

The joint sovereignty proposal for Gibraltar: benefits for all

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Theme

In the wake of the Brexit referendum, Spain submitted a negotiation proposal to the UK on Gibraltar that put joint sovereignty, dual nationality for the Gibraltarians and respect for their autonomy on the table. The Gibraltarians, who voted in favour of remaining in the EU, will be able to capitalise on the opportunity that this solution represents.

Summary

The almost unanimous vote by the Gibraltarians for remaining in the EU places them in a very delicate position vis-à-vis Brexit. The first option is leaving the Union with the loss of EU freedoms that this entails. Gibraltar should weigh another option in line with the Spanish proposal on joint sovereignty tabled in October 2016 at the UN. This offer involves at least five advantages, which will be considered in the present analysis: (1) it takes into account the will of the Gibraltarians; (2) the positive economic potential for the inhabitants of Campo de Gibraltar and the Gibraltarians is enormous; (3) the alternative scenario of isolation would be extremely damaging to Gibraltar; (4) it would put an end to a quarrel between allies and friends; and (5) it would enable Gibraltar's specific but definitive integration into the EU. Over the course of the EU negotiations on Brexit, both the UK and the Gibraltarians will have to take difficult decisions about the future of Gibraltar.

Analysis

The referendum held on 23 June revealed something essential for the Gibraltarians: their political identity is clearly distinct from that of the British. The result demonstrated a striking gulf between the colony and the mother country. In Gibraltar, 95.9% of the vote (with an extremely high turnout of 83.6%) was in favour of remaining in the EU, a figure that was a long way from the overall UK result of 48.1% in favour of remaining. The other areas that supported remaining in the EU were Scotland, with a 62% vote, London (59.9%) and Northern Ireland (55.7%), underlining the typically significant discrepancy with the result in Gibraltar.

After the referendum, the Chief Minister of Gibraltar, Fabian Picardo, made concerted efforts to ensure that the negotiations would enable an intermediate statute and proposed a 'flexible' Brexit. But successive pronouncements by Theresa May's government and the report published by the House of Lords on 1 March about the

consequences of Brexit for Gibraltar made it clear that the UK's withdrawal from the EU freedoms would also apply to Gibraltar.¹

On 29 March the UK presented Brussels with notification that it was triggering article 50 of the EU Treaty. Shortly thereafter, there was a verbal sparring match when certain voices in London (Michael Howard was among those to wade in) used Gibraltar as a device to stoke up the most extreme nationalist sentiments. In reality, the Brexit negotiations between the UK and the EU are of such magnitude and include so many actors that Gibraltar appears only as a minor hurdle at the end of the process. This side-issue should be handled bilaterally between Spain and the UK, as the European institutions have acknowledged. This formula is inevitable because Gibraltar does not constitute British territory, but rather a territorial concession by Spain, and because the UK continues to control the colony's foreign affairs. Bearing in mind the enormous difference between Brexit as an essential issue and secondary problem of Gibraltar, the ratcheting up of the rhetoric was much ado about nothing. The untimely way in which Gibraltar was brought up reflects the desire, on the part of some, to inflame the Brexit debate, and was therefore for internal consumption at a time of initiating some difficult negotiations, in a country that continues to be divided by a historic decision. Such pronouncements were not heard in Gibraltar, and were received calmly by the Spanish authorities, who have always exhibited a constructive attitude towards negotiations on the UK's departure from the EU.

Content of the joint sovereignty proposal

In the months following the Brexit referendum, Spain's reaction was swift and proactive. On 4 October 2016 Spain submitted a proposal to the Fourth Committee of the UN General Assembly to negotiate with the UK in order to reach an agreement about a joint sovereignty regime enabling the continued application of the EU treaties to Gibraltar.² The proposal included joint Spanish-British sovereignty of the territory, dual nationality for the Gibraltarians and a special statute within the EU, as ideas to get negotiations underway.

The outstanding points for Spain's ambassador to the UN were as follows:

- Gibraltar's self-governance would be able to continue and be easily incorporated into the Spanish constitutional system (article 144 of the constitution enables this possibility).
- The Gibraltarians would be able to retain British citizenship and acquire Spanish nationality too if they desired.
- Gibraltar's access to the single market and the other EU freedoms would be ensured, while retaining its own tax system and other exceptions, subject to

¹ House of Lords, 'Brexit: Gibraltar', 1/III/2017, <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldcom/116/116.pdf>.

