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Gibraltar, the United Kingdom and Spain

This paper looks at some of the recent issues and developments in the UK, Spain and the European Union that have had an impact on Gibraltar. These include recent Spanish sovereignty proposals, Gibraltar's constitutional status, defence matters and efforts to combat drug-trafficking. The background to the sovereignty dispute is not discussed in any detail here but can be found in Library Research Paper 95/80, *Gibraltar*, 27 June 1995.

Vaughne Miller

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I Summary

Over the last two years elections in Gibraltar, Spain and the UK have all resulted in a change of the governing party. In Gibraltar, the left gave way to a more moderate Social Democrat party; in the UK, the right gave way to the left, and in Spain the left gave way to the right. All three changes may have an effect on the future of Gibraltar, aspects of which are discussed in this paper.

The problems caused by border controls by the Spanish and of drug-smuggling via Gibraltar have continued to provoke discussion and controversy, with the UK Government accusing the Spanish government of obstructive behaviour, and the Spanish accusing the British of failing to provide adequate policing to combat trafficking. A critical point was reached in 1997 when the Spanish government threatened to withdraw recognition of locally-issued Gibraltar passports, although this was later retracted.

The sovereignty issue continues to hinder constructive relations among the three parties and during the course of 1997 the Spanish government made two new sovereignty proposals for Gibraltar, both of which were rejected by the UK and Gibraltar governments. The Chief Minister of Gibraltar, Peter Caruana, has set out his views on sovereignty, which do not accord with the views of the Spanish government but which the British Government has agreed to keep under consideration.

As Gibraltar's defence role declines, its role as an off-shore financial centre has gained in importance and the Gibraltar Government is anxious to participate fully in the European Union and to enhance prospects in this area. In this context certain provisions of the Amsterdam Treaty signed in October 1997, particularly those governing the Schengen Agreement, have been of concern to the Gibraltar Government. There has also been renewed pressure on the UK Government to find a way of allowing Gibraltarians to vote in and stand for elections to the European Parliament.

These and other issues concerning Gibraltar are considered in this paper, and an indication of the level of UK parliamentary interest in Gibraltar is given in the Appendix.

II Political Developments: Spanish and Gibraltarian Elections

A. Spanish Elections

In the Spanish general election in March 1996 the Socialist government of Felipe Gonzalez lost to the conservative Popular Party (PP) of José-Maria Aznar. The PP failed to win an overall majority, however, and had to form an alliance with Basque and Catalan nationalists. The PP had to make concessions to these parties, mainly with regard to further devolution of powers to the regional assemblies, in return for their support for stringent budget proposals. Commentators suggested that Mr Aznar could not afford to appear soft on the Gibraltar sovereignty issue as well. Thus, any hopes of breaking the stalemate in discussions on Gibraltar's future appeared to be in doubt.

B. Gibraltar Elections

Gibraltarians voted in general elections on 16 May 1996. The Gibraltar Socialist Party of Joe Bossano, which had been in power since 1988, lost to the Social Democrats, led by Peter Caruana. It was reported that voters had been concerned on the one hand about increasing tensions with the UK Government over calls for decolonisation from the uncompromising Bossano Government, and on the other hand that Mr Caruana might be too conciliatory towards the Spanish. The Caruana election platform included pledges to improve relations with Britain and not to give way to Spain on sovereignty, and to clamp down on the remaining drug smugglers operating via Gibraltar.

The results were as follows:

Gibraltar Social Democrats	52.2%
Gibraltar Socialist Labour Party	42.2% (73% in 1992)
National Party	4.6%
Independent	0.16%
.....	
Eligible voters	18,400
Turnout	88%

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In the 15-seat Gibraltar Assembly, the Social Democrats now have 8 seats and the Labour Party 7.¹ On taking office the new Chief Minister, Peter Caruana, said that he would try to improve links between Gibraltar and Spain but that the issue of sovereignty remained non-negotiable. The press speculated that Mr Bossano's defeat was probably favourable for relations with Spain. The *Daily Telegraph* reported on 18 May 1996 that:

There was a degree of satisfaction in both London and Madrid at the defeat of Mr Bossano, whose policies of non-co-operation with Spain and years of tolerance of drug smuggling had led to direct confrontation.

Mr Bossano had promised to seek decolonisation and that the Rock would have "free association within the United Kingdom", similar to that of the Isle of Man, by the turn of the century.

London has already ruled out the association move as marking a dangerous step towards independence.

The *Guardian* suggested that privately both British and Spanish officials were relieved that Mr Bossano had been defeated and that "a key obstacle to progress" had been removed:

Gibraltarians have opted for good relations with Spain, electing a new government to break the existing impasse and deliver economic prosperity while maintaining ties with Britain.²

¹ The winning party always has eight seats in the House of Assembly and the opposition parties the remaining seven.

² *Guardian*, 18 May 1996.

III The Drug-Smuggling Problem

The Spanish government has accused the Gibraltar Government of turning a blind eye to drug and tobacco smugglers, known as the 'Winston boys', who operate in speedboats across the strait between Morocco and Spain, using Gibraltar as a base. The eventual banning of speedboats by Mr Bossano under pressure from the UK Government had provoked riots of an unprecedented nature in 1995 when the smugglers took to the streets. Fears had been expressed that Bossano's defeat in the Gibraltar elections in May 1996 might result in a backlash from the 'Winston boys', who believed Bossano would be less harsh on smugglers than Caruana. In the event there were no riots, but the 'boys' seized the opportunity to make several runs across the strait before Mr Caruana's clampdown came into effect.³

During 1996 Spanish customs officials carried out extensive passport checks at the Gibraltar-Spanish border, ostensibly checking for smuggled contraband goods. Gibraltarians and others working in Gibraltar believed the checks were attempts to disrupt travel between Spain and the Rock. Although the British Government had tightened measures to control smuggling and money-laundering in Gibraltar, the Spanish government remained sceptical about Gibraltar's commitment to the clampdown on crime.

The issue of drug smuggling via Gibraltar remained a bone of contention, in spite of UK Government assurances that steps were being taken to stop it. The British Government and the Gibraltarians suspected that allegations of drug smuggling by the Spanish were an excuse for Spanish border obstruction. Alberto Aza of the Spanish Embassy in London commented on the British suspicions in a letter to *The Times* on 19 April 1996:

Since current licensing procedures for speedboats were introduced in July, 10.5 tonnes of hashish have been seized by Spanish customs officials. Over this period, 51 drug-smuggling operations have been carried out by speed-boats which were thought to have been confiscated.

Those who hailed the measures introduced in July last year as the solution for this problem were wrong. Boats still remain at the disposal of smugglers.

The conspiracy theory that Spain uses the excuse of drugs trafficking to put diplomatic pressure on Gibraltar cannot be revived each time Spain demands the full commitment of Britain to solving this serious problem. Drug smugglers should not be honoured with so significant a role in the preservation of the colony's current status.

Guardian, 18 May 1996

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The Government insists that drug-smuggling has been considerably reduced as a result of Westminster and Gibraltar Government action. Mr Henderson said in January 1998:

We and the Government of Gibraltar have taken decisive action to stop drugs and tobacco smuggling using Gibraltar-based boats. Effective regulatory mechanisms, including new bodies, have been established.

The Government of Gibraltar has also introduced tough legislation to UK and EC standards on an all crimes basis to deal with money laundering. This has transformed Gibraltar's international reputation in this context. EC Commissioner Gradin, for example, said in the European Parliament last year that there are no grounds for suspecting Gibraltar of tolerating money laundering.⁴

⁴ HC Deb, 14 January 1998, c.224W.

