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## GIBRALTAR, LAND RECLAMATION, THE ENVIRONMENT AND BREXIT<sup>1</sup>

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I. THE ANGLO-SPANISH DISPUTE OVER THE WATERS OF GIBRALTAR AND APPLICATION OF EUROPEAN ENVIRONMENTAL LEGISLATION IN SAID WATERS – II. LAND RECLAMATION IN GIBRALTAR AND THE EUROPEAN UNION'S RESPONSE – III. THE EFFECT OF BREXIT ON MARINE ENVIRONMENT PROTECTION AND THE EXPANSION OF MARITIME SPACES AROUND GIBRALTAR: THE SPANISH-BRITISH MEMORANDUM OF UNDERSTANDING OF 2018 ON ENVIRONMENTAL COOPERATION – IV. FINAL CONSIDERATIONS.

**ABSTRACT.** The implementation of EU environmental legislation in Gibraltar will be analyzed in this Paper. An study strongly affected by the historical Anglo-Spanish dispute concerning sovereignty over Gibraltar (Rock and Isthmus), which also extends to the surrounding maritime spaces, the airspace over the territory and the internal waters of the port of Gibraltar. Since environmental matters are the responsibility of the Government of Gibraltar, this latter is also responsible for transposing environmental directives, whereas the UK is answerable to the EU for compliance with them.

It also will be analyzed the lack of cooperation between the States, that is evidenced by the overlapping of spaces protected surrounding Gibraltar, as Sites of Community Importance (SCI) and Special Areas of Conservation (SAC), for which the adoption of conservation measures is envisaged, including regulation of fishing activity and navigation, environmental impact assessment of projects with transboundary effects that may derive from the practice of land reclamation (in accordance with the Environmental Impact Assessment Directive), pollution prevention, bunkering and

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scientific research. For several years, these activities have been challenged at the European level by the NGO ‘Campo de Gibraltar Verdemar-Ecologists in Action Association’, and have also been the subject of complaints and protests on the part of the Spanish Government to the UK.

Finally, the effect of Brexit on marine environment protection and the expansion of maritime spaces around Gibraltar will be studied, specially the Spanish-British Memorandum of Understanding of 2018 on environmental cooperation which was referenced by the Protocol on Gibraltar included in the Agreement on the Withdrawal of the UK from the EU.

**KEYWORDS:** Gibraltar, Brexit, European Union, Disputes, Territorial claims, cross-border cooperation, environmental cooperation, Land reclamation, Withdrawal Treaty, Protocol, Memorandum of Understanding –MoU, maritime zones, Sites of Community Importance –SCI.

### **GIBRALTAR, LOS RELLENOS Y EL MEDIO AMBIENTE ANTE EL BREXIT**

**RESUMEN.** En este estudio analizaremos la aplicación de la legislación medioambiental europea en Gibraltar, que se ve fuertemente condicionada por la controversia histórica hispano-británica sobre la soberanía del territorio (Peñón e Istmo). Una controversia que se proyecta asimismo sobre los espacios marítimos que le rodean y sobre el espacio aéreo que se superpone al territorio y a las aguas interiores del puerto de Gibraltar. Siendo el medio ambiente competencia del Gobierno de Gibraltar, éste asume la transposición de las Directivas en la materia, mientras que es el RU el responsable de su cumplimiento ante la UE.

Destacaremos, por lo tanto, la falta de cooperación entre los Estados con la superposición de espacios protegidos en torno a Gibraltar, como son los Lugares de Importancia Comunitaria (LIC) y las Zonas Especiales de Conservación (ZEC), en las que se prevé la adopción de medidas de conservación que incluyen, entre otras, la regulación de la actividad pesquera, la navegación, la evaluación del impacto ambiental de los proyectos con efectos transfronterizos que pudieran derivar de la práctica de los rellenos (de conformidad con la Directiva de Evaluación del Impacto Ambiental), la prevención de la contaminación, el *bunkering* o la investigación científica. Y estas actividades vienen siendo denunciadas desde hace años ante instancias europeas por la ONG ‘Asociación Verdemar-Ecologistas en Acción del Campo de Gibraltar’, siendo igualmente motivo de quejas y protestas por parte del Gobierno español ante el RU.

Finalmente, analizaremos la incidencia del Brexit en la protección del medio ambiente marino y en la ampliación de espacios marítimos en torno a Gibraltar, en concreto, el memorando de entendimiento hispano-británico de 2018 en materia de cooperación medioambiental, que aparece referenciado en el Protocolo sobre Gibraltar anexo al Acuerdo sobre la Retirada del RU de la UE.

**PALABRAS CLAVE:** Gibraltar, Brexit, Unión Europea, Controversias, reclamaciones territoriales, cooperación transfronteriza, cooperación medioambiental, rellenos, Tratado de Retirada, Protocolo Memorando de Entendimiento- MOU, espacios marítimos, Lugares de Importancia Comunitaria –LIC.

## I. THE ANGLO-SPANISH DISPUTE OVER THE WATERS OF GIBRALTAR AND APPLICATION OF EUROPEAN ENVIRONMENTAL LEGISLATION IN SAID WATERS

The European Union's Integrated Maritime Policy (IMP) has generated considerable advances in marine environment protection<sup>3</sup>, in particular the adoption of the Marine Strategy Framework Directive<sup>4</sup>, which seeks to ensure cooperation between Member States when these border the same region or sub-region (for which a marine strategy must be established) and when the state of the sea is so critical that it requires urgent measures and a common plan of action. However, such cooperation has not been achieved in the maritime area of the *Strait and Alboran*, which includes the Bay of Algeciras, due to the historical Anglo-Spanish dispute over the waters surrounding Gibraltar<sup>5</sup>, as shall be discussed below.

This lack of cooperation between Spain and the United Kingdom (UK) is evident in the overlapping spaces protected under European environmental legislation (Habitats Directive)<sup>6</sup> and included in the European Natura 2000 network of protected areas as Sites of Community Importance (SCI) and Special Areas of Conservation (SAC). These designations imply the adoption

<sup>3</sup> On the IMP, see: BOU FRANCH, V., "La política marítima de la Unión Europea y su contribución a la prevención de la contaminación marina" in Pueyo Losa, J., Jorge Urbina, J. (Coords.), *La cooperación internacional en la ordenación de los mares y océanos*, Ed. Iustel, Madrid, 2009, p. 113-130, specifically p. 98-102; KOIVUROVA, T., "A Note on the European Union's Integrated Maritime Policy" in *Ocean Development and International Law*, 2009, vol. 40, p. 171-183; NÚÑEZ LOZANO, M. C., "La política marítima integrada de la Unión Europea" in Núñez Lozano, M. C. (Dir.), *Hacia una política marítima integrada de la Unión Europea. Estudios de política marítima*, Ed. Iustel, Madrid, 2010, p. 17-38; REY ANEIRO, A., "Las consecuencias de la Política Marítima Integrada de la Unión Europea para el régimen jurídico de la pesca", *Noticias de la Unión Europea*, 2012, no. 326, p. 41-49.

<sup>4</sup> Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy, OJ L 164, 25/06/2008. On the Framework Directive, see the following studies: BOU FRANCH, V., *loc. cit.* and SANZ LARRUGA, F. J., "La Directiva 2008/56/CE sobre la estrategia marina en el marco de la política ambiental y marítima de la Unión Europea", in Arana García, E., Sanz Larruga, F. J. (Dirs.), Navarro Ortega, A. (Coord.), *La ordenación jurídica del medio marino en España: estudios sobre la Ley 41/2010, de protección del medio marino*, Ed. Civitas, Madrid, 2012, p. 109-168.

<sup>5</sup> On marine strategy in Gibraltar, see GONZÁLEZ GARCÍA, I. and ACOSTA SÁNCHEZ, M. A., "La difícil aplicación de la estrategia marina europea y la protección del medio marino en la bahía de Algeciras/Gibraltar", *Revista Electrónica de Estudios Internacionales (REEI)*, no. 25, 2013.

<sup>6</sup> See Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, known as the Habitats Directive, OJ L 206, 22/07/1992, p.7-50.

of conservation measures that include regulation of fishing activities, navigation, pollution prevention, bunkering and scientific research, and environmental impact assessment of projects with transboundary effects that may derive from the practice of land reclamation.

Since Gibraltar was ceded by the Spanish Crown to the British in 1713, its terrestrial surface area has been considerably enlarged by land reclamation works conducted by the Government of Gibraltar to create new land from the sea. For several years, the Campo de Gibraltar Verdemar Ecologists in Action Association has challenged this practice in Spanish courts and European institutions, and it has also been the subject of complaints and protests on the part of the Spanish Government to the UK.

The substantive legal issue is that land reclamation in Gibraltar takes place in waters that Spain considers under its sovereignty, maintaining a historical dispute with the UK over the maritime spaces surrounding the Rock and the waters adjacent to the Isthmus<sup>7</sup>. This is because there is a dual interpretation

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<sup>7</sup> On the Anglo-Spanish dispute over Gibraltar, see Del Valle Gálvez, A. and González García, I. (eds.), *Gibraltar, 300 años*, Serie Estudios Internacionales y Europeos de Cádiz, Servicio de Publicaciones de la Universidad de Cádiz, 2004. In particular, on the waters of Gibraltar, see: GONZÁLEZ GARCÍA, I.: “La bahía de Algeciras y las aguas españolas” in the abovementioned *Gibraltar, 300 años*, p. 211-236; “Los espacios marítimos del Istmo y Peñón de Gibraltar: Cuestiones en torno a su delimitación” in Sobrino Heredia, J. M. (ed.), *Mares y océanos en un mundo en cambio: tendencias jurídicas, actores y factores*, Tirant Lo Blanch / Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales, Valencia, 2007, p. 141-169; By the same author: “The Anglo-Spanish Dispute over the Waters of Gibraltar and the Tripartite Forum of Dialogue”, *The International Journal of Marine and Coastal Law*, no. 26, 2011, p. 91-117. See also DEL VALLE GÁLVEZ, A., GONZÁLEZ GARCÍA, I. and VERDÚ BAEZA, J., “Gibraltar, el Medio Ambiente y el Oro del Sussex: Por un Acuerdo de delimitación de aguas”, *Política Exterior*, 2007, vol. 21, no. 117, p. 163-176; and by the same authors, “Propuestas para un acuerdo práctico sobre las aguas de Gibraltar”, in Aznar Gómez, M. (coord.), *Estudios de Derecho Internacional y Derecho Europeo en homenaje al Profesor Manuel Pérez González, Tomo I*, Tirant lo Blanch, Valencia, 2012, p. 407-440; VERDÚ BAEZA, J., *Gibraltar: controversia y medio ambiente*, Dykinson, 2008; and “La controversia sobre las aguas de Gibraltar: el mito de la costa seca”, *Revista Española de Derecho Internacional (REDI)*, 2014, vol. 66, p. 81-126; O'REILLY, G., “Gibraltar: Sovereignty Disputes and Territorial Waters”, *International Boundaries Research Unit, Boundary and Security Bulletin*, Spring, 1999, p. 67-81; and DEL VALLE GÁLVEZ, A., “¿De verdad cedimos el Peñón?: opciones estratégicas de España sobre Gibraltar a los 300 años del Tratado de Utrecht”, *REDI*, vol. 65, no. 2, 2013, p. 117-156; By the same author: “Spanish Strategic Options for Gibraltar, 300 Years after the Treaty of Utrecht”, in Dadson T. and Elliott, J. H. (eds.), *Britain, Spain and the Treaty of Utrecht 1713-2013*, Legenda, Oxford, 2014, Chapter 11, p. 115-128; “España y la cuestión de Gibraltar a los 300 años del Tratado de Utrecht”, *Análisis del Real*

of Article X of the Treaty of Utrecht: on the one hand, Spain considers that the cession only applied to the town and castle of Gibraltar, together with its port, defences and fort. A literal interpretation of Article X, in accordance with Spain's 'dry coast doctrine', denies the existence of British territorial waters around the Rock, recognising only the internal waters of the original port located between the old and new moles of the time (1704 or 1713). Therefore, Spain does not recognise the existence of British territorial waters around the Rock, and still less around the Isthmus, a territory that Spain never ceded but was occupied by the UK, which since 1966 has claimed acquisition of sovereignty by prescription, a claim that Spain does not recognise. On the other hand, the UK has always claimed and exercised *de facto* jurisdiction over the so-called *British Gibraltar Territorial Waters* (BGTW), which were defined unilaterally in British Admiralty Nautical Chart 1448. In application of the equidistance principle (EP), these waters extend 1.5 miles to the west, encompassing part of the Bay of Algeciras/Gibraltar, and are internal waters since they are within the port of Gibraltar, and 3 miles of territorial waters to the east and south in the Strait, which include the waters adjacent to the Rock (by virtue of principle that the land dominates the sea) and the Isthmus (sovereignty by prescription).

