

Note

Spain, Gibraltar and Territorial Waters: A New Battleground for an Old Conflict

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I. INTRODUCTION

Since Spain lost Gibraltar to England in the War of the Spanish Succession in 1704, Spain has wanted it back.¹ The two nations have fought in the courtroom, in diplomatic negotiations, and even on the battlefield over this “rock” guarding the entrance to the Mediterranean.² With the signing of the Córdoba Accord and the solidification of the European Union in the first decade of the 21st Century it appeared that the worst days of this conflict were in the past. However, a recent spat began when EU laws meant to diminish the tensions in the area instead ratcheted tensions up to levels not seen since the end of Generalissimo Franco’s rule.³

This most recent dispute began when the European Commission granted Spain the oversight of an ecologically important area off the shores of Gibraltar.⁴ This area is home to a number of protected species of fish and plants. Britain and Gibraltar both believe that Commission’s action is an invasion of their sovereignty over the area. They have unsuccessfully appealed the decision through the European Union courts.⁵ Their concern over sovereignty has increased since Spain has attempted to use its authority as environmental monitor to prevent Gibraltarian fishing and refueling operations near the area.⁶ The end result has been a near rescission of the Córdoba Accord, the re-closure of the Gibraltar-Spain border, frosty relations between Spain and Britain,

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1. See CHRIS GROCOTT & GARETH STOCKEY, GIBRALTAR: A MODERN HISTORY 1 (2012) (explaining that the Spanish psyche sees Gibraltar as being unfairly and indignantly lost to Britain. After 1704, kings and dictators alike have either failed to or were unable to reclaim this “lost” land); See also Gino Naldi, *The Status of the Disputed Waters Surrounding Gibraltar*, 28 INT’L J. MARINE & COASTAL L. 701, 703 (2013) (“Spain has never abandoned hope of reestablishing sovereignty over the Rock.”).

2. See *infra* notes 19–25, 40–41, 62–64 and accompanying text; See also Naldi, *supra* note 1, at 715 (stating that the British government and Gibraltar’s local authority appealed the European Commission’s decision regarding Gibraltar’s territorial sea).

3. See *infra* notes 80–89 and accompanying text (describing the modern conflict over Gibraltar).

4. *Id.*

5. *Id.*

6. *Id.*

and an increased sense of uncertainty for the citizens of Gibraltar.⁷

This note will argue that the European Commission was wrong in placing this particular area of Gibraltar's territorial waters under Spanish control. Further, the European Court of Justice was wrong as a matter of law and policy to refuse to settle the matter in court. First, this note will give a detailed background of the conflicts between Spain and Britain over Gibraltar and show how the historical dispute between the two nations has influenced the modern conflict. Next, it will briefly describe the birth of modern maritime law, particularly in regard to territorial waters. Then, it will give an in-depth analysis of the European Court of Justice's decision, indicating why it was the wrong decision as a matter of law and policy. Finally, it will do what the court should have done by analyzing both countries' claims to the territorial waters around Gibraltar. In doing so it will utilize a number of United Nations conventions, including the Convention on the Law of the Sea, and International Court of Justice cases. This note will show that the Spanish claims are generally without merit and, as a matter of law and policy, Gibraltar's claims to its own territorial waters should be recognized and upheld.

II. BACKGROUND

A. HISTORY OF THE CONFLICT FOR GIBRALTAR

Since the cession of Gibraltar to the British in 1713 Spain and Britain have fought both literally and figuratively to control the two and a half square mile rock. Situated at the mouth of the Mediterranean, the Rock of Gibraltar was coveted for its strategic and geopolitical importance.⁸In the modern era the peninsula has economic importance and plays a large role in the shipping industry.⁹Yet, perhaps most important to the current debate is the role the tiny piece of land plays in the national consciousness of both countries. For Britain, Gibraltar is one of the last vestiges of its empire—a living imperial legacy.¹⁰ For Spain, the peninsula represents a piece of sovereign and contiguous territory which was taken by force from its rightful owners; its return is essential to the maintenance of Spanish national pride.¹¹The current conflict can only be

7. *Id.*

8. *See generally* GROCOTT & STOCKEY, *supra* note 1, at 1 (explaining the strategic role of Gibraltar in Britain's Empire).

9. *See* E.G. ARCHER, GIBRALTAR: IDENTITY AND EMPIRE 70–71 (2006) (describing the modern role of Gibraltar in ship building, repair, refueling, and refitting and the industry's effect on the Gibraltar economy).

10. *See* GROCOTT & STOCKEY, *supra* note 1, at 1 (discussing the value of Gibraltar in the modern British mindset and why Britain has been so keen to keep its control over the area).

11. *Id.* (stating that though Gibraltar represents “martial success and bravery” to British writers, “Spanish writers have been no less enthusiastic in focusing on this period, but for rather different reasons. It was in the eighteenth century that Spain ‘lost’ Gibraltar to Britain” in less than honorable conditions).

understood in the context of this history.

