

The Falkland Islands and the UK v. Argentina Oil Dispute:

Which Legal Regime?

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Abstract

Following Argentina's withdrawal from the 1995 Joint Declaration concluded with the UK for the common exploration and exploitation of hydrocarbons in the Falklands, the sovereignty dispute over the Islands has recently re-emerged as an economic 'struggle' for access to the North Falklands Basin's oil deposits. The paper analyzes the states' pending sovereignty dispute and their present claims, from the perspective of the exploitation of the Islands' natural resources. The lawfulness of uncoupling the treatment of title to territory and to natural resources, particularly in an area where sovereignty is disputed has been examined in the present paper. By considering the UN practice on the Falklands' case, it is argued that a separate treatment is not per se unlawful, provided that all the parties having a legitimate sovereign claim over the territory are involved. The Joint Declaration is employed as a model to provide evidence in this regard. In addition, the paper discusses the unilateral conduct of the parties as a possible alternative to a cooperative agreement. As the UK is currently acting unilaterally with regard to the access to the oil deposits in the Islands, the implications of its conduct are also reviewed.

A. Introduction

The dispute between Argentina and UK for the sovereignty over the Falkland Islands is not new. It has involved the two States since 1833, when they initially made competing claims of sovereignty over the Islands. Yet, the controversy has recently re-emerged with regard to the access to the oil deposits located in the Falklands/Malvinas' seabed.¹

This contribution aims to analyze the controversy from the point of view of the exploitation of the Falklands/Malvinas' natural resources, which presently constitutes the key interest of both States. The right to have access to the Islands' oil,² indeed, is inherently linked to the pending sovereignty dispute, being the availability of a territory's natural wealth a corollary of the sovereign title to the territory concerned. The Falklands/Malvinas' dispute is an interesting case in which the title to natural resources is

¹ Argentina traditionally refers to the Falkland Islands as "Las Malvinas"; as a consequence the term "Falklands/Malvinas" will be employed in this article.

² Reference is here made to the Principle of Permanent Sovereignty over Natural Resources (PSNR), which will be further discussed below.

uncoupled from the title to territory. Hence, by analyzing the attempts already undertaken by the parties in order to settle their dispute, and by resorting to useful international law tools, this paper will warn about the possible repercussions that the current natural resources' exploitation might have on the prospective relations between Argentina and the UK.

After a brief overview of the parties' historical and modern claims, the lawfulness of separating the treatment of title to territory and to natural resources, together with its implications for the oil deposits in the maritime area around the Falklands/Malvinas, will be analyzed. More precisely, the paper will discuss the options available for regulating the access to the Falklands/Malvinas' natural resources. In this regard, the 1995 Joint Declaration for Hydrocarbons, that Argentina terminated in 2007, will serve as a model to examine the outcomes of a cooperative approach. Moreover, the decision to act unilaterally is also considered as a choice available to the parties: since the UK seems to follow this strategy, the analysis will be conducted in light of the possible effects that this conduct might have on the title to natural resources in the Falklands/Malvinas. In conclusion, the paper argues that violations of the title to natural resources seems more problematic than violations of the plain title to territory, particularly given the exhaustible nature of natural wealth. Hence, the present conduct of the UK seems to aggravate the status of the dispute by irreversibly impairing Argentina's title to natural resources.

B. The Dispute: Historical and Modern "Warfare"

The ongoing dispute over the Falklands/Malvinas' sovereignty began in 1833, when the Islands came under *de facto* British control. Argentina's claim is based on territorial rights inherited from Spain, which exclusively administered the Malvinas from 1774 to 1810.³ It has to be noted that prior to the Lexington incident⁴ involving Argentina and the United States, the

³ L. Freedman, *The Official History of the Falklands Campaign*, Vol. I (2005), 6.

⁴ *Id.*, 7. In 1823 the Argentine Governor Vernet received a concession on East Falkland for fishing and grazing rights. Seeking to establish a settlement on the Islands, Vernet decided to enforce Argentine fishing regulations by seizing three American ships. The USS warship Lexington was in the River Plata at that time: it sailed to the Islands, and after having destroyed all military installations, and put most inhabitants under arrest, the American Captain Duncan declared the Islands free of all government. As a result, relations between United States and Argentina were severed; moreover the United States denied Argentine jurisdiction over the Islands, implicitly recognizing the British sovereignty.

controversy was latent. The UK decision to re-open the contention and 'reassert' its sovereign title (1832-33),⁵ indeed, resulted from the American recognition of the British sovereignty over the Malvinas, as a consequence of the incident.

