

Spain and the Law of the Sea: 20 years under LOSC

Maritimes zones around Gibraltar

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(A) GIBRALTAR: HISTORICAL DISPUTE AND LAW OF THE SEA

One of the specific legal and political facets of the dispute between Spain and Britain over Gibraltar is that of the maritime zones around it. The dispute extends to the waters around the Rock, its maritime zones and the jurisdiction over them, as Spain rejects the existence of British jurisdictional waters around the Rock, whilst the United Kingdom (UK) has always claimed them and exercised *de facto* jurisdiction over them.

(1) The Dispute and the Waters around Gibraltar

The territory of Gibraltar has a special status under international law. For various reasons, both Spain, on the one hand, and the UK and Gibraltar, on the other, consider Gibraltar to be a different, legally distinct territory from the UK as a state, whose domestic law classifies it as a British Overseas Territory. The territory was ceded by Spain in 1713, and the UK has a valid claim to sovereignty over it. Therefore, Gibraltar is not Spanish, because it is under British sovereignty. Nevertheless, three important qualifications must be made:

First, there is no agreement on exactly which areas were ceded under the Treaty of Utrecht, the 1713 treaty that both Spain and the UK consider to be in force—at least with regard to the first section, concerning territorial cession, and the final section, on restitution to Spain.¹ It seems clear that the town, castle and port, as well as the complementary buildings from 1704, were ceded in perpetuity to the UK and, therefore, are British. However, the territory of Gibraltar comprises other zones (isthmus, Gibraltar Mountain, expansions, reclaimed land, and waters) also under British jurisdiction that Article 10 of the Treaty of Utrecht does not mention. Indeed, the Treaty contains no boundary delimitation, nor has there been any subsequent boundary delimitation or demarcation agreement.

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¹ “The Catholic King does hereby, for himself, his heirs and successors, yield to the Crown of Great Britain the full and entire propriety of the town and castle of Gibraltar, together with the port, fortifications, and forts thereunto belonging; and he gives up the said propriety to be held and enjoyed absolutely with all manner of right forever, without any exception or impediment whatsoever [...] And in case it shall hereafter seem meet to the Crown of Great Britain to grant, sell or by any means to alienate therefrom the propriety of the said town of Gibraltar, it is hereby agreed and concluded that the preference of having the same shall always be given to the Crown of Spain before any others.”

The official English text of the six paragraphs of Art. 10 of the Peace and Friendship Treaty of Utrecht between Spain and Great Britain, concluded at Utrecht on 13 July 1713, can be found in *The Question of Gibraltar* (Ministerio de Asuntos Exteriores y de Cooperación, Madrid, 2008), 97-98.

Second, the UK claims to have two sovereignty titles to territory over Gibraltar: that arising under the conventional cession at Utrecht over the town, port and rock, and, since 1966, that of acquisitive prescription over the isthmus, which was subsequently occupied by the UK in the 19th century. The two separate disputes over the land territory also extend into the adjacent maritime zones. Thus, the problem of the waters can be posed as a third dispute, separate from those over the Rock and isthmus.

Third, the status of Gibraltar was in any case internationalized in 1946 by the United Nations (UN): all of Gibraltar's areas, including those under clear British sovereignty, are now politically and legally conditioned by the UN's decolonization doctrine. The British sovereignty is thus denaturalized, due to Gibraltar's classification as a "non-self-governing territory". Therefore, for today's international society, this international legal status of Gibraltar as a "non-self-governing territory" conditions the British right of sovereignty over the ceded part of the Gibraltarian territory. In this same vein, the UK has the international status of "administering power of the territory".

The current situation is thus that of a lack of an agreed delimitation of the waters surrounding the Rock of Gibraltar and of the waters adjacent to the territory of the isthmus, which, in practice, logically entails a high degree of indeterminacy with regard to the applicable legal regime.²

(2) The Dispute and the Law of the Sea

The adoption of the 1958 Geneva Conventions and, especially, the 1982 UN Convention on the Law of the Sea at Montego Bay,³ conditioned these zones and provided the applicable international legal framework. In each case, Spain made reservations or declarations regarding Gibraltar.

Upon signing and ratifying the Geneva Conventions on the Territorial Sea and the Contiguous Zone and on the Continental Shelf, Spain included the following declaration in its instruments of accession: "Spain's accession is not to be interpreted as recognition of any rights or situations in connexion with the waters of Gibraltar other than those referred to in Article 10 of the Treaty of Utrecht, of 13 July 1713, between the Crowns of Spain and Great Britain."⁴

Especially with regard to the decisive LOSC, Spain made clear by means of a declaration that it does not consider the Convention to apply to Gibraltar: "2. In ratifying the Convention, Spain wishes to make it known that this act cannot be construed as recognition of any rights or status regarding the maritime space of Gibraltar that are not included in article 10 of the Treaty of Utrecht of 13 July 1713 concluded between the Crowns of Spain and Great Britain. Furthermore, Spain does not consider that Resolution III of the United Nations Conference on the Law of the Sea (UNCLOS) is applicable to the colony of Gibraltar, which is subject to a process of decolonization in which only

² I. González García, "The Anglo-Spanish Dispute over the Waters of Gibraltar and the Tripartite Forum of Dialogue", 26 *The International Journal of Marine and Coastal Law* (2011) 91-117.

³ UN Convention on the Law of the Sea, [1833 UNTS 3](#) (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter).

⁴ Convention on the Continental Shelf, made in Geneva on 29 April 1958 ([BOE No. 308](#), 25 December 1971); Convention on the Territorial Sea and the Contiguous Zone, made in Geneva on 29 April 1958 ([BOE No. 307](#), 24 December 1971).

relevant resolutions adopted by the United Nations General Assembly are applicable.”⁵

The UK expressly opposed Spain’s declaration on Gibraltar upon acceding to the LOSC, stating that it did consider the Montego Bay Convention to apply to Gibraltar.⁶

Subsequently, upon choosing the International Tribunal for the Law of the Sea (ITLOS) and the International Court of Justice (ICJ) as means for the settlement of disputes concerning the interpretation or application of the LOSC, Spain declared that it excluded disputes concerning sea boundary delimitation or involving historical bays or titles, in reference to Gibraltar.⁷

This lack of agreement makes the legal status of the various maritime zones recognized by the UK and Spain in relation to the waters around Gibraltar quite problematic: the UK claims a territorial sea around the Rock and the isthmus, which Spain denies. The Bay of Algeciras/Gibraltar is not closed or regulated by Spain. Nor have a continental shelf, exclusive economic zone or other marine zones been established or regulated unilaterally or by mutual agreement by the two states. The two states only recognize the existence of internal waters in the current Port of Gibraltar, the only maritime zone recognized by Spain and the only place in which it recognizes British sovereignty or jurisdiction.

