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SOVEREIGNTY WITHOUT TERRITORY? A SYMBOLIC SOVEREIGNTY PROPOSAL FOR GIBRALTAR

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1. *Sovereignty, Territory and Borders: Legal fictions and paradoxes*

Sometimes, legal fictions and conceptual paradoxes can be found in the special relationship between three basic elements of states: sovereignty, territory and borders. This is especially true in the current times of globalization, the (post-) post-Cold War and the new era in which it we seem to have entered.

In the following sections, I will refer to a series of expressions that are themselves paradoxes.¹ As we will see, however, ultimately the contradictions or incongruities that they at first glance encapsulate are not as important as they seem. At the same time, however, in some ways, they reflect the reconfiguration of this relationship between territory, sovereignty and borders in the current era.

1.1. *A State without Territory?*

A state is an entity made up of the essential elements of territory, population and government that has the attribute of sovereignty and engages in relations with other

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¹ The Cambridge Dictionary defines ‘paradox’ as ‘a situation or statement that seems impossible or is difficult to understand because it contains two opposite facts or characteristics’.

international subjects. This is the most widely accepted definition, according to the historic Montevideo Convention.² But can an essential element, such as territory, be missing? That is, can there be a state without territory? Can a state exist and be sovereign even if it does not have a trace of terrestrial, maritime or air territory?³ One body of literature considers it impossible, since ‘to date, submarine, underground and navigating states are but literary or cinematographic proposals’.⁴

There have been genuine frauds, such as Sealand, a self-proclaimed state based on an artificial platform in the sea, built during World War II near Felixstowe in the United Kingdom. Included on the list of proclaimed *micronations or virtual countries*, the imaginary principality, pursued by Interpol, watched on in 2000 as the Spanish Guardia Civil dismantled its embassy in Madrid.

However, there are also examples of historical entities with recognized international legal subjectivity but minimal or questionable territoriality. Examples include the Holy See and Vatican City or San Marino. There is likewise the case of microstates, originating in modern European history or the decolonization process. In these cases, a statute of international legal subjectivity and even United Nations membership have been agreed: Liechtenstein since 1990, San Marino since 1992, and Andorra since 1993. However, their ability to exercise state functions is severely hampered due to their lack of a “proper” territory: the state-enclave of San Marino spans only 61 km². Consequently, only through a specific international legal subjectivity is it possible to shape the international concept of a state. In this sense, the historical remnants of the Order of Malta, a religious order recognized not as a state, but as a subject with *sui generis* international legal personality, are significant. The Order, which has no territory, maintains diplomatic relations with more than one hundred states.

A more recent case is that of the Asian and Pacific States affected by climate change and rising sea levels. The impact is already certain, and practice confirms the novel situation of the loss of portions of their terrestrial territory. In some cases, such as Papua New Guinea, the population of certain islands that make up part of the state’s territory has even been evacuated. In this sense, a kind of *underwater statehood* has been proposed.⁵ Naturally, the literature already offers several proposals that theorize solutions for such situations, which are unprecedented in international law.⁶ In this regard, it has been proposed that the traditional core concept of state be altered with new approaches (such as the functional theory of territory, through the concept of *detrterritorialized states*)⁷ that make room for these new cases in the (new or modified) concept of state.

Although the complete disappearance of this type of state seems unlikely in the short term, the continued habitability of certain islands is already in question. The possibility of devastating climate-change effects that would annihilate the entire territory of

² Montevideo Convention on the Rights and Duties of States of 26 December 1933, available at <https://www.oas.org/juridico/english/treaties/a-40.html>.

³ V. BILKOVA, ‘A State Without Territory?’, *Netherlands Yearbook of International Law*, 2016, p. 19 ff.

⁴ A. REMIRO BROTONS et al., *Derecho Internacional - Curso General*, Valencia, 2010, at 70 [translated].

⁵ A. TORRES CAMPRUBÍ, *Statehood under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States*, Leiden-Boston, 2016.

⁶ M. AZNAR GÓMEZ, El Estado sin territorio. La desaparición del territorio debido al cambio climático, in *Revista electrónica de estudios internacionales*, 2013.

⁷ V. BILKOVA, *supra*, note 3, at 2.2.2.

these archipelagic or island states will be delayed, but serious declines are expected in their functional capacity in their original territory. In this context, less distorting proposals have also been made, such as those pointing such states towards historically exceptional concepts, like the aforementioned case of the microstates.⁸ Such a solution could perhaps afford these states, newly stripped of their territory or with a reduced or vanishing territory, a special form of international legal subjectivity.

1.2 Territory without Sovereignty?

Are there really *no-man's lands* in international society, terrestrial spaces not under the sovereignty of any state? States are extraordinarily zealous about maintaining and, if possible, even enlarging their own territory. Sudden renunciations of the exercise of jurisdiction over certain parts of it are thus striking.

But, in fact, states have renounced their jurisdiction over certain spaces or territorial zones. In some cases, this renunciation is not a one-off event, but rather generalized, and a certain theoretical and legal apparatus is built. Such withdrawals are less common along maritime borders and at ports, but are abundant at airport facilities and land borders (at fences or border posts with other states).

At airport facilities, there is the case of airport 'international zones'.⁹ At these airport borders, liminal fictions are created. Although airports are usually located entirely in the terrestrial territory of a single state,¹⁰ no borders are created within them, but rather representations of borders, giving rise to imaginary *limitis limen* borders, consisting of a system of border controls, mainly to regulate the movement of people. Indeed, the establishment of such legal fictions at airports within a state is commonplace. The problem arises when the border fiction becomes an extraterritorial fiction, through assimilation of the fact that the checkpoint crossing means the first entering a state's territory, which has legal consequences. The most important one is probably the non-application of human rights regulations in some areas — e.g. 'no-man's lands', 'transit areas' or 'waiting zones' — in violation of international law.

Some European Court of Human Rights (ECtHR) cases, such as *Amuur v. France* (1996), are well known.¹¹ Other cases have been widely reported in the media. After it was revealed that Edward Snowden had disclosed state secrets and could face charges of espionage, the Kremlin stated that the fugitive had not crossed the Russian border, as he had remained in the 'international zone' of Moscow's Sheremetyevo airport — where he spent 40 days in 2013 — and, thus, never formally entered the territory of *Mother Russia*.¹²

However, it is at land borders where the fictions of these spaces, these state no-man's lands, are clearest, even in the 21st century.

⁸ *Ibid.*, at 2.3 and 2.5.

⁹ DEL VALLE-GÁLVEZ, *Las zonas internacionales o zonas de tránsito de los aeropuertos, ficción liminar fronteriza*, in *Revista electrónica de estudios internacionales*, 2005.

¹⁰ The exceptions are the cases of the Geneva-Cointrin and Bâle-Mulhouse border airports, which have been the subject of two agreements between France and Switzerland. See M. GUINCHARD, *La collaboration franco-belvétique en matière d'aéroports (Bâle-Mulhouse et Genève)*, *AFDI*, 1957, p. 668; Ch. DE VISSCHER, *Problèmes de confins en Droit international public*, Paris, 1969, pp. 103-104.

¹¹ ECtHR, Judgment of 25 June 1996, Application No. 19776/92, *Amuur v. France*.

¹² *Edward Snowden never crossed border into Russia, says foreign minister*, in *The Guardian*, 25 June 2013.

Take, for instance, the example of Spain's border fences in Ceuta and Melilla, the only external terrestrial borders of Spain and the EU with a third state, namely, Morocco. Attempts to climb over or enter through the perimeter border fence of these self-governing cities are recurrent.¹³ 'Hot returns' of people who have remained at the fences or in the intermediate space between the border fences are made there.¹⁴ Naturally, the border fences themselves and the space between them are Spanish territory.¹⁵ However, these strips of land are functionally considered special and subject to different domestic and international regulations from those applicable to Spanish terrestrial and maritime territory in general.

'Hot returns' is not a legal concept, but rather a journalistic term. Nevertheless, during the conservative governments of M. Rajoy, new legal definitions of border situations were sanctioned in an attempt to reformulate and adapt the legal concept of international borders to the specific cases of Ceuta and Melilla.

This is the case of the new concept of push-backs or rejections at the border, whose legal basis is the Spanish Aliens and Immigration Law, as amended in 2015. This legal reform was accompanied by the peculiar concept of an *operational border* 'for the sole purposes of aliens law', not included in the amended law, but in administrative police guidelines. The weaker legal basis has not prevented the 'operational border' concept from being applied to both terrestrial borders — the fences — and maritime areas.¹⁶

In short, these are legal fictions to evade the responsibilities of the exercise of state functions in the state's own territory, which, in practice, leaves the strip of land between the border fences in a legal limbo, under neither Spanish nor Moroccan jurisdiction.

These attempts at regulatory and jurisdictional withdrawal from a state's own territory have made it to the ECtHR. The Spanish government claimed that the plaintiffs were outside Spanish jurisdiction, having not entered Spanish territory as they had not passed the border protection device; but the ECtHR ruled against Spain in 2017,¹⁷ finding that it had expelled immigrants detected at the border space between the fences without previously offering them legal assistance or identifying them.

1.3 *Territory without Borders?*

Can a state have no borders or boundaries? Logically, the very concept of state implies a delimitation of the territory with the neighbouring states. Normally, the borders between states are established, delimited and demarcated through bilateral agreements.

Although there are pending issues of boundaries or demarcation between neighbours, borders are fundamental to the international system, since their primary

¹³ I. GONZÁLEZ GARCÍA, *Rechazo en las fronteras exteriores europeas con Marruecos: inmigración y derechos humanos en las vallas de Ceuta y Melilla, 2005-2017*, in *Revista General de Derecho Europeo*, 2017.

¹⁴ I. GONZÁLEZ GARCÍA, *The Spanish-Moroccan Cooperation on Immigration: The Summary Returns Cases of Isla de Tierra-Albuemas (2012) and Ceuta and Melilla (2014)*, in *Spanish Yearbook of International Law-SYbIL* 2015, at 349-356.

¹⁵ M. ACOSTA SÁNCHEZ, *Las fronteras terrestres de España en Melilla: Delimitación, vallas fronterizas y "tierra de nadie"*, in *Revista electrónica de estudios internacionales*, 2014.

¹⁶ The latter is the case of the deaths of migrants by swimming, which occurred when the concept of an operational border was applied to waters under Spanish sovereignty in the Tarajal area of Ceuta, in 2014.

¹⁷ ECtHR, Judgment of 3 October 2017, Application Nos. 8675/15 and 8697/15, *N.D. and N.T. v. Spain*.

function is to delimit the scope of a state's jurisdiction on the surface of the planet. Generally established in modern times, today they are understood as lines drawn on the earth's surface. Some of the main functions of borders are traditionally exercised precisely across these lines: control of the entry and exit of people and goods to and from the territory and control of compliance with tax and health regulations.¹⁸

Nevertheless, the expression *Europe without borders* is common today and has a legal basis in European law. Following the Treaty of Amsterdam, 'a space without internal borders' was established, recognized *expressis verbis* in the treaty. This space had already been created in 1995 by the Schengen agreements, which transformed the EU states' continental territory into a 'federal' space of free movement, with an internal borders/external borders dichotomy. In fact, since the Single European Act of 1986, the internal market had been clearly described as 'a space without internal borders'. Today, this legal expression is found throughout the Treaty on European Union and the Treaty on the Functioning of the EU. The notion of a *space without internal borders* especially describes the area of freedom, security and justice, with two components: free internal movement and control of external borders.¹⁹

But what does this space without internal borders mean? Actually, it is an ellipsis,²⁰ in which the words 'control of' have been omitted. Therefore, although it is phrased 'space without internal borders', it actually means 'space without internal border controls', with the European guarantee of a total absence of controls on people, whatever their nationality, according to Article 77.1.a. TFEU.

Was this omission made for linguistic convenience? In that case, another meaning of 'ellipsis' might apply. In the field of rhetoric, an ellipsis would be the intentional omission of an element of discourse to elicit certain reactions from the reader. The reiteration of the expression in EU primary law from the very start with regard to the internal market should be noted. It suggests an intentional use of ellipsis, probably with a view to legitimizing the EU's political construction in European public opinion. The expression 'Europe without borders' would do more to help European citizens visualize the idea of increased unity than the more legally accurate 'Europe as a space without internal border controls'.

Intentional or not, the obvious ellipsis confirms that the border remains, although the function of state control has been altered or eliminated. In fact, Article 77.4 of the Lisbon Treaty specifically addresses this, providing, 'This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.'

