



HOUSE OF COMMONS

European Scrutiny Committee

Oral evidence: Negotiations with the European Union in respect of Gibraltar, HC 703

Wednesday 24 November 2021

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Members present: Sir William Cash (Chair); Richard Drax; Margaret Ferrier; Mr David Jones; Craig Mackinlay; Anne Marie Morris; Greg Smith.

Questions 65-90

Witnesses

I: Hon. Fabian R Picardo QC MP, Chief Minister of Gibraltar, and Michael Llamas CMG QC, Attorney General of Gibraltar.

Written evidence from witnesses:

– [Add names of witnesses and hyperlink to submissions]

Examination of witnesses

Witnesses: Hon. Fabian R Picardo QC MP and Michael Llamas CMG QC.

Q65 **Chair:** Mr Picardo, Mr Llamas, thank you very much for giving evidence this afternoon before our Committee. On behalf of the Committee, welcome to the House of Commons.

It is not often that we hear from overseas parliamentarians, especially from a territory with which we have such a long connection. I ought to add that I had a connection during proceedings on the Lisbon treaty. I was shadow Attorney General before that, and I had the opportunity to make representations in relation to Gibraltar during the parliamentary proceedings. I should also mention that I have fond memories of my visits to the Rock, not least because many of best school friends were from Gibraltar. For that reason alone, I am more than delighted to see you.

As you will be aware the Committee is closely monitoring the UK's negotiations with the European Union in respect of Gibraltar, and is looking for a deal that protects and promotes Gibraltar's economy and the mobility of those who call it home. We made that very clear when Foreign Office Minister Wendy Morton gave evidence to us in September, and it is a key negotiating objective which I know you share.

We have considered the EU's public negotiating position and taken evidence from the UK Government, but we are yet to hear from the other team on the pitch, which is yourselves—the Government of Gibraltar. We hope today that you can round out our understanding of how the negotiations are progressing and furnish us with further information on your aims and objectives for a UK-EU deal on Gibraltar.

This afternoon we will seek to clarify why that deal is needed and why these negotiations are happening now and were not tied up sooner, potentially as part of the UK-EU trade and co-operation agreement. We will then turn to consider the political framework agreed by the UK, Gibraltar and Spain in December 2020; your objectives for negotiations with the EU and progress made to date; and how any agreement would be approved, along with your preparations in the eventuality that a deal is not reached.

Before we start, Mr Picardo, would you be so kind as to introduce yourself and Mr Llamas? Perhaps you could say a little about the Government of Gibraltar and the background to these negotiations. Over to you.

Fabian Picardo: Thank you very much, Sir William, for having us here this afternoon. I am the Chief Minister of Gibraltar, and Michael Llamas is the Attorney General of Gibraltar. Not with us this afternoon is the Deputy Chief Minister of Gibraltar, Joseph Garcia, who was billed to be here. He has been, and is, an integral part of the negotiating team, but he has had to stay in Gibraltar to take on my role for the 48 hours while I am away from the Rock.



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The first thing to do is to thank you for the opportunity to address your Committee. I know that the invitation comes from your interest and your concern for Gibraltar, and that is something that the people of Gibraltar value highly and that my fellow parliamentarians on the Rock also value highly.

Thank you also for the statements that you have made to date, not least the statement that you issued following your evidence session with the Minister for Europe and the Americas, Wendy Morton. You set out the position—which I could myself have set out for the Government of Gibraltar—that we consider the new year’s eve agreement we reached with the Government and the Kingdom of Spain at the end of last year, on 31 December 2020, to be the route map for the negotiation of a treaty between the United Kingdom and the European Union in relation to Gibraltar in the future. Your starting point, our starting point and the starting point of Her Majesty’s Government is exactly the same, and we believe it is not just where we should start; we believe it is where we should end—with a treaty that reflects those provisions.

Perhaps I could quickly say that the negotiation of the political framework that is the new year’s eve agreement took until literally the last hours of last year. Because of that, it was not possible for us to engage in a negotiation between the United Kingdom and the European Union ahead of the United Kingdom’s final moment of departure from the European Union. You have seen, indeed, that it took some nine months since the end of 2020 for the European Union to go firm on its mandate to start those negotiations. I would say in relation to that mandate, the least said, the better, but we are here to look into it and all that detail. So I look forward to taking your questions and to taking questions from Members here this afternoon, all of whom I thank for their interest in Gibraltar and their attendance today.

Q66 Chair: That could not be clearer. Thank you very much indeed. I will ask the first question. What do the bridging arrangements being applied by Gibraltar and Spain since 1 January 2021 cover and what is their legal base? Then, what are the arrangements published and how are they operating in practice? Finally, how sustainable are they? Could they be brought to an abrupt end by either Gibraltar or Spain if the EU and the UK were unable to reach an agreement in respect of Gibraltar?

Fabian Picardo: Straight to the nub of the issue there. Since 1 January, what Gibraltar and Spain, as the principal actors on the ground, have wanted to do is to seek to preserve, insofar as possible, the status quo ante for those who have to cross from Gibraltar into Spain and from Spain into Gibraltar. That may be because people are required to cross for reasons related to their employment or they are wishing to cross for reasons of tourism or simply to visit families, a shop, and so on. What we have tried to do on the ground, however, is not something that can be legally substantiated in the way that any of the sides might have wanted to see.

We have to understand that Gibraltar, even before we left the European Union with the United Kingdom, was outside the Schengen border area.



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Therefore, the Schengen borders code applies at the crossing point, the frontier, between Gibraltar and Spain. The application of the Schengen borders code requires different degrees of immigration control, depending on whether people are coming from a country in the European Union, a member state of the European Union that is outside the Schengen zone or a third country and, indeed, if we start to look at this in greater detail, whether that third country is a country whose nationals are required to have a visa to enter the Schengen border area.

Gibraltar was a part of the European Union that was not part of the Schengen immigration zone. Therefore, movement between Gibraltar and Spain and Spain and Gibraltar was a movement crossing the Schengen immigration line, but within the European Community. As European Community citizens, we were crossing from one part of the European Union to another, but into a zone that had its own immigration application. We are all British citizens in Gibraltar, so we are now third country nationals going into Spain from Gibraltar. Spanish citizens, or other EU citizens—indeed, other residents of Spain, unless they are British residents of Spain who come into Gibraltar—are, for us, third country nationals entering Gibraltar's immigration zone.

For the purposes of understanding all the Venn diagrams of immigration we are dealing with here, Gibraltar is a separate immigration zone to the United Kingdom. Gibraltar does not have and we have never had a common travel area with the United Kingdom. So when I travel from Gibraltar to London, now that we have left the European Union or before, I show my passport—as a British citizen returning to the United Kingdom, but I do show my passport. It is not quite like returning, for example, from Northern Ireland or, indeed, moving from Ireland to Northern Ireland. There is no common travel area between us and the UK.

In those circumstances, what we have tried to do is ensure that insofar as possible, the day-to-day crossing across that frontier for residents of Gibraltar and residents of Spain and, indeed, of the European Union has remained in keeping with the status quo ante. There is no law to support that. Gibraltar has not passed legislation to permit us to carry out more stringent checks, which is the sort of thing that we might have to do if we were to leave without a deal, and Spain has not applied the full force of the Schengen borders code in as many instances as she might if she wished to, has to or wants to apply them going forward. There is an element of reciprocity. We continue to recognise Spanish and European identity carnets for access to Gibraltar, and Spain continues to recognise red Gibraltar identity cards for the purposes of accessing the Schengen area without the need to stamp the passport of the British citizen who is holding that identity card.