(3) The Waters around the Rock and Isthmus: Spanish Position and Practice

Spain interprets the Treaty of Utrecht—which does not contain any express boundary delimitation of the land territory—as ceding the physical mass of the Rock, but has always formally denied the cession

⁵ According to Resolution III: “The Third United Nations Conference on the Law of the Sea, Having regard to the Convention on the Law of the Sea, Bearing in mind the Charter of the United Nations, in particular Article 73,

“1. Declares that: (a) In the case of a territory whose people have not attained full independence or other selfgoverning status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development. (b) Where a dispute exists between States over the sovereignty of a territory to which this resolution applies, in respect of which the United Nations has recommended specific means of settlement, there shall be consultations between the parties to that dispute regarding the exercise of the rights referred to in subparagraph (a). In such consultations the interests of the people of the territory concerned shall be a fundamental consideration. Any exercise of those rights shall take into account the relevant resolutions of the United Nations and shall be without prejudice to the position of any party to the dispute. The States concerned shall make every effort to enter into provisional arrangements of a practical nature and shall not jeopardize or hamper the reaching of a final settlement of the dispute.

“2. Requests the Secretary-General of the United Nations to bring this resolution to the attention of all Members of the United Nations and the other participants in the Conference, as well as the principal organs of the United Nations, and to request their compliance with it.” Cf. [Final Act of Third United Nations Conference on the Law of the Sea](#).

⁶ Declarations made upon accession: “ (...) (d) Gibraltar: With regard to point 2 of the declaration made upon ratification of the convention by the Government of Spain, the Government of the United Kingdom has no doubt about the sovereignty of the United Kingdom over Gibraltar, including its territorial waters. The Government of the United Kingdom, as the administering authority of Gibraltar, has extended the United Kingdom’s accession to the Convention and ratification of the Agreement to Gibraltar. The Government of the United Kingdom, therefore, rejects as unfounded point 2 of the Spanish declaration.”

⁷ Declarations under Arts. 287 and 298 (19 July 2002): “Pursuant to article 287, paragraph 1, the Government of Spain declares that it chooses the International Tribunal for the Law of the Sea and the International Court of Justice as means for the settlement of disputes concerning the interpretation or application of the Convention.

“The Government of Spain declares, pursuant to the provisions of article 298, para. 1(a) of the Convention, that it does not accept the procedures provided for in part XV, section 2, with respect to the settlement of disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitation, or those involving historic bays or titles.” (Spain’s declarations are available [here](#))

the sea since the 18th century, territories are presumed to project into their adjacent waters.¹²

Furthermore, Spanish practice does not seem consistent with the ‘dry coast’ position it has historically defended. The theory contradicts the country’s traditional practice of allowing the UK to act as if it were the sovereign holder of the waters adjacent to the isthmus and Rock of Gibraltar. In fact, the Spanish maritime authorities have not and do not exercise control over the vessels anchored there. This attitude of the Spanish state, coupled with the continued exercise of British jurisdiction in the waters around the Rock, with continuous and consistent public acts of authority¹³, is favourable to the British thesis, notwithstanding the numerous conflicts and presence of Spanish state vessels in the waters in recent years. These aspects of Spanish practice have been cited to bolster the thesis of implicit recognition by Spain of Britain’s claim to the waters.

As for the isthmus, the Spanish claim has not traditionally differentiated between the waters of the isthmus and the waters of the Rock, which, logically, should be treated differently: the waters surrounding the isthmus are entirely Spanish and were not ceded, whilst those surrounding the Rock border a territory ceded under a treaty. With regard to the waters of the isthmus in particular, i.e. the territory spanning from the outer walls of the Landport Gate (Puerta de Tierra) to the Border/Fence of Gibraltar,¹⁴ since 1966 the UK has claimed to have a right of sovereignty over the isthmus by prescription, which it argues further extends to the surrounding waters, a right that Spain has never recognized. However, the line of argument that Spain has maintained through its non-recognition of this sovereignty does not distinguish between the status of the waters around the isthmus and the status of the waters around the Rock.¹⁵ Likewise, there is no delimitation of the territory of the isthmus or its waters. Of course, the applicable provisions of international law of the sea offer means of delimiting the waters. Article 15 LOSC provides that, failing agreement between the parties, the territorial sea between states with opposite or adjacent coasts shall be delimited by means of an equidistant median line. However, this delimitation has not been carried out, due to the parties’ conflicting interpretations of the boundaries of the territories ceded under the Treaty of Utrecht, on the one hand, and the territorial dispute over the isthmus, on the other.

The drawing of SBs by Spain could also be understood as implicit recognition with regard to the waters adjacent to the isthmus and east of the Rock, as the last segment of the SBs defined by the Spanish government on the Atlantic shore of the country’s southwest coast runs from the island of

¹² According to A. Remiro Brotons, “As to the waters, the general norm by which sovereignty over the coast is projected onto adjacent sea plays in Britain’s favour. It certainly is not an imperative principle and therefore, it is possible to limit a territorial cession merely to land, conceived as a dry coast, but this is an exception that requires proof that this has been the will of the parties involved. In fact, Spain did not dare convert the waters of the Bay into internal waters by closing the entrance with a straight line between Algeciras and Europa Point.” Cf.: “Gibraltar”, 1 *Cuadernos de Gibraltar – Gibraltar Reports* (2015), 13-24, at 20.

¹³ G. Naldi, “The Status of the Disputed Waters Surrounding Gibraltar” 28 *The International Journal of Marine and Coastal Law* (2013) 701-718 at 717.

¹⁴ On the Isthmus and the Fence, see A. del Valle Gálvez, “La ‘Verja’ de Gibraltar”, in *Gibraltar: 300 años...*, *supra* n. 11 155-176, as well as the maps in the same book, at 455-456.