Thus, there seems to have been a certain intentionality on the part of the drafters of the (successive) treaties to use the slogan *space without borders* in order to introduce in public opinion the analogical creation of the federal territory. This is a key political aspect for a Europe whose essential achievements include freedom of movement and citizenship. A

¹⁸ A. DEL VALLE-GÁLVEZ, *Las fronteras de la Unión: el modelo europeo de fronteras*, in *Revista de Derecho Comunitario Europeo*-RDCE, 2002, 299.

¹⁹ Art. 3.2. TEU; Protocol 19 on the Schengen acquis integrated into the framework of the EU; Protocol 24 on Asylum for Nationals of Member States of the EU. The area of FSJ is also related to the objectives of cohesion (Art. 170 TFEU).

²⁰ According to Merriam-Webster Dictionary, an ellipsis is 'The omission of one or more words that are obviously understood but that must be supplied to make a construction grammatically complete'.

further step could even have been taken. The Draft Constitutional Treaty referred to freedom of movement in the *territory of the Union*.²¹ Although the expression would not have been correct for an international organization such as the EU, consecrating the Union's territory in that way could have been revolutionary in the symbolism of the European narratives.

1.4 *Symbolic Sovereignty?*

If sovereignty is supreme, exclusive and independent power over a territory, can there be sovereignty without territory? As the literature on international law notes, the most obvious manifestation of a state's sovereignty is its territoriality.²² It is thus worth considering whether or not a state's sovereignty can be symbolic as opposed to real or effective, that is, whether sovereignty can exist without the functional exercise of state powers over a given territory, making it possible to speak legally of a *nominal sovereignty*. On the surface, this would seem a contradiction in terms.

This gives rise to an interesting debate on the relationship between sovereignty and international legal subjectivity and personality (full or limited?), or the capacity of state and non-state entities to act in relations regulated by international law. Every state — because of its sovereignty — has international legal subjectivity, but not every subject of international law is a sovereign entity. This is the case of international organizations, but also of certain entities with limited international legal subjectivity or international capacity for action. It is also the case of entities with a *sui generis* or temporary legal subjectivity, such as national liberation movements, belligerents or insurgents, in what seems to be a growing list of participants.

Earlier, I referred to entities whose historical peculiarities and specificities explain their current status as special international legal subjects, such as micro- or diminutive states. Whilst the international legal subjectivity of the state of Vatican City may be questionable, the Holy See does have international personality, with observer status in the United Nations. Likewise, Monaco, a UN Member State since 1993, has what has been described as 'weakened' sovereignty.²³

History is marked by transitory post-conflict periods in which defeated countries have been considered to have nominal sovereignty, as in the case of Japan after World War II.

On the other hand, there is the case of *internationalized territories*, some of which are internationally administered.²⁴ The territories with *internationalized administration* are of interest here,²⁵ particularly the cases of Danzig and Trieste, in which sovereignty — suspended due to certain historical circumstances — was exercised not by states (Poland or

²¹ The expression was ultimately suppressed (in Article 77 TFEU) during the adoption of the Constitutional Treaty, authenticated in October 2004.

²² A. REMIRO BROTONS, *supra* note 4, at 76; 'territorial sovereignty is affected by globalization and the increased importance of new technologies (...). However, an alternative approach to territoriality has not yet matured', M. KUIJER, W. WERNER, *The Paradoxical Place of Territory in International Law*, *Netherlands Yearbook of International Law*, 2016, p. 3 ff., at 15.

²³ G. GUIDI, *Monaco*, in *Max Planck Encyclopedia of Public International Law*, 2007, at A.1.2

²⁴ The common feature of internationalized territories is that state sovereignty is restricted by virtue of an international treaty. See: G. DISTEFANO, 'Theories on Territorial Sovereignty: A Reappraisal', *Journal of Sharia and Law*, 2010, p. 25 ff., at 38.

²⁵ M. AZNAR GÓMEZ, *La administración internacionalizada del territorio*, Barcelona, 2008.

Italy), but by international organizations. It was established by treaty that the League of Nations would administer Danzig (1919-1939) and the United Nations, Trieste (1947-1954). In these cases, it was understood that the international organizations would take the states' places in the exercise of state powers for a certain period of time.

In contrast, in the case of the city of Tangier, several states (France, the UK, Spain and, subsequently, Italy) undertook sovereign functions during the period 1923-1958, with an internationalized administration. This international regime for the administration of Tangier has been considered an example of *condominium* or *coimperium*.²⁶ However, cases of joint sovereignty are rare and unstable in international society, except where it is symbolic, as in the case of France and Spain along the shared Pyrenean border, with the *condominium* of the Island of the Pheasants.²⁷

Territories with an *international identity* not integrated in a state include the Channel Islands and the Island of Man, which are related to mediaeval peculiarities recognized by British organization and laws and are quite difficult to categorize. The bailiwicks of the Isle of Man, Guernsey and Jersey are territories linked to the British Crown. As Crown Dependencies they are not part of the British Overseas Territories. However, as they are not sovereign states either, they are also not included in the Commonwealth of Nations. They are thus 'territories for which the United Kingdom is responsible'.²⁸ This gives rise to a special sovereignty over territories legally separated from the UK that are not integrated in the British state, but have a recognized 'international identity'.

Another special case is that of the Tiwinza region, under Peruvian sovereignty, but whose ownership and exercise of state powers corresponds to Ecuador, according to the regime established by a binding agreement.²⁹

These examples show that, in certain situations or circumstances, the exercise of sovereign functions can be highly qualified in some territories or UN Member States and between actors in international society.

One of the most recent ICJ cases was the dispute between Bolivia and Chile.³⁰ This case could be relevant to the search for non-territorial manifestations of sovereignty. In its submissions, Bolivia claimed that Chile has an obligation to negotiate 'in order to reach an agreement granting Bolivia a fully sovereign access' to the Pacific Ocean. The Court, which considered that the expression 'sovereign access to the sea' is not a term of art in general international law, asked the Parties to define its meaning.³¹ For Bolivia, the 'formula' defining the specific content of sovereign access could be expressed through various

²⁶ J. SCHWIETZKE, *Tangier*, in *Max Planck Encyclopedia of Public International Law*, 2008, at D.

²⁷ C. FERNÁNDEZ DE CASADEVANTE, *La frontera hispano-francesa y las relaciones de vecindad (especial referencia al sector fronterizo del País Vasco)*, Bilbao, 1985.

²⁸ Ministry of Justice, *Fact sheet on the UK's relationship with the Crown Dependencies*, at 2.

²⁹ Acta Presidencial de Brasilia, Pronunciamiento Vinculante de los Países Garantes, 23 October 1998. L. LABAN, *El conflicto territorial entre Ecuador y Perú por el Río del Cenepa (1995)*, in *Revista Pléyade*, 2009, 186.

³⁰ ICJ, Judgment of 1 October 2018, *Obligation to Negotiate Access to the Pacific Ocean, Bolivia v. Chile*.

³¹ According to the ICJ Judgment: 'The term "sovereign access" as used in Bolivia's submissions could lead to different interpretations. When answering a question raised by a Member of the Court at the end of the hearings on Chile's preliminary objection, Bolivia defined sovereign access as meaning that "Chile must grant Bolivia its own access to the sea with sovereignty in conformity with international law". In its Reply, Bolivia further specified that a "sovereign access exists when a State does not depend on anything or anyone to enjoy this access" and that "sovereign access is a regime that secures the uninterrupted way of Bolivia to the sea — the conditions of this access falling within the exclusive administration and control, both legal and physical, of Bolivia", *Ibid.*, pars. 88 and 90.

modalities and should emerge from the negotiations between the parties. The Court was not asked to determine which specific type of sovereign access applied. However, to find a formula that would afford Bolivia sovereign access to the Pacific Ocean, it did refer to various types. This access — which is not simply a right of commercial transit — could take many forms: a corridor, a coastal enclave, a special zone, or some other practical solution to be agreed upon by the parties in the negotiations of a future agreement.³²

Thus, Bolivia is seeking to discuss a kind of sovereignty for an activity of essential interest for the state (access to the sea) without the need for a classical/formal transfer of territory. This makes it possible to delve into formulas³³ that would simply satisfy the interests of the parties in conflict, without getting bogged down in purely territorial options.³⁴

This case raises new perspectives on the modalities of exercising sovereignty. The ductility offered by certain examples in international society³⁵ points to possibilities in the field of the symbolic. The objective is to explore formulas of an emblematic nature that would enable the dissociation of sovereignty, territoriality and the exercise of state or sovereign functions. Can there be a *nominal shared exercise* of sovereignty? Perhaps in the case of Gibraltar, we should look for imaginative formulas to settle a dispute anchored in opposing legal positions that date back centuries.

2. *A Symbolic Sovereignty proposal for Gibraltar*

The Gibraltar conflict is especially complex, and the Spanish-British negotiations have been stalled for many years. Brexit has plunged this territory into a situation of great institutional, legal and economic uncertainty. The withdrawal negotiations have not yet resolved the issues of Gibraltar's future status or its relationship with the EU and Spain. Some aspects necessarily require joint regulation, such as those related to cross-border cooperation.

But the Brexit situation may also be the moment to propose future solutions for Gibraltar, such as those based on joint sovereignty, or even to initiate the discussion of other novel proposals, such as the one I have previously advocated consisting of the symbolic sovereignty of a principality under the Crowns of both Spain and the United Kingdom. Perhaps the international legal paradoxes can help settle the Gibraltar dispute.

³² Comments in writing of Chile on the written reply of the Bolivian Government to the question put by Judge Owada at the public sitting held in the afternoon of 8 May 2015, of 15 May 2015. Comments in writing of Bolivia on the written reply of the Chilean Government to the question put by Judge Owada at the public sitting held in the afternoon of 8 May 2015, of 15 May 2015. Both available at <https://www.icj-cij.org/en/case/153>.

³³ O. SANTANA, *La noción de soberanía en las propuestas bolivianas para la salida al mar: el caso de Arica trinacional*, in *Diálogo Andino*, 2015, p. 127 ff.

³⁴ A. REMIRO BROTONS, *Gibraltar en la Política Exterior de España*, in *Cuadernos de Gibraltar — Gibraltar Reports* 2017, p. 29 ff., at 35-36.

³⁵ I. MOLINA refers to the special cases of two enclaves in Switzerland (the German Büsingen and the Italian Campione d'Italia), integrated de facto in Switzerland, in *Gibraltar, a possible solution: diffused sovereignty and shared functions*, in *Real Instituto Elcano*, ARI 64/2018, 7 May 2018.

2.1 Gibraltar: the Dispute, the EU and Brexit

The UK-Spanish dispute over Gibraltar is an entrenched dispute that raises all kinds of international issues. The general deadlock and acute crisis of 2012-2016, which maintained a *status quo* favourable to the UK and Gibraltar, suddenly changed following the 23 June 2016 referendum supporting the UK's withdrawal from the EU. This outcome marked a shift of historic proportions in the dispute, as it disrupts one of the legal, economic and institutional bases of the law that has been consistently applied in Gibraltar since 1973.

The consequent sudden obligation to abolish, change or modify Gibraltar's European status substantively affects and alters the rules of the game, creating a situation now apparently favourable to Spanish interests. This entails a huge change for the economic, legal and political foundations of Gibraltar, currently in a general state of alarm due to the perceived existential threat,³⁶ and could be a turning point as regards Gibraltar's relationship with Spain, the UK and the EU.³⁷

2.1.1. The Dispute today

Gibraltar is a territory that has a special status in international law. Briefly, it was ceded by Spain to the United Kingdom in 1713, and, therefore, the United Kingdom has a valid title of sovereignty to it. Thus, Gibraltar is not Spanish, but rather is of British sovereignty, although the extent of the territory is disputed. For centuries, Spain has claimed this territory, which it views as amputated from its national territory. In the context of the United Nations, it is a territory pending decolonization, and, since 1964, the UN General Assembly has requested that Spanish-British negotiations be conducted for this purpose.

The Bay of Algeciras/Gibraltar, where the disputed territory is located, further complicates the situation. The territorial dispute affects a densely populated region (300,000 people, including 32,000 Gibraltarians) of extraordinary environmental value, in which diplomatic crises have a direct and immediate impact on the day-to-day life of the citizens of Gibraltar and the surrounding area of Campo de Gibraltar.

Several factors make this territorial dispute especially complex and problematic:

a) The existence of a bilateral historical dispute, which has grown more complex over time. This dispute involves legal aspects and scenarios, but also political, security- and defence-related ones. On the one hand, there is a valid title of territorial transfer to the United Kingdom, the Treaty of Utrecht of 1713. However, it does not delimit the borders of the ceded territory, nor does it include a demarcation accepted by the two states. In short, there is no agreement on the area granted under the Treaty of Utrecht, which is thus consistently questioned. The city, castle, port and complementary buildings of 1704 clearly seem to have been ceded in perpetuity to the United Kingdom and are therefore British. But the territory of Gibraltar includes other spaces (mainly, the isthmus, the mountain of Gibraltar, expansions and fillings, and waters) currently under British jurisdiction that

³⁶ F. PICARDO, "Brexit" would destroy Gibraltar: The Rock could find itself excluded from the main trading bloc and at the mercy of Spain, in *Politico*, 3 May 2015.

