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ESTUDIOS

GIBRALTAR

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I. HISTORICAL BACKGROUND

1. Gibraltar was conquered in the first days of August 1704 by an Anglo-Dutch naval force that was supporting the Archduke Carlos of Hapsburg's pretensions to the Spanish throne. In 1713, as part of the prize for peace and his recognition as King of Spain, Philip V had to agree to cede it in perpetuity to the British Crown. It was thus resolved in Article X of the Treaty of Utrecht that, nevertheless, foresaw that the ceded property would not generate territorial jurisdiction and would have no overland communication with the rest of the peninsula. This also recognised that Spain had a right of first refusal "in case it shall hereafter seem meet to the Crown of Great Britain to grant, sell or by any means to alienate from the propriety of the said town of Gibraltar".

2. Throughout the XVIII Century, there were numerous initiatives to regain Gibraltar

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Nota editorial: Este artículo fue redactado para la nueva edición de la *Max Plank Encyclopedia of Public International Law*, tras petición de su director, el Prof. Rüdiger Wolfrum, al Profesor Remiro Brotons. La *Encyclopedia*, al describir el objeto del artículo, expresamente solicitó una evaluación de las cuestiones jurídicas internacionales relevantes relativas a Gibraltar, sus problemas presentes y planes de cambio. El artículo fue entregado a finales de junio de 2007. Un año más tarde el director de la *Encyclopedia* comunicó al autor del artículo su decisión de no publicarlo, arguyendo que no ofrecía un relato objetivo de los diferentes puntos de vista concernientes a la situación jurídica de Gibraltar. Los Directores de la Revista *Cuadernos de Gibraltar – Gibraltar Reports*, que pretende ofrecer todos los planteamientos sobre la cuestión de Gibraltar, han considerado de interés facilitar a sus lectores el artículo del Dr. Remiro Brotons que la *Encyclopedia* no quiso publicar, a fin de darlo a conocer y en su caso posibilitarles extraer conclusiones.

through its sale or exchange (even including Ceuta) or recurrence to force. It was all in vain and in no less than four successive treaties (Seville, 1729; Aachen, 1748; Paris, 1763; Versailles, 1783) the Statute of Utrecht was confirmed.

3. In the XIX Century, Great Britain, in fact, extended its jurisdiction, enlarging this to include waters of the Bay of Algeciras and the sandy isthmus that joined the town of Gibraltar to the peninsula. In 1908, Britain put up a fence to consolidate its appropriation of more than half of the sandy isthmus and to better control the traffic of persons. In 1938, right in the middle of the Spanish Civil War, Britain build an airstrip there which penetrates more than half a kilometre into the Bay of Algeciras. Spain, on the other hand, relaxed the severity of the limits agreed upon in 1713. Commercial relationships, both regular and irregular, became the norm. Several thousand Spaniards crossed the fence every day to work in Gibraltar and the neighbouring Spanish territory also became a dormitory region for Gibraltarians and members of the British garrison.

II. GIBRALTAR AND DECOLONISATION: THE UNITED NATIONS RESOLUTIONS

4. Described as a Crown Colony from 1830 onwards, Great Britain, gave information on Gibraltar as a *non-self-governing territory* according to article 73 e) of the United Nations Charter as from 1947, forming part of the list of territories pending decolonisation once the declaration on the granting of independence to colonial countries and peoples was passed in 1960 (Resolution 1514-XV, of December 14).

5. Legally and politically speaking the situation raised by Gibraltar was of great interest. From a juridical point of view, the Spanish objective was to safeguard rights according to the Treaty of Utrecht and prevent the Gibraltarian population being recognised as having the right to self-determination that was liable to lead to the independence of the territory or to its association with Great Britain. From a political viewpoint, it was a question of the United Nations endorsing the bilateral Hispano-British negotiations as the way to reach a main agreement that would put an end to a colonial situation by returning Gibraltar to Spain.

6. The resolutions of the General Assembly from 1965 onwards have not allowed Spain to regain Gibraltar, although the objectives indicated have been satisfied as they did not adopt the British thesis which claims that where there is a non-self-governing territory, there is a population with the right to self-determination. The coupling of the vindications of the Republic of Argentina on the Falkland Islands with the Spanish vindication on Gibraltar favoured the course of the latter as it counted on the backing of the Latin American countries.