¹⁵ References can, however, be found to the fact that Spain considers infractions committed near the waters of the isthmus more serious. See the Spanish government’s response to the question by the MP S. de la Encina regarding incidents between Spanish fishermen and Gibraltar patrol vessels in *Official Gazette of the Spanish Parliament (BOCG)* No. 261, 2 April 1998.

Tarifa to Acebuche Point. The next segment begins on the southern coast in the Mediterranean and runs from Carbonera Point to Baños Point.¹⁶ Spain has thus refrained from drawing any SB that encompasses the isthmus or the Rock of Gibraltar.

Perhaps with a view to making the theory and practice of the Spanish position more consistent, since the turn of the 21st century, the number of Spanish state vessels and acts conducted in these waters has increased, sparking protests and leading to sometimes serious diplomatic crises.

Another important dimension is the implementation of specific or applicable regulations in the waters of Gibraltar. This is the case of the declaration of a Special Area of Conservation (SAC) in the Site of Community Importance (SCI) known as the “Estrecho Oriental” [Eastern Strait]. In this context, certain actions fall within the scope of the new regulations, such as those of oceanographic vessels conducting environmental research missions.¹⁷

At present, there is no prospect of a different or more nuanced approach than the traditional Spanish position, which according to Spain has been applied continuously since the Treaty of Utrecht and which now seems to be giving rise to its full consequences. Thus, Spain does not recognize any rights or situations other than those expressly established at Utrecht, and it does not consider the activities of its vessels incursions, but rather routine activities in Spanish waters.¹⁸

As recently as 2014, the Spanish Ministry of Foreign Affairs expressly declared that activities related to the control of vessels anchored in the waters east of the Rock are conducted in accordance with international law and the LOSC. Particular attention should be called to the following assertions:

- that the 12-mile stretch of waters to the east of the Rock is Spanish territorial waters; and
- that foreign-flagged vessels anchored, stopped or exhibiting unconventional movements violate the right of innocent passage and, for reasons of maritime surveillance and security, will be invited to leave the territorial waters.¹⁹

¹⁶ See the aforementioned Royal Decree 2510/77, 5 August 1977.

¹⁷ Spanish Ministry of Foreign Affairs, Press Release 229, 6 October 2014, “Spanish Secretary of State for Foreign Affairs holds conversations with British Minister for Europe on Gibraltar”: “The ocean research vessel was performing its assigned duties. More specifically, it was carrying out an environmental research mission within a Special Area of Conservation (SCI-SAC “Eastern Strait”) recognised by the European Union (...) Spain has no doubts whatsoever about the limits of its territory and therefore, as in the case under discussion, Spanish vessels will continue to perform their duties in Spanish waters by completing the tasks assigned to them, as they have done since time immemorial.” (Available [here](#)).

¹⁸ “Spain does not accept any other rights or situations claimed by the United Kingdom as regards the maritime zones around Gibraltar that are not established in Article 10 of the Treaty of Utrecht. Therefore, the adjacent waters are Spanish. That which the United Kingdom describes as ‘illegal incursions’ into what it refers to as ‘British territorial waters’ are simply routine activities by Spanish vessels in Spanish waters.” Ministry of Foreign Affairs, Press Release 229, 6 October 2014, *supra* n. 15.

¹⁹ Official Statement 211, 18 July 2014 “Gibraltar”: “The Spanish Ministry of Foreign Affairs and Cooperation called the British Ambassador to a meeting this morning in order to express Spain’s utmost objection and discontent regarding the way in which the United Kingdom managed the supposed ‘incident’ involving the Spanish Navy vessel Tagomago on 16 July. (...) What the United Kingdom describes as an incident (and regarding which the Foreign Office summoned the Spanish Ambassador in London to a meeting yesterday) was nothing but the routine activity of a Spanish Navy vessel in Spanish waters while fully respecting both domestic Spanish law and international law, in particular the United Nations Convention on the Law of the Sea. According to international law, a 12-mile stretch of waters located to the east of Gibraltar Rock are Spanish territorial waters.

“Within the framework of the Permanent Maritime Surveillance and Security Plan, the Directorate-General of the

(4) The Waters around the Rock and Isthmus: British Position and Practice

The UK holds that Spain could not have ceded sovereignty over the Rock without that sovereignty also projecting into the corresponding maritime zones, in accordance with the “land dominates sea” principle.²⁰ For the UK, its sovereignty over the territorial sea adjacent to the Rock of Gibraltar arises precisely from the sovereignty it exercises over Gibraltar. Its 1966 proposal to settle all aspects of the dispute, including the waters, before the ICJ was not favourably received by Spain.²¹

The UK does not distinguish between the town, Rock and isthmus and considers Gibraltar a single territory (over which it has two different sovereignty titles), such that its sovereignty over the territory as a whole extends to the adjacent waters. Therefore, it does not differentiate between the waters of the isthmus and the waters of the ceded town and port, in which it also includes the mountain. Likewise, the UK does not treat the waters any differently due to their appurtenance to a territory in the process of decolonization, as required under Resolution III of UNCLOS.²²

In any case, the UK has unilaterally delimited the waters of the Rock: on the one hand, it claims they extend 1.5 miles to the west, into the Bay of Algeciras; on the other, it claims a 3-mile territorial sea extending east and south into the Strait.²³ These are the so-called British Gibraltar Territorial Waters (BGTW), or Gibraltar Territorial Waters, terms particularly rejected by Spain. Although earlier references to British Waters or Territorial Waters can be found on British maps dating back to the 19th century, the waters were not delimited until the 1980s and 90s, following the signing of the United Nations Convention on the Territorial Sea²⁴. A clear presentation of these waters can be

Merchant Navy requests the Spanish Navy to invite those foreign-flagged vessels anchored, stopped or whose movements do not adapt to conventional sailing standards —and therefore violating the right of innocent passage— to leave Spanish territorial waters.

“Hence, at 06:00 hours on 16 July, the Spanish patrol boat Tagomago requested the following vessels to leave Spanish territorial waters as they were stationary and therefore violating the right of innocent passage in the space between 7 and 9 miles off the eastern face of the Rock of Gibraltar and to the south of the border parallel (...).

“In light of the above, this Ministry of Foreign Affairs and Cooperation wishes to state the following:

“- The Government of Spain will always stand firm in the defence of Spanish positions regarding the controversy over Gibraltar.

