

LAW, CRIME AND LAW ENFORCEMENT

# New Approaches to the Law of the Sea

(In Honor of Ambassador José Antonio de Yturriaga-Barberán)

**Pablo Antonio Fernández-Sánchez**  
Editor

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**Chapter 4**

**GIBRALTAR:  
ADJACENT WATERS TO THE TERRITORY  
YIELDED BY SPAIN**

***Araceli Mangas-Martín, PhD***

Full Tenured Professor of Public International Law and International Relations,  
Faculty of Law at the Complutense, University of Madrid, Madrid, Spain

**I. INTRODUCTION**

The interpretation in good faith of a treaty requires taking into account the ordinary meaning to be given to its terms and to its context, and in the light of its object and purpose<sup>1</sup>. For this reason, the literal drafting of article X of the Treaty of Peace and Friendship between His Majesty the King of Spain and Her Majesty the Queen of Great Britain, signed in Utrecht on July 13<sup>th</sup> 1713, be interpreted in accordance with to the time in which it was signed. To start with, I should clear any doubts about the nature and the scope of the yielding, which affected the sovereignty in itself and discarded the notion of the yielding of “private” property<sup>2</sup>. Any yield of territory among States implied the exercise of inherent sovereign powers.

The first question to deal with is whether the territory yielded in article X its adjacent waters. The fact that no reference was made to maritime spaces in the said article has to be placed in the historical context in which the treaty was concluded. It is obvious that I exclude from my consideration the waters adjacent to the isthmus, because it was not included in the yield made by Spain.

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<sup>1</sup> Article 31 of the Vienna Convention on the Law of Treaties, of May 23rd 1969.

<sup>2</sup> The most reputed doctrine generally accepts that Spain did not yield Gibraltar as a particular, but as a sovereign State. See, *inter alia*, Jover Zamora, J.M./Hernández Sandoica, E., “España en los Tratados de Utrecht.” In Menéndez Pidal, R., “*Historia de España*.” Madrid, 1985, p. 408; and Pereira Castañares, J.C., “La cuestión de Gibraltar: Cambios, ofensivas y proyectos en la búsqueda de un acuerdo hispano-británico en el primer tercio del siglo XX.” In “*Las relaciones internacionales en la España contemporánea*.” Murcia, 1989, pp. 246-248.

## II. THE TERRITORY YIELDED BY ARTICLE X OF THE UTRECHT TREATY

Paragraph 1 of article X provides for the yielding of the “*full and entire property*,” “*absolutely*,” “*for ever*,” “*without any exception or impediment whatsoever*.” It is important to underline that the numerous, forceful and continuous references to the total sovereignty yielded without any restriction leaves no doubt about the “title of sovereignty” which was transferred to the United Kingdom in full and with all the inherent rights. Which territory was affected by the *unrestrictive* title of the first paragraph? It is to be noted that the expressed will to point out in detail the areas under military occupation (the town, the castle, the fort, the fortifications), which remained enclosed within the walls of the town of Gibraltar, including the Rock that the Spanish authorities, both civilian and military, dislodged. The Spanish military garrison that surrendered by order of the municipal authorities remained literally stationed behind the walls of the castle, which closed the town of Gibraltar.<sup>3</sup> The British conquered and occupied everything enclosed by the walls. Indeed, the Rock occupied by the United Kingdom concentrated there the defence of the town.<sup>4</sup> Spain gave away whatever she occupied militarily, including the Rock, which was the most important element to garrison its artilleries defence. In 1713, Spain did not yield anything, which had not been snatched, from her.

Spain managed to limit the yield to the territory effectively occupied by the British armed forces in order to prevent any extension of the previous jurisdiction of Gibraltar over the small neighbouring territories and the claim by United Kingdom of the powers, the properties and the privileges recognized to the town when it was under Spanish sovereignty<sup>5</sup>. The concern of Spain to carefully confine the yield only to the territories militarily conquered and enclosed within the fortified area was acknowledged by the British negotiators in Utrecht, who fought with determination for “the matter of the extension of the territory around Gibraltar,” admitting the frontal refusal of Spain to yield anything other than the town and the fortress of Gibraltar, including the ground around the Rock<sup>6</sup>. The Spanish negotiators were

<sup>3</sup> Spain recognized that the British Government filed a complaint in 1712, because the Spaniards maintained posts of guard and sentinel at the foot of the wall of Gibraltar. Spain considered that there “physically” ended what Spain had yielded. (*Documentos sobre Gibraltar presentados a las Cortes Generales*, 1965, 2nd ed., Ministry of Foreign Affairs, Madrid, pp. 27 and 26.

<sup>4</sup> On the contrary, Alejandro del VALLE GÁLVEZ (2013, pp.124-125) considers that, from the reading of article X, one may deduce that Spain did not yield the Rock itself, but only those elements quoted in the said article westward of the mountain. In “¿De verdad cedimos el Peñón). Opciones estratégicas de España sobre Gibraltar a los 3000 años del Tratado de Utrecht,” *Revista Española de Derecho Internacional*, 2013, vol. LXV (2), pp.117-156. In my opinion, this is unconvincing and unnatural, given the abandonment of the perimeter of the Rock by the authorities and by the population.

