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Gibraltar: diplomatic and constitutional developments

This paper considers the outcome of the Trilateral Dialogue between the British, Spanish and Gibraltar Governments, which ended in Córdoba in September 2006 with agreements on a range of issues that had obstructed relations between the three parties.

It discusses the constitutional reform process that began in 2001 and the constitutional amendments agreed by the UK and Gibraltar in March 2006. Gibraltar's pursuit of United Nations recognition of a right to self-determination is also considered.

The paper also outlines the main points of the European Court of Justice ruling which rejected Spain's complaint about the UK granting European Parliament electoral rights to residents of Gibraltar.

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Summary of main points

Trilateral talks between the British, Spanish and Gibraltar Governments concluded in September 2006, giving rise to agreements on a number of issues that have affected relations between the three parties for several decades. These included the use of Gibraltar Airport, recognition of the Gibraltar direct dialling code, frontier fluidity and the payment of pensions to certain Spanish workers in Gibraltar. The lifting of Spanish airspace restrictions came into immediate effect, while other elements of the agreements will be implemented over the coming months. The agreements have not affected the parties' fundamental positions on sovereignty-related issues.

At the United Nations the Gibraltar Government and Opposition have continued to press the UN Fourth Committee and Committee of 24, which deal with decolonisation and self-determination, to establish a right to self-determination for Gibraltar in the face of the Spanish sovereignty claim. The British Government believes that none of its remaining overseas territories should remain on the UN list of non self-governing territories, and maintains its commitment not to change Gibraltar's constitutional status against the wishes of the people of Gibraltar. The Government also respects an obligation under the 1713 *Treaty of Utrecht* giving Spain the right of refusal should the UK ever renounce sovereignty of Gibraltar.

In March 2006 the British and Gibraltar Governments concluded negotiations on amendments to the 1969 Gibraltar Constitution which aim to modernise the relationship between the UK and its overseas territory. The draft *Gibraltar Constitution Order 2006* published in June 2006 gives the Gibraltar Government more decision-making powers than it has at present. The British Government retains international responsibility for Gibraltar. The powers of the British Government-appointed Governor are defined, while the Gibraltar Government enjoys the remainder. This reverses the current position whereby power is vested generally in the Governor on behalf of the Crown and the responsibilities of the Gibraltar Government are contained in a list of defined powers. Other constitutional amendments include changing the name of the Gibraltar House of Assembly to the Gibraltar Parliament, changes to certain law-making procedures and offices, the establishment of a statutory Gibraltar Police Authority and a Judicial Service Commission.

In September 2006 the European Court of Justice ruled in a case brought by Spain against the UK relating to the British Government's inclusion of Gibraltar in an existing UK electoral region for the purposes of European Parliament elections. The Court rejected Spain's argument that the extension of electoral rights to Gibraltar residents from British Commonwealth countries who were not citizens of the UK or any other EU Member State was contrary to Articles of the EC Treaty dealing with citizenship of the Union and the EP.

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I Trilateral Dialogue Process

A. Background

On 9 December 2004, following meetings between the Gibraltar Chief Minister, Peter Caruana, and senior British and Spanish foreign office officials, Dominick Chilcott and José Pons, the Governments of the UK, Spain and Gibraltar decided to set up a "Trilateral Dialogue"¹ outside the bilateral Brussels Process.² In June 2005 before the UN Committee of 24³ Mr Caruana praised the Spanish Government's decision to facilitate the Dialogue and its willingness to normalise relations with Gibraltar, in spite of the sovereignty issue. A new draft Consensus Resolution that included a reference to the Dialogue and gave less emphasis than in the past to the bilateral Brussels Process was adopted by the Fourth UN Committee⁴ in October 2005.

The Trilateral (or Tripartite) Dialogue Process was established by a Joint Statement issued by the British Foreign and Commonwealth Office, the Spanish Ministry of Foreign Affairs and the Government of Gibraltar.⁵ The Dialogue has had an open agenda, each of the three parties has had its own voice and all have participated on an equal basis. Working groups were set up to discuss specific issues, and decisions made or agreements reached have been agreed by all participants. The Forum met formally in Malaga in February 2005, Faro in July 2005, Mallorca in October 2005, Chevening in February 2006 and London in July 2006. The final ministerial level talks were held in Córdoba in September 2006.

A range of issues were discussed at the Forum, including the following long-standing issues:

- use of Gibraltar Airport
- the pensions of Spanish workers formally employed in Gibraltar (who left when General Franco closed the Spanish border in 1969)
- border delays and administrative issues
- the normalisation of telephone communications between Gibraltar and Spain.
- the repair of nuclear submarines in Gibraltar

In a press interview José Pons was optimistic that a package of measures could be agreed by summer 2006. He described the subject of the talks as "extremely sensitive"

¹ The FCO has called this the Forum of Dialogue on Gibraltar

² The 1984 *Brussels Communiqué*, issued jointly by Britain and Spain, established a process of negotiations called the "Brussels Process", under which both sides discuss a range of issues concerning Gibraltar, including sovereignty

³ The Special Committee of 24 on Decolonization, established by the UN General Assembly in 1961

⁴ The Fourth Committee of the UN General Assembly (Special Political and Decolonization)

⁵ HC Deb 28 October 2004 cc54-5WS at

<http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo041028/wmstext/41028m01.htm>

and “technically and politically complex” but thought there was “goodwill and commitment” among the participants which would help to advance negotiations on cross-border issues. Mr Pons referred to the Dialogue as a historic opportunity to achieve normal and prosperous cross-border relations, “without any side having to give up their positions of principle”.⁶

The final round of talks took place on 18 September 2006 between Mr Caruana, the Spanish Foreign Minister Miguel Angel Moratinos, and the British Minister for Europe, Geoff Hoon. On 7 September 2006 Mr Caruana was hopeful that the Córdoba talks would have a positive outcome that would benefit Gibraltar and the Campo⁷ at no political price, although he acknowledged that there were still outstanding issues. On 8 September the *Gibraltar Chronicle* reported that the Gibraltar Socialist Labour Party (GSLP) Opposition leader, Joe Bossano, had said a future GSLP-led government would not be bound by any agreement announced on 18 September following the talks.

“We will analyse what it all means when the deal is published, but we want to make clear at this stage that we are not bound by it,” said Mr Bossano in a National Day Message.

He recalled that 30 years ago the GSLP was founded to fight the position of the then British Government.

“This was that none of the 3 decolonisation options⁸ of the UN, then known to us, were acceptable to UK and that we had to remain as a colony and await developments in Spain. In other words, the position the Spanish Government has proclaimed at the UN ever since. Namely, the only option open to Gibraltarians is to remain as a colony unless and until Gibraltar becomes Spanish and is decolonised thereby.”

“We rejected this then and we reject it today. Our position then and now has been to demand formal recognition for our right to self determination from the UK and to be able to use the right to choose the mode of decolonisation we want, to freely and democratically determine the new international status of a decolonised Gibraltar” [...] This year we face fundamental issues including a range of agreements with Spain due to be signed on the 18th by which Spain will relax some of the restrictions imposed against us since the 1960's following our referendum. The terms of these agreements and what Spain gets in exchange is not known, except that leaks in the Spanish media describe this as an historic agreement for the joint use of our airport based on the 1987 deal and for a multimillion pound fund to compensate Spanish frontier workers withdrawn in 1969 by the Spanish Government.⁹

⁶ *Gibraltar Chronicle* 12 June 2006

⁷ The Campo is the area just north of the border with Spain, comprising the seven municipalities of Algeciras, La Línea, San Roque, Los Barrios, Tarifa, Jimena and Castellar. The total population is around 230,000

⁸ The three options set out by the UN are contained in Resolution 1541(XV), 1960 at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/153/15/IMG/NR015315.pdf?OpenElement>

⁹ *Gibraltar Chronicle* 8 September 2006

Another opposition party, the Progressive Democracy Party (PDP), led by Keith Azopardi, called for a referendum on any agreement that emerged from the Process if it affected Gibraltar's sovereignty. In a statement the PDP called on the Gibraltar Government to "treat the electorate with more respect and not present us with a fait accompli".¹⁰ The statement refuted arguments that a new climate in Spain would make agreement possible and cited recent indications of Spanish obstructions, including the European Court of Justice ruling on 12 September 2006 on the challenge to Gibraltar's right to vote in and stand for European elections and Spanish objections to the Gibraltar Football Association's UEFA application.¹¹ The statement went on:

One could be forgiven for thinking that some of what is expected to be heralded as triumphs within the Tripartite process are only the lifting of restrictions that should not be there in the first place [telephones, frontier queues and air restrictions] and the resolution of an issue that Spain badly wants to achieve [pensions]. While resolving conflicts is positive [if these can be achieved without concessions on sovereignty] these also need to be put in a proper context. Such an arduous negotiation to obtain the removal of these restrictions is necessary because the reality is that there is still a terrible reluctance in the acceptance of Gibraltar's rights.¹²

B. Results of the Córdoba Talks

On 18 September 2006 the three participating Governments issued a communiqué on the outcome of the Córdoba ministerial talks and separate statements on the Gibraltar Airport and Pensions. The full texts are in Appendix I.

1. The main points of the agreement

The main points of the agreement can be summarised as follows:

- enhanced use of the local airport for the benefit of Gibraltar and Spain: a single, larger terminal will be built at the border by 2009, under Gibraltar's control and jurisdiction; all Spanish air space restrictions against Gibraltar Airport will be removed; flights from Gibraltar to Spain to start December 2006.
- payment of Spanish pensions: UK to offer all pre-1969 Spanish pensioners a lump sum based on the length of contributions, as an inducement to withdraw from Gibraltar Pension Scheme (GPS). Those who do not accept the offer will stay in the GPS, receiving a Gibraltar pension which will be unfrozen and updated by the local Government.
- improved fluidity at the border: red and green channels at border to be doubled.

¹⁰ *Gibraltar Chronicle* 8 September 2006

¹¹ The GFA appealed to the Court of Arbitration for Sport (Cas). UEFA will make a decision on the provisional membership of the Gibraltar Football Association in December 2006. The UEFA Congress in January 2007 will take the final decision on full membership.

¹² *Gibraltar Chronicle* 8 September 2006

- development of telecommunications: the direct international dialling 350 number will be recognised by Spain and Gibraltar-registered mobile phones will be allowed to function in Spain.
- setting up of an Instituto Cervantes (similar to the British Council in the UK) in Gibraltar.¹³

The British Government also gave a written assurance to Spain that Gibraltar would no longer be used to repair nuclear submarines, although Mr Caruana said that recreational visits by submarines would continue.

2. Reaction to the agreement

Gibraltar

a. Government

Peter Caruana declared that Gibraltar had “come of age” and that the process had been constructive.¹⁴ He thought the accords were pragmatic and would benefit everyone, while protecting fundamental positions on issues such as sovereignty, control and jurisdiction. They would also have “a great impact on the economic and social well being of the region”.¹⁵ Mr Caruana made a statement on the Córdoba outcome on GBC (Gibraltar Broadcasting Corporation) Television on 19 September. Mr Caruana said the establishment of the Trilateral Forum had for the first time put Gibraltar “in a position to represent and defend itself in dialogue about our affairs with our own separate and equal voice, and to ensure that agreements are only struck if we judge them to safeguard and promote our wishes, interests and aspirations”.¹⁶ Unlike the Brussels Process, he said there had been no “bilateralism or done deals hatched behind our backs or over our heads by the UK and Spain”. The process of negotiation had not focused on Gibraltar’s sovereignty, but had been a dialogue with an open agenda, in which nothing could be agreed unless Gibraltarians agreed to it. He had sought “through a process of reasonable and safe dialogue with Spain, to establish as much normality as possible to our lives here in Gibraltar, to the lives of people in the Campo and indeed to our relations with Spain”, and the Process had allowed him to do that. Mr Caruana emphasised the need for good relations with Spain “based on mutual respect and understanding”, as well as the need to defend Gibraltar’s right to self-determination and sovereignty, rejecting the position of those who, he maintained, thought it was in Gibraltar’s interest to be in a state of enmity with Spain. He considered each of the main elements of the agreement, emphasising that the Spanish agreements on the telephone issue and border fluidity

¹³ The headline in a *Daily Telegraph* report on 19 September 2006 was that the deal would allow the Spanish flag to be flown in Gibraltar “for the first time in 50 years”. This refers to the Spanish flag that will be flown outside the new Cervantes Institute.

¹⁴ *Gibraltar Chronicle* 19 September 2006

¹⁵ *Ibid*

¹⁶ Gibraltar Government press release, 19 September 2006, at http://www.gibraltar.gov.gi/latest_news/press_releases/2006/MinisterialBroadcast-19-9-06.pdf

were “Within the context of the overall package, [...] unilateral acts by Spain, which will bring substantial benefits to Gibraltar, as well as a successful and satisfactory end to the political dispute about them”.¹⁷ He commented that the establishment of a Cervantes Institute in Gibraltar to increase knowledge of the Spanish language and culture was “a good thing and poses no political threat to anyone”. The resolution of the pensions issue would benefit all Gibraltar pensioners, and, Mr Caruana pointed out, would also

enable us to discharge a moral debt that we owe to those post-1969 pensioners of all nationalities, including hundreds of Moroccans who, despite having paid full pension contributions, have during all these years received pensions frozen at 1988 rates, and have not been eligible for Community Care because they live outside Gibraltar.¹⁸

Mr Caruana outlined Gibraltar’s contribution to the Airport Agreement, commenting:

Whatever we may think of Spain’s position it is simply not realistic to think that Spain can be persuaded to simply abandon her position in return for nothing at all. We may think that we are entitled to precisely that, but this is not realistic in the real world. Nevertheless, I said that we would not make sovereignty jurisdiction or control concessions, and we have not done so.

The main Gibraltar input will be the new, larger, single terminal, with tunnel and improved access roads. Customs and immigration control concessions will be made to Spain and Schengen entry and exit clearance will be granted to flights to and from Gibraltar from a Spanish airport. Air traffic control in Gibraltar will continue to be the responsibility of the Ministry of Defence, while the commercial operation of the new terminal will be via a contractual concession granted by Gibraltar to a joint venture company owned by Gibraltar and Spanish commercial interests. The Chief Minister added that no aspect of the agreement raised any issue of sovereignty, jurisdiction or control. He elaborated on the arrangement:

The Company will operate on contract to the Gibraltar Government and the terminal remains under the full jurisdiction and laws of Gibraltar and the jurisdiction of the Gibraltar Government.

Problems and issues relating to the working of the agreed arrangements will be considered by a new Permanent Joint Liaison Committee comprised of the representatives of Gibraltar, UK and Spain. But this is a liaison committee only to review issues relating to the working of the agreement. It will have no control, role or say in the actual running of the airport. All flight authorisations and slot management will be done by the Gibraltar aeronautical authorities.

¹⁷ Gibraltar Government press release, 19 September 2006 at http://www.gibraltar.gov.gi/latest_news/press_releases/2006/MinisterialBroadcast-19-9-06.pdf

¹⁸ Ibid

The Gibraltar Government will, in accordance with applicable EU directives, decide on the number of flights that the airport can receive. Given the environmental and other issues that exist, this will be strictly controlled in compliance with all applicable EU Directives. The Airport will thus not become a “free for all” in terms of the number of flights.¹⁹

Mr Caruana described the spirit as well as the letter of the Agreements:

The negotiation of these agreements has been protracted and tough, but they are excellent economically, socially and politically for Gibraltar. They also greatly benefit the Campo. They allow much greater normality that will benefit businesses and people alike on both sides of the frontier, and also tourists. They are historic agreements and resolve various historical problems, previously thought to be insoluble, for the benefit of citizens on both sides, without a political price tag and without adverse political implications.

Politically they signal the real possibility of a very different sort of less hostile, more positive and normal relationship with Spain.

The treatment afforded to me and to the rest of the Gibraltar delegation and thus to Gibraltar throughout this process and in Córdoba by Snr Moratinos (Miguel Angel Moratinos, the Spanish Minister for Foreign Affairs) and the other members of the Spanish delegation could not have been more friendly and respectful.

[...] Spain's contribution to these agreements represent, in my view, a huge down payment in that regard. I welcome and applaud Spain's contributions to these agreements, as I hope she does ours.

He also made clear that the Agreements did not mean the end of Spain's sovereignty claim or Gibraltar's determination to defend its sovereignty. Each side would, he said, continue to uphold its own position. However, in commending the Agreements to the people of Gibraltar, he had no doubt that they were “excellent for Gibraltar and entirely safe politically”.²⁰

b. Opposition

The GSLP leader, Joe Bossano, initially reticent about the Agreement, made a statement on 25 September. He was critical on various counts:

- The references to sovereignty in the declaration includes a statement by the Gibraltar Government that it understands and accepts that such references are bilateral as between the UK and Spain. In Government, we would make a formal

¹⁹ Gibraltar Government press release, 19 September 2006

²⁰ Ibid

declaration to the other two participants that the GSD's views expressed above are neither shared, understood nor accepted by us.

