

# **Gibraltar**

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The status of Gibraltar has been a matter of disagreement between the UK and Spain for nearly three hundred years and a re-emergence of the dispute during the Franco period in Spain led to the closing of the border between Spain and Gibraltar from 1969 to 1985. British sovereignty derives from the Treaty of Utrecht of 1713 and the wishes of the population to remain British were confirmed in a referendum in 1967. In the last ten years, however, the changed political and economic climate in Europe, political changes in Spain following the death of General Franco and Spain's entry into the European Community in 1986, the gradual running down by the British Government of MOD installations in Gibraltar and the Gibraltar Government's own views on its future constitutional status are some of the factors which might contribute to a different relationship between Britain, Spain and Gibraltar. This paper considers the constitutional position of Gibraltar, the sovereignty dispute and future prospects.

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## I Introduction: some basic facts

The name Gibraltar is said to be a corruption of "Jebel Tarik" the Arabic for "Tarik's Mountain", after the Arab leader Tarik ibn Zeyad, who first landed on the Rock in an attack in 711 AD.

The population of Gibraltar in 1992 was 28,848. The official language is English (although most Gibraltarians are bilingual in English and Spanish), and according to a survey in 1971 76.9 per cent of the population was Roman Catholic, 6.9 per cent Muslim (mainly Moroccans), 6.9 per cent Church of England and 2.3 per cent Jewish.<sup>1</sup>

Gibraltar is a British Crown Colony and the British monarch is represented by the Governor who is the executive authority. Since April 1993 this post has been held by Field Marshal Sir John Chapple. The Gibraltar Constitution Order in Council of 1964 was amended by the Gibraltar Constitution Order 1969, which contains the current constitution in Annex 1. Under these arrangements, the Governor is advised by the Gibraltar Council which is composed of four ex-officio members and five elected members from the House of Assembly. The Council of Ministers, which is responsible for domestic affairs, excluding defence and internal security, is headed by the Chief Minister, an elected member of the House. The House of Assembly comprises the Speaker (appointed by the Governor), two ex-officio members and 15 members elected for a four-year term.

The Governor remains responsible for matters not specifically allocated to ministers, in particular defence, external affairs and internal security. In domestic areas delegated to ministers, the Governor acts on the advice of the ministers and in other matters he usually acts with the advice of the Gibraltar Council. The Governor may intervene in domestic matters in the interests of economic and financial stability. The formal assent of the Crown, or the Governor acting on behalf of the Crown, is required for all legislation in Gibraltar, which is also subject to disallowance by the Crown.

In elections in March 1988, on a platform calling for greater autonomy from the United Kingdom, the Gibraltar Socialist Labour Party (GSLP) won 58.2 per cent of the vote against 29.3 per cent to the Gibraltar Labour Party/AACR. Joseph (Joe) Bossano was appointed Chief Minister. He was returned for a second term in January 1992 following the election victory of the GSLP with 73.3 per cent of the vote. The Gibraltar Social Democrats, formed

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<sup>1</sup> *Europa World Year Book, 1994.*

in 1989, obtained 20.2 per cent. The winning party has eight seats in the House of Assembly and the opposition parties the remaining seven.

## II The Sovereignty Dispute with Spain

### A. Background and History

Spain captured Gibraltar from the Moors in the 15th century and it was taken by the English and Dutch in 1704 during the war of Spanish Succession. British possession was confirmed in 1713 under the Treaty of Utrecht and subsequently by the Treaties of Paris in 1763 and Versailles in 1783. The population of Gibraltar has always been a mixture of different nationalities, cultures, religious and ethnic groups, with most of today's Gibraltarians having their roots in the eighteenth century following the capture of Gibraltar by the English. When Gibraltar was ceded to Britain by the Treaty of Utrecht, one of the stipulations was that Moors and Jews would not be allowed to reside there; another guaranteed religious freedom to the Catholics who formed the majority of the population. A "List of Inhabitants" in 1777 gave a population of 3,201, consisting of 506 British Protestants, 1,832 Roman Catholics (English, Irish, Minorkeens, Genoese and Savoyards, Spaniards, Portuguese, French and natives of Gibraltar), and 863 Jews.<sup>2</sup> Gibraltar became a Crown Colony in 1830. An Order in Council in 1885 stipulated that only those born in Gibraltar were entitled to reside there. Even British citizens, unless they were employed by the Crown, had to have residence permits to live in the Colony. This was perhaps one factor which gave to the ethnically mixed population of Gibraltar an identity as Gibraltarians.

British sovereignty is based on Article X of the 1713 Treaty which "yielded ... the town and castle of Gibraltar, together with port, fortifications and forts thereunto belonging" to the British Crown. It stipulated that in the event of the UK wanting to "grant, sell, or by any means alienate" ownership of Gibraltar, Spain would be given first preference<sup>3</sup>.

Spain began its attempt to regain Gibraltar almost immediately after its cession to Britain and it has been a bone of contention ever since. General Sir William Jackson, Governor of Gibraltar from 1978 to 1982, has suggested that Spain made various assumptions after World War II: "It was reasonable to assume that as Britain withdrew from Empire she would no longer need her strategic bases and would be willing to return the Rock to Spain when it became a militarily expensive millstone around her neck".<sup>4</sup> However, Gibraltar remained

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<sup>2</sup> *Information Concerning the Territory of Gibraltar for the Year 1992 in Accordance with the provisions of Article 73(e) of the United Nations Charter*, 1993, Report by the Gibraltar Government for submission by the FCO to the UN Secretary-General.

<sup>3</sup> for full text of Article 10, see Annex II and ref. HC 166, 1981-82.

<sup>4</sup> *The Rock of the Gibraltarians: a History of Gibraltar*, Sir William G.F.Jackson, 1987.

significant for western defences during the Cold War in the 1950s and later as NATO's southernmost reinforcement and supply point.

In the Franco period, Spain introduced various measures which obstructed communications and movement between Gibraltar and Spain, culminating in the severing of all lines of communication in 1968. These measures, known as the Castiella policy after General Franco's foreign minister who initiated them, were accompanied by an on-going diplomatic battle and by Spanish efforts to exert international pressure on the UK to cede Gibraltar.

## **B. Gibraltar at the United Nations**

The new constitution in 1964 gave Gibraltar more internal self-government, to which Spain objected, and at Spain's request the question of its constitutional future was raised at the UN by the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (also known as the Committee of 24 on Decolonisation) in 1963 and 1964. In 1963 the Castiella argument was that it was not the Gibraltarians themselves but a piece of Spanish territory that had been colonised (the Rock and isthmus, including La Linea and other towns and villages in the Cadiz area, had together formed the Campo de Gibraltar before 1713). In short, Gibraltar was a British colony on Spanish soil and decolonisation could not under Utrecht mean independence for Gibraltar, but only a return of the land to Spain (the people of Gibraltar were, according to Spain, implanted by Britain and therefore had no rights over the land). Apart from the historical claims, the Spanish argument was based on UN General Assembly Resolution 1514 (XV), 1960, which contained the Declaration, paragraph 6 of which stated:

Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

On its own this did not take into account other UN conditions, namely that this particular provision was to protect the integrity of colonies from neighbouring aggressors as they moved towards independence. Resolution 1514(XV) also emphasised respect for the wishes of the dependent population in paragraph 2:

All people have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

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What the people of Gibraltar wanted at this point was another status provided for by the UN Resolution, namely "free association with an independent State".

The mood in the Committee of 24 and in the UN General Assembly was during this period strongly anti-colonial and the British/Gibraltarian arguments were continually countered by those of recently independent states or colonial powers which had themselves recently decolonised. The Committee of 24 reached no conclusion in 1963 and in 1964, after further representations from the Gibraltar Chief Minister Sir Joshua Hassan and from the British and Spanish sides (the latter referred to the population of the Rock as "pseudo-Gibraltarians"), the Committee called for a "negotiated solution" in accordance with the provisions of Resolution 1514 (XV) and the principles of the UN Charter, "bearing in mind the interests of the population of the Territory".<sup>5</sup>

In 1965 the British Government published a White Paper, *Gibraltar - Recent Differences with Spain*,<sup>6</sup> in which British historical and political claims to Gibraltar were considered. The White Paper drew attention to the ethnic and religious diversity among Gibraltarians and noted the Gibraltarians' wish to remain linked with Britain, maintaining that there was therefore no conflict with Spain or with the UN over the status of Gibraltar. The Spanish Government's response to the White Paper was the publication in 1965 of the *Red Book*, in which it sought to discredit the UK by accusing the Government of Treaty violations and imperialistic advances onto the Spanish mainland at La Linea beyond the so-called "neutral zone".<sup>7</sup>

In 1965 the UN General Assembly invited Britain and Spain to enter into negotiations over Gibraltar and initial talks began in May 1966. Spain proposed repealing Article 10 of the Treaty of Utrecht, which it regarded as anachronistic, and returning Gibraltar to Spanish rule with certain concessions to Britain to be formulated in an Anglo-Spanish convention. The retention of a British military base on Gibraltar would be covered by a special agreement and there would be legal protection of the interests and nationality of the present population. The UK made counter-proposals in three subsequent rounds of talks in 1966, but Anglo-Spanish relations deteriorated rapidly as agreement on the Rock's future status could not be reached.

The 1966 Spanish proposals provoked a British caveat that they did not prejudice the British view that it had sovereignty over "the whole territory of Gibraltar, which includes all the ground up to the frontier fence", including the neutral zone.<sup>8</sup> Spain refuted this, since the isthmus had not been ceded under Utrecht but had been acquired by Britain "illegally". The

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<sup>5</sup> *Yearbook of the United Nations*, 1964, p.424.

