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GIBRALTAR , THE BREXIT, THE SYMBOLIC SOVEREIGNTY, AND THE DISPUTE. A PRINCIPALITY IN THE STRAITS ?

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I. NEGOTIATION DEADLOCK AND CROSSBORDER COOPERATION – II. GIBRALTAR AND BREXIT: CHANGES IN THE MAIN INTERNATIONAL LEGAL FRAMEWORKS – III. THE NEED FOR A NEW STATUS IN THE EU AND THE KEY ROLE OF SPAIN IN THE ART. 50 WITHDRAWAL NEGOTIATIONS – IV. REMAINING IN THE EU: SCOTLAND AND THE ‘GREENLAND’ MODEL AND THE MICRO STATE-STYLE RELATIONSHIP – V. IS JOINT SOVEREIGNTY A SOLUTION? – VI. A PROVISIONAL *MODUS VIVENDI* – VII. LOOKING FOR NEW IMAGINATIVE PROPOSALS. A PRINCIPALITY IN THE STRAITS? THE SYMBOLIC SOVEREIGNTY FORMULA – VIII. CONCLUSIONS

ABSTRACT. The outcome of the United Kingdom’s ‘Brexit’ referendum on leaving the European Union necessarily entails both a reconsideration of the status of Gibraltar and changes in Spain’s perspective on a solution to the dispute. Following Brexit, negotiations on the UK’s withdrawal from the EU will not only pave the way for a new European and international legal framework, but will also create a historic opportunity for Spain to redefine its relationship with Gibraltar, offering the possibility of new approaches to resolve this historical dispute.

After the crisis of 2013, negotiations reached a stalemate, but the unexpected outcome of the Brexit referendum could have tragic consequences for Gibraltar because the obligation to negotiate the UK’s withdrawal from the EU will likewise oblige Gibraltar to redefine its legal status with the EU, which constitutes the legal framework of greatest practical daily application, together with two other international legal frameworks, namely the Treaty of Utrecht and the UN declaration on decolonisation. The European framework will continue to apply for at least the two years during which withdrawal negotiations are held, providing sufficient legal certainty concerning applicable law in the coming years. However, the effects of uncertainty could have a very negative impact on the economy of Gibraltar, whose population adopted a clear stance in favour of ‘Bremain’ in the referendum. Furthermore, a possible return to the 1713 Treaty of Utrecht has raised fears of the very probable legality of closing the border, at Spain’s instigation, if EU law ceases to be applicable in the future.

The unavoidable renegotiation of the status of Gibraltar within the EU will inevitably involve Spain, which in 1986 did not question the status endowed in 1972. In the present context, however, Spain could leverage the requirement for unanimity at several crucial moments during the process of negotiating British withdrawal as regulated by Art. 50 of the Treaty on European Union (TEU); thus, various possible future scenarios for Gibraltar, such as the Norwegian or Swiss models or the antecedent of Greenland, will depend on Spain’s consent. In addition, solutions that seek to maintain application

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of the European Single Market to Gibraltar would in practice be unworkable in the international arena, because Gibraltar is not part of the British State and its only status under international law is that of a territory awaiting decolonisation in a process supervised by the United Nations.

At the same time, Brexit has opened a window of opportunity for resolving this historical dispute, which encompasses both peaceful coexistence between Spain and the small neighbouring community of Gibraltar just over the border, and the question of sovereignty that underlies the dispute with the United Kingdom. The acting Spanish Government took two important decisions in 2016: it announced the need to negotiate the status of Gibraltar outside the framework of TEU Art. 50, and it proposed joint sovereignty. This historic moment requires strategic decisions supported by broad domestic consensus in Spain, since it is a key issue strongly symbolic of Spanish foreign policy which may have important domestic and international consequences.

Spain now has the opportunity to adopt a strategic approach that incorporates a new narrative and focus for Gibraltar, and which addresses the pending issue of regulating cross-border relations and coexistence with the people of Gibraltar. The unanimous support given in 2016 by all political parties for a European Grouping of Territorial Cooperation (EGTC) with Gibraltar within the EU framework demonstrates that significant changes are possible for cross-border coexistence. Gibraltar and Campo could even adopt a common approach to Brexit and its consequences for Gibraltar and the region, enforcing this in their respective States and the EU as negotiations begin.

The format and content of the joint sovereignty proposal announced by Spain is the same as that of others presented or negotiated previously. But the 2016 Spanish proposal of Joint Sovereignty has structural deficiencies, which make it unworkable in practice. Several objective questions can be raised: UK and Gibraltar have yet rejected this proposal; it was made unilaterally by the conservative Government of M. Rajoy, without looking for previous supporting consensus inside Spain; and the most practical problem which is that the proposal inextricably links cross-border cooperation with the resolution of the sovereignty dispute, this creates an impasse given that both the UK and Gibraltar have already rejected joint sovereignty.

Instead of Joint Sovereignty negotiations as the answer for the Gibraltar question, the article advocates a twofold approach in the current historical negotiating situation for the UK's departure from the EU: a provisional *Modus Vivendi* for cross-border coexistence, and in parallel an agreement to seek a new international and European model for Gibraltar, trying to put an end to historical controversy.

A provisional *Modus Vivendi* for the cross-border coexistence with Gibraltar could be an interim agreement to regulate the aspects that most urgently need the daily normalization. Especially the border crossing by the Border/Fence, but also others such as the issues of transparency and economic-financial collaboration, navigation and jurisdiction over Bay waters, or the use of the airport.

This historic moment could be conducive to moving forwards in new and imaginative ways, with initiatives such as that of 'symbolic sovereignty' formula via the proposed *Principality of Gibraltar* or *City of the British and Spanish Crowns* linked to the EU, which offers sufficient constitutional and international margins for consideration. This proposal of the Two Crowns Principality, linked to the EU, would restore Gibraltar to the Spanish nation and sovereignty, in addition to incorporating it into the EU as part of the Kingdom of Spain, ensuring the maintenance of its current organisation and powers and entailing agreements on Gibraltar's economic and financial regime and British retention of its military bases.

I. NEGOTIATION DEADLOCK AND CROSSBORDER COOPERATION

The UK-Spanish difference over Gibraltar is an entrenched dispute that raises all kinds of international issues. The general deadlock and acute crisis of 2012-2016, which maintained a *status quo* clearly favourable to the UK and Gibraltar, has suddenly changed after the June 23, 2016 referendum supporting a UK withdrawal from the EU. This outcome marks a change of historic proportions for the dispute, because it could disrupt one of the legal, economic and institutional bases of the law that has been consistently applied in Gibraltar since 1973.

The consequent sudden obligation to abolish, change or modify Gibraltar's European status substantively affects and alters the rules of the game, not to mention the very game itself, creating a situation now apparently favourable to Spanish interests in the short, medium and possibly even long term. This represents 'year zero' for Gibraltar, currently in a general state of alarm due to the perceived existential threat², and could be a turning point as regards Gibraltar's relations with Spain, the UK and the EU³.

Negotiations have been in a total deadlock for many years, both bilaterally and multilaterally in the UN. In particular, conflict arose between the neighbouring territories in 2013 with the artificial reef crisis and heavier border controls⁴, leading to the intervention of the European Commission to mediate and enforce EU law. The possibility of *ad hoc* dialogue structures to replace the Trilateral Dialogue Forum of 2004 — which Rajoy's Government

² Fabian PICARDO, "Brexit' would destroy Gibraltar-The Rock could find itself excluded from the main trading bloc and at the mercy of Spain", *Politico*, 03.05.2015.

³ We made a first analysis in "Gibraltar, 'año cero': Brexit, Cosoberanía y nuevas oportunidades de España", *Real Instituto Elcano*, ARI 75/2016, 20.10.2016. <http://www.realinstitutoelcano.org/wps/portal/rielcano_es/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/ari75-2016-delvallegalvez-gibraltar-ano-cero-brexit-cosoberania-oportunidades-espana>.

⁴ VALLE GÁLVEZ, A. del, "The Gibraltar crisis and the measures, options and strategies open to Spain", in *Cuadernos de Gibraltar- Gibraltar Reports* N° 1, 2015, pp. 135-147, and *Real Instituto Elcano*, ARI 32/2013, 30.09.2013; "Gibraltar and the EU: the consequences of the conflict between Spain and the United Kingdom for Gibraltar and the European integration process", en, Eckart D. Stratenschulte (Hrsg.) *Heilsame Vielfalt? formen differenzierter integration in Europe*, Edit Nomos Verlagsgessellschaft, Baden-Baden 2014, pages 193-223

ruled out on assuming power in 2011 — has not materialised since being announced in 2012⁵.

Given Spain's very limited strategic options for Gibraltar⁶, the dispute over sovereignty has reached an impasse, with legal stances that conflict with the need for political dialogue and the support of the Gibraltarian population, whose distrust of Spain has increased with the gradual repeal of Dialogue Forum Agreements, and in particular of the 2006 Cordoba Agreements (annulment of the airport agreement, renewed suspension of European airline regulations from 2014, and closure of the Cervantes Institute in Gibraltar in 2015).

