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## POST-BREXIT GIBRALTAR - CAN IT REMAIN PROSPEROUS AND BRITISH AT THE SAME TIME?

### 1 Introduction

“The day the Spanish flag flies over Gibraltar had come much closer”, said Spanish foreign minister José Manuel García-Margallo on 24 June 2016.<sup>1</sup> He made this declaration just after the result of the Brexit vote became public. He saw two options for Gibraltar: being British outside of the EU or being “hispanobritánicos” within the EU.<sup>2</sup> Even though some 96 per cent of Gibraltar’s population voted against Brexit, the town left the EU together with the other parts of the UK on 1 February 2020. While the Northern Ireland Protocol is well known, the preliminary agreement on Gibraltar is not.

This paper aims to present the Gibraltar dispute with a special emphasis on the situation changed by Brexit. Therefore, we will not intend to explore all the events of the past 300 years. Also, we do not want to elaborate deeply on legal issues because the present territory of Gibraltar can be split into two: the Rock and the harbour, ceded by Spain to Britain under the Treaty of Utrecht, and the isthmus and the bay, for which the legal status is debated between Spain and Britain.<sup>3</sup> We will focus on presenting the development of Gibraltarian identity

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<sup>1</sup> Margallo: La bandera española está ahora mucho más cerca del Peñón de Gibraltar. *ABC España* 24 June 2016 [online]. Available at: [www.abc.es](http://www.abc.es) accessed: 09 February 2022.

<sup>2</sup> González, Miguel: Margallo, sobre Gibraltar: “Pondré la bandera y mucho antes de lo que Picardo cree”. *El País*, 6 October 2016 [online]. Available at: [www.elpais.com](http://www.elpais.com) accessed: 09 February 2022.

<sup>3</sup> On the legal aspects see Lincoln, Simon J.: The Legal Status of Gibraltar: Whose Rock Is It Anyway? In: *Fordham International Law Journal* 18(1). 1994, 285–331.

and the economic situation since both have contributed profoundly to the present situation. We will argue that a *sui generis* solution is needed, which can be achieved only through negotiation and understanding.

## 2 The Question of Sovereignty

Gibraltar's present name derives from the Arabic "Mount of Tariq" (قراط لـبـج); Tariq was an 8<sup>th</sup>-century Moorish military leader who managed to cross the Strait of Gibraltar in 711 with his troops, marking the beginning of the 700-year-long Moorish occupation of the Iberian Peninsula. Before that, Gibraltar was known as Mont Calpe. Spain took the Moorish town twice during the Reconquista: first in 1309, and second in 1462, after it was lost again to the Moors in 1333. After the Spanish conquest, Gibraltar's strategic importance declined, yet it was used as a base for the Spanish capture of Melilla in 1497, for instance.

On 4 August 1704, during the Spanish Succession War, the town was taken by Britain. The defenders were allowed to leave. Out of a population of 6,000, only 200 remained.<sup>4</sup> The others moved to the north and founded San Roque in 1706. Being again in a foreign power's hands, Gibraltar became important strategically. By holding Gibraltar, Britain gained the ability to prevent the ships of Spain and France, then enemies of Britain, from crossing the Strait of Gibraltar. This is why, after the war, Britain maintained control over the *Rock*, as per Art. X of the Treaty of Utrecht of 1713.<sup>5</sup>

At least until the 1780s, Britain showed some interest in trading away the outpost. In 1720, a possible exchange of Gibraltar for Florida or Santo Domingo arose.<sup>6</sup> During the 1740s, especially at the drafting of the

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<sup>4</sup> Plank, Geoffrey: Making Gibraltar British in the Eighteenth Century. In: *History* 98(3). 2013, 346–347.

<sup>5</sup> Under Articles XI, Britain also got the possession of Minorca, which was ceded back to Spain in the Treaty of Amiens in 1802, and now forms part of the Balearic Islands in Spain.

<sup>6</sup> The current Dominican Republic was known as Santo Domingo in English until the early 20<sup>th</sup> century.

Treaty of Aix-La-Chapelle (Aachen) in 1748, the restoration of Spanish sovereignty over Gibraltar was discussed again. However, a crucial change came with the Great Siege of 1779-1783, when Spain tried to take advantage of Britain being occupied in the American Revolutionary War. By that time, the British had realised that Gibraltar's advantage lay not only in its military and commercial strategic position but also in the fact that it had no 'restive' Spanish population, unlike Spanish colonies Spain could have offered in exchange.<sup>7</sup> After the lifting of the siege in 1783, significant changes came: the reconstruction eradicated the Muslim and Spanish architectural heritage of the town, making it truly British in feel and look,<sup>8</sup> and Catholic or Jewish landowners were allowed to sell land only to "his Majesty's natural born Protestant subjects".

In 1870, before the Scramble for Africa started, Spanish Prime Minister Juan Prim suggested that Britain should cede Gibraltar and offered Ceuta in return. He referred to the Ionian Islands, ceded by Britain to Greece in 1863, as an analogous case. Yet, those islands had no specific strategic importance to London, which held them as Protector, not Possessor. The Spanish offer was rejected since Gibraltar was of strategic importance in reaching India, especially after the Suez Canal was opened in 1869, and the fortification of Ceuta would have cost a vast amount of money. Britain also argued that, unlike in the Ionian Islands, the population of Gibraltar did not consider British rule as a foreign occupation.<sup>9</sup>

At the beginning of WWII, the danger of an attack seemed to be imminent. Therefore, the town was evacuated in early 1940. The civil population was taken to Casablanca in French Morocco, but after the fall of France in June 1940, they were first moved back to Gibraltar, then to London, British Jamaica and Portugal Madeira. The threat of a military intervention was real: Hitler, who was in need of a foothold in Morocco while preparing an attack on the Soviet Union the following spring, offered Gibraltar in return for Spain's entry into the war.