- We believe that any question of sovereignty over the airport, the isthmus or anywhere else is entirely bilateral as between the United Kingdom and Gibraltar alone and has absolutely nothing to do with Spain.

THE AIRPORT

Permanent arrangements

- In our judgement, the permanent arrangements in 18 months time for passengers flying to and from Spain means that they will be treated as if the airport was in La Linea and not in Gibraltar.

- A passenger from Gibraltar travelling to Spain who arrives in the terminal will be deemed to have entered Spain when he receives immigration and customs clearance from Spanish officials and moves to the departure lounge, even though the departure lounge is in Gibraltar.

- Passengers flying here from a Spanish airport and wanting to exit from the Gibraltar terminal will have to be cleared as leaving Spain for immigration and customs purposes after landing in Gibraltar and before going through Gibraltar immigration controls.

- The use of Schengen terminology is a smokescreen to cloud the true significance of the fact that the position in the 1987 agreement that all flights between Gibraltar and Spanish destinations are internal Spanish flights.

- There is no need or justification for the setting up of a Joint Permanent Liaison Committee.

- The agreement cannot bind a future Gibraltar Government to grant a contract to a joint venture company with Spanish participation to run the Gibraltar terminal.

- All these aspects are unacceptable and due for implementation after the general election in 18 months time. A GSLP/Liberal Government would not implement them.

Temporary arrangements – DUAL ACCESS

- The Opposition will support the concept of dual access to the airport so that passengers all have the same choice as to whether they want to start or end their flight from the direct Gibraltar access or the direct Spanish access.

CERVANTES INSTITUTE

- We see no reason why the Gibraltar Government should provide premises for the institute.

- The institute is an organ of the Spanish state and as such could fly the Spanish flag.

- The Patron of the Institute is the King of Spain and the President is the Prime Minister of Spain.

- The move is to encourage osmosis which we oppose.

FRONTIER FLOW

- Spain was required by the Brussels agreement that it entered into in 1984 to provide a red and green channel at the frontier in 1985 when the frontier opened and has failed to do so up to now. It is hardly a concession on their part to finally honour what they promised to do 21 years ago.

350 CODE

- The fact that Spain has now accepted the 350 code shows that their argument over the years for not doing so, namely that it would prejudice their position on sovereignty, was totally without substance.

PENSIONS

- The British Government has reversed its policy for not funding pensions increases for pre-1969 Spanish pensioners and is compensating them for the loss of income over the last 17 years on condition that they leave the Gibraltar scheme. The UK should also pay for post-1969 contributors.
- The arrangements agreed for this category of pensioners discriminates against all others on grounds of date of contribution, nationality and residence and may be in breach of EU law.

CONCLUSION

- Many aspects of this agreement fall to be implemented in 18 months time after a general election has been held in Gibraltar. A GSLP/Liberal Government will not implement those parts which it finds unacceptable and contrary to its policies.
- It is complete nonsense to claim that the sovereign will of the people of Gibraltar, as it may be expressed in a general election, can be overridden by these agreements.²¹

The PDP thought the Airport Agreement would affect sovereignty, jurisdiction and control, and was more than the 1987 Airport Agreement relabelled, which is how it had been described.

The New Gibraltar Democracy (NGD) party issued a statement praising the package, which its leader Charles Gomez described as “a significant and positive milestone on the road back to normality 52 years after the old Spanish dictatorship initiated its campaign to annex the Gibraltarian homeland”.²²

c. Chamber of Commerce

The Board of the Gibraltar Chamber of Commerce welcomed the Agreements, which it believed would boost the economies of Gibraltar and the Campo. Nicholas Russo, the Chamber President, said: “The commercial implications on initial review are far-reaching and should be welcomed by the private sector as they should allow the economy to grow further in an ambience of long term stability”.²³

Spain

The Spanish Foreign Minister was satisfied with the results of the talks but was more circumspect as to whether it would turn out to be a historic agreement. Mr Moratinos emphasised the need for a continued dialogue, in which ordinary people might share and participate in initiatives to solve problems, reaffirming this point at the UN General Assembly in September 2006. He confirmed that the Córdoba Agreements did not mean that Spain renounced its claim to the sovereignty of Gibraltar (see also section II A). However, he believed the Tripartite Forum had tried to overcome a situation in which

²¹ GSLP/Liberals press release, 26 September 2006 at http://www.gibnews.net/cgi-bin/gn_view.pl/?GSLA060926_1.xml. The Gibraltar Government rejected Opposition criticism in a reply on 28 September 2006. See press release 285/2006 at <http://gibraltar.gov.uk/admin/uploads/285.pdf>

²² Ibid

²³ Ibid

Gibraltar was seen as a permanent irritant to Anglo-Spanish relations, and had now become a point of contact and an opportunity for shared development “without any of the sides having to renounce their positions of principle or historic claims”.²⁴

Juan Carlos Juárez, the mayor of La Linea in the Campo de Gibraltar, endorsed the agreements but wanted a detailed analysis of the texts. The *Gibraltar Chronicle* reported other reactions from the Campo:

For his part the PP president in Cádiz, José Loiza, echoed those sentiments and said the Córdoba agreements were “good and positive”.

But he told Europa Press news agency that “we have to look at the small print” and said “we cannot renounce [Spain’s claim] over the sovereignty of Gibraltar or the recovery of the isthmus.”

On the PSOE side of the political divide, Manuel Chaves, President of the Junta de Andalucía, also welcomed yesterday’s announcement and said it was an agreement that would benefit citizens on either side of the border.

Mr Chaves, who is due to hold a formal meeting with Chief Minister Peter Caruana in the coming days, was speaking to reporters in Córdoba on the sidelines of the trilateral meeting.

“There has never been an agreement of this importance and of this content within the context of relations between Spain and the UK in respect of Gibraltar,” he said.

Mr Chaves emphasised that the agreement had been achieved “without anyone having renounce their fundamental positions on the issue of sovereignty.”²⁵

The President of the *Mancomunidad de Municipios del Campo de Gibraltar*, Juan Montesdecoca, thought the outcome would bring economic and social benefits to both sides of the border. The La Linea pensioners’ association, Alpeg, also welcomed the agreement, describing the British commitment to pay Spanish workers’ pensions as “extraordinary”. The Spanish frontier workers’ association, Ascteg, was also optimistic, but called for similar attention to be paid to the concerns of the existing cross-border labour force.²⁶

United Kingdom

Mr Hoon described the agreements as a “major breakthrough” in relations between the UK, Spain and Gibraltar, as well as a “huge economic boost to Gibraltar and the Campo”.²⁷ The Ministry of Defence, which controls the Gibraltar Airport, was optimistic that an increase in commercial traffic as a result of the Airport Agreement would not give rise to any conflict of interest between the MOD’s military requirements and the

²⁴ GSLP/Liberals press release, 26 September 2006

²⁵ Ibid

²⁶ *Gibraltar Chronicle* 19 September 2006

²⁷ FCO press release, 18 September 2006 at

<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1158049073887%20&year=2006&month=2006-09-01&date=2006-09-18>

expanded commercial use.²⁸ Talks between the two parties have already begun on practical issues arising from implementation of the Agreement. The *Gibraltar Chronicle* reported:

Part of the challenge will be finding the necessary space to accommodate military installations alongside a bigger terminal and an increased number of civilian aircraft.

“As a result of the agreement there will be a requirement to re-provision a number of buildings on the airfield and this issue is currently under discussion with the Government of Gibraltar,” an MoD spokesman said.

“The public can rest assured that their safety remains of paramount importance and all necessary safety regulations and safety distances [in respect of military installations] will be fully observed.”

The discussions will also address the issue of traffic flow across the runway, both for vehicles and pedestrians.

Although no details have been released as yet, the Government is planning to build a tunnel under the airfield for cars.²⁹

European Union

The agreement was welcomed by British and Spanish European People’s Party (EPP, Christian Democrat-conservative) Members of the European Parliament. The Conservative MEP for Gibraltar, Neil Parish, welcomed the package but insisted it should “not have any strings attached that could threaten the Rock’s overwhelming desire to remain British”. He pointed to other aspects of life in Gibraltar that needed attention, such as cooperation over the operation of the CEPSA oil refinery on the border, which Gibraltarians regarded as a health hazard.³⁰

The European Commission has welcomed the Agreements. The Airport Agreement will involve lifting Gibraltar Airport’s suspension from EU aviation measures within six months, which will remove obstacles to the development of the EU’s air liberalisation policy. The Commission will also be approached for EU assistance in funding the implementation of the Airport Agreement.

C. Timetable for implementing Córdoba

There will be a further ministerial meeting of the Tripartite Forum at the end of 2006 or early 2007, possibly in Gibraltar, at which progress in implementing the Agreements will be reviewed and analysed. There is already evidence of moves to put aspects of the package into effect.

²⁸ *Gibraltar Chronicle* 25 September 2006

²⁹ *Ibid*

³⁰ Neil Parish’s website at <http://www.neilparishmep.org.uk/news.php?article=319>

1. Airport

Hitherto, Spain has not allowed planes coming from Spanish airports to land in Gibraltar. This has caused problems for British operators, especially in bad weather when planes have been forced to divert and have had to land as far away as Tangiers, flying into Gibraltar later. The lifting of such air restrictions to Gibraltar applied with immediate effect as of 18 September 2006.

Until the new terminal is built allowing normal flights into and out of Gibraltar, transitional arrangements will apply, with a direct access link via bus. Gibraltar and Spanish air traffic controllers will coordinate new final approach paths and procedures for planes going to and leaving Gibraltar using Spanish airspace. Aircraft flying to Gibraltar in the face of an easterly wind will soon be able to fly in directly from the direction of Los Barrios, rather than making the sharp turn normally made a mile and a half from landing. Flights taking off in a westerly wind will be able to fly straight out of Gibraltar, climbing as they approach the Los Barrios area before turning towards Córdoba en route to London.

2. Telephones

The Gibraltar telecommunications network, *Gibtelecom*, will speed up discussions with the Spanish *Telefonica Moviles* to make sure roaming agreements are quickly put in place. Initially this will involve an exchange of legal documents with Telefonica setting out details of contracts, technical parameters, signalling and the billing of mobile telephone roaming arrangements. This will be followed by technical tests. The *Gibraltar Chronicle* reported that "The roaming arrangements will be functional to coincide with the local '350' international dialling code coming into operation, and the Spanish 9567 numbers being handed back to Telefonica".³¹ The arrangements are due to become operational within four months.

3. Frontier fluidity

Measures to implement the red and green channel system in both directions and the two-lane traffic into Gibraltar are to be in place by the end of 2006. Mr Moratinos announced on 3 October 2006 that a major works programme at the Gibraltar-La Linea frontier that would begin shortly and would improve the flow of traffic and pedestrians across the border.³²

4. Pensions

Payments will be made as soon as possible after the five-month period for establishing which option each pensioner wants to take. Mr Moratinos has told Spanish pensioners that they will be paid the full lump sum in one payment, which would take place in April

³¹ *Gibraltar Chronicle* 22 September 2006

³² *Gibraltar Chronicle* 4 October 2006

2007. Measures were being taken to ensure that lengthy legal wrangling over eligibility was avoided. The Spanish Government will advance the payments and then be reimbursed by Britain. The *Gibraltar Chronicle* reported on 4 October that Britain would contribute €100 million to the pensions bill of an estimated 5,700 pensioners who were formerly employed in Gibraltar, and that each pensioner could receive a lump sum of over €6,000.

II Constitutional reform

A. Gibraltar at the United Nations

Gibraltar's constitutional status is defined by historical precedent, the *Treaty of Utrecht* of 1713³³ and international principles and legal norms established by the United Nations. For many years Gibraltar politicians from the Government and Opposition have taken their pursuit of self-government and self-determination to the UN General Assembly and to two committees responsible for helping to reform the constitutional position of members' overseas territories based on the principles of decolonisation and self-determination. These committees are the Special Political and Decolonisation Committee, commonly known as the "Fourth Committee"; and the Special Committee on decolonisation, known as the Committee of 24 (the number of its members).

Peter Caruana addressed the UN Committee of 24 on 6 June 2006. He reiterated many of his previous concerns about the UN's regard for Gibraltar's international and constitutional status and asked the Committee to consider four points:

1. It (the UN) had not pronounced on the principle of self-determination with regard to Gibraltar;
2. In spite of recent General Assembly resolutions on the matter, the Committee had not pursued suitable means to implement the right to self-determination in Gibraltar;
3. In spite of resolution 55/146 concerning the Eradication of Colonialism, the Committee had taken no action with regard to Gibraltar;
4. In spite of its stated support for dialogue and cooperation with administering colonial powers to bring about decolonisation, the Committee had not developed a programme of work for the decolonisation of Gibraltar.³⁴

³³ Under Article 10 of the Treaty of Utrecht, Spain has right of 'first refusal' should Britain decide to relinquish sovereignty over Gibraltar. See <http://www.gibnet.com/texts/utrecht.htm>

³⁴ Government of Gibraltar press release 170/2006, 6 June 2006 at http://www.gibraltar.gov.uk/admin/uploads/press_180.pdf

Mr Caruana also criticised the Committee for not sending a visiting mission to Gibraltar for ten years and questioned the organisation's interest in Gibraltar. He spoke of the UN's "disapplication" of the principle of decolonisation in "cases where there was a sovereignty dispute", speculating that "It can only be because this Committee is of the view that sovereignty disputes override the fundamental right of self-determination".³⁵ He thought this was "an absurd proposition" which had led his Government to proceed of its own initiative

to seek to decolonise by the only means apparently available to us. That is, by exercising the right to self-determination by means of a referendum to accept and approve a new constitutional relationship with the UK, which is not colonial in nature, and which gives us that maximum degree of self government beyond which there is only independence.³⁶

Mr Caruana described this as the "Fourth Option": "a status freely determined by the people of Gibraltar in an act of self-determination, as provided for in Resolution 2625(XXV) of 24 October 1970".³⁷ If the new constitutional relationship with the UK were accepted, Mr Caruana wanted the Committee to recommend to the UN General Assembly that Gibraltar be de-listed from the UN list of colonies. However, he remained highly critical of the UN's intentions with regard to Gibraltar and did not think the people of Gibraltar had faith in the Committee or saw the UN "as relevant to their decisions about the way forward for Gibraltar".³⁸

The Spanish Government, on the other hand, thought the process of decolonisation as applied to Gibraltar had to be conditional upon the principle of territorial integrity. Successive Spanish governments have regarded Gibraltar's claim to the right to self-determination as impossible under international law, whereas Gibraltar and British Governments believe that the right to self-determination is a *requirement* of international law, which has been established as a norm of *Jus Cogens* (a peremptory norm of international law, or a 'higher law'), from which no derogation or departure is permitted.

The view of the Spanish Ambassador to the UN, Juan Antonio Yáñez-Barnuevo, was that "though we are delighted that the constitutional reform of Gibraltar is a good text for the governance of this territory [...] such reform is irrelevant to the effects of the decolonisation of Gibraltar".³⁹ In his view, an attempt to assert that with the new

³⁵ Government of Gibraltar press release 170/2006, 6 June 2006

³⁶ Ibid

³⁷ Ibid. Joe Bossano had elaborated on this elusive 4th option before the UN Special Committee on Decolonization in 2003: "in the annex to resolution 2625 (XXV) from October 1970, in the section dealing with decolonization, it said a colonial people may achieve decolonization by selecting independence, free association, integration with a sovereign State, or a fourth option, namely any other status that was freely expressed by the people. He noted that, for example, if the European Union gave Gibraltar maximum self-government, without demanding its association with any other State, then that would constitute a possible fourth option", at <http://www.un.org/News/Press/docs/2003/gacol3084.doc.htm>

³⁸ http://www.gibraltar.gov.uk/admin/uploads/press_180.pdf

³⁹ http://www.gibraltar.gov.uk/int/Today/panorama.asp?fld_ID=1493

Constitution Gibraltar was no longer a non-self-governing territory would contradict the UN doctrine of territorial integrity and breach the historical rights of Spain in the *Treaty of Utrecht*.⁴⁰

The UN Committee Chairman, Julian Hunte, rejected Mr Caruana's "accusation" of lack of concern and outlined the process for de-listing. The UK, as the administering power, would have to advise the UN of changes to the political status of a territory and provide a detailed review of those changes. If new constitutional arrangements in a territory resulted in "mere colonial reform" rather than decolonisation, without meeting the criteria of full self-government set out in by the UN General Assembly, the new arrangements would be acknowledged, but it would be difficult for the international community to declare such an arrangement to be one of full self-government. He cited the Tokelau referendum⁴¹ and the engagement with the Committee of New Zealand, the administering power, during the process.⁴²

The British Government's view on de-listing, set out in a letter to the Chief Minister and reported in the Gibraltar press, is that neither Gibraltar nor any other British Overseas Territory should remain on the UN list of non-self-governing territories; that the UN criteria for delisting are outdated and fail to take account of the mutually acceptable modernisation of the relationship between the UK and its Overseas Territories. It was therefore not UK policy to engage more closely with the UN in seeking the delisting of British Overseas Territories.⁴³

Mr Caruana told the Fourth Committee on 4 October 2006, that the Constitution, if adopted in a referendum, would effectively bring to an end Gibraltar's colonial status. He thought the UN would be relying on "outdated" criteria if it viewed the arrangements as insufficient for the purpose of delisting Gibraltar from its list of colonies. Spain had made clear before Mr Caruana's speech that it did not share this view.⁴⁴

Mr Yáñez-Barnuevo confirmed Spain's commitment to dialogue and better relations under the trilateral process and spoke of "a new era" in relations over Gibraltar. However, he emphasised that Spain's sovereignty claim over Gibraltar remained unchanged and was "a priority" for the Spanish Government. He reiterated Spain's belief in the principle of territorial integrity as the only doctrine applicable to Gibraltar's decolonisation. In his view the forthcoming constitutional referendum could not be seen as an act of self-determination that would alter Gibraltar's international status as a colony.

