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**Gibraltar and the European Union
Brexit or not?**



**CENTRO DI RICERCA PER LE RELAZIONI INTERNAZIONALI
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GIBRALTAR AND THE EUROPEAN UNION: BREXIT OR NOT?

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FOREWORD

One of the chief aims of the Centro di Ricerca per le Relazioni Internazionali (CRRRI) is to study international affairs and to make the results available to the public. Being a Centre based in San Marino, we want to draw attention to the importance of studying international relations in their diversity. More specifically, we want to express the value of studying small states and those specific issues that have a specific interest for their international relations. The topic of Gibraltar's role in European integration is noteworthy, at least since the Treaty of Utrecht.

In world politics size has generally and correctly been connected to power. But whilst being great is always correlated with power, being small is simply viewed as a weakness. This view forgets that power is always a matter of relationships, however unequal they can be. We know that in world politics there are grading of powers. When Aquinas is trying to elaborate the very concept of the state, he meets the difficulty that states are heterogeneous. Three centuries later, in the second paragraph of his *Ragione di Stato* (1589), Giovanni Botero classifies states as follows: «some dominions are small (piccioli), others of a middle size (*mezani*), others are large (*grandi*), not absolutely but comparatively, and with respect to their neighbours». Thus, small states and their issues deserve attention both in historical and theoretical perspective. After all, they can illuminate the diversity and pluralism of international relations.

A little later Botero asks whether it is a greater task to extend or to preserve a state. His answer is that «clearly it is a greater task to preserve a state, because human affairs wax and wane as if by a law of nature, like the moon to which they are subject». Then he adds: «But how does it happen, we may ask, that those who conquer are more honoured than those who preserve? It is because the results of conquest are more obvious and more popular, they cause more stir and noise, they make an outward and have the virtue of novelty, which man so desires and enjoys» (I, 5). Notwithstanding Botero's lasting concept, international society has formally recognized the value of preserving the state of San Marino as «an exceptional testimony of the establishment of a representative democracy based on civic autonomy and self-governance, with a unique, uninterrupted continuity as the capital of an independent republic since the 13th century». In short, San Marino is considered today as «an exceptional testimony to a living cultural tradition that has persisted over the last seven hundred years».

Before this universal recognition by the United Nations, Jorri Dursma has devoted to San Marino a relevant part of his innovative book on *Fragmentation and the International Relations of Micro-States* (Cambridge University Press, 1996). That publication speaks loudly about her contribution to a better understanding of diversity and its role in international affairs. As an international scholar, she does not need presentations anymore and we are honoured to publish her contribution. CRRRI papers are designed to render a useful service to both scholars and citizens alike. I believe that Jorri Dursma devotion to the study of international relations is confirmed by the present, brilliant, analysis on Gibraltar, the European Union and the United Kingdom.

Michele Chiaruzzi

Centro di Ricerca per le Relazioni Internazionali

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ABSTRACT

On 29 March 2017, the United Kingdom (UK) sent a letter to the European Council in accordance with Article 50(2) of the Treaty on European Union to withdraw from the European Union (EU).¹ Gibraltar falls under the international sovereignty of the UK and will therefore leave the EU as well.

The European Council adopted Draft Guidelines following the UK's notification of departure on 29 March 2017 from the EU stating that: "no agreement between the EU and the United Kingdom may apply to the territory of Gibraltar without the agreement between the Kingdom of Spain and the United Kingdom."²

As Gibraltar British nationals have the *jus cogens* right of self-determination, no agreement between Spain and the UK is obliged to make the agreement with the EU valid under public international law. Only the decision of the Gibraltar British nationals has international legal value.

The UK might be out of the EU in 2019 or 2023³ and Gibraltar can have financial benefits for its residents and companies when the UK leaves the EU. The EU should conclude an agreement with the UK/Gibraltar to ensure the continued application by Gibraltar of the 4th Anti-Money Laundering Directive and EU Funding.

Considering Gibraltar's large approval of their relations with the EU and its right of self-determination, the UK and the EU can stimulate their financial growth by giving Gibraltar the trade freedoms it needs.

¹ *Statement by the European Council (Art. 50) on the UK notification* (29 March 2017).

² *European Council* (Art.50), XT 21901/17(31 March 2017), Para. 22.

³ *The Telegraph* (29 March 2017).