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<sup>7</sup> Plank 2013 *op. cit.*, 359.

<sup>8</sup> *Ibid*, 363, 366-368.

<sup>9</sup> Clark, Chester W.: Marshal Prim and the Question of the Cession of Gibraltar to Spain in 1870. In: *The Hispanic American Historical Review* 19(3). 1939, 318-323.

Yet, Madrid declined the offer.<sup>10</sup> In early April 1944, half a year after the surrender of Italy, the repatriation of the Gibraltarians started. However, the process came to an end only in 1951.

After WWII, unlike in many other British colonies, there was no demand for decolonisation in Gibraltar.<sup>11</sup> It was Spain that sought the support of the international community and tried to leverage the decolonisation with regard to Gibraltar—while trying to keep its colonies simultaneously. In September 1963, Spain brought the question of Gibraltar to the UN. By then, at the 1946 request of the UK, Gibraltar had already been on the list of the non-self-governing territories. After a Spanish request, the UN General Assembly (UNGA) called for the decolonisation of Gibraltar in line with Resolution 1514 (XV)<sup>12</sup> adopted in 1960.<sup>13</sup>

Nevertheless, the position of the Gibraltarians was firmly anti-Spanish. As early as 1963, Gibraltarian Prime Minister Joshua Hassan declined the possibility of Spain interfering in the town's affairs in the UN. He also declared that the drafting of a constitution was ongoing in Gibraltar allowing for self-governance while keeping tight ties to Britain. It was adopted in 1964, replacing the first one from 1950. For the first time, this basic law created institutions for the people of Gibraltar to conduct their domestic and municipal affairs without affecting Gibraltar's international status or its constitutional relationship with

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<sup>10</sup> Goda, Norman J. W.: „The Riddle of the Rock: A Reassessment of German motives for the Capture of Gibraltar in the Second World War”. In: *Journal of Contemporary History* 28(2). 1993, 297–314. Eventually, US troops landed in French Morocco in November 1942.

<sup>11</sup> Lambert, David: ‘As solid as the Rock’? Place, belonging and the local appropriation of imperial discourse in Gibraltar. In: *Transactions of the Institute of British Geographers, New Series* 30(2). 2005, 210.

<sup>12</sup> UNGA Resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples.

<sup>13</sup> It should be noted that at the same time the UN also called upon Spain to end the colonisation of Ifni and Spanish Sahara. The former was ceded by Spain to Morocco through an agreement in 1969, while the latter was given independence in 1975, yet Morocco soon conquered most of its territory and has been administering that since then.

Britain.<sup>14</sup> The international community, however, did not see the question resolved, and on 16 October 1964, the UN Special Committee on Decolonization urged Britain and Spain again to negotiate, taking into consideration the standpoint of the Gibraltarians. The next day the Spanish authorities took restrictive actions at the Gibraltarian border, to pressure the British side but no agreement was reached.

On 16 December 1965, the UNGA called upon Spain and the UK again to hold bilateral talks on Gibraltar in its Resolution of 2070(XX). The first round of negotiations ever on the status of Gibraltar was held in May 1966, where Spain requested the subsequent return of the town and offered an agreement allowing the UK to keep a Royal Navy base in Gibraltar.<sup>15</sup> Madrid also offered a "personal statute" for Gibraltarians, protecting their social and cultural interests, including their British nationality.<sup>16</sup> Britain, on the other hand, suggested to Spain that they refer the dispute to the International Court of Justice. Madrid turned down this proposal. On 20 December 1966, the UNGA in its resolution of 2231(XXI) called upon the parties again to hold talks on the decolonisation of Gibraltar with taking into account the interests of the people of the territory. Soon after that, in May 1967, the Spanish authorities closed the airspace to pressure Britain.

On 10 September 1967, Britain organised a referendum in Gibraltar at which 99.6% of the voters rejected the Spanish proposal of 1966 with a turnout of 96.5%.<sup>17</sup> Despite this, Spain's position was strengthened within the international community because, in Resolution 2353(XXII) of 19 December 1967, the UNGA criticised the holding of the referendum

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<sup>14</sup> Fawcett, J. E. S.: Gibraltar: The Legal Issues. In: *International Affairs* 43(2). 1967, 249-250.

<sup>15</sup> It would have been a similar solution to the one reached in the Zurich Agreement of 1959, in which Britain allowed Cyprus to become independent but kept military bases on the island.

<sup>16</sup> Yáñez-Barnuevo, Juan Antonio: Nuevas Perspectivas para España y el Reino Unido en relación con Gibraltar: Reflexiones sobre cómo aprovechar bien la oportunidad que ofrece el Brexit. In: Martínez, Magdalena M. Martín - Martín y Pérez de Nanclares, José: *El Brexit y Gibraltar: Un reto con oportunidades conjuntas*. Madrid: Colección Escuela Diplomática, Vol. 23, 2017, 99-100.

<sup>17</sup> September 10 has been celebrated since 1993 as Gibraltar National Day.

and declared that any colonial situation which partially or completely destroys the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the UN and with paragraph 6 of UNGA Resolution 1514(XV). In Gibraltar, however, a new constitution was adopted in 1969, highlighting for the first time in its preamble that "*Her Majesty's Government will never enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another State against their freely and democratically expressed wishes.*" Bilateral Spanish-British relations became frozen after this, and on 8 June 1969, Spain closed the land border.