³⁷ For an initial analysis, see A. DEL VALLE-GÁLVEZ, Gibraltar, 'año cero': Brexit, Cosoberanía y nuevas oportunidades de España, in *Real Instituto Elcano*, ARI 75/2016, 20 October 2016.

Article X of the Treaty of Utrecht does not mention. The dispute has thus unfolded and multiplied into several separate disputes: the dispute over the isthmus not provided for under the Treaty of Utrecht, today home to a military airport; the dispute over the waters surrounding the Rock; the environmental dispute; and even the dispute over the exercise of controls at the border crossing of La Verja.

b) Territory pending decolonization according to the United Nations. The future of the territory has been addressed by the United Nations, which considers it a case of pending decolonization. This decolonization approach has conditioned all aspects of the dispute, because international society, via the UN, considers and classifies the situation of Gibraltar as colonial and attributes a legal status to the territory, regardless of what the United Kingdom might internally organize at the institutional level. The year 2014 marked 50 years of UN 'doctrine' on Gibraltar, which, in general, is a favourable framework for Spain, since the UK included it *motu proprio* on the list of Non-Self-Governing Territories in 1946. The territory was then included on the Special Committee on Decolonization's (Committee of 24) list of territories pending decolonization. Year after year, since 1964, the UN has insisted that Gibraltar is a territory pending decolonization, a process requiring bilateral negotiations between the UK and Spain. In that sense, the UN's mandate is to conduct negotiations in order to restore Spain's territorial integrity. In this context, the UN has never afforded the status of a 'people' with the right to self-determination to the inhabitants of Gibraltar,³⁸ but rather its own authority to monitor the territory's evolution.³⁹

Because Gibraltar's status has thus been internationalized, its various spaces, including those clearly under British sovereignty, are today politically and legally conditioned by the UN's decolonization doctrine. This means that the British sovereignty is a denatured one, due to Gibraltar's categorization as a 'Non-Self-Governing Territory'. This international legal status conditions the title of British sovereignty over part of the territory of Gibraltar. At the same time, the UK thus has the international status of Administering Power of the territory.

Although the UN has reiterated this doctrine for more than half a century, neither the United Kingdom nor Gibraltar consider it valid. Instead, they propose an alternative reading of decolonization and the right to self-determination.

c) The special status of British law in the territory. Gibraltar is not part of the territory of the United Kingdom as a state. Indeed, although for different reasons, both Spain and the UK view Gibraltar as a distinct territory, legally separate from the United Kingdom. Legally, the UK considers it a British Overseas Territory, with an internal regime of self-organization and a very high degree of autonomy. Its basic law, adopted by the United Kingdom, is the Gibraltar 'Constitution' of 2006. Both the UK and Gibraltar consider this 'Constitution' an example of the exercise of the self-determination of the 'people' of Gibraltar. Gibraltar claims to have an international status separate from the United Kingdom but shielded from Spanish claims.

³⁸ A. SÁENZ DE SANTA MARÍA, *¿Derecho de autodeterminación del pueblo de Gibraltar?*, in A. DEL VALLE-GÁLVEZ, I. GONZÁLEZ GARCÍA (eds.), *Gibraltar 300 años*, Cádiz, 2004, p. 85 ff. By the same author, *Gibraltar and the Decolonization Law*, in T. J. DADSON, J.H. ELLIOTT (eds.), *Britain, Spain and the Treaty of Utrecht 1713-2013, Studies in Hispanic and Lusophone Cultures*, Cambridge, 2014, at p. 94 ff.

³⁹ A. DEL VALLE-GÁLVEZ, *Gibraltar en las Resoluciones y Decisiones de la Asamblea General de la ONU, 1965-2015. Algunas valoraciones*, in X. PONS RAFOLS (eds.), *Las Naciones Unidas desde España – 70 aniversario de las Naciones Unidas – 60 aniversario del ingreso de España en las Naciones Unidas*, Barcelona, 2015, p. 501 ff.

d) The special status of European Law in the territory. Gibraltar has a unique legal status in the EU. Many EU policies do not apply to the small territory of Gibraltar, resulting in a differentiated situation with regard to the application of EU law in the surrounding territory. In Spain's view, this situation encourages and causes illicit trafficking.

e) The extraordinary military and security importance of the British bases. Gibraltar is home to a series of very important military and intelligence bases. They purportedly occupy approximately 40% of the tiny territory and are under the command of the UK's Ministry of Defence. These bases are a basic component of the UK's national security strategy, affording it an advantageous position in the area of the Strait. As a result of this security advantage and the commitment to Gibraltar, the main British interest determining the country's positions in the dispute is the maintenance of the *status quo*. Additionally, after the 2013 crisis and 40 years of democracy in Spain, the UK may have concluded that the cost of continuing the dispute with Spain was acceptable and that, even at critical times, the hostility and damage were tolerable in proportion to its main interest: the incalculable strategic value and advantage of maintaining — with US support — its naval and air bases and intelligence operations in the Strait of Gibraltar.

f) The blocking of multilateral, trilateral and bilateral negotiating frameworks. British-Spanish negotiations have been in a total deadlock for many years, both bilaterally and multilaterally within the UN. In particular, a conflict arose in 2013 with the artificial reef crisis and heavier border controls, prompting the European Commission to intervene to mediate and enforce EU law. The possibility of *ad hoc* dialogue structures to replace the Trilateral Dialogue Forum of 2004, which Rajoy's conservative government ruled out upon coming to power in 2011, has not materialized since its announcement in 2012.⁴⁰

Given Spain's very limited strategic options for Gibraltar,⁴¹ the dispute over sovereignty has reached an impasse, with legal stances that conflict with the need for political dialogue and the support of the Gibraltarian population. Gibraltarians' distrust of Spain has increased with the gradual repeal of the Dialogue Forum Agreements and, in particular, of the 2006 Cordoba Agreements (annulment of the airport agreement, renewed suspension of 2014 European airline regulations, and closure of the Cervantes Institute in Gibraltar in 2015).

This structural stalemate⁴² reflects stances that have reinforced the relatively strong position that the UK (and consequently Gibraltar) had gained in the dispute due to its veto in the UN, the bilateral negotiations and the Spanish government's rejection, in 2011, of the Dialogue Forum.

⁴⁰ A. DEL VALLE GÁLVEZ, 'Gibraltar and the EU: the consequences of the conflict between Spain and the United Kingdom for Gibraltar and the European integration process', in E. D. STRATENSCHULTE (eds.), *Heilsame Vielfalt? Formen differenzierter Integration in Europa*, Baden-Baden, 2014, p. 193 ff.; Idem, *The Gibraltar crisis and the measures, options and strategies open to Spain*, in *Cuadernos de Gibraltar- Gibraltar Reports*, 2015, at 135; and *Real Instituto Elcano*, ARI 32/2013, 30 September 2013.

⁴¹ A. DEL VALLE-GÁLVEZ, *Spanish strategic options for Gibraltar, 300 years after the Treaty of Utrecht*, in T. J. DADSON, J.H. ELLIOTT (eds.), *Britain, Spain and the Treaty of Utrecht*, cit. *supra* note 38, p. 115 ff.; *España y la cuestión de Gibraltar a los 300 años del Tratado de Utrecht*, in *Real Instituto Elcano*, ARI, n° 23/2013, 20 June 2013; and *Cuadernos de Gibraltar- Gibraltar Reports*, 2015, at 83 ff.

⁴² See Spain's official position in the Ministry of Foreign Affairs Official Statement No. 129 of 11 May 2016, 'British Foreign Secretary visits Gibraltar', available at http://www.exteriores.gob.es/Portal/en/SalaDePrensa/Comunicados/Paginas/2016_COMUNICADOS/20160511_COMU129.aspx

In this context of tension and total disagreement at the bilateral and multilateral levels, signs emerged in late 2015 of a change in attitude at the cross-border level in the Campo de Gibraltar area, with the local authorities from all political sides evincing a willingness to cooperate and a desire for détente. An example is the initiatives aimed at fostering effective and practical cooperation, such as the proposals for setting up a European Grouping of Territorial Cooperation (EGTC) within the framework of European regulations. There is a desire for greater understanding and support for the possibility of an EGTC on either side of the border to foster institutional cross-border cooperation at the local level.

2.1.2. *Gibraltar and Brexit*

Above all, Brexit will have a direct side effect by generating a new framework for the dispute that could change the panorama. The UK's withdrawal from the EU entails a substantial change in circumstances, despite the overwhelming 'Bremain' vote in Gibraltar. The negotiations and uncertainty resulting from Brexit reinforce Spain's claims on Gibraltar and weaken those of the UK and Gibraltar itself. The parameters of the dispute have dramatically changed. The dispute has three fundamental legal frameworks, all of which may be structurally affected: the UN's declaration on decolonization, the 1713 Treaty of Utrecht, and EU law.

With regard to the UN framework, in theory, the UN's stance remains unchanged. However, the scenario of an obligatory change in the European status applicable to Gibraltar will draw attention in the EU to the fact — which Spain could legitimately enforce — that Gibraltar's only international legal status recognized by the UN and the international community is that of a Non-Self-Governing Territory awaiting decolonization that has been administered by the UK since 1946.

Regarding the Treaty of Utrecht, one possibility that is a source of concern in Gibraltar is that Spain will decide to close the border after the UK's withdrawal from the EU.⁴³ This situation has been suggested as the main and first consequence of Brexit. Although the border cannot be closed at present, there could be a legal basis for such a closure in future.⁴⁴ As noted elsewhere,⁴⁵ the second paragraph of Article 10 of the Treaty of Utrecht is currently either suspended, inapplicable or superseded by EU law provisions on the free movement of goods and people. Brexit could enable the reactivation of this paragraph, by giving a legal green light to a political decision. Obviously, such a closure can only be contemplated as a future possibility, following the negotiation of the UK's withdrawal and a new international treaty, which in turn would entail a new status for Gibraltar in European law. However, hypothetically, it would be legally possible to reactivate the second paragraph of Article 10, as Brexit would restore its applicability.

Thus, although the border cannot be closed whilst EU law is still applicable, once it ceases to apply — e.g. with a no-deal Brexit — Spain could regain full control of access by land under the Treaty of Utrecht. Furthermore, the UK interprets the last paragraph of Article 10 of the treaty to mean that Gibraltar cannot become independent without Spain's

⁴³ 'Spain 'could close border' after Brexit, Spanish official tells 'Times', *Gibraltar Chronicle*, 30 March 2016.

⁴⁴ The second paragraph of Art. 10 of the Treaty of Utrecht refers to ceding the territory 'without any open communication by land with the country round about' for the purpose of importing 'goods'.

⁴⁵ DEL VALLE-GÁLVEZ, *Gibraltar, controles en la Verja y nuevo dialogo ad hoc: la UE se involucra en la controversia*, in *Real Instituto Elcano* ARI N° 62/2014, 19 December 2014.

consent. This will accordingly limit Gibraltar's options in the quest for a new kind of relationship with the EU.

As for the EU framework, the main structural change to the economic, institutional and legal status of Gibraltar will spring from the UK's future withdrawal from the EU.

Clearly, it is the British state that is withdrawing from the EU, and Gibraltar is not part of the state formed by the 'United Kingdom of Great Britain and Northern Ireland'. However, the UK has sovereignty (under the Treaty of Utrecht) and jurisdiction over the territory of Gibraltar. Community legislation and EU law in general apply to Gibraltar not because it is part of the UK (as a Member State of the EU), but because Gibraltar is a European territory for whose external relations the UK is responsible (Article 355.3 TFEU).⁴⁶

Gibraltar has been in the EC/EU since 1973, as part of the UK's membership. Gibraltar's specific position in the EU is founded on the status established in the UK Accession Treaty of 1972. As a result, EU law is applicable in Gibraltar subject to some significant particularities, as certain parts of the EC treaty do not apply to Gibraltar. In fact, Gibraltar is wholly excluded from some areas of EU law: the Customs Union; the Common Commercial Policy; the rules on the free movement of goods; the Common Agricultural Policy; the Common Fisheries Policy; and the obligation to levy VAT. Likewise, the territory of Gibraltar is not part of the Schengen Area, due to the non-participation of the UK in the Schengen Treaties. This position continues to be held today in the EU (Protocols 20 and 21 to the TEU and the TFEU) through the Treaty of Lisbon). Other than these exceptions, EU law is fully applicable to Gibraltar, and the territory must comply with all Community legislation from which it is not expressly exempt: transport policy, environmental law, taxation, etc.