<sup>5</sup> On the same line, Fernando OLIVIÉ, (1966, p.74) has wondered, “*why without territorial jurisdiction? Because, before the conquest by the British, Gibraltar was the administrative capital of the territories bordering the Bay of Algeciras and, after its transfer to Great Britain, lost its status as capital. Gibraltar not only suffered this loss, but also was kept isolated from the neighbouring territories. The prohibition of any communication by land between Gibraltar and the rest of Spain was clear and conclusive.*” See “Gibraltar y la política exterior española, 1704-1969.” In VVAA.-“*Estudios sobre Gibraltar.*” Instituto de Cuestiones Internacionales y Política Exterior. Madrid, 1996.

<sup>6</sup> “*Documentos sobre Gibraltar...*” Op.cit. in note 3, p. 165. Note of the British Plenipotentiary in Utrecht, Mr. BRISTOL to the Secretary of State for H.M. the British Queen por Foreign Affairs, Lord SAINT JOHN, of 26 April 1712 (doc. No. 4). The United Kingdom was aware of the refusal by Spain to yield an inch northwards of the occupied zone. The maritime projection was not Spain’s concern.

not worried by the loss of the Rock and its adjacent waters, but by the broad territorial jurisdiction exercised by Gibraltar over the region in order to exclude the possibility of the projection of such jurisdiction over the adjacent territories.

### **III. THE REVOCATION OF THE TERRITORIAL JURISDICTION OF GIBRALTAR. THE MENTION OF “WITHOUT ANY TERRITORIAL JURISDICTION”**

Some restrictions related to the extension of territorial jurisdiction are included in the second paragraph of article X. That is to say, it is centered in revoking any right of the territorial jurisdiction, which corresponded to Gibraltar before 1704 and in isolating the part occupied and yielded from the rest of the former territory of Gibraltar. For this reason, all the territories that depended administratively and jurisdictionally from Gibraltar were excluded from the yield. There was a yield of the town, but not of its domains and of the projection of the territorial jurisdiction. It is very important to take into account that, in 1704, Gibraltar was the capital of the neighbouring territories and, accordingly, its *jurisdiction and its possessions extended beyond the town* to the “Campo Llano de Gibraltar,” which included vast territories in the Bay of Algeciras and northwards, with all its mountains, pastures... etc.<sup>7</sup> In fact, the sovereignty (“property”) was yielded without granting Gibraltar the possibility of exercising the territorial jurisdiction, which was formerly exercised by the Spanish authorities of Gibraltar, and what implied the exercise of powers in land and northwards of the yielded territory, towards the isthmus and many kilometres beyond. Spain cut out any possibility for the *occupied* Gibraltar to exercise dominion, by prohibiting its communication by land northward -the isthmus-. For this reason, the vigilance of smuggling could not connote the expansion of British power, excluding the jurisdiction of Great Britain over actions of contraband undertaken outside the strict territory yielded by Spain.

Unlike the case of the absolute lack of communication by land, the communication by sea with the coast of Spain, that is to say, the communication between the Spanish and British coasts were always normally open, except in special circumstances, such as natural emergencies and wars, and Gibraltar could be supplied with provisions from territories neighbouring Spain by sea.

It is in the context of the revocation of the jurisdiction of Gibraltar over the neighbouring municipalities and of its isolation by land that the expression “without any territorial jurisdiction” should be understood, a sovereignty or jurisdiction confined to the small territory occupied and yielded in paragraph 1 of article X. As VERDÚ BAEZA has pointed out, “the intentions to expand such expression to the maritime spaces adjacent to the Rock are

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<sup>7</sup> Martín Gutiérrez, D., “*Sociedad política campogibraltareña. Dese los orígenes hasta la incorporación a Castilla.*” Algeciras, 1997, pp. 149-150. On the basis of historical documents –note 231 and following notes.- the author has recognized that, in view of the fact that the mountain pass of Gibraltar was very small and narrow, the King Enrique IV of Castile first, and the Catholic Kings afterwards, granted Gibraltar the status of “<sup>2</sup>” a royal municipality and gave it the domain over the areas which constitutes to-day Algeciras, San Roque, La Línea and Los Barrios. The first donation was made by King Enrique IV after his second reconquest in 1460. See also the excellent works of López de Ayala, “*Historia de Gibraltar.*” Madrid, 1782, p. 212.

alien to the negotiators in Utrecht.”<sup>8</sup> Therefore, such an expression does neither refer to the inherent extension of the adjacent waters, nor prohibits it.

#### IV. DELIMITATION OF MARITIME SPACES AT THE TIME OF THE UTRECHT TREATY

The only indirect reference to dominion over or control of waters relates only to the “port,” mentioned on two occasions in paragraphs 1 and 2 of article X of the Utrecht Treaty<sup>9</sup>. It is true that there is no expressed mention to maritime waters or spaces and those only places on land are mentioned (castle, harbour, defence, fortress). The traditional interpretation by Spain of this situation has been that she only yielded the waters enclosed in the port of Gibraltar, and the Treaty only mentions “the coast of Spain.”

There are several explanations about that. At that time (1713), the interest of Spain and of the other maritime powers regarding “adjacent waters” was centred on the rules about the right of seizure, neutrality, customs, contraband and fishing rights reserved to nationals in a variable breadth of the sea between 3 and 6 miles. There were isolated provisions on each of these matters, but there was no awareness about the existence of an autonomous strip of sea. The coastal States had a pluralist view about the extension of these areas of control, which varied in accordance with the activity to be controlled.<sup>10</sup> States only had interest in the activities (instrumental concept of the Law of the Sea) and not in spaces (finalist view, more contemporary).