The UK exercised *de facto* sovereign rights over the Falklands/Malvinas since 1833. However, Argentina continuously protested against this situation, but no satisfactory answer or change in the British attitude was reached.⁶ After the Argentine failure to obtain a review of the situation in the Falklands/Malvinas, a new controversy with the UK started in 1884, when Argentina released a map in which the Islands appeared as a part of its territory.⁷ The UK continuously rejected Argentina's proposal to settle the dispute by peaceful means or before an arbitral tribunal.⁸ Formally, Argentina protested again in 1908; and then, during the two world wars, the controversy over the Islands continued without any change in the attitudes of the parties.⁹ Hence, after ineffective political pressure and fruitless negotiations, Argentina invaded the Falklands on April 2, 1982.

As of this military intervention, the territorial claims of both Argentina and the UK have not changed.¹⁰ Both States assert their sovereign title over the Falklands/Malvinas, and none of them seems willing to compromise or retreat such positions, as will be shown below. This is important particularly given that the General Assembly (GA) has repeatedly invited the States to solve their dispute, and particularly the GA Resolution 31/49 calls the Governments to refrain from unilateral actions that would modify the situation prior to a final settlement of their controversy.¹¹

Hence, given the contested sovereignty, if the States are to exploit the Falklands/Malvinas' resources, there are two viable paths. On the one hand,

⁵ *Id.*, 8.

⁶ R. Dolzer, *The Territorial Status of the Falkland Islands (Malvinas): Past and Present* (1993), 137, 139: Reference is made to the protests of 22 January 1833, 17 June 1833, and also 29 December 1934. Moreover, it is noted that the conduct of a state subsequent to the development of an adverse territorial situation is important for the development of territorial status.

⁷ *Id.*, 140.

⁸ *Id.*, 141.

⁹ *Id.*, 142.

¹⁰ Freedman, *supra* note 3, 11. The claim of the UK is based also on the right to self-determination of the islanders, the illegitimacy of the use of force, and, the right to self-defense under art. 51 of the UN Charter; On the status of the Falkland Islands see, Dolzer, *supra* note 6, 170.

¹¹ GA Res. 31/49, 1 December 1976, para. 4.

they could cooperatively approach the problem, in order to jointly benefit from the wealth of the Islands;¹² on the other hand, each of them may unilaterally intervene, but such conduct might be problematic from the perspective of its compliance with international law.

A cooperative attempt for a joint exploitation of the Islands' natural resources was indeed carried out in 1995, when the States concluded a Joint Declaration for Hydrocarbons.¹³ The document resulted from the effort to set aside the – unresolvable – sovereignty issue, while laying the foundations for a cooperative relationship in the access to oil within a Special Co-operation Area that the Declaration identified. Unfortunately, the Declaration failed with the Argentine withdrawal in 2007.¹⁴ The reasons for the Argentine withdrawal seem related to the lack of exploitable resources in the Area; new oil deposits, conversely, have recently been discovered in the North Falklands Basin where the British corporations are currently performing their activities.¹⁵

How may this unilateral action be interpreted, in light of the contested sovereignty nature of the territory concerned? What consequences does this unilateral behavior cause to the parties' claims – and, eventually, rights –, according to international law?

The following sections will be developed in light of these questions. Firstly, the claims of the two states will be analyzed by considering the international law rules concerning the formation of the title to territory. Then, the Joint Declaration for Hydrocarbons will be studied: the Declaration will serve as a model in view of which considering the present controversy and evaluating its possible implications. Indeed, the Declaration constitutes an attempt to separate the treatment of the title to territory from

¹² As will be clarified, this cooperation is in compliance with international law to the extent that no other party can legitimately claim a sovereign title over the Falklands/Malvinas.

¹³ British and Argentine Governments, 'Joint Declaration, Cooperation Over Offshore Activities in the South West Atlantic' (27 September 1995) available at <http://www.falklands.info/history/95agree.html> (last visited 13 April 2011). On bilateral joint development agreement see D. M. Ong, 'The Progressive Integration of Environmental Protection within Offshore Joint Development Agreements', in M. Fitzmaurice & M. Szuniewicz (ed.), *Exploitation of Natural Resources in the 21st Century* (2003), 113-141.

¹⁴ International Boundaries Research Unit (IBRU), 'Claims and Potential Claims to Maritime Jurisdiction in the South Atlantic and Southern Oceans by Argentina and the UK' (24 June 2010) available at http://www.dur.ac.uk/resources/ibru/south_atlantic_maritime_claims.pdf (last visited 13 April 2011), note 4.

¹⁵ *Id.*

the title to natural resources, and therefore it deserves a closer scrutiny through the international law lenses. Lastly, the prospective effect of the current conduct of the parties on their dispute over sovereignty in the Falklands/Malvinas will be commented upon.

