Note on the Application to Gibraltar of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters

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CONTENTS

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1. Introductiou

On July 30, 1998, the Government of the United Kingdom made a unilateral declaration extending the application to Gibraltar of the *Brussels Convention of September 27, 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,* with the amendments introduced as a result of the accessions by Denmark, the United Kingdom and Ireland in 1978; Greece in 1982; and Spain and Portugal in 1989.[1]

This attempt to broaden the territorial scope of a European Community convention was appropriately contested by the Spanish Government on September 11, 1998. On that date, as a State particularly interested in the practice of the United Kingdom in respect of Gibraltar, given that the Hispano-British dispute about that territory was pending settlement, Spain drew up a declaration in which it outlined its position regarding this case and clearly stated its opposition to the unilateral extension of the territorial sphere of application of the *Brussels Convention.* The Spanish Government deems it necessary, based on the Convention itself and on International Law, to have the *explicit consent* of all Parties to this Convention in order to be able to validly enlarge its scope of territorial application, given that such application carries with it the assumption of legal obligations for all the States Parties.[2]

In the light of these Declarations, and for the purpose of determining the possible legal effects of this intended extension, we consider it of interest to briefly recall the features that characterise tlie legal status of Gibraltar on the international plane and the special regime of this territory within the European Community sphere, apart from examining in particular the ambit of territorial application of the *Brussels Convention* and the response provided under the rules of International Law on the territorial application of international treaties.

2. Gibraltar and European Community Law

As we know, from the international legal point of view, Gibraltar has a colonial status. In this connection, since 1947 and pursuant to the provisions of art. 73.e) of the *Charter of the United Nations* on non-self-governing territories, the United Kingdom has been transmitting information on Gibraltar to the UN. Since 1963, this territory lias been included in the preliminary list drawn up by the "Special Committee entrusted with studying the situation with respect to the application of the Declaration on the Granting of Independence to Colonial Countries and Peoples" (Committee of the Twenty-four), which is a subsidiary body of the UN General Assembly. It was thus incorporated into the United Nations decolonisation process in application of General Assembly Resolution 1514

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[1] See text of the Declaration in the *BOE* of March 18, 1999.

[2] The text of the Spanish Declaration can also be seen in the *BOE* of March 18, 1999.

(XV), of December 14, 1960.[3] The culmination of this process is necessarily subject to negotiations between Spain and the United Kingdom for the purpose of re-establishing the Spanish territorial integrity that was destroyed by this anachronistic colonial situation.

As a colonial territory, it has, pursuant to GA Resolution 2625 (XXV) of 1970, a legal status that is separate and different from that of the territory of the administering power, the United Kingdom, which does not exercise sovereignty over it, but is merely responsible for its foreign relations.

Bearing this status in mind, the Treaties establishing the European Communities, and specifically the *EC Treaty*, are applicable to the territory of Gibraltar as a consequence of the inclusion in its former article 227.4 (currently 299.4) of a colonial clause (on *contracting in*),[4] which allows for the extension of the Treaty to the "European territories for whose foreign relations a Member State is responsible".[5] This clause constitutes one of the exceptions to the general rule established in paragraph 1 of this Treaty, according to which the *EC Treaty* is applicable to the Member States, including all the elements forming part of their territory (soil, subsoil, sea and air space).[6]

It must be pointed out on this point that the general rule contained in article 29 of the 1969 *Vienna Convention on the Law of Treaties* gives priority to the wishes of the Parties to the Treaty with regard to determining their scope of territorial application, on establishing that:

"Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of *its entire territory*".[7]

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[3] See J. Díez-Hochleitner, "Les relations hispano-britanniques au sujet de Gibraltar: état actuel", *AFDI*, vol. XXXV (1989), 167–187, p. 170; and C. Izquierdo Sans, *Gibraltar en la Unión Europea. Consecuencias sobre el contencioso hispano-británico y el proceso de construcción europea*, Madrid, 1996, pp. 47–53.

[4] See A. Remiro Brotóns, *Derecho Internacional II. Derecho de los tratados*, Madrid, 1987, p. 290. In connection with the British practice related to the use of the colonial clause, see J. E. S. Fawcett, "Treaty Relations of British Overseas Territories", *BYIL*, vol. 26 (1949), 86–107, pp. 93–100.

