HM Government of Gibraltar—written evidence
(PST0027)

1. Her Majesty’s Government of Gibraltar (HMGoG) has been asked for its perspective on Gibraltar’s involvement in treaty-making processes, on the degree of consultation and involvement that exists, and the expectations HMGoG has for future engagement on treaties.

2. HMGoG wishes to highlight two issues of concern. They relate to:

(a) the constitutional basis for the consultation process; and

(b) the use of entrustments as a possible means of enhancing Gibraltar’s capacity for external action on regional issues.

The constitutional basis for the consultation process

3. Foreign and Commonwealth Office guidelines on the extension of treaties to overseas territories (published 19 March 2013) state:

When the UK is involved in the negotiation or signature of any treaty which could apply to the Overseas Territories it is important that they are fully consulted at the earliest stage. The Overseas Territories must then be allowed a proper length of time to consider the implications of having any treaty extended to them.

4. In practice, there is meaningful and productive consultation between the governments of the UK and Gibraltar in relation to treaty-making. HMG officials regularly engage with their counterparts in HMGoG on matters relating to the extension of the territorial scope of treaties to Gibraltar, and on matters concerning the domestic implementation of treaties in Gibraltar. These discussions have intensified in the context of Brexit, as the UK looks to replace and replicate EU-third country agreements with successor agreements, or accede in its own right to agreements that the EU is currently a party to, and extend many of those agreements to Gibraltar.

5. The degree of consultation that currently exists is welcome, especially when one considers the far-reaching effects of an ever-increasing volume of treaty provisions in the domestic legal order. Meaningful consultation ensures that Gibraltarians – indirectly through their elected representatives – can have some influence over the application and implementation of treaties in the domestic legal order. The consultation process thus confers a measure of democratic legitimacy on the treaty-making process insofar as it relates to
Gibraltar. The modern practice is consistent with the trend towards greater levels of parliamentary scrutiny of treaties in the UK.

6. In the spirit of such developments, HMGoG would like to see the consultation process placed on a firmer constitutional footing. HMGoG notes that it is a constitutional requirement in the Cayman Islands for the Governor, unless instructed otherwise by a Secretary of State, to obtain the agreement of the Cabinet before he or she enters into, agrees or gives final approval to any international agreement, treaty or instrument that would affect internal policy or require implementation by legislation in the Cayman Islands (see Hendry and Dickson (Bloomsbury 2018) p.282, referring to section 55(3) of the Cayman Islands Constitution). Gibraltar’s 2006 Constitution contains no such provision, and HMGoG sees no reason why it should not. Gibraltarians are no less affected than Cayman Islanders by the effects of international agreements in their respective domestic legal orders. There should be a formal constitutional mechanism that recognizes that, other than in exceptional circumstances, the provisions of a treaty agreed by the UK can only enter Gibraltar’s domestic legal order with the consent of HMGoG.

**Entrustments**

7. Gibraltar lacks the treaty-making capacity of a state, but that does not mean that Gibraltar is not an international actor. HMGoG Ministers are constitutionally competent in many spheres of activity that depend on international cooperation and are governed by international legal rules: from transport, to telecommunications, to finance, to data protection, to the protection of the environment.

8. When matters which are the responsibility of HMGoG Ministers arise ‘in the context of the European Union’, they remain the responsibility of HMGoG Ministers notwithstanding the UK’s responsibility for Gibraltar’s compliance with EU law (see section 47(3) of the Gibraltar Constitution). After Gibraltar leaves the EU, many matters arising ‘in the context of the European Union’ – for example, matters arising in the context of the future relationship between Gibraltar and the EU – will continue to be the responsibility of HMGoG Ministers.

9. HMGoG has an interest in preserving and developing its capacity for external action in a regional context, where necessary by engaging with non-EU bodies and non-EU treaty regimes. One way to achieve this would be for the UK to grant Gibraltar a general entrustment covering aspects of external affairs in a regional context, regardless of whether such matters arise ‘in the context of the European Union’.
10. This could be highly effective in an area like environmental protection, where regional cross-border cooperation is indispensable, and where regulatory gaps resulting from Brexit might be plugged by Gibraltar’s participation in non-EU regional regulatory frameworks. With the benefit of a general entrustment permitting external action in regional environmental matters, HMGoG would have a measure of freedom to engage with regional bodies and governments on issues which are of direct concern to Gibraltar, but may not be priority issues for the UK.

11. The entrustment mechanism has been used successfully in relation to Gibraltar in recent years: as is well known, Gibraltar was granted a general entrustment in 2003 to enter into Tax Information Exchange Agreements with EU and OECD countries. Moreover, as Hendry and Dickson note (at p.286), the practice of granting entrustments to British Overseas Territories is becoming more common:

*The number of entrustments granted has increased significantly in recent years. Between 1980 and 1993, around a dozen entrustments were granted, between 1993 and 2007 more than three times that number were granted, and in 2009 alone, 13 were granted. Most entrustments are granted to Caribbean territories and Bermuda, which is mainly a reflection of the extent of integration and cooperation in the region.*

12. Like the Caribbean, the Mediterranean region is highly integrated and many spheres of activity depend on intense cross-border cooperation and shared rules. Gibraltar’s regional interests are as pressing and as deserving of promotion as the regional interests of other Overseas Territories.

13. The British Virgin Islands, the Cayman Islands, Montserrat and the Turks and Caicos Islands were granted general entrustments in 2007, 2009, 2010 and 2013 respectively. Bermuda’s general entrustment of 1968 was update in 2009. Gibraltar is not inherently less capable than other British Overseas Territories when it comes to discharging its international obligations in a regional context; indeed, Gibraltar has a stellar record of compliance with its EU obligations, and section 47(3) of the Gibraltar Constitution reflects the trust that HMG has in HMGoG to take responsibility over external affairs in matters arising in the context of the EU. While Gibraltar’s capacity for external action in a regional context may be constrained in important respects by Spain (for example, Spain seeks where possible to block Gibraltar’s participation in regional bodies), this is not a principled basis for treating Gibraltar differently to other British Overseas Territories when it comes to the capacity for autonomous external action.
14. HMGoG would therefore welcome an opportunity to engage with HMG on the possible grant of a general entrustment resembling those entrustments granted to other British Overseas Territories, as a means of addressing some of the regional challenges that Gibraltar faces.

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