C. The Current Developments and the Status of the Parties' Claims

The dispute between the UK and Argentina involves the maritime areas around the Falklands/Malvinas: the parties have overlapping claims in relation to the Exclusive Economic Zone (EEZ)¹⁶ and to the Continental Shelf, to which Argentina and the Islands are respectively entitled.¹⁷ Gas and oil deposits have recently been discovered in the North Falklands/Malvinas Basin, located within the Islands' Exclusive Economic Zone,¹⁸ and it is over this area that the current tensions are directed.

The recent developments of the dispute followed the arrival in the Falklands/Malvinas of an oil exploration rig, the Ocean Guardian. The rig was hired by the British company Desire Petroleum, with the aim to drill up to ten wells in the North Falklands/Malvinas Basin.¹⁹ The Argentine

¹⁶ “The EEZ can briefly be defined as a maritime zone beyond and adjacent to the territorial sea extending up to 200 nautical miles (‘nm’) from the baseline of a coastal State where the coastal State has sovereign rights over the living and non-living resources of the superjacent waters and its seabed and subsoil – rights of an essentially economic nature – whereas in that zone other States enjoy the freedoms of navigation and overflight (see Art. 56 UN Convention on the Law of the Sea)”, D. Nelson, ‘Exclusive Economic Zone’ (March 2008) available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1156&recno=68&letter=E (last visited 13 April 2011), para. 1.

¹⁷ IBRU, *supra* note 14, note 3.

¹⁸ IBRU, *supra* note 14, note 4.

¹⁹ BBC, ‘Q & A: The Falklands oil row’ (17 February 2010) available at <http://news.bbc.co.uk/2/hi/business/8520038.stm> (last visited 13 April 2011); BBC, ‘Oil drillings off Falkland Islands ‘next week’’ (17 February 2010) available at http://news.bbc.co.uk/2/hi/uk_news/scotland/highlands_and_islands/8519694.stm (last visited 27 April 2011); MercoPress, ‘Falklands’ Desire Petroleum announces Drillings of sixth wells has begun’ (30 March 2011) available at <http://en.mercopress.com/2011/03/30/falklands-desire-petroleum-announces-drilling-of-sixth-well-has-begun> (last visited 27 April 2011); Furthermore, in contrast to the steady economic decline that Argentina is experiencing, in May the British company Rockhopper discovered an oil deposit at about 137 miles off the north coast of the Islands, see T. Webb, ‘UK firm’s Falklands oil find sparks mix of hopes and fears’ (6 May 2010) available at

Government reacted by imposing a shipping ban on all vessels sailing between Argentina and the Falklands/Malvinas (or to them through Argentine waters), in order to make drillings more complicated and expensive for foreign firms.²⁰ Moreover, Argentina accused Britain of having breached a UN resolution forbidding unilateral development in disputed waters,²¹ and protested to the UN Secretary General, who reiterated its availability to perform good offices, provided that both parties agree.²² To counteract the Argentine ban, the UK re-asserted its sovereignty over the Falklands/Malvinas, specifying that the application of law in and around the Islands is a matter for the islanders.²³

The underlying rationale of these claims, and the core of the Falklands/Malvinas dispute, is the title to territory, whose attribution is still pending and contested between the States.

According to Brownlie, the term “sovereignty” denotes the “legal competence which a state enjoys in respect of its territory”²⁴, and it encompasses both the concept and the essence of title; moreover, De Visscher argues that it is the “firm configuration of its territory furnishes the State with the recognized setting for the exercise of its sovereign powers”²⁵. From a different perspective, the title to territorial sovereignty allows a

<http://www.guardian.co.uk/uk/2010/may/06/falklands-oil-discovery-rockhopper> (last visited 13 April 2011).

²⁰ BBC, *supra* note 19.

²¹ The Argentine President is referring to GA Res. 31/49, 1 December 1976, para 4.

²² F. Elliott & H. Strange, ‘Escalating Falklands oil dispute goes to UN’ available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7038582.ece (last visited 13 April 2011).

²³ UK Government, ‘Bryant: ‘No Doubts about Our Sovereignty over Falkland Islands’’ (23 February 2010) available at <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=21811579> (last visited 13 April 2011); The UK had reaffirmed its sovereignty over the Falkland Islands during UN GA, Fourth Committee, Remaining 16-Non-Self-Governing Territories on United Nations List are 16 too many’, GA/SPD/422, 5 October 2009, available at <http://www.un.org/News/Press/docs/2009/gaspd422.doc.htm> (last visited 13 April 2011); see also UN GA, Fourth Committee, A/C.4/64/SR.2, paras 30-33, “The Falklands’ Government stated that supplies were coming from Aberdeen, not Argentina, and therefore the shipping ban will have no effect”, The Economist, ‘Oil and troubled waters – Drilling a vein of nationalism’ (18 February 2010) available at <http://www.economist.com/world/americas/displaystory.cfm?storyid=15546482> (last visited 13 April 2011).

