that he / she is a legal parent and says nothing of the State's acceptance of that issue

⁹ See note 6 above.

c) Other: please specify

14. Is it possible for legal parentage to be established by agreement between the putative parents?

- Yes
- No

If so, please explain the procedure which must be undertaken and specify any restrictions which operate:

15. Is it possible in your State for two persons of the same-sex to be the legal parents of a child?

- Yes
- No

If so, please explain the legal mechanisms available in your State which enable this. Please tick all which apply and provide a brief explanation of the rule(s) and procedure. This may arise by:

- a) Operation of law: The woman who gave birth
- b) Order of the court or other State authorities: Just in case.
- c) Adoption: The woman married with the other woman who gave birth. It is allowed in Spain adoption by same sex marriages and couples.
- d) Other: It is possible the establishment of matrimonial parentage within a same sex marriage. It is possible for a same sex couple to establish non matrimonial parentage concerning for example the woman who did not give birth.

C. **Establishment of legal parentage where assisted reproductive technology ("ART")¹⁰ has been used¹¹**

16. Is ART permitted in your State?

- Yes, all forms of ART are permitted
- Yes, but there are certain restrictions on the services available and who may access these services: please specify
- No, all forms of ART are completely prohibited – **please go to Section D.**
- Other: please explain ART is permitted in Spain where the Law on Assisted Human Reproduction Techniques, No. 14/2006 (May 27, 2006) prohibits cloning for reproductive purposes, defines concept of pre-embryo and lists ART in an open way to allow future techniques.

17. Is there regulation of the use of ART in your State?

- Yes, legislation regulates the use of ART: please briefly explain In Spain, key laws pertaining to ART are the Law on Assisted Human Reproduction Techniques, No. 14/2006 (May 27, 2006) and the Biomedicine Law 14/2007 (July 3, 2007).
- Yes, there are rules or "codes of practice" concerning the use of ART which emanate from the medical regulatory bodies: please briefly explain
- No, there are no rules at all – **go to Question 19**
- Other: please explain

¹⁰ In this document, "assisted reproductive technology" ("ART") is used in a broad sense to refer to any method used to achieve conception which involves artificial or partially artificial means and which is undertaken by a medical / health clinic or institution: e.g., two of the most common methods are artificial insemination and in-vitro fertilisation. Donated gametes (egg and sperm) may be used but will not always be necessary. In this document, ART does not refer to "do-it-yourself" or "DIY" methods of non-procreative conception: i.e., where medical third parties are not involved in the procedure.

¹¹ Please note: surrogacy arrangements are dealt with separately in **Section D** below.

18. If ART is regulated in your State, please state whether the legislation or rules specify the following matters (please tick all which apply and provide a brief explanation, where applicable):

- a) Who may access ART services (e.g., relationship status; age or health requirements; nationality / residency requirements, etc.):
- b) Who may perform ART services:
- c) The regulation of medical or other institutions which perform ART services (e.g., the licensing of clinics or hospitals):
- d) Which ART services may be performed:
- e) Whether egg donation is permitted and, if so, under which conditions:
- f) Whether sperm donation is permitted and, if so, under which conditions:
- g) The costs of ART (including the amount paid to any gamete donors):
- h) The anonymity of gamete donors: The right to know the own biological origin in Spain is enshrined under article 10.1 Spanish Constitution and for adoptive children under article 180.5 Spanish Civil Code after legal reform provided by Act 52/2007 but in ART cases the Spanish Law 14/2006 still guarantees anonymity concerning the donor of genetic material even in excepcional cases as in art 5.5 Act 14/2006.
- i) The right of the child to know his / her genetic or birth origins:
- j) The legal parentage of any child born as a result of ART (see also **Questions 19 to 22** below)
- k) Other: please explain A remision to Spanish Act 14/2006 is needed in all cases for more details.

19. Please explain the consequences of ART for legal *maternity* arising by operation of law:

- a) The woman giving birth to the child will always be considered the legal mother of the child, irrespective of any ART which has led to the birth
- b) Other: please specify According articles 7 to 9 LAW 14/2006 of 26 May on assisted human reproduction techniques:

Article 7. Parentage of children born with techniques of assisted reproduction.

1. The parentage of those born with assisted reproduction techniques are governed by civil laws, with the proviso of the specifications in the three following articles.
2. In any case, the inscription within the Civil Registry will reveal data of which we can infer the nature of generation.
- 3.- When the woman were married with another woman, in absence of legal or factual separation, the last one will be able to declare in the presence of the people in charge of the habitual residence's Civil Registry office, that acknowledges the fact that as soon the child of her spouse is born, the parentage will be establish in her favour concerning that child.

Article 8. Legal determination of parentage.

1. Neither the progenitor woman nor her husband parent when they have previously, expressly and formally give consent to a specific fertilization with donor or donors contribution may contest the matrimonial parentage concerning the child born as a result of such fertilization.
2. Undoubted writing is considered, to the effects foreseen in Article 49 of the Civil Registry Act, the document issued in the authorized service or centre reflecting the consent to fertilization with donor contribution provided by non-marriage male prior to the use of the techniques, safeguarded judicial claim of paternity.
3. Disclosure of donor identity in cases that proceed according to Article 5.5, does not imply any legal determination of parentage.

Article 9. Husband Predecease.

1. It cannot be established legally parentage nor recognize effect or legal relationship between the child born by the application of the techniques covered in this law and husband died when his reproductive material it is not inside the woman's uterus at the time of the death of the man.
2. Notwithstanding the preceding paragraph, the husband may provide his consent, in the document referred to in Article 6.3, in deep or in pre-instructive document, so that their reproductive material can be used within 12 months following his death to fecundate his wife. This generation will produce legal effects arising from matrimonial parentage. The consent for the use of the techniques in those circumstances may be revoked at any moment prior to the use of them. The consent provided according previous paragraph, it is presumed to be provided when the survivor spouse had been subjected to an assisted reproduction technique already initiated for the transfer of pre-embryos prior to the death of the husband.
3. The non-marriage male is able to use the possibility foreseen in the previous paragraph, and that consent could be used to initiate the article 49 Civil Registry Act expedient safeguarded judicial claim of paternity.

Article 10. Surrogacy maternity.

1. Will be null and void the contract establishing surrogacy agreement, commercial or altruistic, by which result a woman renounces to her maternal parentage in favour of intending parent or other.
2. The parentage of children born in cases of surrogacy agreement will be determined by birth.
3. It is safeguarded a possible legal reclamation of paternity regarding the biological father, according to general rules.

Please explain whether the above position results from legislation, rules, case law or other source(s) of law:

20. Please explain the consequences of ART for legal *paternity* arising *by operation of law*:

Please tick all boxes which apply:

- a) The husband of the woman giving birth following ART is the legal father of the child born: please state whether it is necessary for him to have formally consented to the treatment:
- b) The male partner of the woman giving birth following ART is the legal father of the child born: please state whether it is necessary for him to have formally consented to the treatment:
- c) The genetic father will always be the legal father:
- d) Other: please explain According articles 7 to 9 LAW 14/2006 of 26 May on assisted human reproduction techniques:

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1. The parentage of those born with assisted reproduction techniques are governed by civil laws, with the proviso of the specifications in the three following articles.
2. In any case, the inscription within the Civil Registry will reveal data of which we can infer the nature of generation.
- 3.- When the woman were married with another woman, in absence of legal or factual separation, the last one will be able to declare in the presence of the people in charge of the habitual residence's Civil Registry office, that acknowledges the fact that as soon the child of her spouse is born, the parentage will be establish in her favour concerning that child.

Article 8. Legal determination of parentage.

1. Neither the progenitor woman nor her husband parent when they have previously, expressly and formally give consent to a specific fertilization with donor or donors contribution may contest the matrimonial parentage concerning the child born as a result of such fertilization.
2. Undoubtedly writing is considered, to the effects foreseen in Article 49 of the Civil Registry Act, the document issued in the authorized service or centre reflecting the consent to fertilization with donor contribution provided by non-marriage male prior to the use of the techniques, safeguarded judicial claim of paternity.
3. Disclosure of donor identity in cases that proceed according to Article 5.5, does not imply any legal determination of parentage.

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1. It cannot be established legally parentage nor recognize effect or legal relationship between the child born by the application of the techniques covered in this law and husband died when his reproductive material it is not inside the woman's uterus at the time of the death of the man.
2. Notwithstanding the preceding paragraph, the husband may provide his consent, in the document referred to in Article 6.3, in deep or in pre-instructive document, so that their reproductive material can be used within 12 months following his death to fecundate his wife. This generation will produce legal effects arising from matrimonial parentage. The consent for the use of the techniques in those circumstances may be revoked at any moment prior to the use of them. The consent provided according previous paragraph, it is presumed to be provided when the survivor spouse had been subjected to an assisted reproduction technique already initiated for the transfer of pre-embryos prior to the death of the husband.
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2. The parentage of children born in cases of surrogacy agreement will be determined by birth.
3. It is safeguarded a possible legal reclamation of paternity regarding the biological father, according to general rules.

Please explain whether the above position results from legislation, rules, case law or other source(s) of law:

21. Please explain whether gamete donors are, in any situations, considered the legal parent(s) of a child born as a result of ART:

See previous answer to 19 - 20 questions.

22. If your State permits same-sex couples to access ART services, please specify the consequences concerning legal parentage for any child born to a same-sex couple who have used ART to conceive a child:

See previous answer to 19 - 20 questions

23. Is information available concerning how many ART procedures are undertaken in your State each year and how many children are born as a result?

Yes: please provide a copy of, or a link to, the information

No

Other: please explain The Comisión Nacional de Reproducción Humana Asistida can be consulted to this end.