The first rule to regulate maritime spaces under Spain’s sovereignty was the “Real Cédula” (Royal Decree) of 17 December 1760, adopted many years after the signature of the Utrecht Treaty. The scarce relevance given to maritime spaces at the time was shown in the fact that article XI of the Treaty, by which the Island of Minorca was yielded to the United Kingdom includes no reference to maritime spaces<sup>11</sup>. The two articles have in common the absence of any reference to adjacent waters and the enumeration of certain places. The difference lies in that, in article XI, the *whole* island of Minorca is yielded, whereas article X does not yield the whole municipal district of Gibraltar but only the part *occupied* of Gibraltar. It is remarkable that article XI makes no reference to the waters in spite of the fact that what was transferred was an island. It was not common to include such an expressed reference because the territorial yielding did not inherently imply dominion over the coasts adjacent to the territory yielded.

<sup>8</sup> Verdú Baeza, J., “*Gibraltar: Controversia y medio ambiente.*” Dykinson. Madrid, 2008, p. 197. See also its detailed article “La controversia sobre las aguas de Gibraltar: el mito de la costa seca.” *Revista Española de Derecho Internacional*, 2014, vol. LXVI (1), pp. 81-123.

<sup>9</sup> The third and fourth mention of “port” are made in anachronistic provisions which are not compatible with later international rules in force, such those referred to human rights or freedom of trade.

<sup>10</sup> Martínez Caro, S., “Mar territorial español: naturaleza, anchura y delimitación.” In Poch. A. (Ed.), “*La actual revisión del Derecho del Mar: Una perspectiva española.*” Instituto de Estudios Políticos, Madrid, 1974, pp. 252 and 267-268. According to Cristina Izquierdo, at that time, “*the maritime spaces lacked a precise legal configuration.*” See “*Gibraltar en la Unión Europea.*” Tecnos. Madrid, 1995, p.42.

<sup>11</sup> According to article XI, Spain “*yields to the crown of Great Britain the whole island of Minorca and doth transfer thereunto for ever all right and the most absolute dominion over the said island and, in particular, over the town, castle, harbour and fortifications of the bay of Minorca, commonly called Port Mahon, together with the other ports, places and towns situated in the aforesaid island.*”

In the various treaties signed by Spain with the United Kingdom in the framework of the so-called “Utrecht Congress” throughout the XVIII century, the maritime projection never was a controversial issue. There were neither restrictions nor limitations in the treaties of friendship and commerce or in those dealing with the commerce with the Spanish territories in America, in which the navigation and the trade by sea to and from Spanish and British ports were regulated<sup>12</sup>. In the Treaty of 1668, by which Portugal yielded definitively Ceuta to the Spanish Crown mention is only made of “a cidade de Ceuta,” but not of its adjacent waters. Does it mean that Portugal gave away the city of Ceuta to Spain without any projection to the adjacent coast?<sup>13</sup>. Does Spain have no right to a coast in the cities of Ceuta, Melilla and other African territories? Article X did not prohibit the communications by sea of Gibraltar, which was free to trade even with “*the Moors and their ships.*” It prohibited the communications by land northwards of Gibraltar and, in this projection northward, it prohibits the exercise of territorial jurisdiction.

## V. GENERAL RULE OF CUSTOMARY INTERNATIONAL LAW ON THE EXPANSION OF MARITIME SOVEREIGNTY: THE LAND COMMANDS THE SEA

Bartolo de SASSOFERRATO was probably the first person to point out the absolute sovereignty of the coastal State over its adjacent waters. In medieval times, he based the jurisdiction of the land territory over the adjacent sea on the power of the State over the nearest waters -theory of the effectively-. The general rule of the projection of the land over the sea can also be found in the doctrine of Hugo GROCIO, who maintained that “*it was possible to acquire dominion over a part of the sea because of the territory since, from the land, those who are close to the sea can be forced, as if they were in the land itself.*”<sup>14</sup> This thesis about the projection of the land sovereignty over the adjacent maritime spaces was also defended by the classic doctrine of the XVIII century (C. V. Binkershoek, E. Vattel...). The rule that the land commands the sea and, accordingly, the natural projection of the territorial sovereignty over the adjacent waters as an inherent right that need no proclamation can be considered as generally accepted.

It seems, therefore, acceptable to acknowledge that the right over the adjacent waters was converted into a rule of International Law long before the XVIII century with independence of their exact width. Thus, according to José Manuel LACLETA “*the sentence ‘the land*

<sup>12</sup> In the Treaty of Friendship and Commerce also concluded in Utrecht on 9 December 9 1713, refers to the entry in ports under the sovereignty of each State Party and make no reference either to maritimes spaces as such - except ports and anchorage places- or to prohibitions, restrictions or exceptions concerning the waters. These treaties can be found in the splendid compilations of Alejandro del CANTILLO., “*Tratados de Paz y Comercio que han hecho con las potencias extranjeras los Monarcas españoles de la Casa de Borbón desde el año 1700 hasta el día.*” Imprenta de Alegría y Charlain. Madrid, 1847 (also in Google Books).

<sup>13</sup> “*Declaro porem que nesta restituçao Das Praças no entra a cidade de Ceuta, que a de ficar em poder de el Rey Católico, pellas razones que para isso se consideraroo.*” “*Colleçao dos dos Tratados, Convençoes, contratos e actos públicos celebrados entre a coroa de Portugal e as mais potencias desde 1640 até ao presente, compilados, coordenados e anotados por José Ferreira Borges de Castro.*” Impres Nacional, Lisbon, 1856, volume I, p. 368. Attention should be paid to the fasct that the Treaty makes reference to and mentions *expressis verbis* the “city,” but nor its adjacent waters. Being a coastal city, it is inherently entitled to its adjacent waters, with no need to explicit expressly the dominion over such waters.