Gibraltar's unique status as a European territory was not questioned with Spain's accession in 1986, although Spain has always defended its rights and highlighted the indirect effects of the dispute in the field of EU law.

The most important issue is that Gibraltar entered the EU with the UK and must leave the EU with the UK, insofar as any change or alteration in the application of European law in the territory requires the unanimous agreement of all Member States, effectively giving Spain the right of veto.

Legally, everything will continue to operate as before until Gibraltar's new situation is determined. Psychologically, however, the situation has given rise to great uncertainty, which, together with future changes in the legal and economic framework, could have a devastating impact on Gibraltar's political, legal and economic situation,⁴⁷ even greater than the prospect of Spain regaining control over the border in a few years. Furthermore, a number of issues have already been raised that could affect Spanish workers and the region's economy. Understandably, Brexit may be viewed in Gibraltar as the worst disaster since World War II and one that has rendered the debate on Gibraltar's integration into Schengen irrelevant. For its part, the surrounding Campo area is highly alarmed by the envisaged withdrawal scenarios.

⁴⁶ 'The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.'

⁴⁷ *Gibraltar-based gaming company bet365 is scaling down its business in Gibraltar and relocating much of it to Malta, citing Brexit uncertainty as one of the key drivers in its decision*, in *Gibraltar Chronicle*, 24 May 2019.

2.1.3. *The Withdrawal Negotiations and Gibraltar*

The referendum was an act of British domestic law and was translated into an official British position with the formal notification to the EU. This was done by British Prime Minister Theresa May, who notified the European Union of the United Kingdom's intention to leave on 29 March 2017.⁴⁸ All the provisions of the negotiation and withdrawal process established by Article 50 TEU were thus triggered.⁴⁹

In the general framework of the withdrawal negotiations under Article 50 TEU, and in spite of the many doubts regarding the procedural stages,⁵⁰ there are several key moments or points at which Spain can assert its interests and opposition in the decision-making procedures requiring consensus or unanimity. Indeed, the entire process envisaged under Article 50 is shot through with the requirement for unanimity at various stages. Therefore, the UK's position on Gibraltar could be complicated should Spain take an opposing stance.⁵¹ In fact, in theory, Spain will hold the key to unanimity or acquiescence at least three times during the negotiation of the UK's withdrawal from the EU, and it could enforce its position on Gibraltar each time. The main problem for Gibraltar is that,

⁴⁸ 'Prime Minister's letter to Donald Tusk triggering Article 50', available at <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>

⁴⁹ Consolidated version of the Treaty on European Union, OJ C 202, 7.6.2016. Article 50:

'1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.'

⁵⁰ See J. MARTIN Y PEREZ DE NANCLARES, *Brexit and Gibraltar: the Spanish proposal for joint sovereignty*, in *SYBIL*, 2016, p. 305 ff., at 307-312.

⁵¹ For example, the 'Guidelines' of the European Council (Art. 50.2) have been adopted by consensus (adoption of decision without a vote, by prior agreement) amongst 27 states, excluding the UK, as was the decision to adopt the EU-UK Withdrawal Treaty modifying the TEU and TFEU, which is to be adopted unanimously. Although Art. 50.2 TEU establishes that this shall be done by a qualified majority (20 of 27 states), agreement amongst all Member States was considered desirable. Furthermore, this withdrawal treaty modifying the TEU and TFEU will probably have to be accompanied by (at least) a second treaty establishing the conditions of the future relationship with the EU, to be adopted by consensus and with ratification by each state. Furthermore, any extension of the two-year negotiating period would again require a unanimous agreement.

regardless of the UK's eventual new relationship with the EU, there is a separate obligation to establish a new status (or not) for this territory in European law.⁵²

In this context the Spanish government took two important decisions in 2016: it announced the need to negotiate the status of Gibraltar outside the framework of Article 50 TEU, and it proposed a joint sovereignty model to settle the dispute. The Spanish position on the exclusion of Gibraltar from the EU list of topics for negotiation with the UK so far has the unanimous support of the remaining EU Member States. The European Council (Article 50) meeting, held in an EU-27 format, adopted the guidelines for the Brexit negotiations on 29 April 2017 and approved the following guideline for Gibraltar (point 24): 'After the United Kingdom leaves the Union, 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.'⁵³ In theory, any decision about the future application of EU law in Gibraltar is conditional upon a previous British-Spanish agreement.

The UK indicated that Gibraltar should be fully involved in the Article 50 negotiations, and the British Government has guaranteed that there will be no changes in sovereignty. However, as the British have already acknowledged, the UK's obligation to carry out a complex negotiation with multiple problems — in theory, at a disadvantage compared to the 27 EU Member States' negotiating position — does not benefit the Gibraltar position. As already noted, both the initial definition of the negotiating guidelines and the decision of whether or not to include the status of Gibraltar in the list of topics for negotiation mark a crucial milestone; and Spain has already requested that the issue of Gibraltar be kept separate from the negotiations on the withdrawal of the British State, as the British-Spanish agreement must be prior to any agreement regarding the application of EU law in Gibraltar. This request was granted.

Thus, the Brexit negotiations, which entail the need to change Gibraltar's European regulatory regime, not only highlight the EU's conception of the nature of this territory — defined internally by British law as an Overseas Territory — but also its legal status as a Non-Self-Governing Territory pending decolonization, which is Gibraltar's only recognized international legal status in the eyes of the UN. In fact, Spain can enforce this status at any time within the EU during the withdrawal negotiations, which are governed by procedures that repeatedly require the unanimous agreement of the remaining 27 states.⁵⁴

Particular attention should be called to the following aspects of the 2016-2019 negotiation process on the UK's withdrawal from the EU *ex* Article 50 TEU, regarding Gibraltar:

** Spain's initial approach was to put the issue of sovereignty at this juncture on the table for discussion, which it did with the 2016 proposal of joint sovereignty put forward

⁵² For an overview of Gibraltar and Brexit, see: HOUSE OF LORDS, European Union Committee, *Brexit: Gibraltar*, 21 February 2017, 13th Report of Session 2016-17, HL Paper 116, available at <https://www.publications.parliament.uk/pa/ld201617/ldselect/lducom/116/116.pdf>.

⁵³ European Council (Art. 50) guidelines for Brexit negotiations, available at: <https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/>. The full document is available at: http://www.consilium.europa.eu/press-releases-pdf/2017/4/47244658130_en.pdf. See also the previous Statement by the European Council (Art. 50) on the UK notification, 29 March 2017.

⁵⁴ For a detailed look at the Brexit negotiations and the Spanish stance on Gibraltar, see: F. EGUIDAZU, *El Brexit, Gibraltar y España*, in *Real Instituto Elcano*, ARI 29/2919, 6 March 2019.

by the conservative Rajoy government. This proposal was rejected by Gibraltar and the UK and blocked any cooperation of the surrounding district with Gibraltar. Spain associated Brexit with the final solution of the historical dispute, perhaps considering that the position of strength that the EU exit referendum had suddenly provided Spain with should be exploited to make progress on the issue of sovereignty.

** In the European Council's negotiation guidelines, Spain obtained the guarantee of Clause 24, which, in practice, entails excluding Gibraltar from the negotiating list and the general negotiation issues, making any agreement on Gibraltar subject to a prior agreement between Spain and the UK.⁵⁵

** The Withdrawal Agreement of 18 November 2018, endorsed by the European Council on 25 November 2018,⁵⁶ contains a Protocol⁵⁷ on Gibraltar that obtained prior approval from Spain in a separate Spanish-British negotiation. This Protocol refers to four Memoranda of Understanding, signed on 29 November 2018.⁵⁸ In addition, a treaty on taxation and protection of financial interests was signed on 4 March 2019, the first British-Spanish treaty concerning Gibraltar since the Treaty of Utrecht.⁵⁹

** As for the EU-UK Withdrawal Agreement of 25 November 2018, some interpretative declarations were made that ensure both restrictions on Gibraltar in future, particularly with regard to the second EU-UK treaty on future relations and the need for Spain's prior acquiescence to any new situation. These declarations were agreed at the Extraordinary Meeting of the European Council (Article 50) held on 25 November 2018.⁶⁰

⁵⁵ This was reflected in the European Council Guidelines (Article 50) for the Brexit negotiations of 29 April 2017. See the unanimously adopted Negotiating Guidelines Agreement, *supra* note 54, at Clause 24.

⁵⁶ Conclusions of the European Council (Article 50), November 25, 2018, available at <https://www.consilium.europa.eu/en/press/press-releases/2018/11/25/european-council-art-50-conclusions-25-november-2018/>. The Agreement on the Withdrawal in Series C of the Official Journal, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ C66 I, of 19 February 2019; see the October 2019 modifications of the Agreement, *infra*, note 106.

⁵⁷ The Protocol on Gibraltar is available at *ibid.*, 150 et seq. See C. MARTINEZ CAPDEVILA, *Thoughts on the legal value of the instruments concerning Gibraltar adopted in relation to the EU-UK Withdrawal Agreement*, in SYbIL, 2018, p. 1 ff.

⁵⁸ The four Memoranda, in Spanish and English, are available in *Official Statement 172/2018 of the Ministry of Foreign Affairs* of 29 November 2018, 'Signing of the Memoranda on Gibraltar between Spain and the United Kingdom'

http://www.exteriores.gob.es/Portal/en/SalaDePrensa/Comunicados/Paginas/2018_COMUNICADOS/20181129_COMU172.aspx. Texts in English are also available, at: <http://www.gibraltarlawoffices.gov.gi/brexit>. Given the possibility of a 'hard Brexit', without an agreement, the survival of the agreed memorandums, in a bilateral context, has been questioned (*Europasur* 7 February 2019).

⁵⁹ *Official Statement of the Ministry of Foreign Affairs*, 041/2019 of 4 March 2019, http://www.exteriores.gob.es/Portal/en/SalaDePrensa/Comunicados/Paginas/2019_COMUNICADOS/20190304_COMU041.aspx. Government of Spain, Press Release available at <https://www.lamoncloa.gob.es/lang/en/brexit/news/Paginas/20190304taxtreaty-.aspx>. The Text of the Tax Treaty is available at <https://www.triay.com/tax-treaty-relating-gibraltar-spain-published/>.

⁶⁰ Declaration of the Spanish Government of 24 November 2018, available at <https://www.lamoncloa.gob.es/presidente/actividades/Paginas/2018/241118declaracion-brexit.aspx>.

See: Political declaration in which the framework of future relations between the European Union and the United Kingdom is exposed, in OJ C66 I, of 19 February 2019, at 185. See: P. ANDRÉS SAENZ DE SANTA MARIA, C. IZQUIERDO SANS, *Gibraltar y el acuerdo de retirada: claves de interpretación*, in *La Ley - Unión Europea*, 2018.

** Gibraltar's colonial status within the UN has been introduced in EU law through the accompanying references to Gibraltar in the Visa Exemption Regulation.⁶¹ Thus, the EU has adopted Spain's position, in addition to the already existing recognition under EU law of the existence of an international dispute between the UK and Spain.

** The issue of sovereignty will probably be dealt with once again during the negotiation of the second treaty on the future relationship between the UK and the EU.

2.2. Options for Gibraltar in a post-Brexit era

2.2.1 A microstate-style relationship with the EU?

Clearly, the best option for Gibraltar would be to remain within the EU subject to the limited Community policies that are currently applicable to it, especially the internal market policies on the provision of services and the movement of people. However, such a situation would have to be specifically negotiated, along with the option of becoming a third territory in terms of the internal market, the free movement of people, and customs union policies, regardless of the path the UK decides to take. Alternatively, this objective could also be achieved by the UK, whilst essentially remaining in the EU (along the lines of the Norwegian or Swiss model, which would not require structural changes). The ideal situation in the Gibraltarians' initial position was to remain in the EU under the same conditions, with part of the UK's territory (England and Wales) withdrawing, and another part (Scotland, Northern Ireland and Gibraltar, all of which returned a majority 'Bremain' vote in the referendum, in the case of Gibraltar, 95.1%) staying.⁶² Another option would be to apply the precedent of Greenland.⁶³

Should Gibraltar's situation be different from that of the UK? In theory, it is and should be different, since a future status must be negotiated for two different territories: the British state and the European territory of Gibraltar under British sovereignty and jurisdiction. In this scenario, one source of confusion should be clarified: as already indicated, the UK's current sovereignty over Gibraltar (at least, over the castle, city and port) does not mean that Gibraltar is part of the British state.