D. Surrogacy arrangements

Regulation of surrogacy

24. Does your State permit surrogacy arrangements?

- a) Yes, *all* forms of surrogacy arrangements are permitted:
 - i. As a result of express legislation or rules: please specify
 - ii. By default, because surrogacy is unregulated in internal law.
Go to **Question 26.**
- b) No, any form of surrogacy is expressly prohibited by law: please specify, including any sanctions for breach of this prohibition: Surrogacy arrangements are expressly prohibited according the current Spanish Legislation Art. 10.1 Law 14/2006 of 26 May, on human assisted reproduction techniques. Surrogacy arrangements reached in contravention of the law are void and unenforceable in terms of their legal effects. For that reason, general rules concerning legal parentage will apply to any child born as a result of such an arrangement. The gestational, surrogate mother will be considered the legal mother and this is not contestable. Besides, according art. 177.2.2 in fine Spanish Civil Code, in cases of adoption, the consent of the mother may not be given until after 30 days have elapsed from the birth. At the criminal level, there are a punishment to these situations under article 221. In Spain, the Organic Act 10/1995, Dated 23rd November, on the Criminal Code, inside the CHAPTER II devoted to the topic: "On pretended birth of a child and on alteration of the paternity, status or condition of the child", establishes under arts. 220 to 222 the following: Article 220 1. A pretended birth shall be punished with imprisonment of six months to two years. 2. That same punishment shall be imposed on whoever conceals or delivers a child to third parties to alter or change the parentage thereof. 3. Swapping one child for another shall be punished with imprisonment from one to five years. 4. Ascendants, by nature or adoption, who commit the acts described in the preceding three Sections may be punished, in addition to the punishment of special barring from exercise of parental rights they may have in relation to the child or descendent supposed, concealed, delivered or substituted, and, when appropriate, to the rest of their offspring or descendants, for a term from four to ten years. 5. Swapping one child for another arising at hospitals or social health centres due to serious negligence by those responsible for their identification and custody shall be punished with a sentence of imprisonment of six months to one year. Article 221 1. Those who, for a financial consideration, deliver a child, descendent or any minor to another person, even though there is no bond of affiliation or consanguinity, eluding the legal procedures for safekeeping, fostership or adoption, in order to establish a similar relation to that of filiation, shall be punished with imprisonment from one to five years and to special barring from exercise of parental rights, guardianship, care or safekeeping for a term from four to ten years. 2. The same punishment shall apply to punish the person receiving that child and the intermediary, even though the delivery may have taken place in a foreign country. 3. Should the acts be committed using crèches, schools or other premises or establishments where children are cared for, those found guilty shall have the punishment of special barring from practice of those activities imposed for a term from two to six years, and temporary or definitive closure of the establishments may be ordered. The term of temporary closure may not exceed five years. Article 222 An educational or medical practitioner, authority or public officer who, while carrying out the duties of his profession or office, acts as described the preceding two Articles,

shall incur the punishment stated therein and also that of special barring from public employment and office, profession or trade, from two to six years. For the purposes of this Article, the term medical practitioner includes doctors, midwives, nursing staff and any other person who carries out health or social-health activities.

Go to **Question 26.**

- c) It depends upon the nature of surrogacy arrangement (e.g., commercial surrogacy arrangements are prohibited): please specify
- d) Other: please specify

Please provide any clarification, where necessary:

25. If your State has legislation or rules permitting certain or all forms of surrogacy arrangements:

- a) Are the parties to the surrogacy arrangement required to obtain State approval of the arrangement *prior* to conception?
 - Yes, pre-approval by the relevant State authorities is required. Please explain the procedure:
 - No, pre-approval is not required – the rules only regulate legal parentage following the birth of the child. Please explain the procedure:
 - Other: please specify
- b) Please state whether the following aspects of the surrogacy arrangement are regulated in the rules / legislation:

Please tick all which apply:

- i. Who may be intending parents¹² to an arrangement, including:
 - a. Nationality, domicile or residency requirements:¹³ please specify
 - b. Marital or other relationship status:
 - c. Age requirements:
 - d. Health requirements:
 - e. Psycho-social requirements:
 - f. Other:
- ii. Who may be a surrogate mother, including:
 - a. Nationality, domicile or residency requirements:¹⁴ please specify
 - b. Marital or other relationship status:
 - c. Age requirements:
 - d. Health requirements:
 - e. Psycho-social requirements:
 - f. The surrogate mother must already have her own children:
 - g. Other:

¹² Please note that, for simplicity, this document always refers to intending parents in the plural form. However, it is understood that, in some States and in certain circumstances, single persons may enter into a surrogacy arrangement. Please specify this, where relevant, in any response.

¹³ See **Parts II** and **III** below for questions concerning the private international law rules regarding legal parentage and international surrogacy arrangements, respectively.

¹⁴ See **Parts II** and **III** below for questions on the private international law rules concerning legal parentage and international surrogacy arrangements, respectively.

- iii. Which types of surrogacy arrangements are permitted, e.g., traditional and / or gestational,¹⁵ etc.: please specify
- iv. Which medical institutions or clinics may facilitate a surrogacy arrangement (where medical intervention is necessary for the type of surrogacy arrangement being undertaken) and the level of financial remuneration which may be paid for these services: please specify
- v. Which other bodies or persons may facilitate a surrogacy arrangement (e.g., by acting as an intermediary and undertaking tasks such as advertising for surrogate mothers, "matching" surrogate mothers with intending parents, organising certain aspects of the arrangements for the intending parents, etc.) and whether such bodies or persons may receive financial compensation for their services: please specify

- vi. Whether financial remuneration can be paid to the surrogate mother:
 - a. No financial remuneration at all is permitted
 - b. Only reasonable expenses may be paid: in which case please state whether the legislation or rules define what are such "reasonable expenses":
 - c. Compensation beyond reasonable expenses is permitted: please specify what exactly is permitted:
- vii. Whether the surrogacy arrangement is contractually enforceable: please specify
- viii. Who may make decisions concerning the pregnancy (e.g., whether an abortion should be undertaken in certain situations, what medical treatment should be undertaken if problems arise, etc.): please specify
- ix. The legal parentage of the child following his / her birth (see further **Questions 26 to 30** below):
- x. Other: please specify
- c) Please explain any legal consequences, both criminal (e.g., penal sanctions) and civil (e.g., for the legal parentage of the child), if the requirements set down in the legislation or rules are not complied with:
- d) Please provide any additional information you think necessary concerning the nature of the regulation of surrogacy in your State:

Surrogacy and legal parentage

26. Upon the birth of a child following a surrogacy arrangement, who is / are the legal parent(s) *by operation of law* (i.e., without any further steps being taken by any individuals) according to the internal law of your State?

Please explain, including whether this results from legislation, case law or other source(s) of law: Resulting from legislation, legal parentage in these cases is determined by birth and therefore the mother who gave birth to the child is considered the person to have acquired the legal status of being the parent plus the spouse or couple according domestic law and with the caveat concerning the action to establish the paternity regarding the biological father.

¹⁵ See the **Glossary** for the definition of the terms used in this paper.

27. Where necessary, are there any legal mechanisms in your State to enable intending parents to establish their legal parentage?

Please tick all which apply:

- a) Yes, prior to the birth the intending parents can seek a court order declaring that they will be the parents of the child born to a surrogacy arrangement (a "pre-birth order").

Please specify any legal requirements to obtain such an order (including any nationality / domicile / residency requirements) and state whether this position arises from legislation, case law or other source(s) of law:

- b) Yes, *following* the birth the intending parents can seek a court order transferring legal parentage to them (in some States, known as a "parental order" or "parentage order").

Please specify any legal requirements to obtain such a transfer of legal parentage (including any nationality / domicile / residency requirements) and state whether this position arises from legislation, case law or other source(s) of law:

- c) No
- d) Other: please specify
- e) Such mechanisms are unnecessary – the surrogacy contract is sufficient to establish the legal parentage of the intending parents.
- f) Such mechanisms are unnecessary – the intending parents will be the legal parents upon the birth of the child by operation of law: see the response to **Question 26** above.

28. Where a surrogacy arrangement has been undertaken in your State, will the fact of the surrogacy arrangement be visible on the child's birth record and / or certificate?

- Yes: please describe exactly what will be on the record and / or certificate
- No: please explain Surrogacy is expressly prohibited by law.

29. Is information available concerning how many surrogacy arrangements take place in your State each year and how many children are born as a result?

- Yes: please provide a copy of, or a link to, the information
- No
- Other: please explain

30. Are you aware of any illegal practices in your State concerning surrogacy arrangements?

- Yes – please state the practices of which you are aware and, if possible, how frequently they are occurring:
- No
- Other: please explain

E. Contestation of legal parentage

31. Which authority(ies) in your State may determine a dispute concerning legal parentage?

- a) The authority responsible for birth registration (see **Question 1** above)
- b) The judicial authorities (*i.e.*, the courts): please specify Civil jurisdiction

- c) Other State administrative authorities: please specify
- d) Other: please explain

32. Who may bring an action to challenge legal parentage?

- a) Only the individuals currently considered to be the legal mother and / or father and / or the child
- b) Any person claiming to be the legal mother and / or father of a child
- c) Any person determined by the State authorities to have sufficient interest to bring a claim: please explain how the authorities determine this question
- d) Any person
- e) Other: please explain Any person with a legitimate interest shall be entitled to claim declaration of a matrimonial and non-matrimonial parentage manifested by constant possession of status. In absence of the constant possession of status, in case of matrimonial parentage legitimization belongs to the father, mother and son and in case of non-matrimonial parentage legitimization belongs to the child according he law, but the judgment Tribunal Constitutional dated 27.10.2005 in these cases granted legitimization to the progenitor too. To challenge matrimonial father parentage having possession of status, the only legitimate is the husband (136 CC) or the child (137CC) and in the case of challenging matrimonial mother parentage the only legitimate is the mother (139 CC). In case of challenging non matrimonial parentage and if possession of status is absent from family relations, legitimization belongs to those to whom it is prejudicial (140.1 CC) and to intending progenitor or child and affected heirs if there was possession of status.

When there are possession of status

33. Is there a timeframe within which legal parentage must be challenged (*i.e.*, after which time, any challenge to legal parentage is effectively barred)?