Perhaps I should just footnote that submission by reminding you that Gibraltar issues civil registration cards and identity cards, and we always have. Indeed, while we were members of the European Union, there was a British identity card recognised by the European Union for travel purposes, which was the Gibraltar identity card. That has continued on the basis of



reciprocity, and we hope we will be able—of course, this will be the subject of other questions—to finalise an agreement between the UK and the European Union that leads to a treaty between the UK and the European Union, and that that will be a seamless process that will enable us not to have to require any change for those who require an immigration check between Gibraltar and Spain before we finalise those arrangements. I hope that is an answer that satisfies the question that you put.

Chair: I will go further: I do not think anybody could have explained it more clearly and with greater skill, so that is my personal response. It is very complex, but it is extremely well explained, so I now turn to Anne Marie Morris.

Q67 Anne Marie Morris: The timeline issue in all of this is an interesting one, partly because of the challenge of the December 2020 deadline. Why did the Gibraltar and UK Governments only set out their joint objectives for a new EU-UK agreement in Gibraltar in March, after they had already signed—and in theory, therefore, agreed—a political framework with Spain in December 2020? After, perhaps, a bit of an explanation on that, it would be helpful to understand how these objectives were reflected in the December framework, because the misalignment of dates and the—if you like—dissonance between the two is clearly relevant and telling.

Fabian Picardo: Thank you, Ms Morris, for that question. The timeline starts considerably before then, of course, and leads us to the unhappy chronology that you are referring us to. When the article 50 notification was given by Prime Minister May, all sorts of clocks started ticking at the same time, and one in particular related to Gibraltar. The Spanish Government, under successive Administrations—both the Partido Popular and the Partido Socialista Obrero Español—set out that their position was that they would not agree to any arrangements entered into between the United Kingdom and the European Union applying to Gibraltar without their consent. Indeed, that was recorded in the now-infamous article 24 of the EU's first negotiating mandate for a withdrawal agreement, and subsequently in the second mandate that the EU set out for what became the TCA—the future relationship arrangements between the United Kingdom and the European Union.

In order to ensure that we were trying to work in tandem and in parallel with those chronological issues that were quickly coming fast towards us—that is to say, a deadline by which we would leave the European Union without a deal—we engaged with colleagues in the Spanish Government. We were able to reach arrangements that satisfied all parties in respect of our withdrawal, so we left with the benefit of the transition arrangements under the withdrawal agreement, and then we started the process of seeking to ensure that the future arrangements for Gibraltar could be completed in time for the United Kingdom's final withdrawal after the end of the transition.

It was not possible to do that, as I have indicated to Sir Bill. We did not actually do a deal until 3.30 in the morning on 31 December 2020. That is because the Gibraltarians are very clear about what their positions are. We



are not going to compromise on any of the fundamentals, and if people need to see us reach the last second of the last minute of the last hour sticking to our principles, they are welcome to see us reach that moment. Unfortunately, we were therefore unable, in the remaining 21 hours of 2020, to spin up an agreement and do a treaty that took us all the way into the application of these new arrangements, but we did have the new year's eve agreement, and that should not be undervalued. It is a hugely important political framework, agreed between the United Kingdom and Gibraltar on the one hand and Spain on the other.

Having reached that very difficult balance, there was very little for the United Kingdom and Gibraltar to set out as an objective, other than the objective that we wish to see the new year's eve agreement become the treaty between the United Kingdom and the European Union. What you saw Dominic Raab—who was then Foreign Secretary and was hugely supportive of Gibraltar and hugely supportive of my team and the position of the Government of Gibraltar when he was Foreign Secretary—and me do, in a Joint Ministerial Council meeting held in Gibraltar in respect of the JMC Gibraltar, as it is known in respect of EU issues, was set out that Gibraltar remained steadfast and loyal, and the UK remained steadfast and loyal, to what we had provided for in the new year's eve agreement.

If you look at the objective we set out then, we did not set out anything that was contrary to the new year's eve agreement; we simply reinforced the things that had been set out in the new year's eve agreement. I do not mean to be critical, but I am analytical in looking at how the European Union does things. It does things in a slightly more prescriptive way. Of course, it is not two entities that get on hand in glove like the Government of Gibraltar and the Government of the United Kingdom; it is 27 nation states that move together, and that requires a lot more co-ordination. That took considerably longer, but the Government of Gibraltar and the Government of the United Kingdom would have been happy to have sat down to start the negotiation of the treaty on 1 January, 23 and a half hours after we had done our new year's eve agreement.

We understood that that was not possible, and we respected the fact that the European Union needed to provide its mandate. What we did in the objectives we set out at the JMC was to confirm to the European Union that we remained of the view that the new year's eve agreement was a good and solid basis for a treaty when they were ready to negotiate it with us. There is a dissonance in the chronology, and therefore there is an element of legal uncertainty that has crept in to, I think, the unfortunate realisation of all parties, that we are not able to give our citizens in Gibraltar and southern Spain the comfort of legal certainty in the context of questions such as the Chairman asked me a moment ago. However, we remain committed to delivering that legal certainty, because we remain committed and optimistic that we can find a route to a treaty.

Q68 Anne Marie Morris: I think what you are telling me is that, while there is a dissonance in time, there is no dissonance in content. Would that be correct?



Fabian Picardo: That is absolutely right. If you look at the terms of those objectives, they are exactly as set out in the new year's eve agreement.

- Q69 **Anne Marie Morris:** Given that time has moved on, and the lawyers and legalities are now being fast looked into, do you see that consistency remaining? Do you see any cracks or challenges arising?

Fabian Picardo: In fact, the United Kingdom and Gibraltar team has the benefit of having had its lawyers at the table when we were negotiating the agreements—not least the then Foreign Secretary, who, as a former Foreign Office lawyer, knew what he was looking for in all the letters, let alone the words, that were coming up in that negotiation. I don't think that on the British side we believe there is for one moment any issue that we would be concerned about or that we would resile from. We negotiated very carefully. We believe the new year's eve agreement is the right balance to lead forward towards a treaty. It is still the basis on which we are committed to finding a treaty and, to make it very clear, what my team and the Foreign Office team is doing, together at the table as the United Kingdom, is trying to do a treaty based on the new years' eve agreement. That is what we are committed to doing; we are not committed to doing anything else, and we will not do anything else.

Anne Marie Morris: Thank you, that is very clear.

- Q70 **Mr Jones:** Thank you, Chief Minister. As you have explained, the negotiations went up to the 59th minute of the 24th hour. Would that explain the fact that there is no detail in the framework agreement for governance of the future agreement? Was it simply a question of lack of time?

Fabian Picardo: I think it is also a question of lack of vires, if I may say so. You have to understand that the parties that were at the table at the time were entirely competent of the one part—the British part was the United Kingdom and the Government of Gibraltar; we are the decision makers in the context of what we will accept in the treaty, together and in partnership—and on the other hand, you had one member state of the European Union that would not pretend to be competent to negotiate a dispute resolution mechanism for the treaty that is going to be put in place. That is recognised as being something that will have to be negotiated by the Commission, in the context of the many dispute resolution mechanisms that the Commission may be negotiating across treaties such as the TCA and others, although the TCA, of course, is the most relevant and more likely fit.

- Q71 **Mr Jones:** You have said that the December 2020 framework would not touch on sovereignty, jurisdiction or control, yet it would allow Frontex officials to operate on Gibraltar's territory and require Gibraltar to apply a substantial body of EU law. Is that not contradictory?