This structural stalemate⁷ reflects stances that in my opinion have reinforced the relatively strong position that the UK (and consequently Gibraltar) had gained in the dispute due to its veto on UN and bilateral negotiations and the Spanish Government's rejection in 2011 of the Dialogue Forum. In addition, after the crisis of 2013 and forty years of democracy in Spain, the United Kingdom may have concluded that the cost of continuing the dispute with Spain was acceptable and that even in very critical moments, the hostility and damage was tolerable in proportion to its main interest: the incalculable strategic value and advantage of maintaining — with the support of the United States — naval and air bases and intelligence operations in the Strait of Gibraltar.

In this context of tension and total disagreement at bilateral and multilateral level, signs emerged at the end of 2015 of a change in attitude at cross border level in Campo de Gibraltar, with the local authorities from

⁵ VALLE GÁLVEZ, A. del, "Gibraltar, de foro tripartito a cuatripartito: entre la cooperación transfronteriza y la soberanía", *Real Instituto Elcano*, ARI n° 21/2012, 23.03.2012.

⁶ VALLE GÁLVEZ, A. del, "Spanish strategic options for Gibraltar, 300 years after the Treaty of Utrecht", Chapter in the book *Britain, Spain and the Treaty of Utrecht 1713-2013*, Edited by Trevor J. Dadson and J. H. Elliott-Studies in Hispanic and Lusophone Cultures- 8 Ed. Legenda: Oxford, 2014, pp. 115-128; "España y la cuestión de Gibraltar a los 300 años del Tratado de Utrecht", *Real Instituto Elcano*, ARI, n° 23/2013, 20.06.2013.

⁷ See the Spanish official position, in the Ministry of Foreign Affairs Official Statement n 129 of 11.05.2016, British Foreign Secretary visits Gibraltar'' in relation with the visit by the British Foreign Secretary, Philip Hammond, to Gibraltar on Wednesday, 11 May 2018. <http://www.exteriores.gob.es/Portal/en/SalaDePrensa/Comunicados/Paginas/2016_COMUNICADOS/20160511_COMU129.aspx>.

all political camps evidencing a willingness to cooperate and the desire for a détente.

This has especially been reflected in new initiatives aimed at fostering effective and practical cooperation, for example the recent creation of the University of Gibraltar⁸ and a European Grouping of Territorial Cooperation (EGTC), within the framework of European regulations. The Cross-Frontier Group / Grupo Transfronterizo (an umbrella association that brings together all trade unions in Gibraltar and the Spanish CCOO and UGT trade unions, as well as the Chamber of Commerce of Gibraltar and Small and Medium Enterprise Associations in Gibraltar and La Linea) has promoted the creation of a specific EGTC to foster close cross-border relations between Gibraltar and the municipalities of Campo de Gibraltar, optimise the potential for cooperation and develop a new model of institutional cross-border relationships based on the interests of citizens living on either side. This initiative has gained the express support of the provincial government of Cadiz⁹, the Association of Municipalities of Campo and local councils of all political colours Campo¹⁰, in addition to the Government of Gibraltar.

The Spanish general election on June 26, 2016, implied changes in Spanish foreign policy on Gibraltar. From the outset, 2016 was always going to be an important year for this historical dispute, which has left an indelible mark on Spanish foreign policy, due to the general elections of December 2015 and then June 2016. It is noteworthy that before the December 22 and June 26, 2016 general elections, the political parties assumed different stances on the subject of Gibraltar. *Partido Popular* seems to have returned quite decidedly to the idea of negotiations on joint sovereignty begun in the Aznar-Blair period, although this was not mentioned in its 2016 manifesto, focused on

⁸ University of Gibraltar, <<http://www.unigib.edu.gi/>>.

⁹ Provincial Government of Cadiz, (Pleno de la Diputación de Cádiz), 17.02.2016, <<http://www.dipucadiz.es/prensa/actualidad/Aprobacion-del-Plan-Provincial-de-Obras-y-Servicios/>>.

¹⁰ “Mancomunidad aprueba la promoción de la Agrupación Europea Territorial de Cooperación”, *Andalucía Información*, 04.03.2016, <<http://andaluciainformacion.es/campo-de-gibraltar/576975/mancomunidad-aprueba-la-promocion-de-la-agrupacion-europea-territorial-de-cooperacion/>>.

continuing the policy initiated in 2012¹¹. *Ciudadanos* has likewise adopted this stance¹², issuing some initial statements that emphasised the primacy of dialogue and economic cooperation in the region¹³, but without offering explicit proposals in its electoral programme. Neither has the *Podemos Party* offered any specific proposals, and apart from a statement on the ‘traffic of nuclear ships’, seems mainly concerned to uphold the traditional complaint about fiscal and economic harm, because in the Foreign Affairs Committee of Congress it emphasised Gibraltar’s status as a tax haven¹⁴. Lastly, the *Socialist Party’s* manifesto laid more stress on cooperation and understanding for coexistence between Gibraltar and Campo de Gibraltar, reviving and returning to the interrupted dialogue¹⁵.

In short, 2016 brought a slight respite to the total deadlock and lack of understanding in evidence since 2013, with a desire for greater understanding and support for the possibility of a EGTC on either side of the border to foster institutional cross-border cooperation at local level, but none of the four major parties has clearly defined a new stance on Gibraltar. However,

11 “España seguirá defendiendo en Naciones Unidas nuestra legítima reclamación de Gibraltar recordando que, como establece dicha organización, el principio aplicable para el proceso de descolonización de ese territorio es la reintegración de la integridad territorial de España. Para ello es preciso que, siguiendo el mandato de Naciones Unidas, Reino Unido acepte retomar las negociaciones en ese sentido. Mantendremos nuestra plena disposición para la puesta en marcha de un mecanismo de cooperación regional ad hoc en la zona en el que, además del Reino Unido y España, estén representados el Gobierno local de Gibraltar, la Mancomunidad de Municipios del Campo de Gibraltar y la Junta de Andalucía, con la Comisión Europea como observadora”, PP Electoral Manifiesto 2016.

12 Proposición no de Ley 162/000205 sobre la cuestión de Gibraltar, Grupo Parlamentario Ciudadanos, *Boletín Oficial de las Cortes Generales*, Congreso de los Diputados, XI Legislatura, Serie D, 29.04.2016, Núm. 64, pp. 18-21 <http://www.congreso.es/public_oficiales/L11/CONG/BOCG/D/BOCG-11-D-64.PDF>

13 *Diario de Sevilla*, 10.03.2015, “Ciudadanos apela al diálogo en Gibraltar- Marín aboga por que Reino Unido y España “saquen rentabilidad” a la riqueza de la comarca”

14 *Diario de sesiones del Congreso de los Diputados*, 2016, XI legislatura núm. 15, Comisión de Asuntos Exteriores, sesión celebrada el miércoles 17 de febrero de 2016, pág. 20, <http://www.congreso.es/public_oficiales/L11/CONG/DS/CO/DSCD-11-CO-15.PDF>.

15 “Reclamar la soberanía de Gibraltar y la aplicación del Derecho Europeo. Asimismo, favorecer los cauces y los foros acordados para resolver problemas de convivencia. En ese objetivo, proponer mantener en el peñón el Instituto Cervantes”, PSOE Electoral Manifiesto 2016.

despite the failure of a new camp to emerge in the dispute during this period of crisis, there is a new actor: the district of Campo de Gibraltar. This region has its own interests, the foremost of which is to avoid the adverse effects of detrimental decisions taken in London or Madrid.

II. GIBRALTAR AND BREXIT: CHANGES IN THE MAIN INTERNATIONAL LEGAL FRAMEWORKS

Above all, Brexit will exert a direct side effect by generating a new framework for the dispute that could change the panorama: the unexpected vote in favour of a UK withdrawal from the EU entails a substantial change in circumstances, despite the overwhelming vote in favour of Remain in Gibraltar, apparently turning the situation around to Spain's advantage.

The negotiations and uncertainty resulting from Brexit serve to reinforce Spanish claims on Gibraltar and weaken those of the UK and Gibraltar. The parameters of the dispute have undergone a radical change. It should be borne in mind that there are three fundamental legal frameworks of the dispute which may be structurally affected: the UN declaration on decolonisation, the bilateral Treaty of Utrecht of 1713 and EU law.

Regarding the UN framework, in principle, the UN's stance remains unchanged. However, the scenario of an obligatory change in Gibraltar's applicable European status will draw attention in the EU to the fact — which Spain could legitimately enforce — that the only international legal status of Gibraltar recognised by the UN and the international community is that of a non-self governing territory awaiting decolonisation which has been administered by the UK since 1946. That year the UK registered, *motu proprio*, Gibraltar as a 'Non-Self-Governing Territory'. This territory was then included on the list of territories pending of decolonization of the Special Committee on Decolonization (Committee of 24). Year after year, since 1964 the UN has insisted that Gibraltar is a territory pending decolonization -a process that requires bilateral negotiations between the UK and Spain-. In that sense, the UN mandate is to maintain negotiations in order to restore Spain's territorial integrity. In this context, the UN has never recognised to Gibraltar's inhabitants the status of 'people' having the right to

self-determination,¹⁶ but instead its own authority to follow up the evolution of the territory¹⁷.