Although the UK is a state negotiating its withdrawal from an international organization, no specificity of British domestic law or common law can override the external definition of a subject of international law. This means that both the 'Scottish model' and the 'Greenland model' are unworkable.⁶⁴

⁶¹ 'Gibraltar is a colony of the British Crown. There is a controversy between Spain and the United Kingdom concerning the sovereignty over Gibraltar, a territory for which a solution has to be reached in light of the relevant resolutions and decisions of the General Assembly of the United Nations', European Parliament legislative resolution of 4 April 2019 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, as regards the withdrawal of the United Kingdom from the Union, Article 1 (4).

⁶² *Can Scotland remain in the EU after Brexit?*, in *The Guardian*, 29 June 2016.

⁶³ *Chief Minister's Statement to the Gibraltar Parliament on return to Gibraltar from London on Post Brexit Meetings*, 29 June 2016.

⁶⁴ The Greenland Model is unworkable, due to at least three factors. First, Greenland is precisely the opposite case, with radically different circumstances (territory of more than 2 million km² forming part of the American continent). Second, the decision about Greenland's status was taken within a state: by Danish internal decision, it was decided that in one part of the territory of the state of Denmark (Greenland),

Given the questionable viability of these proposals,⁶⁵ the Gibraltar government has been seeking a ‘microstate-style relationship with the EU’,⁶⁶ but any status of this kind needs to be unanimously approved by the 27 Member States.⁶⁷ Other alternatives have been considered, such as the revived option of integration in the UK, or remaining outside the UK but as a territory of the British Crown (such as the Crown Dependencies of the Isle of Man and the bailiwicks of Jersey and Guernsey).⁶⁸ Nonetheless, in practice, all these possibilities would be too convoluted to be sustainable in the international arena — and some, in particular, the integration of Gibraltar into the British state, seem dangerous.⁶⁹ Besides, these options are unrealistic. As noted, Gibraltar is not part of the British state, and its only recognized status under international law is that of a territory pending decolonization in a UN-supervised process. It is not at all surprising that the Gibraltar government’s position in 2019 is the revocation of Article 50 TEU by the United Kingdom.⁷⁰

In short, Gibraltar has a specific status under EU law, which, in theory, could be kept separate from the withdrawal negotiations and future status of the British state with respect to the EU. However, it would appear difficult to find a formula for remaining in the EU capable of meeting the requirement for a unanimous agreement on the amendment of existing treaties.

2.2.2. *Cross-border cooperation and the need for a Modus Vivendi*

In general, cross-border cooperation between Gibraltar and the surrounding region of Campo de Gibraltar has historically been very problematic due to the interference of the Spanish-British dispute. This has hindered the normal understanding and cooperation between historically neighboring communities on either side of the border/fence. These populations have always suffered the consequences of the sovereignty issues disputed by Madrid and London, which have traditionally been detrimental to daily life and economic

Community law would not be applicable (restriction of the territorial scope of the treaties on a state). Finally, third, and this is an even greater legal obstacle, changes in the application of the treaties require unanimity: the decision communicated by Denmark led to the amendment and reform of the EEC Treaty, agreed unanimously in accordance with the constitutional procedures of each Member State at the time.

⁶⁵ For an assessment of these different possibilities, see my analysis: ‘Gibraltar ‘año cero’: Brexit, cosoberanía...’, *supra* note 37. See also the positions of P. ANDRÉS SAENZ DE SANTA MARIA, *La nueva propuesta española de soberanía conjunta: Gibraltar en la encrucijada post-Brexit*, editorial comments in *RGDEur*, 2017, p. 1 ff., at 7-9; and J. MARTIN Y PEREZ DE NANCLARES, *supra* note 50, at 317-319.

⁶⁶ See the Intervention of Chief Minister F. Picardo, House of Lords, 13 December 2016.

⁶⁷ As stressed by the House of Lords and the European Union Committee in *Brexit: Gibraltar*, *supra* note 53, at 30, par. 17.

⁶⁸ These possibilities are discussed in M. MUT BOSQUE, *Ten Different Formulas for Gibraltar Post-Brexit*, DCU Brexit Institute WP 6, 2018.

⁶⁹ This option of integration in the UK is, in my opinion, the worst option for the dispute, the situation in Gibraltar and relations with the UK, as, legally, it would be surprising and unworkable, and politically, an absolutely disproportionate challenge to the UN and Spain, setting all Spanish-British relations on a collision course.

⁷⁰ Government of Gibraltar, *Press Release* No: 131/2019, 26 February 2019, ‘Best option for Gibraltar is revocation of Article 50’, available at <https://www.gibraltar.gov.gi/new/sites/default/files/press/2019/Press%20Releases/131-2019.pdf>. See Court of Justice of the EU, Judgment of the Court of 10 December 2018, Joined Cases C-621/18 *Andy Wightman a.o.*, ECLI:EU:C:2018:999.

development in this area of the southern peninsula, which is home to 300,000 inhabitants.⁷¹ The most important attempt to institutionalize cross-border cooperation was the Tripartite Forum on Dialogue on Gibraltar (2004-2011).⁷²

These reasons have led to spontaneous, irregular and discontinuous cross-border cooperation. Nevertheless, the 2013 crisis consolidated a special civil society cross-border group, the Cross-Border Group/Grupo Transfronterizo. This group promoted the creation of a specific EGTC to foster close cross-border relations between Gibraltar and the municipalities of Campo de Gibraltar, helping to optimize the potential for cooperation. The group has developed a new model of institutional cross-border relationships based on the interests of the citizens living on either side of the border/fence.⁷³

In the current situation, it is in everyone's best interest to reach an interim agreement for the normalization of cross-border coexistence, which can be adopted according to the known formula in International Law of a *modus vivendi*. This kind of instrument can establish a provisional arrangement between subjects of international law, giving rise to binding obligations in order to regulate a certain situation temporarily and can later be replaced by a formal and permanent agreement.⁷⁴

In my opinion, an agreement must be reached on at least the following aspects. First, the border/fence, which is an EU external land border. The issue of controls and fluidity at the border crossing-point is crucial for cross-border standardization, especially considering the thousands of workers who cross the border each day. In particular, a border traffic agreement is even more necessary in the light of some EU regulations.⁷⁵ Moreover, in the context of the Brexit negotiations, this is *the dominant concern in Gibraltar*.⁷⁶ In the UK's view, the border/fence is an international border, whilst for Spain, it is only a border crossing-point (located at the fence);⁷⁷ but other agreements have been reached on the traffic flow, as in the Dialogue Forum agreements of 2006. Considering all these

⁷¹ On cross-border cooperation in this area, see I. GONZÁLEZ GARCÍA, *Gibraltar: cooperación transfronteriza y el nuevo foro tripartito de diálogo*, in REEI, 2005.

⁷² I. GONZÁLEZ GARCÍA, *La nueva estrategia para Gibraltar: el foro tripartito de diálogo y los acuerdos de 2006*, *Revista Española de Derecho Internacional*, 2006, pp. 821 ff.; I. GONZÁLEZ GARCÍA, A. DEL VALLE-GÁLVEZ (eds.), *Gibraltar y el Foro tripartito de Diálogo*, Madrid 2009.

⁷³ The Cross-Border Group is an umbrella association that brings together all Gibraltarian trade unions and the Spanish CCOO and UGT trade unions, as well as the Chamber of Commerce of Gibraltar and small and medium-sized enterprise associations in Gibraltar and La Línea. The EGTC initiative has gained the express support of the provincial government of Cadiz, the Association of Municipalities of Campo de Gibraltar and local councils, in addition to the government of Gibraltar and the regional Andalusian government (i.e. the Junta de Andalucía).

⁷⁴ On the temporarily provisional nature of these agreements, see: A. AUST, *Modern Treaty Law and Practice* 2007, at 31; W. RUDOLF, 'Modus Vivendi', *MPEPIL* Vol. 9, 1986, p. 269 ff.; Z. MENGESHA, *Unratified Treaties, Unilateral Declarations and Modus Vivendi: Circumstances to be Considered to Have Effect on State Parties, Bahir Dam* in *University Journal of Law*, 2014, p. 176 ff., at 203-208.

⁷⁵ Such as the Regulation regarding the reinforcement of checks at external borders, Regulation (EU) 2017/458 of the European Parliament and of the Council of 15 March 2017, amending regulation (EU) 2016/399 as regards the reinforcement of checks against relevant databases at external borders, *OJ L* 74, 18.03.2017, at 1-7.

⁷⁶ EUROPEAN PARLIAMENT, *The Impact of the United Kingdom's withdrawal from the EU on Scotland, Wales and Gibraltar*, AFCO Committee, April 2017, at 21.

⁷⁷ A. DEL VALLE-GÁLVEZ, *La "Verja" de Gibraltar*, in *Gibraltar, 300 años*, *supra* note 39, p. 155 ff.

aspects, and the high number of cross-border worker movements, this point has become critical for all the parties.⁷⁸

However, there are other peremptory issues that should likewise be included in any *modus vivendi*. For instance, an agreement is needed for the exercise of jurisdiction over navigation⁷⁹ and on police intervention in the waters of the Bay,⁸⁰ given the specific problems and conflicts in the waters surrounding the Rock.⁸¹ Other deals are likewise needed, particularly on environmental protection matters.⁸²

The time may also be right to address Spain's concerns regarding financial activities and fiscal transparency, setting out an agreement on coordination in these economic activities. With regard to the airport, the normalization of its use has to be negotiated, suspending existing restrictions and the exclusion of European regulations. A *modus vivendi* could even be the natural framework for consolidating an institutional boost to Gibraltar-Campo de Gibraltar cross-border cooperation, which could lead to the creation of an EGTC.

In my opinion, the agreement for cross-border coexistence, which I have labelled a *modus vivendi*, could be adopted taking three main elements into consideration: a) the continued application of EU law in the current conditions, until new conditions come into force as part of the UK exit negotiations; b) negotiations by the UK and Spain, incorporating Gibraltar, the EU and the regional and local authorities (Junta de Andalucía, Campo de Gibraltar), depending on their respective competencies and powers; and c) formal adoption of the *modus vivendi* agreement by the UK and Spain, attributing enforcement of its application to the EU, where appropriate.

The future of the Brexit withdrawal agreement of 25 November 2018 is not entirely certain as it could still be modified as a result of the extension for the UK's exit from the EU. Nevertheless, it is a valuable element for cross-border cooperation in the Gibraltar area.

In this sense, the Protocol on Gibraltar,⁸³ which has the legal value of a treaty, provides for the various areas pointed out as necessary here. Its articles focus on several important areas for future cross-border cooperation: citizens' rights, inter alia, to the benefit of cross-border workers residing in Gibraltar or in Spain (Article 1); air transport law (Article 2); fiscal matters and protection of financial interests (Article 3); environmental protection and fishing (Article 4); and cooperation in police and customs matters (Article 5).

⁷⁸ In this area Gibraltar is fully prepared to reach agreements that safeguard the flow of border traffic and consider any reasonable solution. Intervention of Chief Minister Picardo in the Constitutional Affairs Commission of the EP, 30 January 2017.

⁷⁹ I. GONZÁLEZ GARCÍA, *The Anglo-Spanish Dispute over the Waters of Gibraltar and the Tripartite Forum of Dialogue*, in *The International Journal of Marine and Coastal Law*, 2011, p. 91 ff. By the same author, *La pesca y el medio ambiente en las aguas de Gibraltar: la necesaria cooperación hispano-británica en el marco de la Unión Europea*, in *Cuadernos de Gibraltar – Gibraltar Reports*, 2015, p. 149 ff.

⁸⁰ M. ACOSTA SÁNCHEZ, *Incidentes hispano-británicos en las aguas de la Bahía de Algeciras/Gibraltar (2009-2014): ¿qué soluciones?*, in *Cuadernos de Gibraltar – Gibraltar Reports*, 2015, p. 171 ff.

⁸¹ A. DEL VALLE-GÁLVEZ, *Maritime zones around Gibraltar*, in *Spanish yearbook of international law*, 2017, 311. For a proposal about the waters surrounding Gibraltar, see: DEL VALLE-GÁLVEZ, GONZÁLEZ GARCÍA, VERDÚ BAEZA, *Propuestas para un acuerdo práctico sobre las aguas de Gibraltar*, in *Estudios de Derecho internacional y de Derecho europeo en homenaje al profesor Manuel Pérez González*, 2012, Vol. I, pp. 407 ff.

⁸² J. VERDÚ BAEZA, *La negativa incidencia de las controversias de Gibraltar en el medio ambiente en la bahía de Algeciras/Gibraltar*, in *REEI*, 2012.

⁸³ Protocol, MOUs and Tax Treaty, *supra* notes 57, 58 and 59, at 2.A.3.