<sup>14</sup> Torrubiano, J., “*Del Derecho de la guerra y de la paz de Hugo Grocio.*” Madrid, 1925, p. 324.

*commands the sea' expresses an old and fundamental principle of the Law of the Sea which offers two sides. It expresses the undisputed idea that, to-day and at least since the XVIII century, the authority, the powers and the jurisdiction which correspond to the State over the sea in front of its coasts does not derive from its power military, economic or –in one word– political, but from the geographical reality of the coast and in front of it.*"<sup>15</sup>

But even if there is any doubt concerning the right in force in 1713 about the inherent right to jurisdiction over the adjacent waters, what matters is that, when a territory is yielded without an expressed and unequivocal restriction, *if the concept of territory evolves and comprehends the yielding over the adjacent waters, such a legal evolution would affect the yielded territory.* The confirmation of the rule by the international jurisprudence was rotund in the XX century. There is no doubt that the right of the coastal State over its territorial sea is full; it is a general presumption unless there were firm evidences of the acceptance of a restriction<sup>16</sup>. According to the International Court of Justice there is a close dependence between the land and the territorial sea, so that the land confers a dependence upon the surrounding sea and grants the coastal State a right over these waters<sup>17</sup>. In the case of the Beagle Canal, between Argentina and Chile, the Arbitral Tribunal confirmed that the maritime jurisdiction could not be exerted in isolation from the territorial jurisdiction<sup>18</sup>.

This customary rule has been codified by the United Nations; first, in article 2 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and, later on, in article 2 of the 1982 UN Convention on the Law of the Sea (UNCLOS), which states that the sovereignty of a coastal State extends, beyond its land territory and internal waters, to the territorial sea. There is, therefore, no doubt that those who *legitimately* possess the territorial sovereignty over the coast have the right to extend such sovereignty over the adjacent sea; *a contrario*, when they do not possess any territorial title, they cannot extend their sovereignty over the waters. It is obvious that, since the isthmus between the town of Gibraltar and La Línea de la Concepción was never yielded in the Utrecht Treaty, the United Kingdom has no valid title over it under International Law, either general or conventional, and, accordingly, no delimitation of maritime spaces can be done.

The territorial title of the United Kingdom, based upon article X of the Utrecht Treaty, confers him the inherent right to project it upon its adjacent waters. Such a right has been, in any case, consolidated with the evolution of International Law during the XIX and XX centuries. Of course, account should be taken, in a coherent way, of the evolution of International Law in the second half of the XX century in the matter of decolonization, in order to determine *the maintenance of the title over the territory and of the right to delimit the*

<sup>15</sup> Lacleta Muñoz, J.M., "Las fronteras de España en el mar." *Real Instituto Elcano* DT No 34/2004. Madrid, 2004, p.1.

<sup>16</sup> The arbitral award of 1909 about the *Grisbardana* case between Norway and Sweden stated that "*conformement aux principes fondamentaux du droit de gens, tant ancien que moderne, d'après lesquels le territoire maritime est une dépendance nécessaire d'un territoire terrestre*" ("*Recueil de Sentences Arbitrales*," volume IX, p.159).

<sup>17</sup> "[S]ome reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts. It follows that, while such State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast" ("*Fisheries case, United Kingdom v. Norway*, Judgment of 18 December 1951. *I.C.J. Reports 1951*, p.133).

<sup>18</sup> Arbitral award of June 30th, 1977, *International Legal Materials* 1978, p.1201.

*territorial sea*, due to the legal effects caused by the right over a territory pending to be decolonized recognized by the United Nations (see par. 8).

The general rule “the land commands the sea” can only be affected by the *exception of the dry shore if it is proved that a limitation was agreed* or by the Law of Decolonization of the UN.

## VI. THE THEORY OF THE DRY SHORE AS AN EXCEPTION TO THE PRINCIPLE “THE LAND COMMAND THE SEA”

The Anglo-Spanish dispute over the extension of the territorial sovereignty to the adjacent maritime spaces arose a few years after the signature of the Utrecht Treaty. One of the first incidents between the two countries was related to the space of military defence of the town, that is to say, to the claim of the rule of the range of British guns to allow the defence of Gibraltar. Very early, in 1731, Spain rejected, in rightness, the British thesis that any fortress could apply the gun rule in order to seize the surrounding territories, especially northward: in the isthmus. Spain acknowledged that, although it was usual, it was “*neither common law nor practice without variation.*”<sup>19</sup> But – as Ambassador LACLETA -Head of the Spanish Delegation to the Third Conference on the Law of The Sea- has pointed-out, the crux of the dispute is not so much the projection of sovereignty over the sea, as the fact that Spain never accepted that the projection of sovereignty be conditioned to the circumstance that the coast was artilliered and garrisoned, and, consequently, the acceptance of the rule of the gun range<sup>20</sup>. On the other hand, H. S. Levie has stated that no treaty about territorial yielding signed during the XIX and XX centuries excluded the extension of sovereignty over the adjacent waters<sup>21</sup>.