Regarding the bilateral Treaty of Utrecht, one possibility that is a source of concern in Gibraltar is that Spain will decide to close the border after the UK's withdrawal from the EU¹⁸. This situation has been suggested as the main and first consequence of Brexit¹⁹. Although the border cannot be closed at present, such a closure could have a legal basis in the future: the second paragraph of Art. 10 of the Treaty of Utrecht refers to ceding the territory "without any open communication by land with the country round about" for the purpose of importing "goods". As indicated²⁰, this paragraph is currently suspended or inapplicable, superseded by EU law on the free movement of goods and people. Brexit could make it possible to reactivate this paragraph, giving a legal green light to a political decision. Evidently, such a closure can only be contemplated as a future possibility, following negotiation of the UK's withdrawal and a new international treaty, which in turn would entail a new status for Gibraltar in European law. However, as can be seen, hypothetically it would be legally possible to reactivate the second paragraph of Article 10, since Brexit would restore its applicability.

Thus, although the border cannot be closed while EU law is still applicable, once it ceases to be so Spain could regain full control of access by land under the Treaty of Utrecht. Furthermore, the last paragraph of Art. 10

¹⁶ ANDRÉS SÁENZ DE SANTA MARÍA, Paz, "¿Derecho de autodeterminación del pueblo de Gibraltar?" in A del Valle Gálvez – I González García (Eds.) *Gibraltar 300 años*, Cádiz 2004, pp. 85-108. From the same author Paz ANDRÉS "Gibraltar and the Decolonization Law", in *Spain and the Treaty of Utrecht 1713-2013*, Edited by Trevor J. Dadson and J. H. Elliott- Studies in Hispanic and Lusophone Cultures- 8 Ed. Legenda, Oxford, 2014, p. 94-ss.

¹⁷ VALLE GÁLVEZ, A del. "Gibraltar en las Resoluciones y Decisiones de la Asamblea General de la ONU, 1965-2015. algunas valoraciones", en PONS RAFOLS, X. (Dir.), *Las Naciones Unidas desde España --70 aniversario de las Naciones Unidas – 60 aniversario del ingreso de España en las Naciones Unidas*, Madrid 2015, pp. 501-517.

¹⁸ 'Spain 'could close border' after Brexit, Spanish official tells Times' *Gibraltar Chronicle* 30.03.2016, <<http://chronicle.gi/2016/03/spain-could-close-border-after-brexit-spanish-official-tells-times/>>.

¹⁹ MANGAS MARTÍN, Araceli (2016). "¿Brexit? Escenarios internacionales y Gibraltar", DT 9/2016, *Real Instituto Elcano*, 17.06.2016.

²⁰ En "Gibraltar, controles en la Verja y nuevo dialogo ad hoc: la UE se involucra en la controversia", *Real Instituto Elcano* ARI N° 62/2014, 19.12.2014.

of this treaty is interpreted by the United Kingdom to mean that Gibraltar cannot become independent without Spain's consent, which limits Gibraltar's options in the quest for a new kind of relationship with the EU.

Regarding the EU framework, the main structural change to the economic, institutional and legal status of Gibraltar will spring from the UK's future withdrawal from the EU. Legally, everything will continue to operate as before until Gibraltar's new situation is determined. Psychologically, however, great uncertainty has been created, which together with future changes in the legal and economic framework could have a devastating impact on Gibraltar's political, legal and economic situation; even more so than the possibility that Spain could regain control over the border in a few years. Furthermore, a number of problems have already been raised that could affect Spanish workers and the economy in the region. Understandably, Brexit could be seen in Gibraltar as the worst disaster since the Second World War, and one that has rendered the debate on Gibraltar's integration into Schengen irrelevant. For its part, the district of Campo has been highly alarmed by the envisaged withdrawal scenarios, as has been discussed at an inter-ministerial meeting on Gibraltar in the Spanish Ministry of Foreign Affairs²¹.

III. THE NEED FOR A NEW STATUS IN THE EU AND THE KEY ROLE OF SPAIN IN TEU ART. 50 WITHDRAWAL NEGOTIATIONS

The referendum was an act of British domestic law, and was translated into an official British position with the formal notification. The act of international legal relevance to the EU is precisely the notification of withdrawal, which activate all the provisions of the negotiation and withdrawal process established by TEU Article 50 (Article 50.2 begins by noting that "A Member State which decides to withdraw shall notify the European Council of its intention"); this is the act of State *ad extra* with legal relevance for the withdrawal negotiation. In this sense, the British Prime Minister, Theresa

²¹ Ministry of Foreign Affairs, Press Release 161, 12.07.161, 'Interministerial Meeting on Gibraltar', <http://www.exteriores.gob.es/Portal/en/SalaDePrensa/NotasdePrensa/Paginas/2016_NOTAS_P/20160712_NOTA161.aspx>.

May, notified the United Kingdom's intention to leave the European Union, the 29 March 2017²².

The main problem for Gibraltar is that regardless of the UK's eventual new relationship with the EU, there is a separate obligation to establish a new status (or not) for the territory in European law²³.

Clearly, it is the British State that is withdrawing from the EU, and Gibraltar is not part of the State formed by the 'United Kingdom of Great Britain and Northern Ireland'. However, the UK has sovereignty (under the Treaty of Utrecht) and jurisdiction over the territory of Gibraltar (although which parts of the isthmus, rock and waters the UK has a legal claim to sovereignty over remains the subject of debate). Community legislation and EU law in general apply to Gibraltar not because it is part of the UK (as a Member State of the EU), but because Gibraltar is a European territory for whose external relations the UK is responsible. Article 355.3 of the Treaty on the Functioning of the European Union (TFEU) states that "The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible".

Gibraltar has been in the EC/EU since 1973, as part of the UK's membership. The specific position of Gibraltar in the EU has its foundations in the status established in the UK Accession Treaty of 1972. As a result, EU Law is applicable in Gibraltar, with some significant particularities, given that certain parts of the EC Treaty do not apply to Gibraltar. In fact, Gibraltar is excluded from some whole areas of the EU legislation: Customs Union territory; Common Commercial Policy; Rules on the free movement of goods; Common Agricultural Policy and the Common Fisheries Policy; obligation to levy VAT; and the territory of Gibraltar is not part of the Schengen Area, as a consequence of the non-participation of the UK in the Schengen Treaties; this position continues today in the EU (Protocols 20 and 21 to the TEU and the TFEU, by the Treaty of Lisbon). With these exceptions, EU Law is fully applicable, and Gibraltar must comply with all Community legislation

²² 'Full text of Theresa May's letter triggering Article 50 of the Lisbon Treaty', *Politics Home*, 29.03.2017, <<https://www.politicshome.com/news/europe/eu-policy-agenda/brexit/news/84672/full-text-theresa-mays-letter-triggering-article-50>>.

²³ A panorama about Gibraltar and the Brexit in: House of Lords, European Union Committee, *Brexit : Gibraltar*, 21.02.2017, 13th Report of Session 2016-17, HL Paper 116. <<https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/116/116.pdf>>.

that it is not expressly exempt from: transport policy, environment legislation, taxation and other EU policies.

This unique status as European territory was not questioned on the accession of Spain in 1986, although the latter has always upheld its rights and highlighted the indirect effects of the dispute in the field of EU law.

The most important issue is that Gibraltar entered the EU with the UK and must leave the EU with the UK. As with any change or alteration in the application of European law in a territory, the unanimous agreement of all members is required, which implies that Spain has the right of veto.

In the general framework of withdrawal negotiations under TEU Article 50²⁴, and in spite of many doubts about the procedural stages²⁵, there are several key moments or points at which Spain could assert its interests and opposition in decision-making procedures requiring consensus or unanimity. Indeed, the entire process envisaged under Art. 50 is shot through with the requirement for unanimity at various times, greatly complicating the position

²⁴ Consolidated version of the Treaty on European Union OJ C 202, 7.6.2016. Article 50: “1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.”

²⁵ Seen José MARTÍN Y PÉREZ DE NANCLARES, “Brexit and Gibraltar: the Spanish proposal for joint sovereignty” 20 *SYBIL* (2016), pp. 305 – 320, particularly pages. 307-312.

of the United Kingdom regarding Gibraltar should Spain adopt an opposing stance.

For example, the ‘Guidelines’ of the European Council (Art. 50.2) must be adopted by consensus (adoption of decision without a vote, by prior agreement) among 27 states, excluding the UK, as must the decision to adopt the treaty; although TEU Art. 50.2 establishes that this shall be made by a qualified majority (20 of 27 states), agreement among all Member States is considered desirable. In addition, the EU treaty modifying the TEU and TFEU must be ratified by each State, again implying unanimity and the express agreement of Spain, through deposition of the instrument of expression of consent after authorisation via an Organic Law of Parliament. Furthermore, this withdrawal treaty modifying the TEU and TFEU will probably have to be accompanied by a second treaty establishing the conditions of the future relationship with the EU, to be adopted by consensus and with ratification by each State. Not to mention that any extension of the two year negotiating period will again require unanimous agreement.