III. HISPANO-BRITISH NEGOTIATIONS IN 1966: RUPTURE AND CONFRONTATION

7. Negotiations were held between Spain and Great Britain from the 18th May 1966. To regain sovereignty over Gibraltar, Spain was willing to make extensive concessions: it would accept the British military base and a privileged statute for the Gibraltarians. But for Great Britain, any negotiation on sovereignty was completely out of the question: it would only deal with matters to settle problems originating from the application of the Treaty of Utrecht and *to return to normality*, that is to say, to the revocation of restrictive measures on overland communication adopted by the Spanish Government in previous years and to the improvement in neighbourly relationships.

8. Unilateral measures that provoked protest and reaction in the other party caused tension to rise. Great Britain reinforced self-government and promoted a qualitative leap in the political nature of the local authorities; in May 1969, it gave Gibraltar a *Constitution* whose preamble stated 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.” Spain, on the other hand, ended up blocking all communications including telegraphic and telephonic ones; it denied British military aviation access to Spanish airspace and established a *prohibited zone* to foreign flights, including civil ones.

9. This policy was counterproductive as it nurtured in the local population a spirit of survival within a hostile environment, favouring the crystallisation of a Gibraltarian identity and causing, by means of adequate lobbying, a revival of anti-Spanish stereotypes in Great Britain.

IV. DEMOCRATIC SPAIN: FROM THE 1980 LISBON TO THE 1984 BRUSSELS AGREEMENT

10. The establishment of a democratic regime in Spain on the death of General Franco (1975) and its foreseeable entry into NATO and the European Community encouraged new initiatives to break the deadlock.

11. The Lisbon Agreement, a gentlemen’s agreement signed on 10th April 1980, was the starting point for the formal resuming of negotiations. Unfortunately, discrepancies in its interpretation became an insuperable obstacle to its application. In the beginning of 1982, it appeared that the stalemate would be overcome, but the Falkland Islands armed

conflict between Argentina and Great Britain ruined the attempt. Afterwards, Britain's lack of willingness to even listen to the sovereignty question, the insistence on obtaining prior assurances on the air services to the Gibraltar Airport and the repercussions of Spain's future adherence to the European Community interfered again and again with the numerous contacts made by both sides from September 1983 onwards.

12. It was finally possible to reach an agreement. On the 27th November 1984, the *Brussels Agreement* made way for putting the *Lisbon Agreement* into practice in *all its aspects*, opening a negotiating process to solve all the differences on Gibraltar, including the questions of sovereignty and to promote, for mutual benefit, economic, cultural, tourist, air traffic and environmental cooperation based on equality of rights and reciprocity. The value of the reference to *sovereignty* was political and psychological. For the first time, Great Britain expressly accepted to talk about this although the parties were still far from sharing the objective of the negotiations. In the same *Agreement* it was warned that the British Government would wholly maintain its commitment to respect the rights of the Gibraltarians according to the preamble of the 1969 Constitution. It was therefore necessary to prepare for a long period of negotiation even though now, it seemed that there was a convergence of interests of both Spain and Britain that had not existed in the past. The fact that a few weeks after the *Brussels Agreement* Britain reached an agreement with the Republic of China on the future statute of Hong Kong seemed to bode well.

13. Unfortunately, when the time came to test Great Britain's willingness to facilitate the "osmosis" of Gibraltar with the neighbouring Spanish territory, the results were disappointing. The touchstone was the agreement to facilitate common civil use of the airport situated on the isthmus (2nd December 1987). Given the opposition of the local Gibraltar authorities to the project, the British Government refused to carry out the agreement. The consequences on the process initiated in Brussels were devastating. The rounds of negotiations became inoperative routines to keep up appearances and Spain devoted its efforts to preventing that the *Nato and EC* condition of the Rock (under a special regime) should be taken advantage of by Great Britain to favour the evolution of a Gibraltar statute contrary to Spanish rights and interests.

V. FROM THE MATUTES PROPOSAL (1997) TO THE UNSUCCESSFUL NEGOTIATIONS OF 2001-2002

14. Ten years later, the Spanish Government tried to break the stalemate by means of the Matutes Proposal that included a transitional period of joint sovereignty for fifty years,

the voluntary keeping of British nationality, protection of the population's linguistic and cultural identity and a broad statute of autonomy within the framework of the Spanish Constitution with their own courts and fiscal regime. The Matutes Proposal, however, was not given the reception that the Spanish Minister had hoped for, mostly due to the fact that the Gibraltar authorities had in mind a plan to finalise their decolonisation through a process of constitutional modernisation that would grant the Rock a statute similar to that of the Isle of Man or the Channel Islands. They tried to impose their presence in any eventual Hispano-British negotiations as the third party involved (not only, as in the past, as part of the British delegation).