<sup>6</sup> Cmnd 2632.

<sup>7</sup> See map in Annex I.

<sup>8</sup> Cmnd 3131.

British Government insisted that as Britain had occupied and used this land for over 150 years, it was British territory by right of long occupation <sup>9</sup>.

In 1966 Spanish obstruction of British activity in and around Gibraltar increased. The Spanish Government had already begun to obstruct and prevent border crossings between Spain and Gibraltar, and in August 1966, Spain banned British military aircraft from flying over Spanish territory. In October of that year, the Spanish Government closed the border to all but pedestrians and in November Spanish customs officials refused to accept Gibraltarian passports issued by the Governor of Gibraltar, thus preventing them from entering Spain. The British Government's suggestion that the issue be referred to the International Court of Justice was rejected by Spain on the grounds that it would contradict the resolution of the Committee of 24 which called for Anglo-Spanish negotiations and progress towards the decolonization of Gibraltar. However, on 20 December 1966, Britain and Spain voted in favour of a UN Resolution which for the first time mentioned the interests of the Gibraltarians themselves.<sup>10</sup>

In a referendum on 10 September 1967, Gibraltarians were asked whether they wanted "to pass under Spanish sovereignty in accordance with the terms proposed by the Spanish Government to Her Majesty's Government on 18 May, 1966" or "voluntarily to retain their link with Britain, with democratic local institutions and with Britain retaining its present responsibilities".<sup>11</sup> The result was a large pro-British vote: with a 95.8 per cent turnout, 12,138 out of a total of 12,762 registered voters voted to stay with Britain and 44 voted for Spanish sovereignty (with 55 spoiled ballots). Spain objected to the unilateral referendum as being in violation of the 1713 Treaty and the UN Charter and Resolutions on Gibraltar. The Committee of 24 agreed with Spain and in the UN General Assembly debate on Gibraltar that followed the referendum a Resolution was adopted which described the referendum as a 'contravention' of Resolution 2231 and urged the resumption of negotiations with Spain.<sup>12</sup> Spain published a second Red Book and reaffirmed its condemnation of the referendum. Anglo-Spanish talks resumed in March 1968 but collapsed almost immediately. The situation was exacerbated by a joint communique issued after talks between the Government and Gibraltar in 1968 on constitutional changes that would give Gibraltarians considerably more control over their domestic affairs, replace the legislative and city councils with a House of Assembly and an executive headed by the Governor. The Communique also required that "Gibraltar should cease to be a colony. Its status should be redefined, incorporating a reference to Britain's permanent and exclusive sovereignty over Gibraltar".<sup>13</sup>

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<sup>9</sup> *Spanish Red Book*, 1968, chapter 3.

<sup>10</sup> A/Res/2231, 20 December 1966.

<sup>11</sup> *HC Deb*, 14 June 1967, c565, statement to the House of Commons by FCO Minister Judith Hart.

<sup>12</sup> A/Res/2353, December 1967.

<sup>13</sup> Communique of Chief Minister, 3 May 1968.

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The new Constitution of May 1969, made under the Gibraltar Constitution Order 1969, reiterated that Gibraltar would remain part of the dominions of the British Crown (unless amended by further UK legislation), and that the UK would "never enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another state against their freely and democratically expressed wishes".

Spain responded by accusing the British Government of maintaining a colonial arrangement in Gibraltar that was incompatible with the UN Charter, and between June and October 1969, Spanish workers in Gibraltar were refused work permits by the Spanish authorities, the Spanish Government closed the border and customs post at La Linea. The Algeciras-Gibraltar ferry service was stopped, telephone lines cut and Spain offered Spanish nationality to all residents of Gibraltar or to those born there.

### **C. Gibraltar and Anglo-Spanish Relations during the Siege**

In spite of the tensions brought about by the severing of links between Spain and Gibraltar, and although the restrictions remained in force, relations between Spain and the UK began to improve in 1969. There was informal contact between the two governments in the early 1970s and a formal resumption of talks in 1974.

In 1973, Gibraltar became part of the European Economic Community as a Dependent Territory of the UK. Its status in Europe and how this has affected the sovereignty issue are discussed in Section VIII "Gibraltar and the European Community". Spain was not to join the European Community until 1986.

In 1974 the Spanish Government made new proposals for the government of Gibraltar which were rejected by Sir Joshua Hassan, Chief Minister from 1964 to 1987. In short, these envisaged:

- i that as soon as Spanish sovereignty was recognized over Gibraltar, the Gibraltar area (i.e. the campo) would become a special territory with legislative, judicial, administrative and financial autonomy;
- ii that Gibraltarians would take Spanish nationality but need not renounce their British nationality;
- iii that the Spanish legal system "as developed by the special legislation of Gibraltar" would apply after the 1969 constitution had been suitably amended, and that Spanish penal and police

laws would apply in all areas concerning Spain's internal and external security;

- iv that the senior authority in Gibraltar would be a civil governor appointed by the Spanish head of state;
- v that the most senior members of the executive would be Spaniards or Gibraltarians of Spanish nationality;
- vi that Spanish would be the official language of Gibraltar, although a wide use of English would be safeguarded.<sup>14</sup>

#### **D. Spain and Gibraltar in the post-Franco Era**

After General Franco's death in November 1975, King Juan Carlos pledged that he would continue the fight for Gibraltar, and the first democratically elected Prime Minister Adolfo Suarez announced that negotiations with Britain to restore Spain's "territorial integrity" would be resumed. In 1977 there were meetings between the Spanish Prime Minister, the UK Prime Minister James Callaghan and the Foreign Secretary David Owen. They agreed to a negotiated solution to the issue but the border and communication restrictions were not lifted. Talks between Britain, Spain and Gibraltar representatives continued throughout 1978 and there were new initiatives following the Conservative election victory in Britain in 1979. The so-called "Lisbon Agreement" agreed in a communique on 10 April 1980 provided as follows:<sup>15</sup>

1. The British and Spanish Governments, desiring to strengthen their bilateral relations and thus to contribute to European and Western solidarity, intend, in accordance with the relevant United Nations Resolutions, to resolve, in a spirit of friendship, the Gibraltar problem.
2. Both Governments have therefore agreed to start negotiations aimed at overcoming all the differences between them on Gibraltar.
3. Both Governments have reached agreement on the re-establishment of direct communications in the region. The Spanish Government has decided to suspend the application of the measures at present in force.

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<sup>14</sup> Keesing's *Border and Territorial Disputes*, 1987.

<sup>15</sup> HC 166, 1980-81: Foreign Affairs Select Committee Report, *Gibraltar: Situation of Gibraltar and UK Relations with Spain*, 22 July 1981.

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Both Governments have agreed that future co-operation should be on the basis of reciprocity and full equality of rights. They look forward to the further steps which will be taken on both sides which they believe will open the way to closer understanding between those directly concerned in this area.

4. To this end both Governments will be prepared to consider any proposals which the other may wish to make, recognising the need to develop practical co-operation on a mutually beneficial basis.
5. The Spanish Government, in reaffirming its position on the re-establishment of the territorial integrity of Spain, restates its intention that, in the outcome of the negotiations, the interests of the Gibraltarians should be fully safeguarded. For its part the British Government will fully maintain its commitment to honour the freely and democratically expressed wishes of the people of Gibraltar as set out in the preamble to the Gibraltar Constitution.
6. Officials on both sides will meet as soon as possible to prepare the necessary practical steps which will permit the implementation of the proposals agreed to above. It is envisaged that these preparations will be completed not later than 1 June.

The arrangements in Gibraltar were completed by the target date of 1 June 1980, but not by the Spanish and implementation of the agreement was stalled, first temporarily, and then, with the outbreak of the Falkland Islands conflict in April 1982, indefinitely.

The House of Commons Foreign Affairs Committee published a report on Gibraltar in 1981 entitled *The Situation in Gibraltar and UK Relations with Spain*,<sup>16</sup> which favoured diplomatic initiatives to explore "possible constitutional solutions" but also noted that the democratic parties in Spain all supported Spanish sovereignty of the Rock and that the Spanish and British governments had significantly different interpretations of the 1980 Lisbon Agreement. The Report concluded that the Spanish parliament would not have accepted the British understanding of the Agreement, which was that only when Spain had unconditionally lifted the border and other restrictions would there be "reciprocity and full equality of rights".<sup>17</sup>

Spain's entry into NATO's political structure in 1982, but without full military integration,<sup>18</sup> and the European Community in 1986, redefined its relations with much of western Europe. The dispute with Britain over Gibraltar also took on a different character during the entry

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<sup>16</sup> Foreign Affairs Committee, Seventh Report, HC 166, 1980-81.

<sup>17</sup> *ibid*, para. 64.

<sup>18</sup> Spain's security and its role in NATO are discussed in Library Background Paper 256, *Spain: Achievements and Prospects*, 30 July 1990.

negotiations and beyond, as Christopher Hill considered in his chapter on "Gibraltar and the House of Commons, 1977-88":<sup>19</sup>

Gibraltar touches on, and is affected by, the question of Spain's entry into NATO and the European Community, which has been one of the central dilemmas for the West European states in the 1980s. If Spain had not been willing to behave reasonably towards Gibraltar, then the unstated possibility was always that Britain would use its position in the two major Western groupings to obstruct Spanish diplomacy. Equally, once Spain was in NATO and the EC, it would be more constrained in the pressures it could bring to bear on Gibraltar.