The Anglo-Spanish dispute over the waters of Gibraltar conducted within the framework of the European Union (EU) has been further inflamed by land reclamation projects in Gibraltar ever since the European Commission declared these waters Sites of Community Importance, producing an overlap between the Spanish and UK SCIs<sup>8</sup>. It should be recalled that based on a proposal by the Government of Gibraltar in 2004, the UK lobbied for the designation of a SCI called the *Southern Waters of Gibraltar* (which encompasses most of the adjacent waters), subsequently granted by Commission Decision of 19 July 2006<sup>9</sup>, in accordance with the provisions of European

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*Instituto Elcano*, ARI 23/2013, 20/06/2013 (*Revista ARI* No. 110, July-August 2013, p. 8-15), and *Cuadernos de Gibraltar – Gibraltar Reports* n° 1, 2015, p. 83-96, recovered from <<https://revistas.uca.es/index.php/cdg/article/view/4583>>; and "Maritime zones around Gibraltar", *Spanish Yearbook of International Law* (SYIL), no. 21, 2017, p. 311-326.

<sup>8</sup> See VERDÚ BAEZA, J., "La doble declaración de Lugares de Interés Comunitario (LIC) y la superposición de zonas marinas protegidas en aguas de Gibraltar. ¿Una nueva controversia?", *REDI*, 2009, no. 1, vol LXI, p. 286-291.

<sup>9</sup> Commission Decision 2006/613/EC of 19 July 2006 adopting, pursuant to Council Directive



environmental legislation<sup>10</sup>. In response, Spain successfully petitioned for the inclusion of a maritime zone called the *Estrecho Oriental* [Eastern Strait] when the EU updated SCI list in 2008<sup>11</sup>. This SCI partly overlaps with the UK's SCI around Gibraltar declared two years previously, which according to Professor Verdú does not include adjacent areas of enormous environmental value, paradoxically under Spanish jurisdiction and with no connection to the pre-existing *Estrecho Natural Park* SCI, which comprises a coastal strip up to Punta Carnero at the western end of the Bay of Algeciras<sup>12</sup>.

In turn, the UK and Gibraltar authorities challenged the Commission's decision to include Spain's *Estrecho Oriental* SCI in the list of Sites of Community Importance, bringing an action in the then Court of the First Instance of the European Communities, but this was not admitted due to formal questions, a ruling that has influenced the Commission's responses to written questions submitted by members of the European Parliament (MEPs) in relation to land reclamation in SCIs, subsequently declared Special Areas of Conservation (SAC).

Pursuant to the provisions of Article 42.3 of Spanish Law 42/2007, of 13 December, on Natural and Biodiversity Heritage<sup>13</sup>, once lists of SCIs have been approved or expanded by the European Commission, the Autonomous

92/43/EEC, the list of sites of Community importance for the Mediterranean biogeographical region, OJ L 259, 21/09/2006, p. 1-104 (notified under document number C (2006) 3261). A map of this British SCI is given in González García, I. and Del Valle Gálvez, A. (eds.), *Gibraltar y el Foro Tripartito de Diálogo*, Dykinson, Madrid, 2009, p. 541. See annex below.

<sup>10</sup> The Habitats Directive.

<sup>11</sup> Commission Decision 2009/95/EC of 12 December 2008 adopting, pursuant to Council Directive 92/43/EEC, a second updated list of sites of Community importance for the Mediterranean biogeographical region, notified under document number C(2008) 8049 and published in OJ L 43, 13/02/2009, p. 393-465. Maps of this SCI, with code ES6120032, are given in *Gibraltar y el Foro tripartito de Diálogo*, *cit.*, p. 542-543. See annex below.

<sup>12</sup> See VERDÚ BAEZA, J., "La doble declaración de lugares de interés comunitario (LIC) y la superposición de zonas marinas protegidas en aguas de Gibraltar. ¿Una nueva controversia?", *cit.*; "La negativa incidencia de las controversias de Gibraltar en el medio ambiente en la Bahía de Algeciras/Gibraltar", *REEI*, no. 23, 2012, p. 286-291.

<sup>13</sup> B.O.E., no. 299, 14/12/2007. This law establishes the legal framework governing basic conservation, sustainable use, improvement and restoration of Spanish natural and biodiversity heritage. See chapter III of Law 42/2007, in relation to Natura 2000 protected spaces, which include Sites of Community Importance (SCI), Special Areas of Conservation (SAC) and Special Protection Areas (SPA).

Communities shall declare them SACs as soon as possible, within a maximum term of six years, and shall also approve the corresponding plan or management instrument<sup>14</sup>. In the case of the Spanish *Estrecho Oriental* SCI, this responsibility was assumed by the State through the Ministry of Agriculture, Food and Environment, under the terms of Article 6 of Law 42/2007<sup>15</sup>, and also of Article 28 c) of the Spanish Law transposing the Marine Strategy Framework Directive (Law 41/2010, of 29 December, on protection of the marine environment)<sup>16</sup>. Consequently, on 30 November 2012, Royal Decree 1620/2012 was approved, *declaring the Site of Community Importance ES6120032, the Estrecho Oriental, located in the Natura 2000 Network Mediterranean biogeographical region, a Special Area of Conservation and approving its corresponding conservation measures*. The geographical boundaries of the *Estrecho Oriental* SAC coincide with those of the *Estrecho Oriental* SCI<sup>17</sup>, which is managed jointly by several public authorities, including the Regional Government of Andalusia in mat-

<sup>14</sup> It was envisaged that the definition of protected spaces (SCI, SAC and SPA) would be the competence of the Autonomous Communities. See the preamble to Law 42/2007, specifically p. 3 of 72. See also Article 41.2 of said law.

<sup>15</sup> “It is the responsibility of the State, through the Spanish Ministry of the Environment, to exercise the administrative functions referred to in this Law, respecting the provisions of the Statutes of Autonomy of the coastal Autonomous Communities, in the following cases: a) in the case of critical spaces, habitats or areas located in marine areas under national sovereignty or jurisdiction, provided that the requirements of Article 36.1 do not apply; b) in the case of species whose habitats are located in the spaces referred to in the preceding paragraph, and of highly migratory marine species; c) where, in accordance with international law, Spain is responsible for managing spaces located in straits subject to international and maritime law”. In addition, under the terms of Article 36.1 of Law 42/2007, “It is the responsibility of the Autonomous Communities to determine and declare the management plan for protected natural environments in their territorial area and marine waters when, in the case of the latter, there is ecological continuity between the marine ecosystem and the protected terrestrial space, supported by the best scientific evidence available”.

<sup>16</sup> B.O.E., no. 317, 30/12/2010. This provision envisages the functions of the State as follows: “To declare and manage Special Areas of Conservation and Special Protection Areas in the marine environment, in the cases established in Article 6 of Law 42/2007, of 13 December”, and these are indicated in the preceding note.

<sup>17</sup> Annex 2 of the present article indicates the geographical boundaries of the Spanish Area of Special Conservation for the Site of Community Importance, the *Estrecho Oriental*, which overlaps the geographical boundaries of the Gibraltar Special Area of Conservation for the Site of Community Importance, the *Southern Waters of Gibraltar* (shown in Annex 1).



ters within its competence<sup>18</sup>.

Conservation measures for the Spanish SCI/SAC include regulation of the uses and activities contained in Appendix I (fishing; aquaculture; access to genetic resources; protected space occupation; extractive and energy uses; navigation; pollution prevention; marine waste; underwater pipes and cables; national defence and public security; bunkering; recreational activities; wildlife observation; scientific research; noise pollution prevention; and monitoring, inspection and control)<sup>19</sup> and the management plan established in Appendix II.

Of particular note, the activities regulated in the Spanish SAC include fishing (bearing in mind the incidents caused following Gibraltar's sinking of seventy concrete blocks in a fishing ground trawled by Spanish fishermen)<sup>20</sup> and the practice of bunkering, which is prohibited, specifically as regards "the permanent mooring of oil tankers in the waters within the protected space"<sup>21</sup>. This refers to fuel supply via high capacity tankers that function as floating fuel stations, a practice that used to be carried out at anchorages located in the waters of the Bay external to the port of Gibraltar<sup>22</sup>, but was terminated by the Gibraltar Government, as we shall see below.

Hence, these are activities that affect marine environment protection but which take place regularly in the so-called BGTW, and therefore also in the Spanish *Estrecho Oriental* SCI/SAC. Despite the historical dispute between Spain and the UK, the Commission has not ruled on the substantive issue, which concerns sovereignty over the overlapping areas, stating that this is a territorial dispute that must be resolved by the States, in accordance with

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<sup>18</sup> Articles 1 to 5 of Royal Decree 1620/2012, of 30 November, in *B.O.E.*, no. 289, 01/12/2012.

<sup>19</sup> The provisions of Royal Decree 1620/2012 and the regulation contained in Appendix I shall be applied without prejudice to the freedom of navigation and overflight and the laying of underwater cables, in accordance with international law (see the first additional provision).

<sup>20</sup> See GONZÁLEZ GARCÍA, I., "La pesca y el medio ambiente en las aguas de Gibraltar: la necesaria cooperación hispano-británica en el marco de la Unión Europea" *Cuadernos de Gibraltar – Gibraltar Reports*, no. 1, 2015, p. 149-170, recovered from <<https://revistas.uca.es/index.php/cdg/article/view/4586>>.

<sup>21</sup> Annex I, p. 83216 in *B.O.E.*, no. 289, of 1 December, *cit.*

<sup>22</sup> See MAGRAMA, press release (29/08/2013): "Arias Cañete announces legislative changes to penalise floating fuel stations in Special Areas of Conservation".

the appropriate international and bilateral instruments<sup>23</sup>, and in line with the United Nations' classification of Gibraltar as pending decolonisation<sup>24</sup>. Of particular interest in this respect is the question posed by MEP Mr Graham Watson to the Commission<sup>25</sup>, after this latter had stated<sup>26</sup> that it “has no competence in relation to territorial disputes between Member States”. Mr Watson had indicated to the Commission the possible implications of recognising the Spanish *Estrecho Oriental* SCI, for example that such recognition might be interpreted as *de facto* acceptance of Spanish claims that the SCI area is in Spanish territory, and he asked whether the Commission recognised the existence of a rule of international law prohibiting the exercise of sovereign power within the territory of another Member State, and whether it understood the implications for European and international law of endowing Spain with obligations in the *Estrecho Oriental* SCI, which includes maritime spaces over which another Member State claims sovereignty<sup>27</sup>.

<sup>23</sup> In response to this question from MEP Mr Graham Watson (ALDE), of 29 July 2009, on the overlap of the *Southern Waters of Gibraltar* and *Estrecho Oriental* SCIs, the Commission replied: “Finally, the Commission has no competence in relation to territorial disputes between Member States and does not consider that the designation process under the Habitats Directive is the appropriate tool with which to resolve them”. See response E-3840/2009, of 25 September 2009. The Commission responded (1 December 2009) in similar terms to a written question from the same MEP (E-4972/2009): “The Commission does not consider that Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora is an appropriate mechanism to resolve such disputes between Member States in relation to sovereignty claims over the same territory. Nor does the Commission consider that the listing of the overlapping United Kingdom site “*Southern Waters of Gibraltar*” and the Spanish site “*Estrecho Oriental*” as Sites of Community Importance for the Mediterranean Region changes the situation in relation to these disputing sovereignty claims, which ultimately will have to be resolved under appropriate international and bilateral mechanisms”.