- Yes, please specify: In cases of claiming matrimonial parentage there is no timeframe and the action is non-lapsable action or ilimited action. In cases of claiming non matrimonial parentage the action is no ilimited but for life in the case of the son and there is no time limit for the action granted to the father. In the case of challenging matrimonial father parentage having possession of status the time limit granted to the father for challenging is one year after having notice of the facts questioning his paternity according Tribunal Constitutional judgment dated 26.05.2005 and the son has a year time limit to claim counting from record of father parentage in Civil Registry. In absence of possession of status the son and their heirs have action whitout time limit. In case of being challenged matrimonial mother parentage the woman is the only legitimate and there is no time limit in cases envisaged under 139 CC. In the case of challenging non matrimonial parentage in absence of possession of status, people legitimated to challenge are not subjected to a specific time limit (140.1 CC) but if there was possession of status there is a four year time limit starting as of the moment the child anjoys possession of status one parentage has been recorded (140.II CC) and there is a one year time limit for the son after his o her majority (140.III CC).

- No
- In certain situations: please explain

34. On what grounds may legal *maternity* be challenged before the authorities in your State?

- a) Only on the basis that the "mother" did not, in fact, give birth to the child
- b) Only on the basis that the "mother" is not, in fact, the genetic mother of the child (*i.e.*, the woman from whom the gamete (egg) came)

- c) Other: please explain Under Spanish Civil Code, the mother is always the woman who gives birth, in the assumption that she, also, is the genetic mother. Theoretically, this could be challenged -however, there is judicial praxis.

The system of reclamation and contestation of parentage is described under articles 131 to 141 as follows:

Article 131. Any person with a legitimate interest shall be entitled to claim declaration of a parentage manifested by constant possession of status. The case where the claimed parentage contradicts another parentage legally determined shall be excepted therefrom.

Article 132. In the absence of the corresponding possession of status, the claim of matrimonial parentage, that it is a non-lapsable action, corresponds to the father, the mother or the child. If the child should die before the lapse of four years from his reaching full capacity, or during the year following to the discovery of the evidence on which the claim should be based, the action shall pass to his heirs for the time required to complete such periods.

Article 133. The action to claim non-matrimonial parentage, in the absence of the respective possession of status, shall correspond to the child during his whole life. If the child should die before the lapse of four years from his reaching full capacity, or during the year following discovery of the evidence on which the claim should be based, the action shall pass to his heirs for the time required to complete such periods.

Article 134. Exercise of the claim by the child or the parent, in accordance with the preceding articles, shall in any event allow the challenging of contradictory parentage.

Article 135. (abrogated)

Article 136. The husband may exercise the action to contest paternity within one year counting from registration of the parentage within the Civil Registry. Notwithstanding the foregoing, such periods shall not begin to count while the husband is unaware the birth. If the husband should die before the lapse of the period provided in the preceding paragraph, the action shall correspond to each heir for the time remaining to complete such period. If the husband should die without being aware of the birth, the year shall count from the date on which the heir becomes aware of it.

Article 137. Paternity may be contested by the child during the year following registration of the parentage. If he or she should be underage or incapable, the period shall count from his or her coming of age or reaching full legal capacity. Exercise of the action on behalf of the child who is underage or incapacitated shall likewise correspond, during the year following registration of the parentage, to the mother holding parental authority, or to the Public Prosecutor. If possession of status of matrimonial parentage should be absent from family relations, the claim may be filed at any time by the child or his or her heirs.

Article 138. Recognitions which determine matrimonial parentage in accordance with the Law may be contested as a result of a defect of consent, in accordance with the provisions of article 141. The contest of paternity for other causes shall be governed by the rules contained in this section.

Article 139. A woman may contest her maternity by justifying the simulation of the birth, or that the child's identity is false.

Article 140. If possession of status should be absent from family relations, non-matrimonial paternal or maternal parentage may be contested by those to whom it is prejudicial. In the event of existence of possession of status, the contesting action shall correspond to the person who appears as child or parent, and to those who may be affected by the parentage as forced heirs. The action shall lapse by legal action after four years from the date on which the child, after registration of the parentage, should have the corresponding possession of status. Children shall in any event be entitled to exercise the action for one year after having reached full legal capacity.

Article 141. The action to contest the recognition of a child made under error, duress or intimidation shall correspond to the person who granted such recognition. The action shall lapse by legal action after one year from such recognition or from the time in which the defect of consent ceased, and may be exercised or continued by the latter's heirs, if he or her should have deceased, before the lapse of one year.

35. On what grounds may legal *paternity* be challenged before the authorities in your State?

- a) Only on the basis that the "father" is not, in fact, the genetic father of the child (*i.e.*, the man from whom the gamete (sperm) came)
- b) Other: please explain

36. What are the legal consequences of a successful challenge concerning legal parentage?

- a) The decision of the State authorities concerning legal parentage is binding *erga omnes* (*i.e.*, on all persons, for all purposes)
- b) The decision of the State authorities will only be binding for limited, specific purposes: please explain
- c) It depends upon the context in which the challenge has been made (*e.g.*, if in the context of a maintenance claim, it will be binding only as concerns the payment of maintenance): please explain
- d) Other: please explain Parentage that has been determined by a judicial judgment cannot be challenged. As a general rule, article 112 Spanish Civil Code establishes that parentage shall be effective from the moment on which it takes place. Its legal determination shall have retroactive effect, provided that such retroactivity is compatible with the nature of such effects and that the Law does not provide otherwise. In any event, acts executed on behalf of the underage or incapable child by his legal representative before determination of parentage shall remain valid.

37. What happens to a child's birth record and / or birth certificate when legal parentage is successfully challenged?

- a) The birth record and / or certificate is revised and the old record and / or certificate will be permanently deleted
- b) The birth record and / or certificate is amended but the original record and / or certificate is retained
- c) Other: please explain

F. The acquisition of nationality by children

38. How may a child acquire the nationality of your State?

Please tick all which apply:

- a) By birth within the territory of the State
- b) By "descent", where one or both of his / her *legal* parents is / are a national of the State: please explain which law, in this context, will apply to the question of who is / are the child's *legal* parents for the purposes of determining nationality:
- c) By "descent", where one or both of his / her *genetic* parents is / are a national of the State: please explain how the genetic link must be evidenced:
- d) If the child would otherwise be "stateless" (*i.e.*, without the nationality of any other State):¹⁶ please specify

¹⁶ As to which, see note 4 above, citing Art. 7 of the UNCRC.

- e) Other: please specify Concerning acquisition of nationality at birth, in Spain is based mainly on ius sanguinis principle (Art. 17.1º a) Spanish Civil Code). Ius soli principle is applied according to Art. 17.1. c) d) Spanish Civil Code even though parents reside in Spain in an irregular administrative situation. Concerning information on whether acquisition of nationality by children born abroad is preconditioned by mandatory registration of a child's nationality at a diplomatic /consular mission abroad, the answer is no. Acquisition of nationality at birth is automatic. Registration of a child's nationality at a diplomatic /consular mission abroad is needed to obtain a passport. In the case of a child born abroad and only one of the parents is a national, the child is a national too automatically according to Art. 17.1.a) Spanish Civil Code. Registration can be made only with the parent who holds the nationality. Parent-child relationship regarding both parents will be made according to the Spanish domestic law which is the child's nationality law. Acquisition of nationality in case of the birth of a child abroad is not conditioned by any conditions other than the registration of nationality to the competent authority (diplomatic /consular mission). Once the parent-child relationship regarding one of the parents has been established, the child becomes Spanish in an automatic way. In Spain, birth's registration is possible during all life, even after death. If as a consequence of registration a person has a Spanish parent, for that only reason will be Spanish at birth. There are not deadlines to establish the Spanish nationality even in cases when a person is born abroad or is a grown-up. Concerning the question about if the law allows acquisition of a nationality to a child whose mother is a foreigner in case of recognition of paternity by a man who is the national of the State of birth of a child, I have to say that recognition of paternity can be made at any moment. Recognition made by a man who is national at birth of a child whose mother is alien, regardless the child was born inside or outside Spain, will have the consequence to transfer the Spanish nationality to the child that has been recognized. In case of foundlings, a foundling born in Spain is Spanish at birth according to Art. 17.1.c) Spanish Civil Code and in order to avoid stateless situations, Art. 17.1.c) and d) Spanish Civil Code grants nationality at birth for a child who is born to parents who are unknown, stateless, or of unknown nationality. According to Art. 19.1 Spanish Civil Code, the law allows for the acquisition of a nationality "ex lege" for adopted children in case of full adoption. Concerning the following question: Does the law require the option of choice of a nationality for a person when he/she reaches the age of majority or for a certain period after having reached the age of majority, in the case that a person has acquired the nationality of both parents with different nationalities at birth? I have to say that if a person has two or more nationalities (being Spanish one of them), after his or her majority and having habitual residence abroad, the Spanish nationality can be lost if he or she is using exclusively an alien nationality acquired before his or her majority in a period of three years counting since emancipation (Art. 24.1 Civil Code). In case of acquiring the nationality of Latin American countries, Andorra, Filipinas, Guinea Equatorial or Portugal the previous legal provision is not applicable. Furthermore, in Spain the possibility to establish a nationality at a later stage has no deadline or time limit. In fact, legislation on nationality in Spain may lead to dual/multiple nationality in several cases: Ius sanguinis, ius soli, naturalisation and recuperation. Concerning the exchange of information with other State/s on changes in civil status (change of name, marriage, divorce, recognition of paternity, etc.) of the national, if this person also possesses the nationality of that state we can apply Convention CIEC nº 3, 4 September 1958 and Convention nº 23 CIEC and Protocol 6 September 1989 to Convention CIEC nº 3.

