

The Treaty - Prize v Price

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By Sir Peter Caruana

I start with a summary of my view on the Treaty: *I support the Treaty, but the UK must give us certain necessary reassurances and the Gibraltar Parliament should not definitively trigger ratification until we have them.*

I have no reason to doubt that the Treaty, which I have read and considered, is the best that Gibraltar could negotiate from the position of weakness in which Brexit put us contrary to our wishes. Predictably and understandably (since neither the EU nor, still less, Spain owes Gibraltar “a free lunch” in this respect), the Treaty is full of things that no one in Gibraltar will like.

But “like” (or rather, dislike) is not the sensible and realistic test of this Treaty. We must think with our heads and not our hearts. Most of the things that we will not “like” in the Treaty are the logical and unavoidable consequences of participating in someone else’s “club” (the Schengen free movement, borderless space) without being a full member of it. This is the *prize*. It is not realistic to expect that the EU would allow Gibraltar (as it does its members states) to be the gatekeeper of access to the whole EU. Monaco is not allowed to do it, so France (as the neighbouring EU Member State) does most of what Spain (as our neighbouring EU Member State) will be doing under this Treaty.

But, as Mr Albares has already said (and we knew), Spain maintains its Sovereignty claim, and we are therefore right to be suspicious and cautious given the political hostility with which she has pursued it in the past (and may in the future). This makes our situation different to Monaco and others. We need a safety net in relation to this Treaty, and the UK itself can provide it to us. If it does, I can support this Treaty with the confidence that we are safe and secure.

For me the sensible and realistic tests are these: are we and (importantly) our future generations safe and secure politically in the sense of sovereignty, jurisdiction and constitutional self-government, and economically. Can this treaty become in the future a trap from which we cannot escape of our own free will?

There should be no serious doubting of the value and importance for Gibraltar of the *prize*, both socially and economically (and conversely of the socio-economic costs and consequences now and in the future of the alternative no-treaty scenario). So, the real issue is: is the *price* too high?

This is the “*price v prize*” issue. It requires an assessment of the price we are being required to pay (agreeing to things we don’t “like” and may be abused against us in the future and giving Spain any sort of role in relation to our affairs) against the socio-economic benefits of

an open and fluid border coupled with freedom of access to the whole EU for goods and people (the prize). Each of us will come to our own conclusion about that.

For my part (and subject to the UK providing us the safety net that we need) I will “hold my nose” on the things I don’t “like” and support the Treaty. What are the things in the Treaty that I and (rightly) no one in Gibraltar will “like”? There are lots of them.

Spain is to set up **border crossing points** at Gibraltar port and airport. *Spain* (in addition to Gibraltar) will conduct **border checks** on people (including Gibraltarians and other Gibraltar residents) arriving at (and leaving from) our port and airport and may deny entry (but not to Gibraltarians or other residents of Gibraltar).

If a “**wanted person**” (even a Gibraltar resident or a person for whom our courts have issued an arrest warrant) arrives or tries to leave Gibraltar via the port or airport, we cannot arrest them without their consent, and if they do not consent, we must let them leave Gibraltar. In my view this is not sensible. While it does not make any sovereignty or jurisdiction concession to Spain or anyone else, it undermines the enforceability of our laws by our law enforcement agencies and of arrest warrants issued by our courts and the authority of our courts in our own territory.

Spain (and not Gibraltar or the UK) will issue **visas** to visit Gibraltar to any person of a nationality that requires a visa to enter the EU.

Spain can veto anyone living in Gibraltar (but not Gibraltarians). We will issue **residents permits** but are agreeing not to do so if Spain objects on one of several stated grounds. Similarly, we are agreeing not to renew the residence permit and to withdraw the permit of any existing or future resident, if Spain requires it on one of those grounds. Restrictions are also placed on our freedom to make new laws as to eligibility to reside here.

Several provisions of the Treaty entitle Spanish official (in certain circumstances and subject to some conditions and restrictions) to be present in the port and airport (outside of the “Schengen Shack(s)”) and elsewhere in Gibraltar. So-called “**boots on the ground**”. There is no requirement that they not be armed, and it is to be assumed that they will be. They may not be in uniform but can be “suitably identified” (i.e., armbands and/or high visibility jackets marked Policia Nacional or Guardia Civil).

Spain may request and conduct (jointly with our own authorities) **inspections** of ships and aircraft entering/leaving the port/airport and to carry out random inspections of their passengers and cargo. So, more boots on the ground.