1. The Warring Period 1704-1783

In the late summer of 1700, Charles II, the mentally and physically disabled king of Spain, died childless.¹² His closest male relative was Phillip, the Duke of Anjou, also the Dauphin or heir to the throne of France.¹³ To prevent a unified Spain and France from dominating Western Europe, over the course of the next 13 years Europe devolved into a massive war.¹⁴ The lines were drawn between Spain and France on one side, and England,¹⁵ the Netherlands, the Holy Roman Empire, and Prussia on the other. They fought to prevent the union of the two kingdoms of France and Spain from dominating Western Europe.¹⁶ The Treaty of Utrecht in 1713 ended the war, and a status quo antebellum emerged: Phillip was allowed to keep the throne of Spain, but was removed from the French succession.¹⁷ Importantly, the treaty also gave Britain ownership of Gibraltar, which the British had captured in 1704.¹⁸ Over the course of the next 100 years Britain would continue to fight Spain a number of times for control of Gibraltar.¹⁹

Initially, British interest in Gibraltar was minimal.²⁰ In fact, Britain had hoped that it might be able to leverage its control of the Rock to trade for a more valuable colonial possession from Spain, which, at that time was the largest colonial power in the world.²¹ However, as the size of the British Empire expanded, and the need for more friendly ports to support

12. STEPHEN CONSTANTINE, *COMMUNITY AND IDENTITY: THE MAKING OF GIBRALTAR SINCE 1704*, AT 12 (2009) (“It needs to be remembered that the European war which broke out in 1702 was a war to determine the succession to the Spanish throne following the death without direct heir of Charles II.”).

13. *Id.* (“The Bourbon domination of Western Europe and of the Mediterranean seemed to other European nations the likely outcome if Louis XIV of France secured the succession for his grandson, Philip, Duke of Anjou. Hence the traditional enemies of the Bourbons formed an alliance in support of [an] alternative claimant.”).

14. *The War of Spanish Succession of 1704. Id.*

15. GROCOTT & STOCKEY, *supra* note 1, AT 9 (explaining that the Act of the Union uniting England and Scotland and creating Great Britain would not be passed until 1707).

16. *See* JAMEL OSTWALD, *VAUBAN UNDER SIEGE: ENGINEERING EFFICIENCY AND MARTIAL VIGOR IN THE WAR OF THE SPANISH SUCCESSION 93–95* (Kelly Devries ed., 2007).

17. HENRY SMITH WILLIAMS, *10 THE HISTORIANS’ HISTORY OF THE WORLD 290* (1904) (“Philip having renounced, both for himself and his successors, all claim to [France].”).

18. *See* GROCOTT & STOCKEY, *supra* note 1, AT 8–10 (noting that Article X of the Treaty of Utrecht [1713] passed sovereignty of Gibraltar from Spain to Britain ‘forever.’).

19. *Id.* at 9 (“Twice more in the eighteenth century Gibraltar would withstand prolonged sieges by Spanish, or Franco-Spanish, forces.”); *See also id.* at 10 (“It did not take long for disputes to break out over the territorial settlement of Article X. British reading of the treaty was less than literal . . .”).

20. ARCHER, *supra* note 9, at 76 (explaining that Britain thought Gibraltar was of little importance and did not see its presence there as necessarily long-lasting).

21. *Id.* (noting that Gibraltar in the Kingdom of Spain was often used as a bargaining counter).

its burgeoning naval power grew, the British government began to see the strategic importance of controlling access to the Mediterranean Sea.²² During the 70 plus years between the signing of the Treaty of Utrecht and the end of the American War for Independence, there was a period of near constant warfare in Europe. British-controlled Gibraltar was besieged three times, culminating in what is known as the Great Siege of Gibraltar.²³ This siege lasted nearly four years.²⁴ The British withstood the siege and as a result held on to Gibraltar.²⁵ Gibraltar would never again face a serious threat of conquest from the Spanish side.²⁶

2. British Empire 1783-1936

During the Napoleonic Wars of the latter 18th and early 19th Centuries, Spain and Britain went from being bitter enemies to close allies.²⁷ The war ended with Britain's total dominance of the seas and the need to maintain its navy increased the importance of Gibraltar as both a trading port and naval base.²⁸

For most of the 19th Century Britain and Spain enjoyed amicable relations regarding Gibraltar.²⁹ The advent of steam power meant that British trade ships began to rely more and more on cheap Spanish labor to do the back breaking work of coaling the ships.³⁰ As a result, a sizable city grew up on the Spanish side of the line separating the two territories.³¹ The town still exists, and the issue of workers crossing the

22. GROCOTT & STOCKEY, *supra* note 1, AT 22–24 (arguing that British traders as early as 1720 were influencing the government on the economic and geopolitical benefits of keeping Gibraltar).

23. *Id.* (“Spain tried and failed, then, on three occasions during the eighteenth century to recover Gibraltar by force of arms. Seemingly, each failed attempt did nothing to dampen Spanish determination to recover the territory; simultaneously each attempt strengthened British resolve to retain it. In particular, the last of these attempts – the Great Siege – appeared to solidify once and for all Gibraltar’s place in the British public imagination.”).

24. STEPHEN CONSTANTINE, *supra* note 12, at 13 (stating that the Great Siege lasted from 1779 to 1783).

25. *See supra* note 23 and accompanying text.

26. ARCHER, *supra* note 9, at 51–57 (showing that for decades after the Great Siege and until the close of the nineteenth century, the British Empire’s preoccupation with Gibraltar was one of economic policy and trade fluctuation. There was no further conflict with Spain, as it had begun to wane through the years of the Napoleonic Wars, and its days as a colonial power came to a conclusive end after its war with the United States over Cuba ended in 1902). *But see* GROCOTT & STOCKEY, *supra* note 1, at 82 (stating that Spain did periodically close the Gibraltar frontier in the nineteenth century).

27. ARCHER, *supra* note 9, at 52–53 (describing the role of Gibraltar during the British supported Spanish resistance to French Occupation).

28. *Id.* (“[W]ith the Spanish economy in ruins” at the end of the Napoleonic Wars in 1815, “there was a potential market for the British goods of the industrial revolution. British manufacturers were in a favorable position, especially those in Manchester who had well-established relations with Gibraltar’s shipping agents. . .”).

29. *See supra* note 19 and accompanying text.