G. Legal developments

39. Please state whether the law in your State concerning the matters covered in **Part I** above (i.e., birth registration, establishment and contestation of legal parentage, ART, surrogacy and nationality concerning children) has changed in the past five years, or whether any initiatives are underway (e.g., in government, before parliament or before the courts) to change the law in future:

The current Civil Registry Act dated 8 June 1957 was amended in the past five years by the following Acts: Act 3/2007, 15 March; Act 39/2007, 19 November; Act 54/2007, 28 December; Act 1/2009, 25 March, and Organic Act 2/2009, 11 December.

The new Civil Registry Act 20/2011, 21st July will enter in force on 22 July 2014.

Nationality is regulated under Spanish Civil Code and the last legal changes in the past five years came from Act 36/2002, 8 October; Act 52/2007, 26 December and Real Decreto 1792/2008, 3 November. The Spanish Civil Code contains the main regulation of the subject under Arts. 17 to 28. There are also specific provisions in the Spanish Civil Registry Act. The Civil Code provisions have been amended in 1954, 1975, 1982, 1990 and 2002.

ART is regulated by the Law on Assisted Human Reproduction Techniques, No. 14/2006 (May 27, 2006) and the Biomedicine Law 14/2007 (July 3, 2007). The Act 14/2006 was amended by the following Acts: 3/07, 15 March; 14/07, 3 July and 26/2011, 1st August.

Parentage is regulated under Spanish Civil Code and Civil Procedure Rule and the last change in the Spanish Civil Procedure Rule (articles 764 to 768) in parentage came from Act 13/2009, 3rd November.

40. Please provide any other information you consider relevant concerning cases (reported, or otherwise) or other developments which have occurred in your State in relation to the Questions appearing in **Part I** above.

The most relevant question is that there is a new Law named Civil Registry Act 20/2011, 21st July, that will enter in force on 22.07.2014 and that in Título X, arts. 94 to 100 covers questions on Private International Law in a very detailed way.

Part II: Private international law ("PIL") and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage

A. PIL and co-operation rules concerning birth registration

41. Please explain when the relevant authorities in your State will assume (international) jurisdiction to register the birth of a child:

- a) Only when the child is born on the territory of the State
- b) When at least one of the putative *legal* parents is a national of the State, regardless of the place of birth of the child
- c) When at least one of the putative *genetic* parents is a national of the State, regardless of the place of birth of the child

- d) When the child is considered a national of the State,¹⁷ regardless of the place of birth of the child
- e) Other, please specify: This is a question governed by articles 15 to 22 Spanish Civil Registry Act dated 08.06.1957. In general, in the Registry will be recorded facts affecting Spanish people and facts occurred on the territory of Spain even affecting foreign people. In any case, will be recorded facts occurred outside Spain when the records should serve as basis to records required by Spanish law.

42. When registering a child's birth, which law will the relevant authorities apply to the question of who is / are the legal parent(s) of the child *by operation of law*?¹⁸

- a) The *lex fori* (i.e., the internal law of your State) is always applied by the relevant authorities
- b) If the situation has foreign elements (e.g., the putative parent(s) or child are foreign nationals, or the child was born overseas, etc.), foreign law may, or must, be applied to this question. Please specify the applicable law rules:
- c) Other: please specify According article 9.4 Spanish civil code the nature and content of parentage, including parentage by adoption, and the relations between parents and their children, shall be governed by the personal law of the child and, if this cannot be determined (stateless for instance), by the law of his or her habitual residence.

43. Have your State authorities ever encountered difficulties resulting from a child's birth being registered in two (or more) States (e.g., the child is registered in your State as the State of birth, and in the State of the parents' nationality and the registers conflict)?

- Yes: please explain the circumstances of the case(s) and the difficulties which arose:
- No

44. Are there any bilateral or multilateral¹⁹ agreements in force between your State and any other State such that:

- a. When a child's birth is registered which involves foreign elements (e.g., one or more foreign national parents), this information is communicated to the authorities in the other relevant State?
- Yes: please specify Spain has signed and has in force the following Conventions under the canopy of CIEC: nº 3, 4, 5, 6, 7, 9, 10, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28 and 29, and out of them the nº 3 and nº 24 are specifically connected to the formulated question. Concerning the convention nº 32 is signed but not yet in force.
- There are no formal agreements but this may happen in practice: please explain
- No

¹⁷ As to which, see **Question 38** above.

¹⁸ Please note that the applicable law rules identified in your response to this Question may be the same as the rules you identify in **Question 45** below.

¹⁹ E.g., the *Conventions on the international exchange of information relating to civil status* of 4 September 1958 and of 12 September 1997 or the *Convention on the recognition and updating of civil status booklet*, 5 September 1990, all adopted under the aegis of the International Commission on Civil Status (< www.ciec1.org >).

b. When there are changes to a child's legal parentage *subsequent to birth* registration as a result of steps taken in your State (e.g., due to a subsequent voluntary acknowledgement of paternity in your State, or a contestation of legal parentage, etc.), this information is communicated to the relevant authorities in the State of the child's birth (where this is not your State)?

- Yes: please specify This only occurs when there are bilateral or multilateral agreements in force establishing the communication.
- There are no formal agreements but this may happen in practice:
please explain
- No

B. **PIL rules concerning the establishment of legal parentage**

By operation of law or agreement

45. Does your State have rules specifying which law is applicable to the establishment of legal parentage by operation of law?²⁰

- Yes: please specify According article 9.4 Spanish civil code the nature and content of parentage, including parentage by adoption, and the relations between parents and their children, shall be governed by the personal law of the child and, if this cannot be determined, by the law of his or her habitual residence.
- No: the *lex fori* (i.e., the internal law of the State) will always be applied where a question of legal parentage arises

46. Does your State have rules specifying which law is applicable to the establishment of legal parentage by agreement?

- Yes: please specify
- No: the *lex fori* (i.e., the internal law of the State) will always be applied where a question of legal parentage arises
- Not applicable: it is not possible to establish legal parentage by agreement

By voluntary acknowledgement

47. Please explain in which circumstances your State authorities will consider they have (international) jurisdiction to accept a voluntary acknowledgement of legal parentage by a putative parent:

Please tick all which apply:

- a) When the child is (habitually) resident in your State: please specify
- b) When the child is a national of your State
- c) When the individual acknowledging the child is (habitually) resident in your State: please specify
- d) When the individual acknowledging the child is a national of your State
- e) Other: please specify In the civil jurisdiction, as a general rule, Spanish Courts and Tribunals have jurisdiction when parties have agreed to refer to the Spanish Courts in an express or implied manner or when the defendant's residence is in Spain (in parentage matters this general rule should not apply according Supreme Court judgement dated 15.12.1999). In default of the foregoing rules and in the matters concerning parentage and parental relations, Spanish courts have jurisdiction when the child's habitual place of residence is Spain at the time of the proceedings or when the claimant is Spanish or his habitual place of residence is in Spain. On top of that, Spanish Courts and Tribunals have exclusive jurisdiction concerning the validity or voidance of records made in a Spanish Register and for the recognition and

²⁰ Please note that the applicable law rules identified in your response to this Question may be the same as the rules you identified in **Question 42** above.

enforcement of foreign judgments or arbitration awards in the territory of Spain.

Please specify whether these criteria (*i.e.*, the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled:

- i. At the time of the child's birth
- ii. At the time of the acknowledgement, or
- iii. At another time: please specify at the time the court is seized

48. Which law will be applied to determine: a) the formal validity of the acknowledgement; and b) the substantive validity of the acknowledgement, *i.e.*, whether it validly establishes legal parentage?

Please tick all which apply:

- a) For the formal validity of the acknowledgement:
 - i. The *lex fori* (*i.e.*, the internal law of your State)
 - ii. The law of the State of the child's nationality
 - iii. The law of the State of the (habitual) residence of the child: please specify in cases of a stateless person
 - iv. The law of the State of the putative parent's nationality
 - v. The law of the State of the putative parent's (habitual) residence: please specify
 - vi. Other: please specify
- b) For the substantive validity of the acknowledgement:
 - i. The *lex fori* (*i.e.*, the internal law of your State)
 - ii. The law of the State of the child's nationality
 - iii. The law of the State of the (habitual) residence of the child: please specify in cases of a stateless person
 - iv. The law of the State of the putative parent's nationality
 - v. The law of the State of the putative parent's (habitual) residence: please specify
 - vi. Other: please specify

Please state whether, in relation to a) and / or b), one or more of these laws will be applied (possibly in a "cascade"), with a view to favouring the establishment of legal parentage: no

Please specify, in relation to a) and b), whether these criteria (*i.e.*, the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled: (1) at the time of the child's birth; (2) at the time of the acknowledgement; or (3) at another time (in which case, please specify):

- a) at the time of the acknowledgement
- b) at the time of the acknowledgement

C. PIL rules concerning the recognition of legal parentage established abroad

Birth certificates

49. Please explain when, if ever, a birth certificate drawn up in another State will be recognised in your State as validly establishing the legal parentage of those persons recorded within it (*i.e.*, the recognition of the content of the certificate).²¹

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign birth certificate will be recognised;
- b) the procedure which must be undertaken for recognition;

²¹ It is understood that, from time to time, this issue may arise in the course of other proceedings (*e.g.*, proceedings concerning succession or maintenance).

- c) any conditions for recognition (e.g., the birth certificate must be authenticated by way of legalisation or apostille²²); and
- d) any grounds of *non-recognition*.