⁴⁰ *Gibraltar Chronicle* 8 June 2006.

⁴¹ See <http://www.un.org/News/Press/docs/2006/sgsm10350.doc.htm> and <http://www.un.org/News/Press/docs/2006/gacol3137.doc.htm>

⁴² *GibraltarNews online* 7 June 2006 at <http://www.gibraltarnewsonline.com/2006/06/07/gibraltar-before-the-united-nations-committee-of-24/>

⁴³ *Panorama* 6 April 2006 at

http://www.panorama.gi/localnews/headlines.php?action=view_article&article=857

⁴⁴ *Gibraltar Chronicle* 5 October 2006

Joe Bossano focussed on self-determination, maintaining that the British Government had not been straightforward with its commitment.

In the light of these contradictions, where they try to give comfort to Spain in a manner inconsistent with their Charter obligations and incompatible with their statements in Parliament and to the Gibraltarian people, the events in the near future will inevitably take them to the point where they will have to upset Spain and defend our decolonisation, or be shown not to be delivering on what they have promised.⁴⁵

In a statement on 5 October, the British representative at the UN, Sakeena Alam, told the Fourth Committee that Gibraltar enjoys rights accorded by the UN Charter and reiterated the principle that the British Government would not enter into a process of sovereignty negotiation with which Gibraltar were not content. Responding to the Spanish Ambassador's invitation to comment on the new Constitution, she said that it provided for "a modern and mature relationship between the UK and Gibraltar. Her Majesty's Government does not think that this description would apply to any relationship based on colonialism".⁴⁶ She confirmed that the forthcoming referendum would be an exercise of the right of self-determination as set out to the UK Parliament on 4 July 2006.⁴⁷ She confirmed the Government's position that the criteria used by the Committee of 24 in its deliberation on whether a Non Self-Governing Territory should be "de-listed" were outdated and did not take account of the way that UK's relationships with its Overseas Territories had been modernised to the satisfaction of both parties. At the same time, the UK did not believe that the principle of territorial integrity was applicable to the decolonisation of Gibraltar. Finally, Ms Alam reiterated the Government's view that Article X of the *Treaty of Utrecht* gave Spain the right of refusal should Britain ever renounce sovereignty. Independence would therefore only be an option for Gibraltar with Spain's consent.

B. Modernising Gibraltar's relationship with the UK

In 1999 in a White Paper called *Partnership for Progress and Prosperity: Britain and the Overseas Territories*⁴⁸ the British Government invited the governments of the Overseas Territories to review their constitutions and submit proposals for constitutional reform. In July 1999 the Gibraltar House of Assembly constituted a Select Committee to "to review all aspects of the Gibraltar Constitution Order 1969 and to report back to the House with its view on any desirable reform thereof".⁴⁹ The Committee⁵⁰ investigated ways of

⁴⁵ *Gibraltar Chronicle* 5 October 2006

⁴⁶ *Gibraltar Chronicle* 6 October 2006

⁴⁷ HC Deb 4 July 2006 c932W

⁴⁸ Cm 4264 March 1999 at <http://www.fco.gov.uk/Files/kfile/OTfull.pdf>

⁴⁹ Appendix 1, Gibraltar House of Assembly Select Committee on Constitutional Reform, 23 January 2002.

⁵⁰ The Committee comprised the Chief Minister, Peter Caruana, Deputy Chief Minister, K. Azopardi, Minister for Health, Education and Culture, B. Linares, Opposition leaders, J. Bossano and J. Garcia.

achieving a consensus on constitutional proposals to submit to the British Government that would end Gibraltar's colonial status in a manner acceptable to the people of Gibraltar in an act of self-determination.⁵¹ It completed the draft amendments in December 2001 and submitted them to the House of Assembly and Opposition parties for comment. The draft *Gibraltar Constitution Order 2001* to amend the *Gibraltar Constitution Order 1969* was published on 23 January 2002 and approved by the House of Assembly on 27 February 2002⁵² (and again in January 2004 after elections in 2003).⁵³ The draft text was formally submitted to the British Government in 2003.

The Tripartite Dialogue and the UK-Gibraltar negotiations on constitutional reform have to some extent been parallel processes, with issues on occasion becoming intertwined. While the sovereignty question was deliberately put aside by all parties to the Dialogue, sovereignty was inevitably at the centre of the constitutional talks. Spain was not a party to the constitutional negotiations, but Spanish contributions to United Nations debates on decolonisation and self-determination - along with those of Gibraltar and UK representatives - punctuated the negotiations and were a reminder that fundamental positions had not wavered in spite of the new spirit of dialogue and cooperation.

C. Gibraltar drafts constitutional amendments

In 2002 the Gibraltar Constitutional Committee had recommended amending the 1969 Constitution, rather than drawing up a new constitution. The amendments were "such as would maximise the self government of Gibraltar by the people of Gibraltar, whilst retaining British sovereignty and close links with Great Britain".⁵⁴ The Committee outlined its approach and objectives in Section B of the Report:

The Committee's approach has been guided by its unanimous view that reform of the Constitution should achieve both a suitable modernisation of the relationship with the United Kingdom (with consequential and enhanced powers of self-government) and that these reforms should, when and if accepted by the people of Gibraltar in a referendum, bring about the decolonisation of Gibraltar through the exercise of the right of self-determination by the people of Gibraltar, and Gibraltar's subsequent delisting from the UN's list of Non Self-Governing Territories maintained under Article 73(e) of the Charter.⁵⁵

Self-government was a recurring element of the amendments. The Committee recommended that the new Constitution Order retain the existing Preamble containing

⁵¹ In 2001 the British Government invited the Overseas Territories to review their constitutions and submit proposals for modernisation. The reform process in Gibraltar is discussed in Research paper 02/37, 22 May 2002, *Gibraltar's Constitutional Future*, at <http://hcl1.hclibrary.parliament.uk/rp2002/rp02-037.pdf>

⁵² See http://www.gibraltar.gov.gi/constitution/constitutional_reform/Constitutional_Reform_part1.pdf for text of Constitution Order 2002

⁵³ *Gibraltar Chronicle* 28 March 2006 at <http://www.chronicle.gi/>

⁵⁴ Select Committee Report, 23 January 2002, Section B (Approach and Objective), p.2.

⁵⁵ *Ibid*, pp.2-3.

the British Government's guarantee on sovereignty. It proposed that "language setting out the right to self determination, in terms of the language used in the UN *International Covenant on Civil and Political Rights* be included in the Constitution as a statement of a fundamental right and freedom".⁵⁶

The amendments generally transferred executive and legislative powers away from British Government appointees, replacing unelected, ex-officio members of the Assembly and the executive with elected Gibraltarian representatives. The Governor, who was re-named the Lieutenant Governor, would be appointed by the monarch only "after consultation with the Chief Minister and Leader of the Opposition through a Secretary of State". The appointment of the Chief Minister would continue to be made by the (Lieutenant) Governor, but the appointment of Ministers other than the Chief Minister would be made on the "advice" of the Gibraltar Government and no longer just "in consultation" with it.

The Committee recommended changing the name of the Gibraltar Assembly to the Gibraltar Parliament, thereby giving it a more authoritative and independent status, and sought to strengthen the status of the Gibraltar Government in the re-wording of various articles on the executive authority of Gibraltar. The Attorney-General and the Financial and Development Secretary, who have been unelected members of the Assembly, would not be members of the newly styled Parliament (Section 25).

The special legislative powers of the Lieutenant Governor (Section 34), in particular those concerning taxation and appropriation, would be curtailed and limited to matters set out in the Constitution. The Government of Gibraltar would be defined as being the Council of Ministers and the Constitution would delimit the responsibilities of the Lieutenant Governor rather than those of the Government of Gibraltar (the 1969 Constitution sets out defined domestic matters for which the Government of Gibraltar is responsible, while the Governor has other defined and non-defined areas, giving him a much broader remit). Although external affairs and defence would remain the responsibility of the British Government, the Lieutenant Governor would consult with, and act (if possible), on the advice of the Chief Minister (Section 46).

Further amendments gave a greater role to the Gibraltar Government in judicial and other senior public service appointments, in public finance, responsibility for Crown land and matters of law and order.

D. The new Constitution

The Committee's 2002 text formed the basis for the constitutional negotiations, which were formally launched in November 2004 between the British Government and a cross-party representation from Gibraltar, including Mr Caruana and Joe Bossano. A second

⁵⁶ Gibraltar Select Committee Report, 23 January 2002, p.4.

round of talks took place in mid-September 2005 in Gibraltar, which ended with a Joint Statement declaring a “wide measure of agreement” on both sides.⁵⁷ A final round of talks was held on 15-17 March 2006. On 27 March 2006 the British and Gibraltar Governments issued a joint statement on the conclusion of “successful negotiations”:

BRITISH

The New Constitution provides for a modern relationship between Gibraltar and the UK. It does not in any way diminish British Sovereignty of and support for Gibraltar and, indeed, the Sovereignty preamble in the 1969 Constitution Order will be replicated in the new Constitution Order. The UK will retain international responsibility for Gibraltar, including its external relations and defence, and as the Member State responsible for Gibraltar in the European Union. Thus the close constitutional links with the UK, and enduring British Sovereignty are, in accordance with the wishes of the people of Gibraltar, enshrined in the new Constitution.

SELF-DETERMINATION

The New Constitution confirms that the people of Gibraltar have the right of self-determination, and that this must be promoted in conformity with the provisions of the Charter of the United Nations and any other applicable international treaties. The UK will take note, in the Despatch to the Constitution, that it supports this right, but holds the view that it is constrained by the Treaty of Utrecht, and therefore that independence would only be an option with Spain's consent. The Despatch will also note that Gibraltar does not share the view that this constraint exists and that Gibraltar's acceptance of this Constitution would be on that basis. However, this is the first time that Gibraltar's right to self-determination, so constrained, is reflected in its Constitution.

The remainder of the new Constitutional text introduces substantial constitutional reform and modernisation. The constitutional reform has been completed in accordance with the principles set out in the 1999 White Paper (Partnership for Progress and Prosperity: Britain and the Overseas Territories) and therefore provides for that degree of self-government which is compatible with British sovereignty of Gibraltar and with the fact that the UK is responsible for Gibraltar's external relations.

The main elements of Constitutional Reform are the following: -

(1) The Human Rights provisions are fully aligned with the European Convention on Human Rights.

GOVERNOR

(2) Whereas under the current Constitution the rights of Gibraltar Ministers are defined and the Governor enjoys the remainder, under this new Constitution that

⁵⁷ FCO 16 September 2005 at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391629&date=2005-09-16>

position is reversed. Accordingly, the powers of the Governor are defined and the elected Gibraltar Government will enjoy the remainder. The Governor's powers are limited to external relations, defence, internal security including certain aspects of policing and certain aspects of public services appointments.

(3) The Gibraltar House of Assembly is restyled the Gibraltar Parliament and that Parliament may now determine its own size.

(4) The right of UK Ministers to disallow laws passed by the Gibraltar Legislature is removed from the Constitution.

(5) The Governor's powers to withhold assent from laws passed by the Gibraltar Legislature are restricted to certain defined circumstances.

(6) The Governor's special legislative powers which at present extend to all matters, are restricted to only matters which are his responsibility.

(7) The offices of Deputy Governor and Financial and Development Secretary are abolished as Constitutional Offices. The Financial Secretary and the Attorney General cease to be members of the House of Assembly. Public Finances become, constitutionally, the direct responsibility of a Minister. The Speaker of the House will be elected and appointed directly by the House.

(8) The Governor's power to dissolve Parliament and remove the Chief Minister are restricted to reflect grounds more typical of those applicable in the UK.

THE QUEEN

(9) Whereas currently all executive authority under the Constitution vests in the Governor, under the new Constitution it will vest, as in the UK directly in Her Majesty the Queen, and (except in the areas of the Governor's responsibilities) it will be exercisable on Her behalf by the elected Gibraltar Government.

(10) The Gibraltar Council is formally abolished. Ministers will be appointed and charged with responsibilities by the Governor acting in accordance with the advice of the Chief Minister, thus reflecting the position in the UK.

(11). As in the UK, the Gibraltar Government is defined as Gibraltar Ministers together with Her Majesty, who is represented in Gibraltar by the Governor.

POLICE AND LAW

(12) The bulk of responsibilities for policing in Gibraltar are transferred to a statutory Gibraltar Police Authority.

(13) A new Judicial Service Commission is constituted to advise on the appointment and other matters relating to members of the judiciary. Save in very exceptional circumstances the Governor, acting on behalf of Her Majesty, must act in accordance with the advice of this new Commission. This Commission would be chaired by the President of the Court of Appeal, and would also comprise the Chief Justice, the Stipendiary Magistrate and two members appointed by each of the Governor and the Chief Minister.

(14) Crown Lands must be disposed of by the Governor in accordance with the advice of the Chief Minister. Crown Lands in the occupation of the MOD must be disposed of with the consent of the Secretary of State and the Chief Minister.

Whilst there are many other new and changed provisions, the above represent the principal elements of the constitutional reforms reflected in the proposed new Constitution.⁵⁸

The then Foreign Secretary, Jack Straw, welcomed the “successful conclusion” of the negotiations, stating that the new Constitution “strengthens Gibraltar's links with the United Kingdom, and thoroughly modernises the relationship between us”. Mr Caruana thought the text was “a good outcome which maximises our self Government, while preserving our British Sovereignty and Constitutional links with Britain...The Government of Gibraltar is delighted with this settlement, and will have no hesitation in recommending it to the people of Gibraltar”.⁵⁹

On 27 March Mr Straw made a Written Statement in the Commons, making clear that the full text of the new Constitution would be put to the people of Gibraltar in a referendum and given effect by Order in Council if it was approved by them. He said he had written to the Spanish Foreign Minister to “clarify those matters of importance to Spain relating to this constitution”.⁶⁰ In a parliamentary exchange the same day the Shadow Foreign Secretary, William Hague, welcomed the conclusion of talks, and asked whether it meant that the Government’s “previous commitments to share sovereignty with Spain are now entirely null and void?”⁶¹ Mr Straw replied:

On Gibraltar, both the joint statement between the Chief Minister of Gibraltar, Peter Caruana, QC, and myself—a copy of which will be in the Library—and my written ministerial statement make clear the position in respect of sovereignty, which is that sovereignty remains British as long as the people of Gibraltar wish it to do so. Should they change their minds about that, which I do not anticipate for a second, the provisions of article 10 of the treaty of Utrecht would apply.⁶²

Following a statement in the Lords, the Liberal Democrat Deputy Leader, Lord Wallace of Saltaire, asked for assurance that “there will be proper parliamentary scrutiny and debate of the new Gibraltar constitutional treaty?”⁶³ For the Government, Lord Triesman undertook to reply to the question and in June he said the Government would, “as is

⁵⁸ *Panorama* 28 March 2006 at <http://www.panorama.gi/>

⁵⁹ DEP 06/699; also *Panorama* 28 March 2006

⁶⁰ HC Deb 27 March 2006 cc 44-6WS at

http://pubs1.tso.parliament.uk/pa/cm200506/cmhansrd/cm060327/wmstext/60327m02.htm#60327m02.html_sbhdQ. See Appendix II for correspondence between the three Governments.

⁶¹ HC Deb 27 March 2006 c557 at

<http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm060327/debtext/60327-11.htm>

⁶² *Ibid* c559

⁶³ HL Deb 27 March 2006 c584 at

http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60327-14.htm#st_129

customary, write to the Foreign Affairs Committee informing them about the new Constitutional Order before it is presented to the Privy Council".⁶⁴

In Gibraltar the GSLP/Liberals issued a statement on 28 March 2006. They would not support modernisation without decolonisation, and stated that for the new constitution to be defended as an act of decolonisation, the UK had to recognise it as such. The British Government had not recognised this and, "under pressure from Spain", had not retained the Opposition's suggested preambular wording. The statement concluded:

The Opposition has made it very clear that it will not support a referendum which is considered only by Mr Caruana as an act of self-determination but which is not so considered by anyone else, not even by the British Government.