Although the Socialist Government of Felipe Gonzalez relaxed restrictions by opening the border to pedestrians in December 1982, it was not until 1984 that any real diplomatic progress was made with the "Brussels Agreement" of 27 November 1984.<sup>20</sup> Its provisions were as follows:

(1a) The provision of equality and reciprocity of rights for Spaniards in Gibraltar and Gibraltarians in Spain. This will be implemented through the mutual concession of the rights which citizens of European Community countries enjoy, taking into account the transitional periods and derogations agreed between Spain and the Community. The necessary legislative proposals to achieve this will be introduced in Spain and Gibraltar. As concerns paid employment, and recalling the general principle of Community preference, this carries the implication that during the transitional period each side will be favourably disposed to each other's citizens when granting work permits. (1b) The establishment of the free movement of persons, vehicles and goods between Gibraltar and the neighbouring territory. (1c) The establishment of a negotiating process aimed at overcoming all the differences between Spain and the United Kingdom over Gibraltar and at promoting co-operation on a mutually beneficial basis on economic, cultural, touristic, aviation, military and environmental matters. Both sides accept that the issues of sovereignty will be discussed in that process. The British government will fully maintain its commitment to honour the wishes of the people of Gibraltar as set out in the preamble of the 1969 constitution. (2) Insofar as the airspace in the region of Gibraltar is concerned, the Spanish government undertakes to take the early actions necessary to allow safe and effective air communications. (3) There will be meetings of working groups, which will be reviewed periodically in meetings for this purpose between the Spanish and British Foreign Ministers.

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<sup>19</sup> From *Parliament and International Relations*, edited by C.Carstairs and R.Ware, 1991.

<sup>20</sup> Deposited Paper 1150, 28 November 1984.

The Chief Minister Sir Joshua Hassan was concerned about the prospect of sovereignty discussions, while the opposition Gibraltar Socialist Labour Party (GSLP) condemned the Brussels Agreement and the combined opposition parties asked for a referendum on it which was refused.

Spain finally lifted its border restrictions on 5 February 1985 but refused to restore the ferry route from Algeciras (removed on 25 June 1969, see below) and the air exclusion zone introduced in 1967.

Talks were resumed in Geneva between the Foreign Secretary Sir Geoffrey Howe, Sir Joshua Hassan and Spain and an agreement was signed on economic and cultural co-operation with the understanding that Gibraltar issues would also be on the agenda. At a subsequent meeting in 1987, Sir Geoffrey Howe "reaffirmed the British Government's commitment to honour the wishes of the people of Gibraltar" and emphasised "the importance of managing any differences between Britain and Spain in a spirit consistent with their links of traditional friendship and their common membership of the European Community and NATO".<sup>21</sup>

### **III Developments in the Discussion on Gibraltar's Constitutional Future since 1987**

#### **A. Political Developments**

In December 1987 the long-serving Chief Minister Sir Joshua Hassan resigned and was succeeded briefly by the Deputy Chief Minister Adolfo Canepa before the general elections in March 1988, as a result of which Joe Bossano became Chief Minister. Mr Bossano has favoured a pragmatic approach to relations with Spain: contacts were established with the mayors of La Linea and Algeciras and in 1992, an Economic Co-ordination Council was set up with neighbouring Spanish cities in the region (although this collapsed in November 1994 as a result of a Spanish decision to withdraw from the Council). He has also had more radical views on the constitutional future of Gibraltar. Viewing the Treaty of Utrecht as archaic, his Government has argued against any form of "colonial" management by Britain or Spain in favour of self-determination under resolutions of the Decolonisation Committee and Article 1(1) of the UN Covenant on Economic, Social and Cultural Rights (1976) which states that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

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<sup>21</sup> Communique, 14 January 1987.

In February 1992, Mr Bossano told the House of Assembly that he would try to obtain a revision of the 1969 Constitution to allow for Gibraltar's foreign affairs and defence matters to be transferred to the European Communities, with the UK retaining formal sovereignty over an otherwise self-governing entity. Independence gambits such as Gibraltar's attempts to ignore both Britain and Spain over the use of the Rock's airport (see section on the Gibraltar airport issue) have not been encouraging for Mr Bossano. The European Court of Justice decided in June 1993 that Gibraltar had no right to overturn the decisions of Spain and Britain, although it has legal personality in UK law.<sup>22</sup>

Mr Bossano addressed the United Nations General Assembly's Committee of 24 in 1992, 1993 and 1994. On 12 July 1994,<sup>23</sup> he emphasised Gibraltar's enthusiasm for proposals adopted in UN Resolution 48/52 of 10 December 1993, which had called upon the Committee "To formulate specific proposals for the elimination of the remaining manifestations of colonialism"<sup>24</sup> and "to recommend to the General Assembly the most suitable steps to be taken to enable the population of those Territories to exercise their right to self-determination and independence".<sup>25</sup> Relying on the Treaty of Utrecht for continuing British rule might be anachronistic, as the Spanish have claimed, but Spain has also been opposed to any discussion of self-determination. In his address called upon Spain to face "the reality of the identity of the Gibraltarians and of their right to self-determination as the only route available for eliminating the anachronism of a colony in Western Europe". He was concerned that in the bilateral negotiations between Spain and Britain:

the wishes of the people of the colonial territory, and indeed their interests, are relegated to second place. The fact that we are not a self-governing territory does not mean, as far as my government is concerned, that others have the right to govern us. It means that others are acting *in loco parentis* on our behalf and assuming a protective role until we are strong enough to be able to govern ourselves.<sup>26</sup>

He was critical of the Brussels process, saying that this had shown:

that where an agreement is reached with the Kingdom of Spain in an area which is entirely under its control there is no guarantee that it will be honoured. Rather than mutually beneficial co-operation, we have had increasing strains in the tripartite relations between the administering Power and the Kingdom of Spain on the one

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<sup>22</sup> Case 298/89, *Gibraltar v EC Council*, judgment of 29 June 1993.

<sup>23</sup> A/AC.109/PV.1433.

<sup>24</sup> UN Resolution 48/52, para. 10a.

<sup>25</sup> *ibid*, para.10b.

<sup>26</sup> *ibid*, p.6.

hand; between Spain and ourselves on the other; and between ourselves and the United Kingdom in turn.<sup>27</sup>

The British Government has not ruled out changes to the 1969 Gibraltar Constitution, as Mr Davis pointed out with reference to Mr Hurd's correspondence with Mr Bossano on 13 February 1995, in which the Foreign Secretary had written that "he would be willing to listen to the views of Gibraltarians and the Gibraltar Government on how the constitution might be developed. But we have always made clear that any changes would have to be realistic in the circumstances of Gibraltar".<sup>28</sup> The Government has been cautious about self-determination on the grounds of the requirement of Article 10 of the Treaty of Utrecht, according to which independence would not be an option without the consent of Spain, which the latter presently would probably not give.

In a Lords Parliamentary Reply, Baroness Chalker set out the Government's view on Gibraltar's bid for self-determination:<sup>29</sup>

Our policy has consistently been that while we support the principle or right of self-determination, reflecting the wishes of the people concerned, it must be exercised in accordance with the other principles and rights in the United Nations Charter as well as other treaty obligations. In the case of Gibraltar, the right of self-determination is circumscribed by Article X of the Treaty of Utrecht. We are willing to look at options for constitutional change, if that is what Gibraltar wants. But they have to be compatible with the Treaty of Utrecht and they have to be realistic.

On 28 November 1994, Spain's former Foreign Minister and Socialist MEP Fernando Moran launched a new campaign for Spanish sovereignty over Gibraltar. In an article in the Spanish newspaper *El País*, 28 November 1994, Mr Moran proposed two possible scenarios: one would be temporary joint ownership and administration of Gibraltar for a certain period, after which the Rock would proceed to full Spanish sovereignty; the second would be its immediate return to Spain and the establishment of a leasing agreement with the UK. It is unlikely that either would be acceptable to the UK or to Gibraltarians.

Douglas Hurd and his Spanish counterpart Javier Solana met in London on 19 and 20 December 1994. Drug-smuggling was discussed but "There was no substantive discussion of sovereignty issues".<sup>30</sup> The two foreign ministers agreed the following:

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<sup>27</sup> *ibid*, p.8.

<sup>28</sup> *HC Deb*, 6 March 1995, c4W.

<sup>29</sup> *HL Deb*, 19 April 1995, WA54.

<sup>30</sup> *HC Deb*, 10 January 1995, c62W.

They reaffirmed their commitment to the Brussels Process. They agreed on the importance of Gibraltar developing a sustainable economy. They recognised that there was a problem of illegal trafficking, in particular drugs, in the Gibraltar area and agreed on the need to establish an effective mechanism, which should include the competent local authorities, to improve consultation and co-operation. On the basis of normal and regular movement between Gibraltar and the neighbouring territory, and in a spirit of co-operation, they will review progress towards agreeing on such a mechanism in the New Year.<sup>31</sup>

Mr Bossano has refused to participate in discussions on the Brussels process (the Governor has been attending the discussions instead) on the grounds that he would be considered as part of the UK delegation and not directly representing the Gibraltar Government. Speaking in Madrid on 8 March 1995, the Chief Minister objected to the bilateral talks between Spain and Britain on Gibraltar's future, and appealed to Spain to understand that the people of Gibraltar would not accept any agreement over its future that did not take account of Gibraltar's direct participation in negotiations. Bossano again insisted on the right of Gibraltarians to self-determination under the United Nations Charter and castigated Spain for not recognising that right or the right to participate directly in negotiations over their future.