The record of a birth concerning Spanish people born abroad in the Spanish Civil Registry, for example, can be obtained by declaration or voluntary acknowledgements or by presentation to the Spanish Civil Registry of a birth certificate drawn up in another State. The recognition is subjected in all cases to the specific International agreement available or in absent of them to the following requirements. In this last case, the recognition of a foreign birth certificate is subjected to certain requirements. According Instrucción dated 18.02.2009 Dirección General Registros y Notariado, the way to record in Spanish Civil Registry these foreign birth certificates is under article 81 Reglamento Registro Civil provisions (Decreto 14.11.1958) avoiding the application of article 9.4 Spanish Civil Code and article 10 Act 14/2006, 26th May, in cases of surrogacy for example. According Instrucción dated 18.02.2009 Dirección General Registros y Notariado the record of a birth certificate drawn up in another State in the Spanish Civil Registry of Spanish people born abroad, implies that the Spanish person in charge of the Spanish Civil Registry has to check the validity of the foreign birth certificate avoiding resort to application of article 954 Spanish Civil Procedure Rule 1881. The foreign birth certificate has to be formally correct by Apostille or legalization process and it is needed certain functional equivalence between registry authorities of both countries. On top of that, the foreign birth certificate must respect Spanish public policy, the jurisdiction of the foreign registry authorities must be checked and has to be supervised that rights of parties involved have been duly respected. Public policy should be take into account under similar provisions like in article 954-3 Spanish civil Procedure rule, article 23 International adoption Spanish Law and 34.1 Regulation Brussels I for example. It is important to stress that once the foreign birth certificate has acceded to the Spanish civil Registry nothing precludes the judiciary to null and void such record and establishing the parentage in the contrary sense. Attention should be paid, on top of that, to the Instrucción dated 18.02.2009 Dirección General Registros y Notariado devoted to the topic of parentage by surrogacy that exacts in these cases a foreign judicial decision establishing parentage to grant access to the Spanish Civil Registry, not being enough with the only foreign birth certificate to be recorded the birth. In this way, the foreign judicial judgment establishing parentage is subjected to a normal exequatur in front of a judge and to be obtained from judicial authorities in Spain unless the judicial foreign judgments has been obtained in a non contradictory procedure, like in "jurisdicción voluntaria" cases in Spain, in which cases the person in charge of the Civil Registry can record the foreign judgment after an incidental control of the judgment that includes control of jurisdiction, formalities, public policy, interest of children and respect to defense rights of parties involved, and that the judgment is not appealable and that the consent given cannot be revoke.

If public policy ("ordre public") is a ground for the non-recognition of a foreign birth certificate, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

Public policy rules should be interpreted in the sense provided by the following legal provisiond among others: like in article 954-3 Spanish civil Procedure rule, article 23 International adoption Spanish Law and 34.1 Regulation Brussels I for example.

Voluntary acknowledgements

²² See, in this regard, the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, available on the Hague Conference website at < www.hcch.net > under "Apostille Section".

50. Please explain when, if ever, a voluntary acknowledgement undertaken in another State will be recognised in your State as validly establishing the legal parentage of the author of the acknowledgement (*i.e.*, the recognition of the content of the acknowledgement).²³

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign acknowledgement will be recognised;
- b) the procedure which must be undertaken for recognition;
- c) any conditions for recognition; and
- d) any grounds of *non*-recognition.

The recognition of the content of the acknowledgment is subject to the same rules previously explained as being part of the foreign birth certificate. The person in charge of the Spanish Civil Registry have to determine the Spanish or foreign applicable law that governs the facts and declarations by applying Spanish conflict of law rules. Article 9.4 Spanish Civil Code should be apply and the people in charge of the Spanish civil Registry have to determine the parentage by way of the correct applicable material law. This is the same way to proceed under article 168 Reglamento Civil Registry (Decreto 14.11.1958) where the people in charge of Spanish civil Registry is forced to control legality and validity of facts referred in acknowledgment.

If public policy ("ordre public") is a ground for the non-recognition of a foreign acknowledgment of parentage, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

Public policy rules should be interpreted in the sense provided by the following legal provisiond among others: like in article 954-3 Spanish civil Procedure rule, article 23 International adoption Spanish Law and 34.1 Regulation Brussels I for example.

Decisions of judicial authorities

51. Please explain when a decision of the relevant judicial authority of another State establishing a child's legal parentage (*i.e.*, a court judgment or order) will be recognised in your State as validly establishing legal parentage.²⁴

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign decision will be recognised;
- b) the procedure which must be undertaken for recognition;
- c) any conditions for recognition; and
- d) any grounds of *non*-recognition.

In this cases is needed the exequátor to be obtained from Spanish judicial authorities if the judicial decisión has been obtained in a contradictory procedure. As it was said previously, if the judicial foreign judgments have been obtained in a non contradictory procedure, like in "jurisdicción voluntaria" cases in Spain, in which cases the person in charge of the Civil Registry can record the foreign judgment after an incidental control of the judgment that includes control of jurisdiction, formalities, public policy, interest of children and respect to defense rights of parties involved, and that the judgment is not appealable and that the consent given cannot be revoke. If the judicial foreign judgments have been obtained in a contradictory procedure, article 83 Reglamento Civil Registry (Decreto 14.11.1958) exacts to resort to Spanish exequátor procedure under articles 951 to 958 Spanish Civil Procedure Rule 1881 where the habitual controls have to be made by the judiciary: jurisdiction,

²³ It is understood that, from time to time, this issue may arise in the course of other proceedings (e.g., proceedings concerning succession or maintenance).

²⁴ *Ibid.*

formalities, public policy, reciprocity, the judgment is not appealable and obtained not in a default of appearance procedure, and control of legality.

If public policy ("ordre public") is a ground for the non-recognition of a foreign decision, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

Public policy rules should be interpreted in the sense provided by the following legal provisiond among others: like in article 954-3 Spanish civil Procedure rule, article 23 International adoption Spanish Law and 34.1 Regulation Brussels I for example.

52. Please specify the effects of the recognition of the legal parentage established abroad (see **Questions 49 to 51** above) and which law(s) govern(s) these effects:

Once the recognition has been made, Spanish law governs the effects of parentage. As it was said, in the case of a foreign birth certificate that have acceded to the Spanish civil Registry nothing precludes the judiciary to null and void such record and establishing the parentage in the contrary sense. The same occurs in cases of incidental recognition like in decisions coming from jurisdicción voluntaria procedures or similar but if the parentage was established in a judicial foreign judgment obtained in a contradictory procedure, that have passed the exequáatur, their effects are the same of any Spanish judgment concerning res judicata and so on.

D. PIL rules concerning the contestation of legal parentage

53. Please explain when the relevant State authorities (which you identified in **Question 31** above) have (international) jurisdiction to determine a dispute concerning a child's legal parentage:

- a) When the child whose parentage is disputed is (habitually) resident in your State: please specify
- b) When the child whose parentage is disputed is a national of your State
- c) When a putative parent disputing legal parentage is (habitually) resident in your State: please specify
- d) When a putative parent disputing legal parentage is a national of your State
- e) Other: please specify In the civil jurisdiction, as a general rule, Spanish Courts and Tribunals have jurisdiction when parties have agreed to refer to the Spanish Courts in an express or implied manner or when the defendant's residence is in Spain (in parentage matters this general rule should not apply according Supreme Court judgement dated 15.12.1999). In default of the foregoing rules and in the matters concerning parentage and parental relations, Spanish courts have jurisdiction when the child's habitual place of residence is Spain at the time of the proceedings or when the claimant is Spanish or his habitual place of residence is in Spain. On top of that, Spanish Courts and Tribunals have exclusive jurisdiction concerning the validity or voidance of records made in a Spanish Register and for the recognition and enforcement of foreign judgments or arbitration awards in the territory of Spain

Please specify whether these criteria (i.e., the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled:

- i. At the time of the child's birth
- ii. At the time the relevant State authorities are seised with the dispute, or
- iii. At another time: please specify

54. In the context of a contestation of legal parentage, which law will the authorities apply to the question of who is / are the legal parent(s) of a child?

Please tick all which apply:

- a) The *lex fori* (i.e., the internal law of your State)
- b) The law of the State of the child's nationality
- c) The law of the State of the (habitual) residence of the child:
please specify in case of a stateless person
- d) The law of the State of the putative parent's nationality
- e) The law of the State of the putative parent's (habitual) residence:
please specify
- f) Other: please specify

Please state whether one or more of these laws will be applied (possibly in a "cascade"), with a view to favouring the establishment of legal parentage: no

E. "Cross-border reproductive care"²⁵ and the consequences for legal parentage

55. If persons resident in your State access ART services in another State, are there any specific PIL rules concerning the establishment of the legal parentage of the child born as a result (e.g., the law of the State in which the ART service was obtained will apply to the question of the child's legal parentage)?

- Yes: please explain
- No
- Other: please explain In Spain, the Spanish law is applicable to ART made in Spain according Act 14/2006, 26th May, as a territorial principle very frequent at international level. Concerning conflict of law rules, article 9.4 Civil Code is applicable in international cases and people born using ART are considered to be children of the people indicated by personal law of the child. Is needed a reference to articles 7 to 9 of 14/2006, 26th May, dedicated to establish parentage in cases of ART.

56. Are you aware of any cases, other than international surrogacy cases (see **Part III** below), where difficulties concerning the establishment or recognition of a child's legal parentage have arisen as a result of individuals resident in your State accessing ART services in another country, or individuals resident abroad accessing ART services in your State?

- Yes: please provide details
- No

F. Legal developments and practical challenges

57. Please state whether the law in your State concerning the matters covered in **Part II** above (i.e., the PIL and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage) has changed in the past five years, or whether any initiatives are underway (e.g., in government, before Parliament or before the courts) to change the law in future:

The most relevant question is that there is a new Law named Civil Registry Act 20/2011, 21st July, that will enter in force on 22.07.2014 and that in Título X, arts. 94 to 100 covers questions on Private International Law in a very detailed way.

²⁵ In this paper, "cross-border reproductive care" is taken to mean when person(s) who wish to access ART services cross a border to do so, for whatever reason (often it is linked with the restrictive rules in their "home" jurisdiction, lower costs or better success rates abroad).

58. Other than cases involving international surrogacy arrangements (as to which see **Part III** below), are there any other cases of which you are aware where difficulties have arisen in your State in relation to establishing, contesting, or recognising a child's legal parentage as a result of the cross-border movement of the child and / or his / her putative parents?

(Some possible examples can be found at Part IV (b) of Prel. Doc. No 11 of March 2011.)