²⁴ I. Brownlie, *Principles of Public International Law*, 7th ed. (2008), 119.

²⁵ C. De Visscher, *Theory and Reality in Public International Law* (1957), 197.

delimitation of the exercise of the sovereign power, since “no state may lawfully exercise its sovereignty within the territory of another”²⁶.

International law recognizes various modes as creating a title to territory;²⁷ yet, the actual effective control over the territory is the most relevant element.²⁸ A valid and substantiated title implies that the state in which it is vested can vindicate it before a Court and also be enabled to recover a possession of which it has been deprived:²⁹ this means that the title must be able to exist even when divorced from possession.³⁰ Nonetheless, the extent to which sovereignty over a territory is also claimed by other parties influence the formation of a valid title:³¹ a long-continued undisturbed possession - i.e.: acquisitive prescription *strictu sensu*³² - ,

²⁶ R. Y. Jennings, *The Acquisition of Territory in International Law* (1963), 2; *Island of Palmas (The United States v. The Netherlands)*, 2 U.N. Rep. Intl. Arb. Awards 829,, 839 [Island of Palmas Case].

²⁷ Occupation, prescription, cession, accession or accretion, subjugation/conquest, Brownlie, *supra* note 24, 133-158. However, Lauterpacht clarifies that “the acquisition of territory by an existing State and member of the international community must not be confused, first, with the foundation of a new State.”, L. Oppenheim & H. Lauterpacht, *International Law: a Treatise*, Vol. 1: Peace (1995), 544.

²⁸ Jennings, *supra* note 26, 4. The author refers also to Roman Law, which requires both *corpus* and *animus*; *Island of Palmas Case*, *supra* note 26, 829, 867.

²⁹ *Titulus est justa causa possidendi quod nostrum est*.

³⁰ Jennings, *supra* note 26, 5.

³¹ *Legal Status of Eastern Greenland (Denmark v. Norway)*, PCIJ Ser. A/B, No. 53, 1933, 46.

³² Acquisitive prescription *strictu sensu*, as opposed to acquisitive prescription *tout court*, refers to the case in which “the actual exercise of sovereign rights over a period of time is allowed to cure a defect in title”. In general terms, acquisitive prescription is linked to ‘immemorial possession’, that is a so well-established possession “that its origins are both beyond doubts and unknown”, Jennings, *supra* note 26, 21; see also, D. H. N Johnson, ‘Acquisitive Prescription in International Law’, in M. N. Shaw (ed.), *Title to Territory* (2005), 294-295: acquisitive prescription has been defined as “the means by which, under international law, legal recognition is given to the right of a state to exercise sovereignty over land or sea territory in cases where that state has, in fact, exercised its authority in continuous, uninterrupted, and peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected states [...] have acquiesced in this exercise of authority. Such acquiescence is implied in cases where the interested and affected states have failed within a reasonable time to refer the matter to the appropriate organization or international tribunal or [...] have failed to manifest their opposition in a sufficiently positive manner”; see also P. K. Menon, ‘Title to Territory: Traditional Modes of Acquisition by States’, 72 *Revue de Droit International et de Sciences Diplomatiques et Politiques* (1994), 1.

indeed, is considered to favor the creation of a good title.³³ Kohen argues that the original condition of the territory concerned could also play a role in the formation of a title to territory: it is on this ground, for instance, that he rejects the British claim over the Falklands, supporting instead the Argentine one.³⁴

The case of the Falklands/Malvinas, hence, is evidently a situation where the attribution of the legal title to territory is contested.³⁵ Whilst the Argentine counter-claim rests on the title inherited as a result of the state's declaration of independence from Spain,³⁶ the UK resorts to the islanders' right to self-determination to found its legitimate title. More precisely, Argentina not only claims a right to territorial integrity and the British correlative duty to permit the reunion of the Islands with the Argentine mainland, but it also contests the attribution of the right to self-determination to the islanders.³⁷ According to Argentina, in the Falklands/Malvinas there is no colonized population, but rather a transplanted British community, which does not conform to the subjugated or dominated people criterion as set forth in the GA Resolutions on the point. Argentina defines them as "a British population transplanted with the

³³ Jennings, *supra* note 26, 21 and 25, where the author makes reference to the attitude of third states toward possession in a disputed case; M. G. Kohen, *Possession Contestée et Souveraineté Territoriale* (1997), 192, emphasizing that the term "title" encompasses both a situation based on a juridical entitlement and on "faits de possession".