BACKGROUND

Gibraltar has been a Non-Self-Governing Territory of the United Kingdom since 13 July 1713, when the Kingdom of Spain and the United Kingdom signed the Treaty of Utrecht whereby, under Article X, Spain yielded to Great Britain: “the full and entire propriety of the town and castle of Gibraltar, together with the port, fortifications, and forts thereunto belonging”.⁴

Furthermore, Spain signed stating that it “gives up the said propriety to be held and enjoyed absolutely with all manner of right for ever, without any exception or impediment whatsoever”.⁵

Gibraltar has 5.8 square kilometres of hard land (Gibraltar’s Tower area) and 3 UK Sea Miles of Territorial Waters.⁶

So far the Gibraltar British nationals wish to remain a Non-Self-Governing Territory of the United Kingdom.⁷ The Gibraltar English nationals have the right of self-determination giving them the freedom to decide Gibraltar’s international legal status, because Gibraltar is a Non-Self-Governing Territory according to the UN.⁸ The International Court of Justice confirmed the right of self-determination of Non-Self-Governing Territories in its Advisory Opinion on the decision of independence of *Kosovo*, of 22 July 2010.⁹ The ICJ stated: “the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories (...)”.¹⁰ Thus, this ICJ declaration also applies to Gibraltar as a non-self-governing territory.

According to Article 74 of the Charter of the UN, all Members of the United Nations, including the EU Member States like Spain and the UK, agree that their policy “must be based on the general principle of good-neighbourliness (...)”.

The British Gibraltarians voted by referendum on 22 June 2016, to remain in the EU by 96.9% of the votes.¹¹

According to the European Parliament: “Gibraltar, one of Her Majesty's dominions that is not part of the United Kingdom but for whose external relations the United Kingdom is responsible insofar as it is a dependent territory, is part of the European Union, subject though to a number of exemptions under

⁴ Art. X, para.1 Treaty of Utrecht, Spain – Great Britain, 13. July 1713.

⁵ See n.1 above.

⁶ See Territorial Waters Jurisdiction Act 1878: <http://www.legislation.gov.uk/ukpga/Vict/41-42/73/enacted/data.pdf>, United Kingdom Hydrographic Office.

⁷ See Keith Azopardi, *Sovereignty and the Stateless Nation: Gibraltar in the Modern Legal Context* (HART Publishing, Oregon, 2009); Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995) 206-210. and Jorri Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (Cambridge University Press, 1996), pp. 48, 51-55, 79, 86 and 88.

⁸ Art. 73 UN Charter.

⁹ Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion, Advisory Opinion of 22 July 2010), Para. 79.

¹⁰ Accordance with international law of the unilateral declaration of independence in respect of *Kosovo* (Request for Advisory Opinion) Advisory Opinion of 22 July 2010, Para. 79.

¹¹ See <http://www.itv.com/.../result-gibraltar-votes-to-remain-in-the-european-union/>

the 1972 Act of Accession of the United Kingdom to the Community.”¹²

Therefore, Gibraltar’s future international legal status towards the EU can only be voted and assured by the Gibraltar people themselves, not by other States, such as Spain. The 2017 position Gibraltar’s Parliament and possible vote of all Gibraltarian nationals is essential to confirm Gibraltar’s international legal position towards all UN Member States, including the UK and Spain.

Gibraltar’s preliminary GDP in 2015/16 was estimated to be GBP 1.77 billion, an increase of GBP 0.13 billion.¹³ This was an increase of 7.5% in real terms compared to 2014/15. In 2016-2017, the principal economic activities in Gibraltar are tourism, financial services, shipping and online gaming.¹⁴

At the end of 2016, 1,358 employees (25.6%) in Gibraltar were working in the Banking, Financial and Insurance industry group.¹⁵ This includes the gaming industry or online betting in Gibraltar. As of 31 March 2017, Gibraltar joined the Schengen Border Code, making the border transfers to and from Spain quicker.¹⁶

The Anti-Money Laundering Code of Practice is ‘interpretive guidance’ to the Gibraltar gambling industry in respect of the requirements of the Act, the Gibraltar Crime (Money Laundering and Proceeds) Act, and the Fourth Anti-Money Laundering Directive.¹⁷ This code applies to all financial transactions associated with defined gambling activities undertaken under the authority of a Gibraltar gambling license. For fixed odds betting operations gaming tax is levied as from 1st April 2005 at 1% of the turnover up to GBP 42,500,000 of annual turnover with the gaming tax capped at GBP 425,000 per annum, with a minimum annual tax payable of GBP 85,000. For Internet casinos gaming tax is currently levied at 1% of the gaming yield or gross profit. The majority of persons participating in the Gibraltar online betting activities are resident in the UK.

