

Thoughts on the legal value of the instruments concerning Gibraltar adopted in relation to the EU-UK Withdrawal Agreement

Editorial Notice*

(A) INTRODUCTION

Because Gibraltar was included in the territorial scope of the [EU-UK Withdrawal Agreement](#) (Article 3(1)(b)), the provision concerning the conclusion between the EU and the UK of agreements governing their future relationship (Article 184) could be considered to include that territory as well.¹ As that provision did not specify the need for Spain's agreement for those future agreements to be applied to Gibraltar, the Spanish government understood that Article 184 did not comply with the [guidelines adopted by the European Council in April 2017](#), in particular, the one whereby "[a]fter 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" (para. 24).

When the Spanish government learned of the Draft Withdrawal Agreement negotiated between the EU and the United Kingdom, the Spanish Prime Minister threatened to withhold support for that instrument at the extraordinary meeting of the European Council to be held on 25 November 2018. That threat to break the consensus required for the European Council's endorsement, together with the sensitive nature of the Gibraltar issue in Spanish public opinion, caused Spanish society to pay particular attention to how this "grievance" was resolved. The solution consisted of the adoption by the [European Council and the Commission of two joint declarations](#), whose content had been revealed to Prime Minister Sánchez in advance by means of a letter that the Presidents of the two institutions sent him on the eve of the European Council meeting. At the same time, also on 24 November, the British Ambassador to the EU sent a [letter to the Secretary-General of the Council of the EU](#), acknowledging that Article 184 of the Withdrawal Agreement imposes no obligations regarding the territorial scope of the agreements governing the future relationship

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¹ See a [set of Negotiating documents on Article 50 negotiations with the United Kingdom](#), published as part of the European Commission's approach to transparency on Article 50 negotiations with the United Kingdom.

between the Union and the United Kingdom. Under these conditions, the European Council endorsed the Withdrawal Agreement and invited the Commission, the European Parliament and the Council to take the necessary steps to ensure its entry into force on 30 March 2019.

The value of these declarations and of the British letter immediately became the subject of debate, based on more or less well-founded arguments. The debate was primarily conducted by political parties, which rejected or affirmed, at their convenience, the legal importance of this set of instruments. At the request of the media, academia has also had the opportunity to weigh in in different ways.

In light of that debate—a purely legal, albeit highly partisan, one—the Editorial Board of the *Spanish Yearbook of International Law* decided that it would be useful to offer a brief analysis with our legal opinion. To this end, we asked our colleague Carmen MARTÍNEZ CAPDEVILA to draft a text discussing the main contested issue, namely, the legal value of the documents adopted and issued in relation to the situation between the Kingdom of Spain and the United Kingdom with regard to the future status of Gibraltar following the British withdrawal from the European Union. The SYbIL Editorial Board fully endorses the arguments and conclusions offered in this text.

The remainder of this text thus aims to briefly consider the legal value not only of the aforementioned declarations, but of all the instruments concerning Gibraltar adopted in relation to the Withdrawal Agreement.

(B) THE PROTOCOL ON GIBRALTAR, THE MEMORANDA OF UNDERSTANDING AND THE
TREATY ON TAXATION

The first such instrument is the Protocol on Gibraltar, which is annexed to the Agreement. Like the other two protocols, it forms an integral part of the Agreement (Article 182). Therefore, all the general provisions of the Agreement apply to it, such as the provision on the Agreement's entry into force or those on the settlement of disputes regarding the interpretation and application of the Agreement. Although the Protocol is expressed in legally binding terms, most of the obligations it imposes are extremely vague, which will make it difficult to verify non-compliance. Many of these obligations apply not to the EU and the UK, but to Spain and the UK, which are basically called upon to cooperate. Whether or not Spain effectively has third-party status with regard to this Protocol is debatable; in any case, our country should be understood to have agreed to the obligations that this instrument imposes on it, in the terms required by the rule codified by Article 35 of the Vienna Convention on the Law of Treaties, of 1969, and Article 36 of the Vienna Convention on the Law of Treaties between States and International Organizations or between

International Organizations, of 1986.

The preamble to the Protocol mentions certain [Memoranda of Understanding](#) concluded between Spain and the UK in relation to citizens' rights, tobacco and other products, cooperation on environmental matters and cooperation in police and customs matters, as well as the agreement of both countries to conclude a treaty on taxation and the protection of financial interests.

On 29 November 2018, the Spanish Foreign Minister and the British Minister for the Cabinet signed the four Memoranda of Understanding. All specify that unless the Parties decide otherwise, the memoranda will cease to have effect on 31 December 2020, *i.e.*, upon conclusion of the transition period provided for under the Withdrawal Agreement. However, none expressly mentions the date of its entry into force. The Memoranda on citizens' rights, environmental matters, and police and customs matters do mention the Protocol on Gibraltar, so their implementation could be understood to be dependent on the implementation (and, thus, entry into force) of the Protocol. However, nothing in the text of the Memorandum of Understanding on tobacco and other products suggests the same. Thus, strictly speaking, if necessary, Spain could invoke it before the UK, regardless of the fate of the Withdrawal Agreement and the annexed Protocols. In practice, this seems highly unlikely.