“- The position adopted by Spain as regards the spaces assigned and not assigned to Great Britain by the Treaty of Utrecht remains unchanged since said document was signed. Spain does not accept any other rights or situations claimed by the United Kingdom as regards the maritime spaces surrounding Gibraltar that are not established in Article 10 of the Treaty of Utrecht.

“- This latest incident represents unacceptable interference by the United Kingdom in the routine activity by the Spanish Navy in Spanish waters, and is made all the more serious by the fact that none of the vessels was a British-flagged vessel.” (Available [here](#)).

²⁰ See Document No. 33 in *Un nuevo Libro Rojo sobre Gibraltar* (Ministerio de Asuntos Exteriores, Madrid, 1967), 501.

²¹ The October 1966 proposal was a compromise to bring the following questions before the ICJ: “Article I (1): Has Spain or the United Kingdom sovereignty over the territory of Gibraltar comprising: i) The fortress, town, fortifications and port of Gibraltar, including the Rock; ii) The southern part of the isthmus connecting the Rock with the mainland of Spain, that is, the area commonly known as the ‘British neutral ground’; iii) The waters adjacent to (i) and (ii)? (...). Article I (3): What is the boundary (if any) between the adjacent waters mentioned in Question 1 above, and Spanish waters? (...)”. The British proposal can be found in *Un Nuevo Libro Rojo*., *supra* n. 20, at 519-520.

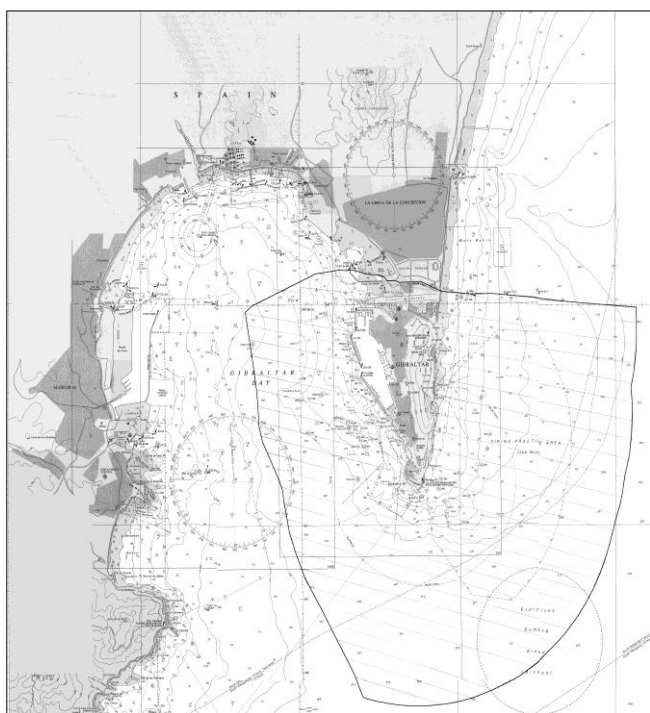
²² See Resolution III, *supra* n. 4.

²³ On this matter, see G. O’Reilly, “Gibraltar: Sovereignty Disputes and Territorial Waters”, 7 *International Boundaries Research Unit Boundary and Security Bulletin* (Spring, 1999) 67-81.

²⁴ See the references in J. Verdú Baeza, *Gibraltar. Controversia y medio ambiente*, (Dykinson, Madrid, 2008), at 203 and

found in Admiralty Chart No. 1448 (reproduced in this page)²⁵, which draws the international maritime boundary in the bay with a median line based on the principle of equidistance.

However, the BGTW was not legally defined until 2011, in the context of progressive Gibraltarian regulation of the activities conducted in the waters adjacent to the Rock. In fact, today the entire BGTW is included in a protected nature area in accordance with the 1991 Nature Protection Ordinance. The amended 2011 version of these regulations describe the waters of Gibraltar thusly: “BGTW” means British Gibraltar Territorial Waters which is the area of sea, the sea bed and subsoil within the seaward limits of the territorial sea adjacent to Gibraltar under British sovereignty and which, in accordance with the United Nations Convention on the Law of the Sea 1982, currently



extends to three nautical miles and to the median line in the Bay of Gibraltar.”²⁶ The introduction of this definition into Gibraltarian domestic law triggered a cascade of amendments to other laws to incorporate the BGTW concept.²⁷

In this context of progressive regulation of the waters, attention should be drawn to the expansion, in 2009, of the concept of “Port of Gibraltar”, carried out in the waters east of the Rock.²⁸

Finally, since 1972, special regulations have governed the so-called Admiralty Waters, the strip of water parallel to the moles at the entrance to the Port of Gibraltar and a naval

note 456.

²⁵ Admiralty Chart 1448 – Gibraltar Bay. The line depicted within the Admiralty Chart 1448 illustrates the UK’s International Maritime Boundary surrounding Gibraltar. ‘Reproduced from Admiralty Chart 1448 by permission of the Controller of Her Majesty’s Stationery Office and the hydrographic offices of Spain and the United Kingdom (www.ukho.gov.uk)’ ‘Not to be used for navigation’. Taken from A. del Valle-Gálvez – I. González García Eds. *Gibraltar, 300 años* (Universidad de Cádiz, 2004), 459.

²⁶ Part I, 2.(1) of Nature Protection Act, 1991 (Act No. 1991-II), *Gibraltar Gazette*, 10 February 2011, *Legal Notice* No. 12 of 2011. The Act establishes certain limitations on navigation and fishing, the protection of which has been entrusted, since 1985, to the Gibraltar Squadron of the Royal Navy. The delimitation of the Gibraltarian waters was specified on 10 February 2011 in an amendment entitled ‘Interpretation and General Clauses Act’, known as the Nature Protection Act, 1991 (Amendment) Regulations 2011 (available [here](#)).

²⁷ Marine Strategy Regulations 2011, *Legal Notice* 13 of 2011, 10 February 2011, transposing Directive 2007/56/EC; Gibraltar Merchant Shipping Act 1995, which also replaces the term “Gibraltar Waters” with “BGTW”, Community Vessel Traffic Monitoring and Information System (Amendment) Regulations 2011, *Legal Notice* 51 of 2011, Second Supplement to the *Gibraltar Gazette* No. 3844, 12 April 2011; Gibraltar Merchant Shipping Act 1995, which replaces the term “territorial Waters” with “BGTW”, Prevention of Pollution from Ships (Amendment) Regulations 2011, *Legal Notice* 24 of 2011, Second Supplement to the *Gibraltar Gazette* No. 3840, 17 March 2011.