Fabian Picardo: I am afraid that I do not think it is. Let me give you an example that I think will make the whole thing very real. Under the Le Touquet agreement, the United Kingdom has agreed that French gendarmes may sit at King's Cross to permit those who will enter Paris



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Gare du Nord to have the advanced clearance they need so that they do not have to show their passports in France. That is not in any way to compromise British sovereignty over King's Cross; it is to create an administrative permission set out in an international treaty in which the United Kingdom permits a thing and is able, in future, to undo that permission in the exercise of its sovereignty. We could talk for hours about whether being members of the European Union amounted to surrendering sovereignty if you always have the lever of an article 50 withdrawal and, at that time, potential administrative concessions would be withdrawn.

In the context of Frontex being on Gibraltar, we are talking about permitting those who arrive at Gibraltar airport to have permission not just to enter Gibraltar—that will be granted only by the Gibraltar Borders and Coastguard Agency, which represents the immigration rules of the Government of Gibraltar—but, additionally, to enter the Schengen area. If you have that permission, you are then able to roam into Spain at will, and from Spain into the rest of the European Union.

If we do not have those provisions in place, it is not that you can roam into Schengen and Spain without showing your passport, or that we are creating a regime for which you have to show your passport to Frontex when you would not otherwise have to. You will in fact have to show your passport to a Spanish Guardia Civil officer at the frontier to be able to enter Spain and Schengen. For reasons that we have ventilated on many occasions in the negotiations, privately and publicly, Gibraltar will not accept—Gibraltar will never accept—that there should be Spanish law enforcement agents present in Gibraltar. We have been very clear about that and it is not going to change, but we believe that there being an independent agency, such as Frontex, with its statutory corps, able to provide that immigration control, which would then relieve people of the need to have the immigration control at the frontier. We believe that is advantageous to Gibraltar, to the region around us, and to all those who travel to Gibraltar.

To give you an example of numbers, we have about 300,000 arrivals at Gibraltar airport through the year—sometimes a few more depending on whether we are in the middle of a pandemic. We have 10 million crossings a year at the frontier. You are taking 300,000 controls a year and replacing them with 10 million controls that would be done at the frontier. Those 10 million controls will, under the Schengen borders code, be much more onerous than they are now.

In the balance, I do not think that there is any sovereignty cession in any way; I do not think there is any cession of jurisdiction and control. I am very keen that you should understand: while I am Chief Minister or, as far as I can see, while any of my compatriots might have the privilege and honour of holding this post, no Gibraltarian would ever negotiate any arrangements that surrender British sovereignty, jurisdiction or control over Gibraltar. I have not got a crystal ball, but I can tell you that the future of Gibraltar, if it is one thing, it is three things: it is British, British, British, and nobody should make any mistake about that.



Mr Jones: I am very pleased to hear it.

Q72 **Margaret Ferrier:** The Chief Minister might have pre-empted part of my question by ruling out the possibility of Spanish border guards operating in Gibraltar. Is it clear that Frontex will be playing only a supporting a role in all of this? I will go on to ask my second question: what sort of powers would Frontex need to have to operate effectively at Gibraltar's port and airport, because there is talk of that, and what safeguards would there need to be to ensure that those powers are used appropriately and do not cross over on sovereignty?

Fabian Picardo: Thank you for that question, because I think it is an important way that we might frame what the reality of this operation on the ground is going to be. In the treaty, the United Kingdom will have to permit these operations happening in Gibraltar at an international legal level, but in the context of Gibraltar, the Gibraltar Parliament will have to legislate to permit an agency such as Frontex to have power to require a person to pass an immigration control.

To put it in very basic terms, at the moment when you arrive in Gibraltar, the Borders and Coastguard Agency is empowered by law to require you to show your passport—you might not otherwise have to show your passport, if there were not a law in Gibraltar that requires you to show your passport. The Gibraltar Parliament, through its immigration legislation, requires you to show your passport to the Borders and Coastguard agent.

If there is to be a second control, the fact that there is an international treaty that might require that is not enough under our system of laws—which is a dualist system of laws—for a person to be subject to that control. So, the Gibraltar Parliament will have to create the legislative framework for persons who are arriving in Gibraltar to go through that dual immigration control, the second of which will be designed to ensure that they pass what is known as the Schengen Information System controls. The powers will be set out in legislation, and the individual will have an obligation to subject themselves to the control and the power of the Frontex official to check the passport.

We are trying to create a mechanism in which the Schengen Information System will be available to the Frontex officers who are on the frontline of that passport check. They will then know whether anything is known about the individual who is appearing before them. That would be something that is only on the Schengen Information System and is not, for example, already on the Interpol system, because what is on the Interpol system would be showing up on the RGP—Royal Gibraltar Police—or Borders and Coastguard Agency system and already alerting us to the fact that this person was for some reason not to be granted permission to enter Gibraltar, and so on. There may be specific things that are just on the Schengen Information System and, therefore, those are the things that would permit a Frontex official to refuse you entry.



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That is the mechanism we believe now has to be set out in Gibraltar law. Once it is agreed in the treaty, we will have to make provision for it in national law as well as in international law.

Chair: Very interesting. Next question, please, from Craig Mackinlay.

Q73 **Craig Mackinlay:** It is very good to see you again, Mr Picardo; it has been a little while. I look back to the days when you gave evidence to the Brexit Select Committee, which was very instructive. We are going to cover similar ground here, I am afraid.

The EU's negotiating mandate will be to look for the operation of a fair bit of the body of EU law in Gibraltar—dare I say that that is not dissimilar to its ambitions for what happens in Northern Ireland? The UK Government have said that that is “excessive and disproportionate”. Where do you think this is likely to sit and finalise—the EU's ambitions and what it should have a right to say about the movement of people or goods, and all those types of things, within Gibraltar territory? Speak for yourself, but I am sure you share the UK Government's view of that being disproportionate and excessive.

Fabian Picardo: First, let me say that I respect the fact that the European Union is a union of laws. It is set up as an entity of its member states. We were members of it. We are no longer members of it. We understand that the things that third parties were required to adhere to in the past will still be required by the Union in the future, and we are now a third party. We need to understand European law in order to, first of all, respect it and, secondly, to interface with it in a way that is not “excessive and disproportionate”. You are absolutely right; those are exactly the words that were used by the United Kingdom Government, but they were used in a very particular way. They were used in reflecting the position of the United Kingdom and Gibraltar in respect of the customs and goods aspects of the mandate that the European Union has published.

In the context of the customs and goods proposal, I really do believe that what has been proposed is excessive and unnecessary. I don't want to create hostages to fortune, because we are in the middle of a live negotiation, and I do not believe that it is in anyone's interest that we should negotiate over the airwaves, so I am going to avoid going into the detail of that in any way, but I will tell you that in the context of the application of European law, we are looking at options that we hope will satisfy all of the parties. The options will give the certainty that citizens and businesses require, so that they can look at a body of law—whether that body of law is “the treaty” or Gibraltar law or any other relevant law. That will ensure that the regulation of the role of the citizen and the state of Gibraltar is not in any way affected by any rules or regulations that are not understood to be relevant in the life of the citizen, in the context of his or her Government or the Government of a company or business in Gibraltar.

We think there are ways we can achieve that that are not excessive and disproportionate, and that none the less give the European Union the



comfort that the single market is protected and that any matters of interpretation of pure EU law are not going to fall to be decided by a court of co-ordinate or competent jurisdiction. Such a court might create a body of jurisprudence, which is contrary to the jurisprudence that is emerging from Brussels and the European Court of Justice. Common law lawyers understand that you cannot have co-ordinate levels of jurisprudence emerging that are contradictory to one another. That actually defeats the principle of legal certainty. I think that there are solutions to this, and I think that we can find those solutions in a way that satisfies the European Union.

Q74 Craig Mackinlay: I want to examine some of the things you have just said. You are not in the customs union and never have been. I have not fully understood how you managed a situation where, in the old days, a good came from a third country directly into Gibraltar, passed across the border—I know this may not happen very often—and faced the European external tariff border and rules. How was that transaction recognised and the European duty collected in such situations?