IV Border Controls and Passports Dispute

A dispute arose at the beginning of 1997 over Gibraltar-issued identity cards. Ninety per cent of Gibraltarians are holders of full, locally-issued British passports which are valid throughout the European Union. The Spanish government threatened to withdraw recognition of the passports, claiming that they were invalid travel documents.⁵ This situation arose shortly before talks on Gibraltar were due to start in Madrid between the then Foreign Secretary, Malcolm Rifkind, and the Spanish Foreign Minister, Abel Matutes, at the end of January. While the British Government insisted that the passports were issued to a dependent territory within the EU and must therefore be recognised in line with EC laws on the freedom of movement, Spain argued that passports were not specifically included in EC legislation. Gibraltar was concerned that Spain might again close its border with the Rock, but on 22 January the Spanish foreign ministry insisted that Spain “had never contemplated in the past, nor will it ever contemplate in the future, the placing of impediments in the way of the rightful freedom of movement within the European Union of the people of Gibraltar”.⁶

The meeting of foreign ministers was not attended by the new Chief Minister, who, like his predecessor, boycotted the talks because he would not be represented as an equal participant with Spanish and British ministers. In addition to the sovereignty issue the ministers discussed the stalled agreement on the joint use of Gibraltar's airport⁷ and the co-ordination of efforts to fight drug-smuggling and crime.

⁵ In 1960 Spain and Britain agreed a visa-waiver treaty which also covered Gibraltarians with passports issued in the colony.

⁶ Press conference on 22 January 1997, reported in *The Times*, 23 January 1997.

⁷ An agreement in 1986 between Britain and Spain allowing joint use of the airport for civil aircraft has been blocked by the Gibraltar government.

V Discussions on Gibraltar's Status

During 1997 the Spanish government put forward two new sovereignty proposals to the UK Government. At the conference in February 1998 on "The Dependent Territories in the 21st Century" Mr Cook formally announced that there would be a change of name from British Dependent Territory to British Overseas Territory, a symbolic change marking a modernisation in Britain's relations with her former colonies and dependent territories.

A. The First Shared Sovereignty Proposal

In January 1997 Mr Matutes put forward a proposal for shared Anglo-Spanish sovereignty of Gibraltar, which the British Foreign Secretary rejected on the grounds that it did not have the consent of the people of Gibraltar. The British Government, he affirmed, was committed to Gibraltar's 1969 constitution, which states 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".⁸ The Spanish 'deal' involved shared sovereignty for up to 100 years followed by a hand-over of the colony to Spain. The Spanish flag would be flown alongside the Union flag and border restrictions would be lifted. The British Governor would remain but "account would have to be taken of the new Spanish position".⁹

The proposal was also rejected by Mr Caruana, who commented:

Mr Matutes' proposition is absurd. As far as the people of Gibraltar are concerned, there is simply no question of sharing sovereignty with Spain.¹⁰

In an interview with the *Times*, Mr Caruana accused the Spanish government of treating Gibraltarians with 'undisguised contempt'. He continued:

For the first time, they have had a government in Gibraltar which is conciliatory, which is itching for a constructive dialogue. We have always said that we would do anything, without prejudicing our British sovereignty, to try to persuade Spanish politicians to take a different view of Gibraltar. We are not asking them to renounce their sovereignty claims but only to put them to one side and talk. Sadly

⁸ Preamble to Gibraltar Constitution, contained in Annex I of *Gibraltar Constitution Order 1969*.

⁹ *The Times*, 29 January 1997.

¹⁰ *ibid.*

they don't seem to have any imagination.... We do not ever want to snap our links of dependency. All we want to do is to modernise our constitution, eliminating certain colonial trappings.¹¹

The Spanish newspaper *El País* quoted Mr Matutes' views on the meeting and the British rejection of the sovereignty proposal:

Relations between Spain and the United Kingdom are excellent and will continue to be so in the future. ... we are friends, we co-operate in the European union and have a good level of understanding. It is also clear that this colonial situation is anachronistic and that a solution must be found that respects the rights of the Gibraltarians.¹²

One reaction to the Government's rejection of the Spanish proposal came from Lord Thomas of Swynnerton in a letter to the *Times*:

It is ... much the best approach to the matter, recalling that Spain is a member of Nato and the European Union. A similar arrangement has existed for hundreds of years in Andorra.

The situation might be different if Gibraltar continued to play an essential part in British defence policy; but it has not done so for a long time.¹³

B. The Second Shared Sovereignty Proposal

On 10 December 1997, in talks between Mr Cook and Mr Matutes, another power-sharing proposal for Gibraltar was put forward by the Spanish Foreign Minister, modelled on Andorra's constitution with France and Spain, which nominally share sovereignty. Under the latest 'two-flag' proposal Britain would have a 99-year lease on the Rock, after which it would be ceded to Spain. Gibraltarians would be able to retain their British nationality if they wished and, according to the Spanish government, they would have more influence over their future and access to more money and special funds than they now have as a British dependency. Gibraltar's status would be comparable to that of the Basque Country or Catalonia, which enjoy a high level of autonomy from Spanish central government. Mr Caruana rejected the proposals and Mr Cook reiterated the Government's position that the wishes of the Gibraltarians would be respected in any future constitutional changes.

¹¹ *The Times*, 3 February 1997.

¹² *El País*, 30 January 1997.

¹³ *The Times*, 5 February 1997.

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Mr Matutes presented the sovereignty proposal to the Foreign Affairs Committee of the Congress of Deputies on 18 February 1998, where it received the support of all parliamentary parties. He warned that the Spanish ‘offer’ was not indefinite and that if there was deadlock in the negotiations, Spain would be in a position to ‘carry to extremes’ controls on the British colony.¹⁴ He was quoted as saying: “We are not at the stage of applying these restrictions but of demonstrating our good faith and explaining the *status* that we are offering to the Gibraltarians”.

When Britain handed Hong Kong back to China in mid-1997, the Spanish drew comparisons with Gibraltar. The *Financial Times* quoted a Spanish diplomat as saying:

Two interesting precedents have been set. Britain has handed to China a colony (Hong Kong island) that it held in perpetuity, and it has done so without consulting the population.¹⁵

There are some, limited, grounds for comparison, although the vastly different geo-political and economic situations of the two Territories make any suggestion of precedent rather tenuous. Hong Kong Island and Kowloon were, like Gibraltar, granted to Britain in perpetuity.¹⁶ The New Territories in the outlying region formed the territory for which a 99-year lease-back arrangement had been agreed, but in 1982 the Conservative Government under Mrs Thatcher opened talks with the Chinese government over the return of Hong Kong and Kowloon along with the New Territories. The people of Hong Kong did not vote on their future constitutional status in a referendum, as did the Gibraltarians, although a consultation exercise was carried out.

The British Government has insisted on the need to honour the 1713 Treaty of Utrecht and the 1969 Gibraltar Constitution, while the Spanish government insists that the Treaty is anachronistic in view of current moves towards decolonisation. By the same token the extension of decolonisation, self-determination, does not appear to be an option acceptable to the Spanish. Spain has also relied on the Treaty, however, in its argument that the original territorial boundary of the British colony, beyond which lay a no-man’s land, has been ‘occupied’ illegally by the site of the Gibraltar airport.

¹⁴ *El País*, 19 February 1998.

¹⁵ *Financial Times*, 1 July 1997.

¹⁶ Under the *Treaty of Nanking*, 1842, and *Convention of Peking*, 1860.

The 1713 Treaty has already been 'breached' in the interests of democracy and respect for human rights: it stipulated that "no leave should be given under any pretence whatsoever either to Jews or Moors, to reside or have their dwellings in the said town of Gibraltar", a requirement that has not been adhered to for some time.¹⁷

¹⁷ According to a survey in 1991, 6.9 per cent of the population were Muslim and 2.3 per cent were Jewish, *Europa World Year Book 1997*.