“Gibraltar is the largest and most successful jurisdiction in the world in the provision of online gaming. Online gaming is a burgeoning part of e-commerce and Gibraltar is at the forefront of Gibraltar.”¹⁸ On 17 June 2016, there were 33 licensed operators in Gibraltar subject to Online Gambling tax 1% of turnover up to GBP 42,500,000,- annually.¹⁹

The people of Gibraltar have expressed their wish to remain under British sovereignty and the Gibraltar Government will not enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another State against their wishes.”²⁰

According to the Gibraltar’s Deputy Chief Minister Dr. Joseph Garcia, “[t]he people of Gibraltar (...)

¹² European Parliament, *Parliamentarian Questions*, 12 December 2001.

¹³ *The Chief Ministers Budget Address 2016*, HM Government of Gibraltar, para.76.

¹⁴ See <http://www.ey.com/gi>

¹⁵ Gibraltar Table EMP.7, Department of Employment.

¹⁶ *GBC* (28 March 2017).

¹⁷ Directive (EU) 2015/849 of 20 May 2015.

¹⁸ <http://www.recruitgibraltar.com/OnlineGamingCompaniesinGibraltar.asp>

¹⁹ GRA, Gibraltar Gambling Commissioner. See <https://www.legalgamblingandthelaw.com/worldwide-gambling-licensing-authorities/isle-man-gambling-supervision-commission>

²⁰ *GBC*, 17 July 2016.

have always been enthusiastic Europeans. Given the majority vote to leave the EU, the Government of Gibraltar is working closely with the United Kingdom in order to obtain the best possible agreement going forward.”²¹

The Gibraltar Government has the responsibility for all EU matters, except those relating to Defense and international relations that are under the responsibility of the UK.

Article 299 (4) of the Treaty establishing the European Community states that “[t]he provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible.” The United Kingdom assumes the international relations of Gibraltar also towards the European Union, because according to Article 344 (3) of the Lisbon Treaty,;

“(t)he provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.” Specific exceptions have been made for Gibraltar in the UK Act of Accession²², such as the exclusion of Gibraltar from the customs territory and VAT.²³ That exclusion further “entails the inapplicability of the Treaty provisions and secondary legislation on trade in goods, unless otherwise expressly provided.”²⁴

Gibraltar is omitted from the list of territories in the definition of the Community customs territory in Annex I, I, 4 to the Act of Accession annexed to the Treaty of Accession of 22 January 1972 (Cmnd. 7463) so that customs legislation and legislation applying to the customs territory do not apply to Gibraltar.

EU policy does not apply to Gibraltar for the EU policy of Customs Union, Common Commercial Policy, Common Agriculture Policy, Common Fisheries Policy and VAT.²⁵ Presently the EU Treaties apply to Gibraltar, but special rules apply to the following matters in Gibraltar:

1. Free importation of goods = Goods imported from Gibraltar to the EU are subject to the import VAT of the importing EU Member State concerned, as if these goods came from outside the EU.²⁶ No VAT is charged in Gibraltar.

There are some customs allowances for importation of goods from Gibraltar into Spain or into the UK.²⁷ Import duties in Gibraltar on items vary from 0% to 10% of the imported value in 2016.²⁸

²¹ E-mail to Jorri Duursma (3 April 2017).

²² OJ 1972, L73/14.

²³ Art. 29 UK Act Of Accession and Annex I, Section I, point 4, thereto.

²⁴ Confirmed by the CJEU in Case C-30/01 Commission/United Kingdom [2003] ECR I-9481, ECLI:EU:C:2003:489, para. 60.

²⁵ By virtue of section 3 of this Act, subject to certain special exceptions, Community Law as a whole applies in Gibraltar. Community Law is set out in the Community Treaties (see section 1 of the Act and Part I of Schedule 1), Regulations and other acts of the Community institutions, and the case law of the European Court of Justice. However, Gibraltar is omitted from the list of territories in the definition of the Community customs territory in Annex I, I, 4 to the Act of Accession annexed to the Treaty of Accession of 22 January 1972 (Cmnd. 7463) so that customs legislation and legislation applying to the customs territory do not apply to Gibraltar.