There might be some interesting parallels between the issue of UK sovereignty of Gibraltar and Spanish sovereignty of the municipalities of Ceuta and Melilla on the north Moroccan coast, although the Spanish Government do not appear to have acknowledged a comparable situation. On 22 February 1995, Spain approved autonomy statutes for the two towns, a move which was criticised by the new Moroccan Government of Abdelatif Filali, who regarded it as a threat to friendly relations between Spain and Morocco and who has stated that regaining sovereignty of Ceuta and Melilla is one of his government's priorities.<sup>32</sup>

## **B. The Economy**

As jobs in defence installations have disappeared (see below), the economy of Gibraltar has had to adapt to a new economic environment. Tourism, construction and in particular financial services are areas which the Government of Gibraltar wants to develop. Gibraltar has for a long time been a centre for offshore trusts with a tax-free regime for beneficiaries not resident in Gibraltar. New financial services legislation has been introduced in an effort to develop Gibraltar as an off-shore finance centre. Mr Bossano has been trying, so far with only limited success, to promote Gibraltar's new financial role as a way of achieving greater

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<sup>31</sup> Dep/3 928, 20 December 1994.

<sup>32</sup> *El País*, 7 March 1995.

economic independence from Britain, and with this, in his view, greater political independence.

Gibraltar controls its own direct and indirect taxation and has a liberal tax regime which makes it an attractive investment base. It is "able to offer competitive offshore facilities coupled with a modern European legal and professional framework often missing in other offshore centres".<sup>33</sup> The relative lack of success in this endeavour has been partly attributed to uncertainty over Gibraltar's status. Mr Bossano is reported to have said: "What is deterring investors is that we are not giving people a clear-cut answer".<sup>34</sup> Other commentators have attributed the Rock's disappointing performance to the economic recession throughout Europe.<sup>35</sup> The *Sunday Telegraph* reported on 13 February 1994 that an impasse over the appointment and accountability of a Financial Services Commissioner for Gibraltar was "seriously impeding Gibraltar's development as an off-shore finance centre. In the last two months of 1993 the rate of business closures averaged at one a week".

David Davis said in reply to a question about UK financial and economic assistance to Gibraltar:

We have provided extensive advice and assistance to the Government of Gibraltar. An economic study, identifying market opportunities which could be exploited by Gibraltar, was supplied in 1993, and another dealing with the impact of MOD drawdown and ways to compensate for that in 1994. In 1994 we set up the joint economic forum to consider ways of assisting Gibraltar in the wake of that rundown. We have also negotiated considerable EC structural funds help for Gibraltar. The MOD runs a training programme.

All this took place against the background of the completion of the 1986 to 1990 development grant, following which the Gibraltar Government have not requested further UK bilateral assistance.<sup>36</sup>

Gibraltar has been averse to any suggestion of closer constitutional ties with Spain, while conceding that friendlier relations might be advantageous for its economy. Self-determination might not always be the best solution for populations in situations like that of Gibraltar and it could be politically and economically disadvantageous for Gibraltarians, unless off-shore services, tourism and other undertakings can be developed.

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<sup>33</sup> *The Commonwealth Yearbook 1993-1994*, p.480.

<sup>34</sup> *Guardian*, 22 November 1993.

<sup>35</sup> *Guardian*, *ibid.*

<sup>36</sup> *HC Deb*, 25 May 1995, c669W.

## IV The Defence of Gibraltar

### A. Gibraltar's Defence Role

Gibraltar's role as a military fortress dates back over centuries because of its valuable strategic position in southern Europe and proximity to Africa and the Middle East. Gibraltar was no more than a defence post until 1160 AD, when a city was founded on the Rock and peninsular by the Arab king, Abd el M'umin.<sup>37</sup> Defence reinforcements were made during successive Spanish and Arab (Moorish) invasions and in the struggle between Spain and England following the capture of the Rock by an Anglo-Dutch force in 1704.

By the end of the Napoleonic wars in 1815 Gibraltar was becoming a successful trading centre, although its primary role continued to be that of a fortress. General Sir George Don, who was appointed Lieutenant-Governor of Gibraltar in 1814, was the first to see Gibraltar as more than just a military stronghold and to appreciate the needs of its civilian population.

Towards the end of the nineteenth century, in response to Germany's increasing power in Europe, the Naval Defence Act of 1889 authorised improvements to Gibraltar's harbours and dockyards which were completed in 1906. Gibraltar's importance as a strategic naval base was evident during both world wars and the airfield that was built during World War II (see below) has since the war helped to make Gibraltar a European communications and tourism centre.

In the 1960s rivalry over strategic bases between the forces of the Warsaw Pact countries and NATO, to which Spain did not then belong, gave rise to a new dispute concerning Gibraltar. The British Government argued that Gibraltar was not in fact a NATO base, although it was used for NATO purposes. This did not satisfy the Spanish, who in their *Red Book* of 1968, published press, Foreign Office statements and other material offering "evidence" of Gibraltar's status as a NATO base. As such, Spain saw it as a possible target of Warsaw Pact nuclear weapons and hence a threat to Spanish territory. In 1966, Spain announced that it would not allow NATO aircraft to fly over Spanish airspace en route for Gibraltar and NATO warships were not allowed to stop at Spanish ports after leaving Gibraltar. UK and other military aircraft flying to Gibraltar are still prohibited by Spain from overflying Spanish airspace and territory except on humanitarian missions.

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<sup>37</sup> *Information concerning the territory of Gibraltar for the year 1992 in accordance with the provisions of Article 73 (e) of the United Nations Charter 1993.*

## B. The Gibraltar Regiment and British Troop Withdrawals

At its peak during World War II, the British garrison numbered seventeen thousand.<sup>38</sup> Peacetime figures have been considerably less. The local defence force, the Gibraltar Regiment, was reorganised after the abolition of national service in 1971 as a largely volunteer reserve force. The following tables<sup>39</sup> show a) the strength of the local Gibraltar regiment and b) the strength of the British garrison from 1975 to 1994:

### Strength of Ministry of Defence personnel in Gibraltar (a)

1 April	Royal Navy (b)	Army	RAF	Total	Civilians
1975	618	822	486	1,926	318
1980	643	776	404	1,823	299
1985	733	771	455	1,959	109
1988	677	723	398	1,798	105
1989	534	754	395	1,683	113
1990	487	686	378	1,551	108
1991	478	131	367	976	112
1992	485	130	374	989	107
1993	761	129	336	1,226	106
1994	420	147	302	869	83
Changes					
1975-1994	-32%	-82%	-38%	-55%	-74%
1988-1994	-38%	-80%	-24%	-52%	-21%
1993-1994	-45%	14%	-10%	-29%	-22%

Notes: (a) From 1994 (and from 1993 for the Army), all service personnel are based on the location code given on an individual's record of service. In earlier years, deployment of individuals was assessed using their record of location.

(b) Includes Royal Marines

Source: Ministry of Defence "UK Defence Statistics 1994"

<sup>38</sup> *The Rock of the Gibraltarians : a History of Gibraltar*, Sir William G.F.Jackson, 1987.

<sup>39</sup> Compiled by Mahmud Nawaz of the Social and General Statistics Section.

### Strength of locally entered personnel in Gibraltar

1 April	Army	Civilians
1975	45	2,695
1980	44	2,656
1985	49	1,699
1988	56	1,545
1989	59	1,544
1990	69	1,534
1991	129	1,478
1992	164	1,409
1993	165	1,334
1994	174	1,313
Changes		
1975-1994	287%	-51%
1988-1994	211%	-15%
1993-1994	5%	-2%

Source: Ministry of Defence "UK Defence Statistics 1994"

The contraction began with the conversion of the Royal Navy dockyard to a commercial dockyard in 1985 with a £30 million investment programme.<sup>40</sup> In 1991 the Government announced its so-called 30/30/50 Plan, under which MOD manpower on Gibraltar was to be reduced by 30 per cent, running costs by 30 per cent and the MOD estate by 50 per cent over a five-year period starting in 1992.

In 1993, the end of the Cold War and pressure to make cuts in the defence budget to reflect the new, less threatening situation in Europe, led the MOD to commission a study into future MOD requirements for a number of areas, one of which was Gibraltar. The 1993 review took account of five core military functions for Command British Forces Gibraltar which were a)

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<sup>40</sup> *Lloyd's List*, 16 January 1991.

intelligence gathering facilities, b) nuclear berthing facilities, c) access to airfield, d) the Gibraltar Regiment and e) Headquarters and Associated Command and Control facilities. The future operation of these functions is set out in an MOD Consultative Document.<sup>41</sup> This document also identified a number of support functions for the Garrison, land sites that would be retained (with surplus land being disposed of to the Gibraltar Government), and personnel reductions. Under the 30/30/50 Plan, the 895 servicemen serving on the Rock would be reduced to 643 by 1997/98 and to approximately 500 by 1999. The number of civilians employed by the Garrison would be reduced from 1246 to 950 in 1997/98 and 350-700 in 1999. The running costs would continue to be funded by the MOD but with the proposed cuts would be reduced from £55 million in 1994/95 to £40 million in 1997/98 and to £35 million in 1999. The MOD has been studying possible training and retraining areas using existing facilities in Gibraltar as part of its ameliorating measures.

Commenting on the changes brought about by the reduction in military personnel and related activities in Gibraltar, Mr Goodlad said:

The Ministry of Defence is conscious of Gibraltar's particular problems and is providing specially tailored training courses for those affected. It is also setting up a special service to assist staff to find alternative employment.<sup>42</sup>

The reduction in defence and dockyard installations has had a considerable effect on the Gibraltar economy, as Mr Goodlad pointed out in a written parliamentary answer in February 1995:

It is generally estimated that at its peak, the Ministry of Defence contribution to the Gibraltar economy was about 50 per cent. It is currently estimated at about 10 per cent.<sup>43</sup>

## V The Gibraltar Airport Issue

Gibraltar's airport was built during World War II on the isthmus north of the Rock which was, according to Spain, a neutral "no man's land" and not covered by the Treaty of Utrecht at which time it had been no more than an inhospitable strip of land which no one thought important. The airport has made Gibraltar a communications centre for the Mediterranean between Europe and Africa and has boosted tourism on the Rock. As well as imposing

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<sup>41</sup> Dep/3 234, 1994.