VI Mr Caruana's Sovereignty Policy

Soon after his election Mr Caruana signalled his intention to join the Brussels process, the 10-year-old negotiating framework which was set in motion when Spain joined the EU. Its brief was to negotiate "all aspects of the future of Gibraltar". Talks had been systematically boycotted by his predecessor who pursued a strongly nationalist policy and maintained a policy of non-co-operation with Spain. Mr Caruana is perhaps more conciliatory than his predecessor, but has argued that the Gibraltar Government should have equal status in any British negotiating team. Talks broke down in September 1996 on the subject of Gibraltar's involvement. Spain refused to accept the British formula of "two flags, three voices" because it implied an active role for Gibraltar as an independent negotiating authority. In a parliamentary answer in January 1997, the then Foreign Office Minister, David Davis, said that although the Spanish Government remained opposed to a separate Gibraltar delegation at Brussels process talks, they had made it clear that they would welcome the participation of Gibraltar's representatives as part of the British delegation.¹⁸

The Chief Minister has rejected the two Spanish sovereignty proposals. He has emphasised too that Gibraltarians do not want to break links with the UK but are interested in a new and more modern constitutional arrangement. He envisaged a new relationship which removed the remaining colonial elements and re-examined the role of the Governor. The Channel Islands and the Isle of Man are often cited as possible examples of a future settlement for Gibraltar and it has been suggested by the Gibraltar government that a transfer of responsibility for the Rock from the Foreign Office to the Home Office would help achieve this change of status from a colony to a 'home' Crown Dependency. This solution would be unlikely to meet with approval from Spain, particularly if it included the whole of the territory currently constituting Gibraltar and the airport on the, according to Spain, 'illegally occupied' isthmus. In its efforts to gain a new economic and financial status in the EU, the Gibraltar government has also been considering the advantages of joining the common customs union and introducing value added tax, from which it is exempt.

In February 1998, the Chief Minister told the Fourth Conference of the Dependent Territories Association of Gibraltar's right to self-determination under United Nations principles and international law. He said that Gibraltar, like other British Dependent Territories, wished "to continue in a close political and constitutional relationship with the United Kingdom". He continued:

But it is only natural and dignified that we should also wish to maximise our self-government and our control over our own affairs and destinies. To that end we may seek to

¹⁸ HC Deb. 24 January 1997, c764W.

reform our Constitutions so that they should reflect a modern, non-colonial constitutional relationship with the UK.

He identified the issues as follows:

The real issue ... is not the existence of a relationship that imposes mutual rights and obligations, which is increasingly the international order of the day even for so-called independent countries. It is rather how to strike a balance between those respective rights and obligations. How to balance the UK's need to be able to protect its legitimate interest in how we conduct our affairs in the Dependent Territories with our own natural aspiration to conduct our own affairs and rule our own destinies. How to ensure that the UK exercises her rights in a way which is consistent with her obligations to the Dependent Territories and with our legitimate aspirations and not just in response to her own national policy. How to ensure that the UK does not exercise her rights and powers to deny us access to legitimate and necessary economic opportunities which she may not wish to participate in herself as a matter of her own policy from time to time.

Mr Caruana also referred to the possibility of a kind of associate status for Gibraltar in the Commonwealth:

We appreciate that at present full membership of the Commonwealth is limited to sovereign independent States which we are not. But there would seem to be no reason why we should not enjoy some intermediate status with a right to attend and participate in Commonwealth events and bodies, albeit in a less than full manner. There is a precedent for this in the Commonwealth Parliamentary Association in which the Dependent Territories participate side by side with full Member States.¹⁹

¹⁹ Address by Hon Peter Caruana at "The Dependent Territories in the 21st Century" Conference, 4 February 1998.

VII The Ceuta/Melilla Comparison

Discussions of the Spanish claim to Gibraltar have often given rise to comparisons with the Moroccan claim to the Spanish North African enclaves of Ceuta and Melilla. There are certainly some parallels, although the histories are by no means identical or necessarily comparable.

Ceuta and Melilla are two Spanish possessions on the coast of Morocco some ten miles across the Straits of Gibraltar. Both are used largely for military purposes. The enclaves are constitutionally an integral part of Spain. Each has a mayor or president and civil authority is held by an official who is directly responsible to the Spanish government.

There are six areas of Spanish territory along the Moroccan coast, of which Ceuta and Melilla are the most well known. Their Spanish status is the result of the last stand-off between the Moors and the Christians and they are the sites of Spanish fortresses built in the fifteenth century to protect Spain from invasion from the south. As in Gibraltar there is an ethnic and religious mix, in this case mainly of Muslims and Christians, with smaller populations of Jews, Hindus and Gypsies. Unlike Gibraltar, there has been considerable tension and conflict between the Christian and Muslim populations, exacerbated by the introduction of the *Aliens Law* in 1985, which affected thousands of Muslims in the enclaves, particularly Melilla. Melilla has a population of around 60,000 and is largely Christian. Although much of the Arabic culture of the regions has been superseded by the Spanish, the Chelha language (the Arabic name for the Berber language, Tamazight, spoken in the Rif mountains in northern Morocco) is spoken by around 20,000 in the enclaves.

In recent times there have been sporadic protests from Rabat over the sovereignty of the enclaves, which Spain has resisted, declaring at the United Nations in 1981 that Ceuta and Melilla were integral parts of Spanish territory. In 1985 nationalist leaders of the two enclaves visited Gibraltar for talks with the then Chief Minister, Joe Bossano, in an attempt to gain support for their cause. The Muslim leader in Melilla was reported to have visited the Moroccan Minister of the Interior in 1986 and Muslims in the enclave announced that year that they wanted to establish their own administration. In response to the Melillan request the Spanish government said that it would work towards the integration of the Muslim community.

There is general agreement in Morocco among government and opposition parties that the enclaves should be returned to Moroccan sovereignty, and in 1987 King Hassan II, attempting to link the Ceuta/Melilla situation to that of Gibraltar, proposed establishing a joint commission to study the future of the enclaves. Spain did not respond and has rejected any comparison between this and the Gibraltar situation. The Moroccan government has on more than one occasion blocked the passage of goods and people across the borders between Morocco and the

enclaves, just as Spain has done with passage to the Rock. In 1988 the Moroccan government presented its claim to the Spanish territories to the UN General Assembly and this has been confirmed by King Hassan in subsequent years.

In 1991 King Juan Carlos and the then socialist Prime Minister, Felipe Gonzalez, signed a bilateral friendship and co-operation treaty with Rabat as part of a wider diplomatic initiative in the North African/Mediterranean region. It paved the way for more soft loans to Spanish companies investing in Morocco and for more Spanish aid and credit to Morocco. The treaty established regular summits between the two governments and bi-annual foreign ministers' meetings. It also incorporated a non-aggression pact which was particularly important to Spain, given the Moroccan claims to sovereignty.

In September 1994, after years of discussion and negotiation, autonomy statutes granting Ceuta and Melilla more powers of self-government were approved by the Spanish government. They were adopted in 1995, providing local assemblies and jurisdiction in areas such as public works, internal trade and tourism. The move was contested by the Moroccan government, which accused Spain of colonialism. At the UN the Moroccan Prime Minister tried to link the Ceuta/Melilla situation, not this time with Gibraltar, but with the return to Chinese sovereignty of Hong Kong and Macau. The new Moroccan government declared that recovery of the enclaves was one of its main objectives. Morocco's main opposition parties accused the Moroccan government of a weak defence of the sovereignty of the enclaves. Spain does not accept that there are parallels between its claim to Gibraltar and the Moroccan claim to Ceuta and Melilla on the grounds that the North African enclaves have long been an integral part of Spain and not a colony, thus strengthening the Spanish claim, whereas Gibraltar has never been an integral part of the UK.

VIII Gibraltar's Defence Role

A. Reduction of MOD Facilities

The contraction of MOD installations on Gibraltar began with the conversion of the Royal Naval Dockyard to a commercial dockyard in 1985 and since then most installations have been run down. In 1991 the Government announced the so-called 30/30/50 plan, under which manpower on Gibraltar would 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. Under this Plan 895 servicemen serving in Gibraltar 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 to 350-700 in 1999. The running costs would continue to be funded by the MOD but with the proposed cuts these would be reduced from £55 million in 1994/95 to £40 million in 1997/98 and to £35 million in 1999.