30. ARCHER, *supra* note 9, at 54 (describing the increase in the size of the dockyard at Gibraltar and its influence of on Spanish migrant work).

31. *See* GROCOTT & STOCKEY, *supra* note 1, at 45 (describing the growth of La Linea de la Concepcion).

border both ways continues to strain Spanish and Gibraltarian relations to this day.³²

During this period the major issue affecting the relationship between Britain and Spain regarding Gibraltar was not sovereignty, but smuggling.³³ Smuggling was a major problem for the protectionist government of Spain after the Napoleonic Wars, which had raised its tariffs hoping to bolster its fledgling industrial growth.³⁴ Smuggling remained a problem even after the opening of the Suez Canal, because Gibraltar, as a major stopping point for ships en route to Africa and India, was a hotbed for cheap raw and manufactured goods.³⁵ These goods were then smuggled across the border into Spain.³⁶ This issue, though contentious, never led to open conflict.³⁷

3. The Spanish Civil War and Franco 1936-1975

The Spanish Civil War threw Spain into chaos and led to the protracted rule of Generalissimo Francisco Franco.³⁸ Franco, a dictator and erstwhile friend of the Axis powers,³⁹ caused relations between Britain and Spain to sour to a point not seen since the end of the Napoleonic Wars.⁴⁰ Adding to the tension already created by the Second World War and the end of the British Empire, the Nationalist Franco regime stretched relations between Britain and Spain regarding Gibraltar to the breaking point.⁴¹

The Spanish Civil War began in 1936 as a conflict between nationalist forces and the republican government at the time.⁴² Official British and Gibraltarian involvement in the war was limited to patrolling the coasts near Gibraltar in an effort to stem the intervention of other countries in the conflict.⁴³ The war affected the Gibraltarian people,

32. See ARCHER, *supra* note 9, at 43 (describing the social and political effects of the worker and immigrant movement between the two areas).

33. See *id.* at 54 (discussing the role of smuggling in Gibraltar and Campo de Gibraltar from its earliest days in trades such as tobacco to the more recent decades).

34. GROCOTT & STOCKEY, *supra* note 1, at 31–32 (explaining that after the Napoleonic Wars ended in 1815 Spain's high protectionist tariffs prompted smuggling of British cotton goods into Spain from Gibraltar which had a low import tax).

35. See *id.* at 43.

36. See explanation *supra* note 34.

37. See GROCOTT & STOCKEY, *supra* note 1, at 83–90 (explaining that although the flow of contraband into Spain caused constant friction between London and Madrid neither government could do much to curb the lucrative activity).

38. GARETH STOCKEY, GIBRALTAR: A DAGGER IN THE SPINE OF SPAIN 88 (2009).

39. *Id.* at 89.

40. See *id.* at 140 (describing the deteriorating relationship between Britain and Spain regarding Gibraltar after the end of the Spanish Civil War).

41. *Id.*

42. See *id.* at 90 (describing the initial skirmishes between the Republicans and Nationalists).

43. *Id.* at 97 (noting that Governor of Gibraltar sought to maintain order within the fortress and to protect Nationalist forces by ordering patrols of the Rock to stop the influx of pro-Republican refugees).

however, as many Gibraltarians had family and business dealings on the other side of the border with Spain.⁴⁴ Furthermore, many Gibraltarians would have likely chosen to intervene on one side or the other if given the opportunity.⁴⁵

At the start of the Second World War, Britain, fearing that Spain would side with Germany and Italy, evacuated the civilian population of Gibraltar.⁴⁶ Most would not return until the war ended.⁴⁷ During the war Franco had plans drawn up for the capture of Gibraltar but made no effort to carry them out.⁴⁸ This was possibly because after many years of civil war Franco was unable to muster the necessary forces and was unwilling to ask for help from Germany or Italy.⁴⁹

Throughout his rule Franco used Gibraltar to stir up nationalist sentiments among the Spanish.⁵⁰ The best example of this was the closure of the border between Spain and Gibraltar in 1969.⁵¹ Many people who lived on one side of the border and worked on the other were no longer allowed to travel to their work.⁵² The Spanish government also cut off communication lines between Spain and Gibraltar, preventing loved ones from contacting one another.⁵³ The border would not be opened again until after Franco's death in 1975.⁵⁴

During this time British decolonization around the globe led to increased self-rule for the Gibraltarians.⁵⁵ The role of the British Governor diminished as the powers of the local legislature increased.⁵⁶ This increasing self-rule in Gibraltar was not popular with the Spanish, who saw it as the British relinquishing authority which was never truly theirs to give.⁵⁷ The Spanish viewed it as an attack on what they believed was their sovereign territory.⁵⁸

44. *Id.* at 99–110 (showing that the civilian population supported partisan attitudes and illegally donated to the war effort based on their partisan leanings).

45. *Id.* (noting that partisanship lines were drawn almost exclusively by social class).

46. See GROCOTT & STOCKEY, *supra* note 1, at 69 (“Between 22 May and 24 June 1940 over 13,000 civilians were evacuated to French Morocco.”).

47. See *generally id.* at 70–71 (discussing the timeframe of return for Gibraltarian refugees).

48. Stockey, *supra* note 38, at 139.

49. *Id.* at 146.

50. *Id.* at 141 (describing Franco's political agenda to recapture Gibraltar was “as much geared towards domestic as . . . towards foreign policy. Periodically resurrecting the issue of Gibraltar enabled the regime – like so many Spanish governments before and even after Franco – to deflect attention away from the very real domestic problems facing Spain.”).

51. GROCOTT & STOCKEY, *supra* note 1, at 100–01 (explaining the closure of the border and the effects on the people of Gibraltar and nearby Spain).