The modernisation of the workings of our Parliament and other public institutions is as incapable of being defended at the United Nations as the termination of Gibraltar's colonial status as the previous modernisations in 1964 and 1969 were.⁶⁵

The final draft Despatch⁶⁶ and Draft Constitution Order were published in the UK on 5 June 2006 in a Deposited Paper.⁶⁷

E. Issues

The final stages of the constitutional negotiations were dominated by disagreement over the timing of the referendum and whether the preamble to the Constitution should describe the referendum as an act of self-determination. The role of the Governor,⁶⁸ policing and judicial independence were also areas of concern.

1. Timing of the referendum

The British Government, and initially, it appeared, the Gibraltar Government, wanted to hold the referendum *before* deciding on the full wording of the preamble.⁶⁹ After the referendum Britain would propose a formula that retrospectively described the process under which the people of Gibraltar had accepted the Constitution. The Opposition

⁶⁴ DEP 06/1084;HDEP 2006/390 6 June 2006

⁶⁵ Statement by GSLP/Liberal Opposition, 34/2006 28 March 2006 at <http://www.liberal.gi/press/opposition/2006/GSLP%20Liberal%20Opposition%20034-2006%2028th%20March%202006%20-%20Decolonisation%20has%20been%20objective%20from%20the%20outset%20says%20Opposition.pdf>

⁶⁶ The Despatch is the "letter" by which the Foreign Secretary sends the amended Constitution to the Governor if it is approved by the people of Gibraltar in referendum and after the Privy Council has promulgated the Order in Council into law.

⁶⁷ DEP 06/1336 5 July 2006

⁶⁸ Lieutenant General Sir Robert Fulton became the new Governor of Gibraltar on 27 September 2006.

⁶⁹ *Panorama* 6 April 2006

GSLP/Liberals maintained that the Preamble and the Constitution were inseparable and there could not be a referendum on the Constitution without the Preamble. Mr Bossano, in reply to a letter from Mr Straw to the Constitution Committee, said the British Government ought to commit itself to the question of self-determination in unequivocal terms in a preamble; its position was inconsistent with its stand during the negotiations and its former statements on this issue; and it had failed to honour earlier pledges and obligations under the UN Charter. He confirmed that the Opposition would recommend a no-vote in the referendum if there were no assurance that the referendum represented an act of self-determination.

The British Government reshuffle in early May brought in Margaret Beckett as the new Foreign Secretary and Mr Straw therefore did not reply to Mr Bossano on these matters. Geoff Hoon, the new Minister for Europe, took on the responsibility for constitutional change in Gibraltar.

On 11 May 2006 it was reported that the British Government had changed its mind about the preamble issue and would seek agreement on the text of an additional preamble to be publicised *before* the referendum. There were reports of meetings between Mr Caruana and Geoff Hoon - who was regarded as more friendly towards Gibraltar than his predecessor - to discuss the preambular wording.⁷⁰ Mr Caruana allegedly said his Government had never agreed to the language of a second preamble being withheld until after a referendum.⁷¹

2. Sovereignty and self-determination

The Gibraltar Government and Opposition wanted the new constitutional text to have an additional preamble to supplement the existing one on sovereignty⁷² which would refer to Gibraltar's self-determination. The Gibraltar Constitution Committee text had reiterated the constitutional pledge that there could be no transfer of sovereignty against the freely and democratically expressed wishes of the people of Gibraltar, and added: "Whereas the people of Gibraltar have accepted the Constitution annexed to this Order in an act of self-determination and Gibraltar can therefore be deemed to have attained the fullest possible measure of self-government...".

In the section on the fundamental rights and freedoms of the individual in the Gibraltar Committee text, another reference to self-determination based on international convention stated that "whereas all peoples have the right to self-determination and by virtue of that right they freely determine their political status...and whereas the realisation of the right to self-determination must be promoted and respected in conformity with the

⁷⁰ See HC Deb 5 June 2006 c322W at <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm060605/text/60605w0667.htm#06060712000184>

⁷¹ *Panorama* 12 May 2006

provisions of the Charter of the United Nations...". During the constitutional negotiations the Gibraltar Government approved a reference to the people of Gibraltar being given the right to freely determine their political status. It was argued that the Foreword to the Government White Paper in March 1999 had stated that the partnership between the UK and its overseas territories "must be founded on self-determination".⁷³ At the final round of constitutional talks on 17 March 2006 Joe Bossano had suggested an alternative wording which did not refer to "self-determination", but which effectively meant the same thing. The British Government said it would consider the wording.

On 5 April 2006 Gibraltar's Constitution Committee discussed the text of the British Government's draft Despatch to the Constitution and a letter from the Foreign Secretary on the Preamble. The Committee wanted a new reference to be inserted in the Preamble to the effect that the proposed referendum on the Constitution would be deemed to be an act of self-determination by which Gibraltar would cease to be a colony. The British Government rejected this proposal and was reported to favour toning down references to self-determination, so as not to breach the terms of the *Treaty of Utrecht*.

The draft Despatch makes clear that the British Government stands by its commitment that "Gibraltar will remain part of Her Majesty's dominions unless and until an Act of Parliament otherwise provides", and that it "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".⁷⁴

The draft Despatch emphasises that the new Constitution "does not in any way diminish British sovereignty of Gibraltar" and that Gibraltar will remain listed as a British Overseas Territory in the *British Overseas Territories Act 2002*. It reiterates the Government's support for Gibraltar's right to self-determination under the UN Charter, but only within the terms of Article X of the *Treaty of Utrecht*. Independence would thus only be an option for Gibraltar with Spain's consent. The Government ends by taking note that "Gibraltar does not share the view that this constraint exists and that their acceptance of this Constitution is on that basis".⁷⁵

The Order in Council is the legal instrument to which the Constitution itself is attached as an annex. The Constitution Order contains in the first preambular paragraph a similar sovereignty assurance to the 1969 Constitution Order, continuing in a second preamble to establish the legal parameters for Gibraltar's self-government:

And whereas the people of Gibraltar have in a referendum held on [date] freely approved and accepted the Constitution annexed to this Order which gives the

⁷² The Preamble states that there cannot be a transfer of sovereignty to another state against the freely and democratically expressed wishes of the people of Gibraltar.

⁷³ See also Second Reading of *British Overseas Territories Bill* 22 November 2001 c477

⁷⁴ British Government draft Despatch and draft Constitution Order at http://www.gibraltar.gov.gi/constitution/new_constitution/DRAFT_DESPATCH_AND_DRAFT_GIBRALTA_R_CONSTITUTION_ORDER_06.pdf

⁷⁵ Ibid

people of Gibraltar that degree of self-government which is compatible with British Sovereignty of Gibraltar and with the fact that the UK remains fully responsible for Gibraltar's external relations.⁷⁶

As expected, the wording does not include "self-determination", falling somewhat short of the draft Order prepared by the Gibraltar Constitution Committee in 2002, which read:

AND whereas the people of Gibraltar have accepted the Constitution annexed to this Order in an act of self-determination and Gibraltar can therefore be deemed to have attained the fullest possible measure of self-government.⁷⁷

The self-determination issue highlighted the rift between the Gibraltar Government and Opposition on the terms of Gibraltar's future constitutional status. On 2 June 2006 a version of the amended Constitution was published by Joe Bossano and Joseph Garcia, based on their record of the negotiations between the Gibraltar and UK delegations.⁷⁸ The Chief Minister warned that their text was not the correct one and stated that the Government would "publish the correct text, in an appropriate and official manner, when the text of the second preamble is known".⁷⁹ The Opposition's additional preamble is the one it proposed at the 17 March meeting.⁸⁰

Mr Bossano accused the Gibraltar Government of "conning" the people of Gibraltar over this issue, saying: "I have not been a member of the House in Gibraltar for 32 years, and involved in Gibraltar politics for 42 years to be a party to a con trick on my own people".⁸¹ This comment prompted an official response from the Gibraltar Government:

The implications of Mr Bossano's statement last week is that the Government may attempt to con the people of Gibraltar in a referendum. This is a desperate and unforgivable suggestion. Mr Bossano is the only Gibraltar leader to have systematically conned the people of Gibraltar in relation to external affairs throughout all the time he was Chief Minister, a fact that the Government will demonstrate during the forthcoming weeks.⁸²

Paco Oliva, editor of the *Gibraltar Chronicle*, commented on the party political tensions in the constitutional debate, criticising Mr Bossano in particular, but calling on all sides to

⁷⁶ British Government draft Despatch and draft Constitution Order

⁷⁷ http://www.gibraltar.gov.gi/constitution/constitutional_reform/Constitutional_Reform.pdf

⁷⁸ This unofficial text is available at <http://www.chronicle.gi/Features/Gib%20Constitution/Cons.htm>

⁷⁹ Gibraltar Government press release 163/06, 2 June 2006, at http://www.gibraltar.gov.gi/latest_news/press_releases/2006/163-2006.pdf

⁸⁰ 5 June 2006 at <http://www.panorama.gi/>.

⁸¹ Talk at Casino Calpe, Gibraltar's oldest club founded 1853 by 47 prominent local residents, now numbering around 335 members, *GibraltarNews online* 3 June 2006 at <http://www.gibraltarnewsonline.com/2006/06/03/furious-government-warns-bossano-leak-is-not-%e2%80%98correct%e2%80%99-draft/>

⁸² Government press release 169/2006 5 June 2006 at http://www.gibraltar.gov.gi/latest_news/press_releases/2006/169-2006.pdf

“cut a path through this rhetorical labyrinth and find a way forward freed from the barrage of mutual bickering to which we have become accustomed in the past decade”:⁸³

No amount of cryptic elaboration will succeed in concealing the fundamental and palpable truths of the constitutional debate, and more importantly of the situation and choices we are up against. The only question for a referendum that would clarify the political scenario once and for all, would be one that gives people two choices based on the facts and information that are available: one the Bossano nationalist monolith of no concessions to Spain, a constitutional preamble that reflects that and goes on to enshrine the concept of self determination to its maximum expression (regardless of any subsequent backlash); and the alternative to that which is not integration into Spain as the Leader of the Opposition would mischievously have us believe, but a model compatible with the development of Gibraltar's political and economic potential, from the premise of tripartite negotiations taken to the maximum expression. The status quo does no longer seem feasible.⁸⁴

Mr Oliva challenged the politicians, particularly the Opposition, to be more accountable for their positions with regard to self-determination and UN delisting:

I challenge any politician to provide evidence of how the life of any single person will be improved in any way by pursuing the delisting so zealously defended by the Leader of the Opposition. I would also challenge them to provide evidence of how it would benefit the economy, if Gibraltar were to be de-listed from the UN list of non-self governing colonies, how it would improve our living standards and how it would in any way shape or form influence one iota of anyone's daily life. How honest is this debate really? Does the Leader of the Opposition really believe that people wake up each morning look at themselves in the mirror and utter “are we or are we not a self-governing territory” before they reach for the toothbrush?

[...]

The solution to the Gibraltar issue lies not in unilateral pronouncements of any of the parties but in direct political negotiations between all the parties concerned. Our future will have to be determined in a synthesis of positions where nationalists and non-nationalists who have been systematically excluded from the local decision making process, can make a contribution. By taking this step we will in practice be having a direct input into the final outcome where it matters, rendering UN doctrine wholly irrelevant to our case.⁸⁵

According to a *Panorama* on-line poll in June 2006 asking whether the preamble was important, out of nearly 200 Gibraltarian respondents, 87% said ‘Yes’, 9% said ‘No’ and 4% did not know.⁸⁶

⁸³ *Gibraltar Chronicle* 5 June 2006 at <http://www.chronicle.gi/Opinion/5.6.2006.htm>

⁸⁴ *Ibid*

⁸⁵ *Gibraltar Chronicle* 5 June 2006

⁸⁶ *Panorama* 16 June 2006

In July and again in early September Geoff Hoon gave an unequivocal assurance that the UK stood by its commitment to recognise the constitutional referendum as an act of self-determination within the prevailing historical and legal context.⁸⁷ Mr Hoon stated:

As my right hon. Friend the then Foreign Secretary (Mr Jack Straw) set out in his written ministerial statement of 27 March 2006, *Official Report*, columns 44-46W, the new constitution provides for a modern and mature relationship between the UK and Gibraltar. I do not think that this description would apply to any relationship based on colonialism. The constitution confirms the right of self-determination of the Gibraltar people. The realisation of that right must be promoted and respected in conformity with the provisions of the UN Charter and any other applicable international treaties. Gibraltar's right of self-determination is not constrained by the Treaty of Utrecht except insofar as Article X gives Spain the right of refusal should Britain ever renounce Sovereignty. Thus independence would only be an option with Spanish consent. Her Majesty's Government recognise that the act of deciding on their acceptance of the new constitution in the forthcoming referendum will be an exercise of the right of self-determination by the Gibraltar people in that context.

The new constitution does not in any way diminish British sovereignty and gives Gibraltar much greater control over its internal affairs and that degree of self-government compatible with British sovereignty and the UK's continuing international responsibilities. If the new constitution is agreed the UK will retain its full international responsibility for Gibraltar, including for Gibraltar's external relations and defence, and as the member state responsible for Gibraltar in the EU. The UK's long standing commitment that the UK will never enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another state against their wishes will be unchanged. This is also set out clearly in the Despatch which will be published at the same time as the Gibraltar Constitution Order and the draft of which I will place in the Library of the House. I will also send a copy to my hon. Friend.

It has also been the UK's long standing view that none of its remaining overseas territories, including Gibraltar, should remain on the UN list of non self-governing territories, despite the different circumstances affecting Gibraltar, namely the application of the Treaty of Utrecht as noted earlier. However, the criteria used by the UN are outdated and fail to take account of the way that relationships between the UK and its overseas territories have been modernised. The UK does not, therefore, engage formally to seek the removal of any of the overseas territories from the UN list.⁸⁸

⁸⁷ See *GibraltarNews online* 5 July 2006 at <http://www.gibraltarnewsonline.com/2006/07/05/uk-government-confirms-referendum-on-new-constitution-will-be-an-act-of-self-determination/>

⁸⁸ HC Deb 4 July 2006 c932W at <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm060704/text/60704w1414.htm#0607046600017>

3. Role of Governor

The Governor of Gibraltar is a British Government appointee, who at present is responsible for everything except areas defined in a list appended to the Constitution as the powers of the Gibraltar Government. The 1969 Order states that “everything which is not a defined domestic matter automatically remains within the Governor’s direct responsibility”. Current Article 45(1) on the “Executive authority of Gibraltar” states:

The executive authority of the Government of Gibraltar shall vest in the Governor on behalf of Her Majesty; and, save as otherwise provided in this Constitution, that authority may be exercised by the Governor either directly or through officers subordinate to him.⁸⁹

The Gibraltar Government wanted the powers of the Governor to be more narrowly defined and the Gibraltar Government to be responsible for everything else. The amended text *does* reverse the allocation of responsibilities. Amended Article 44(1) on the “Executive authority of Gibraltar” states:

44.(1) The executive authority of Gibraltar shall vest in Her Majesty; and, save as otherwise provided in this Constitution, that authority may be exercised by the Government of Gibraltar, either directly or through public officers as prescribed by this Constitution or by any other law.⁹⁰

Amended Article 47(1) lists the special responsibilities of the Governor, which are

- (a) external affairs;
- (b) defence;⁹¹
- (c) internal security, including (subject to section 48) the police;
- (d) such functions in relation to appointments to public offices and related matters as are conferred on him by this Constitution⁹²

Article 47 (2) qualifies this with a presumption that responsibility outside these areas will lie with Gibraltar Ministers:

For the avoidance of doubt it is declared that any matter which falls outside the special responsibilities of the Governor set out in subsection (1), or which is not a function which this Constitution or any other law requires the Governor to exercise in his discretion, is the responsibility of Ministers.⁹³

⁸⁹ Constitution Order 1969 at <http://www.gibraltar.gov.gi/>

⁹⁰ Draft Gibraltar Constitution Order 2006 at http://www.gibraltar.gov.gi/constitution/new_constitution/DRAFT_DESPATCH_AND_DRAFT_GIBRALTA_R_CONSTITUTION_ORDER_06.pdf

⁹¹ The British Government has overall responsibility for defence and external affairs, as Article 47.4 notes.

⁹² Draft Gibraltar Constitution Order 2006

⁹³ Ibid

4. Policing

At present, while the Gibraltar Government finances the police force, it is not their direct responsibility. Responsibility for policing lies with the Governor. The Gibraltar delegation wanted a compromise that would remove some of the ambiguities in this situation. The parties agreed on the need for an independent Police Authority to replace the current system, whereby complaints about the police are handled by the police themselves.