<sup>24</sup> On colonialism (in reference to Gibraltar) in the European Union, see the response of 4 May 2009 to a written question from MEP Mr Marios Matsakis (ALDE) to the Council (E-6926/08, 6 January 2009), which notes that since the European Council of Barcelona in March 2002, “...the matter has not been mentioned before the Council. The respective views of Spain and the United Kingdom continue to be made well known”.

<sup>25</sup> See written question E-4972/09 of 14 October, 2009.

<sup>26</sup> In response to a previous question (E-3840/2009).

<sup>27</sup> Of particular interest is the third question, cited in full here:

3. Article 6(1) of the Habitats Directive states that Member States must establish the necessary conservation measures involving management plans specifically designed for the sites and appropriate statutory, administrative or contractual measures. In addition, Article 23(1) states that Member States shall bring

In its response, the Commission indicated that the listing of the two marine sites off Gibraltar demonstrated that both Member States recognised the ecological value of these marine waters, that obligations arose from the inclusion of a site in the Natura 2000 network of protected areas and that it was for each Member State claiming territorial rights to exercise their responsibilities under the Habitats Directive. Furthermore, the Commission noted that it had expressed its willingness to the States in question (Spain and the UK) to facilitate a process of dialogue and any joint initiatives that they were willing to undertake with a view to ensuring the conservation and management of the disputed marine territory off Gibraltar, including, if they considered it appropriate, work on the preparation of a joint management plan for the protection and attainment of the conservation objectives for the SCIs<sup>28</sup>.

The Anglo-Spanish dispute over the waters of Gibraltar and the overlapping Spanish and British SCIs in these waters is further compounded by the fact that regulation of the SAC in the *Southern Waters of Gibraltar* SCI is the competence of the Gibraltar Government<sup>29</sup>, but it is the UK that is responsible before the EU for observing European environmental legislation<sup>30</sup>.

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into force the laws, regulations and administrative provisions necessary to comply with this directive.

- a) Does the Commission accept that there is a widely recognised rule of international law which prohibits the exercise of sovereign power within the territory of another Member State?
- b) Does the Commission agree that the apparent obligations imposed on the Spanish in this instance have implications in international law?
- c) Does it agree that providing one Member State with various legal obligations within the territory of another Member State (which does not recognise that other State's jurisdiction) has implications in EC law?
- d) How does the Commission envisage that the obligations and enforcement obligations imposed by implementing this SCI will operate in this instance?

<sup>28</sup> Thus, "The Commission has indicated to both the United Kingdom and Spain that is willing to facilitate a process of dialogue and any joint initiatives that they are willing to undertake with a view to ensuring the conservation and management of the disputed marine territory off Gibraltar, including, if they consider appropriate, work on the preparation of a joint management plan for the protection and attainment of the conservation objectives for the site. The Commission has invited the two Member States concerned to engage in such a process and stands ready to respond positively to any steps in that regard". Commission response E-4972/2009, of 1 December 2009.

<sup>29</sup> See Order of 9 March 2011, of the Minister of Environment of Gibraltar, in *Gibraltar Gazette* no. 3839, 10/03/2011. *Designation of Special Areas of Conservation (Southern Waters of Gibraltar)*. Order 2011, Legal Notice 19 of 2011, 10/03/2011, pursuant to the *Nature Protection Act* 1991.

<sup>30</sup> *Southern Waters of Gibraltar SAC*. See <<http://www.gibraltarlaws.gov.gi/articles/2011s019.pdf>>. On this Special Area of Conservation, see "The EU brings proceedings against London for failing

The claim to sovereignty and jurisdiction of overlapping waters has led to numerous incidents between Spain and the UK/Gibraltar. One example would be the harassment of a Spanish oceanographic vessel sent on a VIATAR mission at the request of the Environment Ombudsman in order to obtain information for the Spanish Oceanographic Institute on the environmental impact of the seventy concrete blocks sunk by the Government of Gibraltar in waters claimed by Spain, but which were not inside the Spanish or British SCIs/SACs<sup>31</sup>. Another later incident led to the Spanish Secretary of State for Foreign Affairs to reiterate Spain's position on the question of the waters adjacent to Gibraltar to the British Government's Minister of State for Europe<sup>32</sup>.

The Commission thus plays an important role in the application of European environmental legislation. Below, I shall analyse land reclamation projects in the waters of Gibraltar within the framework of the EU, and then explore the different options for collaboration between Spain and the UK in the field of environmental cooperation in a dual post-Brexit scenario (with or without an agreement), following the extension granted by the EU to the

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to protect the waters of Gibraltar", *El País*, 03/08/2015, in Annex 3.

<sup>31</sup> According to the question addressed by the MEP Mr Sosa Wagner (NI) to the Commission on 27 November 2013 (E-013476-13) on harassment of a Spanish oceanographic vessel in the Gibraltar SAC (SCI), on 18 November 2013 as many as six (seven) boats belonging to the Royal Gibraltar Police, accompanied by two armed Royal Navy boats, harassed the scientific vessel in an attempt to obstruct the scientific work it was carrying out, to such an extent that the Spanish Civil Guard was forced to urgently intervene to protect the Spanish scientists.

<sup>32</sup> See press release 229 of the Spanish Ministry of Foreign Affairs, European Union and Cooperation, of 6 October 2014, on the activities of the oceanographic vessel "Ángeles Alvariño": "Spain does not recognise that the United Kingdom has any other rights in situations relating to maritime spaces that are not covered by Article X of the Treaty of Utrecht. The adjacent waters are, therefore, Spanish. What the UK terms 'illegal incursions' into what it refers to as 'British territorial waters' are nothing but the routine activities of Spanish boats in Spanish waters". The Spanish position on the spaces ceded to the UK by the Treaty of Utrecht is made explicit in press release 160 (11 July 2016) issued after the Secretary of State for Foreign Affairs had summoned the British Ambassador to express vigorous protest about the events that occurred on the afternoon of July 8, when a patrol boat of the Royal Gibraltar Police (RGP) steered on a collision course with a Civil Guard boat, at a distance of one mile off the east coast of the Rock, in Caleta (Catalan Bay). Spain has reiterated this position year after year before the United Nations Political and Decolonisation Committee.

UK until 31 January 2020<sup>33</sup>.

## **II. LAND RECLAMATION IN GIBRALTAR AND THE EUROPEAN UNION'S RESPONSE**

In accordance with Spain's interpretation of Article X of the Treaty of Utrecht, its position on land reclamation projects in the waters adjacent to Gibraltar differs depending on whether these affect the east coast or the area inside the Bay of Algeciras/Gibraltar. In the latter case, the Spanish position also differs depending on whether the land reclamation is sited in the waters of the port of Gibraltar (the sole maritime space where Spain recognises UK sovereignty and which does not form part of either the Spanish or the British SCIs) or beyond this (for example, those sited in the north mole of the port of Gibraltar or to the north of the airport runway, also outside the SCIs/SACs of both States), in waters over which both Spain and the UK claim sovereignty.

Beginning with an analysis of the land reclamations on the **east coast (entirely subsumed within the 'Estrecho Oriental' SCI but only within part of the 'Southern Waters' of Gibraltar SCI)**, it should be noted that numerous written questions have been submitted by MEPs to the Commission<sup>34</sup> concerning the UK's possible violation of the Directive on Environmental Impact Assessment (EIA Directive)<sup>35</sup>, and in particular of Article 7, which

<sup>33</sup> On 19 October 2019, the UK presented a request for an extension of the time limit (31 October 2019) until 31 January 2020. As stated in its application, in the event that the parties ratified the withdrawal agreement before 31 January 2020, the UK government proposed bringing forward the deadline for the end of the extension. This request was approved by the European Council on 29 October 2019. See European Council Decision (EU) 2019/1810 taken in agreement with the United Kingdom of 29 October 2019 extending the period under Article 50(3) of the TEU. *OJ L 278I*, 30/10/2019, p. 1–3; Recovered from <<http://data.europa.eu/eli/dec/2019/1810/oj>>.

<sup>34</sup> The first written question addressed by Ms Salinas García (PSE) to the Commission, of 22 September 2005, on reclamation works prior to the construction of a marina, a residential development and several hotels on the east coast of Gibraltar, notes that the Spanish Ministry of Foreign Affairs had warned the Government of Gibraltar these works (sandbanking) could be the main cause of the constant depletion of sand now occurring at the Playa de Levante at La Línea, due to changes in the volume of coastal sediments and the movements of water on the shoreline. Consequently, Spain had sought to participate in the mandatory impact assessment, expressing its willingness to cooperate with the Gibraltar authorities; the latter, however, insisted that the work was being carried out in full compliance with EU environmental legislation.

<sup>35</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011

stipulates that in the case of projects which could have a significant effect on the environment in other Member States, the environment impact assessment should include transboundary consultations. In addition, Article 8 states that the conclusions (results) of these consultations must be taken into account in the final decision on the project (i.e. in the project authorisation process), and the Member State concerned must be informed (Article 9).

Article 7 of the EIA Directive obliges Member States to allow another Member State to participate in the environmental impact assessment process when the project in question could have significant effects on the environment of that other Member State<sup>36</sup>. In the words of the Commission, “this obligation is only triggered when the impact of the project is considered to have significant effect. For that, the Member State in whose territory the project is intended to be carried out, should first screen and scope any potential impacts of the project under the EIA Directive in order to identify environmental factors considered to be affected seriously”<sup>37</sup>.

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on the assessment of the effects of certain public and private projects on the environment (OJ L 26, 28/1/2012), amended by Directive 2014/53/EU of the European Parliament and of the Council, of 16 April 2014, OJ L 124, 25/04/2014.

<sup>36</sup> Where the UK considered (for example, in relation to *Eastside*) that the project would not have a significant transboundary impact on the environment, it informed the Commission that it had not initiated the procedure laid down in Article 7 of the EIA Directive. In other words, the EIA was carried out in accordance with the Directive before authorising project execution, but “the assessment concluded that the project, as finally authorised, would not have a significant transboundary impact on the environment”. See the joint response of the Commission (10 February 2014) to written questions E-013687/13, E-013685/13, E-013688/13 and E-013686/13.

<sup>37</sup> See the response of the Commission (31 October 2014), to written question E-006814/2014 (11 September), raised by MEP Mr Fernando Maura Barandiarán (ALDE) on a new filling project in Gibraltar (in reference to the *Western Beach* project, to the north of the airport runway). According to the Commission, Article 7 of the EIA Directive “foresees a transboundary environmental impact assessment procedure. The duty to inform an affected Member State of a project arises either where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests”. This was the answer given on 6 August 2015 by the Commission to written question E-009073/2015, June 4, submitted by MEP Mr Jordi Sebastià (Verts/ALE), on plans to build a marina breakwater on the east side of Gibraltar (*Eastside Marina Breakwater*). An identical response was given in relation to the construction of a new power plant, with a new land reclamation plan at Poniente beach (located to the north-west of the airport runway, on the Isthmus) and further reclamation on the east face of the Rock. See the response of the Commission of 5 August 2015, to written question E-005563/2015, April 8, tabled by MEPs Mr de Grandes Pascual and Mr



To the above should be added the provisions of the so-called Habitats Directive, because in the words of the Commission, this “does not ban any particular economic activity, including land reclamation (filling operations) from a site of community importance. Rather it obliges such activities to undergo an appropriate assessment where necessary”<sup>38</sup>. Consequently, in the case of the successive land planning projects presented by Gibraltar on the east coast (the *Eastside* Project<sup>39</sup>, also known as *Sovereign Bay*<sup>40</sup>, later replaced by

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Millán Mon (EPP). The Commission indicated that it did not have information related to the above-mentioned projects and that Article 7 of the EIA Directive “did not foresee a role for the Commission in this consultation process”.