In 1993 the end of the Cold War prompted the MOD to commission a study into future MOD requirements for a number of areas, including Gibraltar. This looked at five core military functions for Command British Forces Gibraltar: intelligence gathering facilities, nuclear berthing facilities, access to airfield, the Gibraltar Regiment and the Headquarters and Associated Command and Control facilities. The future operation of these functions is set out in a MOD Consultative Document.²⁰ Figures for service personnel in March 1997 and in the future were set out in a parliamentary written answer by the then Minister for the Armed Forces, Hon Nicholas Soames:

Current UK force levels in Gibraltar were determined in the Review of the Gibraltar Garrison and announced by my right hon. Friend the Member for Richmond and Barnes (Mr. Henley) when Minister of State for the Armed Forces on 7 July 1994, Official Report, columns 262-63. The review identified the core activities central to our defence responsibilities there. At present, there are some 660 service personnel stationed in Gibraltar, including about 160 members of the Gibraltar Regiment. On current plans, there will be about 50 fewer personnel stationed in Gibraltar in five years' time. These projected force levels enable us fully to carry out our core tasks. They are a clear manifestation of Her Majesty's Government's continuing commitment to the people of Gibraltar. Over the same period, the cost of the Gibraltar garrison will reduce to less than £50 million per annum, compared with expected costs of some £63 million for the current financial year.²¹

²⁰ Dep/3 234, 1994.

²¹ HC Deb, 11 March 1997, c.187W.

B. Strategic Defence Review²²

The Labour Government launched a Strategic Defence Review (SDR) in May 1997, which has examined most areas of Britain's defence. The resultant SDR White Paper, the publication of which is due by June of this year, is expected to place renewed emphasis on the rapid deployment of British forces in response to crises.²³ North Africa and the Near and Middle East are widely regarded as regions of the world where such crises could occur. Gibraltar (and its facilities) provide a useful and independent forward operating base for British forces in the Mediterranean and also serve as a transit base for those en route to the Middle East and elsewhere. Service manpower at Gibraltar has perhaps already been reduced towards the minimum necessary to manage the remaining defence facilities in the colony. For these reasons, it would seem unlikely that the SDR White Paper will institute any significant changes to Britain's military presence there.

As a consequence of British defence cuts in Gibraltar, the defence input into the local economy has fallen to about 10 per cent of GDP or around £60m. This is scheduled to fall to £40m by the year 2000.²⁴

C. The NATO 'deal'

In 1996 the Spanish government announced that it wanted to become a full member of NATO's integrated military structure and negotiations reached a critical point at the NATO Defence Council summit at the end of 1997. Under NATO's planned reorganisation, Gibraltar would no longer be a NATO base and there would be a Joint Sub-Regional Command in Madrid. A parliamentary written answer by the Minister for the Armed Forces, Dr John Reid, said of the proposed new Sub-Command:

NATO's Joint Regional Sub-Commands, once implemented, will have no permanently established boundaries or areas of responsibility. Regional Commanders will be able to propose the establishment of areas of responsibility for particular Joint Sub-Regional Commands in specific contingencies or missions. Such proposals will require the approval of all NATO nations. The defence and security of Gibraltar are, and will remain, the direct responsibility of the United Kingdom.²⁵

²² This sub-section is by Tom Dodd.

²³ HL Deb 10 February 1998 c 996.

²⁴ *The Financial Times* 24 September 19/97.

²⁵ HC Deb, 18 December 1997, cc.277-8W.

And subsequently:

As part of the implementation of NATO's new command structure GIBMED, the NATO headquarters based in Gibraltar will close. The UK national headquarters in Gibraltar will continue to be available for NATO use when required, and NATO facilities will also remain based on Gibraltar. The defence and security of Gibraltar will of course remain the direct responsibility of the UK.²⁶

Negotiations stalled towards the end of 1997 when Britain and Spain failed to settle certain matters concerning access to Gibraltar. The disagreement centred on maritime and air routes to and from Gibraltar. Since 1967 Spanish governments have prohibited ships docked in Gibraltar from proceeding directly to Spanish ports. Individual clearance for all military aircraft using Gibraltar airport is also required and there have been limitations on all access routes to the airport.²⁷ These restrictions have sometimes forced planes to land elsewhere in bad weather.

Abel Matutes stated on 10 November 1997 that the Spanish government would lift its current air restrictions over Spanish air space en route to Gibraltar in exchange for joint Anglo-Spanish military administration of the airport. Both the previous and present British Governments have consistently rejected the suggestion of shared military responsibility for the airport. At the NATO summit in Madrid in July 1997 Mr Cook said that the British Government would block Spain's military integration if the access issue were not settled without compromising British sovereignty of the Rock. In his statement to the Commons on the NATO summit Tony Blair said that Gibraltar's interests would be 'fully safeguarded' if Spain were to play a greater role in NATO.²⁸

The impasse over the British and Spanish positions threatened to delay agreement by the NATO Defence Council on reform of the command structure. The Spanish government had argued that "no country has the right to export its bilateral problems to a multilateral organisation such as NATO in which decisions have to be taken unanimously".²⁹

On 2 December the British Government refrained from further blocking of progress and the Defence Council was able to authorise planning to begin on rationalising the command

²⁶ HC Deb, 12 February 1998.

²⁷ Technically, the isthmus where the airport is situated is a 'no man's land' under the terms of the 1713 Treaty. The airport was built during the Second World War and is, according to the Spanish government, on 'usurped' territory.

²⁸ Statement to the House, HC Deb, 9 July 1997, cc.937-49.

²⁹ *El País*, 11 October 1997.

structure. The approval of the planning phase was hailed as a diplomatic success for Spain in the Spanish press. The new command structure will have to be formally adopted at the December 1998 Defence Council, leaving Britain and Spain until then to reach agreement on the issues concerning Gibraltar. The UK could still veto Spanish accession to the NATO command structure if matters have not been settled to the Government's satisfaction.

IX Gibraltar and the European Union

A. Constitutional Position under the EC Treaty

Gibraltar's constitutional position within the European Community/Union is defined by Article 227(4) of the Treaty of Rome³⁰, 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.³¹

When the British Government was negotiating membership of the then European Economic Community in 1971 it made special arrangements for Gibraltar, the Channel Islands and the Isle of Man. The 1972 *Act of Accession* limited the application of the EEC Treaties to Gibraltar, with the exception of the three areas already mentioned, and 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 naturalisation in Gibraltar, or whose father was so born.³²

B. EC Law

EC law applies in Gibraltar except in the three excluded areas. The British Government, which is ultimately responsible for the application of EC law in Gibraltar, has on occasions agreed to Spanish requests for EC legislation to exclude Gibraltar in order not to prevent the adoption of proposals. The main legislative items are five measures relating to the single market in aviation, which have been agreed by the EC/EU since 1987, subject to them not applying to the Gibraltar airport.³³

³⁰ Treaty of Amsterdam, Article 299.4, p.227 Cm3780.

³¹ Article 28, Act concerning the conditions of accession and the adjustments to the Treaties, 1973.

³² *Treaties establishing the European Communities*, 1978, Annex 1, p.1297.

³³ HC Deb, 10 November 1997, c.391W.

The Gibraltar government has been accused of not implementing EC legislation as quickly or efficiently as it should, a situation which led to some speculation in 1995 that Britain would impose direct rule on the colony from London. In the event a number of civil servants were dispatched to Gibraltar to help reduce the backlog of EC legislation that had not been implemented. In his evidence to the Foreign Affairs Committee (FAC), Mr Caruana said that the large backlog would not be cleared by the end of 1997, as hoped, but that “this Government is politically committed to doing that with all due haste, that we have deployed enormous financial resources and we spend nearly £400,000 or £500,000 a year just on drafting EU Directives ...”.³⁴

C. Links with Brussels

While Anglo-Spanish talks were taking place in Madrid in January 1997, Peter Caruana was on a ‘working visit’ to Brussels for talks with the European Commission and Parliament. The Spanish press was outraged, accusing the Chief Minister of campaigning in Brussels for Gibraltar to be admitted to the EU as the sixteenth sovereign state. Alf Lomas, Labour MEP for London (North East), and the leader of the “Gibraltar in Europe Representation Group” in the European Parliament, commented on the Spanish reaction to the Brussels visit in a letter to the *Times*:

There is a constant flow of local authority representatives to Brussels. The London boroughs must have a permanent office there. In any event, Gibraltar is not a “local authority” and the Chief Minister of that country is only following the practice of his predecessors, Joe Bossano and Sir Joshua Hassan, who made frequent visits to Brussels and Strasbourg.