5. Judicial independence

In August 2006 the issue of judicial independence gave rise to renewed debate. The Gibraltar Chief Justice and other members of the Judiciary, as well as the UK-based Commonwealth Magistrates and Judges Association, expressed concern about the constitutional requirement that the Governor take part in the appointment and dismissal of judges. The amended Constitution states that four out of the seven members of the proposed Judicial Services Commission (JSC) will be appointed by the Governor, two on the advice of the Chief Minister. The Governor, with the prior approval of the British Government, may disregard the JSC's advice if "compliance with that advice would prejudice Her Majesty's service".⁹⁴ A judge might therefore be appointed or promoted not on merit, but in deference to the interests of the executive. *Panorama* commented:

It is widely recognised in modern free and democratic societies that the judiciary must be independent of the executive and the legislature. In determining this requirement regard is had to the manner of appointment of judges, their terms of office, the existence of guarantees against outside pressures and whether the judiciary presents an appearance of independence.⁹⁵

Geoff Hoon rejected concerns about judicial independence. In reply to a submission from the Commonwealth Magistrates and Judges Association, he thought the provisions on the judiciary "stand up very well to scrutiny against international standards in this area".⁹⁶ He continued:

They establish a constitutional framework in relation to the judiciary in Gibraltar consistent with the principles applied in most democratic countries. They also represent a significant and thorough modernisation of the judicial aspects of the present Gibraltar constitution. The British Government would therefore reject any suggestion that any of the provisions of the draft Gibraltar Constitution are in breach of applicable international principles, or may otherwise be inappropriate.⁹⁷

On 14 September 2006 the *Gibraltar Chronicle* reported that the British and Gibraltar Governments had given the Gibraltar Bar Council assurances that the circumstances in

⁹⁴ Article 48(3)

⁹⁵ 15 August 2006

⁹⁶ *Panorama*, 22 August 2006 at <http://www.panorama.gi/>

⁹⁷ *Ibid.* The report reproduces the full text of Mr Hoon's letter.

which the Governor might under the new Constitution disregard the advice of the JSC would have to be “extremely rare and exceptional”. This followed an exchange of correspondence released by the Bar Council chairman, James Neish QC, who said that the Bar Council was now satisfied the matter required no further action. However, at the Legal Year Ceremony address on 7 October 2006 the Gibraltar Chief Justice, Derek Schofield, said the Judiciary should have been “fully consulted and engaged during the process which led to the draft” and warned of possible consequences of a failure to protect its independence.⁹⁸ Mr Schofield is forming a team of constitutional experts to give him an independent opinion on whether the amended Constitution provides for an independent judiciary.

The Commonwealth Judges’ and Magistrates’ Association (CMGA), meanwhile, also remains concerned that the text does not meet recognised international standards, including the Latimer House Principles endorsed by all Commonwealth governments at the Commonwealth Heads of Government Meeting in Abuja, Nigeria, in 2003. The CMGA believes that there should be a constitutional requirement that where the Commission’s advice is disregarded, the matter should be referred back to the Commission with reasons for that rejection. The CMGA is also critical of provisions on the tenure of judicial officers of limited jurisdiction and of judges appointed for a fixed term.⁹⁹

F. Implementation of the new Constitution

1. Gibraltar

There will be a referendum on the acceptability of the final text of the new Constitution. The Gibraltar Government is likely to table a motion in the House of Assembly on the referendum in mid-October, with the vote possibly within three or four months.

The British Government’s assurances on self-determination appear to have dispelled Opposition fears that the British Government was appeasing the Spanish by watering down its position and Mr Bossano has said the GSLP/Liberals will back a ‘Yes’ vote in the referendum. The new Constitution now has the backing of all the main political parties in Gibraltar, which is likely to result in it being approved in the referendum. The Self-Determination for Gibraltar Group (SDGG) and the New Gibraltar Democracy (NGD) reject the new Constitution.¹⁰⁰

The Deputy Chief Minister of Gibraltar, Keith Azopardi, told the Gibraltar press: “If the [referendum] question is framed in terms that asks people to adopt the constitution as

⁹⁸ *Gibraltar Chronicle* 7 October 2006

⁹⁹ *GibraltarNews online* 27 September 2006 at <http://www.gibraltarnewsonline.com/2006/09/27/gibraltar-constitution-could-send-wrong-signals-commonwealth-judges-warn-hoon/>

¹⁰⁰ They boycotted the National Day political rally on 10 September, which was reported as a signal that the groups did not want a public confrontation with the Gibraltar Government.

representing maximum self-government in accordance with our right to self-determination or some other appropriate language then the answer to that question will sit as a stark message which would be difficult to ignore.”¹⁰¹

In November 2002 there was a referendum in Gibraltar on whether the UK and Spain should share sovereignty of Gibraltar.¹⁰² The referendum question on this occasion set the context for the vote:

On the 12th July 2002 the Foreign Secretary, Jack Straw, in a formal statement in the House of Commons, said that after twelve months of negotiation the British Government and Spain are in broad agreement on many of the principles that should underpin a lasting settlement of Spain's sovereignty claim, which included the principle that Britain and Spain should share sovereignty over Gibraltar. ...

and then asked:

Do you approve of the principle that Britain and Spain should share sovereignty over Gibraltar?¹⁰³

2. UK

In the UK the new Constitution will be implemented by means of the *Gibraltar Constitution Order 2006*, which will revoke and replace the *Gibraltar Constitution Order 1969*.¹⁰⁴

III Spain v UK at the European Court of Justice

A ruling against Spain at the European Court of Justice in September 2006 was a further confidence boost for Gibraltar in its attempts to define its status and relationship with the UK.

A. Background

In February 1999 in the case of *Matthews v the UK*¹⁰⁵ the Council of Europe's European Court of Human Rights ruled that the British Government had failed to provide the right for the electorate of Gibraltar to vote in or stand for elections to the EU's European Parliament. Faced with a conflict between two international legal obligations under the EC Treaty and the European Convention on Human Rights, the British Government tried

¹⁰¹ *GibraltarNews online* 10 April 2006 at <http://www.gibraltarnewsonline.com/2006/04/10/azopardi-urges-%E2%80%98yes%E2%80%99-vote-as-start-to-greater-democracy/>

¹⁰² In the vote, which had no legal weight, 98.97% voted against shared sovereignty.

¹⁰³ <http://www.gibnet.com/texts/ref2.htm>

¹⁰⁴ The text of present Constitution is available at http://www.gibraltar.gov.gi/constitution/gib_constitution.pdf

¹⁰⁵ Judgment of 18 February 1999

to remedy this by seeking an amendment to the 1976 Act on direct elections to the EP, which excluded Gibraltar. To amend such an Act required unanimity in the Council of Ministers and the Spanish Government rejected the proposal. In 2001 the British Government decided to take unilateral action to enfranchise Gibraltar voters. The then Minister for Europe, Peter Hain, said:

The Government have now decided to seek legislative time in order to introduce domestic legislation for this purpose. The content of this legislation is a matter for the UK alone: it does not require the approval of other member states. There will be no additional EU legislation. Consultations are already underway between the Government and the Government of Gibraltar on the practical arrangements.¹⁰⁶

In the House of Lords Baroness Symons described the evolution of this decision and noted that the UK decision might be subject to a legal challenge:

After the 1999 ECHR judgment, the Government of Spain would not allow an amendment to the 1976 Act to go forward. We are therefore proceeding to domestic legislation because, although Spain's position might or might not be challengeable, there is a political commitment on the Government's part to enable the franchise to be completed in time for the 2004 elections. That might not be possible to achieve were we to try to do that outside domestic legislation.¹⁰⁷

Although the British Government knew there was a possibility of Spain challenging its action, it stood by its position that it was legally bound to enfranchise Gibraltar following the European Court ruling. Under the Belgian EU Presidency of June-December 2001 agreement was finally reached in the Council of Ministers on the proposed common principles for EP election rules, which involved amending the 1976 Act. A UK guarantee on EP enfranchisement for Gibraltar was entered in the minutes of the final Council text.¹⁰⁸ The Commons Scrutiny Committee reported on the common principles in March 2002¹⁰⁹ and outlined the Government's proposals to resolve the Matthews situation, as follows:

The Explanatory Memorandum dated 2 December 1999, and the subsequent Supplementary Explanatory Memorandum of 14 January 2000, reported the Government's view that securing amendment of the 1976 Act on Direct Elections would be an appropriate way to implement the judgement of the ECHR in the case of *Matthews v UK*. Accordingly, during the course of these negotiations, the Government proposed that the provisions on EP elections should include an addition to the 1976 Act, which would have made express provision for the application of these EP election provisions (in the form of the 1976 Act) to

¹⁰⁶ Reply to questions from Simon Hughes and Syd Rapson, HC Deb 10 December 2001 cc630-2W

¹⁰⁷ HL Deb 14 March 2002 c937

¹⁰⁸ Gen. Sec. 6150/02, 20 February 2002

¹⁰⁹ European Scrutiny Committee 22nd Report 2001-02, 20 March 2002

Gibraltar. However, it proved impossible to obtain the unanimous agreement of other Member States to such an amendment.

Therefore, in November 2001, the Government announced its intention to introduce domestic legislation to extend the EP franchise to Gibraltar. Before taking this step, the Government consulted the Government of Gibraltar, other Member States and the European Commission. All accepted the Government's approach. The Committee will recall that it welcomed, at 1.4(iv) of its most recent response, the Government's efforts and its commitment to consider unilateral action. In recognition of this, it is proposed that two statements will be entered in the minutes of the Council meeting that adopts the amending Act.

The United Kingdom will make the following statement: '*Recalling Article 6(2) of the Treaty on European Union, which states that: 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community Law, the UK will ensure that the necessary changes are made to enable the Gibraltar electorate to vote in elections to the EP as part of and on the same terms as the electorate of an existing UK constituency, in order to ensure the fulfilment of the UK's obligation to implement the judgement of the European Court of Human Rights in the case of *Matthews v UK*, consistent with EU law.'*' The Council and Commission will then make a joint statement noting the UK's proposals. Both these statements are set out in 6150/02. "As a consequence, there is no longer any need, as was proposed, to add Gibraltar to the UK in Annex I (as amended by the provisions) to the 1976 Act.

Part 2 of the *European Parliament (Representation) Bill* (Bill 7 of 2002/03)¹¹⁰ gave legal effect to the Government's decision to enfranchise Gibraltarians. It provided for Gibraltar to become part of a UK "combined region" for EP election purposes. Gibraltar was combined with the electoral region of South West England for the EP elections in June 2004.¹¹¹

B. The Spanish Challenge

The European Scrutiny Committee, which had cleared all the EP election proposals,¹¹² concluded, with regard to the statement on Gibraltar:

We understand that the other Member States consulted by the Government on its approach to extending the European Parliament franchise to Gibraltar include Spain, and therefore that Spain accepts the Government's approach.¹¹³

¹¹⁰ See Library Research Paper 02/78 for information on the Bill

¹¹¹ The overall constituency result gave rise to three Conservatives MEPs, two from the UK Independence party, one Labour and one Liberal Democrat.

¹¹² These included proportional representation, ending the dual mandate and fixed EP election dates.

¹¹³ European Scrutiny Committee 22nd Report 2001-02, 20 March 2002 para.16

However, Spain did not accept the Government's approach. On 27 July 2003 Spain lodged a complaint with the European Commission against the British Government, alleging that the *European Parliament Representation Act 2003* (EPRA) allowing Gibraltarians to vote in EP elections as part of a UK constituency breached the following elements of EC law and the EC Treaty:

- Articles 17, 19, 189 and 190 of the EC Treaty dealing with citizenship of the Union and with the EP, because franchise is granted to persons who are not nationals of the UK and hence not EU citizens. EPRA 2003 grants franchise to "qualified Commonwealth citizens", which includes certain non-British third country nationals.
- Annex II to the 1976 Act on elections of representatives to the European Parliament, because it creates a combined electoral region incorporating Gibraltar into an existing electoral region in England and Wales.

A report in the Spanish daily, *El País*,¹¹⁴ expanded on the arguments put forward by Spanish lawyers:

- Firstly, Madrid objected to the extension of a UK constituency territorially to include Gibraltar on the grounds that the territorial definition for the UK constituencies exists only for the UK. The 1976 Act would need to be changed to legalise this. The British Government had long argued that it was impossible to enfranchise Gibraltar by changing UK law alone, and the 1976 Act could not be changed because Spain would veto it. Even after the ruling by the European Court of Human Rights, the Government had refused to amend the UK law and said the Government was pursuing the only option available, which was to change the 1976 Act.
- Secondly, Spain's sovereignty claim has influenced Spain's objection to Gibraltar being combined with a UK region for the purposes of these elections. Madrid makes a distinction between the enfranchisement of the people and recognition of the whole of the territory of Gibraltar as electorally part of the UK. The Spanish view is that the UK's electoral frontier ends at the La Linea frontier.
- Thirdly, certain Commonwealth citizens who are Gibraltar residents will be able to vote in Gibraltar in EP elections, even though they are not EU nationals.

C. European Commission Response

On 29 October 2003 the Commission adopted a declaration distancing itself from the underlying sovereignty dispute:

¹¹⁴ *El País* 30 July 2003

The Commission considers, following an in depth analysis of the Spanish complaint and an oral hearing held on the 1st of October, that the UK has organised the extension of voting rights to residents in Gibraltar within the margin of discretion presently given to Member States by the EU law. However, given the sensitivity of the underlying bilateral issue, the Commission at this stage refrains from adopting a reasoned opinion within the meaning of Article 227 of the Treaty and invites the parties to find an amicable solution.

The UK statute which Spain contests was adopted by the UK following the “Matthews” judgement of the European Court of Human Rights. Spain does not contest that the UK is under the obligation to give residents of Gibraltar holders of UK passports the right to vote for the European Parliament nor the UK present practice of giving certain Commonwealth citizens resident in the UK the right to vote for the EP.¹¹⁵

The Commission’s declaration did not affect Spain’s right to pursue the issue at the European Court of Justice, and in mid-February 2004 *El Mundo* reported that this is what the Spanish Government intended to do.¹¹⁶ The British Government appeared to be in ignorance of the Spanish intention.¹¹⁷ The Gibraltar Government was annoyed because it had found out from the Spanish press, rather than the British Government, that Spain intended to take legal action against the UK if the Commission did not act.

D. European Court of Justice Opinion

On 6 April 2006 ECJ Advocate General Tizzano issued a non-binding Opinion on the Spanish complaint,¹¹⁸ proposing that the Court reject the first complaint and uphold in part the second on the grounds that:

- the extension of EP voting rights to citizens of non-member countries resident in Gibraltar who are not UK citizens is contrary to the EC Treaty provisions on citizenship of the Union and elections to the EP, and
- such extension and the inclusion of Gibraltar within an existing UK electoral constituency is contrary to Annex II to the 1976 Act concerning the election of representatives to the European Parliament.

A Court press release summarised the Opinion as follows:

According to the Advocate General, the possibility of extending the right to vote in elections to the European Parliament to citizens of non-member countries is

¹¹⁵ Commission Press Release, IP/03/1479, 29 October 2003 at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1479|0|RAPID&lq=en&disp lay

¹¹⁶ Reported in the *Guardian* 18 February 2004

¹¹⁷ <http://www.guardian.co.uk/gibraltar/story/0,11525,1150600,00.html>

¹¹⁸ Case C-145/04, *Spain v United Kingdom, supported by the Commission of the European Communities*.

not precluded by the general Treaty rules. Such an extension appears to be consistent with the democratic principle of universal suffrage, which argues in favour of recognising voting rights for the largest possible number of persons, and thus also extending such rights to non-nationals who are established in a particular Member State.

Member States are, however, under an obligation to comply with the general principles of the legal order, such as the principles of reasonableness, proportionality and non-discrimination, in addition to the specific Community provisions in the area under consideration (such as those imposed on the United Kingdom by Annex II to the 1976 Act).

The extension of voting rights to citizens of non-member countries, however, infringes Annex II to the 1976 Act. That Annex requires the United Kingdom to apply the provisions of the 1976 Act only in relation to the United Kingdom itself.

According to the Advocate General, the United Kingdom was required, as a result of the judgment delivered by the European Court of Human Rights in Strasbourg in the Matthews case, to introduce a derogation from Annex II in order to guarantee voting rights for British citizens resident in Gibraltar. The creation of a new electoral constituency, the carrying out of polling in Gibraltar and the establishment of the electoral register are legitimate measures inasmuch as they are necessary to guarantee the effectiveness of those citizens' right to vote.

By contrast, the extension of that right to persons resident in Gibraltar, but who are not citizens of the United Kingdom or of any other Member State of the European Union, is not required by the need to guarantee the exercise of a fundamental right and therefore does not justify a derogation from Annex II.

The Annex therefore retains its prohibitory scope in regard to citizens of non-member countries.¹¹⁹

While there appears to have been little reaction to the Opinion in the British Parliament, *Gibnet.com* published UK MEPs' reactions. Neil Parish, the Conservative MEP for the South West and Gibraltar thought the opinion was a "mixed bag", commenting:

Our greatest worry was that over a million people could lose their right to vote in European elections on the UK mainland and that is now looking less likely. It is still very sad to think that even one Commonwealth citizen living in Gibraltar could be prevented from voting by Spain's ill-motivated court case against the UK. Spain is determined to make the lives of Gibraltarians difficult over the sovereignty issue and it is frankly pathetic.