²⁶ Art. 274-277 VAT Directive.

²⁷ See also Alejandro del Valle-Galvez “Gibraltar and the EU: the Consequences of the Conflict between Spain and the Union European Integration Process”, in *Heilsame Vielfalt: Formen Differenzien (Stratenschulte (Hrsg.) 2014)*.

2. Freedom of Trade = Real estate housing financing has been made with the Gibraltar Government approval in 2017. This allows Spanish nationals employed in Gibraltar to live in Gibraltar. Thus a lower Gibraltar income tax rate (standard 20% in 2017) will be applied to them than in Spain (from 19% to 45%) and one can avoid cross border transportation delays from Spain.

The Deputy Chief Minister of Gibraltar informed the present author on 3 April 2017, that: “[t]he United Kingdom is Gibraltar’s largest trading partner in respect of services. As much as 90% of Gibraltar’s business is with the UK and not with the EU. The ability of Gibraltar (and UK) to sell services into the EU in the future would depend on the agreement that the UK negotiates with the EU.”²⁹

On 15 November 2013, the European Commission concluded after long border check delays from Spain to Gibraltar that:

“the checks on persons and goods as operated by the Spanish authorities at the crossing point of La Línea de la Concepción have infringed the relevant provisions of Union law.”³⁰

Import duty in Gibraltar on most items is 10% of the imported value.³¹ In July 2016, some consumer products import duties were reduced from 12% to 0%.³²

3. Free movement of Services = Gibraltar legislation on self-employed persons has been regarded by the European Court of Justice conform the EEC Regulation on free movement of capital³³. On 13 November 2015, the European Court of Justice received a legal question, soon to be answered, on the following legal question concerning the free movement of services in Gibraltar: “(...) are the aims, which the referring Court has found domestic measures (such as the New Tax Regime) to pursue, legitimate aims, which are capable of justifying the restriction on the right to free movement of services under Article 56 TFEU?”³⁴

The European Court of Justice declared on 19 January 2017: “The United Kingdom of Great Britain and Northern Ireland and Gibraltar are to be considered as a single Member State for the purposes of the application of Article 56 TFEU.”³⁵

These questions are relevant especially for the free movement of services in the gaming industry in Gibraltar covered by Gibraltar’s own tax regime.

²⁸ Second Supplement to the Gibraltar Gazette, No.4277, 7 July 2016, Import and Export Act, 1986, Import Duty (Integrated Tariff) (Amendment) Regulations 2016, Part 3, Volume 2)(a).

²⁹ See fn. 22.

³⁰ http://www.europa.eu/rapid/press-release_MEMO-14-458_en.htm

³¹ Second Supplement to the Gibraltar Gazette, No.4277, 7 July 2016, Import and Export Act, 1986, Import Duty (Integrated Tariff) (Amendment) Regulations 2016, Part 3, Volume 2)(a).

³² Gibraltar Chronicle, “Budget Measures”, 6 July 2016.

³³ Article 1 (a) (ii) of Regulation (EC) No 1408/71, ECL:EU:C:2016:743M 5 October 2016, Case C-430/15, Secretary of State for Work and Pensions v. Tolley (Deceased acting by her personal representative).

³⁴ Reference for a preliminary ruling from High Court of Justice Queen's Bench Division (Administrative Court) (United Kingdom) made on 13 November 2015 – The Gibraltar Betting and Gaming Association Limited v Commissioners for Her Majesty's Revenue and Customs, Her Majesty's Treasury (Case C-591/15)

³⁵ Case C-591/15 [103].

Any person paid and considered in Gibraltar as an employed or self-employed person shall be regarded respectively as an employed person or a self-employed person within the meaning of Article 1(a)(ii) of the Regulation.³⁶

In 2016, on a total of 12,356 frontier workers, there were 7,227 Spanish nationals, 150 Gibraltarians and 2,483 other English frontier workers employed in Gibraltar.³⁷ To encourage trade and frontier work with the EU Member States, the freedom of employment should be established by Treaty between Gibraltar and the EU now.