² Spanish statement on Gibraltar to the UN, 4/X/2016, http://www.spainun.org/wp-content/uploads/2016/10/Intervenci%C3%B3n-Espa%C3%B1a-Item-58-71AG-versi%C3%B3n-compilada-ESP.ING_.pdf.

respect for EU legislation. Spain would endeavour to ensure that Gibraltar stood to benefit from EU policies and its specificity was respected.

- The dismantling of the fence, erected by the UK in 1909, and the border on the isthmus, would bring about a stimulation of the region's economy, which would benefit not only the surrounding Campo de Gibraltar and its towns, but also Gibraltar itself.
- Spain and the UK would jointly exercise authority over international relations, defence, security and safeguarding Gibraltar's external borders.
- The Ambassador also underlined that the new regime would not interfere in the Gibraltarian way of life, customs or traditions, because it would respect the plurality of a place that has British and Andalusian cultural roots.

The negotiation proposal put to the UK at the UN is subject to the broader framework of the EU negotiations on Brexit. These are multilateral by definition and therefore difficult to conduct and conclude. According to British studies, Brexit will have negative consequences for the UK, but other countries like Spain will also need a process of adaptation owing to the significant bilateral relations in terms of trade and investment and the presence of numerous expatriates from each country living in the other, as Spanish government documents reported in the press have highlighted.³ The issue of Gibraltar will not be in the foreground at the start of European talks, and it is not possible to know in advance when it will be addressed, or the impact that other aspects of the general talks will have on the Gibraltar question. It will have to be addressed at some point, however, and it is then that the considerable benefits of the Spanish offer will make themselves evident.

Five advantages

An objective analysis of the negotiating points set out reveals the following advantages. In the initial proposal: (1) the wishes of the Gibraltarians are taken into account; (2) the economic potential for the inhabitants of the Campo de Gibraltar and the Gibraltarians is vast; (3) the alternative scenario of isolation would be very damaging, above all for Gibraltar; (4) it would put an end to a colonial dispute between allies and friends; and (5), last but not least, it would enable Gibraltar's specific and definitive integration into the EU.

(1) Gibraltar's remaining in the EU would respect the democratically-expressed wishes of the Gibraltarians. In the 23 June referendum they showed an almost unanimous desire to stay in the Union. The Gibraltarians see their future within the EU, and a solution such as that set out here would enable this goal to be achieved, while preserving Gibraltar's identity and history. If the UK's determination to leave the EU is ultimately imposed on the Gibraltarians, this would run counter to the British

³ 'Un informe del Gobierno alerta del efecto negativo del Brexit en España', *El País*, 10/III/2017, http://politica.elpais.com/politica/2017/03/09/actualidad/1489089409_306320.html.

government's promise to take their wishes into account when altering their international status.

The electoral verdict of the Gibraltarians, albeit without any legal force, was so overwhelming that it became a statement of political identity, and represents a break with Gibraltar's recent history. The Gibraltarians had voted in referendums on their international status on two previous occasions. In 1967 they supported continuing under British control, in a referendum that the UN judged to be contrary to its resolutions. After this vote, Gibraltar sought independence, an aspiration that was rejected by the UN on the grounds that the juridical position of Spain, which had yielded the territory in the first place, had to be taken into account. In a second referendum held in 2002, the Gibraltarians rejected a joint sovereignty plan, although at that time the UK was not facing departure from the EU, a circumstance that has now changed. The Gibraltarian and UK authorities maintained at that time that since the Gibraltarians had expressed their desire to continue being a territory under British sovereignty, a decolonisation process no longer applied. But the categorical response of the UN was that it was the UN itself that should determine the end of the decolonisation process.

Such antecedents show that the two attempts at independence (in 1967) and of a regime dependent on the UK (constitutional order of 2006) were incapable of ending Gibraltar's 'colonial' status. Neither of these two pathways could be definitive, as the UN has emphasised, for the simple reason that the origin of Gibraltar was a territorial concession from one sovereign state, Spain, to another, Great Britain, with a clause for its return. Any change in the judicial status of that concession gives rise to a Spanish right to recover the territory, according to the Treaty of Utrecht on which the territorial transfer is based.⁴

The impossibility of independence, endorsed by the UN, together with the democratic desire to continue in the Union are two undeniable facts that present the Gibraltarians with a dilemma. If Gibraltar wants to continue its dependence on the UK, it will have to be outside the Union. If, on the other hand, Gibraltar wishes to be an EU territory, where it can benefit from a special statute, it will have to do so in collaboration with Spain. If the latter course is chosen, the Gibraltarians will need to ask the UK for talks with Spain about a joint sovereignty regime that respects the identity of Gibraltar.