³⁴ Maintaining that the possession acquired after the qualification of the territory as 'non self-governing', or the changes in the possession after a critical date, could not justify the acquisition of sovereignty, Kohen considers that the Administering Power itself cannot invoke the possession as it followed to the qualification of the territory as a non self-governing entity, see, Kohen, *supra* note 33, 194-195.

³⁵ Kohen, *supra* note 33, 193, where it is argued that the claims that "effective possession" outweighs legal titles and that it could reverse the owner of the title to territory both signal a case of "contested possession".

³⁶ UN GA, Special Committee of 24 on Decolonization, 'Statement by Councilor Janet Robertson, Legislative Council of the Falkland Islands' (12 June 2008) available at <http://www.falklands.gov.fk/site/legco/un-speech-2008-robertson.pdf> (last visited 18 April 2011).

³⁷ Permanent Mission of Argentina to the UN, 'Statement made by Argentina Minister of Foreign Affairs, International Trade and Worship at the United Nations' (18 June 2009) available at <http://www.un.int/argentina/statements/miscelaneous/taiana2009.htm> (last visited 27 April 2011). Webb, *supra* note 19; M. G. Kohen, 'Alternativas Para la Solucion del Conflicto por las Islas Malvinas', 7 *Revista de Estudios Internacionales* (1986) 4, 1145.

intention of setting up a colony”³⁸, and thereby addresses the *mala fides* in the British conduct. In addition, Argentina founds its claim on paragraph 4 of GA Resolution 31/49, which states: “[The General Assembly] calls upon the two parties to refrain from taking decisions that would imply introducing unilateral modifications in the situation while the Islands are going through the negotiation process”³⁹. This position was reiterated at the UN Special Committee on Decolonization, where Argentina described the purported British sovereignty over the Malvinas as a “colonial injustice”⁴⁰.

The UK, conversely, affirms its role as the Falklands/Malvinas’ Administering Power,⁴¹ and points to the islanders right to self-determination which shields their will to remain under the British administration.⁴² The Falklands/Malvinas’ islanders, indeed, support the UK position and, by perceiving themselves as a people, they state their right to self-determination in the opening of their Constitution, recalling specifically the UN Charter and Common Art. 1 of the 1966 Covenants.⁴³ In addition, the Falklands/Malvinas’ Constitution expressly qualifies the Islands as a British Overseas Territory, internally self-governed but under British Administration.⁴⁴ As will be noted, the Falklands/Malvinas’ population is

³⁸ UN GA, Special Committee on Decolonization adopts draft Resolution Reiterating Need for Peaceful, Negotiated Settlement of Falkland (Malvinas) Question, UN Doc GA/Col/3140, 15 June 2006.

³⁹ GA Res. 31/49, 1 December 1976, para. 4.

⁴⁰ The Economist, *supra* note 23; Permanent Mission of Argentina to the UN, *supra* note 37.

⁴¹ UK Government, *supra* note 23; UN GA, Most of World’s Population no Longer Lives under Colonial Rule, but United Nations Decolonization Mission Still Unfulfilled, Fourth Committee Told as Debate Begins, UN Doc GA/SPD/371, 8 October 2007; UN GA *supra* note 23.

⁴² UN GA, *supra* note 36; see also, Falkland Islands Government, Department of Mineral Resources, <http://www.falklands-oil.com/> (last visited 18 April 2011); The UK describes its relationship with its Overseas Territories as based on partnership, shared values, and the right of each territory to choose whether to remain linked to the UK or not; as for the *erga omnes* nature of the right to self-determination see *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90, 102 [East Timor Case]; See also, *Barcelona Traction, Light and Power, Limited*, Judgment, ICJ Reports 1970, 3 [Barcelona Traction Case].

⁴³ International Covenant on Civil and Political Rights (ICCPR), 19 December 1966, 999 U.N.T.S. 171 and 1057 U.N.T.S. 407; International Covenant on Economic, Social and Cultural Rights (ICESCR), 19 December 1966, 993 U.N.T.S., 3.

⁴⁴ UN GA, Special Committee of 24 on Decolonization, Statement by Councilor Janet Robertson: as observed by the Legislative Council of the Islands, it is thanks to this mixed status that the political will of the Islands’ people is fully implemented; See

not perceived as ‘people’. In the UN Resolutions the islanders are treated as the object of a conflict between the UK and Argentina, rather than as an autonomous party, entitled to self-determination.⁴⁵ This approach is shared by Argentina which rejects the applicability of the principle of self-determination to the Falklands/Malvinas’ population, and thereby their peoplehood.