In 1977, after the fall of the Franco regime, Spanish–British bilateral talks started in Strasbourg, where Gibraltarians were part of the British delegation. The talks resulted in the Lisbon Agreement<sup>18</sup> of 1980, in which they agreed to strengthen bilateral relations, and Spain committed itself to lifting the border closure. In the agreement, Spain reaffirmed its position on the re-establishment of the territorial integrity of Spain. At the same time, the British maintained their commitment to honour the freely and democratically expressed wishes of the people of Gibraltar as set out in the preamble to the Gibraltar Constitution. The agreement was followed by a new one in 1984,<sup>19</sup> eventually resulting in the opening of the land border in February 1985, yet without resolving the problem of the use of the airspace.

The British–Spanish talks continued until 1997. In December 1997, the Matutes proposals were expressed by the Spanish Foreign Ministry, suggesting temporary joint sovereignty over Gibraltar for an unspecified period before sovereignty would be transferred to Spain.<sup>20</sup> However, the British government reiterated its commitment to the 1969 Constitution of Gibraltar that no decision would be made against the

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<sup>18</sup> The Lisbon Agreement of 10 April 1980. Available at: <https://www.gibnet.com/texts/lisbon.htm> accessed: 22 April 2022.

<sup>19</sup> The Brussels Agreement of 27 November 1984. Available at: <https://www.gibnet.com/texts/brussels.htm> accessed: 22 April 2022.

<sup>20</sup> Joint sovereignty has always been a temporary method for Spain to restore its territorial integrity by recovering Gibraltar. Sans, Cristina Izquierdo: Gibraltar, ¿El fin de una controversia? In: *Revista Española de Derecho Internacional* 54(2). 2002, 627.

will of the people of Gibraltar. Also, around half of the Gibraltarian population petitioned the British government to reject the proposal.

Bilateral talks started again in 2001, resulting in an undisclosed written agreement on joint sovereignty. According to the memoirs of the British negotiator,<sup>21</sup> Spain accepted that the UK would permanently hold joint sovereignty over Gibraltar, also comprising the land (and waters) of the isthmus not ceded in the Treaty of Utrecht and that Britain could keep the military base.<sup>22</sup> The question of the joint British-Spanish sovereignty was put on an unrecognised referendum by the Gibraltar government on 7 November 2002 and was rejected by 99% of the voters with a turnout of 87.9%. Although Britain has not recognised the referendum either, since the mid-2000s the UK has stuck to the position of not taking or advancing in any direction on sovereignty without prior Gibraltarian agreement.

Today, arguments on Gibraltar diverge: Spain insists that the British forces had executed the occupation of 1704 on behalf of a pretender to the Spanish throne, while Britain answers that Admiral Rooke, who took the fortress, occupied it in the name of Queen Anne of England.<sup>23</sup> Furthermore, London stresses that the *status quo* was confirmed in subsequent treaties.<sup>24</sup> Madrid also recalls that any event of a purported grant of independence by Britain to the people of Gibraltar would be an "alienation" giving rise to the option under Article X for Spain to recover its sovereignty over it.<sup>25</sup> Moreover, since Spain considers Gibraltar a small, colonial enclave in Spanish territory, and does not recognise the right of the people of Gibraltar to self-determination, it argues that decolonisation does not necessarily mean independence; it is "the interests of the people" that has to be taken into consideration.

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<sup>21</sup> Hain, Peter: *Outside in*. London: Biteback Publishing. 2012, 274-285.

<sup>22</sup> Valle Gálvez, Alejandro del: Gibraltar, the Brexit, the Symbolic Sovereignty and the Dispute. A Principality in the Straits? In: *Cuadernos de Gibraltar – Gibraltar Reports*, Vol. 2. 2016-2017, 84-85.

<sup>23</sup> Saint Robert, Philippe de: Gibraltar, une usurpation hitorique. In: *Revue des Deux Monde*, September 2017, 162.

<sup>24</sup> Fawcett 1967 *op. cit.*, 238-239.

<sup>25</sup> Cassese, Antonio: *Self-Determination of People: A Legal Reappraisal*. Cambridge; New York: Cambridge University Press. 1995, 209; Fawcett 1967, 247.

Nonetheless, the British side points out that while Spain denies the right of the Gibraltarians to hold a referendum on their future, it also argues in a hypocritical way that Morocco should allow the population of the former Spanish colony of Western Sahara to express their will about their future at a referendum.<sup>26</sup>

### **3 The development of the British legal status and Gibraltarian identity**

Gibraltar was declared a Crown colony on 20 June 1830, as a recognition of the growth of the civil population and the transformation from a military outpost. Its status changed again with the British National Act of 1981, when all remaining colonies were reclassified as British Dependent Territories. This status was replaced by the British Overseas Territory Act of 2002, when Gibraltar, alongside thirteen other territories, was declared a British Overseas Territory. These territories are the remnants of the British Empire, and almost all of them are listed by the UN Special Committee on Decolonization as non-self-governing territories.

Shaping Gibraltarian identity has been a long process. It started immediately after the occupation of 1704 when Britain intended to attract foreigners to the almost uninhabited Gibraltar to make the town viable. The call was answered by Italian, Dutch, and British people, as well as Jews from North Africa, and by 1713 Spaniards formed only a minority.<sup>27</sup> In 1829, the population was made up of 16.000 civilians, among them 9.000 British, and 7.000 foreigners, almost half of the residents for over fifteen years. The town also hosted 3.500 soldiers

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<sup>26</sup> Tannock, Charles: Gibraltar's Right to Self Determination Under Threat. December 2002. Available at: <https://www.gibnet.com/texts/tannock.htm> accessed: 22 April 2022.