Fabian Picardo: The old days are still the current days in that respect. We were never in the common customs union, as you have said, so we have not left it. We were never in it. Then or now, if goods from a third country were to arrive at Gibraltar—or indeed any goods which were in Gibraltar, even goods produced by the European Union or goods from the United Kingdom—they would hit the Spanish border and be subject to duty. The same would be true if you were coming from Spain into Gibraltar or if you were coming from the United Kingdom into Gibraltar. When you arrive at Gibraltar airport from the United Kingdom, your goods are subject to duty if they are in excess of your personal allowances.

So there was always a customs check at Gibraltar. There was a notorious situation in which we sometimes found ourselves, particularly under right-wing Governments—you will recall the Partido Popular—in the past. You would have the frontier guards, who are doing the customs checks, as the pinch point that would produce the very lengthy queues into Spain from Gibraltar. The application of duties, in respect of the common external tariff or any other duties in excess of personal allowances, was really the thing that was and is used to create queues on entry from Gibraltar into Spain.

We are very conscious that if we want to achieve an arrangement that provides for greater mobility of people, we cannot address only the immigration issues that are flashing red, such as Schengen; Gibraltar is beyond the Schengen frontier. We also have to deal with the issues that are flashing red, green and blue, such as the status of the movement of goods. We need to see whether it is possible to reach an arrangement that will enable us to move to almost a blue channel existence between Gibraltar and the rest of the common customs union, so that people can move freely with their goods moving freely alongside them.

Q75 Craig Mackinlay: I do not know, in real terms, how much what you would call bulk goods were ever going from Gibraltar to Spain—probably



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not a huge amount. It would not be a port of primary entry for a freighter full of widgets, I am sure. It never has been. You do certain things in Gibraltar that are quite unique, such as the big duty-free zone. I fully understand your Frontex issues—I get that, and I think it is quite easily overcome. You have also created a very strong market in duty-free fuel for freighters. If you are trying to make that border with Spain fairly seamless, how will the duty-free stuff be overcome? Perhaps in line with the Istanbul agreement on fuel, for instance. Those are quite important positive economic points for Gibraltar. Are they now at threat by having a more fluid border? Will you have to give up things that you have enjoyed for a long time as a very good earner for your area? Is duty free under threat? That is really the question.

Fabian Picardo: Mr Mackinlay, I think you know us well enough to know that we do not do surrender. We do not do surrender. However, there is nothing to surrender. We have to understand where the commercial opportunities are, and sometimes the headlines hide the reality.

First, as you say, we have never had a market in widgets. In other words, Gibraltar has never been the point of entry into the European Union common customs union for third-country goods which enter through Gibraltar. Indeed, the importation of goods into Gibraltar through the port and airport is approximately 2% of the total importation of goods into Gibraltar, which tells you that 98% of our goods come from the European Union through the land frontier, or indeed from the United Kingdom through the European Union land frontier—or, since the end of last year, for reasons related to a border inspection post which deals with phytosanitary goods, crossing the bay of Gibraltar on a ferry from Algeciras, which is where the closest bit is.

Craig Mackinlay: I'm sorry—Algeciras?

Fabian Picardo: Algeciras, which is on the other side of the bay of Gibraltar. Let me try to explain the rationale behind our thinking in respect of duty free and bunkering fuels so that you understand it. Gibraltar is not and never has been duty free. Our duties may have been lower, in some instances—but only in some instances—than excise duties levied in other parts of the European Union, but we have never been duty free, although, in the common consciousness, a lower duty is expressed as a duty-free position. It is one thing to be competitive and have a slightly lower rate of tax or duty; it is another to be entirely disloyal and have a zero rate of duty, which may not be considered to be an appropriate level of competition on some products. I say “on some products” advisedly, and I will come to why in a moment.

In the context of excise goods in particular, Gibraltar has been raising its excise duties for some years, such as on tobacco—one of the key issues on which people have focused in the past—not least because of the health issues that relate to tobacco. You do not want to promote lower duties in the context of a commodity that is, frankly, killing people. I say that as someone who has never smoked and does not understand why people smoke. However, each to their own—many people do not understand why



someone would go into politics, but we all know it is the best game in the world. That is, on the one hand, in terms of excise duties. I do not think we are at a stage where being in a union with the EU customs union—having a common travel area for goods, if I could put it that way—would mean that our excise duties would suffer because they would have to go up so considerably that we would no longer be competitive. That might have been the case 10 or 15 years ago, but it is not the case now. I was moving in that direction anyway, whether or not Brexit was coming.

Bunkering fuels, which is an issue that you raised, is looked at separately in most customs agreements. You have excise goods such as tobacco and alcohol, then you look at fuels separately. There is, in the context of Gibraltar and all the straits of Gibraltar, no duty levied in respect of bunkering fuels. That is to say that the duty is not levied in Gibraltar, it is not levied in Spain, and it is not levied in Morocco at Tanger Med. The price of bunkers in Gibraltar is the straits of Gibraltar price—the STROG price—and that price is common in the three main ports in the area. What has happened is that, with Gibraltar being a pinch point—to use the word I used earlier—geographically also because of the straits, it had become very attractive to bunker there. Gibraltar, as you know, is a small geography. We have, I think, only 12 bunkering slots. I think Algeciras has a few more and Tanger Med has a few more, as does Ceuta. The vessels come, and they take the first slot available. All slots are always full unless there is a weather issue, and the competition there is simply commercial competition in order to provide a better service, if possible, but there is not a competition that is based on having lower duties, because you cannot go lower than zero.

- Q76 **Craig Mackinlay:** Let's examine another issue. I sailed through Gibraltar many years ago, and we had the long trip home. We were delighted that Safeway was there. Safeway had every type of British good you could imagine. You had the sausages and the HP Sauce. It is probably not Safeway any more, but I am sure it is true. How would that be affected by a possible arrangement in the future? This is the old British sausage issue, which has dominated some of the concerns in Northern Ireland. Will there be complaints by the EU to say, "There is the vague possibility of leakage of the evil British sausage over the border to the good burghers of Andalusia, and we need to do something about that"? Where do you think that might settle? You have this unique position, whereby there are probably a lot of British ex-pats living in the south of Spain. They come over to Gibraltar for some home goods and go back over the border into Spain, so some of the phytosanitary issues may come to the fore. How do you think that might be solved?

Fabian Picardo: Mr Mackinlay, you are younger than I thought you were. I am surprised you did not mention Lipton's, which is what it used to be before Safeway. It is now Morrisons, and it is a hugely important part of what Gibraltar is. Gibraltarians being able to buy British products in their supermarkets is an important part of the character of Gibraltar and the cultural difference that Gibraltar marks with the area around us. I think it enriches not just Gibraltar; it enriches the area around us, even for those



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who are not ex-pats and who happen to live in the area. If I shop on a Saturday afternoon, I sometimes find families who I can see are not Gibraltarians—they are Spanish families who are coming to buy HP Sauce and some of the great British bangers that might have been available in the past. When I went into politics, I never thought I would think about the great British banger as much as I am having to think about it today.

I must also tell you that I am disappointed to see that some of our supermarkets are not able to offer the range that they were able to offer before now. I am not looking at the arrangements between the United Kingdom and the European Union, in respect of Gibraltar, that we might enter into a treaty. Today, as a result of Brexit, it is not possible to get as much of the product range into Gibraltar as it was before without administrative burdens that make it difficult for our traders to do so in the way that they used to do before. I am actually confident that we will be able to resolve that and that the treaty that we do will recognise the singularity of Gibraltar, will recognise the amounts of goods consumed in Gibraltar in the past, and will provide for the availability of those goods in Gibraltar in a way that does not in any way, shape or form threaten the single market and does not create an issue with human health and the consumption of food.