<sup>38</sup> See the reply of the Commission (31 October 2014) to written question E-006814/2014.

<sup>39</sup> This land planning project consisted of the construction of skyscrapers, hotels, over two thousand homes, a marina with the capacity for five hundred vessels, squares, gardens and swimming pools. See written question E-0451/09 addressed by MEP Mr Gerardo Galeote (PPE-DE) to the Commission, of 3 February 2009. In accordance with points 10 (infrastructure projects) and 12 (tourism and leisure) in Annex II of the Directive, and included in the *Eastside* project, it is the responsibility of Member States to determine, either through a case by case examination or according to thresholds or criteria, whether the project is to be made subject to an assessment because of its likely significant effects on the environment taking into account the relevant selection criteria set out in Annex III of the directive. See the response of the Commission of 17 March, 2009. In this case, the Commission found that an EIA procedure had been carried out for this project by the Gibraltar authorities (the Development and Planning Commission granted planning permission for the project), and indicated that it was the UK authorities who were ultimately responsible for undertaking appropriate measures to ensure that such projects did not pose serious environmental risks. In the case under study, the Commission responded that “On the basis of the limited information available, it is not possible to detect any non-compliance with EC environmental legislation that might be applicable to this project”. In the final phase of this project, similar representations were again made to the Commission. See the response of 18 March 2015, to the question tabled by MEPs Ms Maite Pagazaurtundúa Ruiz and Mr Fernando Maura Barandiarán (ALDE) on 7 January 2015 (E-000151-15), on construction work on the Rock of Gibraltar. By 15 June 2015, the Commission had not finished evaluating the information on the EIA procedure for the *Eastside* project (E-005562/2015): “As regards the impacts of the Eastside Project and land reclamation activities, the UK has considered them in their Marine Strategy Framework Directive assessment. In respect of the impact of the project on protected species, the UK indicated that a survey was undertaken, concluding that there were no transboundary impacts on protected species. The Commission is still assessing the information provided on the impact assessment procedure in relation to the Eastside Project”. See the answer given by Mr Vella on behalf of the Commission (E-005562/2015), to the question raised by MEPs Mr Luis de Grandes Pascual and Mr Francisco José Millán Mon (EPP), of 8 April 2015.

<sup>40</sup> Answer given by Ms Damanaki on behalf of the Commission (25 September 2013) to the

the *Blue Water* project in the same location and finally by the *Hassan Centenary Terraces* project<sup>41</sup>), the activities carried out in Algarrobo Beach (Sandy Bay) and the construction of two breakwaters close to the *Eastside* project<sup>42</sup>, the Commission has issued its response on the basis of the information supplied, which has not indicated the existence of any infringement of EU environmental legislation<sup>43</sup>.

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question tabled by MEP Mr Sosa Wagner (NI), on bullet tuna fishing in the Gibraltar dry dock (E-007028-13, 17 June): “As regards land reclamation activities in Gibraltar, the Commission requested in September 2011 information from the United Kingdom concerning the works to build the development of Sovereign Bay project in Gibraltar. The United Kingdom authorities indicated that the potential impact of the development had been assessed and that it concluded that there would be no significant impact on any of the Natura 2000 sites designated in the vicinity of the project. From the information provided, the Commission was unable to identify a breach of EU environmental law in this case”. The *Sovereign Bay* project was designed by the architect Norman Foster, and consisted of the construction of more than 2,000 apartments, a hotel, a marina for 300 boats and commercial establishments. Recovered from <[https://www.larazon.es/historico/6603-alertan-de-nuevos-rellenos-al-este-de-gibraltar-por-instalaciones-petroliferas-SLLA\\_RAZON\\_493158](https://www.larazon.es/historico/6603-alertan-de-nuevos-rellenos-al-este-de-gibraltar-por-instalaciones-petroliferas-SLLA_RAZON_493158)>.

<sup>41</sup> *Lainformacion.com* (01/03/2019): “Apartment buildings for Gibraltar in Spanish waters may provoke diplomatic conflict”.

<sup>42</sup> On this occasion, Spain submitted a complaint via a note verbale, describing the expansion of Gibraltar’s territory as “inadmissible” and “incompatible with the Treaty of Utrecht”. See *eldiario.es* (16/08/2013): “Spain urges the United Kingdom to halt Gibraltar expansion works”.

<sup>43</sup> See the response of the Commission (8 October 2014) to the question tabled by MEP Mr Fernando Maura Barandiarán (ALDE), of 29 August 2014 (E-006439-14): “In the course of its assessment, the Commission requested clarification from the UK authorities *inter alia* on the impact assessment of the project [in reference to *Eastside*] on the surrounding environment. The UK authorities indicated that according to their assessment the project would not have any significant environmental effects on this site. Furthermore, the UK authorities set out how the impacts of the *Eastside* project and land reclamation activities were considered in the assessment of the current environmental status in accordance with Article 8 of the Marine Strategy Framework Directive 2008/56/EC and clarified that the transboundary impacts and features of that project were considered in detail in the Environmental Statement, which has been provided to the Commission services. Having considered all the information and standpoints provided on this issue and, based on the evidence produced, the Commission has not been able to identify any breach of EU environmental legislation”, thus responding in the negative to the following questions: “2. Rather than simply seeking explanations from the British authorities, is the Commission thinking of adopting an executive measure of some kind to prevent Gibraltar continuing to damage an area under Community protection?; 3. Is the Commission thinking of adopting a measure of some kind to ensure Gibraltar puts right the environmental damage caused, restoring reclaimed areas to their original

The *Western Beach* project, located **to the north of the airport runway**, has elicited similar reactions. In this case, continuing its policy of land reclamation, the Government of Gibraltar authorised the *Western Beach land reclamation and construction of sports facilities* project, with plans to fill an area of 73,000 square metres destined for sports activities and light industry. Once again, the Commission stated that it “does not possess any evidence of a clear violation of EU environmental legislation”, adding that “publicly available information indicates that an EIA was carried out”<sup>44</sup>.

Reclamation works have continued in order to expand the port and airport of Gibraltar and construct a large stadium. Furthermore, a new land planning project was announced in April 2019 **in the port waters** of the Rock, called *Victoria Keys*<sup>45</sup>. A priori, the location of this project in port waters does not pose a problem for Spain since the fill would be sited in a space that Spain recognises was ceded to the UK in the Treaty of Utrecht<sup>46</sup>.

Similarly, the desire to transform Gibraltar into an important naval base, with a now failed attempt to berth the aircraft carrier HMS Queen Elizabeth (which together with the HMS Prince of Wales, will form an essential element of the UK military naval strategy in coming decades), has led the UK to consider increasing the length and draft of the port of Gibraltar<sup>47</sup>. Spain has

state?” See also the response of the Commission (8 January 2015) to the question presented by the same MEP (E-009688/2014, of 26 November 2014), on landfill works by Gibraltar in an EU special area of conservation, in which complaints were reported from ecology organisations that because Spain had blocked the export to Gibraltar of aggregates for landfill purposes, the aggregates being used could contain dangerous waste, to which the Commission replied that it had seen no evidence to support this claim.

<sup>44</sup> See the reply of the Commission (31 October 2014) to written question E-006814/2014 (of 11 September).

<sup>45</sup> See *abc.es* (19/01/2009): “The Government is allowing Gibraltar to grow at the expense of Spanish territorial waters”, and *sevilla.abc.es* (09/04/2019): “Gibraltar to gain more land from the sea with another urban mega-project”.

<sup>46</sup> *Algecirasalminuto.com* (10/04/2019): “The Ministry of Foreign Affairs says that land reclamation projects in Gibraltar may comply with the Treaty of Utrecht, but it will monitor the situation”, and continues, “the Secretary of State for the EU, Luis Aguiriano, confirmed on Wednesday that according to the initial information available, the new land planning project in Gibraltar appears to comply with the Treaty of Utrecht, because it only reclaims land in the port waters, which were ceded to the United Kingdom in the 18th century”.

<sup>47</sup> *Elconfidencialdigital.com* (14/02/2018): “Gibraltar wins with Brexit: London intends to convert the Rock into strategic base”. On the effects of Brexit on the port of Gibraltar, see *noticiasgibraltar.es*

also considered expanding its port facilities at the port of Algeciras<sup>48</sup> and the marina at La Línea<sup>49</sup>, without affecting the EP inside the Bay of Algeciras/Gibraltar, a line that has not been altered since its delimitation by the UK.

To the north of the airport runway, an **artificial reef** was constructed by the Government of Gibraltar in the summer of 2013 by sinking seventy concrete blocks in a fishing ground traditionally trawled by Spanish fishermen in the Bay of Algeciras<sup>50</sup>. The reason given for this action was that it was an attempt to protect the marine environment, and the Commission has again stated that it has not detected any breach of EU environmental legislation<sup>51</sup>.

Concerning the project for a new power plant on land reclaimed from the sea **on the north mole of the port of Gibraltar**, the Commission responded that it had not received detailed information on the project and had not assessed the safety risks for inhabitants of the surrounding area<sup>52</sup>. The land (14/03/2017); Recovered from <<https://noticiasgibraltar.es/foro/efectos-del-brexite-en-el-puerto-de-gibraltar>>.

<sup>48</sup> The recent announcement of the expansion of the port of Algeciras has prompted the Verdemar Ecologists in Action Association to raise objections. See *europasur.es* (20/09/2019): “Verdemar objects to expansion of the port of Algeciras due to its consequences for the beach of Getares”, and *europasur.es* (25/09/2019): “Landaluce defends expansion of the port of Algeciras to ensure its competitiveness”.

<sup>49</sup> *Elpais.com* (23/06/2013), *cit.*: “Ecologists’ objections fail to stop land reclamation in Gibraltar”.

<sup>50</sup> On the crisis of the summer of 2013, see DEL VALLE GÁLVEZ, A., “La crisis de Gibraltar y las medidas, opciones y estrategias de España”, *Análisis del Real Instituto Elcano*, ARI 32/2013 of 19/08/2013, English version “The Gibraltar crisis and the measures, options and strategies open to Spain” *Cuadernos de Gibraltar - Gibraltar Reports*, no. 1, 2015, p. 135-147, recovered from <<https://revistas.uca.es/index.php/cdg/article/view/4585>>; GONZÁLEZ GARCÍA, I., “La pesca y el medio ambiente en las aguas de Gibraltar: la necesaria cooperación hispano-británica en el marco de la Unión Europea”, *cit.* On its location, see Annex 4 included here.

<sup>51</sup> See the answer given by Mr Vella on behalf of the Commission (E-005562/2015), of 15 June 2015: “As regards the placement of 70 blocks, the UK explained that the London Convention and Protocol/UNEP guidelines were followed and that potential pressures were assessed under the MSFD and the Habitats Directive. Under the latter, it was concluded that no protected species were present within the footprint of the proposed artificial reef”. The Commission reached this conclusion after requesting clarification from the UK, which was provided in March 2014. Spain also provided additional information on the subject. This information was assessed by the Commission, which did not detect any infringement of EU environmental legislation, reaching the same conclusion in the case of bunkering activities.

<sup>52</sup> Question raised by MEPs Mr Luis de Grandes Pascual and Mr Francisco Millán Mon (EPP), of 30 March 2015 (E-004901-15), and answered by Mr Arias Cañete on behalf of the Commission

reclamation work began in May 2014 and was followed by the installation of nine reinforced concrete breakwaters on the western section of the north mole<sup>53</sup>.

Thus, neither the objections to land reclamation in Gibraltar that the Verdemar Ecologists in Action Association has been presenting for years<sup>54</sup>, nor

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(5 June, 2015), as follows: “1. The Commission has received no information about a project of power station in Gibraltar. There is no EU legislation requesting a Member State to inform the Commission on its detailed energy projects (except for nuclear infrastructure)” and “2. The safety assessment of a project is under the sole responsibility of the Member States, without any assessment from the Commission”, albeit the safety of the project was called into question by the leader of the opposition in Gibraltar, then Mr Feetham.