<sup>27</sup> Plank 2013 *op. cit.*, 350–351.



and their families.<sup>28</sup> The civilian population rose to 18.500 in 1871 and to over 20.000 by 1901.<sup>29</sup> The population was joined by Hindus from the Sindh region of Pakistan and Moroccan Arab Muslims after 1969 to replace Spanish workers who were prevented from commuting to Gibraltar by the closed border. Today, the town has a population of around 34.000.

During the 18<sup>th</sup> century, the Gibraltarian British identity galvanised around being a successful “trading nation”, distinguishing themselves from the Catholic and Muslim nations around them; and this feeling even got a boost during the Great Siege of 1779-1783.<sup>30</sup> By the 1930s, the descendants of the settlers of various ethnic backgrounds had started to consider themselves Gibraltarians and also managed to gain some measure of autonomy from their colonial ruler. The mass evacuation of 1940 and the firm will of the Gibraltarians to return also contributed to the strengthening of a solid local identity.

Since WWII, Gibraltarian identity has been shaped by some concrete factors: loyalty to Britain, obtaining self-government, and opposition to Spanish claims.<sup>31</sup> Tourism and financial services as emerging sectors after the decrease of the importance of the Royal Navy in the economic life of Gibraltar in the 1980s have also enriched the Gibraltarian identity. Further stimuli were Britain’s interest in allowing for a wider legal status for the territory in the era of decolonisation, and the stationing of HMS Tireless, a broken nuclear submarine at Gibraltar harbour during 2000-2001. This latter raged the population against Britain, which, according to the local views, did not consider Gibraltarians’ opinion.<sup>32</sup>

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<sup>28</sup> Constantine, Stephen: The Pirate, the Governor and the Secretary of State: Aliens, Police and Surveillance in Early Nineteenth-Century Gibraltar. In: *The English Historical Review* 123(504). 2008, 1169, 1186-1187

<sup>29</sup> *Ibid*, 1190.

<sup>30</sup> Plank 2013 *op. cit.*, 369.

<sup>31</sup> On Gibraltarian identity see Alvarez, David: Nation-making in Gibraltar: From Fortress Colony to Finance Centre. In: *Canadian Review of Studies in Nationalism* 29(1-2). 2001, 9-25, and Lambert 2005 *op. cit.*, 206-220.

<sup>32</sup> Bowcott, Owen - Black, Ian: Nuclear sub keeps Gibraltar in a rage. *The Guardian*, 27 January 2001 [online]. Available at: [www.theguardian.com](http://www.theguardian.com) accessed: 09 February 2022.

This frustration and the bilateral British-Spanish talks of 2001-2002 resulted in the unrecognised sovereignty referendum of 2002.

Today Gibraltar has its own coat of arms and flag,<sup>33</sup> both granted by Isabella I of Castille in 1502, a hymn since 1994,<sup>34</sup> a national day since 1992, and even a dialect called yanito or llanito. It is basically Andalusian Spanish, heavily influenced by words from English and other languages, although the sole official language of Gibraltar is English. Gibraltarians enjoyed European Union citizenship since the signing of the Treaty on European Union (TEU) on 7 February 1992, and British citizenship instead of British Overseas Territories citizenship from 21 May 2002 onwards.<sup>35</sup>

The first city council was established in 1921, but it was not until 1945 that more than half of the members were elected by the population. Civic administration was transferred to the local government in 1964. The predecessor of the current *Gibraltar Parliament*, the *House of Assembly* was created by the constitution of 1969 and today all the 17 members are elected by the population. Today only defence and foreign relations are executed by Britain, everything else is controlled by the Gibraltarian authorities, yet the *de facto* head of state is the governor, the representative of the British ruler, appointed by the monarch on the advice of the British government.

With a consolidated Gibraltarian identity and a solid administrative system in function, decolonisation has come to a problem hard to resolve: the solution preferred by Madrid and supported by the UN, i.e. the restoration of the territorial integrity of Spain is out of the question for the Gibraltarians, whom Spain considers colonisers with no right to decide about the future of the Rock. The meaning of ‘decolonisation’

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<sup>33</sup> Gibraltar is the only British Overseas Territory whose flag does not feature the Union Jack in any form, although the latter is widely flown as a standalone flag.

<sup>34</sup> Yet the official national anthem is God Save the Queen.

<sup>35</sup> At that time, all British overseas citizens, including Gibraltar but with the exception of Sovereign Base Areas of Akrotiri and Dhekelia, became automatically British citizens. Types of British nationality [online]. Available at: [www.gov.uk/types-of-british-nationality](http://www.gov.uk/types-of-british-nationality) accessed: 09 February 2022.

has been debated by international lawyers.<sup>36</sup> Some argue that decolonisation shall move from the limited content it has today, i.e. independence, association with an independent state, or integration in an independent state, to an open-ended process reflecting on the will of the concerned peoples.<sup>37</sup> Yet, for the international community Gibraltar is only a territory awaiting decolonisation in a process supervised by the UN.<sup>38</sup>

Despite this, in 2004, Spain recognised for the first time that Gibraltarians might have a word in the talks opening, thus by this new approach the way to the Cordoba Agreement of 2006 was opened.<sup>39</sup> The agreement resolved the issues of the use of the Gibraltar Airport, the question of the pensions of Spaniards who had worked in Gibraltar, and also allowed for Gibraltar an International direct dialling (IDD) telephone code, and created the Trilateral Dialogue Forum through which Gibraltar was entitled to express its voice directly. This forum worked until late 2011 when incoming right-wing Spanish prime minister Mario Rajoy backed out of it. This withdrawal led to a deadlock lasting until 2016, the time of the Brexit vote.