You might think I am perhaps too optimistic, but people do not pay me to be a pessimist, and I believe that it will be possible to see a resolution of the issues that arise in the context of the island of Ireland, and that that may actually point us in the direction of the resolution that we may adopt in the context of the Gibraltar arrangements. The two are completely separate, but in the context of this particular issue—the movement of the Great British banger from the United Kingdom into the common customs territory of the European Union—those issues will be similar whether the sausage is coming across the frontier from Northern Ireland into Eire, or from Eire, Northern Ireland or Great Britain, through the European continent to Gibraltar.

Q77 Craig Mackinlay: So you have confidence that something that we have not been able to achieve thus far can be achieved, and without a lot of pain, on the Northern Ireland-Republic—

Fabian Picardo: You added that it might not involve a lot of pain. I did not say that.

Q78 Chair: Just to follow up on that and to tighten up the questions a little bit, I want to ask a simple question about the assessment of the number of EU laws it would be necessary and proportionate for Gibraltar to apply. Following on from that, David, could you ask the question on the Court of Justice? These things are interactive, and therefore what the laws are and what they apply to raises the question of the jurisdiction.

Do you have an assessment of the number of laws it would be necessary and proportionate for Gibraltar to apply? Would you say that you should not have any EU laws, or are you going to say that you will have some, but that you will have to find a solution along the David Frost lines sooner



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or later? We are saying, as a Committee—as indeed is the UK Parliament and Government—that we will not have the European Court of Justice applicable to us at all. For practical purposes, could you answer the question about the assessment of the number of EU laws first?

Fabian Picardo: It is not possible for me to give you a reliable answer at this stage. Let me give you a reason why. For example, if we are able to do arrangements that relate to Gibraltar airport, framework regulation 1008/2008, which deals with European flights, would be relevant in the context of the application of whatever we agree in respect of Gibraltar airport, but whether it would be applicable to Gibraltar airport is an issue that is not yet resolved.

I think you will understand that the position that the Government of Gibraltar and the Government of the United Kingdom are taking in the context of this negotiation does not contradict the position that the United Kingdom has taken through the negotiation of the TCA and the arrangements that are being considered in respect of Northern Ireland in two separate negotiations. Contradictory positions are not being put, and the position that you highlight as being the position of the United Kingdom has also been the position of the Government of Gibraltar and the United Kingdom in this negotiation.

That is not to say that you do not have the application of standards or regard to rules, but you do not have the direct application of EU law, which then leads you to whether you need the direct jurisdiction of the European Court of Justice in the context of the dispute resolution mechanism. We believe it is possible to have a dispute resolution mechanism inherent in the treaty that does not require a continued power to refer to Luxembourg in the way that has been the case until our departure from the European Union.

Chair: Of course there is the question underlying all that, which gets even more interesting, in my opinion, and perhaps for you too, about mutual enforcement. Perhaps you have been following the debate about that. There are some very powerful advocates of the notion of mutual enforcement. I think I am right that Jonathan Faull has promoted that idea. He used to be the head of the European Commission in certain respects. That is another area. Because you have answered the question and agree, by nodding your head, that mutual enforcement is an interesting concept, I will pass over to David Jones to ask the next question on the role of the Court of Justice, and then I will come back to Anne Marie.

Q79 **Mr Jones:** I fully understand that your negotiations are continuing, but would you be willing to contemplate any role at all for the European Court of Justice in the interpretation of EU law applicable to Gibraltar?

Fabian Picardo: Let me start by saying that the mutual enforcement of judgments is fundamental for the application of the rule of law across frontiers. That is an area of common agreement between jurists in every jurisdiction, whether a common law jurisdiction or a civil law jurisdiction.



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Jonathan Faull, who is doing a lot of work with the Government of Gibraltar, is a person who has seen how the operation of these rules has developed over the years from the European Commission point of view and, subsequently, after the United Kingdom's departure from the European Union, how we must ensure that if we are going to give our citizens legal certainty, they don't just know which laws apply to them but they also know that if they obtain a judgment in their favour, in one jurisdiction or another, they are going to be able to see that judgment through to enforcement.

This may be important in the context of trade. It is even more important in the context, for example, of matrimonial proceedings, where a parent may need to pursue a judgment being enforced in respect of payment of maintenance etc. This affects people; it does not just affect business.

Chair: And financial services.

Fabian Picardo: And financial services as well.

In the context of the question as put, I am sure that there isn't any mischief in it, but it sounds a little mischievous for the reason that to say whether I would recognise any role for the European Union's court, the European Court of Justice, in the interpretation of EU law is almost to set me up. Of course, that court is created for the purposes of interpreting EU law. Whether or not we would accept the direct effect of the decisions of that court in Gibraltar is a completely different issue.

We believe that the dispute resolution mechanism, along the lines of the TCA, is sufficient—more than sufficient—for the purposes of the arrangements in respect of immigration and the movement of goods that we envisage. That is not to say that there shouldn't be regard to the decisions of the European Court of Justice in the interpretation of EU law, as you would have in respect of the interpretation of any other law by a court of competent jurisdiction, where you were bringing that jurisprudence to the attention of your national court.

In the context of those of us who are old enough to remember the *English and Empire Digest*, where you were able to see the case law of every other common law jurisdiction—you might see how Hong Kong, although that is perhaps not the best example today, or Singapore interpret a particular clause of the constitution or an Act that is similar to an Act that you may have in Gibraltar—that would have been considered to be persuasive in front of a judge in Gibraltar, although it is not a court of competent jurisdiction in Gibraltar. If it is interpreting the same words, then that creates a helpful jurisprudence.

It can, of course, create a divergent jurisprudence, because you haven't got courts of competent co-ordinated jurisdiction competing with each other, and that is the issue to look out for.

Q80 **Mr Jones:** Do I infer from that that you rule out direct jurisdiction of the European Court of Justice in Gibraltar?



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Fabian Picardo: I think that you need to understand the framework of the treaty that we end up with and then analyse what the appropriate dispute resolution mechanism of that treaty is. I don't think you can start at the end.

Remember that I am not, as you know, a Brexit purist. I am one of the 96% in Gibraltar who voted to remain in the EU. So, I wouldn't start this exercise by saying, "This only passes my test. This treaty is only good if the European Court of Justice does not have jurisdiction." I fully respect those who might, but I am not one of those.

I am starting at the other end of the treaty. I believe that by the time we have written the operative clauses of the treaty, it will not be necessary to have at the end of the treaty, in the dispute resolution mechanisms, directly applicable European Court of Justice jurisdiction in Gibraltar. That is not the litmus test for me, at least.

Q81 **Mr Jones:** I was very pleased when you assured the Committee that Gibraltar's future was not just British, it was triply British. It has been argued that the sovereignty of the European Union ultimately resides in the European Court of Justice. If there is any role for the European Court of Justice that has direct effect, doesn't that displace at least an element of British/Gibraltarian sovereignty?

Fabian Picardo: It is an analysis that we could spend a lot of time doing. If you have time to come for a barbecue at home and spend five or six hours talking about it, I would be delighted to host it. I believe that the sovereignty of the United Kingdom vests in the sovereign, not in the Lord Chancellor or in the courts. The courts are the custodian of public morality, in the old analysis of what the Queen's Bench division was, but they are not the holders of British sovereignty.

Now that we are out of the European Union, in our understanding of sovereignty we don't believe that our courts hold our sovereignty. Our sovereignty is held in the people and in the sovereign.