<sup>53</sup> See the answer given by Mr Vella on behalf of the Commission (5 August 2015) in response to the written question submitted by MEPs Mr Grandes Pascual and Mr Millán Mon (EPP), of 8 April 2015 (E-005563/2015), on land reclamation for the construction of a new power plant and the presentation of a new land reclamation plan at Poniente beach (located to the northwest of the airport runway). The Commission did not detect a breach of EU environmental legislation, in accordance with the provisions of Article 7 of the EIA Directive. See *Elconfidencial.com* (23/08/2014) “Gibraltar approves execution of new land reclamation works in the middle of a tobacco war” and *Radiobahia Gibraltar.es* (30/01/2015): “The Government of Gibraltar clarifies the situation of land reclamation on the North Mole”.

<sup>54</sup> Protests began with the first fills during construction of the aerodrome runway in Gibraltar (see *elpais.com* (23/06/2013): “Ecologists’ objections fail to stop land reclamation in Gibraltar”). The Spanish Ministry of the Environment had already received complaints in 2005 that the Port Authority of the Bay of Algeciras was transporting stones from Spain by barge to Gibraltar. See <<https://www.ecologistasenaccion.org/?p=3554>> (01/12/2005), and the written request sent shortly afterwards to the then President of the Government, Mr Rodríguez Zapatero, asking that action be taken to remedy the fills being carried out to the east of the Rock in order to construct a resort and residential development, <<https://www.ecologistasenaccion.org/?p=5316>> (28/06/2006). A new complaint to the Spanish Ministry of Environment was made public on 25 May 2013: “Verdemar protests about new land reclamation works to the east of the Rock of Gibraltar”, <<https://www.diariosur.es/v/20130525/campo-gibraltar/verdemar-denuncia-nuevos-rellenos-20130525.html>>. See also *europasur.es*> (17/08/2019): “Gibraltar anchored ‘Grace 1’ in an area protected by Spain and the EU. Verdemar warns the Ministry for the Spanish Ecological Transition that the ship’s presence violates the law passed in 2012”. Numerous complaints were also submitted to European institutions. See, dated 20 September 2010: “Ecologists ask the EU to investigate land reclamation in Gibraltar. Verdemar protests that the Government of Gibraltar is reclaiming land in a SCI and suspects that it is using ‘hazardous waste’, <<https://www.diariosur.es/v/20100920/campo-gibraltar/ecologistas-piden-investigacion-sobre-20100920.html>>; 9 October 2012: “Warnings of new land reclamation to the east of Gibraltar for oil facilities”, <[https://www.larazon.es/historico/6603-alertan-de-nuevos-rellenos-al-este-de-gibraltar-por-instalaciones-petroliferas-SLLA\\_RAZON\\_493158](https://www.larazon.es/historico/6603-alertan-de-nuevos-rellenos-al-este-de-gibraltar-por-instalaciones-petroliferas-SLLA_RAZON_493158)>; 27 May 2013, <<https://www.>

the Spanish Government's complaints and protests to the UK authorities<sup>55</sup>, has succeeded in halting the expansion of Gibraltar through land reclamation. What the Spanish Government did do in the summer of 2013, in the middle of the crisis with the Gibraltar authorities provoked by the construction of an artificial reef, was to prohibit Spanish lorries transporting stones, debris or aggregates from entering Gibraltar via the border crossing<sup>56</sup>, spurring the Government of Gibraltar to replace these with ships carrying sand and rocks from Portugal, Morocco<sup>57</sup> and Algeria.

On 14 June 2013, in the midst of this crisis provoked by the construction of an artificial reef to the west of the Rock (inside the Bay), the Verdemar Ecologists in Action Association submitted a complaint to the Directorate General for the Environment of the Commission for violation of the natural habitats, wild fauna and flora of the *Estrecho Oriental* SCI, caused by use of

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ecologistasenaccion.org/?p=25960>; 20 October 2013: "According to Verdemar, Gibraltar is placing 'underwater walls' to protect the fill", <<http://www.canalsur.es/gibraltar-coloca-muros-submarinos-para-proteger-los-rellenos/346433.html>>; 17 December 2013: "Ecologists warn that fill materials in Gibraltar include 'pollutants' such as plastic", <<https://www.europapress.es/nacional/noticia-ecologistas-aseguran-rellenos-gibraltar-incluyen-material-contaminante-plastico-20130824113941.html>>; and 3 February 2015: "Gibraltar has expanded its territory in Spanish waters", <https://www.elconfidencialdigital.com/articulo/politica/ampliado-Gibraltar-territorio-aguas-espanolas/20150202194306076042.html>. The Town Council of La Línea de la Concepción has also raised objections. See "The town council of La Línea to complain to the European Union about land reclamation in Gibraltar", <[https://www.europasur.es/gibraltar/Ayuntamiento-rellenos-Gibraltar-Union-Europea\\_0\\_415159180.html](https://www.europasur.es/gibraltar/Ayuntamiento-rellenos-Gibraltar-Union-Europea_0_415159180.html)>, 16 October 2010.

<sup>55</sup> See *eldiario.es* (16/08/2013), *cit.*: "Spain urges the United Kingdom to halt Gibraltar expansion works"; *larazon.es* (26/02/2019): "Gibraltar continues to grow at the expense of Spain", which contains a reference to the note verbale sent on 19 January 2019 by the Spanish Ministry of Foreign Affairs to the British Ambassador in Madrid, expressing the Spanish Government's objection to the continuing construction of six 33-storey tower blocks on the east coast of Gibraltar; see also the note verbale sent in October 2017 on the same subject; and *elpais.com* (26/02/2019), "Spain threatens to denounce the United Kingdom for Gibraltar".

<sup>56</sup> The lorries were transporting material from Casares and Manilva in Málaga or from the Valdevaquero dunes in Tarifa, considered cultural heritage (prompting the ecologists to file a criminal complaint for ecological crime against the mayor of Tarifa). See the news item for 17 December 2013: "Ecologists warn that the fill material used in Gibraltar contains 'pollutants' such as plastic".

<sup>57</sup> *Elconfidencial.com* (29/08/2013): "Gibraltar ignores Spain and is to transport rocks and sand by sea to expand its territory"; *diariodesevilla.es* (26/02/2014): "Gibraltar resumes land reclamation using stones transported by boat"; *abc.es* (28/04/2014): "Gibraltar transports stones in boats for land reclamation".



aggregate fill material to the east of the Rock and by bunkering. This complaint was eventually admitted by the Commission, after the Association had appealed to the Ombudsman<sup>58</sup>.

On the practice of bunkering in Gibraltar, notable among the Commission's responses to questions from MEPs<sup>59</sup> is the one of 15 June 2015, in which, besides recognising the UK's compliance with the provisions of EU environmental legislation<sup>60</sup>, it stated that "there are no vessels acting as floating fuel stations in the *Estrecho Oriental* site at present".

As regards fishing in the waters of Gibraltar, the Commission has given no opinion, considering that in compliance with the Act of Accession of 1972, EU regulations concerning the common fisheries policy do not apply to Gibraltar<sup>61</sup>, and therefore the Commission cannot initiate infringement

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<sup>58</sup> See the question to the European Commission and its written response (E-011321-13), together with the news item of 23 October 2013: "The EU supports the complaint lodged by Verdemar against Gibraltar for fills and bunkering", recovered from <<https://www.diariosur.es/v/20131023/campo-gibraltar/admite-denuncia-verdemar-contra-20131023.html>>. For a detailed report of the content of the complaint, see *EcoDiaria.es* (22/10/2013): "The EU supports the complaint against Gibraltar for fills and bunkering".

<sup>59</sup> Oral question H-0800/02 submitted by Mr García Margallo y Marfil in the plenary session of the Parliament held in December 2002; written question E-3405/02 submitted by Mr Bautista Ojeda (Verts/ALE), on 29 November 2002, and question for written response E-00564/2011, 14 June, submitted to the Commission by Mr Giles Chichester and Ms Julie Girling (ECR), concerning evidence supporting complaints against the companies supplying Gibraltar, to which the Commission responded by reiterating that it had no evidence that the bunkering operations carried out in the Bay of Algeciras by Gibraltar violated European legislation on the matter. See response of 27 July 2011. See also question for written response E-013687-13, of 3 December 2013, concerning fuel bunkering activities in Gibraltar and conservation measures in the *Estrecho Oriental* SAC, which included the prohibition of bunkering activities.

<sup>60</sup> See the answer given by Mr Vella on behalf of the Commission (E-005562/2015): "As regards the bunkering activities, the UK indicated that the potential pressures were assessed in accordance with Marine Strategy Framework Directive and that Gibraltar Port authority operates a strict Bunkering Code of Practice and enforcement programme to protect the marine environment". The Commission reached this conclusion after requesting clarification from the UK, which was provided in March 2014. Spain also provided additional information on the subject. This information was assessed by the Commission, which did not detect any infringement of EU environmental legislation.

<sup>61</sup> See the reply of the Commission (E-007028/2013) concerning bullet tuna fishing in the Gibraltar dry dock. Equally, in the question for written answer addressed to the Commission (E-011321-13, 3 October 2013), on repeated environmental infringements by Gibraltar, MEP Mr Sosa Wagner

proceedings related to the application of and compliance with EU fishing legislation in Gibraltar<sup>62</sup>.

It is therefore evident that to date, the EU membership of both Spain and the UK has enabled the Commission to support the practice of land reclamation in Gibraltar, limiting itself to responding to written questions submitted by MEPs and complaints filed by Spanish ecology associations in the area, without finding evidence that the UK is breaching EU environmental legislation. Neither has the Commission delved further into the underlying question of sovereignty over the maritime spaces where land reclamation works are carried out.

### **III. THE EFFECT OF BREXIT ON MARINE ENVIRONMENT PROTECTION AND THE EXPANSION OF MARITIME SPACES AROUND GIBRALTAR: THE SPANISH-BRITISH MEMORANDUM OF UNDERSTANDING OF 2018 ON ENVIRONMENTAL COOPERATION**

Within the framework of negotiations between the UK and the EU, the Council authorised the signing in January 2019 of the Agreement on the Withdrawal of the United Kingdom from the European Union, of 25 November 2018 (of which the Protocol on Gibraltar forms an integral part)<sup>63</sup>.

noted the complaint submitted by the Verdemar Ecologists in Action Association on 14 June 2013 to the Directorate General for the Environment of the European Commission, detailing the ecological damage caused by landfill practices, the consequences for protected marine fauna and flora, the presence of floating fuel stations and the use of the Gibraltar dry dock to catch bullet tuna. This complaint was subsequently investigated by the Commission, which asked the UK authorities for more information (response of 28 November 2013).

<sup>62</sup> See the response of the Commission (19 January 2015) to the question submitted by MEP Mr Gabriel Mato (E-008639-14) of 3 November 2014, on Atlantic bluefin tuna fishing in Gibraltar, and its response of June, 2015 to the question submitted by MEP Ms Aguilera García (S&D), of 11 March 2015 (E-003860-15), on illegal tuna fishing in the Strait of Gibraltar, where according to environmental organisations, offenders take refuge on the coast of the Rock of Gibraltar.

<sup>63</sup> See 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. The Spanish version of the Treaty in the C series of the Official Journal is given in Acuerdo sobre la retirada del Reino Unido de Gran Bretaña e Irlanda del Norte de la Unión Europea y de la Comunidad Europea de la Energía Atómica, DOUE C66 I, de 19/2/2019. The Protocol on Gibraltar is given in p. 150-ss, recovered from <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2019:066I:TOC>>. After

Given this situation, and in accordance with Article 50(3) of the TEU, the deadline established for treaties to cease to apply to the UK after Brexit, with or without an agreement<sup>64</sup>, has already been extended three times. The most recent extension, granted to allow completion of ratification of the withdrawal agreement, establishes a deadline of 31 January 2020, a decision that has been adopted by the European Council in agreement with the UK<sup>65</sup>. The Withdrawal Agreement was revised in October 2019, and finally approved by the British Parliament in January 2020<sup>66</sup>.