15. In these circumstances and in the middle of a series of incidents, the Spanish Government decided to intensify in Brussels its campaign of condemnation of the systematic breaching of the EC directives in Gibraltar and the parasite nature of its economy that favoured money laundering and tax evasion through fictitious societies whose number, round fifty thousand at that point, was greater than the number of inhabitants in the colony. Likewise, the Spanish Government persevered in its policy of impeding the adoption of EU agreements and regulatory acts which, when applied to Gibraltar, it deemed detrimental to the vindication of the Rock. The situation became even more uncomfortable when the matter of the *Tireless* arose. This was a British nuclear submarine that had broken down and was moored in Gibraltar on the 19th May 2000 awaiting repair.

16. At the beginning of 2001, however, an unexpected initiative by Tony Blair raised hopes of reaching a general agreement by the middle of 2002. The European Council echoed this, demonstrating its satisfaction about the re-launching of the "Brussels Process" and inviting the Commission to explore the ways in which the EU could support any agreements reached. There are some who consider that the British Government made a move with its commitment to do away with anachronisms and by a reconsideration of British interests in the light of the beneficial collaboration that, within and outside the EU, had been established with Spain under Aznar's Government.

17. The Blair Government tried to make shared sovereignty with Spain in Gibraltar a definitive or, at least, a temporarily unlimited solution rather than just a transitory one as Spain had proposed in the past. Without prejudice to this, the Blair Government wished to maintain the military base exclusively under British control, although its use would be opened up to members of NATO (therefore including Spain). Finally, the Blair Government maintained as a *sine qua non* requirement that any eventual Hispano-British agreement be accepted by the population of Gibraltar. This led to an impasse.

18. Blair's proposals met with ferocious opposition in the British Parliament thanks to the efficient performance of the Gibraltar lobby and the very influential Armed Forces' spokesmen and the conservative means of communication that acted on public opinion still open to stereotypes coined in the times of Elizabeth I. On the other hand, the Blair Government underestimated the capacity of the Gibraltar authorities to politically spoil any proposals that seemed to be on a collision course with their aim to progress towards self-government. On the 4th October 2001 all the members and former members of the Gibraltar Legislative Assembly signed a "declaration of unity" in which they affirmed that the people of Gibraltar would never negotiate or renounce their inalienable right to self-determination, their decolonisation being a bilateral matter between Gibraltar and Great Britain (through a process of modernisation in the constitutional relationship with Britain), since Article X of the Treaty of Utrecht should be considered terminated according to general norms of International Law. In the referendum of 7th November 2002, the Gibraltarians said *no* (98.97% of the voters) to the principle of shared sovereignty.

VI. A NEW CONSTITUTION FOR GIBRALTAR AND A TRIPARTITE FORUM FOR NEGOTIATION

19. Gibraltar wished to take advantage of the process of modernisation and greater self-government of the British dependent territories proposed in the White Paper of the British Government in March 1999 (*Partnership for Progress and Prosperity: Britain and the Overseas Territories*) to put an end to its condition of non-self-governing territory by an act of self-determination. However, the new Constitution – a charter granted by the *Privy Council* on the 19th December 2006, that came into effect on the 2nd January 2007 – did not alter the international statute of the Rock. The joint declaration of the British and Gibraltar Governments of the 27th March 2006 at the end of the negotiations on the constitutional text affirms that this "provides for the degree of self-government which is compatible with British sovereignty of Gibraltar and with the fact the UK is responsible for Gibraltar's external relations". The people of Gibraltar, it added, "have the right to self-determination" but the UK "holds the view that it is constrained by the Treaty of Utrecht, and therefore, that the independence would only be an option with Spain's consent". A day later, the Undersecretary of the Foreign Office expressed this in similar terms in a letter to the Spanish Minister for Foreign Affairs.

20. Within the United Nations, the Prime Minister of Gibraltar, Peter Caruana, unsuccessfully tried to convince the members of the Decolonisation Committee (June 2006) and the Fourth Commission of the General Assembly (October 2006) that the approval

by referendum of the new Constitution would entail an application of the “fourth option” mentioned by General Assembly’s Resolution 2625 (XXV). According to the Prime Minister Gibraltar should disappear from the list of non-self-governing territories because Gibraltar would enjoy “a status freely determined by the people...in an act of self-determination”.