Whatever the present Spanish Government may say, there are as many Spanish MEPs who see nothing wrong with this and, although having their own very strong opinions about Gibraltar’s relationship with Spain, they are always cordial and friendly towards visiting Gibraltarians.

Spain should stop being so paranoiac about Gibraltar and learn to live in harmony with its neighbours.³⁵

The Gibraltar government would like to open a Gibraltar representation office in Brussels and envisages a future status within the European Union, possibly under some type of special arrangement. This would be resisted by the Spanish government which does not want Gibraltar to have any separate status within the EU.

³⁴ Foreign Affairs Committee First Report, *The Treaty of Amsterdam*, HC 305, 1997-98, p.44.

³⁵ *The Times*, 1 February 1997.

D. European Parliament Elections

1. The Situation of Gibraltar

Notwithstanding Article 227(4) of the Treaty, the British Government decided, when discussions on direct voting began in the mid-1970s, that it would not be appropriate for Gibraltar to participate in direct elections to the EP. The Government requested that an Annex excluding Gibraltar be added to the Council Act of 1976. Thus, the *Act concerning the election of the representatives of the Assembly by direct universal suffrage*³⁶ stated:

The United Kingdom will apply the provisions of this Act only in respect of the United Kingdom.

In other words, the rights granted to citizens of the Member States in this Act excluded the people of Gibraltar. In Britain the voting system for EP, as for national elections, is based on parliamentary constituencies, of which Gibraltar is not one; furthermore, Gibraltar's population of around 30,000 would be much smaller than other UK EP constituencies, the smallest of which, the Highlands and Islands, is currently around 331,000.³⁷

In the second reading of the *European Assembly Elections Bill* to authorise the EC Act, no mention was made of the exclusion of Gibraltar and other British Overseas Territories from EP elections.³⁸ In other Member States with overseas territories, such as France and Spain, these territories are represented in the EP, but their constitutional and above all territorial links with the former colonial powers are entirely different.³⁹ Many French overseas territories are constitutionally and politically part of metropolitan France and their citizens vote in national elections, even though they may live on a different continent. Gibraltar, although geographically part of Europe, is not politically integrated into the UK and its citizens do not vote in UK elections, even though they hold British passports. Gibraltar's interests are represented in the EP by British MEPs, although it has been argued that this does not constitute the direct representation to which EU citizens have been entitled since 1979. This situation has been challenged by a Gibraltarian at the European Commission of Human Rights (see below)

The desire for stronger representation in the EU has increased as Gibraltar has sought through UN and international fora a more independent voice in the international community. Since

³⁶ OJL 278, 8 October 1976. Annex II, which forms an integral part of the Act.

³⁷ The Highlands and Islands EP constituency was 299,000 in 1979.

³⁸ HC Deb, 6 July 1977, cc.1250-1382, and 7 July 1977, cc. 1436-1570.

³⁹ French overseas territories Guadeloupe and Mayotte are represented in the EP, for example. Melilla, in Spanish North Africa, and now an Autonomous Community of Spain, has a MEP.

Gibraltar is legally bound to implement most EC laws, many more of which will under the Amsterdam Treaty be decided by the co-decision procedure involving the European Parliament, its government is all the more interested in gaining direct EP election and representation rights.

David Millar, considering this matter in a European Parliament Research and Documentation paper in 1985, concluded that the situation could 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 for the UK who would represent electors in Gibraltar as well as those in his UK constituency.⁴⁰

There have been various attempts by British parliamentarians to enfranchise Gibraltarians for the purposes of EP (and Westminster) elections. This was the subject of a Private Member's Bill in July 1997 tabled by Andrew Mackinlay, which fell after the first reading on 1 July 1997.⁴¹ Recent attempts to include Gibraltar within the remit of the *European Parliamentary Elections Bill* are discussed in more detail below.

The Government has argued that Gibraltar could not simply be added to the list of UK constituencies, since it was excluded from EP elections by the 1976 Act. The only way for Gibraltar to be included as a UK constituency for EP election purposes would be by an amendment to Annex II of the 1976 EC Act, which would have to be ratified by all Member States in accordance with their constitutional requirements, as was the original Act. The UK Act implementing the EC one⁴² would also have to be amended.⁴³ The obstacle is not so much a legal as a political one. With the agreement of the Member States, the 1976 Act could be amended to include Gibraltar. The challenge would be to gain the consent of the Spanish government.

Certain amendments to the recent *European Parliamentary Elections Bill 1997/98*⁴⁴, if they had been adopted, would have altered the effect of Annex II of the 1976 Act and given rise to a

⁴⁰ *Gibraltar: its status and relationship with the European Community*, EP Directorate General for Research and Documentation, 85/04/091-EN, 2 May 1985.

⁴¹ Bill 33 1997/98, *Representation of Gibraltar at Westminster and in the European Union Bill*.

⁴² *European Assembly Elections Act 1978*.

⁴³ This process was set out in a parliamentary answer by the Minister for Europe, Doug Henderson, HC Deb, 28 November 1997, c.680W

⁴⁴ Bill 130, 1997/98.

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conflict between UK and EC law.⁴⁵ Two amendments sought to include Gibraltar as part of the UK for the purposes of the Act and two aimed at including Gibraltar with the London region as one EP constituency. The unique and anomalous situation of Gibraltar was raised on a number of occasions in the course of the debate and Members emphasised the need to remedy the ‘democratic deficit’ by enfranchising Gibraltarians, not only in EP, but also in UK elections. Christopher Gill said of the amendments:

[They] do not propose that Gibraltar should be a new constituency. Many hon. Members recognise that if that were the proposal, it would be necessary to amend the 1976 Act on Direct Elections. The amendments simply propose that Gibraltarians should be added to the electoral rolls in the new London electoral region.⁴⁶

This solution, reminiscent of Millar’s suggestion (above) was based on the opinion of Michael Llamas, who represented Denise Matthews in her complaint to the European Commission of Human Rights (see below).⁴⁷

The Bill received its Second Reading in the House of Lords on 9 April and the question of voting rights for Gibraltarians was raised again. The Minister for Constitutional Issues, Lord Williams of Mostyn, recognised that the matter was “an area of legitimate concern”, but reiterated the legal arguments against the UK Parliament legislating to amend the EC Act: “If we tried to amend it, it would not be within our domestic competence and it would be open to change at the European Court”.⁴⁸

2. The Human Rights Challenge

A challenge to the current situation has been made, not via the EU’s European Court of Justice, but via the Council of Europe’s European Commission of Human Rights. Denise Matthews, a citizen of Gibraltar, succeeded in having a complaint admitted to the Commission of Human Rights on the grounds that her rights under Article 14⁴⁹ and primarily under Article 3, Protocol 1 of the *European Convention on Human Rights* had been violated by the UK Government because she had not been entitled to vote in EP elections in June 1994. Article 3 of Protocol 1 states:

⁴⁵ The group of amendments concerning Gibraltar was rejected by 315 votes to 183.

⁴⁶ HC Deb, 24 February 1998, c.201.

⁴⁷ *Matthews v. UK*. Application No. 24833/94.

⁴⁸ HL Deb, 9 April 1998, c.900.

⁴⁹ “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

The Commission of Human Rights declared her case admissible on 16 April 1996 and its report was adopted on 29 October 1997. Ms Matthews' arguments concerning the Protocol rested on the presumption that since the entry into force of the Treaty on European Union in 1993 the EP had had powers that gave it the status of a 'legislature' for the purposes of Article 3, Protocol 1. In her opinion, the UK Government had been under no obligation to exclude Gibraltar from the 1976 Act; and the Act had been signed by the Member States and not by an EU body. From the latter premise she drew the conclusion that the Act was an ordinary international treaty for which the UK Government alone was responsible, and not an Act of the Community.