52. *Id.*

53. *Id.*

54. *Id.* at 101.

55. *Id.* at 105–07

56. GROCOTT & STOCKEY, *supra* note 1, at 113 (describing the process of establishing Gibraltarian self-rule through referendum).

57. *Id.*

58. Constantine, *supra* note 12, at 378–79 (discussing the Spanish view of the British “decolonization” in Gibraltar).

4. European Union 1975-Present

With the end of the Cold War, the reopening of the border, and the easing of relations with Spain in the late 1970s, Britain began to downgrade its military presence in Gibraltar while continuing to increase local sovereignty.⁵⁹ This led to rapid changes in the Gibraltarian economy: tourism, gambling and finance all became major growth industries, while employment based around the military installation, particularly in the shipping industry, began to decline.⁶⁰ The departure of much of the military stationed in Gibraltar also led to the fear that the British would abandon the region. Many Gibraltarians worried this would leave them to be taken in by Spain under the terms of the Treaty of Utrecht, which allows Spain to reclaim Gibraltar if Britain ever surrenders its sovereignty.⁶¹

The creation of the European Union through the Maastricht Treaty in 1993 changed the conversation on Gibraltarian sovereignty.⁶² Both Britain and Spain continued talks in an attempt to share sovereignty over Gibraltar. However, Gibraltarians overwhelmingly rejected⁶³ shared sovereignty in a 2002 referendum.⁶⁴ Given the E.U. and U.N. emphasis on popular sovereignty, Britain realized that sharing sovereignty, which it had tentatively agreed to do with Spain, would be unfeasible and the talks fell apart.⁶⁵ In 2006, the Cordoba Agreement opened a three way dialogue between Spain, Britain, and the government of Gibraltar for the first time to discuss the issue of sovereignty.⁶⁶

B. THE LAW OF THE SEA

Much of what is now considered the law of the sea did not exist when the Rock of Gibraltar was ceded to Great Britain in 1713.⁶⁷ Yet, while the conflict over Gibraltar developed between Spain and England, the concept of territorial waters was also developing along a parallel trajectory.

59. Archer, *supra* note 9, at 62, 67–71 (describing the gradual removal of British troops).

60. *Id.* at 67–71 (explaining the resulting change in the economy when British government spending ceased to be the primary source of economic activity).

61. Constantine, *supra* note 12, at 378.

62. Archer, *supra* note 9, at 25 (arguing that the change in European political structure led to questions of sovereignty being dealt with at the regional and local levels and consequently the national level is being squeezed out).

63. *See generally* Constantine, *supra* note 12, at 413 (emphasizing that approximately 99% of Gibraltarian voters opposed the idea).

64. Constantine, *supra* note 12, at 413–14.

65. GROCOTT & STOCKEY, *supra* note 1, at 116.

66. *Id.* at 117.

67. William R. Palmer, *Territorial Sea Agreement – Key to Progress in the Law of the Sea*, 25 JAG J. 69, 70 (1970–71).

1. Continental Shelf/Territorial Water Development

The concept of the freedom of the high seas has long been recognized by the law of nations.⁶⁸ The contrary idea that a sovereign, either a state or individual ruler, has the right to enforce its law on its “territorial waters” has been recognized for almost as long.⁶⁹ The original size of the area encompassed by territorial waters was small.⁷⁰ By the end of the 18th Century the definition of a nation’s territorial waters had only expanded to 3 miles.⁷¹ This limit was largely accepted as customary law until the end of World War II.⁷²

At the end of World War II the United States claimed territorial water status over its entire continental shelf primarily to secure it for defensive purposes in the early days of the Cold War.⁷³ Several Latin American countries followed suit and extended their claims out to upwards of 200 miles.⁷⁴ The Latin American claims were largely driven by the desire to secure vast fishing areas for their nations.⁷⁵ This desire quickly became untenable. Yet, for many years conflict between the United States and the Soviet Union prevented international agreement over the proper limit of a nation’s territorial waters.⁷⁶

2. United Nations Convention on the Law of the Sea

UNCLOS came into force in 1994 and represented a sea change in the regime of territorial waters.⁷⁷ Instead of the three mile limit that existed pre-World War II, or the extended model of the continental shelf used between 1945 and 1994, the convention limited a nation’s claim to 12 miles of territorial waters.⁷⁸ While both Spain and Britain have ratified the agreement, Spain did so with a reservation that the territorial waters of Gibraltar were no more than 3 miles.⁷⁹

68. *Id.* at 69.

69. *Id.* at 70 (explaining that the concept of a “territorial sea” was developed in tandem with the “high seas”).

70. *See generally id.* (suggesting that early methodology for measuring territorial waters included the distance one could throw a rock).

71. *Id.*

72. *Id.*

73. *Id.* at 71.

74. *Id.* at 71–72.

75. *Id.* at 72–73.

76. *Id.* at 78.