This opinion is not binding on the Court so Commonwealth citizens are not yet out of danger. I will travel to Gibraltar next week to see if we cannot get this mess sorted out so that Commonwealth citizens who contribute to Gibraltar's community can be allowed to vote in the next European elections.¹²⁰

¹¹⁹ Court press release 34/06 6 April 2006 at <http://curia.eu.int/en/actu/communiqués/cp06/aff/cp060034en.pdf>. The full text of the opinion is available at <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-145/04> and <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:DKEY=424752:EN:NOT#OP>

¹²⁰ *Gibnet* 6 April 2006 at <http://www.gibnet.com/eurovote/ecj1.htm>

The Liberal Democrat MEP for the region, Graham Watson, hoped that the final judgment (which would be binding) would “confirm that all those living on the Rock are able to enjoy their full democratic rights”.¹²¹ The UKIP MEP, Roger Knapman, said the opinion had “enraged” him.

This opinion seems to mean that a Hungarian living in Gibraltar can vote, but a Gibraltarian cannot. In order to kow-tow to the paranoia of the Spanish, Europe appears to be intent on discriminating against those from the Commonwealth, this must not be allowed to happen”.¹²²

The UK Law Societies' Joint Brussels Office commented on the Opinion:

If the ECJ follows this Opinion, this will mean that commonwealth citizens who reside in the UK will have the right to vote in European elections, but those who reside in Gibraltar will not. Some commentators have argued that if the underlying justification for allowing UK-resident commonwealth citizens to vote in European elections is recognition of their historical connection with the UK and the importance of allowing this group to participate in a process which affects them, then the same argument should be extended to the smaller but equivalent group of commonwealth citizens resident in Gibraltar.¹²³

E. European Court of Justice Ruling

On 12 September 2006 the ECJ rejected the Spanish complaint. The Court press release summarised the judgment as follows:

The Court recalls, at the outset, that it was to comply with a judgment of the European Court of Human Rights that the United Kingdom adopted the legislation challenged by the Kingdom of Spain. For reasons connected to its constitutional traditions, the United Kingdom chose to grant the right to vote and stand for election to QCCs [Qualifying Commonwealth Citizen] satisfying conditions expressing a specific link with the area in respect of which the elections are held.

The Court holds that neither the EC Treaty nor the 1976 Act defines expressly and precisely who are to be entitled to the right to vote and to stand as a candidate in elections to the European Parliament. Therefore, in the current state of Community law, the definition of the persons entitled to vote and stand as a candidate in elections to the European Parliament falls within the competence of each Member State in compliance with Community law. The relevant articles of the EC Treaty do not preclude the Member States from granting that right to vote

¹²¹ *Gibnet* 6 April 2006

¹²² *Ibid*

¹²³ *Developments from the European Court of Justice*, May 2006 at <http://www.eyba.org/downloads/ECJUpdateMay2006.pdf>

and to stand as a candidate to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory.

In addition, so far as concerns the combination of the territory of Gibraltar with an existing electoral region in England, the Court notes that a Gibraltar elector is thus in a similar situation to that of a United Kingdom elector and need not be faced with difficulties connected to Gibraltar's status which make it impossible for him to exercise that right to vote or dissuade him from doing so. It therefore rejects the Kingdom of Spain's argument in that regard.¹²⁴

The Gibraltar Government stated that "The outcome of this case now definitively brings these issues to a conclusion in totally satisfactory terms for Gibraltar".¹²⁵

¹²⁴ Press release 70/06, 12 September 2006, Case C-145/04, at

<http://www.curia.europa.eu/en/actu/communiqués/cp06/aff/cp060070en.pdf>

¹²⁵ Gibraltar Government press release 264/2006 at <http://gibraltar.gov.uk/admin/uploads/ECJRuling.pdf>

Appendix I The Córdoba Ministerial Statements and Agreements

1. Forum of Dialogue on Gibraltar

1. The Minister of Foreign Affairs and Co-operation of the Kingdom of Spain, Mr Miguel Angel Moratinos, the Minister for Europe of the United Kingdom of Great Britain and Northern Ireland, Mr Geoff Hoon and the Chief Minister of Gibraltar, Mr Peter Caruana held the first ministerial meeting of the Trilateral Forum of Dialogue on Gibraltar (“the Forum”) in Córdoba today under the terms of the Joint Communiqué of 16 December 2004.

2. Since the establishment of the Forum there have been five rounds of discussions. This has made it possible to address a number of issues in detail, and in a constructive spirit, and to resolve them in a way acceptable to Governments of Spain, the United Kingdom and Gibraltar (“the participants”), so as to benefit both Gibraltar and the Campo de Gibraltar, and thus contribute to the creation of a constructive atmosphere of mutual trust, respect and co-operation.

3. We are therefore happy to announce today a package of agreements which we believe will enhance the economic and social development of both Gibraltar and the surrounding region, in particular the Campo de Gibraltar. These agreements show our commitment to the solution of specific problems but have no implications whatsoever regarding sovereignty and jurisdiction, or regarding any issues thereby affected, and any activity or measure undertaken in applying them, or as a consequence of them, is understood to be adopted without prejudice to the respective positions on sovereignty and jurisdiction. The Government of Gibraltar understands and accepts that references to sovereignty in this Communiqué are bilateral to the UK and Spain.

The Pensions Issue

4. We are glad to announce a settlement of the issue of the pensions of former Spanish workers in Gibraltar, the details of which are set out in the Statement on Pensions attached to this Communiqué as Annex 1.

From our earliest discussions about the establishment of the Forum, we agreed on the need to tackle this issue, given the age and financial vulnerability of the group of people affected. Thanks to the thorough work carried out by our technical experts and to our political determination to resolve this issue, we are able to offer a solution which we believe is fair and balanced to all the former Spanish workers who suffered the consequences of decisions adopted in the 1960s.

Every affected pensioner will be personally informed of this offer shortly, and we hope that those affected will welcome the settlement which the participants regard as final. The Gibraltar Government will make a separate statement shortly in respect of other Gibraltar pensioners.

Gibraltar Airport

5. We have also been able to agree upon arrangements that will facilitate the enhanced use of the Gibraltar Airport for civilian air traffic for the benefit of

Gibraltar and the Campo de Gibraltar. Details of the agreement are set out in the Statement on Gibraltar Airport attached to this Communiqué as Annex 2.

The full implementation of that Statement entails the construction of a new single air terminal adjoining the south side of the fence/frontier, and related road and access works. We have therefore agreed to advance, as far as possible, the implementation of many of the provisions of that Statement, so as to enable the citizens of Gibraltar and the surrounding area to enjoy the benefits thereof even before these civil works are completed.

Fence/Frontier

6. More fluid movement of people, vehicles and goods between Gibraltar and the surrounding area will improve the day to day lives of people in Gibraltar and the Campo de Gibraltar. The Spanish Government, through the Agencia Estatal de Administración Tributaria, is already investing close to one and a half million euros in substantial improvement works to its facilities and those of the Guardia Civil. The works will be completed this year, at which time the access will operate on a two lane basis in both directions and the red/green channels system, for both people and for vehicles, will be introduced. The Gibraltar Government has also invested substantial sums of money on the enhancement of its facilities.

7. We also commit ourselves to keep the situation under review and to study additional measures to further improve the fluidity of both commercial and non-commercial traffic in both directions, bearing in mind the challenge posed by an annual traffic of more than seven million persons between territories with different customs regimes since Gibraltar is outside the EU Customs Union, and given also the fact that the UK (and thus Gibraltar) are outside the Schengen area for external borders purposes. As long as these differences remain, certain controls are necessary, and this, coupled with traffic volumes means that some delays are inevitable.

However, we acknowledge that the fluidity of traffic will continue to be an important issue for the Forum given the high numbers of daily movements for reasons of work, commerce and leisure.

Telecommunications

8. In the field of telecommunications, and in order to both address the current limitation on the quantity of telephone numbers in Gibraltar accessible from and through the Spanish network, and also enable roaming agreements between networks in Spain and Gibraltar for mobile telephones, telephone calls from Spain to Gibraltar will be channelled using the technical procedures for international direct dialling recommended by the International Telecommunications Union for all States and territories, including the territory of Gibraltar.

In addition, the Spanish network operators will be able to accept the codes assigned to Gibraltar by the aforementioned organization, in order to identify the operators in that territory.

These arrangements will become operational within four months from to-day's date, and the 30,000 telephone numbers reserved by Spain in its national numbering plan for access to the Gibraltar network will then be available for reassignment in Spain.

Since the introduction of mobile roaming is a matter for the Network operators, the participants shall request from their respective telephone Network operators that, as soon as possible, they enter into appropriate commercial agreements, in

accordance with the rules of the free market and in compliance with the EC Electronic Communications Directives (Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services) and other legal community provisions on electronic communications, all of which have been brought into effect.

Instituto Cervantes

9. We welcome the proposal by the Spanish Government to establish in Gibraltar an Instituto Cervantes. The Instituto Cervantes is dedicated to increasing knowledge of the Spanish language and culture. We welcome also the Gibraltar Government's agreement to make available suitable premises for the Institute, and its willingness to facilitate its early establishment.

Comisión Mixta de Cooperación y Colaboración

10. We encourage the "Comisión Mixta de Cooperación y Colaboración established between the Mancomunidad de Municipios de la Comarca del Campo de Gibraltar and the Gibraltar Government" to continue its work for the development of local co-operation. We would also welcome the participation in the Comisión Mixta of the Junta de Andalucía, as this would enhance the efficacy of this process in areas of its competence.

Ports

11. We welcome and encourage the co-operation between the port authorities of the Bay in relation to issues relating to their operations, and in continuing to explore possibilities for collaboration in fields of common interest.

Commitment to the Forum

12. We reiterate our full commitment to continue the process of dialogue entailed by the Forum, with its open agenda, on any issue relating to or which affects Gibraltar. We have had an exchange of views about the range of issues that could be discussed in future meetings of this Forum.¹²⁶

2. Gibraltar Airport

The Minister of Foreign Affairs and Cooperation of the Kingdom of Spain, Mr. Miguel Angel Moratinos, the Minister for Europe of the United Kingdom of Great Britain and Northern Ireland, Mr Geoff Hoon, and the Chief Minister of Gibraltar, Mr. Peter Caruana, meeting in Córdoba on the 18th of September 2006 have agreed the following Statement in relation to the Gibraltar Airport as an Annex to the Ministerial Communique.

Wishing to enable the enhanced use of Gibraltar Airport for the benefit of the social and economic development of Gibraltar and of the Campo de Gibraltar and improved employment and commercial opportunities for both, on terms acceptable to the three participants ("the participants") in the Dialogue Forum established on 16th December 2004 between the Governments of the UK, Spain

¹²⁶ FCO website at <http://www.fco.gov.uk/Files/kfile/communique%20UK%20Gibraltar180906.pdf>

and Gibraltar (“the Dialogue Forum”) and without prejudice to their respective sovereignty positions and constitutional status.

Have agreed the following arrangements:

1. This Statement and the arrangements which it entails (“the arrangements”), which are to operate in accordance with EU/international requirements, procedures and practices, relate to civilian air traffic, and will have no implication for sovereignty and jurisdiction or control and any activity or measure undertaken in applying them, or as a consequence of them, are understood to be without prejudice to the respective legal positions with regard to the dispute over sovereignty and jurisdiction over the territory in which the airport is situated. The Gibraltar Government understands and accepts that the references to sovereignty are bilateral to the UK and Spain.

2. In this context, and in order to overcome problems of terminology relating to references to the words “frontier” or “fence”, the phrase “fence/frontier” is used. This phrase means frontier for the UK and Gibraltar, and fence for Spain.

3. This Statement and the arrangements will replace the Joint Declaration on the Airport made in London on December 2nd 1987, and the full compliance herewith will, for the purposes of all EU measures containing an article suspending the application of that measure to Gibraltar Airport until the 1987 Declaration is complied with, be deemed to constitute compliance with the 1987 Declaration for the purposes of such articles. The UK and Spain will so inform the Council.

Therefore, as part of the arrangements, there will be a lifting of Gibraltar Airport’s suspension from all EU aviation measures. Consequently, Gibraltar Airport will be bound by, comply with and benefit from all applicable EC regulations and directives. The participants attach particular importance to EU rules relating to environmental impact. As part of the arrangements there will also be an end to the current discriminatory restrictions imposed by Spain over use of Spanish airspace by civilian aircraft flying in and out of Gibraltar Airport.

4. Recalling the participants’ aim of enabling the enhanced use of Gibraltar Airport to benefit the social and economic development of Gibraltar and the Campo de Gibraltar, and given the proximity of the airport to the populations of Gibraltar and the Campo de Gibraltar and the shared concerns on environmental and other matters regarding the use of the airport, a Permanent Joint Liaison Committee of the participants will be established as a forum to consider at a technical level any problem or issue relating to the functioning of the arrangements.

5. The UK Government is responsible for all international obligations including aviation safety and security relating to Gibraltar Airport, as laid down in the pertinent rules and regulations of ECAC/ICAO, Eurocontrol and of the EC. Recognising the fact that Gibraltar Airport is a military airfield available for civilian flights, the Permanent Joint Liaison Committee will be appropriately notified of any interruption to the arrangements, including flight restrictions caused by military use.

6. A single air terminal (“the terminal”) adjoining the southern side of the fence/frontier will be built, in the appropriate manner as decided by the Gibraltar Government, to enable passengers and their luggage access to and from such terminal directly to/from the north side of the fence/frontier.

7. The following arrangements will apply for passengers arriving or departing through the terminal:

(a) Passengers flying from Gibraltar Airport to a Spanish airport accessing the terminal via the direct access from the north side of the fence/frontier will be treated as if they had not left the Schengen travel area;

(b) Other passengers flying from Gibraltar Airport to a Spanish airport will be checked into the Schengen travel area before boarding the aeroplane. This check will be carried out by Spanish officials, who themselves will be located on the north side of the fence/frontier, in a manner facilitated by the design of the terminal. Therefore, on arrival at a Spanish airport, these passengers will not be subject to further Schengen entry controls;

(c) Passengers flying to Gibraltar Airport from a Spanish airport and exiting the terminal via the direct access to the north side of the fence/frontier will also be treated as if they had not left the Schengen travel area;

(d) Other passengers travelling to Gibraltar Airport from a Spanish airport, after they have disembarked, will go through a Schengen exit check, which will be carried out by Spanish officials in the same manner as in (b) above. These passengers will then continue to a place where the Gibraltar authorities will carry out an appropriate identity/passport check to clear entry into Gibraltar;

(e) Passengers in categories (a) and (c) who remain airside of Gibraltar customs and immigration will be treated as transit passengers in the terminal and, by virtue of administrative waiver thereof by the Gibraltar authorities, will not in normal circumstances be subjected to Gibraltar customs and immigration controls. The Gibraltar authorities retain the right to exercise such controls on grounds of security or in other exceptional or unusual circumstances that render them necessary or desirable. For their part, the Spanish authorities retain the equivalent right, in line with their Schengen obligations.

Once the participants have been able to assess the operation of these arrangements they will, but subject to further agreement in that regard, give consideration to ways of obtaining the practical benefits of Schengen clearance for flights to and from Gibraltar Airport and Schengen destinations other than Spanish airports in a way legally and politically acceptable to all the participants.

8. Air cargo arriving from within the European Customs Union and destined to the northern side of the fence/frontier or vice versa, will be treated as in transit/bond and thus will not be subject to any customs duties. Arrangements in accordance with applicable EU requirements will be made to facilitate the overland forwarding to Gibraltar of cargo, free of Spanish customs duties, from flights destined for Gibraltar Airport that have been diverted to a Spanish airport.

9. In order to ensure the safe and fluid access to and egress from Gibraltar Airport by aircraft, the Air Traffic Control (ATC) service providers and, whenever necessary, the aeronautical authorities of the participants will meet as required to coordinate and agree air traffic control issues and procedures between the ATC Control Center at Sevilla Airport and the ATC Tower at Gibraltar Airport. Recalling that the Gibraltar Airport airfield is a military airfield, the United Kingdom will ensure that the ATC service provider is certified in accordance with EC rules.

10. All passenger and flight services including all facilities and functions relating to airside and aircraft services, passengers' check-in, baggage handling and passenger and baggage security will be provided in and by the terminal. Subject to EU directives the Government of Gibraltar will grant a contractual concession to operate the terminal and provide these services on a commercial basis to a joint venture company owned by Gibraltar and Spanish commercial interests.

11. The Geneva Airport model vis-a-vis France will serve, as appropriate, and as may be agreed as the basis for the arrangements.