<sup>42</sup> *HC Deb*, 20 December 1994, c1535.

<sup>43</sup> *HC Deb*, 7 February 1995, c.122W.

restrictions on British military aircraft using Spanish airspace (see above), Spain demanded that two terminals be built at the airport so that Spanish passengers would not have to pass through UK-Gibraltar customs and immigration control. These demands were rejected by the Gibraltar House of Assembly, which agreed the following private member's motions passed unanimously on 24 March 1986<sup>44</sup> and 17 December 1986:<sup>45</sup>

This House affirms that, should proposals be put forward in connection with greater civilian use of the Gibraltar airport, which might in the view of the Gibraltar House of Assembly make it possible to represent or interpret such use as being an encroachment on British sovereignty over the isthmus, such proposals would be unacceptable to this House and to the people of Gibraltar. It calls on Her Majesty's Government to note this view and make it known to the Government of the Kingdom of Spain.

This House declares that the views and wishes of the people of Gibraltar in respect of the use of the Airport are: (a) that it should continue under the exclusive control of the British and Gibraltarian authorities and (b) that any flight from or to any foreign country should be governed by the rules applicable to international flights.

Separately from bilateral negotiations on the airport, in 1987 the European Community provisionally agreed a package of air liberalisation measures on market access, fares and licensing which extended the 1983 agreement in which Gibraltar had been included as a British regional domestic airport. Spain vetoed the agreement, making its support conditional on it not being applied to Gibraltar. The House of Assembly condemned the Spanish action, saying that it was totally unwarranted "and an attempt to deprive Gibraltar and its people of their rights as members of the Community".<sup>46</sup> The Gibraltar Government continued to maintain that it would reject any agreement between the British and Spanish Governments that would give Spain any measure of control over the airport.

However, in December 1987 Spain and the UK agreed a joint declaration on co-operation over the use of the airport once the House of Assembly had amended existing customs and immigration legislation.<sup>47</sup> Gibraltar's inclusion in the part of the EC Air Transport package on market access was suspended and made subject to its government's approval of the Anglo-Spanish agreement. This was acknowledged in the EEC draft Council Decision on Capacity Sharing and Market Access, which stated:

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<sup>44</sup> Hansard Vol. 1, p.15.

<sup>45</sup> Hansard p.62.

<sup>46</sup> Gibraltar House of Assembly Motion, Hansard, p.40, 6 July 1987.

<sup>47</sup> Dep. 3386, 2 December 1987.

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The application of this Decision to the airport of Gibraltar is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty of the territory in which the airport is situated.

Application of the provisions of this Decision to Gibraltar airport shall be suspended until the arrangements in the joint declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 have come into operation. The Governments of Spain and the United Kingdom will so inform the Council on that date.<sup>48</sup>

The Spanish Government suggested that if Gibraltar did not accept the agreement, it might build its own airport on the Spanish side of the border. The airport issue was a prominent campaign issue in the 1988 elections which brought the Gibraltar Socialist Labour Party to power and the appointment of Joe Bossano as Chief Minister.

The problem remains unresolved. Michael Colvin MP argued in a debate on Gibraltar in December 1994:

If the airport agreement of 1987 were implemented, it would help. The problem is that the airport agreement was bilateral between Spain and the United Kingdom; Gibraltar was not party to it. If the financial centre is to work, it is very important that Gibraltar has a properly operating airport. At the moment Gibraltar is reluctant to implement the agreement simply because it does not trust Spain. The lack of trust must be overcome<sup>49</sup>

Gibraltar still has not implemented the other measures in the EC package and there remains a possibility of action under Article 169 of the Treaty.<sup>50</sup>

GB Airways and Air Europe are the main airlines operating scheduled services from Gibraltar. Under the present conditions only UK aircraft may fly directly into Gibraltar. Other airlines may do so once they have obtained a UK permit, although in practice most scheduled commercial airlines find this procedure too complicated and so do not fly to Gibraltar. Richard Gozney summarised the economic and political damage of the airport dispute as twofold:

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<sup>48</sup> Annex III, A/AC. 109/963 p.19.

<sup>49</sup> *HC Deb*, 20 December 1994, c1530.

<sup>50</sup> Under this Article the Commission gives a reasoned opinion on failure by member state to fulfil Treaty obligation, followed by ECJ action if there is failure to comply.

- a) to the economies of Gibraltar and Cadiz Province, both of which would receive a significant boost from flights into Gibraltar Airport from Madrid, probably from Frankfurt and perhaps from Brussels and one or more capitals in Scandinavia. The extra employment at the airport and throughput of potential shoppers would benefit Gibraltar. The beaches and mountain villages of Cadiz Province would receive more tourists, and more Northern Europeans looking for second homes;

...

- b) to the credibility of the EC in the eyes of the Gibraltarians who hold, with some logic, that Spain should not be allowed to block the natural development of Gibraltar and its airport within the EC and that the new air routes would permit the free movement of people and services to and from Gibraltar, both of which are clear Gibraltarian entitlements. If the EC is too weak, in Gibraltarians' eyes, to meet as unambiguous an obligation as the application to Gibraltar of air service deregulation, can Gibraltar reasonably rely on the Community in other areas, and should Gibraltar go out of her way to fulfil her own, sometimes inconvenient, obligations to the Community?<sup>51</sup>

## VI The Gibraltar-Algeciras Ferry

Linked to the airport issue is that of the ferry link between the Rock and Algeciras, the Spanish port about five kilometres to the west of Gibraltar. Spain has refused to allow the ferry service to operate until the airport agreement has been resolved, an argument that the British Government has not accepted and has called "counter to the spirit of the European Union".<sup>52</sup> This was drawn to the attention of the European Commission in 1991, but the Commission did not take the view that the Spanish action was contrary to EC law. Under Article 59 of the Treaty of Rome, in accordance with the completion of the single European market in the free movement of persons, services and capital, a company based in one member state is allowed to operate in another member state. The difficulty with the ferry situation is that it is a Spanish company that wants to operate and has sought permission from

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<sup>51</sup> Richard Gozney, *Gibraltar and the EC: Aspects of the relationship*, RIIA Discussion Papers 49, 1993.

<sup>52</sup> The Earl of Arran, *HL Deb*, 11 October 1994, c814.

the Spanish Government, which has refused permission. In a Lords debate in October 1994,<sup>53</sup> Lord Molloy explained that the Commission had found Spain not to be in breach of Article 59 and regretted that "there appear to be no avenues open to us other than determined persuasion". This situation has not been resolved and diplomatic efforts continue in an effort to resolve the impasse.

## VII Drug Trafficking and Money Laundering

Spanish border police have maintained that Gibraltar is being used as a money-laundering centre for drug traffickers and cigarette smugglers. The blame for this has been laid on the Gibraltar Government for failing to comply with EC Directives which are "intended to curb money-laundering and other deviations from normal banking practice".<sup>54</sup> According to the *Independent* report:

Multi-million pound cigarette and tobacco smuggling, rising drugs traffic using Gibraltar-based boats and growing reports of money-laundering by big-time crooks including Arabs and Colombians operating on Spain's Costa del Sol, are causing increasing concern in both Whitehall and Madrid.

What angers Spain, whose tobacco retail industry is state-controlled, is that it loses hundreds of millions of pounds a year to the illegal trade from Gibraltar. And the Gibraltar government of Joe Bossano makes a fortune. The more cigarettes that come in legally - mostly from the US .... - the more money the government makes, perfectly legally, on import duty.

Most drugs apparently move through Algeciras, on the Spanish side of the bay, but La Linea, on the isthmus with Spain, is also well-known for drug-related crime. It has been suggested that as La Linea has one of the highest unemployment rates in Spain, its people can make large profits from US tobacco smuggled from Gibraltar.

At the beginning of November 1994, and some ten years after the lifting of the Spanish siege of Gibraltar imposed by General Franco, Spain introduced reinforced and time-consuming border and customs checks at the border crossing at La Linea. The lengthy checks were said by the Spanish authorities (headed by the new Governor of Cadiz, César Brana) to be to stop the drug and tobacco smuggling via the Rock, although Gibraltarians protested that they were linked to the sovereignty issue. The secondary checks were lifted towards the end of 1994.

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<sup>53</sup> *HL Deb*, 11 October 1994, c 814.

<sup>54</sup> *Independent*, 14 December 1994.

On 26 January 1995, Spanish and British delegations which included senior police and customs officials, agreed on joint measures to fight drug and tobacco smuggling and money-laundering on the Rock. Mr Bossano linked the issue to that of sovereignty and Gibraltar's control of its own affairs in the prevention of drug and tobacco trafficking and money-laundering:

Our legislation, copied from Australia, is the strictest in Europe, and departs from the assumption of guilt rather than innocence. ... but it is illogical that policy comes to us from London when we are two metres from those who are doing it or that Spanish officials do not come to our courts to present proof of drugs seized at sea from a boat.<sup>55</sup>

Spain has accused Britain of not doing enough to stop the illegal activities and the UK Government has expressed dissatisfaction with what it sees as Gibraltar's reluctance to control tobacco trafficking. This has led to tensions between Mr Bossano and the British Government which are discussed in more detail below. The Spanish Foreign Minister threatened to impose sanctions against Gibraltar which would affect border and air-space access and Gibraltar capital investments in Spain, although this threat appears to have been retracted following talks between Javier Solana and Douglas Hurd on 19 June. The Spanish Government has made a formal complaint against Britain to the European Commission, accusing the British and Gibraltar Governments of not co-operating with Spanish police to stop the illegal trafficking of tobacco and drugs.<sup>56</sup> Spain has also submitted to the Commission a detailed report on trafficking and money-laundering on the Rock, estimating that tobacco smuggling has increased from 40 million packets in 1989 to 130 million in 1994.