I do not believe that it will be necessary for the decisions of the European Court to have direct effect in Gibraltar, but I believe that the correct analysis is to look at the structure of the treaty and what it does. Are we able to agree with the European Union a treaty that provides for what we need to provide? Then, at the end, let us consider together with the European Union what the appropriate dispute resolution mechanism is. I don't believe that will require the direct effect of the decisions of the European Court of Justice, even though I don't share your analysis of sovereignty.

Mr Jones: I won't press you any further on that. Your negotiations are continuing.

Chair: I will, slightly, because we had to confront a similar sort of question before we entered into the final arrangements for our parliamentary legislation.



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I spent eight hours in No. 10 arguing for what become section 38 of the European Union (Withdrawal Agreement) Act. That contains the now very famous words, “notwithstanding” the question of European law, and includes both the withdrawal agreement and the protocol. I refer you to section 38(2)(b)—you might care to look at this. It actually excludes direct effect, if and when the United Kingdom uses the powers contained in section 38 to resolve the question of whether or not sovereignty prevails in the UK as against the EU, and, as David was just saying, with reference to the European Court.

In a nutshell, I am inviting you to look at section 38(2)(b), because it deals with the issue of direct effect. But this is not a seminar on the question of sovereignty. You have been extremely astute in the way in which you have handled those questions. They remain on the table, but they are very important in practice.

I will now pass to Anne Marie.

- Q82 **Anne Marie Morris:** Mr Picardo, I regret that I am not going to move away from the issue that is already on the table. I want to raise a little bit of concern as to your definition of sovereignty. If a country’s sovereignty isn’t reflected in its court and legal system, I am not sure it has that sovereign power and sovereign control. I don’t think it is as simple as whether or not you have a monarchy. That worries me.

While I admire the creativity that you are bringing to bear with the best of intentions, to try to find a way through something which looks intractable, there are some fundamental differences between common law systems and codified legal systems—

Fabian Picardo: You’re telling me.

Anne Marie Morris: And the way that the law is made, the case law approach that we have in the common law system will mean that it is not entirely out of order to look at judgments in other countries which have common law systems. In a codified system, it is actually very different, so I don’t think, with respect, you can compare the two.

When you have come to the conclusion that there is a way forward to reconcile these two different systems, without ultimately having to have recourse to some final arbiter, that is perhaps a little unrealistic. On the arbiter, your starting point was to give certainty to the people of Gibraltar and frankly, to the people of the United Kingdom as well. Well, if these things cannot be certain until and unless they get to the ECJ or, in the UK, the UK courts, or some arbitration mechanism that is finally agreed in a treaty, that still leaves a great deal of room for uncertainty for the day-to-day lives of Gibraltarians.

What I would put to you is the case that I think we as British citizens would put, looking at the deal which is on the table, or has been on the table, between Europe and the UK, which is that sovereignty is something which is integral and absolutely at the heart of the deal that we did and that anything which impacts it—that includes any reference back to the



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ECJ—is something that we see as completely unacceptable. From everything that you have said, I cannot see how we can square the many circles and conflicts between two different legal systems to give the certainty that you describe. It seems to me it is one or the other. While I respect and admire your negotiation to try and find a compromise, I would put to you that at some point you may have to go one way or the other.

Ultimately, if you are to respect Britain 1, Britain 2, Britain 3, then there will be absolutely no role, direct or indirect, for the ECJ. I understand that there would be some grandfathering of some standards and the like, but not to accept any EU law—which will continue to change, which then gives rise to questions: if it changes, do you then follow it, and so on.

All I am doing, Mr Picardo, is putting on record my concern that despite your best attempts, I do not yet see a way to square the circle. I wish you could come up with this silver bullet, but I do not see it. I am conscious that we are going to have to agree to disagree, but I just wanted to complete the circle in terms of the differences in the legal systems, which have not really been clarified on the record and, I think, need to be. I am then going to move on, unless you want to make any final comment.

Fabian Picardo: Yes, if you don't mind, because I think you are snatching disagreement from the jaws of violent agreement. Remember that I started the intervention by saying that I do not believe there is any need for there to be any direct effect of European Court of Justice decisions in Gibraltar in the context of the treaty we are proposing. The issue that I took with Mr Jones was in respect of the analysis that the sovereignty of the European Union resides in the courts, because that is not my analysis of where the sovereignty of the United Kingdom resides. The sovereignty of the United Kingdom, I think we would all agree, resides in Her Majesty, in the Crown and in the people, not in the Lord Chancellor, the Judicial Committee of the Privy Council—as it still is for Gibraltar—or the Supreme Court.

I am not making that analysis esoterically: I think it is fundamentally important to how we understand our own legal system, not the European legal system. The European legal system, and direct effect of decisions of the European Court of Justice, is for membership of the European Union; I am very clear about that. And we have left membership of the European Union. If what you have is a free-standing international agreement—a treaty—with the European Union, the natural thing is to have a dispute resolution mechanism in that treaty that deals with the disputes that arise in respect of that treaty. To a very great extent, I think we are all saying the same thing in a slightly different way: the analysis we are all making is the same one. Sir Bill referred me to section 38—

Chair: (2)(b).

Fabian Picardo: Of the withdrawal agreement.

Chair: The Act.



Fabian Picardo: The Withdrawal Agreement Act. We are now not dealing with the withdrawal agreement: we are now dealing with TCA territory, and in TCA territory, it is a DRM. I do not necessarily share the analysis that this is just about common law systems versus civil law systems. The civil law system is extraordinarily prescriptive; I might have been a remainer, but I am still not a fan of a civil law system of laws. I really respect what Justinian did with the 12 tables, but it was then developed by Napoleon in completely the wrong way. I do believe that the best system is the common law system, but there are members of the European Union even today that have common law systems of laws, not least Malta and Ireland, to name but two.

I think we are actually in violent agreement. We could spend hours talking about this at an analytical level—an esoteric level—but in the context of the negotiation and where we are going, what I am saying is that you need a treaty that does what you need it to do—those are the operative clauses of the treaty—and then you need a dispute resolution mechanism in that treaty. The issue of whether the Court of Justice has jurisdiction or not is about the dispute resolution mechanism. We do not believe that there needs to be any Court of Justice jurisdiction. Then I said, “But I don’t assess the purity of this by making that the litmus test,” because that is my analysis. However, you do not need to think that there is therefore any likelihood that I am going to be less of a guardian of the need for the DRM not to wander where it need not. That does not affect how red, white and proud I am; how red, white and free we will be in the future; and how red, white and blue every Gibraltarian is when you cut him.

Q83 **Chair:** If I may say, Anne Marie, I think he has given you as good an answer as you are likely to get on a question like this. It is a very expert analysis, I believe, in the circumstances, although I will say that you did mention Napoleon, which made me remember that Nelson, I think, sailed from Gibraltar to Trafalgar.

Fabian Picardo: In 1805.

Chair: 1805, so they had better watch out. Moving on to the next person—

Q84 **Anne Marie Morris:** I am still on my visa question.

Fabian Picardo: Make it a little bit easier.

Anne Marie Morris: I will. Who would be responsible for decisions on applications for visas and residence permits, given that entry to and residence in Gibraltar would effectively allow unhindered movement across the land border with Spain?

Fabian Picardo: To properly answer that question, I need to ask you to look at the Venn diagram created by this proposed arrangement. Gibraltar will not form part of the Schengen area. All parties may have said that as shorthand—indeed, even today, when quickly expressing the deal we are



trying to do, it might be expressed in that way. However, we are entering into an arrangement between Gibraltar and the Schengen area.