In relation to the subject under study, this means that the UK's withdrawal from the EU will also entail Gibraltar's withdrawal, pursuant to Art. 355.3 of the TFEU (relative to the scope of application of the Treaties of the EU)<sup>67</sup>. Consequently, in response to guidance from the European Council of 29 April 2017<sup>68</sup> and to the declaration of the European Council and of reaching 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 adaptations to Articles 184 and 185 of the agreement, as well as on a revised text of the political declaration of 17 October 2019, the European Council approved the amended agreement on withdrawal and the revised text of the political declaration. On the 21 October 2019, the Council adopted Decision (EU) 2019/1750 amending Decision 2019/274 (EU) on the signing of the Withdrawal Agreement, *OJ L 274*, 28/10/2019.

<sup>64</sup> That is, two years after the UK had notified the European Council of its intention to do so.

<sup>65</sup> See European Council Decision (EU) 2019/1810 taken in agreement with the United Kingdom of 29 October 2019 extending the period under Article 50(3) of the TEU.

<sup>66</sup> Council Decision to conclude the Withdrawal Agreement of 30.01.2020, recovered from <<https://www.consilium.europa.eu/en/press/press-releases/2020/01/30/brexit-council-adopts-decision-to-conclude-the-withdrawal-agreement/>>. The Treaty was signed in London and Brussels the 24.01.2020, 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 29*, 31.1.2020, p. 7–187

<sup>67</sup> In the terms of Article 355.3 of the TFEU: “The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible”.

<sup>68</sup> These established that “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”. These guidelines were reiterated in the supplementary negotiating directives of the Council of 29 January 2018 and in the guidelines of the European Council of 14 March, 2018. See the Proposal for a Council Decision 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, Doc. COM (2018) 833 final, Brussels, 05/12/2018, p. 5-6.

the Commission contained in the statements for the minutes of the meeting of the European Council of 25 November 2018<sup>69</sup>, Spain and the UK have adopted four bilateral agreements (or memoranda of understanding) that are referenced in the Protocol on Gibraltar (on the rights of citizens; tobacco and other products; environmental cooperation; and police and customs cooperation), and envisaged the adoption of a international treaty on taxation and protection of financial interests<sup>70</sup>, finally adopted in March 2019, although this is currently in the process of ratification by both States.

Focusing on the Memorandum of Understanding (MoU) on environmental cooperation, this marks an important step forwards as regards the current state of cross-border cooperation between Spain and the UK in relation to Gibraltar<sup>71</sup>. In effect, this MoU envisages the creation of an institutional framework for cooperation (the Technical and Coordination Committee) with representatives of the competent authorities<sup>72</sup>, which include not only the two States<sup>73</sup>, but also the Government of Gibraltar, the Regional Government of Andalusia and the Association of Municipalities in

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<sup>69</sup> According to the declaration of the European Council and of the Commission: “After the United Kingdom leaves the Union, Gibraltar will not be included in the territorial scope of the agreements to be concluded between the Union and the United Kingdom. However, this does not preclude the possibility to have separate agreements between the Union and the United Kingdom in respect of Gibraltar. Without prejudice to the competences of the Union and in full respect of the territorial integrity of its Member States as guaranteed by Article 4(2) of the Treaty on European Union, those separate agreements will require a prior agreement of the Kingdom of Spain”. It is worth highlighting the interpretative declaration that the European Council and the Commission issued on the same occasion concerning Article 184 of the withdrawal agreement and the scope of future territorial agreements. *Ibidem*, p. 6.

<sup>70</sup> See Statement 172 (29/11/2018) of the Spanish Ministry of Foreign Affairs, the European Union and Cooperation on the “Signing of memoranda between Spain and the United Kingdom on Gibraltar”; <[http://www.exteriores.gob.es/Portal/es/SalaDePrensa/Comunicados/Paginas/2018\\_COMUNICADOS/20181129\\_COMU172.aspx](http://www.exteriores.gob.es/Portal/es/SalaDePrensa/Comunicados/Paginas/2018_COMUNICADOS/20181129_COMU172.aspx)>.

<sup>71</sup> Characterised by the absence of an institutional framework on cross-border cooperation ever since Spain withdrew from the tripartite forum for dialogue in 2011.

<sup>72</sup> The MoU provides for the appointment of a president, responsible for the operation of the Technical and Coordination Committee. This post will rotate every five months among the competent authorities.

<sup>73</sup> As indicated in the MoU, representatives of the Governments of Spain and the UK will participate in all meetings of the Technical and Coordination Committee.

the Region of Campo de Gibraltar<sup>74</sup>. This implies recognition of Gibraltar as an interlocutor and guarantor of the MoU's application, together with the UK<sup>75</sup>, since to date, the Gibraltar authorities have assumed responsibility for environmental matters and for transposing environmental directives that affect the territory of Gibraltar<sup>76</sup>.

The MoU is intended to ensure that the competent authorities act in good faith, in the sole interest of protecting and improving the environment, and envisages the participation of the EU in the meetings of the Committee, which will report regularly to the Specialised Committee on issues related to implementation of the Protocol on Gibraltar<sup>77</sup>.

It should be noted that the MoU expands the scope of competence for cooperation laid down in the Protocol on Gibraltar<sup>78</sup>, because in addition to

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<sup>74</sup> The MoU expressly states that “cooperation between the competent authorities is essential to ensure the effective implementation of the arrangements laid down in this Memorandum of Understanding”.

<sup>75</sup> In the context of the EU, Spain does not recognise the Gibraltar authorities as valid interlocutors, after the signing by Spain and the UK on 19 April 2000 of the “Agreed arrangements relating to Gibraltar authorities in the context of EU and EC instruments and related treaties”. Under this agreement, EU Member States shall not maintain any direct communication with the Gibraltar authorities, and all communication must be channelled via the British authorities, clearly indicating that the UK is the Member State responsible for Gibraltar, including its external relations. The agreement can be consulted in Council Document 7998/00, relating to Gibraltar authorities in the context of EU and EC instruments and related treaties, of 19/04/2000, and in the previously cited book, *Gibraltar, 300 años*, p. 473-477.

<sup>76</sup> According to the MoU: “The activities of the TCC and of the competent authorities in respect of the TCC will be without prejudice to the requirements of EU law applying during the transition period”. It was envisaged that this MoU would cease to have effect on 31 December 2020 (the end of the transitional period established in the agreement on withdrawal), unless the parties agreed otherwise.

<sup>77</sup> This Specialised Committee acts as a subcommittee of the Joint Committee (EU-UK) which oversees the implementation, operation and repercussions of Brexit, in accordance with the provisions of Article 165 of the withdrawal agreement.

<sup>78</sup> With respect to the subject under study, Article 4 of the Protocol on Gibraltar on “Environment protection and fishing” states that “Spain and the United Kingdom shall establish a coordinating committee as a forum for regular discussion between the competent authorities of issues concerning in particular waste management, air quality, scientific research and fishing. The Union shall be invited to participate in the meetings of that coordinating committee. That coordinating committee shall report to the Specialised Committee on a regular basis”.

serving as a forum for waste management<sup>79</sup>, air quality<sup>80</sup>, scientific research<sup>81</sup> and fisheries<sup>82</sup>, the Technical and Coordination Committee is responsible for “assessment of the environmental impact of proposed projects in both Gibraltar and the surrounding area, in particular the territory of the municipalities that make up the Mancomunidad de Municipios del Campo de Gibraltar (including land reclamation) that are likely to have a significant transboundary effect”<sup>83</sup>; for “water quality and the protection of the marine habitat in both Gibraltar and the surrounding area”<sup>84</sup>; for the marine environment “consistent with the desire to maintain high environmental standards and protection and facilitate sustainable development both in Gibraltar and in the surrounding area”<sup>85</sup>; and for refuelling activities<sup>86</sup>.

Thus, the Technical and Coordination Committee is envisaged as a forum to promote discussion, enhanced cooperation and the exchange of information, on request, on issues related to the subject of the present study that have been raised before the European Commission, which has not detected

<sup>79</sup> “The TCC, alongside the Working Group on Customs referred to in the Memorandum of Understanding on Police and Customs Cooperation, will also provide a forum for enhanced cooperation in respect of solid waste and rubble crossing from Gibraltar to Spain for treatment in places other than the landfill of the Mancomunidad de Municipios del Campo de Gibraltar”.

<sup>80</sup> “The TCC will provide a forum for enhanced cooperation, and for the exchange of information on request between the competent authorities, on air quality in both Gibraltar and the surrounding area”, referring in particular to the municipalities that make up the Association of Municipalities in the Region of Campo de Gibraltar.

<sup>81</sup> In this field, the Committee shall act as a forum “for the sharing of related scientific data”, with the express provision that “scientific research vessels of EU or UK flag which intend to carry out their activities in that area [referring to Gibraltar and the surrounding area, in particular the municipalities of Campo de Gibraltar] will inform the TCC of their route, duration, objectives and any other matter the Committee will consider relevant with reasonable notice before the beginning of the activities”, and that the Committee shall receive a copy of the research findings.

<sup>82</sup> The Committee is envisaged as “a forum for the discussion of fishing activities”.

<sup>83</sup> In this respect, the Technical and Coordination Committee “will provide a forum for enhanced cooperation, and for the exchange of information on request between the competent authorities”.

<sup>84</sup> In this instance, the Committee will serve as a forum for enhanced cooperation between the competent authorities.

<sup>85</sup> In this respect, the Committee “will provide a forum for enhanced cooperation between the competent authorities”.

<sup>86</sup> In this case, the Committee “will provide a forum for promoting the highest environmental protection”.



violations by the UK of EU environmental legislation (in relation to land reclamation, bunkering, fisheries, protection of the marine environment or harassment of oceanographic vessels) in waters close to Gibraltar that fall within the Spanish *Estrecho Oriental* SCI.

However, the validity of the MoU is conditional upon the entry into force of the agreement on the withdrawal of the UK from the EU. Nevertheless, the Spanish position of favouring an orderly withdrawal of Gibraltar in order to alleviate negative consequences in Campo de Gibraltar and ensure the rights of cross-border workers and the socio-economic stability of the region<sup>87</sup>, together with recent statements by the British Ambassador to Spain, leave open the possibility of endowing validity to the memoranda of understanding in the context of a hard Brexit without an agreement<sup>88</sup>.

In the worst case scenario, where the UK withdraws from the EU without an agreement (or we have another hard Brexit scenario in January 2021 with no agreement about the Treaty on future relationship EU-UK) relations with Spain could become even more difficult and turbulent should the UK decide to extend the territorial waters of Gibraltar to 12 miles, something that has occasionally been advocated by the Government of Gibraltar. The British Government has raised this possibility before, during an escalation in tensions with Spain in the summer of 2013<sup>89</sup>, after the Gibraltar authorities sank seventy concrete blocks and Spain toughened control of the passage of people and goods across the border.

An extension of territorial waters from 3 to 12 miles would endow the UK with powers to regulate maritime traffic in the Strait of Gibraltar, thus affecting the Spanish-Moroccan agreement adopted within the framework of the International Maritime Organisation (IMO), which establishes the maritime traffic separation scheme in the Strait of Gibraltar and the notification system for vessels sailing in the Strait<sup>90</sup>.

<sup>87</sup> See the non-legislative proposal on negotiation with the UK on an orderly exit of the territory of Gibraltar from the EU and the application to that territory of any agreement on the future relationship with the EU, BOCG, Sección Cortes Generales, serie A, no. 266, of 12 February 2019.

<sup>88</sup> *Europasur.es* (15/10/2019): “The British ambassador says that the memoranda on Gibraltar ‘remain in force’”.

<sup>89</sup> *Europapress.es* (27/08/2013): “The British Government is considering extending the waters of Gibraltar to twelve miles off the coast”.

