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BREXIT NEGOTIATIONS AND GIBRALTAR: TIME FOR A 'MODUS VIVENDI'?

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The unexpected outcome of the United Kingdom's 'Brexit' referendum on leaving the European Union may have historic and even tragic consequences for Gibraltar, since it 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 an opportunity for Spain to redefine its relationship with Gibraltar, offering the possibility of new approaches to resolve this historic dispute.

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 very uncomfortable position of being forced to seek to negotiate a new arrangement within the 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 'doctrine' about the decolonization of Gibraltar.

A UNIQUE STATUS WITHIN THE EU

Gibraltar has been in the EC/EU since 1973, as part of the UK's membership. EU Law is applicable to Gibraltar, not as a territory of the UK as a Member State, but as a European territory whose external relations the UK is responsible for (Article 355.3 TFEU²). 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

¹ Co-Director of the Journal *Cuadernos de Gibraltar/Gibraltar Reports*.

² Article 355.- In addition to the provisions of Article 52 of the Treaty on European Union relating to the territorial scope of the Treaties, the following provisions shall apply: (...)3. The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.

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

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 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, in the unlikely event that EU law ceases to be applicable in the future.

EU-BREXIT NEGOTIATIONS, SPAIN AND GIBRALTAR

The unavoidable renegotiation of Gibraltar’s unique status within the EU will inevitably involve Spain, which in 1986 did not question the status endowed in 1972 but may well do so now, in defence of its interests. In the present context, 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)³; thus, various

3 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

possible future scenarios for Gibraltar, such as the Norwegian or Swiss models or the antecedent of (reverse) Greenland case, will depend on Spain's consent. In addition, these kind of solutions that seek to maintain application of the European Single Market to Gibraltar would in practice be unworkable in the international arena, for two main reasons: A) Gibraltar is not part of the British State "United Kingdom of Great Britain and Northern Ireland", and B) Independently of the British legislation that considers Gibraltar a "British Overseas Territory", its only legal status under International Law -recognised by the UN and the international Community- is that of a non-self governing territory (administered by the UK since 1946) 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 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

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."

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.” 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)⁴. So in principle any decision about the application in the future of the EU Law in Gibraltar is conditioned to a previous British-Spanish agreement.

THE SPANISH JOINT SOVEREIGNTY PROPOSAL

The option of joint sovereignty formally presented in September-October 2016 to the UN and to the EU Institutions and Member States, was firmly announced as an overall solution. The basic ideas of this proposal are: transitional joint sovereignty between the UK and Spain, British and Spanish nationality, Statute of Autonomy (Art. 144 of the Spanish Constitution); 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/fence and border controls would disappear.

The offer revives measures suggested in previous joint sovereignty proposals. This recurrent idea has been passed around the negotiating tables of the dispute for some time. Even 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.

In my opinion, 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. Unlike the negotiations in 2001-2002, the UK has adopted since 2006 a different stance, whereby it will not take or advance in any direction

⁴ <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/>

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”)⁵. 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. And third 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. Anyway, the Blair/Aznar joint sovereignty negotiations showed how complex it can be to reach a complete agreement, given the existence of nuclear “red lines”: for Spain, the temporary or transitional (not definitive) nature of joint sovereignty; or for the UK, the maintaining of exclusive command and control of military bases in Gibraltar.

THE FUNDAMENTAL INTERESTS OF SPAIN, UK AND GIBRALTAR

Is there any alternative in this negotiation deadlock? First of all, we must take onto account the fundamental interests of the stakeholders involved: for Spain, recovering some form of sovereignty over the kingdom's lost city; for the UK, the incalculable strategic value and advantage of maintaining naval and air bases and intelligence operations in the Strait of Gibraltar; and for Gibraltar, consultation and the power to decide on its future respecting its specific identity. For all parties, the problem is of a highly symbolic nature and then has a strong irrational component, 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.

⁵ 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>

I therefore 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.

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 Agreement.

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)⁶. However there are other peremptory issues that should be included equally in the *Modus Vivendi*. An agreement for the exercise of jurisdiction over navigation, and on police intervention in the waters of the Bay. 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-Bor-

⁶ 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/TEXT/PDF/?uri=CELEX:32017R0458&from=ES>.

der Cooperation, which could lead to the creation of a European Grouping of Territorial Cooperation (EGTC).

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.

SOVEREIGNTY NEGOTIATIONS

Spain cannot, in my opinion propose a *Modus Vivendi*, without at the same time raising the claim of sovereignty. In accordance with the resolutions and decisions of the UN General Assembly (1965-2016), it must request Spanish-British negotiations to establish a new and permanent statute for Gibraltar, linked to the EU, and which entails the decolonization of the territory and the termination of the Treaty of Utrecht.

In my view, an agreement should be sought, in parallel with the *Modus Vivendi*, to open negotiations on the desirable model of a definitive solution to the Gibraltar question. This agreement to initiate sovereignty negotiations could count on the presence of the EU as an observer, being alternative or complementary to the Brussels Agreement of 1984.

With this agreement to open negotiations in the most reserved areas of the controversy, Spain and the UK could consider exploring the search for a format inspired by new imaginative proposals. We discard the formula of the joint sovereignty since as we have indicated we do not consider it a workable model for starting negotiations. In contrast, other new formulas could be, for example, the Principality of Gibraltar or City of the British and Spanish Crowns, formally integrated in the Kingdom of Spain and therefore in the EU, institutionally linked to the Campo de Gibraltar, and with maintenance of the current British jurisdiction and organization of Gibraltar. This new model can explore an internationalized statute supervised by the EU. Howe-

ver, a complementary British-Spanish agreement on military bases would be necessary, with probable anchoring in the NATO framework.

CONCLUDING REMARKS

I should finish by highlighting that 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.

Anyway, 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. 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

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