Please provide as much detail as possible concerning the situation which arose and the difficulties encountered:

Part III: The particular challenges concerning International Surrogacy Arrangements²⁶ ("ISAs")

This Part asks for information regarding the experience of State authorities with ISAs. It is divided into two sections:²⁷

- **Section A** asks a number of questions concerning "**Incoming cases**" of ISA: i.e., those cases in which your State was the State of residence of the intending parents, and the State to which it was sought to bring child(ren), born to a surrogate abroad, to live.
- **Section B** continues with questions concerning "**Outgoing cases**" of ISA: i.e., those cases where your State was the State in which the surrogate mother gave birth and from which the child(ren) needed to leave to travel to the State of residence of the intending parents in order to live with them in that State.

A. Incoming cases²⁸

- This Section is inapplicable – there have been no "Incoming cases" of ISA in this State. Go to Section B.**

Basic empirical data

59. Do you have any information concerning:

- a) The number of **Incoming cases** of ISA which have required the assistance of your State authorities in recent years?
- Yes – please provide any figures available:
 Pre-2009
 2009
 2010
 2011

²⁶ See the **Glossary** for the definition of the terms used in this paper.

²⁷ Please note: it is understood that, in relation to both "Incoming" and "Outgoing" cases, there may be more than two States involved in a particular case: e.g., the surrogate may be resident in a different State to the State in which she travelled (or, in some cases, was trafficked) to give birth; in other cases, a gamete donor may be resident in a third State etc. Please explain any such elements in your responses to the questions in this part.

²⁸ I.e., those cases where your State was the State of residence of the intending parent(s), and the State to which it was sought to bring the child(ren), born to a surrogate abroad, to live.

2012

2013 (so far)

No information is available

- b) How many children have been born to surrogate mothers in another State as a result of ISAs involving intending parents resident in your State?

Yes – please provide any figures available:

Pre-2009

2009

2010

2011

2012

2013 (so far)

No information is available

If you have provided any figures above, please comment upon whether you consider that these figures reflect the true number of Incoming cases of ISA involving your State²⁹ and, further, please provide a general comment concerning the prevalence of Incoming cases of ISAs and whether such cases have increased in the past five years:

If you have not provided figures above, are you able to provide any comment concerning the prevalence of Incoming cases of ISAs involving your State and / or whether this has increased in the past five years: I can imagine that these cases have increased in the past five years but still the question remained as affecting a minority.

60. Please list all the States in which intending parents resident in your State have engaged a surrogate mother (*i.e.*, entered into an ISA), insofar as you are aware:

The procedure for Incoming cases of ISA

61. Please explain the procedure, including any immigration and legal processes, which intending parents resident in your State need to undertake (before leaving your State, before returning to your State or upon return to your State, as applicable) in order to:

- a) Enter your State with a child born abroad as a result of an ISA:

No special requirements are needed. The problem is at the level of accessing to the Spanish Civil Registry of a birth certificate issued abroad, being the woman who gave birth a surrogate mother, for example.

- b) Reside permanently in your State with the child:

No special requirements are needed. The problem is at the level of accessing to the Spanish Civil Registry of a birth certificate issued abroad, being the woman who gave birth a surrogate mother, for example.

- c) Have their legal parentage recognised (or established) under the law of your State (*if this is possible*):

²⁹ Since it is recognised that there may be many cases which do not come to the attention of the State authorities.

Spain is a State which apply a "conflicts of law" or "recognition" method to the question of legal parentage established in the child's State of birth. If the request of the intending parents is rejected the real situation between them and the child is similar to the placement of children.

Please include an estimate of the time it may take to complete each stage of this process:

- a) No estimate is available
- b) No estimate is available
- c) No estimate is available

If the answer to this question varies depending upon the factors set out below, please provide a brief explanation, including the impact the particular factor has on the procedure which must be undertaken and any timeframes.

Please tick all which apply:

- i. The country in which the child was born: please explain
- ii. The particular document(s) produced by the intending parents to establish their legal parentage (e.g., a birth certificate, voluntary acknowledgement, court decision, etc.): please explain
- iii. Whether the child(ren) is / are genetically related to one or both of the intending parents: please explain
- iv. The nationality of the intending parents: please explain
- v. Any other factor: please explain

62. Have your State authorities engaged in cross-border administrative or judicial co-operation with the authorities in any other State in order to resolve an ISA case?

- Yes – please specify:
 - a) Which authorities in each State were involved:
 - b) The nature of the co-operation:
 - c) Whether the co-operation resulted from legislation, guidelines or practice:
 - d) The result:
- No

63. In your experience, which documents are generally produced to your State authorities to substantiate the claim of the intending parents to an ISA to legal parentage?

Please tick all which apply:

- a) A birth certificate from the State of birth, including the name(s) of the intending parents: please state from which countries these birth certificates originate and any other details necessary:
- b) An amended birth certificate from the State of birth, including the name(s) of the intending parents: please state from which countries these amended certificates originate and any other details necessary:
- c) A pre-birth court order from the State of birth: please state from which countries these orders originate and any other detail necessary:
- d) A post-birth court order from the State of birth (*i.e.*, transfer of parentage): please state from which countries these orders originate and any other details necessary:
- e) An adoption order from the State of birth: please state from which countries these orders originate and any other details necessary, including whether use of the 1993 Convention³⁰ was attempted by either State³¹:

³⁰ Full title: the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter, "1993 Convention"). For further information, please see < www.hcch.net >, under "Intercountry Adoption Section".

³¹ See the Conclusions and Recommendations of the Special Commission meeting on the practical operation of the 1993 Convention (17-25 June 2010), which concluded that use of the 1993 Convention in cases of international surrogacy arrangements was "inappropriate", paras 25-26.

- f) Other: please specify This is a question governed by Instrucción Dirección General de Registros y del Notariado dated 5th October 2010 and published in Spanish Oficial Journal nº 243 dated 7th October 2010. In all cases at least a foreign judicial decisión on parentage is needed to be subject to an exequátor procedure.

If possible, please state (using the relevant letter) which of the above documents your authorities are presented with most frequently in these cases:

64. In general, what is the outcome of these cases in your State for the child:

Please tick all which apply and provide as much detail as possible:

- a) The child is able to travel to your State and reside there with the intending parents *and* the intending parents are recognised as the legal parents of the child.

Please explain how this is achieved:

- b) The child is able to travel to your State and reside there with the intending parents *but* one or both of the intending parents is not able to be recognised as the child's legal parents: please explain

- c) The child is not able to travel to your State and has to remain in the State of his / her birth: please explain why and what has happened to the children in such cases

- d) Other: please explain In the beginning, the Instrucción de la Dirección General de Registros y del Notariado dated 18th February 2009 faced the question of the access to the Spanish Civil Registry of a birth certificate issued by a Californian authorities admitting two minors born in California as sons of two Spanish males, being the woman who gave birth the surrogate mother, deciding effects in accordance with article 81 Reglamento del Registro civil español. According to judicial judgments dated 15th September 2010 and 23rd November 2011, coming from Juzgado de Primera Instancia nº 5 de Valencia y Court of Appeal Valencia, the registry of a birth certificate in these cases and ordered under Instrucción 18th February 2009 is null and void and was rejected. According a new Instrucción de la Dirección General de los Registros y del Notariado dated 5th October 2010 on parentage by surrogacy, it is possible in these cases to register a foreign birth Certificate producing several documents, specially a foreign civil decision on parentage .

If possible, please state which of the four outcomes above occurs most frequently in your State:

The challenges encountered

65. In general, which of your State authorities are involved in assisting those who encounter difficulties as a result of Incoming cases of ISA?

Please tick all which apply and provide information concerning their particular role:

- a) The embassies / consulates in the State of the child's birth
- b) The immigration authorities
- c) The judicial authorities (*i.e.*, the courts): please specify which
- d) The Ministry of Justice (or equivalent)
- e) The Ministry of Foreign Affairs (or equivalent)
- f) The Ministry of Health (or equivalent)
- g) The Ministry of Social Affairs (or equivalent)
- h) Other: please explain Authorities involved in these cases are the national or consular authorities in charge or Civil Registry and in case a claim is hauled up the competent judicial authorities.

66. Please explain any legal problems your State has encountered in relation to Incoming cases of ISA.

Please tick all boxes which apply and provide explanations, including the other country(ies) involved in the ISA. Where reported cases are referred to please provide the full text of the judgment, including a translation into English or French where possible.

Problems relating to:

- a) The child being able to leave his / her State of birth:
- b) The child being able to enter your State:
- c) The child being able to reside in your State:
- d) The child's nationality:
- e) The child's legal parentage:
- f) The behaviour of any party(ies) which is criminal according to international legal standards or according to the domestic rules of the countries involved (e.g., trafficking, sale of children, exploitation of women, etc.):
- g) The treatment of the surrogate mother in any State (e.g., whether her consent was free and informed, concerning the financial payments made to her, the medical care provided, etc.): please specify
- h) The breakdown of the ISA: e.g., due to either of the parties renegeing on the agreement, for example, due to the child's disability or ill health, the wish of the surrogate mother to keep the child, the relationship breakdown of the intending parents or the clinic using the wrong gametes or another reason, etc.: please explain
- i) Other: please explain According previous explanation under question 64 d), the children arriving in Spain before Instrucción Dirección General de los Registros y del Notariado dated 5th October 2010 on parentage by surrogacy can encounter serious problems to access the Spanish Civil Registry according Spanish case law over Instrucción 18th February 2009 and children arriving in Spain after Instrucción 5th October 2010 can encounter a wall of bureaucracy that may be not consistent with the superior interest of children if in all cases at least a foreign judicial judgment establishing parentage is needed. On top of that, for example, the recent Court of Appeal Madrid judgment dated 1341/2012, 3rd December, sección 24, does not recognize a foreign judicial judgment coming from Colorado for being null and void in Spain the International surrogacy agreement.

Please provide any further information you consider relevant concerning the above problems:

67. Using the categories set out below, please provide any available information concerning the costs intending parents resident in your State have paid for an ISA. If, in your experience, costs have varied significantly depending upon the country in which the surrogate mother resided or gave birth, please specify per country.