77. United Nations Convention on the Law of the Sea art. 308, Dec. 10, 1982, 1833 U.N.T.S. 129 [hereinafter UNCLOS].

78. UNCLOS, *supra* note 77, at art. 3.

79. Spain, *statement upon signature* Dec. 4, 1984, UNCLOS, https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en#EndDec (“The Spanish Government, upon signing this Convention, declares that this act cannot be interpreted as recognition of any rights or situations relating to the maritime spaces of Gibraltar which are not included in article 10 of the Treaty of Utrecht of 13 July 1713 between the Spanish and British Crowns. The Spanish Government also considers that Resolution III of the Third United Nations Conference on the Law of the Sea is not applicable in the case of the Colony of Gibraltar,

C. THE PRESENT CONFLICT

The present conflict began when the European Commission granted Spain the right to supervise an environmental protection zone within what had traditionally been known as Gibraltarian national waters.⁸⁰ The European Commission's decision did not recognize Spanish sovereignty over the region. Nevertheless, the British and Gibraltar governments were concerned that Spanish oversight over environmental protection in the region might impinge upon their own sovereign rights to control the area.⁸¹ Indeed, Spain used its environmental supervision of the area to attempt to police Gibraltarian fishing vessels and refueling operations.⁸² Both Britain and Gibraltar appealed the Commission's decision but both appeals were dismissed on procedural grounds.⁸³ After the Gibraltarian government sunk several large concrete slabs into the sea in order to promote coral growth, the Spanish government restricted border access. Spain claimed its actions aimed to increase security and decrease smuggling.⁸⁴ Gibraltar and Britain viewed Spain's actions as an infringement of their sovereignty in the area.⁸⁵ Spain indicated that it was simply following the mandate of the European Commission, which it believed recognizes Spanish sovereignty over the area.⁸⁶ As a result, Spanish and British relations fell to their lowest point since 2006.⁸⁷

The European Commission's decision on appeal did not rule on the merits of the original order granting Spain supervision over the environmental protection of Gibraltar's territorial waters. It granted neither approval nor disapproval of the European Commission's order,⁸⁸ allotting the environmental oversight to both the governments of Spain and Great Britain.⁸⁹ Instead, the court upheld the lower court's decision to dismiss Gibraltar's claim because it lacked the proper grounds for

which is undergoing a decolonization process in which only the relevant resolutions adopted by the United Nations General Assembly apply.”)

80. Case C-407/11 P, *Gibraltar v. Comm'n* (2012), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=126841&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=826644>.

81. See AFP, *Gibraltar: Timeline of Dispute Between Britain and Spain*, THE TELEGRAPH (Aug. 13, 2013, 1:44 PM), <http://www.telegraph.co.uk/news/worldnews/europe/spain/10230698/Gibraltar-timeline-of-dispute-between-Britain-and-Spain.html> [hereinafter *Dispute Timeline*] (outlining events in the recent territorial waters dispute between Gibraltar and Spain).

82. *Id.*

83. *Id.*

84. See Vanessa Barford, *What are the Competing Claims over Gibraltar?*, BBC NEWS MAGAZINE (Aug. 12, 2013, 10:02 PM), <http://www.bbc.co.uk/news/magazine-23617910> (describing the competing claims to Gibraltar in the context of the current conflict).

85. *Id.*

86. *Id.*

87. See generally *id.*; see also *Dispute Timeline*, *supra* note 81 (discussing the current state of British-Spanish relations).

88. Commission Decision 2009/95, 2009 O.J. (L 43) 393 (EC).

89. Case C-407/11 P, *Gibraltar v. Comm'n*, ¶ 48 (2012), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=126841&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=826644>.

appeal from the Commission's order.⁹⁰

The Court determined that Gibraltar's claim was based on four grounds. First, the court misapplied the rules of partial annulment and severability. Second, the court distorted the sense of the evidence. Third, the court infringed on the rights of the defense. Fourth and finally the court did not provide adequate reasoning for its decision.⁹¹

In overturning the first argument of the Gibraltarian government, the court stated:

“... [the] partial annulment of a European Union act is possible only if the elements the annulment of which is sought may be severed from the remainder of the act. The requirement of severability is not satisfied where the partial annulment of an act would have the effect of altering its substance.”⁹²

Gibraltar argued that the commission's act was not legislation, a regulatory decision, or another similarly important decision, but was instead a “delimitation of a geographical area and whether certain parts should be excluded.”⁹³ Also that delimitation of a geographical area does not rise to the level of an annulment or partition of legislation or an administrative order.⁹⁴ Finally, Gibraltar argued that because delimitation was neither an order nor legislation, it need not survive the same severability standard required for legislation or orders.⁹⁵ Nevertheless, the court found that the criteria for determining a site's importance cannot be separated from the site itself without altering the substance of the act.⁹⁶ The court also determined that it could not separate the portion of the Spanish controlled area within Gibraltar's national waters without altering the order.⁹⁷

Next, the court determined that the second ground of the appeal, Gibraltar's claim that the lower court distorted the sense of the evidence could not stand without the first.⁹⁸ The court argued that its application of the law made the evidential argument irrelevant because the issue needed to be severable before the evidence came into play. Because the court ruled that the issue was not severable, the evidentiary concerns were not relevant.⁹⁹ Finally, the court determined that the lower court properly followed its procedures and did not violate the rights of the defendant because it was under no obligation to do any more than it had done in the

90. *Id.*

91. *Id.* ¶ 20.

92. *Id.* ¶ 29.

93. *Id.* ¶ 22.

94. *Id.*

95. *Id.*

96. *Id.* ¶¶ 30–33.

97. *Id.* ¶¶ 33–34.

98. *Id.* ¶¶ 34–35.

99. *Id.*

III. ANALYSIS

A. GIBRALTAR V. COMMISSION: A FAILURE OF THE ALTERATION RULE

It is very likely that, given the politically sensitive nature of the question over Gibraltar's territorial waters, the European Court of Justice chose to sidestep weighing in on the merits of the issue. Britain and Spain represent two of the largest nations within the European Union in terms of both population and economic impact.¹⁰¹ Yet, the determination made by the court has exacerbated the tensions between Britain, Gibraltar, and Spain.¹⁰² The court erred both in its legal and policy analysis of the situation with its ruling. The result is high tension at the mouth of the Mediterranean.