The Protocol also refers to four MOUs between the UK and Spain. The MOUs focus on the same issues from a UK-Spain bilateral perspective. Specifically, they are: the Memorandum of understanding on citizens' rights; the Memorandum of understanding on cooperation on environmental matters; the Memorandum of understanding on cooperation in police and customs matters; and the Memorandum of understanding on tobacco and other products. There is also an international agreement on taxation and the protection of financial interests between Spain and the UK regarding Gibraltar.

All in all, there are now a variety of legal instruments of great significance, as they shield cross-border cooperation between Gibraltar and the surrounding area of Campo de Gibraltar in EU primary law. Thus, border-crossing in the area is consolidated under the protection of the EU. The institutionalization of cooperation carried out through various Committees (Joint Committee, coordination committees, and Specialized Committee) in the Protocol and MOUs is particularly remarkable.

This means that the *modus vivendi* advocated here has essentially been institutionalized and regulated through the Brexit Withdrawal Agreement (Protocol, MOUs and international tax treaty), with a special legal format. This Withdrawal Agreement — provided it is ultimately ratified by the UK and the EU and enters into force with its current wording — has thus set out original and varied legal provisions regarding cross-border cooperation in the area, regulating present and future Spanish-British bilateral agreements. The stability of the cooperation is underpinned by its recognition in primary law and by the expected creation of cooperation committees. However, in 2019, many doubts remain about the viability of the 2018 Withdrawal Agreement's entry into force. Perhaps the contents of the agreements about Gibraltar, currently collected in the 2018 Protocol and MOUs, could be preserved under any other legal formulas in future.

2.3. In search of imaginative ideas: a Principality in the Straits?

What options can be considered to settle the Gibraltar dispute? Viable options for debate and negotiation are currently scarce:⁸⁴

- A judicial solution in international courts is highly unlikely.
- The independence of Gibraltar would only be possible with the consent of Spain, according to the UK's own interpretation of the Treaty of Utrecht.
- Granting Gibraltar a new legal status under British domestic law, whether as part of the state or as a 'Crown Dependency', is an eccentric or unrealistic option.
- Maintaining its current legal status under European law would only be possible if the UK revokes Article 50 TEU in future.

Thus, for a realistic debate, we must analyse the option of joint sovereignty, a possibility that is repeatedly raised in the Spanish-British negotiations. It is also the one I have proposed elsewhere under the new formula of symbolic sovereignty consisting of the 'City of the Two Crowns'. I will now examine these possibilities below.

2.3.1. Joint Sovereignty proposals

⁸⁴ See references *supra* notes 40 and 41.

Brexit has given rise to a certain revival of the idea of Spanish-British co-sovereignty for Gibraltar. In 2016, the Spanish government presented a new proposal in the line of joint sovereignty as a solution to the historical dispute. This offer, which revived measures suggested in former proposals, deserves further comment in relation to the issue of joint sovereignty.

Previous co-sovereignty offers contained similar measures, because this recurrent idea has been passed around the negotiating tables of the dispute for some time. Suffice it to say that in the democratic era, it has been suggested or formally presented by Spanish Foreign Ministers F. Morán (temporary joint dominium, 1985) and A. Matutes (50 years of transitory co-sovereignty, 1998). Joint sovereignty ideas were even advanced as a possible solution by the Gibraltarians themselves in the 1970s ('nominal co-sovereignty') and, later, in 2010, by P. Caruana, based on the example of Andorra.

Above all, joint sovereignty was expressly negotiated in the 2001-2002 period by the Blair and Aznar governments. It was undoubtedly the most advanced stage ever reached in three centuries of negotiations for a final solution to the Anglo-Spanish dispute.

Some objective questions can be raised about the idea of joint sovereignty. The interests at stake for each party must be borne in mind. In Spain's case, these include the temporary or transitional (not definitive) nature of joint sovereignty; for the UK, the consent of Gibraltar (in 2002, after the agreement; since 2007, prior to any negotiations or final agreement). The UK also wants to maintain exclusive command and control of the military bases and intelligence operations in Gibraltar. The Blair/Aznar joint sovereignty negotiations showed just how complex it can be to reach a complete agreement, given the existence of various core 'red lines'.

Nevertheless, experience has shown that despite everything, an agreement is possible. If we are to believe the memoirs of the head negotiator and British Minister for Europe Peter Hain, the Blair-Aznar negotiations on joint sovereignty had reached a full written form with regard to these fundamental demands⁸⁵. Although the text of the draft agreement on joint sovereignty that was subsequently abandoned is not publicly available, this experience indicates that these demands can be accommodated. This implies the feasibility of renouncing historical stances: in the case of Spain, the Aznar government eventually accepted that the UK would permanently hold joint sovereignty throughout Gibraltar and, thus, also over the land (and waters) of the isthmus not ceded in the Treaty of Utrecht. Likewise, and perhaps more importantly as it is what truly lies at the heart of the problem, an agreement was reached on British control and use of the military bases within the context of NATO (with a kind of *permanent* British control and common use).

The most recent joint sovereignty proposal was formally presented in September 2016. The Spanish government announced its desire for separate negotiations over Gibraltar, whilst at the same time offering the aforementioned possibility of joint sovereignty, whereby Gibraltar would be incorporated into Spain as the 18th Spanish autonomous region. The Spanish Foreign Minister, Garcia-Margallo, outlined the basic ideas of the proposal: transitional joint sovereignty between the UK and Spain, British and Spanish nationality for Gibraltarians, and a statute of autonomy (according to Article 144 of the Spanish Constitution); Spain would take responsibility for external relations after the UK's effective withdrawal from the EU; Gibraltar would remain part of the EU; and the

⁸⁵ P. HAIN, *Outside in*, London, 2012, at 274-285. Former Spanish Minister of Foreign Affairs Josep PIQUÉ has confirmed the existence of this written agreement (*Gibraltar y la geopolítica*, in *El País*, 7 June 2017).

border and border controls would disappear. All these ideas were subsequently raised by Spain at the UN headquarters.⁸⁷ They were also included in the 2016 Decision on Gibraltar of the Decolonization Committee and, for the first time, as a Declaration at the 2016 Ibero-American Summit in Cartagena.⁸⁸

This 2016 proposal by Spain's conservative government was openly defended by some academics.⁸⁹ I believe, however, that the proposal has structural flaws, making it unworkable in practice.⁹⁰ Several objective issues can be raised today against the idea of joint sovereignty.

The first such issue is that, since the 2002 referendum in Gibraltar, 'joint sovereignty', at least by that name, has been called into question or discredited. Unlike the negotiations in 2001-2002, since 2007, the UK has adopted a different stance, whereby it will not take or advance in any direction on sovereignty without prior Gibraltarian agreement. Even the UN General Assembly's Fourth Committee (Decolonization) reflected this new British position in its 2016 Decision 91. This 'double-lock' commitment on sovereignty by the UK explains why bilateral Spanish-UK negotiations offer no prospects for progress. In any case, Gibraltar has announced it will boycott any move towards joint sovereignty.

Second, Spain's conservative government made the proposal unilaterally, without seeking prior consensus inside Spain, as formally expressed by the Cortes (Spanish parliament). The proposal was submitted to the UN and to the EU institutions and EU Member States without this internal consensus.⁹²

Third, the applicability of some concrete proposals is doubtful, such as the dismantling of the British border demarcation (the fence) and the border controls of the two states at the border/fence, whilst at the same time maintaining the tax and customs specificities.

Fourth, there are other internal and external collateral effects of the 2016 sovereignty proposal that apparently have not been properly assessed: the dubious constitution of a

⁸⁷ Statement of the Ambassador, Permanent Representative of Spain to the United Nations R Oyarzun at the 71st Session of the General Assembly, IV Committee, 4 October 2016, available at 2 *Cuadernos de Gibraltar — Gibraltar Reports* (2017), Document 5, Documentation, at 363.

⁸⁸ Comunicado Especial sobre la cuestión de Gibraltar, approved by the 22 Chiefs of State on 29 October 2016, XXV Cumbre Iberoamericana in Cartagena de Indias, Colombia. *Cuadernos de Gibraltar — Gibraltar Reports*, 2017, Document 27, Documentation, at 535.

⁸⁹ See P. ANDRES SAENZ DE SANTA MARÍA, *supra* note 65; J. MARTIN Y PEREZ DE NANCLARES, *supra* note 50; and M. ORTEGA CARCELÉN, *The joint sovereignty proposal for Gibraltar: benefits for all*, in *Real Instituto Elcano* ARI 50/2017, 13 June 2017.

⁹⁰ A. DEL VALLE-GÁLVEZ, *Gibraltar and the "Brexit" — New Scenarios within a Historic Dispute. A Proposal*, in *Verfassungsblog on Matters Constitutional, VerfBlog*, 17 April 2017.

⁹¹ 'Takes note of the position of the United Kingdom on this issue, that is, the commitment never to enter into arrangements [...] nor enter into a process of sovereignty negotiations with which Gibraltar is not content', Special Political and Decolonization Committee (Fourth Committee), Draft decision submitted by the Chair – Question of Gibraltar, 7 November 2016, Doc. A/C.4/71/L.17. Approved by the UN General Assembly on 6 December 2016, available at <http://undocs.org/en/A/C.4/71/L.17>, and 2 *Cuadernos de Gibraltar — Gibraltar Reports* (2017), Document 4, Documentation, at 362.

⁹² This is a key issue that is strongly symbolic of Spanish foreign policy. The current Spanish position towards Gibraltar is conditioned by the Proposition approved in Congress in November 2016 advocating consensus in Congress for a state strategy on Gibraltar, dialogue with the Gibraltar authorities, and the safeguard of the interests of cross-border workers and Campo de Gibraltar (BOCG Congreso de los Diputados, 16 November 2016, Serie D No. 51, 28-2).

new autonomous community, the consequences for Morocco's claims on Ceuta and Melilla, and the internal effects on the Basque and Catalan nationalist pretensions.⁹³

However, perhaps the most practical problem is that the proposal inextricably links cross-border cooperation with the resolution of the sovereignty dispute, which leads to an impasse as both the UK and Gibraltar have already rejected joint sovereignty.⁹⁴

Instead of 'joint sovereignty' negotiations as the answer for the Gibraltar question, I advocate a twofold approach in the current historical situation of the negotiation of the UK's departure from the EU: the aforementioned *modus vivendi* for cross-border coexistence, and, in parallel, an agreement to seek a new international and European model for Gibraltar, with a view to ending this historical dispute.

2.3.2. *A Symbolic Sovereignty formula: the City of the Two Crowns*

The Brexit scenario is so utterly novel that Spain could exploit the advantageous position it has suddenly acquired to attempt to solve this historical dispute. If the dispute is indeed entering a new historic stage due to changes in one of the fundamental parameters regulating the status and relationship with Gibraltar, then this could be the ideal moment to devise imaginative proposals to solve the thorny issue of finding an answer acceptable to all parties.

Such an answer should be based on the fundamental interests of the stakeholders involved. Let us recall these core interests: for Spain, some form of recovery of sovereignty over the Kingdom's lost city; for the UK, to maintain its military bases and intelligence operations; and for Gibraltar, to be consulted, with the power to decide on its future respecting its specific identity. It should also be borne in mind that in this symbiotic relationship, the UK defends Gibraltar's primary interests as its own (consultation before, during and after) and *vice versa* (hence, the permanent Gibraltarian awareness campaign directed at the United States on the importance of the UK military bases, even though it has no competences with regard to defence matters).

These essential interests include elements that have emerged and been shaped as additional interests in recent years. Thus, Spain has progressively come to identify its general interest with those of the Campo de Gibraltar region. In addition, there are other related interests, which Spain has historically not considered a priority but which require an urgent acknowledgement by Spain as a national interest: that of the opacity and the necessary democratic control of British military and intelligence bases in the Bay of Algeciras — including the frequent transit of nuclear-powered submarines — a serious risk for the security of Spaniards. On the other hand, in the British political parties, and in particular the conservative party, the symbolic nature of the sovereignty over Gibraltar has been reinforced as a component associated in the collective imagination with the British Empire. The specific context of Brexit may well have added new interests in Gibraltar. Since the June 2016 Brexit referendum, Gibraltar likely also has an essential interest in ensuring a minimum degree of certainty regarding its medium- and long-term political, institutional and economic future. It seems clear that in this situation of uncertainty, Gibraltar's historical distrust of Spain has been accentuated, given the policy of

⁹³ See A. REMIRO BROTÓNS, *Gibraltar could come back to Spain like a boomerang from the other side of the Straits*, in *Gibraltar, Cuadernos de Gibraltar/Gibraltar Reports*, 2015, p. 13 ff., at 21.