Thus, in principle, Spain will hold the key to unanimity or acquiescence at least three times during negotiation of the UK’s withdrawal from the EU, and the Spanish position on Gibraltar could be enforced each time. In fact, the Spanish Foreign Minister indicated in 2016 that Gibraltar should be excluded from the list of matters to be discussed during UK withdrawal negotiations, thereby leveraging the first key requirement for consensus in the definition of the European Council’s negotiating guidelines²⁶. This was formally communicated to the EU Members States and Institutions (28.09.2016)²⁷.

In this context the acting Spanish Government took two important decisions in 2016: it announced the need to negotiate the status of Gibraltar outside the framework of TEU Art. 50, and it proposed a joint sovereignty model to solve the dispute.

The Spanish position of exclusion of Gibraltar from the EU list of topics for negotiation with the UK, has had so far the unanimous support of the remaining EU Member States. The European Council received the

²⁶ Spain could veto Brexit talks, Margallo says, *Gibraltar Chronicle*, 21.07.2016 <<http://chronicle.gi/2016/07/spain-could-veto-brexit-talks-margallo-says/>>.

²⁷ ‘Margallo pide el apoyo da la UE para excluir a Gibraltar de la negociación del Brexit’, *El País*, 29.09.2016, <http://politica.elpais.com/politica/2016/09/29/actualidad/1475132511_587788.html>.

letter from the British Prime Minister, Theresa May, notifying the United Kingdom's intention to leave the European Union, the 29 March 2017; and two days later the draft European Council guidelines following the United Kingdom's notification under Article 50 TEU included this point: "After the United Kingdom leaves the Union, no agreement between the EU and the United Kingdom may apply to the territory of Gibraltar without the agreement between the Kingdom of Spain and the United Kingdom"²⁸. The Special European Council (Article 50), in an EU 27 format, adopted the guidelines for the Brexit negotiations the 29 April 2017, and approved this guideline about Gibraltar (point 24)²⁹. So in principle any decision about the application in the future of the EU Law in Gibraltar is conditioned to a previous British-Spanish agreement³⁰.

Evidently, the UK has indicated that Gibraltar should be fully involved³¹ in negotiation of Art. 50, and the new British Government has guaranteed that there will be no immediate changes³². However, as the British have already recognised, the UK's obligation to carry out a negotiation with multiple windows and problems — in principle at a disadvantage compared to the 27 EU states — does not benefit the Gibraltar position³³. As noted, the initial definition of the negotiating guidelines and the decision whether or not to

²⁸ Statement by the European Council (Art. 50) on the UK notification, 29.03.2017, <<http://www.consilium.europa.eu/en/press/press-releases/2017/03/29-euco-50-statement-uk-notification/>>.

European Council (Art. 50) - Draft guidelines following the United Kingdom's notification under Article 50 TEU, point 22: <<http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2017/03/FullText.pdf>>.

²⁹ Press Release, <<http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/>>.

³⁰ The full document, <http://www.consilium.europa.eu/press-releases-pdf/2017/4/47244658130_en.pdf>.

³¹ "UK minister says Gibraltar to be fully involved in Brexit negotiations", *Reuters* 12.07.2016, <<http://in.reuters.com/article/britain-eu-gibraltar-idINKCN0ZS1F1>>.

³² Theresa May garantiza que no se negociará la soberanía de Gibraltar, *Europa Sur*, 25.08.2016, <<http://www.europasur.es/articulo/gibraltar/2355053/theresa/may/garantiza/no/se/negociara/la/soberania/gibraltar.html>>.

³³ 'Londres admite que será más difícil proteger el interés de Gibraltar tras el 'Brexit'', *El País* 26.06.2016, <http://internacional.elpais.com/internacional/2016/06/26/actualidad/1466939267_851906.html>.

include the status of Gibraltar in the list of topics for negotiation both mark a crucial milestone, and Spain has already requested –and obtained- that the question of Gibraltar be kept separate from negotiation on the withdrawal of the British State, as the British-Spanish agreement must be previous to any agreement about application of EU Law in Gibraltar.

Thus, the negotiation of Brexit, which entails the need to change Gibraltar's European regulatory regime, not only highlights the EU's conception of the nature of this territory, defined internally by British law as an Overseas Territory, but also its legal status as a non-self governing territory pending decolonisation, which is Gibraltar's only recognised international legal status in the eyes of the UN, which Spain could enforce at any time in the EU during withdrawal negotiations governed by procedures that repeatedly require the unanimous agreement of the remaining 27 states.

IV. REMAINING IN THE EU: SCOTLAND, THE 'GREENLAND' MODEL, AND THE MICRO STATE-STYLE RELATIONSHIP

Clearly, the best option for Gibraltar would be to remain within the EU and subject to the selected Community policies that are currently applicable, especially internal market policies on the provision of services and movement of persons. However, achieving this would require specific negotiation, as would the option of becoming a third territory in terms of the internal market, free movement of people and customs union, regardless of the direction the UK decided to take. Alternatively, this objective could also be achieved by the UK essentially remaining in the EU (in line with the Norwegian or Swiss model, which would not involve structural changes). The ideal situation in the Gibraltarians' view would be to remain in the EU under the same conditions, with part of the territory of the UK (England and Wales) withdrawing, and Scotland, Northern Ireland and Gibraltar (which all returned a majority vote in favour of Remain in the referendum, in the case of Gibraltar with 95.1%) staying³⁴, or alternatively to apply the precedent of Greenland³⁵.

³⁴ "Gibraltar negocia con Escocia cómo quedarse en la UE tras el 'Brexit'", *El País*, 27.06.2016 <http://internacional.elpais.com/internacional/2016/06/27/actualidad/1467045208_265698.html>.

³⁵ *Chief Minister's Statement to the Gibraltar Parliament on return to Gibraltar from London on Post Brexit Meetings*, 29.06.2016, <<https://www.gibraltar.gov.gi/new/sites/default/files/press/2016/>

Might the situation of Gibraltar be different from that of the UK? In principle, it is and should be different, since a future status must be negotiated for two different territories: the British State and the European territory of Gibraltar under British sovereignty and jurisdiction. In this scenario, one source of confusion should be clarified: present British sovereignty over Gibraltar (at least, over the castle, city and port) does not mean that Gibraltar is part of the British State, which since 1972 has been known as ‘the United Kingdom of Great Britain and Northern Ireland’.

Although the UK is a State negotiating its withdrawal from an international organisation, any specificity of British domestic law or *common law* cannot override the external definition of a subject of international law. This implies that the Scottish model would be unworkable, as would the Greenland model, due to three factors: a) Greenland is precisely the opposite case, with radically different circumstances (territory of more than 2 million km² forming part of the American continent); b) the decision about Greenland’s status was taken within a State: by Danish internal decision, it was decided that in one part of the territory of the State of Denmark (Greenland), Community law would not be applicable (restriction of the territorial scope of the treaties on a State); c) in addition, and this is an even greater legal obstacle, changes in application of the treaties require unanimity: the decision communicated by Denmark led to the amendment and reform of the EEC Treaty, agreed unanimously in accordance with the constitutional procedures of each Member State of the time.

Given the questionable viability of these proposals³⁶, the Gibraltar Government seeks for a “*microstate-style relationship with the EU*”³⁷, but any

[Press%20Releases/20160629%20Chief%20Minister%20Statement%20to%20the%20Gibraltar%20Parliament%20on%20return%20to%20Gibraltar%20from%20London%20on%20Post%20Brexit%20Meetings.pdf](#)>.

³⁶ An assessment of these different possibilities in our Analysis “Gibraltar ‘año cero’: Brexit, cosoberanía...” ARI 75/2016 *cit.*. See the critical positions of Paz ANDRÉS SÁENZ DE SANTA MARÍA “La nueva propuesta española de soberanía conjunta: Gibraltar en la encrucijada post-Brexit” Editorial en la *Revista General de Derecho Europeo* 41, enero 2017, pp. 1-14, en pp. 7-9.; José MARTÍN Y PÉREZ DE NANCLARES, “Brexit and Gibraltar: the Spanish proposal for joint sovereignty” *SYbil cit.*, en pp. 317-319.

³⁷ See the Intervention of Chief Minister F. Picardo, House of Lords, el 13.12.2016, and comments by P. ANDRÉS, *RGDeur cit.*, pp. 8-9.

status of this kind needs the unanimity of the 27 Member States³⁸. Other alternatives are being considered, such as the revived option of integration in the UK³⁹, or remaining outside the UK but as a territory of the British Crown (such as the *Crown Dependencies* of the Isle of Man, and the Bailiwicks of Jersey and Guernsey). Nonetheless, in practice, all these possibilities would be too convoluted to be sustainable in practice in the international arena. There are two main reasons for this: Gibraltar does not form part of the British State, and Gibraltar's only recognised status under international law is that of a territory awaiting decolonisation in a process supervised by the United Nations.

However, this integration option in the UK is the worst option for the controversy, the situation in Gibraltar and relations with the UK, as it would be an absolutely disproportionate challenge to the UN and Spain, leading to a collision course all the Spanish-British relations. It is more than a mere theoretical elucidation⁴⁰.

In short, Gibraltar has a specific status under EU law which in principle could be kept separate from the withdrawal negotiations and future status of the British State with respect to the EU. It would appear difficult to find a recipe for remaining in the EU capable of satisfying the requirement for unanimous agreement on modification of the existing treaties.