21. Nevertheless, once the negotiations on the co-sovereignty had failed, it was necessary to put the *Brussels Process* aside and adopt a new strategy that came into force at the end of 2004 with the establishment of a *Tripartite Forum for Dialogue* for cross-border cooperation. This *Forum* has offered Gibraltar the participation on an equal footing with Great Britain and Spain in matters of interstate cooperation. Its decisions are taken unanimously, having foreseen that when matters of exclusive competence of the States are involved, the UK will not give its consent without the Gibraltar Government being in agreement. The *Forum* has found a natural complement in the Joint Committee for cooperation between Gibraltar and the neighbouring municipalities of the *Campo de Gibraltar* (the Spanish territory around the border with Gibraltar) that can be extended to the regional authorities of Andalusia.

22. The *Forum* gave its first results in September 2006 on reaching agreements to facilitate overland traffic, telecommunications, payment of pensions to former Spanish workers on the Rock and the opening in Gibraltar of a Cervantes Institute for teaching Spanish. The most striking of the agreements –whose legal nature is disputed- was the elimination of civil air traffic restrictions by Spain, the inauguration of a direct flight Madrid-Gibraltar and the planned construction of a single passenger terminal in the airport, situated on the isthmus. The prospect that Spanish customs agents and police will carry out their duties on an aerial corbel over Spanish territory highlights the Gibraltarian sensitivity to any step, short though it may be, that could imply the carrying out of Spanish sovereign competence on the other side of the *Fence*.

VII. LEGAL CONCLUSIONS

23. From a legal point of view, the historical process reveals that Article X of the Treaty of Utrecht is still the valid title of British sovereignty over Gibraltar although the interpretation of the limits of the ceded territory has been divergent.

24. Even having discarded the extreme opinion that Spain ceded the *property* but not the *sovereignty* of Gibraltar to Great Britain, it has been upheld that the cession “with no territorial jurisdiction” presupposed the transfer of *only* the places enumerated in Article X, to wit, the city, castle, port, fortifications and fort, with no projection over land space (the isthmus) and adjacent waters. Great Britain replied with the rule of the *effective range of a cannon* that was

highly popular in the XVIII Century, to maintain that the land and sea territory covered by Gibraltar's cannons was under British sovereignty.

25. This argument was very weak when applied to the isthmus, as the Spanish cannons from La Línea had Gibraltar also under their reach until Great Britain, taking advantage of the *alliance* against the Napoleonic armies on the peninsula, demolished the forts of San Felipe and Santa Barbara. The isthmus was considered neutral ground, no a *no man's land*. If the sovereignty cessions were to be interpreted in a restrictive sense, the necessary conclusion was that the isthmus was Spanish. Something else is what could be deduced from the acts and omissions of the parties involved throughout these three hundred years that classified as *promise, renunciation, recognition or acquiescence*, could originate obligations modifying the Treaty or stopping its application. It was thus, in the 1966 negotiations, that the British Government invoked the *usucapion* on which to base its sovereignty over part of the occupied isthmus.

26. As to the waters, the general norm by which sovereignty over the coast is projected onto adjacent sea plays in Britain's favour. It certainly is not an imperative principle and therefore, it is possible to limit a territorial cession merely to land, conceived as a *dry coast*, but this is an exception that requires proof that this has been the will of the parties involved. In fact, Spain did not dare convert the waters of the Bay into *internal waters* by closing the entrance with a straight line between Algeciras and Europa Point.

27. The present force of Spain's right of preference of having the Rock in case Great Britain decided to grant, sell or by any means to alienate it, is, on the other hand, recognised by the British Government: "Article X of the Treaty (of Utrecht) gave Spain the right to be the first to claim its sovereignty if Gibraltar were to cease being British. All constitutional change must be compatible with the Treaty of Utrecht, and moreover, applicable in practice. Independence would be an option for Gibraltar if Spain were in agreement." (*Declaration by the British Government before the Houses of Parliament on the 14th December 1995: White Paper on Overseas Territories*, March 1999). The non-recognition by the United Nations of the population of Gibraltar as the holder of the right to self-determination avoids the incompatibility of Spain's right of first refusal with a posterior imperative norm. Spain is not only Gibraltar's neighbour but also the holder of rights and legitimate expectations according to the same valid treaty from which the origin of British sovereignty over the Rock comes, as well as others deduced from the decolonisation principles.