⁹⁴ *Britain rejects Spain's talk of joint sovereignty for Gibraltar*, in *The Guardian*, 24 June 2016; *Gibraltar rebuffs Spanish proposal for joint sovereignty to save EU status*, in *The Guardian*, 6 October 2016.

confrontation with Gibraltar in the 2013-2015 period, which included, amongst other things, the progressive dismantling of the agreements reached since 2004 by the trilateral Dialogue Forum and the cancellation of the Forum itself.

In reality, symbolism and nationalistic representations cannot be neglected in the analysis of the interests at stake for the parties. The fact is that the question touches on very strong symbolic and, therefore, irrational elements, which periodically encroach on governments, the media and public opinion alike. For all parties, the problem is emblematic and highly symbolic. At the same time, however, the Gibraltar issue also requires a real willingness to compromise in order to achieve an imaginative and enriching solution for all, particularly for the Campo de Gibraltar region, whose interests the Spanish authorities should increasingly adopt as their own.

In any case, the expressions ‘co-sovereignty’, ‘joint Sovereignty’ and ‘shared sovereignty’ also have a component of nominal value, which carries a very strong negative connotation for Gibraltarians. This negative preconception regarding the term ‘joint’ or ‘shared’ sovereignty itself probably renders it unworkable in practice as the name of any theoretical formula to be debated, regardless of the exact underlying content.

The paradox is that any potential solution will necessarily involve some sort of final format that, even if not officially labelled ‘joint sovereignty’, can nevertheless accommodate content that could be understood as related to that ambiguous term. Territorial disputes are *per se* emotional charged because of the sentimental components of national claims, which are rooted in feelings, prejudices and perceptions. Therefore, any solution must take into account both these terminological issues and the symbolic aspects of the dispute.

To this end, I will now outline a new proposal that could offer theoretical grounds for consideration, namely, the *Principality* or *City of the Two Crowns* theory, or the *City of the British and Spanish Crowns*. This proposal involves a kind of symbolic sovereignty shared by the two states, as well as an international legal status for Gibraltar that is both associated with and coordinated by the EU.

Certain basic ideas support the legal feasibility of this proposal for a City of the Two Crowns.⁹⁶

With regard to the question of territorial integrity, the UN has never categorically stated, *expressis verbis*, that Gibraltar must be reincorporated into Spanish territory. The UN General Assembly has only once referred to paragraph 6 of Resolution 1514 (XV), and then only as a recital. Although the UN has indicated that the principle of (Spanish) territorial integrity is valid and applicable to the colonial situation of Gibraltar, territorial restitution as the ultimate solution is not a UN mandate; rather, it is a deduction reached by Spain for a series of historical and legal reasons and because of the UN’s position on Gibraltar.⁹⁷

⁹⁶ I first proposed this ‘Two Crowns’ formula in ‘Gibraltar, ‘año cero’: Brexit, Cosoberanía y nuevas oportunidades de España’, *supra* note 37. See also: ‘España y Gibraltar ante el Brexit: *Modus Vivendi* y Principado, una propuesta’, in M. MARTÍN, J. PÉREZ (eds.), *El Brexit y Gibraltar: un reto con oportunidades conjuntas*, Colección Escuela Diplomática No. 23, MAEC, Madrid, 2017, pp. 157-176; and ‘Gibraltar, the Brexit, the Symbolic Sovereignty, and the Dispute. A Principality in the Straits?’, *Cuadernos de Gibraltar-Gibraltar Reports*, 2017, pp. 67 ff. In the same regard, see MOLINA, *supra* note 35. See also A. DEL VALLE-GÁLVEZ and I. MOLINA, *Gibraltar, Ciudad de las dos Coronas*, in *El País*, 28 March 2018, available at https://elpais.com/elpais/2018/03/26/opinion/1522078361_237194.html.

⁹⁷ A. DEL VALLE-GÁLVEZ, *supra* note 39, 513.

Therefore, the restitution of Spanish sovereignty does not necessarily have to entail the inclusion of Gibraltar in the Spanish regional or provincial territorial structure. An agreement or treaty that would bring the Principality or the City of Gibraltar under Spanish sovereignty as a city of the Crown would not require its adaptation to the provincial or autonomous region structure. In fact, the Kingdom of Spain already has other territories that are not integrated into the provincial or autonomous region or city structure. The Chafarinas Islands, the Alhucemas Islands and the Rock of Vélez are Spanish possessions on the African coast and, thus, under Spanish sovereignty and jurisdiction. However, these territories, which are scarcely regulated in Spanish law, depend on the central government in Madrid.⁹⁸

Thus, restitution of the city to Spain by means of a treaty of sovereignty would imply a theoretical affiliation to the Crown. Naturally, the Spanish Crown cannot actually 'possess' or administer Spanish territories nor exercise an executive role; that function corresponds to the government. For example, the aforementioned Spanish islands on the African coast are under the direct rule of the Spanish government.

In Spain, with the instruments of Article 93 of the Spanish Constitution and an international agreement, the exercise of powers and competences derived from the Constitution in the territory of Gibraltar could be transferred to or vested in the EU and the United Kingdom. As for the 1978 Constitution, Article 93 was settled thinking in the accession to the European Communities.⁹⁹

For the establishment of the City of the Two Crowns, in my opinion, two treaties may be needed:

** An initial treaty between Spain and the United Kingdom (ex Article 94 Spanish Constitution) could provide for:

- Recognition of Gibraltar as the City of the Two Crowns, i.e., of both the Spanish and British Crown.
- The incorporation of the City into the Crown and Kingdom of Spain enabling it to become an EU territory.
- The granting of an international statute to the City linked to the EU.¹⁰⁰
- Maintenance of the current institutions and organization in Gibraltar and exercise of jurisdiction by the UK, as is currently the case.
- Linkage to the City of the surrounding region of Campo de Gibraltar.
- Establishment of a simple follow-up structure with an EU Special Representative, assisted by representatives of the two states with jurisdiction and sovereignty over the City of Gibraltar.
- The question of British military bases would be regulated in a separate agreement, with an agreement, initially, on permanent British jurisdiction,

⁹⁸ A. DEL VALLE-GÁLVEZ, *Ceuta, Melilla, Chafarinas, Vélez y Alhucemas: tomar la iniciativa*, in *Real Instituto Elcano*, ARI 163/2011, 20 December 2011; 'El contencioso territorial con España', Chapter VII, in A. REMIRO, C. MARTÍNEZ (eds.), *Unión Europea-Marruecos: ¿Una vecindad privilegiada?*, Madrid 2012, p. 369 ff.

⁹⁹ 'By means of an organic law, authorization may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organization or institution'. The English version of the Spanish Constitution is available at *Boletín Oficial del Estado* <https://www.boe.es/legislacion/codigos/codigo.php?id=158¬a=1&tab=2>.

¹⁰⁰ M. WEIBEL suggests giving Gibraltar an autonomous status within the European Union in *Gibraltar*, in *MPEPIL*, 2013, at 35.

- The treaty would be valid for a period of 100 years and would terminate the Treaty of Utrecht. At the same time, the UK and Spain would inform the UN about the final solution and their desire to close the Gibraltar decolonization process.

** A second treaty between Spain, the United Kingdom and the European Union (ex Article 93 Spanish Constitution). This treaty could vest in the EU the exercise of competences deriving from the Spanish Constitution for the supervision and control of the initial British-Spanish treaty: a) in the territory under British jurisdiction (i.e. the City of the Two Crowns); and b) in the Spanish region linked to the City of the Two Crowns. Everything would be consistent with the first Spain-UK treaty.

It should be emphasized that this is not a proposal for international administration of a territory by the EU, as occurred in the past with Danzig and the League of Nations or Trieste under a projected UN administration. The exercise of state powers would continue as currently carried out by the United Kingdom and the government and institutions of Gibraltar. Therefore, it would instead be a case of an internationalized (or Europeanized) territory.

This would require a minimal reform of the Spanish Constitution and, probably, of the Statute of Autonomy of Andalusia, not only to block the provision for expansion into Gibraltar as a 'historical territory' of Andalusia (Additional Provision 1), but also to recognize the special relationship between Gibraltar and the surrounding Campo de Gibraltar.

On the British side, changes, legal and otherwise, would probably be required in the regulation of the British Overseas Territories, as well as in the 2006 Gibraltar Constitution. These acts would somehow have to recognize the particularity of Gibraltar in light of its new international status, as well as foresee the main legal consequences for current British and Gibraltar laws and the legislation to be developed.

A Principality treaty on Gibraltar linked to the EU and based on the concept of a City of the British and Spanish Crowns would not involve the territorial elements encompassed in the notion of joint sovereignty. The focus would instead be on the question of the *exercise* of sovereign functions and the symbolic meaning of sovereignty powers.¹⁰¹

The treaty would automatically incorporate Gibraltar into the Kingdom of Spain and, therefore, into the EU, respecting Gibraltar's current political organization. Regardless of how the UK decides to link Gibraltar to the British Crown and British state, the treaty would involve Gibraltar's legal integration into Spain, and its citizens would become part of the Spanish nation and people, with a recognized right to elect parliamentary representatives and to enjoy European citizenship — on a voluntary basis.

Inevitably, such an agreement, although simple and essentially symbolic in nature, would entail additional agreements on the military bases to ensure the necessary democratic control by the Spanish Parliament of the bases in the Bay of Algeciras. A complementary Spanish-British agreement on military bases would thus be necessary (probably anchored in the NATO framework), as well as clarification about the responsibility for foreign affairs and defence.

¹⁰¹ I. MOLINA notes that symbolism would be softened or diffused in *Gibraltar, a possible solution: diffused sovereignty and shared functions*, *supra* note 35.

On cross-border cooperation matters, the new City of the Two Crowns would need to establish fresh institutional ties with Campo de Gibraltar, as well as secondary agreements or *modus vivendi* on cooperation and control of the waters and on economic and financial activities, which, through institutional ties with neighbouring Campo de Gibraltar, would enhance economic development in the region as a whole.

This Principality or City of the Two Crowns, formally integrated into the Kingdom of Spain and, therefore, in the EU, could be used as a starting formula for negotiation and could accommodate variables such as the institutional link to Campo de Gibraltar or the modulation of the EU's relationship with the Principality.

Any agreement that might potentially be reached would clearly require ongoing consultations with Gibraltar, during and after the negotiation. However, in my opinion, ultimately, any final agreement will need to be formally concluded by the United Kingdom and Spain and would require a separate bilateral treaty on the potential new international and European city status.

This proposal would provide a tailor-made solution to the unique problem of Gibraltar, dispelling analogies with Spain's internal problems and clearly marking a difference in the inevitable comparison with Ceuta and Melilla.¹⁰² However, in the long term that comparison might be of interest to Spain.

3. *Conclusions*

Territory, sovereignty and borders are necessary and basic elements of a state. This paper has highlighted some of the paradoxes that arise in international law regarding the relationship between some of these essential components of states.

These paradoxes probably do not entail any substantive alteration in the relationship between the traditional elements of territory, sovereignty and borders. The contradictions or anomalies exemplifying these paradoxes are limited or reframed with the help of international law.

However, in some ways, these apparent '*contradictio in terminis*' expressions also reflect a certain readjustment of the concepts or meanings of sovereignty and their exercise today. They also reveal an interesting margin of legal flexibility, in both the historical and recent examples.

These are the ideas behind the responses given here to the questions posed. 'States without territory?': an impossibility whose exceptions have had to fit into an *ad hoc* format of international subjectivity. 'Territories without sovereignty?': non-existent spaces, although in certain areas or territorial margins, states seek to evade their responsibilities. 'Territories without borders?': definitely a convenience of legal language, which, in European law, conceals (probably intentionally) a revealing ellipsis about the reality of borderlines and of the suppression of the function of border control in the European continental territory. And, especially, the question of symbolic sovereignty, in relation to which paradoxical cases related to the exercise or not of sovereign functions in certain territories were discussed.

¹⁰² A. DEL VALLE-GÁLVEZ *Gibraltar — Ceuta y Melilla: ejercicio comparativo desde el Derecho Internacional*, in J. ALCAIDE FERNÁNDEZ, E. W. PETIT DE GABRIEL (eds.), *España y la Unión Europea en el orden internacional*, Valencia, 2017, p. 179 ff.

In the case of Gibraltar, these examples could perhaps prompt us to explore imaginative formulas that have not yet been raised in order to find a solution. The ductility offered by some examples in the exercise of sovereignty by states and international entities within international society can lead us to examine possibilities in the field of the symbolic. The main aim is to explore formulas of a symbolic nature that could allow for a dissociation of sovereignty, territoriality and the exercise of state or sovereign functions. Can there be any nominal shared exercise of sovereignty? Could there even be a symbolic sovereignty shared by two states?