#### **4 Gibraltar in the EU – Before Brexit**

When the UK joined the European Communities (EC, today EU), Gibraltar, although not being part of the UK, also joined the EC. Article 355.3 of the Treaty on the Functioning of the European Union (TFEU)

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<sup>36</sup> According to Resolution 2625(XXV) of 1970 of the UNGA the implementation of the right of self-determination by a people could entail “[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by [that] people”.

<sup>37</sup> Yusuf, Hakeem O. and Chowdhury, Tanzil: The U.N. Committee of 24’s Dogmatic Philosophy of Recognition: Toward a Sui Generis Approach to Decolonization. In: *Indiana Journal of Global Legal Studies* 26(2). 2019, 437–460.

<sup>38</sup> Valle Gálvez 2016–2017 *op. cit.*, 82.

<sup>39</sup> García, Inmaculada González: La nueva estrategia para Gibraltar: El foro Tripartito de diálogo y los acuerdos de 2006. In: *Revista Española de Derecho Internacional* 58(2). 2006, 821–842.

made it possible by stating that “*The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible*”, since Gibraltar is an overseas territory for whose external relations the UK is responsible. The UK Accession Treaty of 1972 contained special regulations concerning Gibraltar hence during the British EU membership, the following EU policies were not applicable in Gibraltar: Customs Union; Common Commercial Policy; Rules on the free movement of goods; Common Agricultural Policy and the Common Fisheries Policy; obligation to levy VAT.<sup>40</sup> Also, the town was not part of the Schengen Area.

The porosity of the border has always been one of the most important questions for Gibraltar due to its reliance on the surrounding Spanish hinterland of *Campo de Gibraltar*. There are currently two borders: the land border and the airport. Both of them lie on the debated neutral ground taken by the British illegally according to Spanish accusations, but in effective British possession since the early 18<sup>th</sup> century.<sup>41</sup> To protect the disputed territory, in 1909, Britain raised a fence, *La Verja* in Spanish, which is still in place, however, at the end of 2020, the parties agreed to demolish it, as we will see later. The border was closed completely between 1969 and 1982, and the situation normalised only in 1985, after the Brussels Agreement. In that, the two governments committed themselves to establish the free movement of persons, vehicles and goods between Gibraltar and the neighbouring territory.<sup>42</sup> This coincided with the Spanish accession to the EC, and the return of the Spanish workforce helped the reshaping of Gibraltar’s economy. The free movement of labour came into force on 1 January 1993.

However, the question of the air border is more complicated, mainly because there is no mutual interest. The airport was built in 1938 on the disputed neutral ground and gained importance during WWII.

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<sup>40</sup> Valle Gálvez 2016–2017 *op. cit.*, 76.

<sup>41</sup> Memorandum submitted by the Foreign and Commonwealth Office, March 1999 [online]. Available at: <https://tinyurl.com/59rk4fn9> accessed: 09 February 2022.

<sup>42</sup> Supplementary Memorandum submitted by the Foreign and Commonwealth Office March 1999, point 1, [online]. Available at: <https://tinyurl.com/2p8mzf8u> accessed: 09 February 2022.

According to Britain, there is an Exchange of Notes of 20 July 1950 in which the Spanish government recognised that Gibraltar is "a military airfield",<sup>43</sup> however, Spain denies the existence of such a document. The use of Spanish air space was tolerated until 1967, when a complete closure came. On 2 December 1987, the parties agreed to share the control of personnel, but the agreement did not enter into force as the Gibraltarian government rejected it on the ground of a possible ceding of sovereignty.<sup>44</sup>

After signing the Schengen Agreement, and especially the Schengen Convention of 1990, Spain intended to bring the town within the Schengen Area of which Britain was not part. To ensure this, after 1991, Madrid suggested that border control at the airport and the harbour should be exercised by the UK and Spain jointly.<sup>45</sup> Yet, the issue of the airport was resolved only in 2006 by the Cordoba Agreement signed by the British Minister for European Affairs, the Gibraltarian Chief Minister and the Spanish Foreign Minister. The parties agreed to build a new terminal allowing passengers and cargo to reach Spain directly without stepping foot on UK territory. The text also stipulated that a tunnel should be constructed to avoid vehicular traffic routinely crossing the airport runway. The tunnel and the terminal connection to the north of the fence have not been built, and a deadlock occurred in 2012 when the Spanish government withdrew from the Agreement. After this withdrawal, the European airline regulations had to be suspended again.<sup>46</sup> The relationship became very tense, Gibraltar even shut down the Cervantes Institute in 2015.<sup>47</sup> It started to ease only at the end of 2015, shortly before the Brexit vote took place.

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<sup>43</sup> Fawcett 1967 *op. cit.*, 246.

<sup>44</sup> Memorandum 1999, point 31.

<sup>45</sup> Boixareu, Angel: Las fronteras exteriores de la Unión Europea y la cuestión de Gibraltar. In. *Política Exterior* 10(49). 1996, 141-142. Finally, Spain had four external land border crossings, two to Morocco from Ceuta and Melilla, respectively, one to Andorra and one to Gibraltar at La Línea de la Concepción, meaning that Gibraltar did not take part in the Schengen Area.

<sup>46</sup> Answer to question No. E-002559/2014, 23 April 2014 [online]. Available at: <https://tinyurl.com/3kfa2yy7> accessed: 09 February 2022.

<sup>47</sup> Valle Gálvez 2016-2017 *op. cit.*, 69-70.