The counter-arguments put forward by the Government were that the 1976 Act fell within the European Community legal order and was not one for which the UK could be held responsible under the Council of Europe Convention. Thus, the Commission of Human Rights was not entitled to examine any consequences of it. Furthermore, the Annex to the Act was an integral part of the Act and could not be changed unilaterally by Britain. Neither did they accept that the EP became a legislature by virtue of the new powers granted to it by the TEU, since the EP had been granted no more than a power of veto in certain, limited circumstances. The EP could neither initiate nor pass legislation on its own⁵⁰. Finally, 'legislature' under the Convention was intended to refer to national legislatures and not to the EP, which is an institution of a non-contracting party. The Government also drew attention to the simple majority voting system in the UK and maintained that it would be inconsistent with this system to include Gibraltar in a domestic constituency. It would be much smaller than the average EP constituency (about 720,000) and also too small to have an MEP in its own right.⁵¹

Although the Commission ruled by 11 votes to 6 that there had not been a violation of Article 14 or Article 3 of the Protocol, the opinions of the six dissenting judges offer some interesting legal arguments. They generally support the opinion of Mr Llamas (quoted by Mr Gill in the Commons debate) that the Act on direct elections to the EP was applicable to Gibraltar by virtue of Article 227(4) of the Treaty and because for EC purposes, Gibraltar was considered to be an integral part of the Member State, the UK.⁵² Llamas suggested that it might be done in two ways, either:

⁵⁰ Under Article 138b of the Treaty the EP may only request the European Commission to submit a proposal on a matter on which it considers a Community Act is required.

⁵¹ Based on summary from *Human Rights Case Digest*, Vol. VII, No.7, July 1996.

⁵² HC Deb, 24 February 1998, c.202.

by the integration of the Gibraltarian vote in the vote of European Parliament constituency in the United Kingdom [or] by the grant of a European Parliament constituency seat to the territory of Gibraltar. ... In the former case, the United Kingdom can ... act unilaterally whereas in the latter case it cannot do so.... It is possible for the Gibraltarian vote to be integrated into the vote of a European Parliamentary constituency in the United Kingdom. This solution would maintain the exclusion of the territory of Gibraltar from the Act on Direct Elections, as interpreted by the United Kingdom, but would allow the citizens of the European Union who reside in Gibraltar to exercise the rights protected under Article 3 of Protocol 1. Since this vote would be expressed in the context of a European Parliament constituency in the United Kingdom there is no need to amend Annex II. The problem would be solved internally and unilaterally by the United Kingdom.⁵³

The dissenters were not quite as radical as to how Gibraltar might be included:

The United Kingdom clearly could not unilaterally amend the provisions of Annex II to the Act on Direct Elections; nor are we able to accept the Applicant's argument that the application of the Act on Direct Elections could be extended to Gibraltar by the United Kingdom without the need for any amendment of Annex II. However, we consider that the United Kingdom could, unilaterally and consistently with its international treaty obligations, extend the right of franchise to Gibraltar by integrating the Gibraltarian vote in the vote of a European Parliamentary constituency in the United Kingdom.⁵⁴

One of the dissenters, H.G.Schermer, concluded that:

The United Kingdom was not entitled to transfer legislative powers to the Community without protecting the rights of Article 3 of Protocol No. 1, also for the citizens of Gibraltar.⁵⁵

This raised the question of the extent to which the human rights Article, Article F of the TEU,⁵⁶ could be relied upon by EU citizens at the Council of Europe bodies.

The case will now proceed to the European Court of Human Rights and any further action will lie with the Government and the EU Member States. The present Government is keeping an open mind on the issue. The Minister for Europe said in reply to a question on 9 December 1997 that the Government would "keep policy under review in the light of those

⁵³ *Ibid*, c.202.

⁵⁴ *Denise Matthews against the United Kingdom*, Report of the Commission, 29 October 1997.

⁵⁵ *Ibid*.

⁵⁶ "The Union shall respect fundamental human rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... as general principles of EC law".

facts” (the requirement to amend the 1976 Act).⁵⁷ It is unlikely, however, that the Spanish Government would ratify unconditionally any instrument that gave Gibraltar voting or representation rights.

E. The Treaty of Amsterdam and Border Control Measures

1. Background

For nearly a decade the status of Gibraltar has been the obstacle to agreement among the Member States on a convention to control third country immigration into the EC/EU, a common visa format and a policy for crossing the EC/EU’s external frontiers.

The former Trevi group of interior, justice and immigration ministers negotiated the *Draft External Borders Convention* in 1989 and reached political agreement in 1991. Following the entry into force of the TEU in 1993, certain aspects of the draft were revised to take account of the new ‘third pillar’ provisions for intergovernmental conventions in third country immigration. The then Spanish socialist government of Felipe Gonzalez refused to ratify the draft because of its application to Gibraltar and insisted that the southernmost external frontier of the Union should be at La Linea on the southern tip of Spain. The draft did not define the outer limits of the Union and the Commission’s view, shared by the then British Government, was that this was a matter to be negotiated by the Member States. Recognition of Gibraltar as an EU frontier would give Gibraltar a status unacceptable to the Spanish government. Because of the Spanish objection, the draft convention has not come into force and has to a certain extent been superseded by Schengen and other EU developments.

2. The 1996-97 Intergovernmental Conference

The EU Intergovernmental Conference (IGC) which opened in March 1996 and concluded in June 1997 approved amendments to the EU Treaties. The new Treaty, known as the *Amsterdam Treaty*, was signed on 2 October 1997 in Amsterdam. It will come into effect as and when it has been ratified by all the Member States in accordance with their constitutional requirements.⁵⁸

⁵⁷ HC Deb, 9.12.97, c.499W.

⁵⁸ Ratification is not likely to be completed in all Member States until 1999.

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In reply to a question as to whether the Gibraltar Government would be consulted before matters of interest to Gibraltar were considered in any European Council, Doug Henderson replied: "It is already the policy of Her Majesty's Government to consult the Government of Gibraltar on issues of interest to Gibraltar in the EU".⁵⁹ Asked about the consequences for Gibraltar of the Amsterdam summit, Mr Henderson said: "I believe that the agreement reached at Amsterdam fully protects UK and Gibraltar's interests."⁶⁰ The Government of Gibraltar thought otherwise.

In evidence to the Foreign Affairs Committee (FAC) in November 1997, Peter Caruana expressed concern that the Gibraltar Government had not been consulted or advised about any of the IGC negotiations which would have "an actual or potential" effect on Gibraltar.⁶¹ He regretted the lack of any "meaningful process of consultation" and told the FAC that:

... whatever Gibraltar has been able to do for itself and to input into the Amsterdam Treaty has been the result of the deployment of our own resources, principally our lawyers in Brussels to obtain for us copies of the drafts of the Treaty as and when they became public. I think it is true to say that had that not occurred, had Gibraltar not mobilised its own resources and its own efforts, we would not have found and spotted many of the points we did, some of which were actually satisfactorily resolved by her Majesty's Government as a result of us pointing them out to them.⁶²

3. The Schengen Agreement

In his evidence to the FAC the Chief Minister identified incorporation of the Schengen Agreement into the Community 'pillar' in the Amsterdam Treaty as one of the main areas of concern. Schengen was in fact an earlier agreement than the external frontiers draft. Agreed in 1985 by five Member States⁶³, the Schengen Agreement came into force in 1995 with seven participants⁶⁴. Prior to Amsterdam Schengen was not an EC treaty but an intergovernmental agreement between Member States wishing to abolish all forms of border controls between them. Within the Schengen area the agreement provided for a harmonised visa policy and rules for the determination of asylum applications, police and customs co-operation and a computerised information exchange system. By mid-1997 there were thirteen full Schengen members, all the EU Member States except for the UK and Ireland, with associate status for Norway and Iceland, which are members of the European Economic Area (EEA).

⁵⁹ HC Deb, 15 July 1997, cc.93-4.

⁶⁰ HC Deb, 8 July 1997, c.421W.

⁶¹ FAC Report, *The Treaty of Amsterdam*, HC 305, 1997-98.

⁶² *Ibid*, p. 38.

⁶³ France, Germany, Belgium, Netherlands, Luxembourg.

⁶⁴ The original five with Spain and Portugal.