<sup>90</sup> See CEPILLO GALVÍN, M. A., “El dispositivo de separación del tráfico marítimo en el Estrecho de

Meanwhile, the extension in 2009 of waters under the jurisdiction of the port authority, with the port of Gibraltar dock on the east side of the Rock (extending port of Gibraltar services to this area of the coast)<sup>91</sup>, has led to the immobilisation of numerous foreign ships in Spanish territorial waters (sometimes opposite the coast of Málaga) while waiting for permission to enter the port of Gibraltar. This disruption of navigation and the right of innocent passage through territorial waters is prohibited in Spanish waters, in accordance with the United Nations Convention on the Law of the Sea of 1982<sup>92</sup>.

#### IV. FINAL CONSIDERATIONS

Previous experiences of cross-border cooperation<sup>93</sup> indicate that within

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Gibraltar” in Sobrino Heredia, J. M. (ed.), *La contribución de la convención de las Naciones Unidas sobre el derecho del mar a la buena gobernanza de los mares y océanos*, vol. 2, 2014, p. 731-745.

<sup>91</sup> See reference in DEL VALLE GÁLVEZ, A., GONZÁLEZ GARCÍA, I. and VERDÚ BAEZA, J., “Propuestas para un acuerdo práctico sobre las aguas de Gibraltar”, in Aznar Gómez, M. (Coord.), *Estudios de Derecho Internacional y Derecho Europeo en homenaje al Profesor Manuel Pérez González*, cit., section II.1, note 28.

<sup>92</sup> See MAEC press release no. 211, of 18 July 2014, on Gibraltar, reporting that the Spanish Ministry of Foreign Affairs and Cooperation had summoned the British Ambassador to express the strongest protest and dissatisfaction at the way in which the United Kingdom had handled the so-called “incident” with the Spanish Navy ship ‘Tagomago’ two days previously. Then, the MAEC stated that “What the United Kingdom has termed an incident (and therefore the Foreign Office yesterday summoned the Spanish Ambassador in London) was no more than the routine activity of a Spanish Navy ship in Spanish waters, in complete accordance with both Spanish domestic law and international law, and in particular with the United Nations Convention on the Law of the Sea. Under international law, the waters from the east of the Rock until 12 miles out are Spanish territorial waters. In accordance with the Permanent Maritime Surveillance and Security Plan, the Directorate General of the Merchant Navy requires the Navy to invite foreign-flagged vessels at anchor, stationary or whose movements do not conform to conventional navigation patterns—therefore infringing the right of innocent passage—to leave territorial waters. Consequently, on the 16 July at 06.00 h, the patrol boat ‘Tagomago’ requested the exit from territorial waters of the following ships, which were stationary and hence impeding innocent passage in the space between 7 and 9 miles off the east side of the Rock and south of the border line: MAERST TAURO, MT NILUFER SULTAN, MARE ATLANTIC, SOYO, SFAKIA WAVE...”, recovered from <[http://www.exteriores.gob.es/Portal/es/SalaDePrensa/Comunicados/Paginas/2014\\_COMUNICADOS/20140718\\_COMU211.aspx](http://www.exteriores.gob.es/Portal/es/SalaDePrensa/Comunicados/Paginas/2014_COMUNICADOS/20140718_COMU211.aspx)>.

<sup>93</sup> See GONZÁLEZ GARCÍA, I., “El marco estatal y subestatal de la cooperación transfronteriza entre Gibraltar y el Campo de Gibraltar”, in *Gibraltar, 300 años*, p. 315-338.

the institutional framework of the Tripartite Forum for Dialogue (2004)<sup>94</sup>, Spain and the UK were capable of putting aside questions of sovereignty in order to foster cooperation<sup>95</sup>, and in 2007, of expressly including environmental issues on the agenda<sup>96</sup>. Moreover, in July 2009, agreements on environmental issues and on maritime communications and security were expressly defined in the proceedings and outcome of the matter then pending before the Court of the First Instance of the European Communities on the overlap of Spanish and British SCIs around Gibraltar<sup>97</sup>.

<sup>94</sup> In an attempt to promote a process which had been suspended following the failure of Spanish-British negotiations on co-sovereignty of the Rock in 2001-2002, the Government of Mr Rodríguez Zapatero adopted a new strategy that in October 2004 led the Spanish and British Ministers of Foreign Affairs to “consider and subsequently conduct consultations on the establishment of a new forum for dialogue with an open agenda on Gibraltar”. See press release no. 9,556, of 27/10/04, of the Diplomatic Information Office (Spanish initials: OID) of the MAEC. The Forum for Dialogue was officially created on 16 December of the same year by the Governments of Spain, the United Kingdom and Gibraltar (OID press release no. 9,583, 16/12/04). On the ‘Forum of Dialogue on Gibraltar’, see: González García, I. and Del Valle Gálvez, A., *Gibraltar y el Foro tripartito de Diálogo* 2009 *cit.*; and GONZÁLEZ GARCÍA, I., “Gibraltar: Cooperación transfronteriza y nuevo foro tripartito de diálogo”, *REEI*, no. 9, 2005. By the same author: “La nueva estrategia para Gibraltar: El Foro tripartito de diálogo y los acuerdos de 2006”, *REDI*, vol. 58, no. 1, 2006, p. 821-842.

<sup>95</sup> As was the case when the tripartite forum for dialogue was created, the Memorandum of Understanding on Environmental Cooperation in 2018 also establishes a safeguard clause on questions of sovereignty, in the following terms: “Noting that the present Memorandum, or any action or measure taken in application or as a result thereof, do not imply any modification of the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to sovereignty and jurisdiction in relation to Gibraltar”.

<sup>96</sup> The last technical meetings of the Forum were held in late 2010. See press release no. 77-2010 of the Directorate General for International Communication of the MAEC, of 21/10/2010, on “New technical meetings of the Forum for Dialogue on Gibraltar”, which notes that “the Forum participants... reiterate our commitment to the Forum and to the need to continue with the planned schedule in an attempt to conclude the broadest possible agreement in the six new areas of cooperation for the next Ministerial Meeting”. These areas were visas, financial services and taxation, maritime communications and security, the environment and education. See <<http://www.maec.es/es/MenuPpal/Actualidad/Comunicados/Paginas/77comunicado20101021.aspx>>.

<sup>97</sup> See appendix to press release 51-2009 of the Spanish Ministry of Foreign Affairs on the ministerial meeting of the Forum for Dialogue on Gibraltar, of 21 July 2009, *Marco para próximas negociaciones* [Framework for upcoming negotiations], both the section on environmental issues and the section on maritime communications and security: “Neither the designation of Sites of Community Importance nor the Decisions of the European Union Commission in relation to the same,

However, finding solutions to the common problems of the populations living in the border area requires the recognition as partners of the competent territorial and regional authorities located on either side of the border. Therefore, dialogue is essential with the Government of Gibraltar<sup>98</sup>, the Regional Government of Andalusia and the Association of Municipalities in the Region of Campo de Gibraltar<sup>99</sup>, which is recognised in the MoU on

taken in accordance with Council Directive 92/43/EEC, have implications for, and therefore do not change, the sovereignty, jurisdiction and control of the waters to which they refer, which consequently remain as they were before.

Nothing in this Paper (especially but not exclusively the contents of the preceding paragraph) or in any arrangement reached in accordance with or as a result of it, and nothing carried out or omitted pursuant to such an arrangement, will prejudice any position in relation to any stage or matter arising in relation to Case T-176/09 in the Court of First Instance of the European Communities. This Paper and any arrangements, acts or omissions referred to above may not be cited or presented, serve as the basis, or used in any way, in any stage in connection with this Case”. See this text in Anexo Documental I.20 de *Gibraltar y el Foro tripartito de Diálogo*, cit, p. 580-ss, and the citation on p. 482-483.

<sup>98</sup> This cooperation was reaffirmed by the European Commission in its report of 15 November 2013 in relation to Spanish control at the border (Letter addressed to the United Kingdom / Gibraltar), which noted that “as for any crossing point, the best results in fighting smuggling and cross-border crime as well as maintaining a smooth flow of traffic can be achieved through daily cooperation between the authorities working on each side of the border. I would therefore like to encourage the Gibraltar authorities to strengthen their constructive dialogue with their counterparts for this purpose”: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/261148/DOC011.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/261148/DOC011.pdf)>.

<sup>99</sup> Following the disappearance of the Forum for Dialogue in 2011, new hopes for cooperation arose when in December 2012 the Spanish Minister of Foreign Affairs publicly advocated attempting to reach an agreement with the UK to cooperate in the environmental management of the disputed waters, setting aside questions of sovereignty. Thus, following a meeting of the Council of Ministers of Foreign Affairs of the EU, he reported renewed contact with his British counterpart in London aimed at seeking a formula for cooperation that did not imply reciprocal recognition of sovereignty but rather management of a *de facto* situation, in reference to the overlapping SCIs around the waters of Gibraltar (see *europapress.es* (10/12/2012): “Gibraltar – Margallo calls to put aside sovereignty dispute and cooperate in environmental management of disputed waters”; and *europasur.es* (11/12/2012): “Margallo calls to put aside sovereignty dispute to protect the waters”). Such hopes were short-lived, dashed by the Government of Gibraltar’s refusal to participate, revealing the deadlock reached in existing channels of interstate cooperation, namely the Brussels Process, for addressing questions of sovereignty between Spain and the United Kingdom, and the tripartite Forum for Dialogue, aimed at addressing issues of cross-border cooperation (*abc.es* (12/12/2012): “Gibraltar denies there will be meeting between Madrid and London, as Margallo claims”). This necessary cooperation between the competent authorities has for some considerable

environmental cooperation. This recognition of the competent authorities stems from the Spanish proposal (after withdrawing from the Forum for Dialogue in 2011) to replace the tripartite format of the Forum with an ad hoc mechanism for regional cooperation in Campo de Gibraltar involving the participation of the States and the European Commission, which would be invited to participate as an observer<sup>100</sup>.

As a result, the above-mentioned 2018 MoU on environmental cooperation represents a major step forwards, not only as regards recognising the competent authorities (including the Government of Gibraltar) as partners in the Technical and Coordination Committee, but above all in terms of being a forum for enhanced cooperation and the exchange of information,

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time been advocated by DEL VALLE GÁLVEZ, A., GONZÁLEZ GARCÍA, I. and VERDÚ BAEZA, J., in “Gibraltar, el Medio Ambiente y el Oro del *Sussex*: Por un Acuerdo de delimitación de aguas”, *cit.*; “¿Es posible un acuerdo de delimitación de aguas con Gibraltar?”, in A del Valle – I. González (Eds.) *Gibraltar y el Foro tripartito de Diálogo*, p. 293-317; and “Propuestas para un acuerdo práctico sobre las aguas de Gibraltar”, in Aznar Gómez, M. (Coord.), *op. cit.*