4. Competition and State Aid = Several cases were judged by the European Court of Justice whereby unjustified State aid was claimed by the Commission against EU Member States using Gibraltar's State aid in Gibraltar's Corporate Tax Reform.³⁸

5. The EU Directive = The EU Directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing applies to the financial market in Gibraltar.³⁹

On 25 April 2013, the European Court of Justice declared, in its judgment concerning the Gibraltar based Danish bank Jyske versus Spain, that the EC Directive against money laundering and terrorist financing did not preclude its application to Gibraltar. Spain could thus no longer block financial transactions involving Gibraltar where this EC Directive applied.⁴⁰

The Anti-Money Laundering Code of Practice is used for an interpretative guide in the Gibraltar gambling industry, in respect of the requirements of the Gibraltar Crime (Money Laundering and Proceeds) Act. Gibraltar also follows the 4th EU Anti-Money Laundering Directive.

The IMF evaluated positively Gibraltar's legislation against money laundering in 2007 stating:

"International cooperation on mutual legal assistance is particularly important in the case of Gibraltar, because it is a small jurisdiction whose economy depends in large measure on its offshore financial services industry. Any country can request and obtain at least a basic level of mutual legal assistance from Gibraltar through letters rogatory."⁴¹

6. International Trade Deals = Gibraltar is possibly included in the UK's trade deals with all States post-Brexit according to UK Secretary of State Dr. Liam Fox after meeting with Gibraltar's Chief Minister Fabian Picardo on 30 March 2017.

Gibraltar does have 3 Representative Offices in Belgium, the United Kingdom and the United States, with a possible representative office in China planned from 2016.

³⁶ Case C-430/15 [12].

³⁷ Gibraltar Department of Employment, *Table EMP 2* (24 January 2017)

³⁸ ECLI:EU:C:2011:215, Joined Cases C-106/09 P and C-107/09 P, European Commission, Spain v. Gibraltar and the UJ.

³⁹ Art. 355 (3) TFEU. EU Directive 2015/849 on preventing the use of the financial system for money laundering or terrorist financing. See Jorri Duursma, "Gibraltar" in J.C. Duursma, "Andorra", "Gibraltar", "Holy See", "Liechtenstein", "Luxemburg", "Malta", "Monaco", and "San Marino", in B. Rider and C. Nakajima, ed., *Anti Money Laundering Guide*, Sweet & Maxwell Editions, London (1999-2017).

⁴⁰ ECLI:EU:C:2013:270, Para. 85.

⁴¹ *IMF Country Report No.07/157* (May 2004) p. 103.

There are 16 foreign consulates in Gibraltar from EU Member States, Switzerland and Thailand.⁴² Since 2014, Gibraltar has maintained an office in Hong Kong, which was described as being very favourable to Gibraltar's economy.⁴³

Since 2004, Gibraltar has participated in the European Parliament elections as part of the UK's South West Constituency.⁴⁴

On 30 January 2017, the Gibraltar Government spoke to the European Parliament's Constitutional Affairs Committee emphasizing that "the mutually beneficial free flowing border which will be good for the adjoining Spanish region and for Gibraltar is an essential."⁴⁵ Gibraltar's adherence to the Schengen Border Area since 31 March 2017 has now opened the free flow.

The Treaties concerning the establishment of the European Union shall cease to apply to the United Kingdom from the date of entry into force of the withdrawal agreement. The consent of the European Parliament has to be obtained before signature of the withdrawal agreement by the European Council with the UK.⁴⁶

EU Security

Ever since Gibraltar came under the sovereignty of the UK on 13 July 1713, Gibraltar's position at the entry of the Mediterranean has been essential for the security of UK politics and trade with Mediterranean and African States (especially Morocco, France, Italy and Israel).

The European Security Strategy (ESS) 2016 involves the UK's security powers in Gibraltar, because of regular UK Marine exercises in the Mediterranean Sea via the Gibraltar harbour.

The EU Member States have every interest to maintain these security interests via the Gibraltar harbour in order to protect their security in the Mediterranean Sea also when the UK has left the EU.⁴⁷

The UK and the Mediterranean EU States then use the Gibraltar-Morocco / Spanish-Cueta strait for the combat of terrorism. The control of refugees crossing over from Africa is one of Gibraltar's major concerns.

The NATO warned that Russian Warships sailed through the Strait of Gibraltar towards the besieged city of Aleppo (Syria) on 25 October 2016.⁴⁸ Gibraltar airport is often used by all NATO nations for stopovers, exercises and temporary duties.