[5] See J. Mégret, M. Walbroek, J. V. Louis, D. Vignes, J. L. Dewost, *Le Droit de la Communauté Européenne*, vol. 15, *Dispositions générales et finales*, Bruxelles, 1987, pp. 474–477; and J. L. Dewost, "L'application territoriale du droit communautaire: disparition et résurgence de la notion de frontière", SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL (Ed.), *La frontière*, Colloque de Poitiers, Paris, 1980, 253–267, p. 261.

[6] A. Mangas Martín, D. J. Liñán Nogueras, *Instituciones y Derecho de la Unión Europea*, 2nd edition, Madrid, 1999, p. 176.

[7] The italics are ours. See text of article 25 of the project definitively approved by the International Law Commission in 1966 on the basis of the reports by the Special Rapporteur H. Waldock, and his corresponding comments, in the *ILC Yearbook* 1966-11. par. 38, pp. 233–234 (pages of the Spanish version). In its comments on this provision, the Commission considers that the territorial application of a treaty depends on the intentions of the Parties and that, in accordance with international jurisprudence, States' practice, and the doctrine, it must be presumed that a treaty

In accordance with the drafting of this article, which refers to the territory of the States Parties, and considering, pursuant to GA Resolution 2625 (XXV), that the territory of a colony can in no case by assimilated by the State that administers it, it is necessary to include an explicit clause (the colonial clause) in the text of the Convention in order to make its application possible to a non-independent territory, such as Gibraltar.[8]

The former article 227.4 of the *EC Treaty* (article 299.4) thus allows for the incorporation of Gibraltar into the European Community following the accession of the United Kingdom. However, the Act of Accession of that State introduced a special regime based on the peculiarity of this territory, whereby the contents of the Community treaties as applied to this colony were amended.[9]

Thus, article 28 of the British Act of Accession established that Gibraltar would be excluded from application of the provisions on the Common Agricultural Policy and harmonisation of the laws of the Member States relative to value added tax (VAT). However, these exclusions were not necessarily definitive, given that this article contains a provision allowing the Council to repeal them when acting in unanimity and on the proposal of the European Commission.[10]

Moreover, under the provisions of Annex 1 to the Act of Accession,[11] Gibraltar is also excluded from the common customs union; and finally, pursuant to Annex II of the Act relative to the election of representatives to the European Parliament by universal direct suffrage, attached to Council Decision 76/787, of September 20, 1976, it is excluded from this election as a consequence of its colonial status.

With regard to the exercise of the right of the residents of Gibraltar to vote in the European elections, the recent and controversial ruling by the European Court of Human Rights, of February 18, 1999, in the case of *Matthews v. the United*

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applies to the whole territory of each of the Parties, unless otherwise deduced from the treaty itself. The "whole territory" is understood in the broad sense, which includes both the territory itself and the sea and air space forming part of it. This is the general rule on the territorial application of treaties, outlined in the draft that served as a basis for the adoption of the 1969 *Vienna Convention.*

[8] J. D. González Campos, L. I. Sánchez Rodríguez, P. Andrés Sáenz de Santamaría, *Curso de Derecho Internacional Público*, 6th ed., Madrid, 1998, pp. 296–297.

[9] With a view to the criteria for determining the compatibility of the special regimes with the general Community interests, see A. Asín Cabrera, *Islas y archipiélagos en las Comunidades Europeas*, Madrid, 1988, pp. 50–51.

[10] J. P. Puissochet, *L'élargissement des Communautés Européennes. Présentation et commentaire du Traité et des Actes rélatifs à l'adhésion du Royaume-Uni, du Danemark et de l'Irlande,* Paris, 1974, pp. 241–242; J. Mégret, M. Walbroek *et al, Le Droit de la Communauté, ...op. cit.,* p. 491.

[11] This Annex changes the sphere of application of EEC Council Regulation 1496/68 of September 27, 1968 (*OJEC* L 238 of September 28, 1968, p. 1), which will define the territory of the Community customs union without making any reference to Gibraltar.

Kingdom, is worth mentioning. In this ruling, the Court deemed that the failure to call and organise elections to the European Parliament in Gibraltar in 1994 constituted a violation of art. 3 of Protocol n.1 to the *European Convention on Human Rights* that, in this case, would guarantee the right of Gibraltarians to participate in "free elections, with a secret ballot, in conditions that guarantee the free expression of the people's opinion in the election to the legislative body".[12]

The contents of this ruling are open to criticism, in that it raises problems if it is analysed from the standpoint of General International Law. In other words, the Court totally ignores the peculiar legal status of Gibraltar (a colonial territory) that precisely constitutes the reason why this territory was excluded from the European elections.