<sup>100</sup> See press release 199 of the Spanish Ministry of Foreign Affairs and Cooperation: “The Secretary of State for Foreign Affairs reiterates a proposal to the United Kingdom to launch an “ad hoc” mechanism for regional cooperation in Campo de Gibraltar”, 03/08/2015. Also of interest, the non-legislative proposal on Gibraltar, adopted on 2 November 2016 by the Foreign Affairs Committee of the Congress of Deputies, urged the Government to “establish an institutional framework agreed by consensus in order to achieve a State strategy on Gibraltar”, using the Congress of Deputies “as a necessary place to establish a basic consensus on Spain’s position on Gibraltar”; “to establish an action plan that breaks the present institutional deadlock and impasse in relations between the United Kingdom and Spain on the question of Gibraltar”; “to strengthen the forums of dialogue and cooperation between the different institutions with competences in the area (Regional Government of Andalusia, Provincial Government of Cádiz, Campo de Gibraltar town councils) and associations and social agents in the affected areas”; and “to maintain and promote fluent dialogue with the Gibraltar authorities aimed at establishing a mechanism for cross-border dialogue and cooperation with Gibraltar and its authorities for the sake of the Campo de Gibraltar region”, among other initiatives. *BOCG*, Congreso de los Diputados, Serie D, no. 38, 25 October 2016, p. 67-69. See DEL VALLE GÁLVEZ, A., “Gibraltar, de foro tripartito a cuatrimpartito: entre la cooperación transfronteriza y la soberanía”, *Análisis del Real Instituto Elcano*, ARI 21/2012, of 23/03/2012, recovered from: <[http://www.realinstitutoelcano.org/wps/portal/rielcano\\_es/contenido?WCM\\_GLOBAL\\_CONTEXT=/elcano/elcano\\_es/zonas\\_es/europa/ari21-2012](http://www.realinstitutoelcano.org/wps/portal/rielcano_es/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/europa/ari21-2012)>; and “Gibraltar, controles en la verja y nuevo diálogo ad hoc: la UE se involucra en la controversia”, *ARI/Real Instituto Elcano* 62/2014, of 19/12/2014, recovered from: <[http://www.realinstitutoelcano.org/wps/portal/rielcano\\_es/contenido?WCM\\_GLOBAL\\_CONTEXT=/elcano/elcano\\_es/zonas\\_es/ari62-2014-delvalle-gibraltar-controles-verja-y-nuevo-dialogo-ad-hoc-ue](http://www.realinstitutoelcano.org/wps/portal/rielcano_es/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/ari62-2014-delvalle-gibraltar-controles-verja-y-nuevo-dialogo-ad-hoc-ue)>.

on request, for environmental impact assessments of proposed projects in Gibraltar and neighbouring municipalities in Campo de Gibraltar that could have a significant transboundary impact. Such projects include those that Spanish ecology groups have been protesting about for years, namely controversial land reclamation projects in the waters of the *Estrecho Oriental* SCI. This would not affect the two States' claims to sovereignty over the waters adjacent to the Rock and the Isthmus.

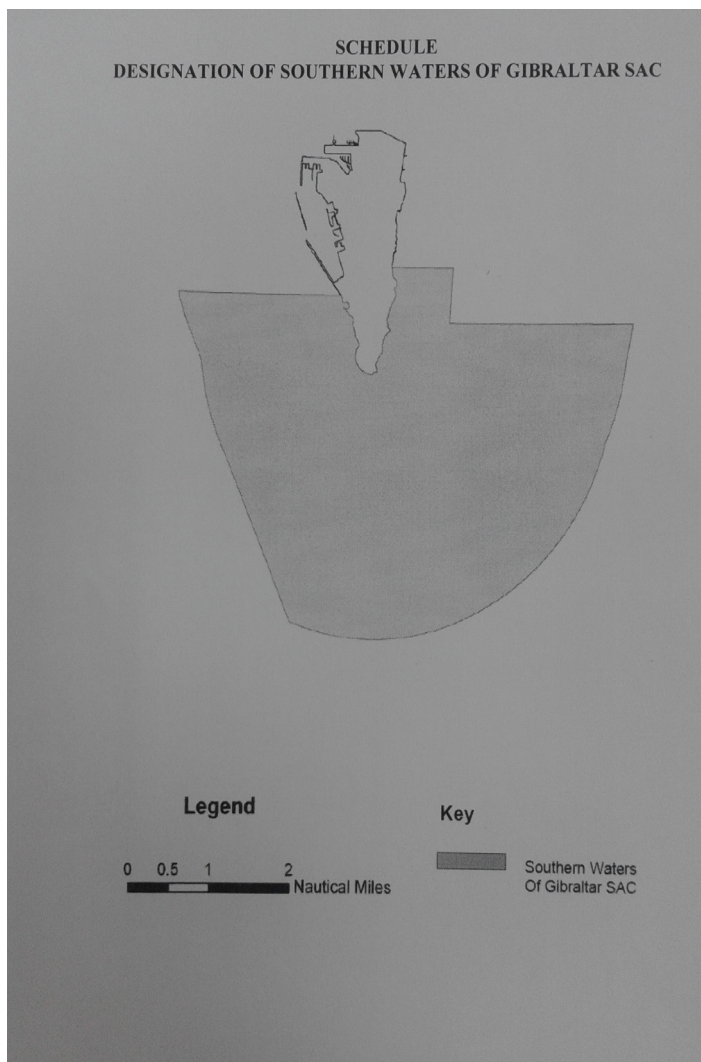
However, even in the context of a hard Brexit without an agreement between the UK and the EU, the States have indicated their willingness to observe the memoranda of understanding. Thus, together with the Protocol on Gibraltar annexed to the withdrawal agreement, these enshrine stable cross-border cooperation with Gibraltar in Primary European law<sup>101</sup>, in particular as regards environmental cooperation. In this context of fostering cooperation and setting aside questions of sovereignty, any unilateral extension by the UK of territorial waters from 3 to 12 miles around Gibraltar would not be viable.

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<sup>101</sup> See DEL VALLE GÁLVEZ, A., “Política exterior española en el Área del Estrecho. Gibraltar, Ceuta y Melilla, Marruecos”, *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz*, no. 1, 2019, p. 389-460, in particular p. 417.

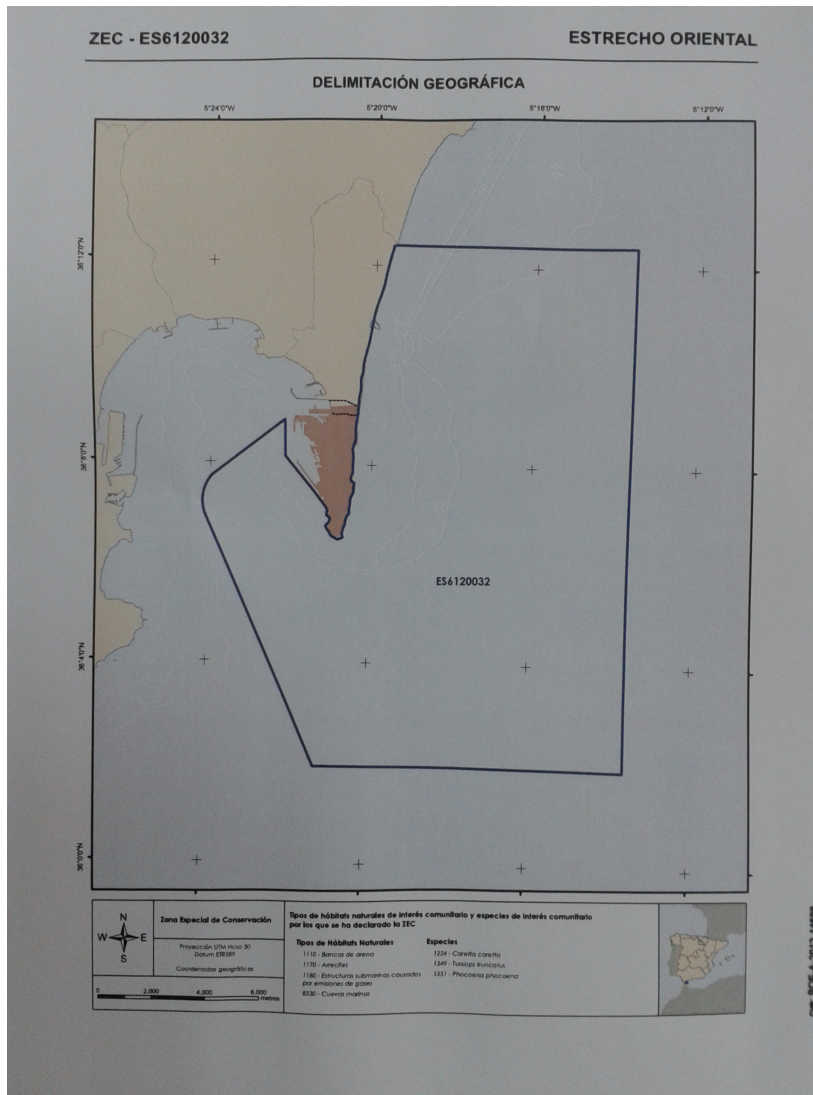


## **ANNEX 1: GIBRALTAR BOUNDARIES OF THE SOUTHERN WATERS OF GIBRALTAR SPECIAL AREA OF CONSERVATION**



SOURCE: Designation of Special Areas of Conservation (Southern Waters of Gibraltar). Order 2011, Legal Notice 19 of 2011, of 10/03/2011.

## ANNEX 2: SPANISH BOUNDARIES OF THE ESTRECHO ORIENTAL SPECIAL AREA OF CONSERVATION



SOURCE: Royal Decree 1620/2012, of 30 November, declaring the Site of Community Importance ES6120032, Estrecho Oriental, located in the Natura 2000 Network Mediterranean biogeographical region, a Special Area of Conservation and approving its corresponding conservation measures, B.O.E., no. 289, of 01/12/2012.

### **ANNEX 3: OVERLAPPING OF SPECIAL AREAS OF CONSERVATION IN THE WATERS AROUND GIBRALTAR**

#### **ZONAS DE ESPECIAL CONSERVACIÓN (ZEC)**

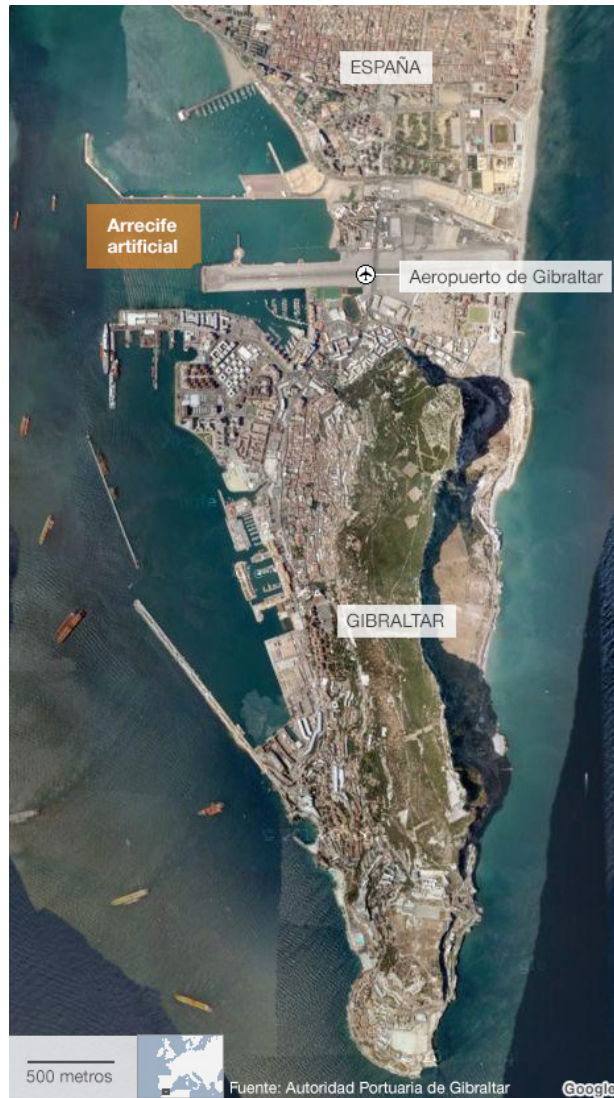


Fuente: Ministerio de Agricultura, Alimentación y Medio Ambiente.

EL PAÍS

SOURCE: DOMÍNGUEZ CEBRIÁN, B. and GONZÁLEZ, M., “La UE expedienta a Londres por no proteger las aguas de Gibraltar”, *El País*, 03/08/2015. Recovered from <[http://politica.elpais.com/politica/2015/08/03/actualidad/1438624951\\_363934.html](http://politica.elpais.com/politica/2015/08/03/actualidad/1438624951_363934.html)>.

#### **ANNEX 4: LOCATION OF THE ARTIFICIAL REEF THAT PROMPTED THE CRISIS OF 2013 AND VIEW OF LAND RECLAMATION ON THE EAST FACE**



SOURCE: Gibraltar Port Authority.





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