In keeping with the EU-wide police co-operation regime, *Spanish* police and Guardia Civil will be able to **continue surveillance** of anyone under surveillance by them and to continue to pursue (**hot pursuit**) anyone who they are pursuing who enters Gibraltar. They may be armed and in their own marked service vehicles. This requires notification and the RGP may take over the operation. So, the real likelihood of boots on the ground.

The Treaty contains extensive and intrusive obligations in respect of the provision of **banking information**.

The required **transaction tax** on all goods imported into Gibraltar will be very challenging for our retail, wholesale and distributive sectors. And the rates will have to be raised above the 15%-17% range if that is decided by the Independent Consultative Body to address issues of competition or any significant actual distortion in trade between Gibraltar and “the contiguous frontier zone” in the goods or categories of goods concerned.

Airport Joint Venture. A joint venture company will be established in the EU (I understand that Ireland is intended) “under the shared responsibility” of Spain and “the UK, in respect of Gibraltar” to “select, through regular public tender, and supervise the commercial company in charge of the day-to-day management of Gibraltar airport”. The public tender “may foresee the contract and labour law applicable to the commercial company and its operations” (which envisages the possibility that it may not be the laws of Gibraltar). Litigation against the joint venture or the commercial company may take place in the courts of a member state (including Spain). It is not clear from the language of the treaty whether the role of the JV company goes beyond ensuring Gibraltar’s compliance with EU tendering rules and Treaty obligations. I am assured by the Government that it is so limited. If it does go beyond those things, then that would represent an unacceptable loss (in Spain’s favour) of jurisdiction and control over our air terminal and airport.

This is the *price* that we are paying for the *prize*. For my part, I think it is worth paying it because (i) the prize is very important for our future, (ii) most of the terms (though not the airport joint venture) are “normal” for arrangements such as those brought about by the Treaty, (iii) there is no loss or concession of British Sovereignty of Gibraltar and (iv) there is no unacceptable loss of our own jurisdiction and control (beyond that which is normal in such treaties), except possibly in relation to the airport (depending on what the treaty means).

Comfort from the UK. But we need the comfort and security that the UK can provide to us. Circumstances could change in the future and governments will change in Spain and in the UK. There is plenty of scope for Spain (if it wished to do so) to abuse the Treaty provisions in a way that would be unacceptable for Gibraltar. Even a future UK Government may act against what we consider to be our best interests (remember the Airport Agreement, the Brussels Agreement, Joint Sovereignty, Brexit and our exclusion from the UK’s own Brexit agreement with the EU). Any or all of these could in the future make the continuation of the Treaty politically and socio-economically unacceptable and threatening to Gibraltar, especially in the light of Spain’s continuing sovereignty claim. In short, the treaty could become politically unsafe and insecure for us. We cannot then be trapped in it.

The UK can give us this confidence, safety and security by agreeing with Gibraltar that it will exercise its right under the Treaty to terminate it (by giving the required 12 months’ notice to do so) **if Gibraltar requests it**. That will give us an exit route if we feel we need it. Otherwise, the Treaty could become a trap for us because it is not humanly possible to now foresee what may happen or how it will work in the future. The EU have given Spain that right to exit.

There is another reason why, in my opinion, the UK’s assurance that it would trigger termination if Gibraltar asked it to, is necessary. If the UK should at any time in the future negotiate its re-entry into the EU, we would then be left in a position that even though the UK is in the EU (without us because Spain would almost certainly veto that), Spain would continue to be the Member State responsible for Gibraltar under this Treaty. That would be

very damaging optically and from a sovereignty perspective. Gibraltarians at that time should have the opportunity to exit the Treaty if they so wished.

Also, if the UK were, *without the Gibraltar Government's agreement*, to exercise its very considerable powers under the Treaty to agree further supplemental agreements and/or bilateral administrative arrangements with Spain, or to make decisions in the Cooperation Council or to conduct “our” business under the Treaty (of which there is much), that would have the same adverse effect on our political and socio-economic “safety and security”, as well as rolling back our Constitutional self-government in a quite unacceptable way. The UK could give us the required comfort and security by agreeing this with the Gibraltar Government not to do so.

So, my position is that, subject to the above, I support the Treaty. This matter is too important to Gibraltar to become politically partisan or tribal about it. We cannot make our assessment of the Treaty a referendum on what we think of the Government or the Chief Minister. That would be irresponsible.

But such is the importance that I attach to the political and economic “safety net” that I have just described, that I believe that the Gibraltar Parliament should *not* pass a resolution definitively asking the UK Government to ratify the Treaty unless the UK has agreed to terminate it at our request and given us the other comfort which I believe is both necessary and right for us to have.

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