Since then, the thesis of the “*dry shore*” has been formally and intermittently maintained by Spain aside from the settling of maritime spaces and of its international codification. Spain’s position is based upon an *exception* to the common secular rule contained in the general principle “*the land commands the sea.*” Being a serious restriction of the coastal State’s sovereignty over its waters, this exception to the general rule requires an *explicit* character and its acceptance by the parties concerned. The evidence of the concerted will of the parties in respect of this restriction is essential<sup>22</sup>. The restriction of the sovereignty cannot be made in a unilateral way.

Some authors, like C. Izquierdo, maintain –with well argued criteria based on intertemporal law- that, given the few maritime delimitations made at the time, the scarce

<sup>19</sup> Doc. No. 5. Note of the Spanish Secretary of State, Marqués de la PAZ, to the Minister of His British Majesty in Madrid, Mr. Keene. In *Documentos sobre Gibraltar...* Op.cit. in note 3, pp. 165 and 167. This document shows concern not for the projection of the land over the sea, but for the extension of the isthmus (“*la plaza de Gibraltar se cedió sin jurisdicción alguna territorial...ni pertenece a la clase de las que se consideran que tiene derecho a pedir la jurisdicción de los terrenos que domina su cañón*”), in connection with the legal settlements of British troops in the so-called “neutral Camp,” established on Spanish territory.

<sup>20</sup> Lacleta, Op. cit. in note 15, p.1.

<sup>21</sup> Levie, H.S., *The Status of Gibraltar*, Westview Press. Boulde, 1983, p. 85-.

<sup>22</sup> According to A. Remiro Brotons, “it is , therefore possible to limit a territorial yielding to the sole land space, conceived as dry shore, but it is an exception which requires evidence that such is the will of the parties.” See “Regreso a Gibraltar. Acuerdos y desacuerdos hispano-británicos.” In “*Gibraltar 300 años.*” Publications of Cádiz University, Cádiz, 2004, p. 74.



support received then by the general rule and the assertion that “time governs the facts,” it is possible that, “*in the time when the Treaty was agreed upon, the rule –historically linked with the issue of the breadth of the territorial sea- was not as well established as in our time, and, therefore, the exegesis of the clauses of territorial yields should be considered in a broader way.*” She concludes “*the attribution of rights over the waters adjacent to the Rock as an aftermath of its yield at the beginning of the XVIII century can be called into question.*” The *Ius Gentium* did not prevent Spain from yielding land without rights over the surrounding waters and, at that time, the presumption to be overcome was less solid than it is today, when there are more structured concepts<sup>23</sup>. But, these are not decisive arguments proving the will of the parties to establish and accept restrictions to an inherent exercise of the sovereignty. The exception of the dry shore as the expression of a common will has to be proved in an incontrovertible way.

There is no convincing evidence of the expressed limitation by Spain of a territorial yield with a “dry shore” clause or of its expressed acceptance by the United Kingdom. The *official* position of Spain contrary to the general customary rule existing in 1713 and codified in UNCLOS that “the land commands the sea” and to the right of any legitimate sovereign to project its territorial sovereignty towards the spaces adjacent to the internal waters and the territorial sea was not legally justified. Neither the Utrecht Treaty nor any other document later agreed proved that there was a common will to restrict the territorial yielding to the land surface.

## VII. THE SPANISH PRACTICE: “*DE FACTO*” RECOGNITION OF ENGLISH WATERS

Some relevant documents –as the splendid “*Derrotero de la costa*” of Admiral Vicente TOFIÑO<sup>24</sup>- and, especially, relevant Spanish legal norms raise doubts about the Spain’s firmness about the dry shore doctrine, given the persistent incoherence shown in accepting *de facto* the “English waters.” A clear example is the Royal Decree of 1876 for the repression of contraband, which was almost a century in force. It considered “English waters” the waters “comprised westwards between the Rock’s foothill and a straight line that, beginning in Punta Mala towards Bullones Mountain, passes two miles away from Punta Europa, and southward and eastward an extension of three miles measured from the beach in all directions.”<sup>25</sup> Although some authors –as Azcárraga and Uxó- tried to give hardly any importance to a norm which was in force during almost one century, with the unsounded argument that it was not a

<sup>23</sup> Izquierdo. Op.cit. in note 23, p. 46.

<sup>24</sup> Tofiño’s “*Derrotero de las costas de España*” mentioned ‘*the English’s anchorage place*’ (‘*el fondeadero de los ingleses*’), *in accordance with the gun range ‘in full armor’* (“*de punta en blanco*”). The Marquis of MIRAFLORES’ reaction was to deny official value to the “Derrotero” and point out that TOFIÑO did make no reference to frontiers but to an anchorage place. He reported facts, not rights. “*He told what he saw,*” that is, that when the United Kingdom occupied “*de facto*” the anchorage place of Punta Mala and half of the Bay of Algeciras (doc.cit. in note 3, p.179). Letter of the Secretary of State, Marquis of MIRAFLORES to the Minister of His British Majesty in Madrid, Lord HOWDEN, of June 9 1851 (doc. No. 10). In this correspondence, one can observe that the controversy did not refer to the right to waters but to the criteria about its delimitation or extension.

<sup>25</sup> It was not in force until the approval of the Decree 2671, of 19 October 1967. *Boletín Oficial del Estado* of 13 November 1967.

norm for delimiting frontiers, but only for the purpose of prosecuting contraband. They considered irrelevant that the Spanish State had renounced the *ius puniendi* in its own territory. The Decree, however, referred to the exercise of sovereign powers (criminal prosecution) and accepted the exercise by the United Kingdom of such jurisdiction - sovereignty, in short- in the “English waters” (*sic*)<sup>26</sup>.