12. To enable the Statement and the arrangements to be fully operational, and to accommodate expansion of traffic volumes, substantial sums of money will have to be invested by the corresponding participant in the following:

- a) Executing the necessary civil works for the terminal.
- b) An appropriate technical solution acceptable to the Government of Gibraltar must be found, including the one consisting of the creation of a tunnel at the Eastern end of the airfield, in order to avoid vehicular traffic routinely crossing the airport runway, and the increase in vehicular traffic congestion exacerbated by a material growth in the number of flights;
- c) Infrastructure and arrangements north of the fence/frontier will have to be adapted in order to facilitate the direct access of passengers and luggage to the terminal.

The participants should seek appropriate EU funding for these investments.

13. The Government of Gibraltar will immediately commence the project for the construction of the terminal and any necessary new roads and tunnels on the south side of the fence/frontier envisaged in connection with the arrangements and enhanced use of the airport. It is envisaged that these works will be completed within 18 to 24 months. Spain will complete any civil works required on the north side of the fence/frontier to implement the arrangements, within the same timescale. The participants will keep each other fully informed of progress in these works, liaising with each other as may be necessary.

14. With effect from today, Spain will:

- (a) Suspend the discriminatory restrictions on civilian flights to Gibraltar Airport, thereby enabling flights bound to Gibraltar Airport diverted to a Spanish airport to subsequently fly on directly from that airport to Gibraltar Airport;
- (b) Make arrangements to facilitate the overland forwarding to Gibraltar of air cargo from flights destined to Gibraltar Airport, in accordance with paragraph 8;
- (c) Suspend all current discriminatory restrictions imposed by Spain over the use of Spanish airspace by all civilian aircraft flying in and out of Gibraltar Airport. New final approach paths to Gibraltar Airport, in order to enhance operational safety conditions, will be adopted, including straight-in approach, taking into account their environmental impact;
- (d) Cease to seek the suspension of Gibraltar Airport from any EU Aviation measure not yet adopted.

15. With effect from a date not later than three months from today:

- (a) There will be no objection to the normal operation of air services to and from Gibraltar Airport on the basis currently affecting this airport notwithstanding any continuing suspension from EU aviation measures;
- (b) Until such time as the Government of Gibraltar completes the construction of the terminal, whereupon the arrangements specified in paragraph 7 of this Statement will be implemented, passengers and their baggage going from the north side of the fence/frontier to the present air terminal and vice versa will be carried by bus from the airside of the terminal, directly to a meeting point north of the fence/frontier and the administrative waiver of customs and immigration controls specified in paragraph 7(e) of the Statement will apply to them. Passengers and their baggage will not be subject either to customs or immigration controls north of the fence/frontier.

(c) The Government of Gibraltar will enable air cargo arriving from within the European Customs Union and destined to the northern side of the fence/frontier to benefit from the provisions of paragraph 8.

16. With effect from a date not later than six months from today, Spain will join the UK in procuring the formal lifting of Gibraltar Airport's suspension from the application of all EU Aviation measures.

17. Once the Government of Gibraltar completes the new terminal within the timeframe envisaged in paragraph 13 and has fully implemented the arrangements specified in paragraphs 7 and 8 of the Statement, restrictions set out in paragraph 14 (a) and (c) for all civilian aircraft flying in and out of Gibraltar Airport will formally be ended.

18. The participants will use their best endeavours to make fully operational the Statement and the arrangements at the earliest possible date and will monitor progress thereon in the Trilateral Dialogue Forum.

19. The commitments in this Statement will be fully implemented unless the three participants agree to the contrary.¹²⁷

3. Pensions

The Minister of Foreign Affairs and Cooperation of the Kingdom of Spain, Mr. Miguel Angel Moratinos, the Minister for Europe of the United Kingdom of Great Britain and Northern Ireland, Mr Geoff Hoon, and the Chief Minister of Gibraltar, Mr. Peter Caruana, meeting in Córdoba on the 18th September 2006 have agreed the following statement on the issue of pensions of former Spanish workers in Gibraltar as an annex to the Ministerial Communiqué:

Background

1. As is well known, historical circumstances prevented large numbers of Spanish workers resident in Spain from continuing to work in Gibraltar and thus from continuing to contribute to the Gibraltar Social Insurance Fund (GSIF) from the late 1960s.

2. We acknowledge the financial imbalance which affected the GSIF as a result of the disparity between the contributions to it of those workers and the enhanced rate of pensions to which they became legally entitled as a result of Spain's accession to the EU in 1986. Accordingly, in 1996 the UK Government assumed indefinite responsibility for the funding of pensions from the GSIF of the pre-1969 Spanish workers. As part of those arrangements, such pensions have remained frozen at the 1988 rates.

3. Wishing, in the spirit of the Trilateral Forum of Dialogue on Gibraltar ("the Forum"), to improve local co-operation and relations and to resolve some of the problems affecting them, the Governments of the United Kingdom, Spain and Gibraltar ("the participants") have agreed a full and final settlement of the Pensions and related issues on the terms set out in this statement.

Beneficiaries

4. This agreement applies to Spanish nationals, alive to-day, who were resident in Spain while working in Gibraltar and who made contributions to the GSIF prior

¹²⁷ FCO website at <http://www.fco.gov.uk/Files/kfile/Annex%20I%20Airport%20agreement180906.pdf>

to 1969, who qualify for a pension from the GSIF, and who, as a result of the border/fence closure in 1969, were no longer able to continue working in Gibraltar, or contributing to the GSIF or to draw a GSIF pension, and who did not resume contributions to the GSIF after 1969, and who are now resident in the EU. The agreement also covers other recipients of a pension, including widows. In this statement, beneficiaries of this agreement are referred to as "Affected Spanish Pensioners".

The Agreed Solution

5. The agreed solution will be offered to all Affected Spanish Pensioners, on a voluntary basis, and it will treat all such pensioners in an equal manner. All payments will be funded and made by the UK.

6. All Affected Spanish Pensioners will be offered by the UK a lump sum in exchange for withdrawing from the GSIF and giving up any further claims in relation thereto. This lump sum takes into account the fact that, unlike elderly persons resident in Gibraltar, the Affected Spanish Pensioners, as EU residents, many of whom received very reduced pensions because of their incomplete contribution record, have not been able to access any other source of financial support since 1989, during which period their Gibraltar pensions have remained frozen. The lump sum will be paid in two tranches. The first tranche will be paid in April 2007 and the second tranche will be paid in April 2008. By way of indication only, the average total lump sum will be about 6,200 €.

7. If they accept the offer by the UK, those Affected Spanish Pensioners will receive their future payment entitlement from a non-contributory scheme to be established and funded by the UK for that purpose. This scheme will make payments equivalent to their former GSIF pensions, increased to what they would have been had the GSIF pensions been uprated annually from 1989 to April 2007 in accordance with the Gibraltar Index of Retail Prices.

Future uprated payments will be index-linked to the UK Retail Price Index.

8. Any Affected Spanish Pensioner who decides not to accept this offer and withdraw from the GSIF will not be entitled to receive and will not receive any lump sum payment. They will continue to be members of the GSIF and thus to receive their pension from the GSIF. The pensions of this group of pensioners (including such future uprating of Gibraltar pensions as the Gibraltar Government decides) will continue to be paid by the UK.

9. The lump sum, but not the future payments, will be paid to the estate of any Affected Spanish Pensioner who formally agrees to accept the offer when it is made, but who dies before the full payment is made.

10. The estate or next of kin of any other deceased Affected Spanish Pensioner has no right to claim either the lump sum or the future payments.

11. Although Spain is entitled under EC legislation to claim reimbursement-compensation for the costs of benefits in kind for the Affected Spanish Pensioners, there will be no change to the current arrangements.

Outcome

12. The settlement will provide a more sustainable financial future for Affected Spanish Pensioners. In addition, those who accept will have received a lump sum in exchange for withdrawing from the GSIF. All Affected Spanish Pensioners will have been treated equally in terms of the calculation of the financial offer to them.

Timetable

13. The Government of Gibraltar will write to the Affected Spanish Pensioners within one month, outlining the offer in general terms.

The Government of the United Kingdom will write again to each of the Affected Spanish Pensioners within not later than three months setting out an individual offer in detail and explaining what the pensioner has to do next.

Pensioners will be required to respond within two months of the date of the offer letter

The participants will carry out any necessary steps to enable the new arrangements to come into effect as soon as possible in accordance with the timetable set out above.¹²⁸

¹²⁸ FCO website at http://www.fco.gov.uk/Files/kfile/Annex%201%20Pensions%20statement_180906.pdf

Appendix II Statements and Correspondence on the Constitution

British Government Letter to Spanish Government, March 2006

Copies of Mr Straw's letter to the Spanish Foreign Minister, Miguel Angel Moratinos, and the UK/Gibraltar joint statement on the constitutional talks were deposited in the House of Commons in March 2006.¹²⁹ The letter was also published on the Gibraltar news network, *Gibnet*.

Dear Miguel

You and I have discussed Gibraltar on a number of occasions. You have expressed concern that any new constitution should not undermine Spain's position in respect of the Treaty of Utrecht. I am accordingly writing to advise you that the negotiations between the United Kingdom and Gibraltar delegations to agree a new Constitution for Gibraltar were concluded on Friday 17 March. The full text of the draft Constitution will not be ready for publication for another few weeks. It will then be put to a referendum in Gibraltar and, if it is approved, given effect through an Order in Council. However, I wanted to take this opportunity to clarify certain key issues for you in the draft Constitution. These same points will also be set out in a Despatch from myself to the Governor at the same time that the Order in Council is given effect.

As I set out in my statement of 6 February 2004, the starting point for the work to modernise Gibraltar's constitution was the invitation in the 1999 White Paper (Partnership for Progress and Prosperity: Britain and the Overseas Territories) to OT governments to submit proposals for constitutional reform. In July 1999, the Gibraltar House of Assembly constituted a Select Committee to report on Constitutional reform. The Committee published its proposals in January 2002. We formally received them in December 2003. These proposals were subsequently discussed between delegations from the UK and Gibraltar in November/December 2004, September 2005 and March 2006.

The new Constitution provides for a modern relationship between Gibraltar and the UK. This Constitution does not in any way diminish British sovereignty of Gibraltar, and the UK will retain its full international responsibility for Gibraltar, including for Gibraltar's external relations and defence, and as the Member State responsible for Gibraltar in the European Union. Gibraltar will remain listed as a British Overseas Territory in the British Nationality Act of 1981, as amended by the British Overseas Territory Act 2002.

As a separate territory, recognised by the United Nations and included since 1946 in its list of non-self governing territories, Gibraltar enjoys the individual and collective rights accorded by the UN Charter. Her Majesty's Government therefore supports the right of self-determination of the people of Gibraltar,

¹²⁹ DEP 06/699, 28 March 2006.

promoted in accordance with the other principles and rights of the UN Charter, except in so far only as in the view of Her Majesty's Government, which it has expressed in Parliament and otherwise publicly on many occasions, Article X of the Treaty of Utrecht gives Spain the right of refusal should Britain ever renounce Sovereignty. Thus, it is the position of Her Majesty's Government that there is no constraint to that right, except that independence would only be an option for Gibraltar with Spain's consent. ...¹³⁰

Spanish Government Reply to British Government letter, March 2006

Mr Moratinos' reply¹³¹ welcomed UK acknowledgement of the validity of the *Treaty of Utrecht* in determining Gibraltar's constitutional status and the continuation of Gibraltar's international status as a British Overseas Territory.

Querido Jack:

Thank you for today's letter in which you inform me of the conclusion of the conversations between the delegations of the United Kingdom and Gibraltar to grant a new constitutional text to Gibraltar, and which clarifies some key problems related to this text that will be reflected in the "Dispatch" to be sent to Governor of Gibraltar and that accompanies and supplements the constitutional text.

The Government of Spain understands that the United Kingdom has concluded the work of modernisation of its relationship to Gibraltar in the framework of the projects begun in 1999 for all the British dependent territories ("British Overseas Territories") to develop local self-government, and to encourage practices of good Government.

To this end, neither the constitutional text nor the proposed referendum in no way affects the ongoing process of decolonisation, under the United Nations mandate. The position of my Government is that this poll is no more than the democratic expression referred to in the proposed text by the inhabitants of Gibraltar of their right to choose an improved system of modern and effective government.

On the other hand, I would like to express my gratitude for your confirmation of the validity of the Treaty of Utrecht on behalf of the United Kingdom, which is in no way affected by the new constitutional text.

It is good to note that with this new constitutional text does not change in any manner the international status of Gibraltar, which continues being that of a "British Overseas Territory", under British sovereignty and for which the United Kingdom continues to assume the full international responsibility.

¹³⁰ *Gibnet* at <http://www.gibnet.com/texts/con062.htm>

¹³¹ *Gibnet* note: This is an unofficial translation of the letter based on a document obtained from the MAE website and is believed to be accurate

Equally we note confirmation of the fact that the possible inclusion of the right to self-determination must be accomplished according to the existing principles and rights of the Charter of the United Nations and with the Treaty of Utrecht, recognising the different circumstances that affect Gibraltar in the process of decolonisation with regard to the other non self-governing dependent territories of the United Kingdom.

I understand by all this that your Government continues to be fully committed to finding a definitive solution to the Question of Gibraltar, that the General Assembly of UN has requested continuously from 1964, and most recently on the 8th of December last year. This solution, to be agreed between the Government of Spain and that of United Kingdom, is to be adopted to the light of the appropriate Resolutions of the General Assembly and applicable principles, and in accordance with the United Nations Charter.

In this context, my hope Mr. Secretary is that we can, without further delay, continue the negotiations between Spain and the United Kingdom in the spirit of our joint Statement of 27th of November 1984 to solve, in accord with the United Nations mandate, and listening the interests and aspirations of the population, the problems of sovereignty related to Gibraltar.

Finally, I want to state that the new constitutional text, or any activity or measure adopted in the application of the same, or as consequence of the same, is completely without prejudice to the position of Spain in relation to the controversy on the sovereignty of the territory of the isthmus that was not relinquished together with the City of Gibraltar to the British Crown by virtue of Article X of the Treaty of Utrecht, and nothing thereafter.

I am convinced of the fact that the spirit of friendship and co-operation that underpins our relationships and that has allowed the start of the forum of dialogue over Gibraltar will remain in effect for the good of our countries and of the population of the Campo Gibraltar and of Gibraltar.¹³²

The Gibraltar Government was not satisfied with the Spanish response and was reported in the Gibraltar press as finding the Moratinos letter “inaccurate and incorrect in several material respects”. It failed “to realistically reflect the position and therefore requires clarification by the Foreign Secretary”.¹³³

British Government Letter to Spanish Government, March 2006

Thank you for your letter of 28 March in response to mine of earlier that day. I welcome the constructive tone with which you and your government have responded to this constitution. I also appreciate that you have sought, in your letter, to set out the Spanish Government's position on a number of issues relating to Gibraltar. Given that, and the spirit of close co-operation and understanding which has characterised our discussions over Gibraltar, I thought

¹³² *Gibnet* at <http://www.gibnet.com/texts/con063.htm>

¹³³ <http://www.gibraltarnewsonline.com/2006/03/29/gibraltar-demands-uk-response-to-moratinos-letter/>

it sensible to respond, and clarify at this stage those points in your letter which do not exactly match our own position.

As you noted, my letter confirmed that the new constitution will not diminish British Sovereignty over Gibraltar, that Gibraltar will continue to be listed as a British Overseas Territory in the British Nationality Act (as amended), and that the UK will retain its full international responsibility for Gibraltar. It made no reference to a change to Gibraltar's international status, nor to a link between the new Constitution, any referendum by which it may be accepted by the people of Gibraltar, and the process of decolonisation.

Indeed, it is my own view that the label "colonial" is misleading and anachronistic in this context; regardless of the United Nations dimension. As Peter Caruana and I said in our joint statement on Monday, the new Constitution provides for "a modern and mature" relationship between the UK and Gibraltar. I do not think that this description would apply to any relationship based on colonialism.

You noted the statement in my letter that the right of self-determination for Gibraltar should be promoted in accordance with the other rights and principles of the UN Charter, except as constrained by the Treaty of Utrecht. As previous discussions between our countries at the United Nations have demonstrated, dating back a number of years, we take a different view on exactly which of those principles are applicable in the context of Gibraltar.

Your letter also expressed the hope that we shall be able to resume negotiations on sovereignty issues relating to Gibraltar without further delay. William Hague, Opposition Foreign Affairs spokesman in the House of Commons, asked me about this during my statement to the House last Monday 27 March. I made clear in my response that Gibraltar's sovereignty would remain British as long as the people of Gibraltar wish it to do so. That will also again be made clear in the Preamble to the new Gibraltar Constitution Order. In light of this commitment, and as I have made clear to Peter Caruana some time ago, HMG would not enter into a process of sovereignty negotiations with which Gibraltar was not content

I welcome the warm sentiments with which you closed your letter, on the spirit of friendship and co-operation in our relations, and, for my part, I fully reciprocate them.¹³⁴

Letter from Gibraltar Chief Minister to British Government, April 2006

The Gibraltar Government has considered the Foreign Secretary's letter to Sr Moratinos, issued on Friday, and considers that it adequately clarifies, as requested by the Chief Minister, the doubts created by Sr Moratinos' letter to Mr Straw.