V. IS JOINT SOVEREIGNTY A SOLUTION?

The idea of joint sovereignty occasionally began to be suggested in 2015, it was in 2016 that this option was firmly announced as the solution⁴¹, and was presented as such in September 2016. Although the details remain unknown,

³⁸ As stressed by House of Lords, European Union Committee, *Brexit: Gibraltar, cit.*, pág. 30, punto 17.

³⁹ "Integration could be Brexit fall-back position, Feetham says", *Gibraltar Chronicle* 30.08.2016, <<http://chronicle.gi/2016/08/integration-could-be-brexit-fall-back-position-feetham-says/>>.

⁴⁰ "La integración en el Reino Unido es un modelo posible", Interview to F Picardo, *El País*, 07.04.2017, <http://politica.elpais.com/politica/2017/04/07/actualidad/1491588072_436458.html>.

⁴¹ Margallo ofrece al Reino Unido una cosoberanía en Gibraltar, *Europa Sur*, 12.07.2016, <<http://www.europasur.es/articulo/gibraltar/2327308/margallo/ofrece/reino/unido/una/cosoberania/gibraltar.html>>.

the former Spanish Foreign Minister outlined the basic ideas of the proposal: transitional joint sovereignty between the UK and Spain, British and Spanish nationality, and a Statute of Autonomy (Art. 144 of the Spanish Constitution⁴²); Spain would assume responsibility for external relations after the UK's effective withdrawal from the EU; Gibraltar would remain part of the EU; the border and border controls would disappear⁴³. All these ideas were subsequently raised by Spain at UN headquarters⁴⁴. It was also included in Decision 2016 on Gibraltar of the Decolonization Committee, and for the first time as a Declaration at the Ibero-American Summit of Cartagena (29.10.2017⁴⁵). Foreign Affairs Minister Dastis Quecedo has expressly endorsed this proposal.⁴⁶

⁴² “Nosotros le proponemos a Gibraltar cosoberanía entre el Reino Unido y España durante un tiempo, transcurrido el cual se reintegraría en la soberanía española. Sus habitantes podrían conservar la nacionalidad británica, a la que se añadiría la española, y tendrían un Estatuto de Autonomía, como establece el artículo 144 de nuestra Constitución”, Interview to Foreign Affairs Minister García-Margallo, *ABC*, 01.08.2016. <http://www.abc.es/espana/abci-garcia-margallo-si-no-gobierno-declaracion-congreso-podria-disolver-cortes-201608010309_noticia.html>.

⁴³ Interview ABC 01.08.2016, *Ibidem*

⁴⁴ Statement of the Ambassador Permanent Representative of Spain to the United Nations R Oyarzun Marchesi, at the 71st Session of the General Assembly, IV Committee, 04.10.2016, <http://www.spainun.org/wp-content/uploads/2016/10/Intervenci%C3%B3n-Espa%C3%B1a-Item-58-71AG-versi%C3%B3n-compilada-ESP.ING_.pdf>.

Spanish Ambassador Oyarzun declared in UN that the proposal entailed four major points: “possible dual-nationality status for Gibraltarians; maintenance of Gibraltarian self-governance institutions within the framework of a wide-ranging system of autonomy and in compliance with the Spanish constitutional system; maintenance of the Territory's special tax regime, insofar as it was compatible with European Union law; and dismantling the fence separating Gibraltar from the rest of the Iberian Peninsula. Spain and the United Kingdom would retain joint authority over matters of defence, foreign affairs, control of external borders, immigration and asylum”, Special Political and Decolonization Committee (Fourth Committee) Summary record of the 3rd meeting Held at Headquarters, New York, on Tuesday, 4 October 2016, Doc. A/C.4/71/SR.3, 28.11.2016, p. 2, point 3. <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/307/93/PDF/N1630793.pdf?OpenElement>>.

⁴⁵ Comunicado Especial sobre la cuestión de Gibraltar, aprobed by the 22 Chiefs of State the 29th October 2012, XXV Cumbre Iberoamericana in Cartagena de Indias, Colombia, <<http://segib.org/wp-content/uploads/10-COM-ESP-GIBRALTAR-FINAL-E.pdf>>.

⁴⁶ See the intervention of the Foreign Affairs Minister in the Senado, 11.01.2017. “Dastis reitera al R. Unido la “generosa” propuesta de cosoberanía de Gibraltar”, *El Confidencial*

This offer, which revives measures suggested in previous joint sovereignty proposals, merits a few comments on the issue of joint sovereignty. The previous proposals contained similar measures, because this recurrent idea has been passed around the negotiating tables of the dispute for some time; suffice it to say that in the democratic era, it has been suggested or formally presented by the Spanish ministers F. Morán (temporary joint dominium, 1985), A. Matutes (1998), even advanced by the Gibraltarians themselves in the 1970s as a possible solution ('Nominal Co-sovereignty'), and later in 2010 by P. Caruana, based on Andorra as the model of reference. In sum, joint sovereignty was expressly negotiated in the period 2001-2002 by the Blair and Aznar Governments, undoubtedly the most advanced stage of negotiation reached towards a final solution to the Anglo-Spanish dispute.

Some objective questions can be raised about the idea of joint sovereignty. It is very important to bear in mind the fundamental demands of each party. These are, for Spain, the temporary or transitional (not definitive) nature of joint sovereignty; and for the United Kingdom, the acceptance of Gibraltar (in 2002, after the agreement, since 2007, prior to any negotiations or final agreement); the UK also wants to maintain exclusive command and control of military bases and intelligence operations in Gibraltar. The Blair/Aznar joint sovereignty negotiations showed how complex it can be to reach a complete agreement, given the existence of these nuclear "red lines".

Nevertheless, experience has shown that despite everything, an agreement is possible because the Blair-Aznar negotiations on joint sovereignty reached a full written agreement on these fundamental demands, if we are to believe the memoirs of the head negotiator and British Minister for Europe, Peter Hain⁴⁷. Although the text of the draft agreement on joint sovereignty — subsequently abandoned — is not publically available, this experience indicates that these demands could be accommodated, which implies the feasibility of renouncing historical stances: in the case of Spain, the Aznar Government eventually accepted that the UK would permanently hold joint sovereignty throughout Gibraltar, thus also including the land (and waters) of the isthmus not ceded in the Treaty of Utrecht. Likewise, and perhaps more importantly

19.01.2017, <http://www.elconfidencial.com/ultima-hora-en-vivo/2017-01-19/dastis-reitera-al-r-unido-la-generosa-propuesta-de-cosoberania-de-gibraltar_1116024/>.

⁴⁷ *Outside in*, Biteback Publishing, London, 2012, pp. 274-285.

because this is what truly lies at the heart of the problem, agreement was reached on British control and use of the military bases within the context of NATO.

This 2016 proposal of the Government of M Rajoy has been defended openly by some authors⁴⁸. I believe, however⁴⁹, the proposal has structural deficiencies, which make it unworkable in practice. So several objective questions can be raised today against the idea of joint sovereignty.

The first of these is that following the 2002 referendum in Gibraltar, ‘Joint Sovereignty’ has been called into question or discredited, at least with that name. Unlike the negotiations in 2001-2002, the UK has adopted since 2007 a different stance, whereby it will not take or advance in any direction on sovereignty without prior Gibraltarian agreement. Even the UN General Assembly’s Fourth Committee (Decolonization) now reflects this British new position in its 2016 Decision (“Takes note of the position of the United Kingdom on this issue, that is, the commitment never to enter into arrangements nor enter into a process of sovereignty negotiations with which Gibraltar is not content”)⁵⁰. This is why Spain-UK bilateral negotiations do not offer any prospects for progress, and in any case Gibraltar has announced to boycott any move towards joint sovereignty.

Second, the proposal made unilaterally by the conservative Government of M. Rajoy, without looking for previous supporting consensus inside Spain, formally expressed by the Cortes. Moreover, the joint sovereignty was not included in the program of the Popular Party Manifesto for the 2016

⁴⁸ See Paz ANDRÉS SÁENZ DE SANTA MARÍA “La nueva propuesta española de soberanía conjunta... *cit*”; José MARTÍN Y PÉREZ DE NANCLARES, “Brexit and Gibraltar: the Spanish proposal for joint sovereignty” *SYBIL.cit.*; M. ORTEGA CARCELÉN “La propuesta de cosoberanía para Gibraltar: beneficios para todos” *Real Instituto Elcano*, ARI 33/2017 – 12.04.2017. See too the opinion of Peter HAIN, ‘Britain should ‘share sovereignty of Gibraltar with Spain’ – Peter Hain’, *The Guardian* 06.04.2017 <<https://www.theguardian.com/world/2017/apr/06/britain-should-share-sovereignty-of-gibraltar-with-spain-peter-hain>>.

⁴⁹ A. del VALLE GÁLVEZ, “Gibraltar and the “Brexit” – New Scenarios within a Historic Dispute. A Proposal”, *Verfassungsblog on Matters Constitutional, VerfBlog*, 17.04.2017.