In reply to a parliamentary question on the amount of drugs seized by the Royal Gibraltar police over the last two years, the Foreign Office Minister David Davis said that in 1993 approximately 1.5 tonnes had been seized or found and that over 2 tonnes were seized or found in 1994.<sup>57</sup> According to a report in *El País*<sup>58</sup> the Gibraltar police have since the beginning of the year and with FCO help seized 43 kilos of drugs and 136 packets of contraband tobacco and have detained 209 suspected smugglers. However, *El País* later reported<sup>59</sup> that Spanish officials has seized 900,000 packets of contraband tobacco from January to April 1995 and 650,000 in May.

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<sup>55</sup> *El País*, 9 March 1995.

<sup>56</sup> *El País*, 27 June 1995.

<sup>57</sup> *HC Deb*, 25 May 1995, c671W.

<sup>58</sup> 9 June 1995.

<sup>59</sup> *El País*, 27 June 1995.

## VIII Gibraltar and the European Community

### A. The Constitutional Position

Gibraltar became part of the EC under Article 227(4) of the Treaty of Rome which states:

The provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible.

At the request of the British Government, Gibraltar was excluded from the Community Customs Area, the Common Agricultural Policy and the VAT regime.<sup>60</sup>

### B. Gibraltar and the European Parliament

When the UK was negotiating membership of the EC, it made special arrangements for Gibraltar, the Channel Islands and the Isle of Man. The 1972 Act of Accession limited the application of the Treaty to Gibraltar, with the exception of certain customs and tax provisions and the CAP (since Gibraltar has no agriculture). Another provision of the 1972 Act defined the term "nationals" in the context of Gibraltar as follows:

persons who are citizens of the United Kingdom and Colonies by birth or by registration or naturalization in Gibraltar, or whose father was so born.<sup>61</sup>

This, according to Lord Trefgarne, meant that "Gibraltarians are United Kingdom nationals for European Community purposes".<sup>62</sup>

However, this does not apply for all European Community purposes. The UK Government decided that it would not be appropriate for Gibraltar to participate in direct elections of the EP and requested that an Annex to this effect be added to the Council of Ministers Act of 1976, as follows:

The United Kingdom will apply the provisions of this Act only in the United Kingdom.<sup>63</sup>

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<sup>60</sup> Article 28, Act concerning the conditions of accession and the adjustments to the Treaties, 1973.

<sup>61</sup> *Treaties establishing the European Communities*, 1978, Annex 1, p.1297.

<sup>62</sup> *HL Deb*, 24 July 1979, c1910.

<sup>63</sup> *OJL* 278, 8 October 1976.

This has been interpreted as meaning that Gibraltar is excluded from the provisions of the Act. The reasons for excluding Gibraltar are not altogether clear. David Millar, considering this question in a European Parliament Research and Documentation paper in 1985,<sup>64</sup> concluded that there appeared to be no reason why the situation could not be modified to give Gibraltar direct representation:

If the European Parliament wished to enfranchise the people of Gibraltar in European elections, they could be added to the electoral roll in one or more constituencies in the United Kingdom ..... Or Gibraltar nationals could vote directly for a Member from the UK who would represent electors in Gibraltar as well as those in his UK constituency.

The British Government has not indicated any intention of changing Gibraltar's current status in the EU:

At the time of British accession, Her Majesty's Government negotiated for Gibraltar a special status within the Union, which relieves Gibraltar of many burdensome aspects - for example, it is not part of the common agricultural policy, or the common customs territory, nor does it have to levy VAT. It is therefore not a contributor to Community resources.

Gibraltar's position within the Union gives it access to the single market in services - crucial to its aspiration to develop as a financial services centre within the Community. We have also negotiated for Gibraltar an impressive package of EU structural funds. Between 1994-96 Gibraltar is due to receive some £8 million. That funding is well above the UK average, which takes careful account of the territory's distinct needs and problems. This is a mark of our commitment to securing for Gibraltar the maximum possible benefits from its position within the European Union.<sup>65</sup>

### C. EC Law in Gibraltar

EC laws apply in Gibraltar with the exception of certain customs and tax provisions and the CAP. As the Lord Trefgarne pointed out in the Lords debate on *Gibraltar: Benefits of EC Membership*:<sup>66</sup>

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<sup>64</sup> *Gibraltar: its status and relationship with the European Community*, EP Directorate General for Research and Documentation, 85/04/091 - EN, 2 May 1985.

<sup>65</sup> Rt Hon Alastair Goodlad, *HC Deb*, 20 December 1994, c1536.

<sup>66</sup> *HL Deb*, 24 July 1979, cc.1898-1914.

All the other rules of the Community apply in Gibraltar and Gibraltar is part of the territory of the Community. Community regulations are given direct force by law by means of Gibraltar's European Communities ordinance; and the Gibraltar authorities have taken steps to implement all Community legislation where relevant locally.<sup>67</sup>

It has become apparent that there is a mounting backlog of EC directives that have not been implemented in Gibraltar. In December 1994, in reply to a question on the subject, Foreign Office Minister David Davis said that the backlog included "directives in the areas of financial services, money laundering, the environment and health and safety. We are addressing this problem in co-operation with the Government of Gibraltar to whom we are giving substantial support in London and Gibraltar".<sup>68</sup> This situation was also addressed by Mr Goodlad in the Gibraltar adjournment debate:

In that spirit of shared mutual interest, we have discussed with the Gibraltar Government the backlog of directives awaiting implementation in the territory. In recent months, we have identified a package of specific measures - primarily EC directives - that require implementation in Gibraltar. Implementation of those measures would amount to a major step forward for Gibraltar in addressing its backlog. That is essential, and turning a blind eye to legally enforceable obligations cannot be an option.

Many of the directives are important for reasons of good government and sound administration. They concern regulatory standards in Gibraltar's financial services centre, open tendering of Government contracts and the curbing of money laundering. Others are important because of the protection that needs to be extended to Gibraltarians, for example, against dangerous working practices, environmental pollution and so on. Gibraltarians should have that protection just like all other European Union citizens.<sup>69</sup>

Mr Bossano has been dissatisfied with what he has called British "criminal negligence"<sup>70</sup> over the handling of Gibraltar's interests in the EC and has said that:

Gibraltar is seeking to update the terms of the Gibraltar constitution in order to bring it into line with the realities of its relationship with the EC. This exercise is necessary simply to ensure smooth working arrangements in the day-to-day task of Government. It also opens an opportunity for dialogue and examination of the long-term future of Gibraltar which has to be addressed.<sup>71</sup>

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<sup>67</sup> *ibid*, c1909.

<sup>68</sup> *HC Deb*, 19 December 1994, c898W.

<sup>69</sup> *ibid*, c 1536.

<sup>70</sup> Reported in *The Guardian*, 22 March 1993.

<sup>71</sup> *New Europe*, Vol.5, No.6, 1992, "Gibraltar in the New Europe", J.J.Bossano.

Michael Feetham, Gibraltar's Minister for Trade, expanded on this in an interview for a *Lloyd's List* special report on Gibraltar,<sup>72</sup> saying:

In the UK's transformation of a number of EU directives, Gibraltar was often simply forgotten. Britain sat back for many years with Gibraltar remaining very much at the bottom of the tray, and all of a sudden in those areas where our government has desired to progress, questions of responsibilities came up in the grey areas between us and Britain in matters concerning the EU. This meant long drawn-out discussions that hindered our development efforts during the last two years.

For example, we had the Gibraltar Banking Ordinance in place before we became an EC member. When we entered the Community, we carried all existing legislation with us like other EC countries, therefore we became the 13th banking authority. A bank set up in Gibraltar can operate anywhere in the European Union. But ever since we started going down that particular road, we have been having problems with the UK. Similarly, we have had difficulties with the running of the Financial Services Commission.

If Britain had been looking after our interests and had not forgotten Gibraltar for so many years, all these matters would have been sorted out during the normal process, and the difficulties that we faced would not have happened. This is one of the reasons more businesses have not taken up opportunities in Gibraltar.

The various views indicate some confusion as to who is responsible for the implementation of EC law in Gibraltar. Mr Bossano identified ambiguities arising from the concept of "defined domestic matters" in the 1969 Constitution, which pre-dated the UK's EC membership, and the present situation where EC law is also part of Gibraltar's domestic law. In an article in the *New European*, Volume 5, No 6, 1992, he wrote:

Since 1973 ... the increasing body of Community law in the form of directives has meant that Gibraltar's parliament, the House of Assembly, is engaged predominantly in bringing in new legislation to give effect to Community obligations. In this, it is no different from the parliaments of the 12 Members. However the question arises as to who is responsible for the transposition of Community obligation in Gibraltar laws. Is it the United Kingdom as the responsible Member State or the elected Government as the 1969 Constitution declares? The dilemma centres around the definition of external affairs. Clearly in 1969 external affairs meant anything that was not domestic or a bilateral UK-Gibraltar issue, i.e. relations with the rest of the world. The UK takes the view that the application of Community obligations are its responsibility, though it accepts that, as the

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<sup>72</sup> 9 January 1995.

bulk of these form part of the Gibraltar Government's control of domestic matters, it is up to the elected government to introduce the necessary laws in Gibraltar.