Moreover, the decision also reflects the possibility of conflict between two particular legal systems – European Community law and European human rights law. In this connection, it is of special interest that the Court – the judicial body of the European system of protection of human rights – should make an extensive interpretation of Community law (specifically the role of the European Parliament in the process of drawing up Community rules) and should describe it as a "legislative body", especially after the increase in powers provided under the 1992 *Treaty on European Union*.[13]

3. The *Brussels Convention* of September 27, 1968: its Scope of Territorial Application

This multilateral text constitutes a *complementary convention* which was concluded between the Member States of the European Community. Its legal grounds were contained in art. 293 (former art. 220) of the *EC Treaty*. This provision laid down the obligation of the Member States, whenever necessary, to enter into negotiations between themselves in order to promote the interests of their nationals through the setting up of a common body of law in different spheres of Private International Law over which Community jurisdiction was not exercised.[14] Amongst these, was explicitly included the simplification of the requirements for reciprocal recognition and enforcement of judgments and arbitral awards. This was the main objective of the 1968 *Brussels Convention*,[15]

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[12] See text of the ruling in *Human Rights Law Journal*, vol. 20 (1999), pp. 4–12.

[13] With regard to these matters, see the critical analysis by L. I. Sánchez Rodríguez, "Sobre el Derecho Internacional, de los derechos humanos y comunitario europeo", *RDCE*, n. 5 (1999), 95–108, pp. 99–104.

[14] W. M. Hauschild, "L'importance des conventions communautaires pour la création d'un droit communautaire", *RTDE*, vol. 11 (1975), 4–13, pp. 4–9.

[15] The Convention came into force on February 1, 1973 in the original version between the six States that founded the Community, and after each enlargement it has been adapted for the purpose of allowing for the accession of new members, which are compelled to comply with the Convention as a result of the stipulations contained in their respective Acts of Accession to the Community.

that it was proposed to complete under the *EC Treaty* in an area necessary for the proper operation of the internal market, thereby guaranteeing the free movement of judgments in civil and commercial matters.[16]

As to the nature of the Convention, it can be said that, although in a strict sense it is not a European Community act but rather an international convention,[17] it is undeniable that in its capacity as a complementary convention it is inextricably related to European Community law.[18] In this connection, it must be noted that in the Acts of Accession of the new Member States the obligation to accede to the complementary conventions is always included.[19] Moreover, their formulation is somewhat specialised to the extent that European Community institutions, such as the Council and the Commission, participate in drawing them up. Thus, the Commission is present at the negotiations, the draft is transmitted to the Council and the Commission, the latter issues a formal opinion on it, the text is signed by the representatives of the States at a Council meeting, and it is deposited with the Council Secretary General.[20]

Finally, although the jurisdiction of the European Court of Justice is not in principle applicable to these complementary conventions with a view to interpreting them in a uniform and binding way in a preliminary ruling, States may grant this jurisdiction to the Court. In practice, this has been done through the *Luxembourg Protocol* of June 3, 1971, to which all the States Parties have acceded.[21]

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[16] See, for a general perspective, and among many others, P. Gothot, D. Holleaux, *La Convention de Bruxelles du 27 septembre 1968 (Compétence judiciaire et effets des jugements dans la CEE)*, Paris, 1986; and A. L. Calvo Caravaca (ed.), *Comentario al Convenio de Bruselas relativo a la competencia judicial y a la ejecución de resoluciones judiciales en materia civil y mercantil*, Madrid, 1994.

[17] L. I. Sánchez Rodríguez, "Los tratados constitutivos y el Derecho derivado", in E. García de Enterría, J. D. González Campos, S. Muñoz Machado (Dirs.), *Tratado de Derecho Comunitario Europeo*, 3 vols., vol. I, Madrid, 1986, 313–354, p. 334.

[18] A. Mangas Martín, D. J. Liñán Nogueras, *Instituciones y Derecho de la Unión Europea*, *op. cit.* p. 193.