⁵⁰ Special Political and Decolonization Committee (Fourth Committee), Draft decision submitted by the Chair- Question of Gibraltar, 07.11.2016, Doc. A/C.4/71/L.17. Approved by the UN General Assembly the 6th December 2016, see <<http://undocs.org/en/A/C.4/71/L.17>>.

elections⁵¹. And without this internal consensus was submitted to the UN and to EU Institutions and EU Member States.

Third, it is doubtful the applicability of some concrete proposals, such as dismantling the British border demarcation (the Fence) and the border controls of the two States in the Frontier/Fence, and maintaining at the same time the tax and customs specificities.

There are also other internal and external collateral effects of the Garcia-Margallo's sovereignty proposal that apparently have not been properly assessed : the problematic constitution of a new Autonomous Community, the consequences for Morocco's claims on Ceuta and Melilla, or the internal effects on Basque and Catalan nationalist pretensions⁵².

But perhaps the most practical problem which is that the proposal inextricably links cross-border cooperation with the resolution of the sovereignty dispute, this creates an impasse given that both the UK and Gibraltar have already rejected joint sovereignty⁵³.

Instead of Joint Sovereignty negotiations as the answer for the Gibraltar question, I advocate a twofold approach in the current historical negotiating situation for the UK's departure from the EU: a *Modus Vivendi* for cross-border coexistence, and in parallel an agreement to seek a new international and European model for Gibraltar, trying to put an end to historical controversy.

⁵¹ See *supra*, Footnote 10.

⁵² "EL PNV se pregunta por qué no puede tener Euskadi cosoberanía 'si Madrid se la ofrece a Gibraltar?' ", *El Mundo* 16.04.2017. It is particularly interesting the approach of Professor REMIRO BROTONS, Antonio: "it is obliged to pay attention to the possible unleashing of imitative claims in other Spanish regions that could raise the costs of the recovery of Gibraltar to totally unacceptable levels for Spain. Gibraltar would fit into an autonomous Spain but not everything fits into an autonomous regime, at the risk of making the State an empty shell. On the other hand, Morocco has to find additional motives to put its aspirations on Ceuta and Melilla in the same mould as the Spanish on Gibraltar. Although legally speaking they are not the same, the parallel between both situations has been repeated actively and passively so often as to become commonplace. Gibraltar could come back to Spain like a boomerang from the other side of the Straits", in 'Gibraltar', in *Cuadernos de Gibraltar / Gibraltar Reports* n 1, 2015, p. 13-24 , in page 21.

⁵³ 'Britain rejects Spain's talk of joint sovereignty for Gibraltar', *The Guardian* 24.06.2016, <<https://www.theguardian.com/world/2016/jun/24/britain-gibraltar-rejects-spains-talk-joint-sovereignty>>; 'Gibraltar rebuffs Spanish proposal for joint sovereignty to save EU status', *The Guardian* 06.10.2016, <<https://www.theguardian.com/world/2016/oct/06/gibraltar-rebuffs-spanish-proposal-for-joint-sovereignty-to-save-eu-status>>.

VI. A PROVISIONAL MODUS VIVENDI

In the current situation, it is in the best interest of all to reach an interim agreement for the normalization of cross-border coexistence, which can be adopted according to the known formula in International Law of a *Modus Vivendi*. This kind of instrument can settle a provisional arrangement between subjects of International Law, giving rise to binding obligations in order to regulate temporarily a certain situation, and can be later replaced by a formal and permanent Agreement⁵⁴.

In my opinion, it should be necessary to reach an agreement on -at least- the following aspects. First, the Border/Fence, which is an EU land external border. The issue of controls and fluidity at the border crossing point is crucial for cross-border standardization, especially considering the existence of thousands of workers crossing the border every day. In particular, a border traffic agreement becomes more necessary in the light of the new EU Regulation regarding the reinforcement of checks at external borders (entered into force on 07 April 2017)⁵⁵. This is *the dominating concern in Gibraltar*⁵⁶. Although as we know for UK it is an international border, while for Spain it is only a border crossing point (which is located in La Verja⁵⁷), it has been possible on other occasions to reach agreements on traffic flow, as happened with the Forum of Dialogue agreements of 2006⁵⁸. In this area

⁵⁴ Stressing the temporarily provisional character of these agreements, Anthony AUST, *Modern Treaty Law and Practice*, 2nd edit., Cambridge 2007, p. 31. Walter RUDOLF, “Modus Vivendi” en la *Encyclopedia of Public International Law*, 1986, volume 9, pp. 269-270; Zewdu MENGESHA, “Unratified Treaties, Unilateral Declarations and Modus Vivendi: Circumstances to be Considered to Have Effect on State Parties” *Bahir Dar University Journal of Law* Vol.4, No.1 (2014) pp, 176-212, p. 203-208.

⁵⁵ Regulation (EU) 2017/458 of the European Parliament and of the Council of 15 March 2017, amending regulation (EU) 2016/399 as regards the reinforcement of checks against relevant databases at external borders, OJ L 74, 18.03.2017, p. 1-7. <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0458&from=ES>>.

⁵⁶ European Parliament, *The Impact of the United Kingdom's withdrawal from the EU on Scotland, Wales and Gibraltar*, AFCO Committee, April 2017, p. 21.

⁵⁷ A. del VALLE, “La ‘Verja’ de Gibraltar”, en Alejandro del VALLE GÁLVEZ, Inmaculada GONZÁLEZ GARCÍA (Eds) *Gibraltar, 300 años cit.*, p. 155-176.

⁵⁸ Inmaculada GONZÁLEZ GARCÍA - Alejandro del VALLE GÁLVEZ, (Eds) *Gibraltar y el Foro tripartito de Diálogo*, Ed. Dykinson, Madrid, 2009.

Gibraltar is fully prepared to reach agreements that safeguard the flow of border traffic⁵⁹.

However there are other peremptory issues that should be included equally in the *Modus Vivendi*. An agreement for the exercise of jurisdiction over navigation⁶⁰, and on police intervention in the waters of the Bay⁶¹, given the specific problems that exist⁶², in particular in environmental protection matters⁶³.

The moment can also be opportune to address Spain's concerns about financial activities and fiscal transparency, setting out an agreement on coordination in these economic activities. Regarding the airport, negotiate the normalization of its use, by suspending existing restrictions and the exclusion of European regulations. It could also be the natural framework for consolidating an institutional boost to Gibraltar-Campo Gibraltar Cross-Border Cooperation, which could lead to the creation of a European Grouping of Territorial Cooperation (EGTC).

⁵⁹ "Gibraltar is of course prepared to consider any reasonable solution to safeguard border flow", Intervention of F Picardo in the Constitutional Affairs Commission of the EP, 30.01.2017.

⁶⁰ GONZÁLEZ GARCÍA, Inmaculada, "La pesca y el medio ambiente en las aguas de Gibraltar: la necesaria cooperación hispano-británica en el marco de la Unión Europea", *Cuadernos de Gibraltar – Gibraltar Reports* Número 1, 2015, pp. 149-170. GONZÁLEZ GARCÍA, Inmaculada, "The Anglo-Spanish Dispute over the Waters of Gibraltar and the Tripartite Forum of Dialogue" *The International Journal of Marine and Coastal Law*, Volume 26, Issue 1, pages 91 – 117; GONZÁLEZ GARCÍA, I. – ACOSTA SÁNCHEZ M., "La difícil aplicación de la estrategia marina europea y la protección del medio marino en la bahía de Algeciras/Gibraltar" *Revista electrónica de estudios internacionales* (REEI), n 25, 2013.

⁶¹ ACOSTA SÁNCHEZ, Miguel "Incidentes hispano-británicos en las aguas de la Bahía de Algeciras/Gibraltar (2009-2014): ¿qué soluciones?", *Cuadernos de Gibraltar – Gibraltar Reports*, Número 1, 2015, pp. 171-208.

⁶² A proposal in A. del VALLE GÁLVEZ – I. GONZÁLEZ GARCÍA – J. VERDÚ BAEZA, "Propuestas para un acuerdo práctico sobre las aguas de Gibraltar", *Estudios de derecho internacional y de derecho europeo en homenaje al profesor Manuel Pérez González* M. J. AZNAR GÓMEZ, Coord.; J. CARDONA LLORENS - J. A. PUEYO LOSA - J. L. RODRÍGUEZ-VILLASANTE Y PRIETO - J. M. SOBRINO HEREDIA (Editores), Volumen I, Tirant, Valencia, 2012, pp. 407-440.

⁶³ VERDÚ BAEZA, Jesús, "La negativa incidencia de las controversias de Gibraltar en el medio ambiente en la bahía de Algeciras/Gibraltar" *Revista electrónica de estudios internacionales* (REEI), N°. 23, 2012

In my opinion, the agreement for cross-border coexistence that we call *Modus Vivendi* could be adopted considering three basic elements:

A) Continuity of application of EU law in the current conditions, until new conditions come into force as part of the negotiations to exit the UK.

B) Negotiation by UK and Spain, incorporating Gibraltar, the EU and the regional and local authorities (Junta de Andalucía / Campo de Gibraltar), depending on the respective competencies.

C) Formally, the *Modus Vivendi* Agreement must be adopted by the United Kingdom and Spain, and where appropriate attributing to the EU the guarantee of its application.