Please tick all which apply and provide any known figures and a description of to whom the money was paid and for what service:

- a) Medical costs:
- b) Legal costs:
- c) Fees or other costs paid to an intermediary: e.g., a surrogacy agency:
- d) Expenses and / or other costs paid to the surrogate mother:
- e) Other: please explain No information available on this point

Areas of concern

68. Do any of the following areas give your State authorities cause for concern in these cases?

In each case, where possible, please specify your particular concerns in the field provided:

- a) The uncertainty of the legal status of children born to ISAs, in particular in terms of their legal parentage:
- b) The nationality of children born to ISAs:
- c) The right of children born to ISAs to know their (genetic and birth) origins:
- d) The surrogate mother's free and informed consent to the surrogacy arrangement:
- e) The psychological impact of an ISA on the surrogate mother:
- f) The medical or other care provided to the surrogate mother:
- g) The financial aspects of ISAs:
- h) The competency and / or conduct of the intermediaries involved (lawyers, agencies, etc.):
- i) The (mis)-information provided to intending parents or surrogate mothers:
- j) The eligibility and / or suitability of the intending parents to care for the child (e.g., in terms of age, criminal records, psycho-social suitability, etc.):
- k) Contractual matters: e.g., issues surrounding the enforceability of the surrogacy agreement or the capacity of any of the parties to enter into the agreement:
- l) Other:

Please state (using the letters above) which of the concerns you have identified above are the most troubling: The only one pointed out.

Legal developments

69. Does your State have any legislation, rules or guidance which has been specifically enacted or drawn up for intending parents resident in your State engaging in ISAs?

- Yes: please explain
- No

If your State is contemplating any such legislation, rules or guidance in future, please provide further information: The only exception is the previously cited Instrucción de la Dirección General de los Registros y del Notariado dated 5th October 2010 on parentage by surrogacy,

70. Please provide any other information you consider relevant concerning your State's experience of Incoming cases of ISA:

B. Outgoing cases³²

This Section is inapplicable – there have been no “Outgoing cases” of ISA in this State. Go to Part IV.

Basic empirical data

71. Do you have any information concerning:

- a) The number of **Outgoing cases** of ISA which have required the assistance of your State authorities in recent years?

- Yes – please provide any figures available:
Pre-2009
2009
2010

³² I.e., those cases where your State is the State in which the surrogate mother gives birth and from which the child has to leave to travel to the place of residence of his / her intending parents.

2011
2012
2013 (so far)

- No information is available
- b) How many children have been born to surrogate mothers in your State as a result of ISAs involving intending parents resident in another State?
 - Yes – please provide any figures available:
Pre-2009
2009
2010
2011
2012
2013 (so far)
 - No information is available

If you have provided any figures above, please comment upon whether you consider that these figures reflect the true number of Outgoing cases of ISA involving your State³³ and, further, please provide a general comment concerning the prevalence of Outgoing cases of ISAs and whether such cases have increased in the past five years:

If you have not provided figures above, are you able to provide any comment concerning the prevalence of Outgoing Cases of ISAs involving your State and / or whether this has increased in the past five years?

72. Please list any States in which intending parents, engaging a surrogate mother in your State by way of ISA, have been resident:

The procedure for Outgoing cases of ISA

73. In general, which of your State authorities are involved in assisting those who undertake an ISA with a surrogate mother in your State?

Please tick all which apply and provide information concerning their particular role:

- a) The immigration authorities: please specify
- b) The judicial authorities (*i.e.*, the courts): please specify which
- c) The Ministry of Justice (or equivalent)
- d) The Ministry of Foreign Affairs (or equivalent)
- e) The Ministry of Health (or equivalent)
- f) The Ministry of Social Affairs (or equivalent)
- g) Other: please explain

74. Do foreign-resident intending parents require a visa or any other immigration document(s), or do they have to meet any other conditions, to enter your State to be able to undertake the necessary meetings and medical procedures to enter into an ISA in your State?

Please tick all which apply:

- Yes, they have to meet the following conditions – please specify:
- Yes, they have to obtain a visa or other immigration document(s) – please specify what type of document is required, the conditions for obtaining it and the procedure:

³³ Since it is recognised that there may be many cases which do not come to the attention of the State authorities.

- No
- It depends upon the State of residence or nationality of the intending parents: please specify

75. Is the law of the State of the habitual residence of the intending parents taken into account in any way when considering whether intending parents are permitted to undertake an ISA in your State (e.g., where this law forbids surrogacy arrangements).³⁴

- Yes – please explain how this law is taken into account:
- No
- It depends upon the State of residence or nationality of the intending parents: please explain

76. How do foreign-resident intending parents, who are party to an ISA, obtain legal parentage for a child born to a surrogacy arrangement in your State?

Your response to this question will likely depend upon your answer to Questions 26 to 27 above.

Please tick all which apply:

- a) They will be the legal parents by operation of law and therefore their names will be placed immediately on the child's birth certificate: please explain
- b) They can obtain an amended birth certificate: please explain
- c) They can obtain a pre-birth court order confirming their legal parentage: please explain any conditions for obtaining such an order
- d) They can obtain a post-birth court order (i.e., a transfer of parentage): please explain any conditions for obtaining such an order
- e) They can adopt the child: please explain, including whether use of the 1993 Convention has been attempted in this regard³⁵
- f) Other: please specify

Please explain the procedure for any of the options ticked above and any specific requirements which apply to *foreign*-resident intending parents:

Please further specify whether the surrogate mother's consent, and her husband or partner's consent where applicable, is required for any of these procedures and the consequences if this consent is not forthcoming at the relevant time:

77. Please explain the procedure, including any immigration and legal processes, which foreign-resident intending parents need to undertake in order to *leave* your State with a child born to a surrogacy arrangement:

Please state the time it may take to complete this process:

³⁴ E.g., see clause 34(19) of the *Indian Assisted Reproductive Technologies (Regulation) Bill 2010* still pending, explained in Prel. Doc. No 10 of March 2012 (note 1) at para. 45. In addition, the recent Indian visa requirements now impose on foreign nationals visiting India to undertake a surrogacy arrangement, a condition to similar effect: i.e., that the intending parents must have a letter from the embassy of their State of residence indicating that the State recognises surrogacy and that the child born will be permitted to enter this State. See also the Ukrainian Draft Law No 0989 (former No 8282) on the restrictions pertaining to the use of assisted reproductive technology (rejected by the Parliament of Ukraine on 21 March 2013). This bill also envisaged, in particular, restrictions on the use of surrogacy arrangements for nationals of those States where surrogacy is prohibited by law.

³⁵ See note 31 above concerning the 2010 Special Commission meeting on the practical operation of the 1993 Convention which concluded that use of the 1993 Convention in cases of international surrogacy arrangements was "inappropriate".

If the answer to this question varies depending upon the factors set out below, please provide a brief explanation, including the impact the particular factor has on the procedure which must be undertaken and any timeframes.

Please tick all which apply:

- a) The country in which the intending parents live: please explain
- b) The particular document(s) produced by the intending parents to establish legal parentage (e.g., a birth certificate, voluntary acknowledgement, court decision, etc.): please explain
- c) Whether the child(ren) is / are genetically related to one or both of the intending parents: please explain
- d) The nationality of the intending parents: please explain
- e) Any other factor: please explain

78. Have your State authorities engaged in cross-border administrative or judicial co-operation with authorities in any other State in order to resolve an ISA case?

Yes – please specify:

- a) Which authorities in each State were involved:
- b) The nature of the co-operation:
- c) Whether the co-operation resulted from legislation, guidelines or practice:
- d) The result:

No

79. In general, what is the outcome of these cases in your State for the child?

Please tick all which apply:

- a) The child is able to leave your State, travel to the State of residence of the intending parents, reside there with the intending parents *and* the intending parents are recognised as the legal parent(s) of the child.
Please explain how this is achieved:
- b) The child is able to leave your State, travel to the State of residence of the intending parents, reside there with the intending parents *but* one or both of the intending parents are not able to be recognised as the child's legal parents: please explain
- c) The child is able to leave your State but is not able to travel to the State of residence of the intending parents and has to remain in your State: please explain what has happened to the children in such cases
- d) The child is not able to leave your State: please explain why and what has happened to the children in such cases
- e) Other: please explain

If possible, please state which of the five outcomes above occurs most frequently in your State:

The challenges encountered

80. Please explain any legal problems your State has encountered in relation to Outgoing cases of ISA.

Please tick all boxes which apply and provide explanations, including the other country(ies) involved. Where reported cases are referred to please provide the full text of the judgment, including a translation into English or French where possible.

Problems relating to:

- a) The child being able to leave your State:

- b) The child being able to enter the State in which his / her intending parents are resident:
- c) The child being able to reside in the State in which his / her intending parents are resident:
- d) The child's nationality:
- e) The child's legal parentage:
- f) The behaviour of any party(ies) which is criminal according to international legal standards or according to the domestic rules of the countries involved (e.g., trafficking, sale of children, exploitation of women, etc.):
- g) The treatment of the surrogate mother in any State (e.g., whether her consent was free and informed, concerning the financial payments made to her, the medical care provided, etc.): please specify
- h) The breakdown of the ISA: e.g., due to either of the parties renegeing on the agreement, for example, due to the child's disability or ill health, the wish of the surrogate mother to keep the child, the relationship breakdown of the intending parents or the clinic using the wrong gametes or another reason, etc.: please explain
- i) Other: please explain

Please provide any further information you consider relevant concerning these legal problems:

81. Using the categories set out below, please provide any information you have concerning the costs intending parents resident abroad have paid for an ISA in your State. If, in your experience, costs have varied significantly depending upon the country in which the intending parents resided, please specify per country.