The assumed firmness of the dry shore theory was not maintained in various official actions of Spain, such as the Spanish Government’s proposal in 1881 of a *modus vivendi* based on the principle that there was no land without jurisdictional waters. During Mateo Sagasta’s liberal Government, the Secretary of State, the Marquis of VEGA ARMIJO, proposed to *divide* the Bay of Algeciras “*as it was convenient, in such a way that it would not result in lands without jurisdictional waters,*” and the Spanish proposal was accepted by English Plenipotentiary Minister in Madrid<sup>27</sup>. Spain considered, therefore, that there was no dry shore. This agreement that may have allowed putting an end to the dispute was not finally signed.

When Spain established the limit of the waters in the Algeciras-La Línea harbour<sup>28</sup>, it “did not do it, in a conscious and deliberate way, as the full sovereign of the Bay, but she took into account the waters claimed by the United Kingdom on behalf of Gibraltar. Thus, Spain did not recognize such sovereignty, but she fixed the limits of the port waters respecting the so-called ‘English waters.’ ”<sup>29</sup> No, but yes. Spain applied, *de facto* and *de iure*, the secular legal doctrine of the right of States to its adjacent waters in Gibraltar, whereas at the same time maintained nominally the theory of the dry shore. The whole of the Spanish coastline is delimited by means of a questionable application of straight baselines except, precisely, in the Algeciras Bay; the only bay not closed -Royal Decree 2510/1977, of 5 August -<sup>30</sup>.

Some relevant members of the contemporary scientific doctrine in Spain have considered that the theory of the dry shore is not applicable to Gibraltar since such a restriction has not been proved or that, in accordance with the International Law in force, the United Kingdom, as the administrating power of the territory, has the right to delimit her territorial waters in the land yielded by article X of the Utrecht Treaty although only in the territory of the Rock and not in the isthmus, which was not included in the yield, in view of the evolution and the general acceptance of the principle that “the land commands the sea.”<sup>31</sup> Another author has observed, “how the doctrine of the dry shore historically defended by the Spanish

<sup>26</sup> For Verdú it is “*a precedent of the admission of the British jurisdiction over Dutch waters, even acknowledging its limited scope in connection exclusively with the repression of contraband.*” In *op.cit.* in note 8, p. 200.

<sup>27</sup> Fernández Rodríguez, M., “Gibraltar y sus aguas jurisdiccionales.” *Boletín de la Real Academia de la Historia*, 1999, vol. 196 (2), p. 328. In González García’s opinion, “*the proposal of recognizing as common waters the waters which were under gun range in the ‘Campo Neutral,’ territory of the isthmus, allowed to interpret contrario sensu, that the waters which were not under the range of the Spanish artillery would be considered as British waters, thus being the case of the waters situated southward and eastward of the Rock, a position more in concordance with the exercise of sovereignty which the United Kingdom exercises in the practice over the waters adjacent to the Rock.*” In “*La Bahía de Algeciras y las aguas españolas.*” Service of Publications of Cádiz University. Cádiz, 2004, p. 226.

<sup>28</sup> Decree 2671, of 19 October 1967. *Boletín Oficial del Estado*, of 13 November 1967.

<sup>29</sup> Suárez de Vivero, J.L., “Jurisdicciones marítimas en el Estrecho.” *Real Instituto Elcano*, 2002.ARI vol. 31. In an article published by the Spanish Ministry of Defense, the author assigned 12 kilometers of coast and 79 kilometers of maritime surface to Gibraltar. He made the serious mistake of assigning these spaces to Gibraltar and not to the United Kingdom, as if Gibraltar was a State, which is placed among the *States* of the Mediterranean. Madrid, 2011, p. 43.

<sup>30</sup> *Boletín Oficial del Estado*, of 30 September 1977.

<sup>31</sup> Mention has been made to Remiro Brotons’ opinion in the sense that the exception of the dry-shore responds to a concerted will has to be proved. *Op.cit.* in note 22.

Governments faces up to the practice traditionally followed, what is evident to-day”; it is a theoretical position, which is in contradiction with a practice, which lacks regulation and control<sup>32</sup>.

In VERDÚ’s opinion, the exception of the dry shore must be interpreted in a restrictive way, the presumption being rather against it. He has recognized that Spain’s point of view was not clearly shown either in the Treaty or in the previous negotiations and, in any case, it could not be easily identified. In addition, it is not easy to prove the existence of “a Spanish practice uniform and coherent with her claim to all the maritime spaces of the Algeciras Bay<sup>33</sup>. IZQUIERDO has also recognized that “*Spain has not systematically opposed the exercise of British sovereignty over such waters. May the subsequent behaviour of the former sovereign State and its lack of protest be alleged as a prove of the recognition of the British acquisition of sovereignty over the waters adjacent to the Rock?*” The fact of not opposing systematically the exercise by Great Britain of sovereignty over the Rock “favours indeed the British interpretation.”<sup>34</sup> Finally, Spain’s position has been qualified by VERDÚ as closed in itself and merely nominalist, “*without a solid legal ground in accordance with the International Law of the Sea, not confirmed by the practice and moving away from the real and serious problems existing in the area.*”<sup>35</sup>

### **VIII. THE DELIMITATION OF THE ADJACENT TERRITORIAL SEA AND RESOLUTION III ANNEXED TO THE FINAL ACT OF THE THIRD UN CONFERENCE ON THE LAW OF THE SEA**

In accordance with article 2 of UNCLOS, -which codifies the general customary principle that “the land commands the sea”- and with article 3, any State having valid territorial competence over a territory with coastline has the right to extend its territorial sovereignty by means of the relevant delimitation of the adjacent waters, up to a limit not exceeding 12 nautical miles<sup>36</sup>.