Perhaps finding a solution to the Gibraltar dispute requires ingenious formulas, as the gap between the opposing legal positions has been widening for centuries. The Brexit situation may in fact be a window of opportunity to discuss new solutions for the specific and unique case of Gibraltar.¹⁰³

The outcome of the UK's referendum on leaving the European Union necessarily entails both a reconsideration of the status of Gibraltar and changes in Spain's perspective on a solution to the dispute. Following Brexit, negotiations on the UK's withdrawal from the EU will not only pave the way for a new European and international legal framework, but also create a historic opportunity for Spain to redefine its relationship with Gibraltar, offering the possibility of new approaches to resolve this historical dispute. In this sense, Spain may now have the opportunity to adopt a new strategic focus and approach to the question that incorporates a new and convincing narrative for Gibraltar, one that is acceptable to and recognized by Spanish citizens at the current historical moment. Present circumstances may provide the opportunity to resolve the pending issue of regulating cross-border relations with Gibraltar, accepting not only the proximity of but also coexistence with its population in a context of gradual integration into the Spanish nation.

After the crisis of 2013, negotiations reached a stalemate. However, the unexpected outcome of the Brexit referendum could have tragic consequences for Gibraltar as the obligation to negotiate the UK's withdrawal from the EU will likewise require Gibraltar to redefine its legal status vis-à-vis the EU. This status constitutes the legal framework of greatest practical daily application, together with two other international legal frameworks, namely, the Treaty of Utrecht and UN doctrine on decolonisation. The European framework have been applying during the two years of withdrawal negotiations foreseen in Article 50 TEU, providing sufficient legal certainty concerning applicable law. However, the effects of uncertainty have had a very negative impact on the economy of Gibraltar, whose population adopted a clear pro-'Brexit' stance in the referendum. Furthermore, a possible return to the 1713 Treaty of Utrecht has raised fears of the very probable legality of closing the border, at Spain's instigation, should EU law cease to apply in the near future.

The renegotiation of Gibraltar's status within the EU will inevitably involve Spain, which, in 1986, did not question the status with which it had been endowed in 1972. In the present context, however, Spain could leverage the requirement for unanimity at several crucial junctures during the process of negotiating the British withdrawal as regulated under Article 50 TEU. Various possible future scenarios for Gibraltar, such as the antecedent of Greenland or a microstate-style relationship with the EU, will depend on Spain's consent. In addition, solutions intended to maintain the application of the European Single Market

¹⁰³ 'All indications are that a strictly legal solution to Gibraltar is unlikely (...) a full and final settlement hinges on political negotiations', M. WEIBEL, *supra* note 100, at 35.

to Gibraltar would in practice be unworkable in the international arena, because Gibraltar is not part of the British state and its only status under international law is that of a territory awaiting decolonization in a process supervised by the United Nations.

The opportunity that Brexit offers to resolve this historical dispute encompasses both peaceful coexistence between Spain and the small neighbouring community of Gibraltar just over the border and the question of sovereignty that underlies the dispute with the UK. The Spanish government took two important decisions in 2016: it announced the need to negotiate the status of Gibraltar outside the framework of Article 50 TEU, and it proposed a joint sovereignty solution.

The format and content of the joint sovereignty proposal are similar to others presented or negotiated previously between Spain and UK. In the complicated case of Gibraltar, Spain has historically offered special solutions that have leveraged the malleability of sovereignty, venturing several times into the hypothetical terrain of joint or shared sovereignty, which, by definition, is a mediaeval institution shrouded in ambiguity. Despite the difficult-to-explain arcane nature of such a solution, Spain has advanced the joint sovereignty option on multiple occasions, having even negotiated it with considerable prospects of success in the Blair-Aznar era.

The 2016 Spanish joint sovereignty proposal has structural flaws that make it unworkable in practice. Several objective obstacles can be identified: the UK and Gibraltar have rejected the proposal *in limine*; the conservative Rajoy government made it unilaterally, without seeking prior consensus inside Spain, particularly with regard to the creation of a new autonomous community; and it could have internal and external collateral effects for Morocco's claims on Ceuta and Melilla and Basque and Catalan nationalist pretensions. The most practical problem, however, is that the proposal inextricably links cross-border cooperation with the resolution of the sovereignty dispute, which leads to an impasse as both the UK and Gibraltar have already refused to consider joint sovereignty.

Instead of joint sovereignty negotiations as the answer for the Gibraltar question, this article advocates a twofold approach in the current historical context of the negotiations for the UK's departure from the EU: a provisional *modus vivendi* for cross-border coexistence and, at the same time, an agreement to seek a new international and European model for Gibraltar, with a view to ending the historical dispute.

On the one hand, one provisional *modus vivendi* for cross-border coexistence with Gibraltar could be an interim agreement to regulate the aspects most urgently in need of daily normalization. This would especially include border-crossing at the border/fence, but also other issues, such as transparency and economic-financial collaboration, navigation and jurisdiction over Bay waters, or the use of the airport. It would also be necessary to consolidate Gibraltar-Campo de Gibraltar cross-border cooperation, by means of a European Grouping of Territorial Cooperation (EGTC) with Gibraltar. Spain now has the opportunity to adopt a strategic approach that incorporates a new narrative and focus for Gibraltar and addresses the pending issue of normalizing cross-border relations and coexistence with the people of Gibraltar.

The Brexit Withdrawal Agreement of November 2018 focused precisely on cross-border cooperation and its institutionalization. A Protocol annexed as part of the Treaty (and, at the bilateral level, four MOUs and an international tax treaty) has institutionalized and regulated cross-border cooperation in the area with a special legal format, regulating it directly and giving recognition to the present and future Spanish-British bilateral agreements. The stability of the cooperation is underpinned by its recognition in primary

law and by the expected existence of cooperation committees. However, in 2019, there are still many doubts regarding the viability of the entry into force of the 2018 Withdrawal Agreement¹⁰⁴. It should be of interest to all the parties to ensure that the contents of the agreements about Gibraltar — currently set out in the 2018 Protocol, tax treaty and MOUs — are preserved under any other legal formulas in future.

On the other hand, in terms of a solution to the Gibraltar dispute, viable options for debate and negotiation are limited. Currently, a judicial solution in international courts, the independence of Gibraltar, or its integration into the UK are all unrealistic options. Maintaining the current legal status of European law does not seem possible either.

Joint sovereignty formulas seem unworkable for Gibraltar. ‘Co-sovereignty’, ‘joint sovereignty’ and ‘shared sovereignty’ are formulas that have a very strong negative connotation for the 32,000 Gibraltarians. This negative preconception most likely invalidates them in practice as the name of any theoretical formula to be debated, regardless of the exact underlying content.

Paradoxically, however, any potential solution will necessarily involve some sort of final format that, even if not explicitly called ‘joint sovereignty’, can nevertheless accommodate content that could be understood as related to that ambiguous term. Territorial disputes are *per se* emotionally charged and based on feelings and perceptions. Therefore, any solution must take into account both these terminology problems and the symbolic aspects of the dispute.

In light of these considerations, one new proposal that could offer theoretical grounds for consideration is the *Principality* or *City of the Two Crowns* theory, or the *City of the*

¹⁰⁴ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *OJ C* 66I 19.02.2019; Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, *OJ C* 66I 19.02.2019. After reaching an agreement between the UK and the EU on a revised text of the Protocol on Ireland / Northern Ireland included in the Withdrawal Agreement and on the necessary technical adaptations of arts. 184 and 185 of the aforementioned Agreement, as well as on a revised text of the Political Declaration, on October 17, 2019, the European Council approved the modified Withdrawal Agreement and the revised text of the Political Declaration: Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *OJ C* 384I 12.11.2019; Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, *OJ C* 384I 12.11.2019.

The authorisation for the signing of the Agreement on the withdrawal, in Council Decision (EU) 2019/274 of 11 January 2019 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *OJ L* 47I, 19.2.2019. After the EU-UK agreement of October 2019 on a revised text, a new Decision was adopted: Council Decision (EU) 2019/1750 of 21 October 2019 amending Decision (EU) 2019/274 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *OJ L* 274I, 28.10.2019.

The 3 Decisions extending the period under article 50.3 TEU : European Council Decision (EU) 2019/476 taken in agreement with the United Kingdom of 22 March 2019 extending the period under Article 50(3)TEU, *OJ L* 80I , 22.3.2019; European Council Decision (EU) 2019/584 taken in agreement with the United Kingdom of 11 April 2019 extending the period under Article 50(3) TEU, *OJ L* 101, 11.4.2019; European Council Decision (EU) 2019/1810 taken in agreement with the United Kingdom of 29 October 2019 extending the period under Article 50(3)TEU, *OJ L* 278I , 30.10.2019.

British and Spanish Crowns. This proposal involves a kind of symbolic sovereignty shared by the two states, along with an international legal status for Gibraltar that is associated with the EU.

I advocate probing the creative path of the City of the Two Crowns, an unexplored avenue that could lead us into the territories of symbolic sovereignty, enabling Gibraltar's incorporation into the Crowns of both Spain and the United Kingdom. This theory or proposed solution for Gibraltar aims to reintegrate the territory, currently under British jurisdiction, into the Kingdom of Spain, incorporating it into the Spanish Crown. The key lies in the exercise of state functions, which would be entrusted in practice to the United Kingdom under the supervision of the EU and in coordination with Spain. In other words, although the city would formally be under Spanish sovereignty, Spain would not directly exercise that sovereignty, but rather be limited to a coordinating role with the UK and the EU. Such a solution would open the possibility of seeking the lost City's legal reintegration into the Kingdom of Spain, placing it under nominal Spanish sovereignty and terminating the 1713 Treaty of Utrecht. With regard to the City's territory, in practice, the proposal provides for 100 years of symbolic Spanish sovereignty.

In my opinion, the establishment of the Principality or City of the Two Crowns would require at least two treaties: a bilateral treaty between Spain and the United Kingdom (using Article 94 Spanish Constitution); and a second treaty between Spain, the UK and the EU (based on Article 93 Spanish Constitution) to provide for the exercise of competences deriving from the Constitution to be vested in the EU in order to allow it to supervise and control the initial British-Spanish treaty. The EU would also enforce the agreement. Both treaties would restore Gibraltar to the Spanish nation and sovereignty, in addition to incorporating it into the EU as part of the Kingdom of Spain. The treaties would also ensure the maintenance of the current Gibraltar-UK organization and powers, requiring subsequent agreements on Gibraltar's economic and financial regime and British retention of its military bases

This historic moment could be conducive to moving forwards in new and imaginative ways, with initiatives such as that of the 'symbolic sovereignty' formula via the proposed Principality of Gibraltar or City of the British and Spanish Crowns linked to the EU, which offers sufficient constitutional and international margin for consideration. The theory of the Principality of the Two Crowns seeks formulas of non-territorial sovereignty that make it possible to safeguard the interests of the parties and find a unique solution for this unique case that moreover addresses essential symbolic aspects. If the conflict is about the strong irrational and symbolic elements that have accompanied a 300-year territorial dispute, then the solution must address that symbolism, whether real or perceived by the citizens and inhabitants of the most affected territories. In this regard, the Crowns could serve as a screen for sovereignty, avoiding unqualified *expressis verbis* references to direct territorial sovereignty. The Crown has a separate legal status in both Spanish and British law. In both cases, they may also be the appropriate institution to dilute the irrational elements of the territorial claim.

Therefore, the royal standards of the British and Spanish Crowns, in addition to the EU flag, could represent the symbolic aspects of this agreement in Gibraltar. They could also highlight the permanent will to move away from the legal conflict in order to give priority to cross-border cooperation and to consolidate a new internationalized border reality in the southern Iberian Peninsula and the Strait.

This imaginative and non-orthodox solution could, in turn, serve strategic purposes that are also in the parties' medium- and long-term interest. First, the linkage of the surrounding area to the City of the Two Crowns would boost the institutional, commercial and social dimensions of the economic development of the Campo de Gibraltar region in an internationalized territory.

Second, this case of internationalization of the 'City of Gibraltar' could, if necessary, eventually inspire specific solutions for the cases of Ceuta and Melilla. It should not be ruled out that, at some future point, Spain might have an interest in using such a model to its advantage, especially in view of the enduring comparison between the cities subject to claims by Morocco and Spain on either side of the Straits¹⁰⁵.

¹⁰⁵ A. DEL VALLE-GÁLVEZ, *Política exterior española en el área del Estrecho. Gibraltar, Ceuta y Melilla, Marruecos*, in *Cursos de derecho internacional y relaciones internacionales de Vitoria-Gasteiz*, 2019, p. 389 ff.