⁴² <http://www.EmbassyPages.com>, last update 25 February 2017.

⁴³ The Magazine Gibraltar, "Office in China – The Chinese Economy and Brexit Opportunities", 1 February 2017.

⁴⁴ Art. 3 ECHR Protocol No. 1 was held to be violated by the UK if no European Parliament elections could be held in Gibraltar, see ECHR Case of Matthews v. the United Kingdom, 18 February 1999.

⁴⁵ European Parliament, Constitutional Affairs Committee, Gibraltar, 30 January 2017, p. 7.

⁴⁶ Art. 50 (2) Lisbon Treaty TEU.

⁴⁷ See Sven Biscop and Jan Joel Andersson (eds.), *The EU and the European Security Strategy: Forgoing a Global Europe* (Routledge Taylor & Francis Group, 2008).

⁴⁸ *Gibraltar Chronicle* (26 October 2016).

EU funding

The EU and the UK/Gibraltar should conclude an agreement to confirm the delivery of EU Funds that were allocated to Gibraltar ending in 2020, the end of the funding programmes that benefit projects having EU beneficial owners. Since 1990, Gibraltar has benefitted for a total 60 million Euros from EU funding.⁴⁹

These EU co-funded programmes are:

1. ERDF: The European Regional Development Fund (ERDF) which allocated a total GBP 5,209,857.08 million to be delivered for their Growth & Jobs Goal programme in 2014-2020. Mainly subsidies for building works and equipments were then provided. The beneficiaries are based in the EU – mainly the UK and Spain.⁵⁰

2. ESF: The European Social Fund (ESF) has given GBP 2,493,245.75 to, among others, the Gibraltar Ministry for Economic Development & Telecom for promoting sustainable and quality employment including labour mobility. The Departments of the Environment & Climate Change and the Ministry for Economic Development & Telecom were also beneficiaries of this ESF financial aid.

3. ETC: The European Territorial Cooperation received and sent to Gibraltar GBP 1,476,000.00 for research into low carbon energy transition.

According to the *GBC* news of 24 March 2017, “Gibraltar is one of the few places where EU Funding has benefitted almost everyone in the community. At the end of a visit to Gibraltar, the Mission from the Employment & Regional Department of the European Commission said it left with a strong feeling of European identity on the Rock.

On 23 March 2017, the Spanish Foreign Minister stated that “if Gibraltar wants any future relationship with Spain – and therefore the EU – this would have to be agreed bilaterally between London and Madrid.”⁵¹

An example of a trade agreement with the EU and the UK-Gibraltar small territory could be inspired by the upcoming negotiations of the EU with other European small States Andorra, Monaco and San Marino.⁵² So far, the latter States have concluded agreements with the EU for the use of EU currency with the specific emblems of Andorra, Monaco or San Marino.⁵³ Moreover, these three States have also concluded agreements with the EU concerning the combat of fraud and the exchange of fiscal

⁴⁹ *GBC* 24 March 2017.

⁵⁰ See *Gibraltar EU Programmes Secretariat Website*.

⁵¹ *GBC* (24 March 2017).

⁵² See meeting Andorra, Monaco and San Marino, *Journal de Monaco* (18 March 2017).

⁵³ European Monetary Agreements EU with Andorra *Official Journal of the European Union* (2011/C 369/01), Monaco (2012/C 23/07) and San Marino (2001/C 209/01).

information.⁵⁴

Conclusions

Presently, the following European policies are essential for the Gibraltar economy:

1. Commercial aviation,
2. Use of the Territorial Sea,
3. Energy and
4. State aid.

Ad 1. Commercial aviation

The EU rules on commercial aviation are not applied by Spain for flights going to or coming from the airport of Gibraltar. A stop in Spain is thus excluded.

This is also the case for flights coming or going from or to Northern Cyprus without a stop in Turkey. Both territories mentioned above can now conclude a treaty with the EU and its Member States to make commercial aviation trade fluid. The international legal principle of good neighbourliness should then be applied in the European legal context.⁵⁵

Ad 2. Use of the Territorial Sea

That Gibraltar is entitled to a territorial sea is well founded in international law, though this was contested only by Spain.⁵⁶ Gibraltar's territorial Sea is especially used by foreign and EU vessels for tourism and transportation of goods to be delivered in States surrounding the Mediterranean Sea.⁵⁷

The sovereignty of the UK over Gibraltar's territorial waters has had to be evoked several times to the Spanish Navy leading to diplomatic protests by the UK to Spain.