The international legislation in force provides for a maximum extension of the breadth of the territorial sea, whatever the extension reached in the past might have been. In the case of States with opposite or adjacent coasts, article 15 of UNCLOS provides for their delimitation by means of a median line, failing agreement between them on the contrary. It also contemplates the possibility of not resorting to the median line when it was necessary by reason of historical title or other special circumstances. Precisely Spain has resorted to the exception of “historical rights” to review her formal position about the non-inclusion of

<sup>32</sup> González García. Op. cit. in note 27, pp. 221-226.

<sup>33</sup> Verdú. Op.cit. in p.199 and p. 113, respectively. See also “Las aguas de Gibraltar, el Tratado de Utrecht y el Derecho Internacional.” *Cuadernos de Gibraltar/Gibraltar Reports*, 2015, vol. 1, p. 113.

<sup>34</sup> Izquierdo. Op. cit in note 23, p. 46.

<sup>35</sup> Verdú. Op. cit in note 8, p. 203.

<sup>36</sup> The declarations made by Spain when signing and when ratifying UNCLOS -as well as those formulated to the 1958 Geneva Conventions - in order to exclude or modify the application of articles 2 and 3 of UNCLOS to Gibraltar were rejected by the United Kingdom and, therefore, are not opposable to it. Accordingly, they do not alter the legal effects of the said articles *vis-à-vis* the recognition of the adjacent territorial sea in combination with resolution III annexed to the Final Act

maritime spaces in article X of the Utrecht Treaty or the *dry shore*<sup>37</sup>. The Verbal Note 151/11 of 2007 implied a readjustment of the dry shore doctrine by taking into account the two exceptions allowed by article 3 of UNCLOS, in order to prevent the extension of sovereignty to a 12-mile territorial sea. It seems clear that these two exceptions –historical rights and special circumstances- appeared in connection with the particular delimitation of a maritime space, in order not to apply the median line, though *not to deny the right to the mere space of the adjacent waters*. When Spain resorted to article 15 of UNCLOS invoking historical rights, she did not deny the United Kingdom’s right to have territorial sea, but claimed a different delimitation, more favourable to her than the median or equidistant line. On the one hand, the existence of historical rights had to be proved and, on the other hand, if it was proved, it would justify not to use the median line but another more favourable to the State which invoked them, but it cannot imply that the neighbouring States were totally deprived of their right to territorial sea. The Note 151/11 is clearly incongruent.

LACLETA has pointed out that, when no agreement is reached between the States concerned, “article 15 of UNCLOS allows any of these States to unilaterally establish the equidistant line for the delimitation, unless the other State, invoking such circumstances, contests it, in which case, the corresponding negotiations should start.”<sup>38</sup> In a general way, the whole international community takes an interest in the delimitation of maritime spaces and, when the coasts are opposite or adjacent, the delimitation is of the interest to the neighbouring States<sup>39</sup>.

In the western side of Gibraltar, the appropriate delimitation in accordance with article 15 of UNCLOS, failing agreement between the two States concerned to the contrary, should be the median/equidistant line between Punta Carnero and Punta Europa in the Bay of Gibraltar until the old pier yielded by article X of the Utrecht Treaty and, in the southern side, the median line between Punta Europa and the Spanish coast in North Africa (Ceuta). The Spanish practice vis-à-vis third States has accepted the median line every point of which is equidistant from the nearest points on the baselines. In the eastern side, since there is no opposite coast, the United Kingdom might project a 12-mile breadth from Punta Europa to the end of the territory yielded by article X, excluding the eastern waters of the isthmus.

These assertions, however, need to be précised and nuanced in view of the specific nature of the legal regime applicable to Gibraltar, due to its status as a territory pending decolonization which has been the subject of various resolutions of the General Assembly and of resolution III annexed to the Final Act of the Third UN Conference on the Law of the Sea<sup>40</sup>. In fact, it is not possible to recognize competence to the United Kingdom to delimit the

<sup>37</sup> The Verbal Note 151/11, of 12 July 2007, states that “*in no case, can Spain –in accordance with article 3 of UNCLOS- accept a limitation of her right to fully enjoy a 12-mile territorial sea. In the case of States with adjacent or opposite coasts –as in the strait of Gibraltar- the Convention provides for an exception to the general regime of the equidistant or median line when, due to the existence of historical rights, it is necessary to delimit the territorial sea in a different way (article 15)... Therefore, the Rock does not generate maritime spaces and those adjacent to the coast of Gibraltar are under the sovereignty or the jurisdiction of Spain.*”

<sup>38</sup> Lacleta. Op.cit. in note 20, p. 6.

<sup>39</sup> For the International Court of Justice, “*the delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law*” (Fisheries case, United Kingdom v. Norway, Judgment of December 18th, 1951, p. 132.