Please tick all which apply and provide any known figures and a description of to whom the money was paid and for what service:

- a) Medical costs:
- b) Legal costs:
- c) Fees or other costs paid to an intermediary: e.g., a surrogacy agency:
- d) Expenses and / or other costs paid to the surrogate mother:
- e) Other: please explain

Areas of concern

82. Do any of the following areas give your State authorities cause for concern in these cases?

In each case, where possible, please specify your concerns in the field provided:

- a) The uncertainty of the legal status of children born to ISAs, in particular in terms of their legal parentage:
- b) The nationality of children born to ISAs:
- c) The right of children born to ISAs to know their (genetic and birth) origins:
- d) The surrogate mother's free and informed consent to the surrogacy arrangement:
- e) The psychological impact of an ISA on the surrogate mother:
- f) The medical or other care provided to the surrogate mother:
- g) The financial aspects of ISAs:
- h) The competency and / or conduct of the intermediaries involved (lawyers, agencies, etc.):
- i) The (mis)-information provided to intending parents or surrogate mothers:
- j) The eligibility and / or suitability of the intending parents to care for the child (e.g., in terms of age, criminal records, psycho-social suitability, etc.):

- k) Contractual matters: e.g., issues surrounding the enforceability of the surrogacy agreement or the capacity of any of the parties to enter into the agreement:
- l) Other:

Please state (using the letters above) which of the concerns you have identified above are the most troubling:

Legal developments

83. Does your State have any legislation, rules or guidance which has been specifically enacted or drawn up for intending parents or surrogate mothers engaging in ISAs in your State?

- Yes: please explain
- No

If your State is contemplating any such legislation, rules or guidance in future, please provide further information:

84. Please provide any other information you consider relevant concerning your State's experience of Outgoing cases of ISA:

Part IV: Current bilateral or multilateral instruments in the field

85. Please list any bilateral, regional or multilateral instruments which currently, or may in future, bind your State concerning:

- a) Any matters related to the establishment, recognition or contestation of the legal parentage of children;
- b) Any matters specifically related to surrogacy arrangements;

At the international level, within European Union field, we have the European Parliament's Directorate-General for Internal Policies that produced a Report in 2010 entitled "Recognition of parental responsibility: biological parenthood v. legal parenthood, i.e mutual recognition of surrogacy agreements"; and within the Council of Europe scope it is possible resorting to the Council of Europe 2011 Draft Recommendation on the rights and legal status of children and parental responsibilities.

Please provide any detail you consider necessary:

Part V: Thoughts on possible future work

86. What, if any, are the **needs** you consider ought to be addressed by any possible future global work in this area?

Please specify: The main problem to tackle is how to protect women from exploitation and how to protect the rights of the child to be born to know and live with his or her natural parents. Besides, it is needed to eliminate "limping" legal parentage, to ensure children are able to acquire a nationality and to ensure their right to know

their identity. Another problem is how to overcome the traditional ban to these practices in the vast majority of countries where surrogacy agreements are considered an unethical practice involving in many cases commercial aspects. Another problem is how to create, if it is decided to do it, a reliable legal mechanism to enable one or two of the people involved (genetic, birth and commissioning parents) to be registered as the legal parents. More to the point, it is important to allow the recognition and enforcement of the surrogacy agreements in another countries. This envolve a soft public policy approach that not all Countries seem to be able to do.

87. Please provide your thoughts concerning the **approach** that should be taken in relation to any possible future regulation of any of the matters mentioned in this Questionnaire.

In this response, you may wish to consider and comment upon the thoughts set out in Section VIII of Preliminary Document No 11 of March 2011 and Section IV of Preliminary Document No 10 of March 2012.

*You may also wish to comment upon the **nature** of any possible future regulation: e.g., whether a binding instrument should be considered or whether approaches such as a model law, non-binding principles or guidance, etc. would meet the needs you identified in **Question 86** above.*

Consequences of the international surrogacy agreements are a reality generating problems that need to be addressed. A first barrier we encountered to tackle these problems is how to surmount the general practice banning surrogacy agreements when in the vast majority of countries there is no legal mechanism available, other than adoption, by which adults other than the birth mother and her spouse can take over responsibility for parenting the child. Concerning surrogacy issues, there is no unanimity in Europe against surrogacy, even though it is acknowledged that in the vast majority of European states, surrogacy is effectively illegal. Only a reduced number of states have adopted laws on surrogacy. At the EU internal level, attempts to extend the legal possibility of surrogacy have been made for instance in France, Bulgaria, and Romania but within the EU Greece and the United Kingdom are the only countries that have legislated to make surrogacy possible. The current national and international trends try to re-think ethic questions in order to recommend law changes for expanding legal recognition of surrogacy. Beyond the current domestic legislation in each state, if the reality seems to impose the necessity of enable new legal tools to provide effective solutions to theses cases, the problem is which tools are the most appropriate. Nowadays, beyond mere guidance or non binding principles, it is difficult to think in the reality of binding instruments or model laws, and the possibility of achieving an international convention to harmonize private international rules is only a notion. Maybe the best way to progress will be to resort to cooperation tools and inter-State cooperation case by case to resolve the problems affecting individuals in each case and making possible in some way the recognition of parentage fixed in a country allowing surrogacy agreeemets in other country that bans this possibility.

88. If the Hague Conference were to develop a global instrument on the private international law issues surrounding the status of children (in particular, the cross-border recognition of legal parentage), which of the following general features *may* be desirable to include in such an instrument?

Please tick all which apply (and please note that these features are not mutually exclusive and necessarily overlap):

The child's legal status

- a) Harmonisation of the private international law rules relating to the establishment, recognition and contestation of legal parentage: please comment

- b) Recognition by operation of law of child(ren)'s legal parentage established in one State Party, in compliance with the instrument's rules, in all other States Parties: please comment

Safeguards

- c) The establishment of safeguards (minimum standards) to ensure that any procedures for the establishment, recognition and contestation of legal parentage take place with respect for the fundamental rights and welfare of all parties involved, in particular the child(ren) concerned: please comment

Co-operation

- d) The establishment of a system for co-ordination, communication and co-operation between States in relation to the establishment, recognition and contestation of legal parentage. Such a system may include a clear division of responsibilities between States, as well as the establishment of defined channels for communication between the relevant authorities.

Please comment, including in relation to whether you see a need for the establishment of "central authorities" within such a system:

Other

- e) Other: please specify

89. If the Hague Conference were to develop a global instrument specifically on international surrogacy arrangements,³⁶ which of the following general features *may* be desirable to include in such an instrument?

Please tick all which apply (and please note that these features are not mutually exclusive and necessarily overlap):

The child's legal status

- a) Harmonisation of the private international law rules relating to the establishment, recognition and contestation of legal parentage, limited to legal parentage arising following a surrogacy arrangement: please comment
- b) Recognition by operation of law of child(ren)'s legal parentage established in one State Party following a surrogacy arrangement, in compliance with the instrument's rules, in all other States Parties: please comment
- c) Provisions concerning the child(ren)'s nationality: please comment

Safeguards

- d) The establishment of safeguards (minimum standards) to ensure that such arrangements take place with respect for the fundamental rights and welfare of all parties involved, i.e., the child(ren) to be born, the surrogate mother and intending parents: please comment, including in relation to which elements you consider there ought to be such minimum standards (e.g., the surrogate mother's free and informed consent, the child's right to know his / her origins, etc.)
- e) Safeguards (minimum standards) specifically in relation to the intermediaries involved in such arrangements (e.g., surrogacy agencies, lawyers, etc.). These standards may be combined with a system of licensing and supervision to ensure compliance: please comment

³⁶ See **Part III** of the Questionnaire above.

- f) Safeguards (minimum standards) specifically in relation to medical institutions undertaking the procedures connected with international surrogacy arrangements: please comment

Co-operation

- g) The establishment of a system for co-ordination, communication and co-operation between States in relation to such arrangements. This may include a clear division of responsibilities between States, for example, such that: (a) the competent authorities of the State of the habitual residence of the intending parents would be responsible for determining that the intending parents are eligible to enter into the arrangement, and that any child born as a result will be permitted to enter and reside in their State;³⁷ and (b) the competent authorities of the State in which the surrogate mother habitually resides would be responsible for determining that the surrogate mother is eligible and suitable to enter into the arrangement and that the child will be entitled to leave this State following his / her birth. The co-operation system could also include the creation of defined procedures which must be complied with by the parties to such arrangements.

Please comment, including in relation to whether you see a need for the establishment of "central authorities" within such a system: Central authorities are always connected to such kind of cooperation systems.

Other

- h) Provisions concerning the financial aspects of international surrogacy arrangements: please comment
 i) Other: please specify

90. What priority would you give working towards a future instrument on the private international law issues concerning the status of children (in particular, the cross-border recognition of legal parentage) generally?

- a) High priority / urgent
 b) Medium priority – desirable but not urgent
 c) Low priority – possibly desirable but other projects should take priority
 d) No priority – no further work should be done in this field
 e) Other: please specify

91. What priority would you give working towards a future instrument specifically on the challenges occurring as a result of international surrogacy arrangements?

- a) High priority / urgent
 b) Medium priority – desirable but not urgent
 c) Low priority – possibly desirable but other projects should take priority
 d) No priority – no further work should be done in this field
 f) Other: please specify

92. Please provide any other comment(s) you may have concerning the possible future global regulation of matters contained within this Questionnaire: At the moment, both the European Union and the Hague Conference seem to be reflecting on the idea of wording an international convention on private international law aspects of cross-border surrogacy in order to look for common standards both for substantive and private international law on legal parenthood after surrogacy. The Council of Europe seems to recommend states having laws in this field for making provisions to

³⁷ Following the trend in some States in which international surrogacy arrangements are regularly entered into to take into account the legal position in the State of the habitual residence of the intending parent(s) before permitting the surrogacy arrangement to proceed: see note 34 above.

establish motherhood for legal purposes other than on the basis of the mother who gives birth to the child. Both initiatives should be seriously considered in the future but at the moment the initiative to establish ways of cooperation under the basis of soft public policy attitudes is more realistic.

Thank you for your time: this information will greatly assist the work of the Permanent Bureau.