(2) Secondly, the Spanish proposal for talks sets out the prospect of significant benefits for the economies of the both Campo de Gibraltar area and the Rock. The interdependence of the economies is currently recognised by all concerned. Towns in the Campo de Gibraltar have benefitted from various industrial plans and continue to have enormous potential in sectors such as oil refining and logistics. Various studies conducted by the Gibraltar Chamber of Commerce have found that some 8,000 Spanish workers are employed on the Rock, and that Gibraltar is a highly significant source of income for the surrounding area. But these reports also acknowledge that the benefits

⁴ Martín Ortega Carcelén (2013), 'Gibraltar y el Tratado de Utrecht', ARI nº 19/2013, Elcano Royal Institute, http://www.realinstitutoelcano.org/wps/portal/rielcano_es/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/politicaexteriorespanola/ari19-2013-ortega-gibraltar-tratado-de-utrecht.

are mutual. Whether in terms of trade, tourism or human flows, Gibraltar derives considerable advantages from the surrounding area. Fabian Picardo himself has underlined this interdependence. On 30 January Picardo told the European Parliament that relations between Gibraltar and the adjoining hinterland were 'a European success story to be proud of'.⁵ In the same session, with a conciliatory tone, he added that 'Gibraltar would consider any reasonable solution to safeguard border flows'.⁶

If the interdependence is strong as things stand, full integration of Gibraltar into the surrounding region would increase the benefits for all. The eradication of the border and flourishing cooperation in various economic sectors would facilitate the development of the zone, founded on such elements as a bilingual workforce and access to a large population including the provinces of Cádiz and Málaga. This would enable Gibraltar to consolidate itself as a financial and services centre within the EU regulatory framework, to the advantage of the entire region. Joint use of the airport would represent a boost to transport and tourism. Its strategic location between the Mediterranean and the Atlantic and as a point of contact between Europe and Africa would also be given a significant boost. Until such time as economic studies place a figure on the economic benefits of eradicating the border, there is little doubt that this step would result in sustained economic growth.

(3) Thirdly, the Spanish proposal seeks to avoid a situation that is undesirable for Gibraltar and the surrounding region. The UK's departure from the EU will mean the end of the free movement of goods, workers, services and capital for Gibraltar too. This would transform the current frontier into an external border of the Union, and justify greater control of all types of transit. Likewise, Gibraltar would lose access to European regional funds and policies. The document drawn up by the House of Lords, published on 1 March, explicitly says in its conclusions that 'any loss of access to the Single Market in services, or to its cross-border workforce, could significantly harm Gibraltar's economy'. If Gibraltar is excluded from the EU area there would clearly also be a negative impact on the neighbouring regions, but less serious than the impact the Rock would have to endure. Despite the prospect of losing employment, the Campo de Gibraltar has a population in excess of 250,000 and a considerable network of industry and services. By contrast, the impossibility of tapping into the EU freedoms of the free movement of services and capital that it currently enjoys would be a severe blow to the Gibraltarian economy.

Gibraltar's departure from the EU would reopen the question of the territorial isolation of the Rock, envisaged in the Treaty of Utrecht to avoid contraband and risks to Spain's security. It should be remembered that the border was opened in the 1980s as a consequence of Spain joining the European Community. The history of the time shows that the decision was taken in the belief that the exchanges would facilitate talks on sovereignty. The Brussels declaration of 27 November 1984 established an explicit link between free movement and the start of the negotiating process, on the eve of Spain's

⁵ Radio Algeciras, 31/1/2017, http://cadenaser.com/emisora/2017/01/31/radio_algeciras/1485845033_704849.html.

⁶ 'EU Parliament hears contrasting views on Gibraltar and Brexit', *Gibraltar Chronicle*, 31/1/2017, <http://chronicle.gi/2017/01/eu-parliament-hears-contrasting-views-on-gibraltar-and-brexit/>.

entry into the Common Market. The fact that the UK has now decided to leave the Union triggers a *rebus sic stantibus* effect on Spain's opening of the border and the other agreements struck in that context. In other words, a fundamental change of circumstances vis-à-vis the Brussels agreement would enable the restoration of the preceding situation.

(4) The proposal to negotiate a joint sovereignty arrangement with the UK also entails the enormous advantage of normalising this aspect of relations between two countries that are partners and allies. Relations between Spain and the UK are excellent, but it is obvious that Gibraltar mars them at times and raises sensitive issues. The presence of nuclear submarines, the incidents between coastguards, the dropping of concrete blocks on the seabed and the use of the airport are some of the examples of awkward situations that would be better left behind. The rhetorical excesses of the two sides should also be toned down. A territorial concession made 300 years ago for military purposes no longer makes sense between allies, above all when the UK could continue using its base. The special colonial status that was subsequently given to the British possession does not justify independence, according to declarations of the UN. It is thus a case of an irregular situation that impedes bilateral relations, and could be resolved with good will in a negotiated and peaceful way. An agreement between Spain and the UK would not affect British interests and would safeguard the wishes of the Gibraltarians.