I know that this can create confusion with the issue on the island of Ireland, and I am cautious to use this terminology, but it is helpful for the purposes of understanding this conceptually: Gibraltar is entering into a common travel area with Schengen. There are two separate immigration zones, but there is an agreement in respect of the two of them, and if you are in one you are able to move fluidly into the other. You do not have free movement. Remember that free movement is one of those terms of art that has been interpreted by the Court of Justice of the European Union, and where the Court has direct effect it means the right to establish yourself, the right to live and the right to seek employment. Here, you have fluidity between the two.

Why is that important in the context of a question about visas? Because there are two separate immigration zones, which means you then have to have two visa-issuing authorities. The Schengen zone will require certain third-country nationals to have a visa in order to be able to access the Schengen zone. Gibraltar today operates a system where we require people to obtain visas to come to Gibraltar if they are from certain third countries. That will continue to exist, so if you are going to come into Gibraltar and you are a third-country, visa-requiring national, you will still require your Gibraltar visa to enter via Gibraltar. If you require a visa to enter Schengen, you will have to apply to the relevant Schengen state for that visa to enter through Gibraltar.

There are rules about how you apply for Schengen short-term visas. I do not pretend to know the rules off by heart, but I know the broad-brush approach. You are able to apply either to the Schengen state through which you will enter the Schengen zone or to the Schengen member state in which you will spend most of the period in which you will be within the Schengen zone for 90 days. Broadly, that will continue to be the case.

Michael Llamas *indicated assent.*

Fabian Picardo: I am always heartened when I see the Attorney General nod his head when I reflect a piece of EU law. Separately, Gibraltar will require you to have a visa if you are coming from one of those third countries. To enter the Schengen zone through Gibraltar, if you are interested in going somewhere in Schengen other than Gibraltar and Spain, you might decide that it is not so attractive. If you enter Schengen through Malaga airport, for example, you will apply only for your Schengen visa, but if you are going to enter through Gibraltar and you are a third-country, visa-requiring national, you will require your Gibraltar visa and your Schengen visa, because Gibraltar is a separate immigration zone. That will continue to be the case.

Q85 **Anne Marie Morris:** That is very clear. Thank you. Do you see any problems with those who would seek to get into one or other of these countries illegally? What sort of checks and balances will there be to ensure that does not happen? It seems to me that you have put very



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clearly what the visa arrangements might be, but not everybody coming into countries will be looking to use those systems and so will be illegal immigrants, which right now is a very hot issue. How will your approach to immigration policy and visas and the checks that people have for visas be effective, given this free movement?

Fabian Picardo: Not free movement; fluidity. If you say free movement, you will get yourself interpreted by the Court of Justice, with direct effect, so let us be careful.

Anne Marie Morris: I am; you're right.

Fabian Picardo: This is fluidity that we are talking about. The issue of immigration is as vexed in Gibraltar as everywhere else. We understand that there are people who are escaping and want to access Europe as a continent—not just the European Union—and some find themselves in Gibraltar. Gibraltar does not create a particularly attractive place to find yourself if you are there illegally, because if you are illegally in Gibraltar it is a criminal offence and you are kept at Her Majesty's prison while the issues are resolved. We do not think we are creating a pull effect, but in relation to visas, we are only dealing with the airport or the port in Gibraltar, and I don't think that would be an area where people would want to find themselves.

In other words, if you want to arrive illegally in Europe, you are not going to do it through the airport that will require you to have two visas that you will fail to have. You will probably try to do it somewhere else. If you are arriving by sea in a way that is not regulated, in one of those small boats that leave the north African coast, you will try to arrive on a sandy beach, and Gibraltar's coast is craggy. We do have some fantastic beaches, as those who have been to Gibraltar know, but they are not easy to find at night. You would use Gibraltar usually as a landmark and you would sail left or right of Gibraltar to try to reach the beaches in Spain.

This is an issue on which we need to continue—I use the word continue advisedly—to work together with our Spanish colleagues. There is a lot of co-operation and there always has been. Despite some headlines that might show we are not working together on many issues, on this issue, which involves primarily the safety of life at sea, we work very well together with our Spanish colleagues and we always have. We need to continue doing that, first of all to save lives, and secondly to ensure that there is no pull effect created by those new arrangements to Gibraltar, because Gibraltar is not going to be a more attractive place to be an illegal immigrant tomorrow than it is today, and today it is pretty unattractive.

Anne Marie Morris: Thank you. That is a very good, clear answer.

Chair: Very interesting indeed.

Q86 **Craig Mackinlay:** Next year, we will have the ETIAS scheme more fully fledged and computerised and so on. This year, if you are a British passport holder going into France, Spain or anywhere else, you get a physical stamp, just like the old days. As I come through Gibraltar airport



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in the future, you will have your own immigration desk and there will be a Frontex-inspired desk, and—correct me if I am wrong—I will have to go through both to get into Gibraltar. By the very nature of coming into Gibraltar, I then have the right to go into the Schengen zone, because I will be recorded on the ETIAS computer. I do not want to go anywhere else in the Schengen zone; I just want to stay in Gibraltar for an extended period. Will my 90 days out of the 180 the ETIAS allows start ticking down for the days I am in Gibraltar, or can I enter Gibraltar and say, “No, I want nothing to do with the Schengen zone. I just want to stay in Gibraltar. I am staying with family.”? I don’t know how long a British citizen or normal UK passport holder is allowed to stay in Gibraltar. Am I now ticking down my 90 days by staying in Gibraltar? That is quite a significant change from historical arrangements, if that is the case.

Fabian Picardo: Indeed, the whole new mechanism that will be applied in the context of ETIAS is a step change for immigration into the Schengen zone. So that those who might be less versed in it understand, ETIAS is the European equivalent of ESTA. It is not required by those who require visas—they have visas—but those of us who do not require visas will require ESTAs to go to the US and now ETIASs to go into the Schengen zone. In the context of a British citizen who does not require a visa to enter the European Union, he will the none the less require an ETIAS, and to come to Gibraltar and to pass through the Frontex control you will require an ETIAS.

What we believe is possible is to have a Gibraltar-only visa, so that you can come just to Gibraltar in certain circumstances, but that would apply principally to third-country nationals who require a visa and who would come to Gibraltar for that purpose. This is not to reinvent the Schengen wheel from the outside of Schengen; the Schengen agreement already provides, I think in article 25 of its visa regulation, that each of the Schengen member states can issue visas of limited geographic application, which are just for the member state that grants them. For example, Germany can grant a visa for a person to arrive in Germany and spend time only in Germany. That person cannot legally go into France, but of course there is no control between Germany and France and they may do. These days, with electronic payments, credit cards, et cetera, if you did wander into France you would have to explain how it was that your credit card was being used there when you had no permission to be there. It is a risk that is tolerated by the member states of Schengen, which understand that it is very unlikely that it is going to give rise to any real problem, because of course the Germans are granting that visa of limited territorial application, checking that person against the same Schengen information system that they would have been checked against anywhere else, and they would not grant a visa of limited territorial application if there were a security issue with that person.

We believe that it is possible to grant Gibraltar-only visas in the same sort of context. It is true that you will have the freedom to move in and out of the Schengen zone undetected once you are in Gibraltar and through the



Frontex control, even if you say that you are only going to stay in Gibraltar.

Q87 Craig Mackinlay: What about Gibraltarians themselves?

Fabian Picardo: Gibraltarians will not be residents of the Schengen area, but it will be very difficult to say that they have been in the Schengen area for 90 days or less. Therefore, I imagine that the final conclusion of the negotiation will lead to an exemption from those provisions, at least in practice if not in the letter of the treaty. That is an issue in particular that is relevant in the context of ETIAS. I think it is common ground between all the parties that the Gibraltar residence permission—whether it is the Gibraltarians red ID card or any other residence permission granted by Gibraltar—would mean that you obviate the need for an ETIAS in the future, when they are required.