The court erred when it decided that a geographical change was a fundamental alteration.¹⁰³ The court's error was not one of law, but of application of law. The order at issue consisted of nothing more than a list of sites to be protected.¹⁰⁴ Within the order, the sites are described in minimal terms, using only names and coordinates.¹⁰⁵ Given the minimalist nature of the descriptions, even the slightest change to any part would obviously "alter the substance [of the order]."¹⁰⁶ Such a standard cannot be reasonably applied in every situation, particularly in one such as this where any request for a slight change would be dismissed because it alters the order. Under this rule, for example, if in the unlikely scenario France was given supervision over an area which fell under Italy's territorial waters and Italy showed that it was far better suited to supervise that area, as long as France wished to maintain that

100. *Id.* ¶¶ 35–36.

101. *See generally Spain*, EUROPA.EU, http://europa.eu/about-eu/countries/member-countries/spain/index_en.htm (last visited Feb. 12, 2014); *United Kingdom*, EUROPA.EU, http://europa.eu/about-eu/countries/member-countries/unitedkingdom/index_en.htm (last visited Feb. 12, 2014); *World Economic Outlook Database: Report for Selected Countries and Subjects*, INT'L MONETARY FUND (Apr. 2013), (<http://www.imf.org/external/pubs/ft/weo/2013/01/weodata/weorept.aspx?pr.x=47&pr.y=9&sy=2011&ey=2018&scsm=1&ssd=1&sort=country&ds=.&br=1&c=946%2C137%2C122%2C181%2C124%2C918%2C138%2C964%2C182%2C968%2C423%2C935%2C128%2C939%2C936%2C961%2C172%2C132%2C184%2C134%2C174%2C144%2C944%2C178%2C136%2C112%2C941&s=NGDPD%2CPPPPC&grp=0&a=#cs1>) (describing the GDP and population of Spain and the United Kingdom compared to other nations of the European Union).

102. *See generally* Barford, *supra* note 84; *see also Dispute Timeline*, *supra* note 81.

103. Case C-407/11 P, *Gibraltar v. Comm'n*, ¶ 34 (2012) (referring to lower court decision, Case T-176/09 (2011)).

104. *Id.* ¶¶ 3–7.

105. *See* Commission Decision 2009/95, *supra* note 88 (indicating the British controlled site as merely "UKGIB0002 Southern Waters of Gibraltar 5 486,5 0 E 5 22 N 36 7" and the Spanish controlled site as "ES6120032 Estrecho oriental 23 641.82 W 5 17 N 36 7" with no other details or information).

106. Case C-407/11 P, *Gibraltar v. Comm'n*, ¶ 40 (2012) (referring to lower court decision, Case T-176/09 (2011)).

supervision Italy would have no recourse through the courts.

The court similarly misinterpreted the law when looking at Gibraltar's second argument. It decided that the failure of Gibraltar's first argument invalidated its position¹⁰⁷ the lower court was wrong in deciding "there is no evidence that a new delimitation of Site ES6120032 would satisfy the criteria laid down in Annex III to the Habitats Directive for classification as a site of Community importance."¹⁰⁸ The Court should have examined the record to determine if the proposed ES6120032 zone would fulfill the requirements of a site of Community importance. A thorough examination would have shown that the proposed zone contained "four habitat types and three species – including one priority species – listed respectively in Annexes I and II to the Habitats Directive." This means that the area would have qualified as a site of Community importance.¹⁰⁹

The most basic failure of both the lower and higher courts was not using this conflict as a means to give a final ruling on the status of Gibraltar's territorial waters. This case presented the European Court of Justice with the perfect opportunity to declare that, as a matter of European Union law, Gibraltar has a claim to territorial waters, and the European Commission violated that territory when it assigned a part of it to environmental observation by Spain. Given the tensions that have arisen between Britain, Gibraltar, and Spain in the aftermath of this failure,¹¹⁰ and the errors made in law and policy, it is unfortunate that the courts refused to give a clear ruling on the status of Gibraltar's territorial waters. The remainder of this note will analyze each country's claim to these territorial waters, and it will determine which side has the stronger claim, as the court should have done.

B. GIBRALTAR'S CLAIM TO TERRITORIAL WATERS

Any analysis of Gibraltar's claim to territorial waters must begin with a discussion of the ownership of Gibraltar itself. The government of Spain continues to contest British ownership and a number of legal scholars believe that Spain's claim to Gibraltar may be legitimate.¹¹¹ However, Britain continues to occupy Gibraltar per the terms of the Treaty of Utrecht,¹¹² and the citizens of Gibraltar have voted on three separate occasions to remain under British rule.¹¹³

In many respects British rule offers them more opportunities for

107. *Id.*

108. *Id.* ¶¶ 42–48 (describing the court's decision not to sustain the appeal on these grounds).

109. *Id.* ¶37.

110. See Barford, *supra* note 84; see also *Dispute Timeline*, *supra* note 81.

111. See generally Simon J. Lincoln, Note, *The Legal Status of Gibraltar: Whose Rock is it Anyway?*, 18 *FORDHAM INT'L L. J.* 285 (discussing the competing claims for Gibraltar).

112. *Id.* at 313.

113. *Id.* at 297.

self-rule than Spanish governance would.¹¹⁴ The purpose of this note however, is not to argue the merits of the British or Spanish claim to Gibraltar itself, but to examine the situation as it is and determine which state has a more legitimate claim to Gibraltar's territorial waters. Therefore, this note will proceed under the assumption that the British ownership of Gibraltar is valid primarily because it is the current state of affairs.