<sup>40</sup> *Inter alia*, res.2070 (XX), of 16 December 1965, res. 2353 (XXII), of 19 December 1967 and res.1514 (XV), of 14 December 1960. These resolutions demanded the United Kingdom to decolonize Gibraltar, maintaining Spain’s territorial integrity, broken by the 1704 military invasion and by the Treaty of Utrecht

waters adjacent to Gibraltar without conditions. In order to project its rights, account should be taken of Gibraltar's status as a non self-governing territory pending decolonization and, accordingly, of resolution III adopted by the Third UN Conference on the Law of the Sea as an annex to UNCLOS. The said resolution included in the Final Act of the Conference states the following:

“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 interest of the people of the territory concerned shall be a fundamental consideration. Any exercise of those rights shall take into account 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.”<sup>41</sup>

The resolution established the scope and the conditions of the maritime delimitations of the non self-governing territories pending decolonization, over which States may have territorial disputes. It required that the delimitations made by the administering power be done in favour of the interests of the people of the colony and not of its own interest. If there was a territorial dispute over which the United Nations have recommended means of settlement -as in the case of Gibraltar-, the rights or interests of such an authority will remain suspended until the settlement of the dispute by the decolonization of the territory, in accordance with paragraph 6 of res. 1514 (XV). According to resolution III, the right to possess and delimit the adjacent waters (internal waters and territorial sea) cannot be definitively exercised until the said dispute is settled. Nevertheless, without the need to wait until such settlement, the Parties should hold consultations and reach provisional arrangements. Such provisional arrangement should be logically made in favour of the population of the colony and not in favour of the administering State.

These resolutions are not legally binding for the Parties but mere recommendations that they are bound to examine and apply in good faith. They are usually resolutions adopted by the UN General Assembly to be included in the Final Act of a treaty and form part of its context for the purpose of its interpretation -article 31-2 of the 1969 Vienna Convention on the Law of Treaties-, but not of its text -article 318 of UNCLOS-. Therefore, they have only an interpretative value at the time of applying the treaty and should guide the task of judges in the case of submission of the dispute to an international court, like the ICJ. It is true that the resolution was adopted at the same time as the Convention and, therefore, its scope is somewhat different and slightly superior to other resolutions, but in no way can be maintained that it is a compulsory rule binding by itself.

The resolution was a good present for Spain, since it found its place in the controversial frame of Gibraltar, and the settlement of the dispute does not lay in its people's exercise of the right of self-determination, because the General Assembly established the means for the settlement, reaffirming the force of the pro-decolonization's resolutions in an implicit way.

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<sup>41</sup> Paragraph a) of the resolution refers to the territories still under colonial occupation and confines the effects of any delimitation to the exclusive benefit of the population of the colony and not of the population of the metropolis.

Even more, it can be deduced that the right assigned in UNCLOS over maritime spaces remains conditioned to an agreement which –if not reached- provokes the suspension of the rights over the adjacent waters<sup>42</sup>. The definitive exercise of the right over the maritime spaces remains conditioned to the definitive settlement of the colonial territorial dispute. It is a text coherent with the UN pro-decolonization resolutions and, *a priori*, coincides with the Spanish interests, although the blindness of the Spanish Government made it to reject the resolution in its Declaration, which was formulated in the following way:

“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, which is undergoing a decolonization process in which only the relevant resolutions adopted by the United Nations General Assembly apply.”<sup>43</sup>

This Declaration is confuse and does not seem to benefit Spanish interests<sup>44</sup>. Spain made it because it considered that the right of decolonization had priority over any other issue and took into account that the General Assembly had approved specific resolutions to put and end to the colonial situation in Gibraltar. In the opinion of the Spanish negotiators, no attention should be paid to issues derived from, or linked with, the principal issue. It is to be noted that some authors, like R. RIQUELME<sup>45</sup>, have considered that the declaration was correct, since it centred itself in the main issue of the Spanish-British dispute. When Spain ratified UNCLOS, she reiterated her declaration of inapplicability of resolution III to Gibraltar, in view of the process of decolonization in which the United Nations had obliged the United Kingdom to place Gibraltar. In any case, Spain’s Declaration is mainly political and does not alter the object, the purpose or the effects of paragraph b) which, on the other hand, was coherent with the Law of Decolonization, as well as pragmatic<sup>46</sup>.

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<sup>42</sup> Orihuela Calatayud, E., “*España y la delimitación de sus espacios marinos.*” Murcia, 1989, p. 29.

<sup>43</sup> The Declaration made by Spain in ratifying UNCLOS is practically identical. See the text of the Declarations in [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm).

<sup>44</sup> It seems inexplicable that Spain declared the inapplicability of Resolution III to Gibraltar. In the view Izquierdo, Spain should have declared that it did not accept any interpretation other than the one given in the resolution. Paz Andrés has also considered that “*in case of disputes over non self-governing territories, the exercise of the rights recognized by the Convention in conditions to the respect of the resolution adopted to the effect by the United Nations*” (In “Algo más que un incidente frente al Peñón.” “*El Mundo*,” 10 November 2009). Other authors, such as del Valle, González García or Verdú have also maintained that the Spanish Government has not given a differentiated legal treatment to the adjacent waters without further argument than not to recognize more waters than those expressly yielded in 1713.

<sup>45</sup> Riquelme Cortado, R., “*España ante la Convención sobre el Derecho del Mar.*” Murcia, 1990, p. 73.

<sup>46</sup> Comité, V di, “La incidencia de la ratificación española del Convenio de Montego-Bay sobre el régimen jurídico del Estrecho de Gibraltar.” *Revista Española de Derecho Internacional*, 1997, vol. L (1), p. 328.

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