VII. LOOKING FOR NEW IMAGINATIVE PROPOSALS. A PRINCIPALITY IN THE STRAITS? THE SYMBOLIC SOVEREIGNTY FORMULA.

The acting Spanish Government announced in 2016 its desire for separate negotiations over Gibraltar, while at the same time offering the possibility of joint sovereignty mentioned earlier, whereby Gibraltar would be incorporated into Spain as the 18th Spanish Autonomous Region.

However, the Brexit scenario is so utterly novel that the advantageous position so suddenly acquired by Spain — in my opinion, circumstantial rather than structural — could be deployed to attempt to solve this historical dispute. If the dispute is indeed entering a new historic stage due to changes in one of the fundamental parameters regulating the status of and relations with Gibraltar, then this is the ideal moment to devise imaginative proposals that would solve the thorny problem of finding an answer acceptable to all parties.

Such an answer should be based on the fundamental interests of the stakeholders involved. Let us remember these nuclear interests: for Spain, recovering some form of sovereignty over the kingdom's lost city; for the UK, maintaining its military bases and intelligence operations; and for Gibraltar, consultation and the power to decide on its future respecting its specific identity. It should also be borne in mind that in this symbiotic relationship, the UK defends Gibraltar's primary interests as its own (consultation before, during and after) and vice versa (hence the permanent Gibraltarian awareness campaign directed at the United States on the importance of UK military bases, even while having no responsibility for defence).

In these essential interests there are elements that have been appearing and shaped as added interests in recent years. Thus, for Spain, progressively the general interests have been identified with those of the Campo de Gibraltar. In addition, there are other related interests, which Spain has historically not considered a priority but which require urgent concern for Spain as a national interest: that of opacity and the necessary democratic control of British military and intelligence bases in the Bay of Algeciras, serious risk for the security of the Spaniards. On the other hand, in the British political parties and in particular the conservative party, the symbolic character of the sovereignty over Gibraltar has been reinforced, as a component associated in the collective imagination to the British Empire. Probably the Brexit specific context may have added new interests for Gibraltar: I think it is likely that, following the Brexit referendum in June 2016, Gibraltar will also have as essential interest a minimum of certainty about its political, institutional and economic future in the medium and long term. It seems clear that in this situation of uncertainty the historical distrust of Gibraltar towards Spain has been accentuated, given the recent policy of confrontation with Gibraltar in the period 2013-2015, which has included, among other things, the progressive dismantling of the agreements reached since 2004 by the Dialogue Forum, and the cancellation of the Forum itself.

In reality, the analysis of interests in presence cannot neglect the fact that the question passes by very strong symbolic, and therefore, irrational elements, which periodically encroach on public means and opinions. For all parties, the problem is of a highly symbolic nature but also requires real willingness to compromise in order to achieve an imaginative and enriching solution for all, particularly for Campo de Gibraltar, whose interests the Spanish authorities should increasingly adopt as their own.

Thus, a brief outline will be given below of a new proposal that could offer theoretical grounds for consideration. It is the *Principality* or *Crown City* approach, or *the City of the British and Spanish Crowns*, which involves a kind of symbolic sovereignty in common between the two states, with a status that is associated with and coordinated by the EU.

Certain basic ideas could support its legal feasibility⁶⁴.

⁶⁴ We first proposed this Two Crowns formula in “Gibraltar, ‘año cero’: Brexit, Cosoberanía y nuevas oportunidades de España” *ARI Elcano* 20.10.2016 *cit.*

With regard to the question of territorial integrity, the UN has never categorically stated that, *expressis verbis*, Gibraltar must be reincorporated into Spanish territory; the UN General Assembly has only once referred to paragraph 6 of Resolution 1514 (XV), and then only as a recital. Although the UN has indicated that the principle of territorial integrity (of Spain) is valid and applicable in the colonial situation of Gibraltar, territorial restitution as the ultimate solution is a deduction reached by Spain for a series of historical and legal reasons, and because of the UN's position on Gibraltar⁶⁵. Therefore, the restitution of Spanish sovereignty does not necessarily imply the inclusion of Gibraltar in the Spanish regional or provincial territorial structure. An agreement or treaty on 'shared sovereignty' that brought the Principality or City of Gibraltar under Spanish sovereignty as a Crown City would not require its adaptation to the provincial or autonomous region structure. In fact, the Kingdom of Spain already has other territories that are not integrated into the provincial or autonomous region or city structure (the Chafarinas Islands, the Alhucemas Islands and Rock and the Peñón de Vélez)⁶⁶.

Thus, restitution of the city to Spain by means of a treaty of sovereignty would imply theoretical affiliation to the Crown: naturally, the Spanish Crown cannot 'possess' or administer Spanish territories nor exercise an executive role, a function that corresponds to the Government. For example, the aforementioned Spanish islands on the African coast are under the direct rule of the Spanish Government. Since this is not the place to expand on these ideas in detail, suffice it to say that with the instruments of Art. 93 of the Spanish Constitution and an international treaty, the exercise of power in the territory of Gibraltar derived from the Constitution could be transferred to the EU and the United Kingdom. This would require a minimal reform of the Constitution, and probably of the Statute of Andalusia, not only to block the provision for expansion into Gibraltar as a "historical territory" of Andalusia (Additional Provision 1) but also to recognise the special relationship between Gibraltar and Campo de Gibraltar.

⁶⁵ VALLE GÁLVEZ, A. del, "Gibraltar en las Resoluciones y Decisiones de la Asamblea General de la ONU, 1965-2015. algunas valoraciones", en PONS RAFOLS, X. (Dir.), *Las Naciones Unidas desde España*, *op. cit.* p. 513-ss

⁶⁶ VALLE GÁLVEZ, A. del, "Ceuta, Melilla, Chafarinas, Vélez y Alhucemas: tomar la iniciativa", *Real Instituto Elcano*, ARI 163/2011, 20.12.2011.

A Principality treaty on Gibraltar linked to the EU and based on the concept of a *City of the British and Spanish Crowns* would not involve the territorial stances encompassed in the notion of joint sovereignty, being focused instead on the question of the exercise of sovereign functions, and the symbolic meaning of sovereignty powers. The treaty would automatically incorporate Gibraltar into the Kingdom of Spain and therefore into the EU, respecting the current political organisation of Gibraltar. Regardless of how the UK decided to link Gibraltar to the British Crown and State, the treaty would involve the legal integration of Gibraltar into the State of the ‘Kingdom of Spain’, and its citizens would become part of the Spanish nation and people, with a recognised right to elect a parliamentary representative. Inevitably, an agreement such as the one proposed, although simple and essentially symbolic in nature, would entail additional agreements on the military bases (which would imply the necessary democratic control by parliament of bases in the Bay of Algeciras), responsibility for foreign affairs and defence, and cross-border cooperation and institutional ties with Campo de Gibraltar, as well as several *modus vivendi* on cooperation and control of the waters, or on economic and financial activities that through institutional ties with neighbouring Campo would enhance economic development in the region.

The proposal would provide a unique solution to the unique problem of Gibraltar, dispelling analogies with Spanish internal problems, and clearly marking a difference in the inevitable comparison with Ceuta and Melilla⁶⁷.

VIII. CONCLUSIONS

With negotiations at a stalemate since the crisis of 2013 and the regulation of coexistence and cross-border relations with Gibraltar far from satisfactory, the unexpected outcome of the Brexit referendum may have historic consequences for Gibraltar.

Indeed, the obligation to negotiate a UK withdrawal from the EU will compel Gibraltar to redefine its European legal status, regardless of whether it remains within or outside EU law. This places Gibraltar in the

⁶⁷ VALLE GÁLVEZ, A. del, “Gibraltar – Ceuta y Melilla: ejercicio comparativo desde el Derecho Internacional”, en Joaquín Alcaide Fernández y Eulalia W. Petit de Gabriel (Editores) *España y la unión europea en el orden internacional*, Ed Tirant Lo Blanch, Valencia 2017, pp. 179-191.

very uncomfortable position of being forced to seek and negotiate a new arrangement in the all important EU legal framework; unquestionably the framework of greatest practical daily application, together with two other international legal frameworks, namely the Treaty of Utrecht and the UN declaration on decolonisation.

Evidently, the European framework will continue to apply for at least the two years during which withdrawal negotiations are held, and could even be subsequently extended, thus providing sufficient legal certainty concerning applicable law in the coming years. However, the effects of uncertainty could have a very negative impact on the economy of Gibraltar, whose population voted quite clearly in favour of Remain. Furthermore, the possible return to the 1713 Treaty of Utrecht has raised fears of the very probable legality of closing the border, at Spain's instigation, in the unlikely future event that EU law ceases to be applicable.

Spain is in a different position now than it was in 1985 when it entered the EC. Therefore, the unavoidable renegotiation of Gibraltar's unique status within the EU will depend on the agreement of Spain, which in 1986 did not question the status endowed in 1972 but may well do so now, in defence of its interests. In this context, Spain could leverage the requirement for unanimity at several crucial moments during the process of negotiating British withdrawal, since various possible future scenarios for Gibraltar, such as the Norwegian or Swiss models or the antecedent of Greenland, will depend on Spain's consent.