1. The UNCLOS Default

The United Nations Convention on the Law of the Sea provides the basic law on territorial waters and their extent.¹¹⁵ This convention, signed by both Britain and Spain, provides an extension for territorial waters out to twelve miles from the coast.¹¹⁶ The European Union is also a signatory of the convention through an earlier accession of the European Community.¹¹⁷ Therefore, as a matter of European Union law, the provisions of the treaty while not necessarily binding on all the members are binding on the institutions of the Union. Despite the ability to claim up to twelve miles of territorial waters, Britain has only claimed a three-mile zone for Gibraltar.¹¹⁸ The disputed zone, known as the Estrecho Oriental, falls partially within that three-mile area.¹¹⁹ Spain, however, has claimed that Gibraltar has no territorial waters, and thus the entire Estrecho Oriental is under its supervision.¹²⁰

UNCLOS defines the rights associated with territorial waters as an extension of the sovereignty which a state enjoys over its own territory.¹²¹ It states, "[E]very State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention."¹²² It further states, "[E]xcept where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."¹²³ Taken together the default rule provided by UNCLOS gives Britain and Gibraltar the right to extend their sovereignty over an area three nautical miles from the shore. Given that the Estrecho Oriental is centered four miles from

114. *See id.* at 320–23.

115. UNCLOS, *supra* note 77, at art. 3.

116. *Id.*

117. European Union, *statement upon signature* April 1, 1998, UNCLOS, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf>.

118. GIBRALTAR TERRITORIAL WATERS, <http://www.gibnet.com/fish/waters.htm> (last visited Jan. 28, 2014).

119. *Id.*; *See generally* Commission Decision 2009/95, *supra* note 88 (identifying the zone, Estrecho Oriental).

120. GIBRALTAR TERRITORIAL WATERS, *supra* note 118.

121. UNCLOS, *supra* note 77, at art. 2.

122. *Id.* at art. 3.

123. *Id.* at art. 5.

shore and extends around that point for nearly two miles, this would normally be a clear-cut case of conflicting sovereignty. However, given Gibraltar's unique position internationally, it must be determined if the default provisions of UNCLOS apply in order to resolve the conflicting sovereignty. There are two key difficulties in applying UNCLOS to Gibraltar: one, whether Gibraltar represents the sort of territory whose sovereignty can be extended; and two, whether any statements or reservations made by Spain or Britain to the signing of UNCLOS are enforceable.

2. Territorial Questions

Whether or not Gibraltar is a territory where sovereignty may extend into the territorial seas is at first glance easily answered; of course the convention is meant to apply to all coasts under the sovereignty of any nation. However, the language of the treaty seems to imply that the expansion of state sovereignty over an area can only apply to that state's domestic territory.¹²⁴ This interpretation fits in with the general goals of the United Nations, particularly the goal of self-determination and promoting the territorial integrity of states.¹²⁵ In fact, Spain has used this rationale for why it does not recognize Gibraltar's right to territorial seas.¹²⁶ Nevertheless, the first impression reading of this treaty is the correct one, and there are no true textual bars within UNCLOS as to Gibraltar's claim to territorial waters.

The central focus of this argument relates back to the underlying dispute of who has sovereignty over Gibraltar. The actual territory of Gibraltar is not barred from inclusion in the convention merely because its sovereignty is held by a noncontiguous nation.¹²⁷ Indeed, the fact that UNCLOS does not give a definition to the term "coastal state" lends credence to the notion that it was meant to apply to all territory bordering the sea.¹²⁸ Given that this note is proceeding under the assumption that Gibraltar is a territory rightfully held under British sovereignty, there is no bar to a noncontiguous application of sovereignty over territorial seas. Finally, and perhaps most tellingly, one of the strongest indications that UNCLOS would otherwise apply to Gibraltar is that Spain has issued a reservation to its ratification of the convention stating that it did not recognize Gibraltar's right to a territorial sea.¹²⁹ If Spain truly felt that Gibraltar did not have a valid claim through UNCLOS, it would not have

124. See *id.* at art. 2-5 (describing the right to extend territorial sovereignty over territorial sea to "States").

125. Lincoln, *supra* note 111, at 309-10 (discussing UN's preference for territorial integrity).

126. GIBRALTAR TERRITORIAL WATERS, *supra* note 118 (describing the Spanish rejection of Gibraltar's territorial seas claim).

127. UNCLOS, *supra* note 77, at art. 305.

128. *Id.* at art. 1.

129. Spain, *statement upon ratification* January 15, 1997, UNCLOS, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf>.

issued this reservation.

3. The Spanish Reservation and the Vienna Convention

Upon its accession to UNCLOS Spain issued the following reservation:

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 Third United Nations Conference on the Law of the Sea is applicable to the colony of Gibraltar, which is subject to a process of decolonization in which only relevant resolutions adopted by the United Nations General Assembly are applicable.

This was a strong and clear indication of Spain's refusal to recognize any claim Gibraltar and Britain might make regarding Gibraltar's territorial seas.¹³⁰ The Vienna Convention on the Law of Treaties establishes a number of requirements which must be met in order to determine whether or not reservations are valid.¹³¹ Therefore, Spain's reservation and its bearing on Gibraltar's claim to territorial seas must begin with an analysis under this convention.

The Vienna Convention on the Law of Treaties entered into force in 1980.¹³² Its goal was to create a set of standardized rules to govern countries in the creation and enforcement of treaties.¹³³ Both Spain and Britain, and indeed most of the European Union, are parties to this convention.¹³⁴ In addition to reservations, the Vienna Convention contains guidelines for the accession of treaties, the creation of treaties, dealing with conflicting treaties, and what entities are allowed to enter into treaties.¹³⁵ Section three of the convention, which deals with the rules regarding the formation, acceptance of, objection to, and the effects

130. *Id.*

131. Vienna Convention on the Law of Treaties art. 19–23, May 23, 1969, 1155 *U.N.T.S.* 331 [hereinafter Vienna Convention].