Mr Bossano also considers that the Spanish position on EC law in Gibraltar is contradictory, since Spain argued for Spanish nationals and corporations to be granted rights under EC law (as early as 1985, before Spain had even joined the Community), yet they "argue that because they dispute British sovereignty over the stretch of land joining the Rock and Spain - where one-third of the population lives - it should not be considered to be EC territory".<sup>73</sup>

Richard Gozney<sup>74</sup> has suggested five "theoretical options" for Gibraltar to consider in its efforts to define its future relations with the EU. These are 1) maintaining the status quo; 2) a new, special status with additional selective benefits of EC membership; 3) special status in the EC as a "highly autonomous province of Spain"; 4) leaving the EU with the loss of most present entitlements and obligations (status similar to that of the Channel Islands); and 5) "full participation" in the EU.

### **D. Financial Services Laws and Implementation**

Mr Bossano maintained that Gibraltar had adopted the EC Directive on money-laundering, but that extending it to all money suspected of being linked to criminal activity, which is what the UK Government have demanded, would "place an intolerable burden of regulation on the Rock's burgeoning off-shore financial industry".<sup>75</sup>

Gozney notes:<sup>76</sup>

There is an obvious dichotomy between the delegation of the so-called defined domestic matters, including economic affairs, to the authorities on the Rock under Gibraltar's 1969 Constitution and the fear of the British Government and the financial regulatory authorities in London that if a Gibraltar-based bank or investment company were to collapse then ultimately the international community, or the European Court of Justice, could hold the metropolitan power responsible.

Gozney maintains that since the collapse of the Barlow Clowes company in Gibraltar in 1988, "and following the establishment of an independent Financial Services Commission, the mechanisms have been updated and strengthened and progress has been made in clarifying the Constitutional problems".

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<sup>73</sup> *ibid.*

<sup>74</sup> *Gibraltar and the EC: Aspects of the Relationship*, RIIA Discussion Paper 49, p.22, 1993.

<sup>75</sup> *Independent*, 19 May 1995.

<sup>76</sup> *Gibraltar and the EC: Aspects of the Relationship*, RIIA Discussion Paper 49, 1993.

In September 1994, the Foreign Secretary gave the Gibraltar Government a list of EC measures on which it had to take action to ensure good government and compliance with EC law, but only a portion of these was subsequently implemented and "insufficient progress" was reported at the end of 1994. As a result of the recent tensions over unimplemented or poorly implemented EC banking and financial services legislation, the UK Government has taken a tougher line. Bank of England and FCO officials have been sent to Gibraltar "to 'help' local officials speed up legal reforms"<sup>77</sup> and there was press speculation that the UK Government might impose direct rule from London, "a step that Gibraltar would resist".<sup>78</sup> Mr Bossano speculated that this might be done by an Order in Council to change Gibraltar law by decree, and if his government refused to comply, then the UK Government might suspend the Gibraltar Constitution of 1969. This would mean governing Gibraltar from London without recourse to its Constitution or elected Government, a situation which the Chief Minister had said (though in a different context) was inconceivable:

... I cannot for one moment imagine that the Government of the United Kingdom would even attempt to impose decisions in any area on a democratically elected Government of the people of Gibraltar.<sup>79</sup>

In an exchange in the House of Lords on 13 June, Baroness Chalker said that the imposition of direct rule from London was "pure press speculation" and that the Government "believe that Gibraltar is now taking the sensible path of introducing the legislation that is important for its own future".<sup>80</sup> According to recent reports, Mr Bossano has agreed to introduce "separate legislation to deal with the proceeds of crimes not linked to drug trafficking".<sup>81</sup> The new legislation that the Gibraltar Government intends to implement will be similar to UK provisions and, according to Mr Bossano, will exceed the requirements of EC money-laundering laws.<sup>82</sup>

## **E. The External Frontiers Convention and the Schengen Agreement**

The draft External Frontiers Convention concerns third country immigration and a common visa format and policy for crossing the EC's external borders. Negotiations on the draft convention began in 1989 and political agreement was reached in 1991. Following the entry into force of the Maastricht Treaty in November 1993 certain aspects of the draft were revised

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<sup>77</sup> *Independent*, 19 May 1995.

<sup>78</sup> *Independent*, *ibid*.

<sup>79</sup> Mr Bossano's address to the UN, 12 July 1994, A/AC. 109/PV.1433, p.9.

<sup>80</sup> *HL Deb*, 13 June 1995, c 1634.

<sup>81</sup> *Independent*, 14 June 1995.

<sup>82</sup> *El País*, 26 June 1995.

to take account of the "third pillar" provision for intergovernmental conventions on third country immigration.<sup>83</sup>

Spain has refused to agree to ratification of the convention until the question of its application to Gibraltar has been resolved. At the heart of the dispute appears to be Spain's refusal since 1991 to agree to Gibraltar being included within the territorial limits of the Union's external frontiers. Spain insists that the southernmost external frontier should be at La Linea on the southern tip of Spain. The latest draft of the Convention itself does not define the limits of the Union's territory, the Commission's view, shared by that of the UK Government, being that it is up to member states to negotiate these among themselves.<sup>84</sup> The former Home Office Minister Charles Wardle, discussing the possibility of Spanish officials operating external frontier controls inside Gibraltar, said that this would be "a significant advance on sovereignty for Spain and it would be politically impossible for Gibraltar".<sup>85</sup> The issues remain unresolved.

The Schengen Agreement, which came into force on 26 March 1995, is not an EU convention but an agreement between some EU member states which has abolished all forms of border controls between its signatory states (currently France, Germany, Spain, Portugal and the Benelux countries, with Italy, Greece and Austria to follow). The parties to the agreement check only for third country entrants at the external frontiers of the Community. On 27 March 1995, the requirements of Schengen was the reason given for a Spanish resumption of border checks by police systematically examining passports, vehicles and pedestrians entering and leaving Gibraltar. The result has been delays at the border crossing with Gibraltar. While acknowledging Spain's right to establish who are EC and who are non-EC nationals for the purpose of immigration controls, FCO Minister David Davis condemned this action in a debate on Gibraltar on 17 May:<sup>86</sup>

Spain must provide adequate resources to carry out its checks without causing undue delays to European Union citizens. That has happened elsewhere in Spain, where there are no significant delays as a result of Schengen.

Referring to the view expressed by the civil governor of Cadiz that the Gibraltar frontier is an external frontier of Europe, Mr Davis said: "That is nonsense. Gibraltar is part of the

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<sup>83</sup> Title VI, *Provisions on Co-operation in the Fields of Justice and Home Affairs*, Article K3 (2)(c) in particular. The draft convention was considered by the European Legislation Select Committee, 29th Report, HC 385, 1993/94.

<sup>84</sup> For further comment, see Memorandum by Richard Plender, QC,LLD, in evidence to the Lords Select Committee on the European Communities, 14th Report, *Visas and Control of External Borders of the Member States*, HL 78, 1993/94.

<sup>85</sup> Charles Wardle, Select Committee on European Community Legislation, 29th Report, HC 385, 1993/94.

<sup>86</sup> *HC Deb*, 17 May 1995, c.305.

European Union".<sup>87</sup> He regarded the civil governor's prediction that there would be significant delays at the border over the Easter period as implying that "Spain would knowingly understaff the Gibraltar border posts".<sup>88</sup> During the course of the debate, Andrew Mackinlay drew attention to the headline in *El País*, 15 May 1995, which stated that "Spain was to put sanctions on Gibraltar for not helping in the struggle against contraband"<sup>89</sup> (this referred to Spanish accusations that Britain was not co-operating in efforts to stop drug and tobacco-smuggling via Gibraltar, see above). It was also suggested that the Spanish action constituted revenge for British support for the Canadian fisherman rather than their EU partner Spain in the dispute in March/April over fishing rights in the north Atlantic. *El País* continued:

The British betrayal of Spain during the so-called *turbot war* has contributed to a climate favourable to the adoption of unilateral sanctions. In mid-April, when Brussels concluded the fishing agreement with Canada, Solana warned the United Kingdom that it would pay for its lack of solidarity. The Foreign Affairs Ministry gave assurances, however, that the Gibraltar measures have no connection with the attitude of London during the conflict.

The British Government has raised the matter with the Spanish Foreign Minister Mr Solana and has also approached the Schengen Secretariat, other Schengen parties and the European Commission.<sup>90</sup> The Commission also intends to examine the legality of the Spanish requirement (since the 1980s) to check passports in La Verja for those entering and leaving Gibraltar.<sup>91</sup>

## IX Comparison of Gibraltar with Small European States

Citizens of Gibraltar are citizens of the European Community/European Union, as are the citizens of the French Overseas Departments (Martinique, French Guiana, Guadeloupe and Réunion) and the Territorial Collectivities (St Pierre et Miquelon and Mayotte), which are part of metropolitan France. Unlike Gibraltar, the latter, together with the French Overseas Territories (French Polynesia, New Caledonia and Wallis and Futuna Islands), are represented in the European Parliament. Under France's PR system, they currently have one MEP, Blaise Aldo (RPR) from Guadeloupe.

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<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*, c.306.

<sup>89</sup> *ibid.*, c302-3.

<sup>90</sup> Douglas Hurd, *HC Deb*, 7 June 1995, c204.

<sup>91</sup> *El País*, 19 May 1995.