²⁸ Indeed, it now includes “the area within Gibraltar territorial waters commonly known as the Eastern Anchorage”, 2, Port, (c) of the Gibraltar Port Authority Act 2005-14, amended on 29 October 2009 by Act 2009-39. This differs from the description of the Port of Gibraltar included in the Schedule of the Port Act 1960-16.

base under British military control.²⁹

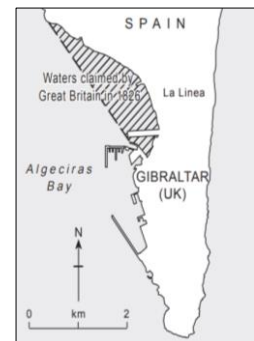
In short, Gibraltarian law regards as British the waters adjacent to Gibraltar (Rock and isthmus), for a breadth of three nautical miles to the south and east and to the median line, or about one and a half miles, in the Bay of Algeciras to the west. The LOSC is expressly cited as the legal basis for this delimitation. Because these waters are understood to be under British sovereignty, any passage of Spanish state vessels through them is viewed as an incursion, a fact that is subject to monthly protests. Likewise, any acts involving the exercise of Spanish authority (inspections, marine research) are subject to immediate individual protests. In any case, the official British position is that these occurrences are violations of, rather than threats to, its sovereignty.³⁰

(B) CERTAIN QUESTIONS CONCERNING THE WATERS AROUND GIBRALTAR

With regard to the waters around the Rock, attention should be called to certain legal situations and particularities.

(1) The Waters of the Port

The concept of the port ceded in 1713 is one of the most complex legal problems. Needless to say, the cession included anchoring in the waters outside the moles, in the roadstead or bay, which, in the 19th century, included the waters north of the isthmus, from Punta Mala to the Old Mole. In fact, anchoring outside the port (called Port Canning, 1826, sketched on the right)³¹ was most likely carried out uninterruptedly under British jurisdiction and that of the Gibraltar Port Authority for the long period stretching from 1826 to 1968.



Under the ‘dry coast’ theory regularly asserted by the Spanish Ministry of Foreign Affairs since the 1960s, “port waters”, in reference to the present-day enlarged port, is generally understood to refer to the strip of water enclosed between the access and protective moles, i.e. it is a very restricted interpretation of these waters. This Spanish interpretation of the concept of “port” is questionable, as outside the moles are port areas affecting certain waters that are usually regulated by the port authority. This is the case with the Port of Gibraltar, whose waters and jurisdiction were extended to include the waters on the east face of the Rock by means of the extension, in 2009, of the waters under the port authority and, probably, of the concept of “Port of Gibraltar” itself. To the author’s knowledge, Spain did not oppose this extension.

One instance of express recognition of British jurisdiction over the waters of the port occurred in a doubtful case of hot pursuit by Spanish Guardia Civil officers, who entered the Port of Gibraltar

²⁹ Admiralty Waters (Gibraltar) Order, SI 1972/2207, of 5 April 1972, which contains a map of these waters.

³⁰ J. Trinidad, “The Disputed Waters around Gibraltar”, 86 *British Yearbook of International Law* (2016), VI, 101-154, at 147.

³¹ Source: G. O’Reilly, “Gibraltar: Sovereignty Disputes and Territorial Waters”, 7 *International Boundaries Research Unit Boundary and Security Bulletin* (Spring, 1999), 78.

itself, for which Spain later apologized.³²

(2) The Waters around Military Facilities

Certain strips or zones of the waters around the Rock have a special status for security reasons. These are the waters adjacent to the important military and intelligence bases on the Rock. In particular, as noted above, the Admiralty Waters have been subject to specific regulation since 1972.³³ Located in a 200 metre strip that runs from outside the port (Rosia Bay) along the outside of the moles, these waters are, for security reasons (security waters) subject to specific military regulation.

The Spanish Foreign Minister recognized the existence and special statute governing these waters in the (verbal) agreement of 1998 on fishing in the waters of the Rock. Spain expressly recorded that the agreement did not imply Spanish recognition of British jurisdiction or sovereignty over this zone of the waters outside the Port of Gibraltar.³⁴

Additionally, the waters west of the landing strip at Gibraltar Airport, a military airport belonging to the RAF (a small part of which is used for civilian purposes), are subject to special regulation for reasons of military security and air safety. Specifically, navigation is prohibited under certain conditions³⁵ and anchoring in the widest area of the waters around the landing strip, which extends into the bay, is prohibited in general.

Finally, according to Admiralty Chart 1448, there is also an “explosives dumping ground” southeast of the Rock and a “firing practice area” east of it.

(3) Nuclear Submarines

A particular problem is that posed by the nuclear-powered warships and submarines —of various nationalities but primarily British— that make stopovers and repairs in the Gibraltar port facilities, whose activities could potentially affect the entire Bay and Campo de Gibraltar, the neighbour county in the Spanish province of Cádiz. This question concerns the *transit* of these nuclear-powered vessels through the waters and ports, as it is understood that they are not carrying nuclear cargo or weapons when they call at the Port of Gibraltar, nor is British nuclear ammunition currently stored on the Rock.

The use of the Port of Gibraltar to repair components linked to nuclear propulsion and reactor systems is nevertheless quite problematic, as evidenced by the long stopover of the submarine *Tireless* from 2000 to 2001 for the repair of its nuclear reactor cooling circuit. Although Britain has agreed not to turn the port into a permanent base for the repair of submarines,³⁶ the port facilities have

³² Press release by the Spanish Minister of Home Affairs, 8 December 2009. M. Acosta Sánchez “Incidentes de la Guardia Civil con la Royal Gibraltar Police en aguas de la bahía de Algeciras: persecución en caliente y posibles soluciones” 64 REDI No. 2 (2012) 292-296.

³³ Admiralty Waters (Gibraltar) Order, SI 1972/2207, 5 April 1972, containing a map of these waters.

³⁴ Agreement, *infra* No 39, Observation 4, paragraph 2: “on the Spanish part, this does not imply the recognition of the British Jurisdiction over this zone”.

³⁵ Entry Restricted: “Navigation is prohibited within the area indicated during aircraft movements”.