The international community seems divided upon the sovereignty dispute between Argentina and the UK. The position of Argentina finds support among the Latin American states, which backed Argentine “legitimate rights [...] in the sovereignty dispute with Great Britain”⁴⁶ during the Rio Group Summit; whilst, interestingly, the United States seem not willing to side in favor of the UK,⁴⁷ whose position finds however an indirect recognition by the members of the European Union through the inclusion of the “Falkland Islands” among the “Association of Overseas Countries and Territories” regime, established in the newly entered into force Treaty of Lisbon.⁴⁸

As known, sovereignty comprises a number of liberties in terms of internal organization and disposal of territory.⁴⁹ Among its corollary, the

also, Falkland Islands Government, Department of Mineral Resources, <http://www.falklands-oil.com/> (last visited 18 April 2011).

⁴⁵ GA Res. 2065 (XX), 16 December 1965; GA Res. 3160 (XXVIII), 14 December 1973; GA Res. 31/49, 1 December 1976; GA Res. 37/9, 4 November 1982; GA Res. 38/12, 16 November 1983; GA Res. 39/6, 1 November 1984; GA Res. 40/21, 27 November 1985; GA Res. 41/40, 25 November 1986; GA Res. 42/19, 17 November 1987; GA Res. 43/25, 17 November 1988.

⁴⁶ Elliott & Strange, *supra* note 22; see also, R. Carroll, ‘Latin American leaders back Argentina over Falklands oil drilling’ (24 February 2010) available at <http://www.guardian.co.uk/uk/2010/feb/23/argentina-uk-falkland-row-oil> (last visited 14 April 2011); see also, UN GA, Fourth Committee, A/C.4/64/SR.2, *supra* note 23: More precisely, Uruguay (paras 11-13) maintains that the sovereignty dispute over the Falklands involves Argentina and UK as the sole parties. It considers that the principle of self-determination cannot be applied in this case, since in the Malvinas there is no colonized population, but rather a transplanted British community. Venezuela (para. 35) as well declares its support for the legitimate sovereign rights of Argentina. Furthermore, Uruguay, Venezuela and Mexico (paras 14-18) urge the Governments of Argentina and the United Kingdom to resume negotiations, to find a peaceful and just solution to their sovereignty dispute.

⁴⁷ G. Whittell & J. Bone, ‘US refuses to endorse British sovereignty in Falklands oil dispute’ (25 February 2010) available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7040245.ece (last visited 14 April 2011).

⁴⁸ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, 2007/C 306/01, Part 4, Art. 198.

⁴⁹ Brownlie, *supra* note 24, 106.

right to exploit the natural resources and wealth, is the most interesting for the study that this contribution aims to develop.⁵⁰ Is it possible, and to what extent, to exploit the natural resources of a territory whose sovereignty is contested?

The case of the Falklands/Malvinas seems to advocate for a positive answer to these questions; yet, this asks for a further analysis under international law. After the failure of a cooperative agreement for the exploitation of hydrocarbons in the lately-discovered, resource-void Special Cooperation Area, the situation in the Falklands/Malvinas ended in a stalemate, interrupted only by English unilateral, recent activity in the resource-rich North Basin. Is this legitimate, provided that the UK only asserts its sovereign title, but is not lawfully vested with it?

Following a brief description of the object of the present tensions, the interplay between sovereignty and the title to natural resources will be commented upon.

D. A Quick Insight on the Matter of the Dispute: the Falkland Islands' Oil

The concrete object of the latest controversy over the Falklands/Malvinas is located in the North Basin, within the Islands' EEZ, in the form of exploitable oil deposits. Among the companies drilling in the area, one can enumerate Desire Petroleum, Rockhopper and BHP Billinton, which are all British firms.

Rockhopper found a deposit of “high quality reservoir interval with very good porosity and permeability”⁵¹. Provided that the reservoir's quality is as estimated, the company declared to be looking “at a discovery of maybe a couple of hundred million barrels”⁵². On the average amount of the reserves, the opinions are contrasting: a conservative estimate suggests a bare minimum viable recovery of 3.5 billion barrels of oil; the estimate of

⁵⁰ Reference here is made to the Principle of Permanent Sovereignty over Natural Resources which will be forthwith commented.

⁵¹ E. Sefton, ‘High quality’ Falklands oil find raises tensions’ (10 May 2010) available at <http://www.thefirstpost.co.uk/63121,news-comment,news-politics,high-quality-falklands-oil-find-raises-tensions-with-argentina-rockhopper> (last visited 14 April 2011).