The Spanish denial of Gibraltar's sovereignty also led to practical problems: the non-recognition of British passports and driving licences with Gibraltar inscription on the front,<sup>48</sup> complications in inter-institutional and legal cooperation even on the EU level connected to institutions set up by the 1969 Constitution, i.e. the Supreme Court and the Attorney-General.<sup>49</sup>

## 5 The economy of Gibraltar

The British immediately tried to attract population to ensure the provision of the garrison after the Spanish forces and the population left the fortress in 1704, relying first on African merchants.<sup>50</sup> After 1713, Britain concluded treaties with North African rulers to grant special trading privileges for merchants from Gibraltar and encouraged merchants from European territories to move to the town. They succeeded, and Gibraltar developed into an important commercial centre. Until the 1980s, the town's economy was highly dependent on MoD employment, similar to that of Melilla, a North African Spanish exclave bordering on Morocco,<sup>51</sup> but since then, financial services, maritime services, and tourism have become more important.<sup>52</sup> Britain intentionally turned Gibraltar into a financial services centre since accessible institutions, an educated workforce, a UK-style legal system, easy access to the EU market and regulation to UK standards were all provided.

Spain argued for a long time that smuggling and other illegal and unnatural means helped to sustain Gibraltar's economy proving "the unnatural character of the human assemblage that resides at Gibraltar"

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<sup>48</sup> Memorandum 1999, points 52–57. Especially because many Spaniards obtained Gibraltar issued driving licences.

<sup>49</sup> Memorandum 1999, points 71–73.

<sup>50</sup> Plank 2013 *op. cit.*, 348.

<sup>51</sup> Manzinger Krisztián: Erődök, gyarmatok vagy multikulturális városok? In: *Külügyi Szemle* 18(2). 2019, 108.

<sup>52</sup> Memorandum 1999.

and, for instance, used this as a pretext when closing the border in October 1964.<sup>53</sup> Drug and tobacco smuggling between Morocco and Spain peaked in the mid-1990s partly through Gibraltar forcing local authorities to step up and crack down on such activities.<sup>54</sup> Spain also complained that the obscure Gibraltarian legislation made the town the main repository of funds taken out of Spain to evade taxes.<sup>55</sup> Although fishing has never been a major industry in Gibraltar, the use of the bay by Spanish fishermen often resulted in bilateral conflict, particularly in 1998, when the foreign ministers of Spain and Britain had to arrange a solution.<sup>56</sup>

Reliance on the neighbouring Spanish territories has been important since the 18<sup>th</sup> century:

“Most of the food supplies had to be fished from the sea or brought in daily from Spain, and likewise water, on the backs of donkeys, because the natural supply was limited to a few springs and wells plus that captured in cisterns from rainfall. Labour was also needed from outside [...]. Entry to Gibraltar from Spain or by sea was therefore close to a necessity [...]. There were stout walls and only three gates, but the frontier had to be porous. The challenge to the colonial authorities was to allow access without putting at risk the security and efficiency of the garrison, or trade prosperity.”<sup>57</sup>

The entry to Gibraltar has been regulated since the 1720s,<sup>58</sup> but according to Spain, the dependency on foreign workforce proves the artificiality of Gibraltar’s economy.<sup>59</sup> The closure of the border between 1969 and 1982 caused severe economic problems in the town.

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<sup>53</sup> Fawcett 1967 *op. cit.*, 244.

<sup>54</sup> Memorandum 1999, points 68–70.

<sup>55</sup> Memorandum 1999, points 60–67.

<sup>56</sup> Memorandum 1999, points 35–42.

<sup>57</sup> Constantine 2008 *op. cit.*, 1170.

<sup>58</sup> *Ibid*, 1172.

<sup>59</sup> Fawcett 1967 *op. cit.*, 245.

During the decades both Gibraltar and Spain were members of the EU, reliance on each other strengthened: at the end of 2019, the number of daily commuters was nearly 14.000 including 2.500 Britons living in Spain.<sup>60</sup> Therefore, it is not a coincidence that 96% of the Gibraltarian voters opted for "Bremain" at the 2016 Brexit referendum. Their main fear was again in connection with the border: Brexit would have led to the complete closure of it if Article X of the Treaty of Utrecht was taken literally since it had been superseded by EU law on the free movement of goods and people.<sup>61</sup> The hard border did not threaten with Gibraltar ending up completely inoperable since two-thirds of the cross-border workers had their access via *La Verja* where they were allowed to cross the border just by showing an ID card. It was the limitation of development and the deprivation of the nearby Spanish population of customers with high spending power that threatened those living along the border.<sup>62</sup>

## 6 Gibraltar and Brexit

Just after the results became public, Scotland and Gibraltar held talks about remaining in the EU despite the decision by a slight majority that the UK would leave the EU.<sup>63</sup> However, it turned out quite soon that the political elite of London was "Brexiting" the whole of the UK from the EU. After the later Prime Minister Theresa May's declaration

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<sup>60</sup> Gibraltar Wants to Join Schengen Post-Brexit – UK Says No. *Schengen Visa Info*, 20 January 2020 [online]. Available at: [www.schengenvisainfo.com](http://www.schengenvisainfo.com) accessed: 09 February 2022.

<sup>61</sup> Valle Gálvez 2016–2017 *op. cit.*, 74.

<sup>62</sup> González, Miguel – Cañas, Jesús A.: Spain, UK reach 'preliminary agreement' that will see an end to the border with Gibraltar. *El País*, 31 December 2020 [online]. Available at: <https://english.elpais.com/> accessed: 09 February 2022.