Sr Moratinos' letter called for the immediate resumption of bilateral Sovereignty negotiations between the UK and Spain in the spirit of the Brussels Declaration.

¹³⁴ *Panorama* 4 April 2006

In his response, Mr Straw has made it clear that HMG would not enter into a process of sovereignty negotiations with which Gibraltar was not content. The Gibraltar Government warmly welcomes that response which confirms the position as previously made clear by HMG to the Chief Minister.

In his letter, Sr Moratinos, purporting to confirm the content of Mr Straws' letter to him, had also said that the new Constitution and the referendum to approve it will in no way affect the UN decolonisation process and further, that the new Constitution did not alter Gibraltar's international status in any way. In his response on Friday, Mr Straw has pointed out that he made no reference to any such things in his letter.

Mr Straw also makes clear to Sr Moratinos that the New Constitution establishes a modern, mature relationship between the UK and Gibraltar, which cannot properly be said or thought to be based on colonialism.

The Gibraltar Government confirms its view that although Gibraltar does not accept that the Treaty of Utrecht grants Spain even the right to prevent our independence, the new Constitution does not, in fact, violate that right that Spain claims and on which the UK shares Spain's view. This is not important to Gibraltar since we neither seek nor want independence. Although Spain has no role in our Constitution, the Gibraltar Government is pleased that this reassurance to Spain avoids the consequences for everybody of a wholly unnecessary and inappropriate Spanish reaction to our new Constitution, however unjustified that reaction may have been.¹³⁵

British Government Letter to Gibraltar Chief Minister, April 2006

I am writing to confirm that I have approved the final text of the new Gibraltar Constitution as agreed by the UK and Gibraltar delegations last week. I understand that our officials are now preparing this for publication in the next few weeks.

At the talks the Leader of the Opposition tabled language for use in the Preamble to the Constitutional Order in Council, which modified that set out in the original proposals from the House of Assembly. He also asked the UK to publicly state its position on Gibraltar's de-listing from the UN list of non-self governing territories.

As you know, we are not inclined to agree Preambular language until after a referendum has taken place. At that stage we will propose a formula that retrospectively describes the process under which the people of Gibraltar have accepted the Constitution.

Our position on delisting is longstanding, and remains unchanged. It is as follows:

¹³⁵ *Panorama* 4 April 2006

* We do not believe that any of the British Overseas Territories, including Gibraltar, should remain on the UN list of non-self governing territories, despite the different circumstance affecting Gibraltar, namely the UK's stated position that independence is not an option without Spanish consent, by virtue of the Treaty of Utrecht.

* We believe that the criteria used by the UN Committee of 24 are outdated and fail to take account of the way that relationships between the UK and its Overseas Territories have been modernised, in a way that is acceptable to both parties. We have made this view clear since the UK restarted its informal cooperation with the committee in 1999.

* Consequently, it is not UK policy to engage more closely with them in seeking the de-listing of any of the territories. ¹³⁶

Gibraltar Opposition Statement, April 2006

The statement issued by Mr Caruana last week is a deliberate, self-serving misrepresentation of what the Opposition has said. The Opposition has made no comment whatsoever on what Mr Caruana has asked the Foreign Secretary Jack Straw to do.

The content of Mr Caruana's letter to Jack Straw, or Jack Straw's letter to Mr Caruana, or Jack Straw's second letter to Mr Moratinos at Mr Caruana's request, none of which was known at the time of our previous statement, had nothing to do with the press release issued by the Opposition on 29 March. In it, the Opposition attacked Moratinos' reply to Jack Straw and also highlighted the fact that Straw should not have written to him in the first place to give him any explanation as to the contents or the outcome of the negotiations on Gibraltar's decolonisation.

Mr Caruana of course may no longer agree with this view, but when the negotiations with London opened in November 2004 the UK delegation was told that the constitutional review to bring about Gibraltar's decolonisation, which was about to start, was a matter for Gibraltar and London only.

As has been made abundantly clear on very, many occasions the Opposition's view is that the agreement to decolonise Gibraltar, is none of Spain's business whatsoever, does not require their consent, and they have no right to have their concerns taken into account, to be kept informed during the process, or to be given explanations at the end of it to ensure that they are satisfied with the result. As regards the use of the words "applicable principles", it is Mr Caruana who is being untruthful in his statements about the negotiations on the wording surrounding the new constitution. Mr Caruana claims that it is the Opposition who says that this was agreed at a meeting between him and Mr Straw and that this is not true.

¹³⁶ *Panorama* 10 April 2006

Either Mr Caruana's statement is mendacious now or it was mendacious on 2 March when he said that he said that he had secured Mr Straw's agreement to the use of the words "applicable principles".

The record of the meeting at the Caleta Hotel in September 2005 makes clear that although the words were suggested, the matter was left open. A few weeks later the same words appeared for the first time, by agreement between London and Madrid, in the UN text on Gibraltar's decolonisation.

The Opposition believes this is no accident and wanted the words taken out from the Gibraltar Constitution. At the meeting of the Gibraltar delegation before the last round of talks in London, after a heated discussion which lasted over one hour, Mr Caruana's position was that the agreement he had achieved in London had now been signed off by Ministers and that it would be very difficult to go back and reopen the question.

However, it was eventually agreed that the matter would be raised on behalf of the Opposition by Joe Bossano and not on behalf of the Gibraltar delegation. However, when the point was reached in the second day of the negotiations in London, Mr Chilcott announced that he was aware of the debate that had taken place in Gibraltar and that the offending words would be replaced.

At no time did Mr Chilcott or anyone else make any reference to these words being capable of an interpretation that includes the possibility of the principle of territorial integrity since the matter was not discussed at all.

It is therefore absurd for the Government to claim that the words were removed because they were innocent and that it vindicates their position, when their position was that they should remain.

What is clear, and what the Opposition has highlighted in its previous statement, is that the words "applicable principles" were referred to by Mr Moratinos in his letter to Jack Straw as if they were still in the text. He also refers to the United Nations Consensus of last October where these words appear. The link has been made by Spain except that because the words have been removed from the constitutional text they are no longer there. This is the important point for the public to note.¹³⁷

Gibraltar Opposition Letter to British Government, April 2006

Joe Bossano wrote to the Foreign Secretary asking for clarification of points in his letter to Mr Caruana (above):

¹³⁷ Statement by GSLP/Liberal Opposition 36/2006, 3 April 2006 at <http://www.liberal.gi/press/opposition/2006/GSLP%20Liberal%20Opposition%20036-2006%203rd%20April%202006%20-%20Caruana%20explanation%20is%20self-serving%20misrepresentation%20says%20Opposition.pdf>

Dear Foreign Secretary,

I write to seek clarification of the statement contained in your letter dated 28 March addressed to Mr Caruana.

I wish to bring to your notice that when we agreed to support and participate in the Select Committee of the House to review our present Constitution in 1999, it was not in response to the White Paper of that year but to formulate proposals for decolonisation.

I stated the following in the House of Assembly at the time of the motion to set up the Select Committee in July 1999:

“If we were to finish up with a modernised Constitution, that retained the status of Gibraltar as a non self-governing territory subject to Article 73(e) of the Charter of the United Nations in respect of which the United Kingdom was required to report annually to the UN until such time as we were decolonised, then effectively as far we are concerned the importance of what needs to be done would not have happened and in such circumstances our position would be that if that was put to the people in a Referendum we would campaign against its acceptance. I think it is important that that should clearly be understood because we do not want to be seen to be misleading anybody as to where we are coming from.”

This position was made clear when Bill Rammell opened the Constitutional talks at Lancaster House and I informed him that we had agreed to participate on the basis of achieving common ground in seeking the maximum level possible of self-government.

At the very start of the talks, the text of the additional Preamble was discussed. Mr Chilcott stated that determining whether the maximum level possible of self-government had been attained would be a judgment reserved for the end of the process. He added that there existed a difficulty which was Spain's reaction. Therefore, he said, it would be a judgment for UK Ministers at the end of the process. There would be a need to ensure that Ministers were comfortable with the language aimed at delisting.

During the second meeting in Gibraltar in September 2005, I again raised the matter and asked whether the British Government had given any thought to the fundamental issue of the decolonisation of Gibraltar. Mr Chilcott answered that you had not been briefed on delisting partly due to the fact that it was important to know beforehand what level of constitutional changes had tentatively been agreed and that any decision on this would need to await the final outcome of the talks.

At the end of the process, on 17 March 2006, we were told that UK Ministers would not agree to the inclusion in the Preamble of words saying that the proposed referendum would be the exercise of our right to self-determination or that the new Constitution provided the maximum level possible of self-government. Clearly, this statement at the eleventh hour was not compatible with the answers we had received in the previous two meetings. However, since the impression was created that it was a question of choice of words rather than of substance, I proposed an alternative text to the one originally tabled and

approved by the House of Assembly and was invited to explain its rationale which I did.

The alternative text used different terminology to achieve the same result.

This was taken away to be considered by you and your reply now is that UK is not inclined to agree any text for the Preamble until after the people have voted in a referendum.

With all due respect, I have to tell you that UK should have told us that in Lancaster House in November 2004 and that would have been the end of the Opposition's participation in the process. The referendum is being promoted as an act of self-determination to choose a constitution that provides the maximum level possible of self-government. We will only support this if we are clear that the United Kingdom agrees that this is what would be taking place and what would be achieved if the new constitution were accepted.

I have to tell you that on the basis of the responses we have had from your officials during the course of the negotiations I believe we are fully entitled to expect you to come clean and tell us exactly where you stand on these issues.

We have the right to self-determination under the Charter and you have confirmed this and the UK Government's obligation to promote and respect it. We want to exercise this right to achieve a full measure of self-government short of independence. If you are not willing to support and defend that this is what we have achieved in our negotiations, then I have to tell you that you will be failing to honour and deliver what you have promised and we will not be a party to endorsing a continuation of our status as non self-governing territory.

I trust you will be able to clarify the position of the UK in the light of the above.¹³⁸

Gibraltar Opposition Letter to British Minister for Europe, May 2006

Dear Geoff,

Thank you for your letter faxed to my office last Friday afternoon. It is good to have you back looking after Gibraltar's interests and I look forward to meeting up again soon.

As you probably know, Mr Caruana convened a meeting of the group that was involved in the negotiations with UK on 5 April, to report back on the outstanding issues left pending from the London round of 17 March. He read to us Jack's letter of 28 March at this meeting. He then informed the meeting that this was the end of the matter and that therefore the role and involvement of the group was ended.

¹³⁸ *Panorama* 19 April 2006

I reserved my position pending being given a copy of Jack's letter and said that once I had studied its contents I would seek further clarification from the Foreign Secretary.

I do not consider your letter of the 12 May to be anything more than an acknowledgement of receipt of my letter of 10 April. I still expect to get a substantive reply to the issues I raised in that letter.

Whatever consideration you may give to the text of the additional preamble, in consultation with the Chief Minister is, as you will appreciate, a matter for you and him. We will campaign for or against the adoption of the new Constitution depending on whether the UK recognises that in participating in such a referendum the people of the territory would be exercising their right to self-determination which the new constitution confirms we possess.

The purpose of this is to achieve the objective set out in the report on the constitutional proposals adopted by the House of Assembly, namely that the new constitution would, as far as the UK is concerned, alter Gibraltar's international status so that it would no longer be a non-self governing territory.

The United Kingdom must make its position clear to us before the vote takes place. That has been our position throughout and is the reason why we proposed in London on March 17 alternative wording for the additional preamble for the consideration of UK Ministers. This alternative wording is what I was supposed to be getting an answer to, from Jack Straw.

Incidentally, I note that you have qualified what Jack said in his letter of 28 March by introducing now, in your letter to me, the adverb "formally" which was not in the original letter. This indicates that the UK is now inclined not to agree the language of the additional preamble before the referendum "formally" but presumably is willing to consider doing it "informally".

I look forward to the Foreign Secretary's reply to my letter of 10 April.¹³⁹

PDP Letter to Minister for Europe, June 2006

Geoff Hoon met Bernardino Leon, the Deputy Spanish Foreign Minister, on 19 June 2006 and visited Gibraltar on 20 June. The PDP delivered a letter addressed to Mr Hoon to the Governor's office, summarised below:

The PDP call on Mr Hoon to transmit to the British Government that it should;

- Agree the final missing preambular language to the draft Constitution as soon as possible to enable the publication of the official text of the constitutional document to be voted on in referendum. This is important not only to assess the content and effect of such final language but also

¹³⁹ *Panorama* 18 May 2006

so that there can be a formal and detailed debate on this important question. So far views have been expressed without the content of the constitutional text and draft Order in Council being published officially. It is plain that there is a danger of the debate being held in a vacuum.

- Take into account that for the majority of people in Gibraltar constitutional advancement should not be affected or held to ransom by the Spanish dimension. To that extent while tripartite progress with Spain is to be welcomed [and will in due course - if agreements are reached - be judged on its separate merits] this process should not hamper our achievement of constitutional progress.
- Thirdly and while unrelated to these issues the British Government should act in a way that emphasises its recognition of the importance that a good continuing relationship with its locally employed civilian workforce has to its strategic military interests in Gibraltar. To that end the PDP urges that the in-house option, which will in due course be presented by the MOD workforce and the Gibraltar Trades Unions, be supported and accepted by the Defence Secretary. This will present the best possible package for Gibraltar and Britain's interests in Gibraltar.¹⁴⁰

Gibraltar News reported in June 2006 on Mr Hoon's visit to Gibraltar and his pledge to answer the self-determination question "clearly and definitively in a parliamentary answer in due course, but before the referendum".¹⁴¹ The paper published an interview with the Minister in which he was asked about a range of issues affecting Gibraltar and its relations with the UK and Spain:

Q. Is the new Constitutional package a good one for Gibraltar? Is it one you would recommend to us?

"I believe it is a very good package indeed. I accept, as always is the case with these kinds of changes, that there will be concerns. But given that the existing constitutional arrangement is from 1969, a different world, I think it is right that the people of Gibraltar should have a 21st century constitution. I hope it will stand the test of time."

Q. Do you think that the position of the UN on issues like the Constitution and de-listing is critical?

"From the UK perspective, when you say critical, we have had our criticisms - I am turning that word on its head - of the view of the United Nations. We regard their (the UN) test of colonial status as being antiquated. We believe this is a modern, 21st century non-colonial constitution and I don't believe that anyone looking at this constitution could reach any other conclusion than that. It is an

¹⁴⁰ *Panorama* 20 June 2006 at

http://www.gibraltar.gi/locals/news.php?action=view_article&type=weeks&article=1120

¹⁴¹ 21 June 2006 at <http://www.gibraltarnewsonline.com/2006/06/21/hoon-set-to-make-statement-on-self-determination-during-visit-to-gibraltar/>

important step forward in defining the modern relationship between the UK and Gibraltar. That is why I said we believe it is something that should be adopted."

Q. Are you going to be able to scramble enough money together to pay the pensions to keep the Spaniards happy? Will that happen?

"I said in Spain that we recognise that we had obligations to Spanish pensioners. That is something that we want to resolve. It is always a challenge to find money that we had not always allowed for and therefore we are looking at the best way of doing that. We have made some progress and we have to reach a conclusion."

Q. Is it still an all or nothing agreement that we are talking about?

"That is rather a melodramatic question. I know that journalists are melodramatic by nature. At the moment, we are negotiating, we are trying to find solutions to some rather difficult problems. Ideally we would like to deliver a package because that is what we have been trying to do. I am not yet of the opinion or have reached the point where I am saying 'actually we can do part of the package but not all of it'.

I know you have a deadline and have headlines to write but the truth is we have made real progress so far and I just want to deliver all of it. It was a politician who actually came up with that 'all or nothing' formula... Not this one!"

Q. Back in 2002 Jack Straw made the statement (that a lasting settlement would include Britain and Spain sharing Sovereignty). Do you think that the British Government has moved on from that as a vision and as a policy irrespective of its position now on consent?

"What I said in the press conference today is that having come here and been very well received as Secretary of State for Defence and having had excellent conversations with Peter (Caruana) who I first met in 1999, I have always felt that there is an extremely strong relationship. What I have been impressed by since coming back here and into the Foreign Office with responsibility for Gibraltar is the fact that things have moved on. They have moved on in relation to new constitutional arrangement. They have moved on in the trilateral relationship involving Spain as well. All that is extremely positive and in a way this makes my life easier as a minister because I have got all the very positive development to build on."

Q. You are close to the MoD and know them well. Are all the issues with the Airport going to be addressed?

"I am confident they can be. There is a real determination here as Peter has said that with passion in a conversation after my arrival. The MoD want to ensure their assets and equipment are used efficiently and effectively. There is quite an interest north of the airport in greater use of the strip because that will benefit this region and area. All the interests are moving in the same direction and we ought to be able to deliver some really positive change for people in Gibraltar on the use of the airstrip."