³⁶ Specifically, in a letter from the Secretary of State for Foreign and Commonwealth Affairs to the Spanish Foreign Minister dated 27 February 2017, the UK undertook as follows: “The United Kingdom does not maintain permanent

occasionally been adapted for this purpose for the British Navy. Furthermore, accidents involving these nuclear vessels are always possible, a matter of special concern to the neighbouring Spanish population—which the British contingency plans do not take into account—and the Spanish government, which, following the disbandment of the Forum of Dialogue, now lacks an institutional cooperation channel to address these types of problems.³⁷

(4) Navigation and Illicit Trafficking

The existence of a *de facto* division of the Bay of Algeciras into two zones controlled by two different authorities, without any coordination channels between them, has given rise to specific problems related to navigation and the routine activities carried out in these waters.

For instance, certain activities that are prohibited in the Spanish zone due to their high risk are engaged in freely in the part under British jurisdiction. In this regard, special mention should be made of bunkering, or the supply of fuel oil to ships from large tankers at anchor. This activity, conducted in the Gibraltarian part of the bay, has caused numerous oil spills.

With regard to navigation, the lack of centralized control over the dense traffic in the bay and of coordination between the Spanish and Gibraltarian areas poses additional problems related to maritime traffic safety, which, in turn, generates serious risks of potentially polluting accidents. Likewise, with regard to ship control, complaints of looser control by the Gibraltar Port Authority are common, and environmental organizations have frequently warned of the presence of monohulls and substandard vessels in waters under Gibraltarian control, a practice that poses significant risks to the entire bay.

As for the control and pursuit of vessels allegedly engaging in illicit trafficking by vessels of various Spanish (Guardia Civil, Customs, Navy), Gibraltarian (Royal Gibraltar Police) and British (Royal Navy) institutions, risk situations sometimes arise. These aspects of the presence, control and pursuit of vessels by Spanish state vessels in waters under British jurisdiction in particular have often triggered protests and diplomatic incidents, sometimes leading to crises in Spanish-British relations.

Finally, both Spain and the UK have anchored buoy lines at different times for air signalling, anchorage, and demarcation purposes. However, they have done so independently, without any prior agreement on these boundaries.³⁸

(5) Fishing

Traditionally, Spanish fishing vessels had engaged in certain fishing activities in these waters. Following the enactment of the 1991 Gibraltarian Nature Protection Act, fishing continued to be

facilities in Gibraltar for major nuclear repairs to submarines". This letter, and the letter sent by the Spanish Minister in response, can be found in *Gibraltar y el Foro tripartito de Diálogo* (Dykinson, Madrid, 2009), Document 25 of the Document Appendix, at 514-517.

³⁷ On the accident involving the submarine HMS *Ambush* in 2016 in waters near Gibraltar, see *Notas de Prensa del MAEC* 169, dated 21 July 2016, and 175, dated 28 July 2016, Documents 17 and 19, *Cuadernos de Gibraltar – Gibraltar Reports* No. 2 (2016-2017), 495 and 498.

³⁸ See I. Gonzalez García, "La Bahía de Algeciras y las aguas españolas", in *Gibraltar: 300 años...*, *supra* n. 11, at 211-ss *loc. cit.*, and 221-22.

tolerated by the British and Gibraltarian authorities. However, an incident in the waters of Gibraltar (the so-called “Piraña” case) caused a bitter crisis between Spain and the UK, leading to two different fishing agreements.

First, in 1998, the UK and Spain reached an “official” agreement for the exercise of fishing activities (British/Spanish Agreement to Fish in Waters Surrounding Gibraltar, 3 November 1998 - *Compromiso Hispano-Británico para la Pesca en las Aguas Próximas al Peñón*), between the British Embassy, on the one hand, and the Secretary General for Fisheries, the Spanish Ministry of Foreign Affairs, and the affected fishing industry on the other. The agreement took the traditional form of a “gentlemen’s agreement” (“commitment, understanding or verbal agreement”, according to point I.1 thereof³⁹). This 1998 Spanish-British agreement enabled fishing and moreover reflected the parties’ respective positions on the waters. Thus, the English version of the agreement refers to “fishing in these waters [...] surrounding the Rock” whilst the Spanish version refers to “las aguas en litigio”, literally, “the waters in dispute”.⁴⁰ The commitment even refers to the prohibition on fishing in the “military zones” of the naval base, or “Admiralty Waters”, the aforementioned 200 metre strip parallel to the entrance to the Port of Gibraltar.⁴¹

Subsequently, in 1999, a different, atypical agreement between the Campo de Gibraltar Fishing Committee [*Mesa de Pesca del Campo de Gibraltar*] and the Chief Minister of Gibraltar enabled a real and practical solution for fishing in the Bay of Algeciras.⁴²

Both agreements⁴³ evidence the complexity —and real possibility— of reaching agreements between the states, the government of Gibraltar and the civil society stakeholders from Campo de Gibraltar, capable of agreeing to regulate this activity in Gibraltarian waters. Even for the two states, the need led to an agreement on certain bilateral formulas, leaving aside the issues of sovereignty over the waters, as the parties stated that with the 1998 commitment they did “not have in mind to better our

³⁹ “I. Observations 1. The commitment, understanding and agreement, ratified by the Ministers of Foreign Affairs of both Spain and the United Kingdom in Luxembourg on 5 October...”(...) “3. This is a commitment, understanding and verbal agreement. This is due to the fact that both Spain and the United Kingdom do not have in mind to better our position regarding sovereignty over the waters in this dispute, which is what would have been the case if the agreement would have been a written agreement, as one of the positions would have prevailed over the other.”

⁴⁰ Specifically, the Spanish version refers to “la pesca en las aguas en litigio (milla y media en poniente y tres millas en levante) próximas al Peñón”, literally, “fishing in the waters under dispute (one and a half miles to the west and three miles to the east)”.

⁴¹ The issue of the waters in the Bay of Algeciras was addressed in the negotiated bilateral plan solely for the purposes of “recovering the traditional fishing practice prior to 1997”. To this end, on 5 October 1998, following a long negotiating process, the Spanish and British governments ultimately adopted what they called a “commitment, understanding or verbal agreement”. Under the terms of the agreement, Spanish fishermen are allowed to work in the waters under dispute near the Rock, subject to the aforementioned restrictions.