28. At no other time in history has Spain counted on a better-prepared constitutional order for the territorial reintegration of Gibraltar. On the one hand, the autonomous organisation of the State facilitates differentiated regimes that take into consideration the peculiarities

of autonomous communities, both regional and national. On the other hand, even without making express mention, Gibraltar is one of the assumptions behind Article 144 b) of the Constitution when it makes provision for the Parliament (*Cortes Generales*) to be able to authorise or agree to a Statute of Self-Government *for motives of general interest* for territories that are not integrated into provincial organisation. And yet again, nothing impedes, the Gibraltar Statute in the Spanish constitutional order counting on the international guarantee granted by a treaty concluded between Spain and Great Britain

29. Having said this, 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.

VIII. LOOKING TOWARD THE FUTURE

30. Assuming that the political will to recover Gibraltar exists, the Spanish proposals have responded, in the past, to a sequence that is coherent with limits that can barely be altered. In this sense:

First, Spain may consent to a formula to share the sovereignty with Great Britain for a limited period of time (up to fifty years), if and when the aforementioned sovereignty automatically reverts to Spain at the end of that period or, at least, a clause for revision is established; in the case of its accepting shared sovereignty *permanently*, it would be essential to accompany this with a clause similar to Article X of the Treaty of Utrecht.

Second, Spain could share the military base with Great Britain in the same terms, even accepting for a time an operative control that is exclusively British and afterwards negotiating agreements similar to those made with NATO allies or within the framework of European policy of defence and security.

Third, Spain promotes a regime that respects the identity and legitimate interests of the population of Gibraltar, improves its self-government and may accept the guarantee, besides the one granted by the Spanish Constitution, of a treaty with Great Britain whose duration may be extended once the period of shared sovereignty has concluded.

31. In these terms, Spain could agree to the exclusion of Gibraltar from the list of non-self-governing territories and consider abrogated the rights of Article X of the Treaty of Utrecht. In the EU environment, the normative basis of the incorporation of Gibraltar would pass from the – present – Article 299.4 of the ECT (European territory whose relationships are assumed as a member State) to the Article 299.1 (sovereign territory of member States). Spain would cooperate with Great Britain in the improvement of the EU Statute on the Rock that raises varied and complex problems in a co-sovereignty regime.

32. Spain cannot, instead:

First, Accept shared sovereignty over Gibraltar in perpetuity or for an indefinite period, incompatible with the reestablishment of territorial integrity that has been the lever of its reclamation. Moreover, to share the sovereignty in areas that were not ceded in Utrecht is a form of ceding, not recovering, what had not been ceded.

Second, Accept a military base that is exclusively British and that occupies almost half the surface territory of the Rock, in the same terms.

Third, Agree on a regime that makes Spanish territorial sovereignty an empty shell, destabilises the autonomous territorial architecture of the State and consolidates Gibraltar's parasitism on its surroundings.

33. In any case, the role of the population of Gibraltar must be reconsidered. Spain is not going to renounce its rights – the *old* ones in the Treaty of Utrecht and the *new* ones in the decolonisation – yet it must be sensitive to the evolution of the right to self-determination that in these last years has come to reinforce the aspirations of a population whose identity has been growing while recognising a prominence that makes it responsible for its own acts. Instead of denying this right, it would be a better choice to insist that this right is not exclusive. Of course, it is not just a question of recognising Spain as a conspicuous neighbour whose security must not be threatened or who should not be annoyed too much so as not to complicate a pleasant life. It is a question of recognising that Spain also has rights, within and outside the normative framework of decolonisation and that, therefore, self-determination of the territory requires a freely agreed arrangement of the legitimate interests of all parties involved.

34. Really it is not the Treaty of Utrecht that limits the right to the self-determination of Gibraltar, but the right to self-determination itself according to the interpretation that the General Assembly's resolutions have given to it and that the Gibraltarians and those who support their aspirations tend to ignore or hope to rewrite unilaterally from metajudicial positions. The need to reach an understanding must be insisted upon and, as a means to

this end, a long process will be necessary to persuade the population that Gibraltar is not in the English Channel like the Isle of Man, nor, even less so, is it a rock in the middle of the ocean; it is an extraordinarily beautiful Rock that rises at the end of a peninsula one hundred thousand times larger than itself and of which it forms part. One cannot leave a colonial anachronism to enter an anomaly that has been fattened by the exploitation of sovereign prerogative and EU advantages to the detriment of the rights of Spain.

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