"The Royal Navy challenges all unlawful maritime incursions into British Gibraltar territorial waters," a UK Government spokesman said. "We back this up by making formal diplomatic protests to the Spanish government (...) These actions effectively defend our sovereignty over British Gibraltar territorial waters."

⁵⁴ *Direction de la Communication*, Monaco (18 March 2017, 2).

⁵⁵ See Dimitry Kochenov and Elena Basheska, "The Case of Gibraltar". In *Good Neighbourliness in the European Legal Context* (Bril Leiden, 2015, 160-183).

⁵⁶ Gino Naldi, "The Status of the Disputed Waters surrounding Gibraltar", *The International Journal of Marine and Coastal Law* 28 (2013), p. 702-703, Fernandez, Pablo Antonio, "La Controversia sobre la Titularidad juridico-internacional de los Espacios maritimos" (*Revista Espanola de Derecho Internacional*, 47, 2015) and Dias Gonzalez, Jose Carlos, Tirant lo Blanch, "Gibraltar and the EU: The Consequences of the conflict between Spain and the United Kingdom" (*Derecho del Mar y Sostenibilidad*, 2014)

⁵⁷ Verdu Baeza, Jesus/Tirant lo Blanch "La Controversia hispano-britanica sobre delimitacion de les espacios marinos de TJUE", in Verdu Baeza, Jesus/Tirant lo Blanch, *El Arreglo pacifico de Contraversias in Ma. Vazquez Gomes, Ma. Dolores Adam Munoz, Noe Cornago Prieto and Cepillo Galvin, Miguel Angel, "El Dispositivo de Separacion del Trafico maritime en el Estracho de Gibraltar"* (*La Contribution de la Cour Droit de la Mer a la bonne Gouvernance des Mers et des Oceans*, 2 2014)

The UK has made several diplomatic protests to the Spanish Government for “unlawful incursion” amid diplomatic tension over Gibraltar when a Spanish warship sailed into Gibraltar’s territorial waters on 4 April 2017. The UK thus defended its sovereignty over Gibraltar’s territorial sea.

Ad 3. Energy

Wave, solar and wind energy are the easiest renewable energies Gibraltar can produce for itself and neighbouring communities in Spain.⁵⁸

In February 2015, a National Renewable Energy Action Plan for Gibraltar was adopted especially covering the production and use of electricity. Gibraltar has decided that 15% of total final energy consumption should come from renewable energy by 2020. It targets 27% of consumption to come from renewable energy by 2030.⁵⁹

The European Union adopted a Directive Nr. 2009/28/EC for the promotion of the use of energy from renewable sources on 23 April 2009. This Directive does not apply to Gibraltar, but Gibraltar nevertheless adopted the target of 15% of total final energy consumption to come from renewable energy by 2020.

An Israeli company, *Eco Wave Power*, has signed an agreement with the Gibraltar Government to harness wave energy and convert it into electricity.⁶⁰ Other renewable energies to be produced in Gibraltar could be solar, wind, wave and marine current energies.⁶¹

According to Gibraltar’s Deputy Chief Minister:

“A number of renewable energy projects have been pioneered in Gibraltar since this Government came to office. There are no plans to export electricity at present.”⁶²

Ad 4. State Aid

Joint Ministerial Committee for Gibraltar’s Exit of the European Union:

The European Court of Justice concluded on 15 November 2011 that State aid in Gibraltar was an illegal corporate tax measure, because of a Gibraltar tax reform which could exempt companies from taxation.⁶³ The European Court of Justice then concluded that in order to qualify for exempt company status, a company had to meet a number of conditions. Those conditions included the prohibition of carrying on or transacting any trade or business in Gibraltar, other than with other exempt or qualifying

⁵⁸ Gutierrez Castillo, Victor L., *Le Detroit de Gibraltar et l’Application de la Normative de l’Union européenne relative aux Énergies renouvelables* (Universidad de Cadiz, 01 2013) 116-119.

⁵⁹ Gibraltar Department of the Environment of the Ministry of Health, Environment, Energy & Climate Change, *National Renewable Energy Action Plan For Gibraltar*, February 2015, p. 3.

⁶⁰ *GBC*, 11 June 2014.

⁶¹ See n. 35, p. 4.

⁶² See fn.22.