⁴² The continuous fishing-related incidents that occurred following the adoption of the Spanish-British agreement of 1998 led the Spanish fishermen of Campo de Gibraltar to sign a fishing agreement with the Chief Minister of Gibraltar, Mr Caruana. See also the *communiqués* issued by the Diplomatic Information Office of the Spanish Ministry of Foreign Affairs, on 28 and 29 January 1999, Nos. 8,421 and 8,422. On the agreement adopted in Gibraltar on 3 February 1999 between the representatives of the Campo de Gibraltar Fishing Committee and the Chief Minister of Gibraltar, and a comparative analysis of that agreement with the Spanish-British agreement of 1998, see: I. Gonzalez García., *supra* n. 34, at 228-231. See also: G. O’Reilly, *supra* n. 21, at 76-77.

⁴³ They are collected in the Documentation Section of *Cuadernos de Gibraltar – Gibraltar Reports* No. 1, 2015, at 261-268. Available [here](#).

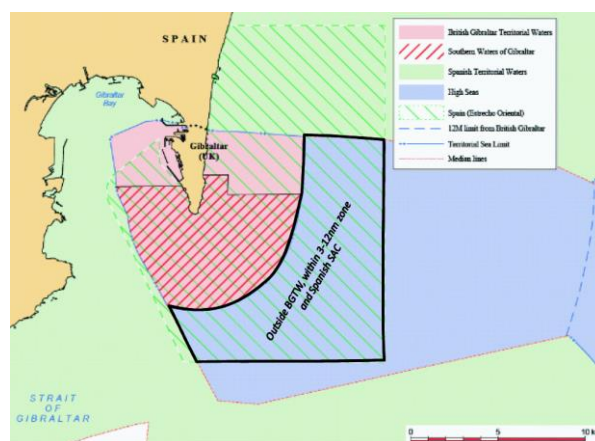
position regarding sovereignty over the waters in this dispute”. However, the matter’s close connexion to the issues of jurisdiction and maritime sovereignty led to the suspension, in 2012, by Gibraltar of the fishing activities agreed in 1999, on the grounds of environmental protection.

The lack of dialogue has led to numerous incidents in the Bay of Algeciras, related to the Spanish fishing fleet and to the presence, in the waters around the Rock, of vessels from the Royal Navy, the Spanish Navy, the Guardia Civil and the Gibraltar Royal Police. The fishing conflict was aggravated by the artificial reef crisis of 2013, which has since prevented fishing activities in the zone where the concrete blocks were sunk, in the internal waters of the isthmus around the landing strip, in the bay. Furthermore, the specific and strategic site chosen for the creation of the artificial reef — in the waters of the isthmus that Spain holds were not ceded, outside the area covered by the Spanish and British SCIs, and a specific fishing site for the Spanish fishing fleet — was most likely responsible for the response of the Spanish government and the extraordinary acrimony of the crisis (2013-2015)⁴⁴. Consequently, the situation regarding traditional Spanish fishing activities in the waters around Gibraltar has not been regulated since 2012.

(6) The Environment and the European Marine Strategy

In general, the marine environment is one of the aspects that has most suffered as a result of the dispute, and it has become an important aspect of it. Both the Bay of Algeciras and its surroundings are an area of high biological interest, requiring a suitable level of protection. Furthermore, both Spain and Gibraltar have included maritime zones in the Bay of Algeciras in protected nature areas within the scope of their respective domestic laws, needless to say, without any sort of connexion between them. In Spain, the waters of the Getares Inlet are included in the El Estrecho (The Strait) Natural Park,⁴⁵ whilst in Gibraltar all waters it considers under its jurisdiction are protected by the 1991 Nature Protection Ordinance.

Special attention should be given to several aspects related to environmental protection in the waters around the Rock. *First*, the aforementioned bunkering practices have repeatedly caused oil spills of medium importance, which contributes to the deep degradation of the ecosystems and beaches of the Bay of Algeciras. *Second*, a new dispute has arisen regarding the Sites of Community Importance (SCIs) in the waters around the Rock (see figure on the right)⁴⁶, in a clear sign of the lack of coordination between the parties regarding environmental



⁴⁴ A. del Valle Gálvez “[The Gibraltar crisis and the measures, options and strategies open to Spain](#)” *Análisis del Real Instituto Elcano* - ARI 32/2013, 30.09.2013

⁴⁵ Decree 57/2003, 4 March 2003, of the Andalusian Department of the Environment, declaring the Strait a Natural Park (*Official Gazette of the Andalusian Government* (BOJA) no. 54/2003, 20 March 2003).

⁴⁶ Source: House of Commons Foreign Affairs Committee, [Gibraltar: Time to get off the fence](#) (Second Report of Session 2014-15) (2014), at 18.

protection in the area. Briefly, in 2006, the European Commission recognized, at the initiative of the UK, an SCI in part of the waters surrounding the Rock. Subsequently, in 2008, it recognized, at the initiative of Spain, a different SCI in a larger part of the same waters. Consequently, there is an overlap with regard to the authorities responsible for monitoring compliance with European environmental regulations in these waters around Gibraltar. This dual designation of SCIs in the same waters adjacent to Gibraltar has emerged as a specific dispute, including a judicial component before the Luxembourg Court. Initially, the UK, based on a 2004 proposal by the government of Gibraltar, obtained a declaration of an SCI under the name “Southern Waters of Gibraltar”, comprising most of the waters adjacent to the Rock. Spain reacted by proposing and achieving, in 2008, the inclusion in the list of EU SCIs of a marine area, under the name of “Estrecho Oriental” [Eastern Strait] of almost 34,000 hectares, including an overlap of more than 5,000 hectares with the waters of the Gibraltarian SCI, declared a couple of years earlier. Thus, these waters, also included in the British SCI, are under Spanish jurisdiction.⁴⁷

Finally, third, in the context of this lack of coordination, the European Marine Strategy seems unlikely to be applied in the Bay of Algeciras. In the context of the European Integrated Maritime Policy, it is intended to lend an element of sustainability and coherence to the massive human intervention on Europe’s coasts. The Strategy requires coordination between authorities from different countries, and one of the Spanish regions in which a Strategy should be established is the Gibraltar Strait/Alborán Sea demarcation. This region comprises the Bay of Algeciras, site of the dispute between Spain and the UK over the waters around Gibraltar, as well as the recent conflict over the SCIs. All of this poses a serious challenge for the implementation of marine strategies in the waters of Gibraltar.⁴⁸

(7) Future Projection of Maritime Zones by Gibraltar

Experience shows that certain aspects of the Gibraltar dispute can emerge unexpectedly to endow the historical dispute with even greater complexity. In future, this could well be the case with certain claims by the UK and Gibraltar to jurisdiction over zones or functions in waters in the area of the Strait.