<sup>63</sup> Cañas, Jesús A.: Gibraltar negocia con Escocia cómo quedarse en la UE tras el 'Brexit'. *El País*, 27 June 2016 [online]. Available at: [www.elpais.com](http://www.elpais.com) accessed: 09 February 2022.



that “Brexit means Brexit” on 11 July 2016,<sup>64</sup> it also became obvious that there was no option for using of the Norwegian or Swiss model to keep the UK within the EU to some extent. Also, the reversed Greenland example was debated in vain as a possibility for Gibraltar, since in that case Denmark remained in the EC, while the autonomous part of Denmark, Greenland decided to leave it in 1978. The “microstate-style relationship with the EU”<sup>65</sup> also emerged as a possibility, but that was turned down immediately by Spain,<sup>66</sup> arguing that Gibraltar was a non-self-governing colony and not an autonomous region of a member state or a sovereign entity.<sup>67</sup>

Shortly after the vote, Spain made it clear – in opposition to the Spanish declaration of 2004 – that the question of Gibraltar was still a bilateral issue in line with the UN approach<sup>68</sup>. Spain’s position seemed to be strong since the EU had declared that any future agreement between the EU and the UK would require a prior agreement with Spain, and also because the EU treaty modifying the TEU and TFEU had to be ratified by each State, including Spain. This resulted in Madrid’s success in the recognising that the question of Gibraltar should be kept separate from the negotiation on the withdrawal of Britain, i.e. outside of the framework of TEU Art. 50, since the British-Spanish agreement must be previous to any agreement about the application of EU Law in Gibraltar.<sup>69</sup>

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<sup>64</sup> No second EU referendum if Theresa May becomes PM, 11 July 2016 [online]. Available at: [www.bbc.com](http://www.bbc.com) accessed: 09 February 2022.

<sup>65</sup> Andorra, Liechtenstein, Monaco and Vatican City are not members of the EU, yet they have a special relationship with the community.

<sup>66</sup> Brexit: Gibraltar Contents Chapter 5: An uncertain future [online]. Available at: <https://tinyurl.com/5n7jx8fb> accessed: 09 February 2022.

<sup>67</sup> Martín y Pérez de Nanclares, José: Brexit y Gibraltar: la cosoberanía como posible solución de la controversia sobre Gibraltar: un acer-camiento jurídico en el contexto del Brexit. In: Martínez, Magdalena M. Martín – Martín y Pérez de Nanclares, José: *El Brexit y Gibraltar: Un reto con oportunidades conjuntas*. Madrid: Colección Escuela Diplomática, Vol. 23. 2017, 32–33.

<sup>68</sup> Margallo: La bandera española está ahora mucho más cerca del Peñón de Gibraltar. *ABC España* 24 June 2016 [online]. Available at: [www.abc.es](http://www.abc.es) accessed: 09 February 2022.

<sup>69</sup> Valle Gálvez 2016–2017 *op. cit.*, 80.

Madrid again proposed a transitional joint sovereignty model to solve the issue. The Spanish offer contained adding Spanish citizenship to the British and a Statute of Autonomy under Art. 144 of the Spanish Constitution, while Spain would assume responsibility for external relations instead of Britain after the UK's withdrawal from the EU; in return, Gibraltar would remain part of the EU, and the border and border controls would disappear.<sup>70</sup> The idea was welcomed neither in Britain nor in Gibraltar.

In October 2018, Gibraltarian chief minister Fabian Picardo openly stated that Gibraltar needed a differentiated withdrawal process from the EU.<sup>71</sup> In January 2020, he went further, proposing that Gibraltar should become part of the Schengen Area; however, the idea was rejected by Britain.<sup>72</sup> After the British withdrawal on 1 February 2020, a transition period took place during which EU law was applied to and in the UK in accordance with the withdrawal agreement. The transitional phase ended on 31 December 2020. During these eleven months, the Gibraltarian government constantly kept the population informed about the changes if there was a no-deal Brexit.<sup>73</sup>

Although after exhausting talks, the EU and UK negotiators concluded a Trade and Cooperation Agreement on 24 December 2020, Gibraltar was not included in the scope of this document. Only on 31 December 2020, the last day, did Britain and Spain reach a preliminary agreement, allowing for the fluidity of the border while safeguarding Gibraltar's sovereignty.<sup>74</sup> According to the deal, Gibraltar joined the Schengen Area for the first time, and the UK and Spain agreed to move

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<sup>70</sup> *Ibid*, 83.

<sup>71</sup> Gibraltar needs a differentiated process of withdrawing from EU, says territory's chief minister. *Schengen Visa Info*, 24 October 2018 [online]. Available at: [www.schengenvisainfo.com](http://www.schengenvisainfo.com) accessed: 09 February 2022.

<sup>72</sup> Gibraltar Wants to Join Schengen Post-Brexit – UK Says No. *Schengen Visa Info*, 20 January 2020 [online]. Available at: [www.schengenvisainfo.com](http://www.schengenvisainfo.com) accessed: 09 February 2022.

<sup>73</sup> The documents can be accessed via: [www.gibraltar.gov.gi/brexit](http://www.gibraltar.gov.gi/brexit) accessed: 09 February 2022.