Should the British Government decide to join the Schengen *Acquis*⁶⁵ in the future, the unanimity requirement in the Amsterdam Treaty could mean that entry by Britain, and by extension Gibraltar, would be blocked by the Spanish government, unless Britain agreed to exclude Gibraltar. This could create further obstacles to free movement to and from the Rock.

4. Attitudes Towards Schengen: Westminster and Gibraltar

The Conservative Government did not intend to join Schengen because of its incompatibility with the UK's policy on the need to retain border controls. The Labour Government has expressed similar views and has said that it has no intention of joining. The Foreign Secretary said in an exchange in the Commons in November 1997:

... there is no intention on the part of Her Majesty's Government to enter the Schengen acquis. On the contrary, the main gain from the Amsterdam treaty for Britain is that it has achieved a clear legal foundation for our border controls, which was never obtained by the Conservative party in 18 years.⁶⁶

The Gibraltar Government, on the other hand, is for economic reasons extremely keen to join Schengen and be free of both official and unofficial border controls.

The Schengen *Acquis* and provisions to build on them were included in the Amsterdam Treaty as a *Protocol Integrating the Schengen Acquis into the Framework of the European Union*⁶⁷. The UK will not be a party to the Schengen *Acquis*, as provided by Article 4 of the Protocol, but "may at any time request to take part in some or all of the provisions of this acquis"⁶⁸. Shortly after the Amsterdam summit, the Europe Minister was asked what arrangements had been made for Gibraltar to enter the Schengen area if it decided that it was in its interest to do so, to which the minister replied that it was "for the United Kingdom to decide whether or not to apply to join in any, or all, of the Schengen arrangements".⁶⁹ Since Gibraltar is part of the UK for most EU purposes, there could be no question of unilateral decision-making in this area by the Gibraltar government.

⁶⁵ The *Acquis* is the body of law already made under the Schengen Agreement to which the participating states are bound.

⁶⁶ HC Deb, 25 November 1997, c.754.

⁶⁷ P.76, Cm 3780.

⁶⁸ P.78, Cm 3780.

⁶⁹ HC Deb, 30 June 1997, c.38W.

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The voting procedure for opting into the Schengen *Acquis* has been of concern to the Gibraltar Government. In his reply to a parliamentary question on 2 December 1997 Mr Henderson said that unanimity would be required if the UK and Ireland were to apply to take part in a measure within the existing Schengen *Acquis*⁷⁰. This remains subject to the current intergovernmental voting procedure of unanimity, which means that Spain could block British participation. The Amsterdam Treaty Declaration on Article 4 of the Protocol implies that political pressure would be put on any Member State attempting to block such a move⁷¹ (see below).

Measures which build on the Schengen *Acquis* would be subject to different procedures under Article 5 of the Protocol. In this case, the authorisation required for using the Community mechanisms to participate in closer co-operation in measures to 'build on' Schengen would be granted by the Council by Qualified Majority Voting (QMV) under Article 11 of Amsterdam,⁷² unless a Member objected for reasons of national policy. In that case the Council may by QMV ask the European Council to decide by unanimity (Article 11(2), with the possibility of veto).

In evidence to the FAC, Mr Cook discussed the Treaty Protocols and Declaration in relation to the possibility of future British membership of Schengen and insisted that there was nothing in the Treaty:

... that alters the status of Gibraltar in relation to Spain or alters the right of Spain to impose frontier controls on Gibraltar ... Spain has no power to impose border controls on Gibraltar as a result of this Treaty. Secondly, in the event that we should choose to join Schengen, then we do have the protection both of the Commission opinion and the requirement on Spain and every other country to use their best efforts to enable us to do so. At the moment we have no plans to do so, ... , and I do not actually envisage that changing in the foreseeable future.⁷³

There were reports of a 'misunderstanding' at the time of finalising the Amsterdam provisions on Schengen which have added some confusion to the nature of the opt-in arrangements. Mr Cook denied that there had been a 'cock-up' during the Amsterdam Treaty negotiations and described how the unanimity requirement had arisen in a parliamentary reply on 25 November 1997:

⁷⁰ HC Deb, 2.12.97, c.123W.

⁷¹ P.107, Cm 3780.

⁷² P.137, Cm 3780.

⁷³ Foreign Affairs Committee Report, *The Treaty of Amsterdam*, Minutes of Evidence, 4.11.97, HC 305.

Spain did propose an amendment to have the effect of bringing in unanimity for UK participation in the Schengen acquis. I did challenge it and Spain withdrew that amendment. There was an agreement that there should be an amendment only if it was submitted in writing by Spain. No such amendment was submitted during the hearings of the Amsterdam negotiations.

The subsequent change to the treaty was a bilateral agreement between Spain and the Dutch presidency. When, a week later, we received the text that contained that change, we obtained the declaration to which I have referred, but I repeat: there is no intention on the part of Her Majesty's Government to enter the Schengen acquis.⁷⁴

The position of Schengen in the Amsterdam Treaty remains somewhat confusing and has been described as “glued in an ungainly manner onto both the first and third pillars”⁷⁵ (i.e. in both the Community and the intergovernmental pillars). According to Mr Cook, Spain had not deposited its proposal in writing with the Presidency to be agreed by all Member States and yet it was written into the Treaty, allegedly as a result of a bi-lateral agreement between the Spanish government and the Presidency.

Since the Amsterdam summit some Members of Parliament have pursued through parliamentary questions the matter of the British Government's acceptance of the unanimity requirement⁷⁶, including a request for the Council General Secretariat's tapes of the Amsterdam negotiations.⁷⁷ The tapes, it was said, were for the internal use of the General Secretariat and not available to the Member States. The Government has maintained the position that the Spanish amendment had not been circulated and that the changes to the draft “reflected an understanding between the Dutch Presidency and Spain”.⁷⁸ The circumstances surrounding the amendment remain somewhat unclear and the Government has not commented further on the precise timing or documenting of the process other than to say that they learnt of the change when they received the revised Treaty text⁷⁹ on 19 June 1997, that the Presidency thought this was an accurate reflection of discussions at the summit and that the text had been deposited in the Libraries of the House at the time.⁸⁰

The Treaty Declarations 4 and 5 secured by Mr Cook provide for the Commission to be consulted if the UK should want to join Schengen, and for the Member States to “make their best efforts” to allow Britain and Ireland to join in some or all of the Schengen *Acquis*.⁸¹

⁷⁴ HC Deb, 25 November 1997, C.754.

⁷⁵ *The Treaty of Amsterdam: text and commentary*, Federal Trust, edited by Andrew Duff, 1997.

⁷⁶ Until 3 March, 27 questions had been asked about Schengen which related to the voting issue.

⁷⁷ HC Deb, 3 March 1998, c.512W.

⁷⁸ HC Deb, 6 February 1998, c.844W.

⁷⁹ CONF 4001/97).

⁸⁰ HC Deb, 21 January 1998, c.540W.

⁸¹ P. 106-7, Cm 3780.

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Although Declarations do not have the legal weight of Protocols, their political weight might be sufficient for Spain to refrain from obstructing British entry into the Schengen *Acquis*. History does not support this view, however, as Mr Caruana pointed out in his statement to the FAC:

The Foreign and Commonwealth Office believe that the ... Declaration would make it embarrassing and difficult for Spain to deploy the veto. In my opinion, this view is misconceived. Spain has shown no embarrassment at paralysing the Community to protect her position over Gibraltar, i.e., Air Liberalisation, External Frontiers Convention etc. And it is not for nothing that Spain slipped the veto language back into the text during the Summit and then threatened to block signature of all the Treaty of Amsterdam if the non veto language were reinstated.