(5) Finally, the ideas for talks submitted by Spain pave the way to Gibraltar's specific but definitive integration into the EU. Since the UK joined the European Community in 1972, Gibraltar has benefitted from a special arrangement, inasmuch as the European Customs Union does not apply to it, which *de facto* means that the free movement of goods will be affected. VAT is not levied either, and the territory is not part of Schengen. Apart from these and other exceptions, the remaining EU regulations are applicable, and the UK is responsible for this in accordance with article 355(3) of the Treaty on the Functioning of the European Union (TFEU).

This special regime has given rise to a major problem as far as taxation and contraband are concerned. By not levying VAT or applying the special tax collected by the EU as an excise duty on such products as tobacco and alcohol, Gibraltar imports considerable quantities of such goods that are subsequently smuggled into Spain, with the consequent harm to Spanish and EU coffers. The European Anti-Fraud Office, OLAF, estimated in 2014 that more than half the tobacco smuggled into Spain came from Gibraltar. Similarly, the special regime enables ships to be refuelled without such indirect taxes being levied, which amounts to unfair competition.

Turning next to direct taxation, Gibraltar is subject to EU regulations, and the European rules on companies and financial practices, in spite of which it has used its special position to facilitate tax avoidance. In specific terms, the European Commission has launched an investigation into agreements with 165 companies on tax rulings between 2011 and 2013, companies that in many cases have no more than a fictitious presence in Gibraltar. The Commission considers that these fiscal agreements are the equivalent of state aid, prohibited by article 107 (and onward) of the TFEU. The investigation is not

over yet but the Commission's report is devastating.⁷ Similarly, exemption from taxes on online gambling businesses operated by companies based on the Rock has led to a case between the UK and Gibraltar. Using another fiction, Gibraltar allows companies registered there to pay winnings on bets free of tax, when the winners of such bets would have to pay tax at a rate of 15% in the UK and 25% in Spain. It is interesting to note that the preliminary hearing brought before the EU Court of Justice is a dispute between the British tax authorities and the Gibraltar Betting and Gaming Association. In this case, the EU's Advocate General has said that the UK and Gibraltar cannot consider themselves as two separate entities for the purposes of complying with taxation regulations.⁸

Gibraltar's various taxation practices described thus far entail serious harm to Spanish (and British) revenues and to the EU itself, which is also deprived of the excise duty on goods originating from outside and converted into contraband. It is true that the Gibraltar authorities have made efforts to comply with the standards introduced in recent years on money laundering and other financial regulations. Such efforts are insufficient, however, as the cases lost by the UK in the name of Gibraltar at the European Court of Justice show; likewise the OECD's repeated warnings issued to the Rock. Gibraltar's position impedes other aspects of European cooperation, such as the declaration on Sites of Community Importance (SCI) in the sea, which affects fishing and environmental protection, an issue that gave rise to an ongoing crisis between 2013 and 2015,⁹ and also the progress of legislation on interior and justice issues, and the regulation of civil aviation.

If Gibraltar wants to continue belonging to the EU, as the referendum clearly showed it does, its judicial and economic practices need to respect European legislation. Gibraltar can enjoy a special regime within the EU. It can become a first-class financial and services centre in the context of its region. In order to do all this it needs to establish a new *modus operandi* consistent with its desire to belong to the Union. Spain's proposal for talks emphasises that, on the basis of joint Spanish-British sovereignty, Gibraltar would continue 'to benefit from the free movement of workers, capital and services... In addition, Spain will ensure that Gibraltar benefits from EU policies and will propose that the EU establish the exceptions necessary to take into account the special situation of Gibraltar, as long as they are compatible with EU law'.

Coming of age

The result of the Brexit referendum shows that the Gibraltarians are ready to take important decisions about their future. The prospect of independence has been repeatedly rejected by the UN. The imposition of customs controls on an external border

⁷ Report of the European Commission in the case of "UK - Gibraltar corporate tax regime", C(2014) 6851 final, 1/X/2014, http://ec.europa.eu/competition/state_aid/cases/250265/250265_1784365_398_2.pdf.