<sup>74</sup> UK–Gibraltar–Spain agreement: statement from the Foreign Secretary 31 December 2020 [online]. Available at: [www.gov.uk](http://www.gov.uk) accessed: 09 February 2022.

the border to Gibraltar's airport and port from *La Verja*. A four-year implementation period was set during which Gibraltar's authorities and Frontex, the European border agency, jointly manage border controls, yet Spain is responsible for making sure the Schengen rules are observed in Gibraltar. That means that the European agents have to account to the Spanish authorities on who is permitted to enter the area and the policy of conceding visas. Anyone travelling to Gibraltar from Spanish territory is not required to have a passport, but British citizens are, given that the United Kingdom is not part of the Schengen Area.<sup>75</sup>

Many, especially in Spain, saw this document as an essential step towards Gibraltar coming under Spanish sovereignty. Nevertheless, at a UK-Gibraltar Joint Ministerial Council on 29 March 2021, London made it clear that it would never enter into arrangements whereby the people of Gibraltar would pass under the sovereignty of another state against their freely and democratically expressed will, nor into a process of sovereignty negotiations with which Gibraltar was not content.<sup>76</sup> Therefore, it is not a surprise that a document published by the European Commission in July 2021 envisaging Spanish authorities, without mentioning Frontex, to carry out relevant EU rules at Gibraltar port, airport and waters to ensure the full protection of the Schengen area, caused indignation.<sup>77</sup> The proposal was declared unacceptable by Gibraltar's chief minister, while the UK foreign secretary evaluated the proposal as one undermining the UK's sovereignty over Gibraltar.<sup>78</sup>

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<sup>75</sup> González, Miguel - Cañas, Jesús A.: Spain, UK reach 'preliminary agreement' that will see an end to the border with Gibraltar. *El País*, 31 December 2020 [online]. Available at: <https://english.elpais.com/> accessed: 09 February 2022.

<sup>76</sup> Press release - A treaty between the UK and EU in respect of Gibraltar: joint ministerial statement, 29 March 2021 [online]. Available at: [www.gov.uk](http://www.gov.uk) accessed: 09 February 2022.

<sup>77</sup> Recommendation for a Council Decision authorising the opening of negotiations for an agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, in respect of Gibraltar, 20 July 2021 [online]. Available at: <https://tinyurl.com/356sfcf5> 3., accessed: 09 February 2022.

<sup>78</sup> Miguel, Rafa de: UK threatens no-deal scenario for Gibraltar due to plans for Spain-run border controls. *El País*, 23 September 2021 [online]. Available at: <https://english.elpais.com/> accessed: 09 February 2022.

The final document authorising the start of negotiations for an EU-UK agreement in respect of Gibraltar, adopted on 5 October 2021 by the European Council, used different wording and envisages the deployment of Frontex officials alongside the local officials at Gibraltar's airport and port.<sup>79</sup> This decision marked the beginning of the EU-UK talks on the future relationship of Gibraltar with the EU that had six rounds until late February 2022. The talks aim to create a treaty regulating the future of Gibraltar with the EU, concerning the movement of labour and goods, the environment, citizen's rights, continued recognition of documents. The state of play today is that the agreement will inevitably create a closer relationship with the EU than Gibraltar had ever had during the 48-year-long British EU membership.<sup>80</sup>

## 7 Conclusions

Since 711, Gibraltar was Moorish for 627 years, Spanish for 266 years and has been British for 318 years. There has been an ongoing legal dispute between Spain and Britain concerning sovereignty over the town, which is currently a British Overseas Territory enlisted by the UN as a non-self-governing territory, considered by Spain as an artificial and unjust British enclave hampering Spain's territorial integrity, and by Gibraltar and the UK as a self-governing entity entitled to decide its fate on its own. Although these perspectives seem to be far from each other, history has shown that results can be achieved when all interested parties are willing to negotiate in good faith and on the ground of mutual respect.

Brexit has led to a situation in which Gibraltarians have to balance on a narrow path: they want to keep the land border with EU member

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<sup>79</sup> Bounds, Andy – Dombey, Daniel: EU moves to reduce Gibraltar border tensions with UK. *Financial Times*, 5 October 2021 [online]. Available at: [www.ft.com](http://www.ft.com) accessed: 09 February 2022.

<sup>80</sup> Mardell, Mark: Is Brexit Driving Gibraltar Into Europe's Arms? *Foreign Policy*, 10 March 2021 [online]. Available at: [www.foreignpolicy.com](http://www.foreignpolicy.com) accessed: 09 February 2022.

Spain open while maintaining their strong relationship with the non-EU UK, which is not only responsible for the territory's foreign relations but also the main guard of the town's Britishness and an obstacle to the Spanish territorial claims. Despite Brexit and the entrance into the Schengen Area, Gibraltar has continued to be a British Overseas Territory: even today, only Gibraltarians and British citizens are entitled to live and work in the town without a residence permit. Gibraltar is interested in both economic development and keeping Spain out of the town while relying strongly on the Campo de Gibraltar. After Brexit, the riddle is how Gibraltar can remain British and enjoy the four freedoms of the EU at the same time? The agreement of 2020 opened the way for Spanish authorities to assume some power in Gibraltar for a period of four years, yet in the name of the EU 27.

None of the parties are in an easy situation. In the already complex issue of Brexit talks, the problem of Gibraltar adds to the Northern Ireland question, and to some extent, to the problem of the Channel Islands for the UK that wants to make the most advantageous deal possible with the EU. On the other hand, Spain has made an offer seen as generous from Madrid, however, unacceptable for Gibraltar on joint sovereignty in the case of Gibraltar returning to the country. Spain also balances on a narrow path when approaching Gibraltar since it has been struggling both internally with some of the autonomous communities eager to obtain joint sovereignty (meaning a wider legal status than they enjoy today under the Spanish constitution), and externally with the Spanish exclave towns of Ceuta and Melilla reclaimed by Morocco on a similar ground as Madrid reclaims Gibraltar.

Resolving the issue of Gibraltar will not be simple, therefore, but history has shown that mutual respect and persistence can result in sustainable solutions.

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