[19] Indeed, the *Brussels Convention* has been acceded to by the fifteen Member States of the European Union. Following its ratification by the six original Member States, it was acceded to by the United Kingdom, Ireland and Denmark through the *Luxembourg Convention* of October 9, 1978; by Greece through the *Luxembourg Convention* of October 25, 1982; by Spain and Portugal through the *San Sebastián Convention* of May 26, 1989; and, finally, by Austria, Sweden and Finland through the *Brussels Convention* of November 29, 1996. (See the "consolidated version" of the Convention following the latest accessions, in *OJEC* C 27, of January 26, 1998, pp. 1–27. This version, which has no legal validity, is for the purpose of facilitating consultation and practical handling of this text by jurists).

[20] G. Isaac, *Manual de Derecho Comunitario General*, 5th ed., Barcelona, 2000, p. 215.

[21] See the "consolidated version" of the Protocol, amended following the successive accessions of the new Member States, in *OJEC* C 27, of January 26, 1998, pp. 28–33.

A) Article 60 of the Convention

Having defined the purpose and the nature of the *Brussels Convention,* it is worthwhile to examine its contents for the purpose of determining its scope of territorial application and ascertaining whether, in accordance with the wishes of the States Parties as set forth in the text of this instrument, the possibility is envisaged of extending the application of its provisions to the territory of Gibraltar, or whether the Convention will remain silent and this eventual extension will be subject to the general rules of international law on the territorial application of treaties.

Here reference must be made to art. 60 of the Convention. This provision, which has now been abolished, was present in the original version of the Convention and remained valid after the adaptations that were made in 1978 as a result of the accession by the United Kingdom, Ireland and Denmark, until Spain's accession in 1989.

As initially drafted, art. 60 provided for the application of this Convention to the European territories of the signatory States as well as to the French overseas departments and territories, and it also empowered the Netherlands to extend this application, by unilateral declaration, to Surinam and the Netherlands Antilles.[22]

In 1978, with the accession of the United Kingdom, Ireland and Denmark, this article was amended under art. 27 of the Accession Conventions of these three States. As for the territory of Gibraltar, it must be mentioned that in the new version, the territories located outside the United Kingdom, for whose international relations said State would be responsible, are excluded from the scope of application of the Convention. At the same time, the right of the United Kingdom to make opposing unilateral declarations at any time concerning any of these territories was preserved. These would then be notified by the Secretary General of the European Community Council (the *contracting in* variant of the colonial clause).[23] In accordance with this clause, the colonial territory of Gibraltar could have been incorporated into the scope of application of the Convention, through the simple unilateral expression of the United Kingdom's wishes. However, such a declaration was not made during the time that art. 60 was in force between the Member States.

This provision was abolished as a result of the negotiations for Spain's accession to the Convention. The strong and natural Spanish objection to its continuance, considering that accepting it would imply acknowledging an obligation to recognise judicial decisions related to the territory of Gibraltar (the

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[22] C. Izquierdo Sans, *Gibraltar en la Unión Europea, op cit.*, pp. 261–262.

[23] Art. 60.3, par. 2 of the Convention, amended by the *Luxembourg Convention* of October 9, 1978.

Rock and the isthmus[24]), determined by the expression of the United Kingdom's wish to extend the application of the Convention to this territory,[25] led to it being repealed under art. 21 of the 1989 *San Sebastián Convention*,[26] which was ratified by the United Kingdom on September 13, 1991.[27]

As a result, the clause relative to the scope of territorial application disappeared from the text of the Convention. It has not been included again following the adaptations introduced under the accession conventions of Austria, Sweden and Finland on November 29, 1996.[28]

B) General Rules of International Law

The British Declaration of July 30, 1998 was made in this context. Its intention was to extend the scope of application of the *Brussels Convention* to Gibraltar, in its capacity as a territory for whose international relations the United Kingdom was responsible.

This Declaration appears to ignore the fact that, once art. 60 had been removed from the text of the Convention, this instrument no longer contained any specific clause on territorial application and, as a result, the extension of this application to Gibraltar and, in general, to any European or extra-European territory for whose international relations a State Party was responsible, was subject to the general rules of international law applicable in this matter.

In this connection, we must first of all consider that, according to the general rule laid down under article 29 of the *Vienna Convention on the Law of Treaties*,[29] Gibraltar cannot be automatically incorporated into the scope of application of a convention that does not include an explicit colonial clause, which is the case of the *Brussels Convention,* as we mentioned before.

In the second place, it must also be pointed out that, from the material point of view, the envisaged extension of the application of the Convention would imply an alteration in the status of rights and obligations under this Convention that was voluntarily accepted by the States Parties by virtue of their sovereignty.