Q88 Craig Mackinlay: You understand my difficulty. We want a free-flowing border. You want a free-flowing border. Spain wants a free-flowing border. We have already created some differences in making a free-flowing border that could be an excuse for a Spanish border official to say, “Which one are you? Are you a Brit just going to Gibraltar, who didn’t want to go into the Schengen area? Are you a Gibraltarian, with an exemption, or not?” We are creating a multitude of issues again.

Fabian Picardo: That is the reality of what Schengen is. Even today, many different immigration statuses are recognised on arrival at Schengen frontiers, all of which give you different degrees of rights when you are within the Schengen zone. Some people are able to stay 90 days. Some people are able to stay more than 180 days. For example, there is something in Schengen called a long-term visa, which is alien to our law. We either have short-term visas or residence permits, but we do not have long-term visas. You can have different immigration rules applying, and as long as you can reconcile the basis on which people will be able to fluidly move, and you provide for that in an international treaty, I think it is possible to reach an arrangement that is satisfactory.

Chair: I think that is as far as we can take that one.

Q89 Greg Smith: Good afternoon. It has been incredibly helpful to hear the breadth of the evidence that you have given us on the myriad issues that are faced as part of the negotiation. Of course, it is all part of a negotiation, and notwithstanding your comment earlier, which was perfectly fair and reasonable—that you do not negotiate over the airwaves—can you give us a sense of where the negotiations are up to, particularly the round that you had earlier this month, and can you share with us a timescale of the best case and worst case that there could be on Gibraltar getting agreement with the EU as part of these negotiations?

Fabian Picardo: I want to make sure that I do not create hostages to fortune in the context of what I say, because I think it is as much in the interests of the people in the region around Gibraltar as it is in the interest of the people of Gibraltar, who I represent, that we work optimistically and realistically to deliver this agreement and the treaty that is necessary as



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soon as possible. I believe that it is possible for us to finalise agreement before the end of the year. Remember that what you had at the end of last year was an agreement between the United Kingdom and Gibraltar for one part, and Spain for the other part.

I am not going to give you an answer on “probable” or “possible”, but I do not think it is likely that we will have the text of a treaty by the end of the year. That is not to say that there isn’t the possibility that we will have moved to a high level of agreement between, now, the United Kingdom and Gibraltar, of the one part, and the European Union and Spain, of the other part. I think if we have reached that agreement and we are then at the stage where we are simply writing that down at an international legal level, we will have done as much as we can for the people of Gibraltar and the region in time to avoid reaching the end of this year without even having an agreement.

I think it is not impossible that we stretch every sinew to try to reach agreement before the end of the year. There are still some negotiating rounds to go between the United Kingdom and Gibraltar, and the European Union. While wanting to preserve the confidentiality of the negotiations, I am confident that the exchange that we have had to date would be described by all parties as positive and engaging, giving me the ability to tell you that we can continue to be optimistic that there is a route to a treaty. Are there reasons why we might all be able to throw our toys out of the pram and declare that we should not continue? Of course there are, but the maturity that is required of all the parties at the negotiating table requires us to continue to look at what we can agree and to find ways around the things that we cannot agree, in a way that does not cross any of what we have traditionally called our red lines, which include not just the fundamentals but areas of concern.

I think that we can get there. I think it is possible to see that way through. It is what the Gibraltarians pay me to do. If you know the history of Gibraltar, you will know about the Córdoba agreements. My predecessor in government, the former Chief Minister Sir Peter Caruana, wanted to try to do those arrangements, and it was right that he should want to try to do those arrangements after the joint sovereignty debacle and be looking to exploit the new détente that there was at that time with the Socialist Government in Madrid.

It is not about wanting now; it is about having to try, because our departure from the European Union makes the issues so much more complex. If there is an opportunity to reach an arrangement between the United Kingdom and the European Union in relation to Gibraltar, we must do our best to try, while always being very clear that there is a price that we will not pay and there are lines that we will not cross. I think people understand that. The fact that people are still at the table shows you that they understand it. They, too, must, in my view, see a route to a treaty that we would be able to do and they would be able to do. That fills me with joy and optimism.

Q90 **Chair:** That is very helpful indeed. This will be the last question. First, in



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relation to the complexity that you have described, I would say that they were getting value for money in Gibraltar—from what we have heard this afternoon—in having you in charge of these negotiations. That would be my view. My second and last point is that I would like to have an indication from you as to how you think you could ensure that any agreement concluded between the EU and the UK in respect of Gibraltar has the support of the Gibraltar people. It is the democratic question.

Fabian Picardo: I sincerely appreciate your very kind words; thank you very much.

Let's look at how the issue of these arrangements first comes into play. You may not know that in 2013, when we were suffering those awful five or six-hour queues imposed by the Spanish Government, and David Cameron called the Barroso Cabinet and asked that the Commission do an inspection of the Gibraltar border, one of the things that I spoke to then DG Home Commissioner Cecilia Malmström about was the possibility of Gibraltar entering Schengen then, which might have obviated all these issues.

The Commission were actually very supportive. They said, "Well, look, obviously you've got to get Spain's agreement." In those days, as you will recall, being members of the European Union—when the Schengen acquis had been created back in the 1990s, under article x and protocol y any part of the European Union that was not in the Schengen area and that wanted to become part of it even if it was not a member state, in particular a territory for the external relations of which a member state was responsible, which was a European territory, required unanimity of the member states of Schengen, not a qualified majority. As you know, Sir Bill, there was only one such territory. It was a structure designed to give Spain a veto on Gibraltar joining Schengen, but the Commission was saying "Well, we think this is a good way of resolving this and it might work."

I raised that issue then with David Lidington, who was then Minister for Europe—a great friend, who was hugely supportive throughout that difficult period. The Foreign Affairs Committee actually raised the issue in paragraph 43 of their 2014 report, which is entitled—I will never forget—"Gibraltar: Time to get off the fence". They said they thought this was a potential solution to these issues. That was in 2014-15. Her Majesty's Government responded to the FAC saying that they were prepared to explore this. I launched a consultation in Gibraltar and, that year, we won a general election with 68% of the vote.

We have moved on since then, of course—there has been lot of water under the bridge. There was an election in 2019, with all of the issues relating to the withdrawal agreement ventilated. No treaty that would be entered into by the United Kingdom in respect to Gibraltar, with the European Union, which is negotiated in part by the Government of Gibraltar, I think should be assented to by the United Kingdom without the Gibraltar Parliament expressing its consent that that should be the case—obviously, by a majority. It would be impossible to suggest that a



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Parliament can only approve things by unanimity; a Parliament approves things by a majority.

It is important that the Gibraltar Parliament should be able to debate any treaty that is proposed in respect of Gibraltar, and should, by motion or resolution, express its view whether it is a good treaty that should be entered into or not. I would not take a treaty to the Gibraltar Parliament on a motion or resolution if it was not approved by my Cabinet. You can see that all of those filters would apply before Her Majesty's Government of Gibraltar, under my hand, would express to Her Majesty's Government of the United Kingdom that the people of Gibraltar wished to see that treaty entered into.

That is, to a very great extent, to mirror the mechanisms that have been in place, in this place, in respect of the approval of the TCA for the United Kingdom. There will be all of those moments of the application of democracy in the heart of Gibraltar's democracy, which is in the Gibraltar Parliament, for different views to be expressed, or for unanimous views to be expressed, in respect of the treaty, if appropriate.

Chair: I think that brings things to a very good conclusion. I will now bring the meeting to an end. Thank you very much for coming. It has been a bit of a masterclass, if I may say so, and I would be concerned for the negotiators on the other side.

Fabian Picardo: You are very kind.

Chair: Thank you very much indeed.