132. *Id.* at 332.

133. *Id.* at 332–333 (“Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law, Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained... Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations . . .”).

134. *Id.* at 332.

135. *See id.* at 331–353.

of reservations is particularly important to understanding this dispute.¹³⁶

Under the terms of the Vienna Convention, reservations to treaties must be issued formally in writing either before or at the confirmation of the treaty.¹³⁷ Spain's reservation was made on the ratification of the treaty, thus fulfilling this requirement.¹³⁸ A reservation may be formulated and added to every treaty unless the treaty itself specifically states that reservations are not to be accepted or the reservation "is incompatible with the object and purpose of the treaty."¹³⁹ Article 309 of UNCLOS provides that "no reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention."¹⁴⁰ There are no provisions of the treaty that all allow for reservations along the lines of Spain's reservation.¹⁴¹ Furthermore, it is arguable that Spain's reservation may be contrary to the goals and objects of the treaty. These goals include the desire to create a universal territorial waters scheme.¹⁴² The Spanish reservation works against this goal by specifically exempting areas from such a scheme.¹⁴³ Taken together, these two rules certainly place the legality of the Spanish reservation on very dubious grounds. Despite this, if either Britain or Gibraltar properly accepted the reservation and made no move to reject it, the reservation may still gain the force of law.

Under the Vienna Convention any objection to a reservation must be made either at the confirmation of the treaty, or within a year of the reservation's issuance.¹⁴⁴ After that, all parties who have not objected to a reservation are deemed to have accepted it.¹⁴⁵ The British in ratifying this treaty issued the following objection to the Spanish reservation,

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.

136. *Id.* at art. 19–23.

137. *Id.*

138. Spain, *statement upon ratification*, *supra* note 129.

139. Vienna Convention, *supra* note 131, at art. 19.

140. UNCLOS, *supra* note 77, at art. 309.

141. *See* Vienna Convention, *supra* note 131.

142. UNCLOS Preamble, Dec. 10, 1982, 1833 U.N.T.S. 129 ("[Recognizing] the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment...[Believing] that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter.")

143. Spain, *statement upon ratification*, *supra* note 129.

144. Vienna Convention, *supra* note 131, at art. 20.

145. *Id.*

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.¹⁴⁶

This is a clear rejection of the Spanish Reservation by the British Government, and therefore the reservation has no force between those two nations.

Thus, because Spain's reservation was unlawful under the Vienna Convention and Britain formally rejected it, Spain's reservation has no force. Without the Spanish reservation the UNCLOS default rule applies and Gibraltar is clearly within its right to claim three miles of territorial waters. Therefore, a ruling by the European Court of Justice regarding the environmental supervision of the Estrecho Oriental should have decided that Spain's claim violated Gibraltar's sovereignty over its own territorial waters; and should have given sole supervision over the environmental wellbeing of the contested area to Gibraltar and Great Britain.¹⁴⁷

CONCLUSION

Since the end of the Franco Regime there had been a return to a more cordial relationship between Britain and Spain regarding the status of Gibraltar. This culminated in 2006 with the Cordoba Accords, which opened the border between Spain and Gibraltar, and made a number of other concessions that made the lives of people living in Gibraltar and La Linea Dela Concepcion better.¹⁴⁸ However, Spain has not given up its claim to sovereignty over Gibraltar. As the economies of Europe worsened, the relationship between Spain and Gibraltar worsened. Finally, a court battle over the supervision of an environmentally important zone within Spain and Gibraltar's competing claims has sent the relationship between the two sides back to the bad old days of the mid-20th Century. Since this new dispute arose, the border with Spain and Gibraltar has been closed, the Spanish Royal Family refused to attend Queen Elizabeth's birthday celebrations, and the two nations have exchanged strongly worded reprimands. Britain even went so far as to send its sole aircraft carrier, the HMS *Illustrious*, to Gibraltar.¹⁴⁹

146. United Kingdom of Great Britain and Northern Ireland, *statement upon signature* July 25, 1997, UNCLOS.

147. UNCLOS, *supra* note 77, at art. 2-5; Spain, *statement upon ratification*, *supra* note 129.

148. Daniel Hannon, *Spain Should Want a Prosperous Gibraltar*, THE TELEGRAPH (Aug. 6, 2013), <http://blogs.telegraph.co.uk/news/danielhannon/100229898/spain-should-want-a-prosperous-gibraltar/> (describing insulation from the recent downturn in the Spanish economy).

149. *HMS Illustrious Sets Sail Amid Gibraltar Row*, BBC (Aug. 12, 2013), <http://www.bbc.co.uk/news/uk-23663262>; *Spain's Queen Snubs Britain's Diamond Jubilee Celebrations over Gibraltar*, CBS NEWS (May 21, 2012),

This conflict would never have escalated if the courts had reached a final conclusion regarding the status of Gibraltar's territorial waters. Without a definite answer provided by the courts there is no conceivable end to this conflict. In refusing to give a final ruling the court made a number of legal errors, including the adoption of the impossible to achieve alteration test. Properly applied, the law clearly shows that Gibraltar's claim to territorial waters through the United Nations Convention on the Law of the Seas more valid than Spain's. Spain's sole argument is its reservation to the treaty. This reservation, however, is invalid under the Vienna Convention on the Law of Treaties. The court should reexamine this issue in the light of its merits, and in finding for Gibraltar's claim, finally return the two sides to the cordial relations which existed before this conflict arose. A refusal to reexamine the issue by the ECJ may lead to continued tensions between the three parties and perhaps further litigation through the United Nations.