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[24] It should be recalled here that, together with the dispute relative to the territory of the Rock of Gibraltar, ceded by Spain under the 1713 Treaty of Utrecht, which possesses colonial status and is subject to the United Nations decolonisation process, the dispute relative to the Spanish territory of the isthmus is also pending settlement. This territory, located to the north of the Rock and never ceded by Spain to the United Kingdom, was illegally occupied by that State, which alleges the acquisition of sovereignty over it through prescription. See J. Díez-Hochleitner, "Les relations hispano-britanniques...", *loc. cit.*, pp. 168–169.

[25] See C. Izquierdo Sans, *Gibraltar en la Unión Europea, op. cit.*, pp. 263–264.

[26] *BOE*, of January 28 and April 30, 1991.

[27] See *Informe sobre el Convenio de San Sebastián de 26 de mayo de 1989*, drawn up by M. de Almeida Cruz, M. Desantes Real and P. Jenard in *OJEC* C 189, of July 28, 1990, in particular about the territorial application of the Convention, pp. 49–51.

[28] See *BOE* of March 31, 1999.

[29] See sec. 2 above.

In particular, the application of the provisions of the Convention to this colonial territory would generate the obligation for all of them to automatically recognise and enforce the judgments handed down in civil and commercial matters related to alleged incidents that had occurred in said colonial territory or to property located therein.[30]

Therefore, as clearly reflected in the Declaration by the Spanish Government, in which the objection to the extension of the Convention to Gibraltar was made, the British pretension could only be opposed on an international legal level, generating compulsory legal effects for the States Parties if all of them, by virtue of the principle of sovereign equality, should *explicitly* consent to such extension. That is, the silence of a State could not be interpreted as alleged tacit acceptance of its contents because these contents could not be legally binding for third parties without their explicit acceptance, assuming that there was an extension of the legal commitments undertaken under the Convention.

4. Final Considerations

According to the foregoing outline, from the international legal point of view, it must be emphasized that the British Declaration regarding the extension of the appplication of the 1968 *Brussels Convention* to Gibraltar has no validity in respect of the other States Parties to this Convention without their explicit acceptance. In this connection, the position of the Spanish Government, outlined in the Declaration formulated on September 11, 1998, must be mentioned. Apart from deserving a positive appraisal in political terms, given Spain's legitimate interest in claiming the colonial territory of Gibraltar, it is also irreproachable from a legal standpoint, since its contents are in agreement with or adjusted to the international provisions applicable in this case.

However, from the material standpoint, if attention is paid to achieving the objectives of the process of European integration and their effectiveness (in particular the free movement of judgments within the "European judicial area"), the advisability could be considered of extending the application of the *Brussels Convention,* especially bearing in mind the economic and financial relations that, in practice, have been established between Gibraltar and the European Community Member States, Parties to this Convention.

In this connection, it must be said that the developments that have taken place following the entry into force of the *Treaty of Amsterdam* of 1997 are linked to the "communitisation" of the matters regulated by the Convention, given that these matters are explicitly included within the scope of article 65 of the *EC*

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[30] See Title III of the Convention (arts. 25 to 49).

Treaty,[31] and within the framework of the progressive establishment of the new European Union *area of freedom, security and justice* (Title VI of the *EC Treaty* and Title VI of the *TEU*).[32]

In particular, it must be mentioned that the Council has recently adopted Regulation 44/2001, of December 22, 2000, intended to replace and update the contents of the *Brussels Convention*.[33] This instrument, which enters into force on March 1, 2002, will be applicable in all the Member States except in Denmark which, in principle, will continue to be subject to the provisions of the Convention unless this State individually chooses otherwise. This is laid down in the specific protocol to the *TEU* and the *EC Treaty*, which deals with the position of this State in respect of the new Title IV of the *EC Treaty*.[34]

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[31] This provision regulates the adoption, by the Council, of measures to improve and simplify "the recognition and enforcement of judgments in civil and commercial matters, including extra-judicial decisions" (art. 65.a).

[32] See A. del Valle Gálvez, "La refundación de la libre circulación de personas, tercer pilar y *Schengen:* el espacio europeo de libertad, seguridad y justicia", *RDCE*, n. 3 (1998), 41–78, pp. 46–60.

[33] *OJEC* L 12, of January 16, 2001, p. 1.

[34] See H. Labayle, "Un espace de liberté, de sécurité et de justice", *RTDE*, vol. 33 (1997), 813–881, pp. 839–843.