⁵² *Id.* For comparison, Saudi Arabia is estimated to have reserves totaling 264 billion barrels.

the British Geological Society suggests around 60 billion barrels.⁵³ What is certain, however, is that the payback for the UK in case of success will be significant, particularly in terms of corporations' taxes and royalties.⁵⁴ By next year, British Borders & Southern will be performing exploration activities in the North Falklands/Malvinas; and, Argus Resources as well is planning to drill for oil off the Islands.⁵⁵

The British 'race for oil' seems therefore unconstrained: Argentina, which is facing a severe economic crisis, does not seem to have the power to influence the UK's action, through neither economic pressure nor the resort to force. Indeed, Rockhopper continued its activity and announced on September 7, 2010, to have commenced the flow test to probe commerciality of the Falklands/Malvinas' oil discovery in the "Sea Lion well"⁵⁶. Apparently, "oil activities still remain encouraging"⁵⁷ in the Falklands/Malvinas since the Sea Lion well was successfully tested and, therefore, Rockhopper is furthering its operational program in the area.⁵⁸

⁵³ British Geological Survey, 'The science behind Falklands oil exploration', available at http://www.bgs.ac.uk/research/highlights/falklands_oil_exploration.html (last visited 14 April 2011).

⁵⁴ P. C. Glover, 'A Falklands Gusher: UK Look for an Oil Rich Payback' (16 June 2010) available at <http://www.energytribune.com/articles.cfm/4341/A-Falklands-Gusher-UK-Looks-For-An-Oil-Rich-Payback> (last visited 14 April 2011). Moreover, while Rockhopper's shares 'rocketed by 150%' thanks to its activity in the North Falkland Basin, the quest for oil in the Southern one proved a failure, see, R. Wachmann, 'Falkland Oil and Gas shares plunge after its Toroa Well proves empty' (12 July 2010) available at <http://www.guardian.co.uk/business/2010/jul/12/falkland-oil-production-exploration> (last visited 14 April 2011).

⁵⁵ MercoPress, 'Fifth Company Argos Plans to Drill for Oil' (9 July 2010) <http://en.mercopress.com/2010/07/09/fifth-company-argos-plans-to-drill-for-oil-off-the-falkland-islands-says-ft> (last visited 14 April 2011).

⁵⁶ MercoPress, 'Flow tests begin to probe commerciality of Falklands' oil discovery' (7 September 2010) available at <http://en.mercopress.com/2010/09/07/flow-tests-begin-to-probe-commerciality-of-falklands-oil-discovery> (last visited 14 April 2011): "The top oil sand in the Sea Lion well was encountered at 2,374 meters subsea, and the base of the lowest oil sand ("oil down to") level was encountered at 2,591 meters subsea. The total vertical oil column is 217 meters (712 feet), with total net pay of 53 meters in seven identified pay zones, the thickest of which is approximately 30 meters".

⁵⁷ MercoPress, 'Falkland Islands: Oil activity still remain encouraging' (7 September 2010) available at <http://en.mercopress.com/2010/09/03/falkland-islands-oil-activities-still-remain-encouraging> (last visited 14 April 2011).

⁵⁸ MercoPress, 'Rockhopper Planning Further Drilling in North Falkland Basin' (14 October 2010) available at <http://en.mercopress.com/2010/10/14/rockhopper-planning-further-drilling-in-north-falkland-basin> (last visited 14 April 2011).

More precisely, Rockhopper is currently “fully funded to undertake an extensive exploration and appraisal programme across all of [the Falklands/Malvinas’] acreage during 2011”⁵⁹. Although a “development phase could take up to ten years to plan before hydrocarbons became available on the market”, the discovery encourages “oil companies to invest in the area and drill more wells”⁶⁰.

E. The Interplay between Sovereignty and Exploitation of Natural Resources

It is a well-established practice, accepted as law that the title over natural resources is to follow that over territory:⁶¹ accordingly, the sovereign subject enjoys the exclusive right to dispose of the natural wealth of the area over which it exercises sovereignty.⁶²

⁵⁹ Rockhopper Exploration PLC website, available at <http://www.rockhopperexploration.co.uk/> (last visited 14 April 2011).

⁶⁰ MercoPress, ‘Rockhopper Executives in the Falkland Islands’ (27 January 2011) available at <http://en.mercopress.com/2011/01/27/rockhopper-executives-in-the-falkland-islands> (last visited 14 April 2011).

⁶¹ N. Schrijver, *Sovereignty over natural resources – balancing rights and duties* (1997), 238. See also, Principle 21 of the Stockholm Declaration, Principle 2 of the Rio Declaration and Art. 3 of the Biodiversity Convention.