⁸ Conclusions of the EU Advocate General, 19/II/2017, in case C-591/15 regarding taxes on games of chance, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=186974&pageIndex=0&doclang=ES&mode=req&dir=&occ=first&part=1&cid=502462>.

⁹ See Alejandro del Valle (ed.) (2015), *Cuadernos de Gibraltar*, University of Cádiz, <http://catedras.uca.es/jean-monnet/revistas/cuadernos-de-gibraltar/contenidos/01/cgib01-numero-completo-full.pdf>.

would cause Gibraltar's economy to go into steep decline, and legal problems with Spain to multiply. Amid the prospect of this undesirable scenario, the Gibraltarians, hitherto the wards of Britain, have the opportunity to declare their coming of age and take a new course of action. The 96% of the population that stated their preference to remain in the EU can ask the UK to negotiate with Spain to maintain their European status. The joint sovereignty proposal takes the interests of the Gibraltarians and the entire region into account. It is an open and inclusive proposal. As things currently stand, the old dilemma of being forced to choose between being British or being Spanish no longer makes sense, because the Gibraltarians can enjoy both nationalities at the same time. The real choice is between being European citizens and keeping an outdated and possibly isolated 'colonial' status.

As far as the economy is concerned, Gibraltar's current economic model has a poor outlook in the event of leaving the EU. Isolation would impede access to the surrounding region and the European market. The Gibraltarians' coming of age should also be couched in terms of economic viability in the future. The democratic desire to remain in the EU must be consistent with the fulfilment of European regulations on economic, business and financial activities. It is the price that comes with participating in the world's foremost economic hub, with the highest standard of living and levels of rights and freedoms.

The Brexit referendum revealed that there is a gap between the interests of the UK, on the one hand, and the interests of Gibraltar on the other. Even if in the end the UK decides not to complete the process of separating from the EU (because of an about-turn in public opinion, for example) the referendum of 23 June would still demonstrate the enormous difference of interests between the colony and the motherland. In such circumstances, the Gibraltarians will need to take a rational decision about their future, without renouncing their own characteristics and identity. Gibraltar's starting point justifies a specific statute that needs to be enshrined within the EU framework. The offer of negotiations advanced by Spain is appropriate because Gibraltar would be able to enjoy significant autonomy, similar to or greater than that it has at present, preserving its British character and adding a Spanish element that in fact already exists owing to the strong ties it has with the surrounding region.

At the moment, the Gibraltarians' position on the proposal of joint sovereignty is one of reticence, although differences have also been observed from the UK's position. It is possible that as time goes by the advantages of such a proposal will become clearer. Even in Gibraltar voices have started to be heard that may pave the way to future agreements. Appearing before the European Parliament on 30 January the Chief Minister, Fabian Picardo, said: 'Gibraltar has always had a different status in the EU to the UK and in so far as the remaining member states agree and Gibraltar wishes, we should be able to enjoy any opt in or make other realistically and geographically sensible arrangements'.¹⁰

¹⁰ *Gibraltar Chronicle*, 31/1/2017, <http://chronicle.gi/2017/01/eu-parliament-hears-contrasting-views-on-gibraltar-and-brexite/>. New voices are also asking for a different approach to Gibraltar in the UK: Oliver Bullough, 'Defend Gibraltar? Better condemn it as a dodgy tax haven', *The Guardian*, 9/IV/2017, <https://www.theguardian.com/commentisfree/2017/apr/08/defend-gibraltar-condemn-it-as-dodgy-tax-haven>.

Conclusion

The result of the Brexit referendum reveals a tension between British and Gibraltarian interests. The UK's withdrawal from the EU will very probably mean a loss of Gibraltarian access to the European freedoms. On becoming a non-EU territory, Gibraltar's border controls will need to become more stringent, and the situation prevailing prior to the 1984 Brussels Declaration may be restored. In the face of such a prospect, the citizens of Gibraltar will have two options: either deciding to leave the Union, like the UK, or opting to remain through an agreement with Spain that respects their identity, autonomy and traditions.

In October 2016 Spain tabled a proposal for a new solution on Gibraltar, which included joint Spanish-British sovereignty over the territory, dual nationality for the Gibraltarians, political autonomy and a special statute within the EU as ideas to kick-start talks. Obviously, multilateral negotiations first need to be conducted on Brexit, and the Gibraltar issue will only be tackled at the end. But the Spanish proposal provides clear advantages and takes the interests of all parties into account. While it falls to the UK to make a decision on the proposal, the people of Gibraltar, who have expressed their almost unanimous desire to be European citizens, have the opportunity to demand a future that is compatible with their preference to remain part of the EU.