Furthermore, the Spanish press announced the inclusion of the veto language as a massive victory in protecting Spain's position over Gibraltar.⁸²

Gibraltar's concerns and interests have also been raised in the debate on the *European Communities (Amendment) Bill* to allow the Amsterdam Treaty to be implemented in the UK. Andrew Mackinlay was critical of the Foreign and Commonwealth Office for not consulting or informing the Gibraltar Government of matters under discussion at the IGC which might be relevant to Gibraltar and continued:

It has now become endemic in Foreign Office thinking – not the Ministers – that the people of Gibraltar are just also-rans and do not need to be worried about. This is wrong. It is time that we stood up and said that that cannot be tolerated. Other territories of other countries are taken into account by their negotiators. That is necessary for Gibraltar too.⁸³

When the Commons Committee stage of the Bill resumed on 15 January 1998, it considered two New Clauses stipulating that no steps should be taken by the Government to opt in to Schengen under Protocol 4 unless such moves were extended to include Gibraltar. New Clause 1 required that the UK Government should not opt in to any Schengen provisions without first asking Parliament, and without providing a statement that its request included Gibraltar, and that it would not be pursued “unless accepted by the Council without qualification”. New Clause 28 required a Resolution in each House “considering the voting arrangements for such opt-in for the people of Gibraltar” if the Government decided to join Schengen border controls arrangements under Protocol 4 of Amsterdam. The amendments provoked some interesting debate but were not adopted.

⁸² FAC Report, *The Treaty of Amsterdam*, HC 305, 1997-98.

⁸³ HC Deb, 12 November 1997, c.943.

The Bill received its Second Reading in the House of Lords on 16 February and went to a Committee of the Whole House on 12 March 1998.⁸⁴ During Second Reading Lord Moynihan raised the matter of the incorporation of the late Spanish amendment on Schengen and Lord Taverne, arguing in favour of more qualified majority voting, suggested that the “veto can be used as a bargaining point for all kinds of undesirable consequences”.⁸⁵ Lord Moynihan proposed a New Clause similar to the Commons New Clause 28 requiring that the Government should not opt in to border controls set out in Protocol 4 until each House had come to a Resolution on a Government motion “on the implications for the people of Gibraltar of the voting arrangements for such an opt-in”. This amendment has not yet been debated in Committee.

⁸⁴ HL Bill 62, 1997/98.

⁸⁵ HL Deb, 16 February 1998, c. 80.

X Conclusion

The Gibraltar government is pressing ahead with its own agenda for a viable and prosperous future in the European Union. Its efforts to become an off-shore finance centre have been encouraged by the British Government and in 1997 the DTI granted it the right to issue its own insurance 'passports'. This credential will enable insurance companies in Gibraltar to trade throughout the EU and the European Economic Area (the EU and Norway, Iceland and Liechtenstein). Banking 'passports', expected to be granted this year, will allow Gibraltar to offer banking facilities on a similar basis. Anthony Fisher, the development director of Gibraltar's financial services centre, told the *Financial Times* that the "final step will be permission to set up fund management services on the Rock and market them around the world".⁸⁶ The report concluded:

Thus, the three pillars needed to get an offshore financial centre up and running - insurance, banking and fund management - are almost in place. Gibraltar, by taking control of its own financial sector, will be able to offer low costs and a highly tax favourable package to its clients. Unlike the Channel Islands, Gibraltar will be regulating business that is in the EU and for the EU. The Rock should, in addition, be able to market considerably cheaper services than Jersey or Guernsey. Backers of the venture also point out that Gibraltar, unlike the Channel Islands will be able to import skilled personnel because its regulators will not insist on local recruitment.

The sovereignty issue appears to be no nearer a solution. The Spanish government's tactic of using Gibraltar as a bargaining chip continues to obstruct or delay certain EU proposals, although Spain also objects in principle to the UK sovereignty claim. A negotiated settlement satisfying all parties would seem to be as distant as ever, unless it can first be agreed that some of the provisions of the 1713 Treaty (which parties have relied upon selectively) might need to be amended to reflect more recent political realities such as the Gibraltar Constitution, developments in the European Union and United Nations principles on self-determination. The British Government has not ruled out changes to Gibraltar's current constitutional relationship with Britain and it remains to be seen what form this might take.

⁸⁶ *Financial Times*, 24 September 1997.

APPENDIX

British Parliamentary Interest in Gibraltar

The subject of Gibraltar has been raised in the British Parliament in relation to a number of specific issues, mainly the constitutional status of Gibraltar and the UK, its position in the European Union and NATO, its defence role and the British Government's relations with Spain.

In his chapter on "Gibraltar and the House of Commons" in *Parliament and International Relations*, Christopher Hill comments:

The problems of Gibraltar constitute only one small part of the huge range of foreign policy business which even today preoccupies British decision-makers. In its turn, foreign policy is a minority interest in both Whitehall and Westminster, where domestic business proliferates and tends to have priority. It would be reasonable, therefore, to expect that a specialised and relatively low profile issue like Gibraltar would not come to the attention of Parliament very often, or generate much expertise among MPs. A close look, however, at the practice of the last decade compels us at least to qualify this picture.⁸⁷

From the parliamentary session 1977-78 to the session 1987-88 Hill's academic study revealed a total of 876 occasions on which Gibraltar was the subject either of parliamentary questions, replies or ministerial statements in the Commons, with the highest number during this period at 150 in 1981-82. In that session, following a nationality campaign by and on behalf of Gibraltarians, the British Government gave citizens of Gibraltar the right to retain full British citizenship. In addition, negotiations for the complete opening of the border between Spain and Gibraltar were postponed as a result of the invasion of the Falkland Islands (Spain was aligned with Argentina). It is not surprising that this period of intense international and diplomatic activity involving Britain, Spain and Gibraltar gave rise to so much parliamentary activity. Interest in Gibraltar has fluctuated in recent years and interest has been sustained among a smaller core group of Members.

⁸⁷ *Parliament and International Relations*, edited by Charles Carstairs and Richard Ware, 1991.

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The total number of parliamentary questions and statements from the session 1988/89 to the session 1997/98 amounts to less than half the number in Hill's study⁸⁸, while the figures for each session in this decade have been calculated as follows⁸⁹:

1988/89	44
1989/90	18
1990/91	23 ⁹⁰
1991/92	19
1992/93	29
1993/94	19
1994/95	89 ⁹¹
1995/96	24
1996/97	17
1997/98	58 (up to 30.3.98) ⁹²

The higher level of interest in the 1994/95 session can be attributed largely to two issues: the stepping up of Spanish controls at the Gibraltar-Spain border over alleged illegal drug-smuggling activities, which caused long delays for vehicles and pedestrians; and the failure of the Gibraltar Government to implement a number of EC directives, which led to speculation about possible direct rule from Westminster. The recent surge in interest is also the result of two dominant issues: the inclusion in the EC's Amsterdam Treaty of the *Schengen Agreement* on the abolition of border controls between Member States and the unanimity requirement for the UK to opt into the agreement; and attempts to gain voting rights for Gibraltarians in

⁸⁸ 340 up to 30 March 1998. Figures in this paper have been reached in a somewhat less comprehensive study of parliamentary activity involving Gibraltar than the academic study by Hill.

⁸⁹ Source: *Hansard*.

⁹⁰ There was also an adjournment debate on Gibraltar on 15 July 1991.

⁹¹ There was also an adjournment debate on Gibraltar on 20 December 1994 and a Christmas recess motion speech on 19 December 1994.

⁹² A further 29 (up to 26 March 1998) were asked on aspects of the Schengen agreement in relation to the Amsterdam Treaty in which Gibraltar was the underlying concern. This would bring to 87 the total up to the end of March 1998.

European Parliament elections through amendments to the *European Parliamentary Elections Bill*. Both of these are considered in more detail in the section on Gibraltar and the European Union. Other matters, such as the use and status of the Gibraltar airport and UK relations with Spain, have continued to be of interest.

If there are any conclusions to be drawn from the figures, they are that Gibraltar and its future continue to occupy a firm if small place on the British foreign policy agenda, particularly in European matters. Issues relating to Gibraltar have on occasion presented the Government with the threat or the reality of being taken to one of the European Courts.⁹³ The status of Gibraltar has been the obstacle to agreement among the EU Member States on legislation and conventions. Its voice at the UN has forced British Governments at least to consider changes to its colonial status, and has also drawn attention to some of the anachronisms of treaty law in a modern international context and to the conflicting provisions of treaty and constitutional law.

⁹³ The EU Court of Justice or the Council of Europe's European Court of Human Rights, see above and also Background Paper 95/80, *Gibraltar*.