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It is difficult to draw exact parallels with small European states such as Liechtenstein, Monaco, Andorra and San Marino, although all four, like Gibraltar, are linked linguistically and geographically with larger European states which have played some part in their history and development. In each case, the relationship with the EC is different. Liechtenstein is a sovereign state and not connected with the Community, whereas the other three all have some kind of associate status with the EC, by being part of the French Franc Area, for example, or by virtue of trade agreements or customs union with the EC.

Monaco's Prime Minister is a French civil servant selected by the reigning Prince (Rainier III), and although a sovereign state, Monaco is under French protection. San Marino is also a sovereign state but has a customs union with Italy, with whom it has ratified a friendship and co-operation treaty. Andorra has the most confusing status. Although a sovereign entity and a member of the UN, it has been ruled jointly by France and Spain for centuries. A trade agreement and customs union between Andorra and the EC took effect in July 1991 as a result of negotiations following Spain's accession to the EC in 1986.

None of these states has membership of the EC/EU and none is represented in the European institutions, although their monetary links with the Community have been included in Declarations in the Treaty of Rome and the Maastricht Treaty on European Union. The Maastricht Treaty also contains a Declaration on the Nationality of a Member State, which states that this "shall be settled solely by reference to the national law of the Member State concerned".

The European Parliament drew up a report in 1989 "on the rights of citizens of small European States and Territories",<sup>92</sup> in which it called for "the rights of European citizens" (in the context of European Union) to be applicable on a reciprocal basis to the citizens of these mini-states "by means of special arrangements". Concluding, the report:

Calls on its appropriate committee to investigate ways in which the citizens of these states and areas may be involved in the development of the Community, with the same rights and obligations as the citizens of the member states of the European Community.

It is not clear to what extent this would be realisable, although clearly, with small states such as Malta and Cyprus applying to become members of the EU, there will have to be some consideration of the status and role of small populations in the Union.

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<sup>92</sup> EP Doc. A 86/89, 20 April 1989; Rapporteur: Francesco Compasso.

## IX Conclusion

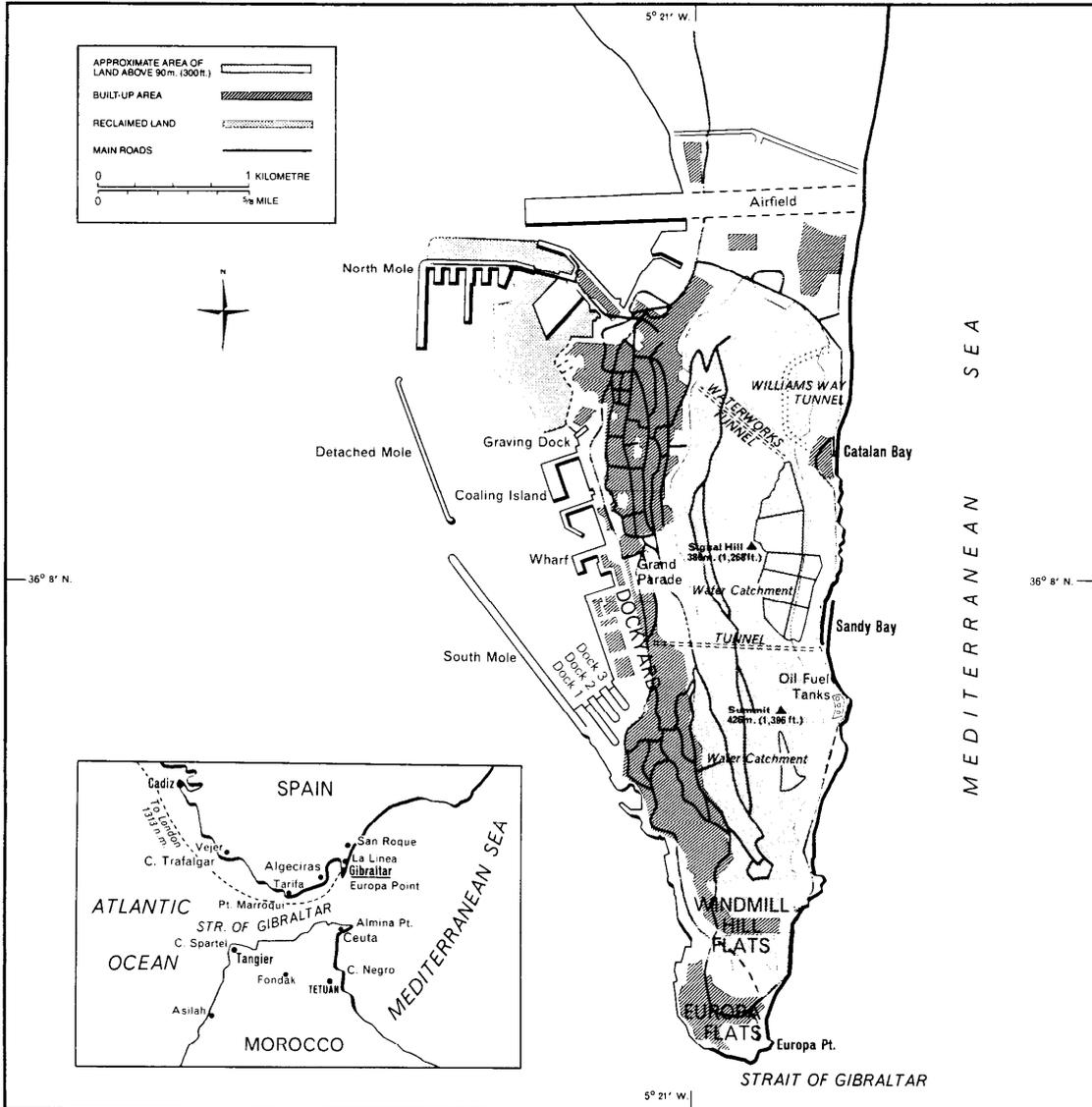
None of the European micro-states described above presents an exact parallel with Gibraltar. The most obvious differences are:

1. The other micro-states all have their origins in forms of local sovereignty which were common in Europe before the rise of modern nation states. None of them was ever a 'colony' in the way that Gibraltar has been for most of its history.
2. None of the other states is the subject of a territorial dispute between member states of the EU.
3. Although the other micro-states rely on a range of past treaties and understandings to govern their relations with neighbouring states, these arrangements do not directly limit each territory's capacity for self-determination. By contrast, both Britain and Spain regard the Treaty of Utrecht as placing limits on the right of the people of Gibraltar to self-determination.

These circumstances mean that any permanent settlement of the conflict over Gibraltar's status would require the consent of three entities, Britain, Spain and Gibraltar, all with different perceptions and interests and with Spain objecting to any involvement by Gibraltar in determining its future. There have been some grounds for believing that the removal of economic and other barriers within the European Union might with time make questions about sovereignty over Gibraltar less important and less emotive. The fact that this does not seem to have happened is testimony to the durability of national-territorial attitudes (on all sides) and also perhaps to the fact that Gibraltar's future prosperity is seen by many Gibraltarians as depending precisely on its continuing to be different from and separate from Spain. It is this distinctiveness which makes Gibraltar attractive to both tourists and the financial services industry, and these are likely to be the mainstays of the local economy for the foreseeable future.

Annex I

Gibraltar



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## Annex II

### **The Treaty of Peace and Friendship between Great Britain and Spain, signed at Utrecht, 2/13 July, 1713: Extract from Article X (Translated from the Latin)**

X. The Catholic King does hereby, for Himself, His heirs and successors, yield to the Crown of Great Britain the full and intire propriety of the Town and Castle of Gibraltar, together with the port, fortifications, and forts thereunto belonging; and He gives up the said propriety, to be held and enjoyed absolutely with all manner of right for ever, without any exception or impediment whatsoever. But that abuses and frauds may be avoided by importing any kinds of goods, the Catholic King wills, and takes it to be understood, that the above-named propriety be yielded to Great Britain without any territorial jurisdiction, and without any open communication by land with the country round about. Yet whereas the communication by sea with the coast of Spain may not at all times be safe or open, and thereby it may happen that the garrison, and other inhabitants of Gibraltar may be brought to great straits; and as it is the intention of the Catholic King, only that fraudulent importations of goods should, as is above said, be hindered by an inland communication, it is therefore provided that in such cases it may be lawful to purchase, for ready money, in the neighbouring territories of Spain, provisions, and other things necessary for the use of the garrison the inhabitants and the ships which lie in the harbour. But if any goods be found imported by Gibraltar, either by way of barter for purchasing revisions, or under any other pretence, the same shall be confiscated, and complaint being made thereof, those persons who have acted contrary to the faith of this Treaty shall be severely punished. And Her Britannic Majesty, at the request of the Catholic King, does consent and agree that no leave shall be given under any pretence whatsoever either to Jews or Moors, to reside or have their dwellings in the said town of Gibraltar: and that no refuge or shelter shall be allowed to any Moorish ships of war in the harbour of the said town, whereby the communication between Spain and Ceuta may be obstructed or the coasts of Spain be infested by the excursions of the Moors. But whereas Treaties of friendship, and a liberty and intercourse of commerce are between the British and certain territories situate on the coast of Africa, it is always to be understood that the British subjects cannot refuse the Moors and their ships entry into the port of Gibraltar purely upon the account of merchandising. Her Majesty the Queen of Great Britain does further promise that the free exercise of their religion shall be indulged to the Roman Catholic inhabitants of the aforesaid town. And in case it shall hereafter seem meet to the Crown of Great Britain to grant, sell, or by any means to alienate therefrom the propriety of the said town of Gibraltar, it is hereby agreed and concluded, that the Preference of having the same shall always be given to the Crown of Spain before any others.

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