⁶³ ECLI:EU:C:2011:732, 15 November 2011, Judgment of the Court C-106/109, paras. 20-22.

companies. With some exceptions, an exempt company was exempted from payment of income tax in Gibraltar and was liable only to taxation at a fixed sum of GBP 225 per annum.

The European Court of Justice then concluded that “the operative part of the contested decision, which states that the proposed tax reform constitutes a scheme of State aid within the meaning of Article 87(1) EC which the United Kingdom is not authorised to implement.”⁶⁴ This Gibraltar tax reform of 2011 will probably not be reinstalled legally when the UK leaves the EU.

The Deputy Chief Minister Gibraltar stated that:

“The Gibraltar corporate tax regime is based on a tax rate of 10%. This is EU compliant. Once outside the European Union, Gibraltar would no longer be bound by EU directives and regulations on the subject but we would continue to adhere to the highest standards. The final outcome depends on the details of the agreement that the United Kingdom negotiates with the European Union.”

In its judgment of 15 November 2011,⁶⁵ *European Commission versus Gibraltar*, the UK supported by Ireland and Spain, the European Court of Justice annulled the planned aid scheme of the UK to implement the Gibraltar Corporate Tax Reform. This Gibraltar payroll tax and business property occupation tax capped at 15% of profits inherently favoured offshore companies, which had no real physical presence in Gibraltar and which, as a consequence, did not incur corporate tax.

This proposed tax reform was considered materially selective, because it would grant selective advantages to the offshore companies.

European aid⁶⁶

The following European aid programmes to Gibraltar which were planned until 31 December 2020 will now continue until 2020 conform the:

1. 2014-2020 ERDF Programme (European Regional Development Fund)
2. 2014-2020 ESF Programme (European Social Fund)
3. 2014-2020 South West Europe Programme (Sudoe)
4. 2014-2020 Med Programme (Med)

The European Regional Development Fund (ERDF) allocates a total of 5,209,857.08 GBP funding for 2014-2020 to be used in Gibraltar for infrastructural works, wholesaling, retailing, financial services and mobile investments. As these funds are also beneficial for Spain and other EU workers, the Brexit agreement between the EU and the UK/Gibraltar will have to precise under which circumstances the already approved future EU funding will be realized.

⁶⁴ Ibid., Para. 187.

⁶⁵ ECLI:EU:C:2011:732, Cases C-106/09 and C-107/0/ P, Commission v. Gibraltar and the UK, 15 November 2011.

⁶⁶ For further information, please visit: <http://eufunding.gi>

The European Social Fund (ESF) may stimulate jobs in Gibraltar for EU nationals after the UK leaves the EU, if the agreement between the EU and the UK/Gibraltar so provides. The ESF has now allocated 1,853,574 GBP to Gibraltar for social employment work. The European Territorial Cooperation (ETF) has provided financial assistance for easy transfer of work to and from Gibraltar and the EU Member States.⁶⁷ The beneficiaries so far are the University of Gibraltar and research into Low Carbon Energy.⁶⁸

Conclusions: Advantages Gibraltar with Brexit

If the UK leaves the EU, they and Gibraltar have every interest to regulate the following items by treaty:

1. Anti-Money Laundering and financing of terrorism legislation
2. Renewable Energy
3. Air space

Neither Spain, nor any other EU Member State, can legally block Gibraltar's departure from the EU without Gibraltar's and the UK's consent.

On the first of April 2017, the UK's Defence Secretary Sir Michael Fallon said:

"the UK was going to be looking after Gibraltar and the Rock would be protected all the way. Gibraltar is going to be involved throughout the negotiations, with an agreement reached that respects the wishes of the people."⁶⁹

A spokesperson for the UK's Prime Minister Mrs. Theresa May said the first of April 2017

"they will never enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another state against their freely and democratically expressed wishes, nor will ever enter into a process of sovereignty negotiations with which Gibraltar is not content." Gibraltar will be fully involved in the Brexit process, said the UK.⁷⁰ European legal practice can now support historic legal decisions in Gibraltar.

⁶⁷ ESF and ETF total funds 5,209,857.08 UKP on Gibraltar EU Programmes Secretariat website 2017.

⁶⁸ ETC total funds to Gibraltar 2017, 100,075.00 Euro.

⁶⁹ *GBC* (02.04.2017).

⁷⁰ See fn. 69.