In fact, legally, it would be possible. The 2011 definition of the BGTW allows for the potential extension thereof, noting that the waters “...currently extends to three nautical miles and to the median line in the Bay of Gibraltar”⁴⁹. Nothing would prevent an eventual extension of the territorial sea to twelve miles to the east and south (where it would overlap with the waters of Ceuta), as Gibraltarian and British politicians have been calling for for some time now. Such a decision to

⁴⁷ The British SCI was adopted by means of the Commission decision of 19 July 2006, in accordance with the provisions of Directive 92/42/EEC, known as the Habitats Directive. The area was legally defined by Gibraltar in 2011.

⁴⁸ Marine Strategy Framework Directive, Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (OJ L 164, 25 June 2008, pp. 19-40). Directive transposed in Spain through Law 41/2010, 29 December 2010 (BOE No. 317, 30 December 2010, pp. 108464-108488).

⁴⁹ Reproduced *supra* n. 26.

unilaterally extend the territorial waters to twelve miles would no doubt once again trigger enormous new political tensions between the parties.

Gibraltar and the UK could even consider creating other maritime zones in future, such as the continental shelf and exclusive economic zone. In fact, Gibraltar law already provides for this possibility. Following its amendment in 2011, the aforementioned 1991 Nature Protection Act provides that it applies to “(a) BGTW; and (b) any area of sea, the sea bed and subsoil within the limits of the exclusive economic zone adjacent to Gibraltar, when and if that zone is established”.

To date, the Spanish position is that none of the waters around the Rock were ceded. However, a British or Gibraltar initiative concerning these other maritime zones could lead Spain to qualify, develop or adapt that position. Spain already officially communicated, in 2014, that it considers the 12-mile stretch of waters east of the Rock to be part of the Spanish territorial sea.⁵⁰

Finally, a potential British claim to participate in the control of maritime traffic through the Strait⁵¹, today carried out by Spain and the Kingdom of Morocco in accordance with the international legal framework of the International Maritime Organization, is not a minor matter.

(C) CONCLUSION

In summary, with the exception of the waters of the port, Spain denies the existence of waters appertaining to Gibraltar. However, in practice, it allows the exercise of British jurisdiction within an extension unilaterally established by the UK, without distinguishing between the waters of the Rock and those of the isthmus. Meanwhile, the UK asserts a *presumed* sovereignty over the waters around the Rock;⁵² however, its initial position that the waters surrounding the isthmus are British is legally weak.

Two main factors explain the glaring lack of coordination with regard to the legal regime governing the waters around the Rock. The first is structural: it is inextricably linked to the core issues of the sovereignty dispute, as the waters are legally and judicially inseparable from the other disputes over the cession of the town, port, rock and isthmus, as well as from the UN doctrine on decolonization. The other factor is temporary: the lack of institutional channels or other channels of dialogue to encourage the parties to address practical issues of coexistence and jurisdiction in the waters since the elimination of the Forum of Dialogue on Gibraltar following the arrival in office of the Rajoy administration in 2011. This explains the utter impossibility of reaching understandings regarding the waters and even the unlikelihood of reaching a simple and provisional *modus vivendi* on the regime to govern navigation in them⁵³.

⁵⁰ Official Statement 211, 18 July 2014, reproduced *supra* n. 17.

⁵¹ On this question, see the contribution in this volume by López Martín on “[Navigation through the Strait of Gibraltar](#)”.

⁵² See the opinion of A. Remiro, *supra* n. 12.

⁵³ A. del Valle Gálvez, I. González García & J. Verdú Baeza, “Propuestas para un acuerdo práctico sobre las aguas de Gibraltar”, *Estudios de derecho internacional y de derecho europeo en homenaje al profesor Manuel Pérez González*, M. J. Aznar Gómez, Coord. Vol I (Tirant, Valencia, 2012), 407-440; A. del Valle Gálvez “[Brexit Negotiations and Gibraltar: Time for a Modus Vivendi?](#)” 2 *Cuadernos de Gibraltar – Gibraltar Reports* (2016-2017), 19-26.

The Spanish 'dry coast' position is not as legally sound with regard to the waters as to other aspects of the dispute, and it moreover weakens Spain's claim as a whole. This theory, advocated by Spain, is in some ways inconsistent with Spanish practice and, furthermore, seems to be fairly young, having been established in the 1960s during the dictatorship and subsequently continued in the Spanish democracy⁵⁴.

In this context, the UK unequivocally seems to have expanded its concept of port over the 19th and 20th centuries and brought under its jurisdiction anchoring in waters near but outside the port, up to the Spanish coast in La Línea, Punta Mala and San Felipe in the bay. For more than 140 years, the UK applied its own particular version of the 'dry coast' theory, in that case, against Spain. That period, which spanned from 1826 to 1968, is a bad precedent for the Spanish 'dry coast' position. Despite the existence of protests and Spanish notes rejecting any form of claim to British waters outside the port, the continuous exercise of vessel control in this zone could undermine the strength of the Spanish interpretation of the Treaty of Utrecht, in particular, with regard to the waters of this external anchorage near the isthmus and, in general, with regard to all the waters of the bay.

Ensuring greater coherence between Spanish theory and practice in relation to Spain's position on the waters of the bay would strengthen the consistency and credibility of its claim to the waters in the Gibraltar dispute, which seems to have arisen in the 1960s in response to the 'dry coast' theory applied by the UK to Spain at that time.⁵⁵ However, for achieving greater coherence on the Spanish position, it would be necessary to reformulate in some way the theory of the 'dry coast' in its application to the mountain and the isthmus of Gibraltar.

⁵⁴ J. Verdú Baeza "Las aguas de Gibraltar, el Tratado de Utrecht y el Derecho Internacional del Mar" 1 *Cuadernos de Gibraltar – Gibraltar Reports* (2015), 97-132.

⁵⁵ "The doctrine appears as a mirror image of Britain's own 'dry coast' doctrine in relation to the Punta Mala anchorage, which for many decades was a source of considerable consternation in Spain." J. Trinidad, *supra* n. 30, at 150-151.