With regard to the legal value of the Memoranda, the fact that they are called Memoranda of Understanding, the contrast with the title of "treaty" used for the instrument on taxation and the protection of financial interests, the procedure followed in Spain for their conclusion, the lack of typical treaty formulas (with the exception of the term "Parties" and the reference—in the Spanish version—to the authentic languages) and the lack of official publication suggest that Spain and the UK have conceived of them as non-legally binding instruments. They would thus be political commitments, whose breach would not entail the international responsibility of the non-compliant country. Nevertheless, some of the Memoranda's provisions describe the undertakings of the signatories with a degree of specificity perfectly comparable to that of a treaty.

In addition to the Memoranda, the Protocol on Gibraltar also refers to the conclusion between Spain and the UK of a "treaty on taxation and the protection of financial interests". According to the information published by the Spanish Ministry of Foreign Affairs, the two countries have already reached an agreement on its content and will shortly authenticate it by signature. Everything clearly indicates that it is a treaty. Furthermore, its conclusion, on the Spanish side, is already expected to require parliamentary approval.

(C) THE EUROPEAN COUNCIL AND THE COMMISSION DECLARATIONS

As for the declarations approved and entered in the minutes of the European Council meeting of 25 November 2018, first, the use of such declarations is very frequent in the practice of EU institutions in which, as in the case of the European Council, national interests come into conflict. Suffice it to say that, when the [Rules of procedure of the European Council](#) refer to the content of the minutes to be drawn up for each meeting, they cite “the statements made by the European Council and those whose entry has been requested by a member of the European Council” (Article 8). Of the three declarations recorded in the minutes of the European Council meeting of 25 November, two are particularly relevant in terms of their impact on the issue of the application to Gibraltar of the future agreements between the EU and the UK; both are joint declarations of the European Council and the European Commission. The first is an Interpretative Declaration on Article 184 of the Withdrawal Agreement; the second, a Declaration on the territorial scope of the future agreements.

According to the Interpretative Declaration, Article 184 of the Withdrawal Agreement “imposes no obligations regarding the territorial scope” of the agreements governing the future relationship between the EU and the UK and “there is no obligation or presumption, on the basis of this provision, for such agreements to have the same territorial scope as the one provided for in Article 3 of the Withdrawal Agreement”. This is the same wording used in the letter that the UK Permanent Representative to the EU sent to the Secretary-General of the EU Council on 24 November 2018. Accordingly, in the declaration, the European Council and the European Commission “take note of the declaration by the United Kingdom, that the United Kingdom shares this interpretation”.

When establishing the legal value of an interpretative instrument, the debate should not focus on its mandatory or non-mandatory value. An interpretative instrument is not intended to be a source of obligations for those who endorse it. What matters is whether it has the interpretative effects it is intended to have. In this case, the Interpretative Declaration clearly forms part of the context of the Withdrawal Agreement, in accordance with Article 31(2)(b) of the two Vienna Conventions on the Law of Treaties, of 1969 and 1986. The declaration is clearly an “instrument which was made by one or more parties [the EU] in connection with the conclusion of [a] treaty and accepted by the other parties [the UK] as an instrument related to the treaty”. As part of the context, the declaration must be considered in the combined operation by which international treaties are interpreted, an operation that must take into consideration the terms of the treaty in their context and in the light of its object and purpose (Article 31(1) of the Vienna Conventions). As none of the aforementioned elements takes precedence over the others, had the clarifications contained in the declaration

been included instead in a provision of the Withdrawal Agreement (even in Article 184 itself, thereby making them part of the “terms”), they would have had the same interpretative value that should be recognized here. From this perspective, there is thus no need to regret that the content of the declaration was not enshrined in the Withdrawal Agreement itself.

The second declaration adopted by the European Council and the Commission rounds out the previous declaration and Article 184 of the Withdrawal Agreement, stating that “Gibraltar will not be included in the territorial scope of the agreements to be concluded between the Union and the United Kingdom” once it leaves the EU. “[T]his does not preclude”, the declaration continues, “the possibility to have separate agreements between the Union and the United Kingdom in respect of Gibraltar”. “[T]hose separate agreements—it concludes—will require a prior agreement of the Kingdom of Spain”. The final part of the declaration thus reembraces the terms of the guidelines adopted by the European Council in April 2017, which Spain was unwilling to forget.

This declaration is not intended to reflect an agreement between the EU and the UK. Hence, even if the terms of a [second letter sent by the UK Permanent Representative to the EU on 25 November 2018](#) had been contrary to the terms of the declaration (*quod non*), it could hardly have altered its legal effect.

The Declaration on the territorial scope of the future agreement is a guarantee by the EU to Spain: whether these separate future agreements in respect of Gibraltar are mixed agreements or whether they are configured as EU-only agreements, and regardless of the voting rule used at the EU Council when deciding their conclusion on behalf of the Union, they will require the agreement of Spain. In other words, Spain will have veto power.

The declaration is set out in very precise terms. It was moreover issued by the institution that sets the general guidelines for the EU, guidelines that govern the exercise of their powers by the other institutions. In view of these circumstances, beyond what value the instrument might have as such, under the principle of the protection of legitimate expectation, which is in force in EU law and governs the relations between the Union’s institutions and the Member States, safeguarding the expectations that the former might generate in the latter, the Union’s institutions (and, in particular, the EU Council) will be obliged to act in accordance with the terms of the declaration. This is especially true given that, in their letter of 24 November 2018, the Presidents of the European Council and of the Commission offered the same guarantees to the Spanish Prime Minister that were later included in the declaration and that conditioned Spain’s position at the meeting of the European Council held the next day.