Paradoxically, however, Brexit also opens multiple windows of opportunity for this historical dispute. This unexpected turn of events could help resolve the problem, which encompasses both peaceful coexistence between Spain and the small neighbouring community of Gibraltar just over the border, and the question of sovereignty that underlies the dispute with the United Kingdom.

In this present juncture, the acting Spanish Government took two important decisions in 2016; it announced the need to negotiate the status of Gibraltar outside the framework of TEU Art. 50, and it proposed joint sovereignty.

In this context, several ideas can be suggested as conclusions:

1. This delicate and very particular historic circumstance requires strategic decisions supported by broad domestic consensus in Spain. This is a key issue strongly symbolic of Spanish foreign policy. It should be borne in mind that the restitution of Gibraltar to Spanish sovereignty is a complex decision of a political nature that is not strictly related to foreign policy. It is very important to emphasize that the current Spanish position towards Gibraltar is conditioned by the Proposition approved in the Congress in November 2016, which advocates consensus in Congress for a State strategy on Gibraltar, Dialogue with the Gibraltar authorities, and preserve the interest for cross-border workers and the Campo de Gibraltar⁶⁸.

2. Spain may now have the opportunity to adopt a new strategic focus and approach to the question that incorporates a new and convincing narrative for Gibraltar which is acceptable to and recognised by Spanish citizens in the current historical moment. Present circumstances may provide the opportunity to resolve the pending issue of regulating cross-border relations with Gibraltar, accepting not only the proximity of but also coexistence with its population in a context of gradual integration into the Spanish nation.

3. In this vein on cross-border relations, the unanimous support given in 2016 by all Spanish political parties at local, district and provincial levels of Cadiz for a EGTC with Gibraltar in the EU framework indicates that significant changes are possible in order to address and develop cross-border coexistence. In addition, the time is ripe to consolidate the shared cross-border interests of Gibraltar and Campo de Gibraltar⁶⁹. In this sense, both entities could adopt a common approach to Brexit and its consequences for Gibraltar and the region, enforcing this in their respective States and the EU as negotiations begin, in particular with respect to institutional cross-border

⁶⁸ Proposición no de Ley (PNL) presentada por el Grupo Socialista 161/000634, *BOCG* Congreso de los Diputados, 25.10.2016 Serie D nº 38, 67-69; *BOCG* Congreso de los Diputados, 16.11.2016, Serie D nº 51, pp. 28-2). Diario de Sesiones del Congreso de los Diputados, Comisión de Exteriores, n 42 de 02.11.2016, p. 13-ss. <http://www.congreso.es/public_oficiales/L12/CONG/DS/CO/DSCD-12-CO-42.PDF>. ‘El Congreso se desmarca de la oferta de Margallo sobre Gibraltar- La Comisión de Exteriores pide consenso e insta al Gobierno a no adoptar “acciones unilaterales”’, *El País*, 02.11.2016, <http://politica.elpais.com/politica/2016/11/02/actualidad/1478111616_884722.html>.

⁶⁹ Picardo y el Grupo Transfronterizo impulsarán mesas de cooperación, *EuropaSur* 27.08.2016, <<http://www.europasur.es/article/gibraltar/2356330/picardo/y/grupo/transfronterizo/impulsaran/mesas/cooperacion.html>>

cooperation and a unique, common economic and legal status. At such an important historical juncture, this would enhance the gradual trend towards identification of Spain's interests with those of the Spanish citizens who live in closest proximity to the territorial problem and dispute, the residents of Campo de Gibraltar, who have historically been those who have most suffered the consequences of decisions taken by distant governments, such as the one to close the border.

4. The format and content of the joint sovereignty proposal by the Spanish Government is the same as that of others presented or negotiated previously. But the 2016 Spanish proposal of Joint Sovereignty has structural deficiencies, which make it unworkable in practice. Several objective questions can be raised today against the idea of joint sovereignty: UK and Gibraltar have yet rejected the proposal; it was made unilaterally by the conservative Government of M. Rajoy, without looking for previous supporting consensus inside Spain; and the most practical problem which is that the proposal inextricably links cross-border cooperation with the resolution of the sovereignty dispute, this creates an impasse given that both the UK and Gibraltar have already rejected joint sovereignty.

5. Instead of Joint Sovereignty negotiations as the answer for the Gibraltar question, I advocate a twofold approach in the current historical negotiating situation for the UK's departure from the EU: a provisional *Modus Vivendi* for cross-border coexistence, and in parallel an agreement to seek a new international and European model for Gibraltar, trying to put an end to historical controversy.

A provisional *Modus Vivendi* for the cross-border coexistence with Gibraltar could be an interim agreement to regulate the aspects that most urgently need the daily normalization. Of course first and especially the border crossing by the Border/Fence, but also others such as the issues of transparency and economic-financial collaboration, navigation and jurisdiction over Bay waters, or the use of the airport.

6. This historic moment could be conducive to moving forwards in new and imaginative ways, with initiatives such as that of 'symbolic sovereignty' formula via the proposed *Principality of Gibraltar* or *City of the British and Spanish Crowns* linked to the EU, which offers sufficient constitutional and international margins for consideration. This proposal of the Two Crowns

Principality would restore Gibraltar to the Spanish nation and sovereignty, in addition to incorporating it into the EU as part of the Kingdom of Spain, ensuring the maintenance of its current organisation and powers and entailing agreements on Gibraltar's economic and financial regime and British retention of its military bases.

The 'Modus Vivendi' would be a provisional measure pending the settlement of a new international and European status. The agreement for the commencement of negotiations on sovereignty, as well as the 'Modus Vivendi' accord, could be incorporated in the Treaty on the UK's withdrawal from and future relationship with the EU by way of a Protocol or Declaration. Each has a different legal and jurisdictional effect since Protocols form part of an international Treaty.

* * * * *

Following Brexit, negotiations on the UK's withdrawal from the EU will not only pave the way for a new European and international legal framework, which has been described as 'year zero' for Gibraltar, but will also create a historic opportunity for Spain to redefine its relationship with Gibraltar, an opportunity which could be leveraged to devise important and imaginative initiatives that foster coexistence and offer reasonable and pragmatic ways forwards that will resolve this historical dispute. The 2016 Spanish Joint Sovereignty proposal is probably not the right start for the solution, and perhaps we must explore new Symbolic Sovereignty formulas, like a Principality in the Straits. Nevertheless, we must be aware that the current situation is not favourable for the presentation of major initiatives to solve the complex issues linked to the historical controversy, including those of coexistence with the surrounding area of the Campo de Gibraltar. The policy period of confrontation with Gibraltar (particularly the years 2013-2015) also meant the annulment of the Forum of Dialogue 2006 agreements for the normalization of cross-border coexistence, and the Forum itself. The historical distrust towards Spain is added to the very delicate situation of Gibraltar and the United Kingdom when Brexit negotiations begin.



Cuadernos de Gibraltar Gibraltar Reports

#02 | 2016-2017

Sumario

Table of Contents

PRESENTACIÓN

Inmaculada GONZÁLEZ GARCÍA; Alejandro del VALLE GÁLVEZ

EDITORIAL

Alejandro del VALLE GÁLVEZ, *Brexit Negotiations and Gibraltar: Time for a 'Modus Vivendi'?*

CONFERENCIAS DE EXCELENCIA

Antonio REMIRO BROTONS, *Gibraltar en la política exterior de España*

ESTUDIOS

Tito BENADY, *The Jews of Gibraltar before the Treaty of Utrecht and the development of the Jewish Community since*

Alejandro del VALLE GÁLVEZ, *Gibraltar, the Brexit, the Symbolic Sovereignty and the Dispute. A Principality in the Straits?*

Miguel ACOSTA SÁNCHEZ, *Gibraltar, trabajadores fronterizos y controles de frontera*

Jesús VERDÚ BAEZA, *Controversia y protección del patrimonio cultural subacuático en la Bahía de Algeciras/Gibraltar*

Luis ROMERO BARTUMEUS, *Los actores que intervienen en la estrategia del Estrecho de Gibraltar*

Teresa PONTÓN ARICHA, *Los acuerdos internacionales de intercambio de información fiscal con Gibraltar*

Martín GUILLERMO RAMÍREZ, *Instrumentos legales para la cooperación transfronteriza: Las Agrupaciones Europeas de Cooperación Territorial*

ÁGORA

Fabian PICARDO, *Futuros para Gibraltar y el Campo tras el Brexit*

Peter CARUANA, *No hay fórmula más eficaz o válida que el diálogo tripartito*

Juan CARMONA DE CÓZAR, *El Grupo Transfronterizo / Cross-Frontier Group. Historia, motivación y objetivos*

Peter MONTEGRIFFO, *Gibraltar - Campo de Gibraltar, evolución y perspectivas de futuro para la convivencia transfronteriza*

Tito BENADY, *Inmigración en Gibraltar procedente de otras colonias británicas en el Mediterráneo: Menorca en el Siglo XVIII, y Malta en el Siglo XIX*

RECENSIONES

Gracia LEÓN ROMERO, *Campo de Gibraltar, una imagen con valor estratégico*, por Juan Domingo TORREJÓN RODRÍGUEZ

José Ramón REMACHA TEJADA, *Gibraltar y sus límites*, por José Antonio DORAL GARCÍA

DOCUMENTACIÓN



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