⁶² Schrijver, *supra* note 61, 7-9 and 68-69. During the drafting process of Resolution 1803, the very existence of the legal concept of “permanent sovereignty over natural wealth and resources” was challenged. Several states, among which Japan and Afghanistan, clearly interpreted the right to dispose of the natural wealth as an attribution of the sovereign state. Moreover, during 1970s and 1980s only peoples whose territories were under foreign domination or occupation were identified as subjects of the right to self-determination. However, in the same time-span a tendency to consider the states as the sole subjects of the PSNR re-emerged, both in the UN GA CERDS of 1974 and in the ILA Seoul Declaration of 1986. Arguably, the state does not seem to have an arbitrary right to exploit natural resources, rather the natural wealth should serve the interest and the well-being of the population, including indigenous peoples, see, Schrijver, *supra* note 61, 232, 241. See also UN Declaration on Permanent Sovereignty, para 1; Art. 1 of the Human Rights Covenants; *Texaco v. Libyan Arab Republic*, 53 *International Law Reports* (1977), 484 [Texaco Award]. The customary nature of the principle of permanent sovereignty over natural resources has been also recognized by the ICJ in *Case Concerning the Armed Activities in the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168. In the literature see, K. N. Gess, ‘Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and Its Genesis’, 13 *The International and Comparative Law Quarterly* (1964) 2, 398, 449;

H. W. Baade, 'Permanent Sovereignty Over Natural Wealth and Resources', in R. S. Miller & R. J. Stanger (eds), *Essays on Expropriation* (1967), 3-40; J. Baloro, 'Some International Legal Problems Arising from the Definition and Application of the Concept of 'Permanent Sovereignty over Wealth and Natural Resources' of States', 20 *The Comparative and international Law Journal of South Africa* (1987), 335-352; J. N. Hyde, 'Permanent Sovereignty over Natural Wealth and Resources', 50 *The American Journal of International Law* (1956) 4, 854; L. Barrera-Hernandez, 'Sovereignty over Natural Resources under Examination: the Inter-American System for Human Rights and Natural Resource Allocation', 12 *Annual Survey of International and Comparative Law* (2006) 1, 43; G. S. Akpan, 'Host State Legal and Policy Response to resource Control Claims by Host Communities: Implications for Investment in the Natural Resources Sector', in T. Wälde, E. Bastida & J. Warden Fernández (eds), *International and Comparative Mineral Law and Policy: Trends and Prospects* (2005), 283-310; On peoples' rights see, S. J. Anaya, *Indigenous People in International Law* (2004), 104-106; S. J. Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resources Extraction: the More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources', 22 *Arizona Journal of International and Comparative Law* (2005) 1, 7; E. Duruigbo, 'Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law', 38 *The George Washington International Law Review* (2006) 1, 33; B. Sloan, 'Study of the Implications, under International Law, of the United Nations Resolutions on Permanent Sovereignty over Natural Resources, on the Occupied Palestinian and other Arab Territories and on the Obligations of Israel Concerning Its Conduct in These Territories', Annex to UN Doc A/38/265, E/1983/85, 21 June 1983; Y. Dinstein, 'Collective Human Rights of Peoples and Minorities', 25 *The International and Comparative Law Quarterly* (1976) 1, 102, 186; Minority Rights Group International, 'The Right to Development: Obligations of States and the Right of Minorities and Indigenous People' (10 February 2003) available at <http://www.minorityrights.org/923/briefing-papers/the-right-to-development-obligations-of-states-and-the-rights-of-minorities-and-indigenous-peoples.html> (last visited 18 April 2011); A. Rosas, 'The Right to Development', in A. Eide (ed.), *Economic, Social and Cultural Rights* (2001), 119-130; B. C. Mank, 'The Rights of Indigenous Peoples to a Healthy Environment and Use of Natural Resources under International Human Rights Law', in D. Barnhizer, *Effective Strategies for Protecting Human Rights: Economic Sanctions, Use of National Courts and International 'Fora' and Coercive Power* (2001); E-I. A. Daes, 'Indigenous peoples' permanent sovereignty over natural resources – Preliminary report', UN Doc E/CN.4/Sub.2/2003/20, 21 July 2003, para 16; A. Eide, 'Rights of Indigenous Peoples – Achievement in International Law During the Last Quarter of a Century', 37 *Netherlands Yearbook of International Law* (2006) 1, 155; M. Gestri, *La gestione delle risorse naturali d'interesse generale per la Comunità internazionale* (1996); A. F. M. Maniruzzaman, 'Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: an Overview', 8 *Journal of Transnational Law and Policy* (1998-1999) 1, 57; ILA, Committee on the Rights of Indigenous Peoples, 'Conference Report The Hague – Interim Report' (2010) available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> (last visited 18 April 2011), 51.

The title over natural resources is also known as “Principle of Permanent Sovereignty over Natural Resources” (PSNR), and it developed through various GA Resolutions.⁶³ It evolved in the post-war era as a new principle of international economic law, aiming in particular to secure to developing countries and peoples living under colonial rule the advantages stemming from the exploitation of natural resources within their territories. PSNR functioned as a legal tool for newly independent states against breaches of their economic sovereignty.⁶⁴

⁶³ See, GA Res. 523 (VI), 12 January 1952; GA Res. 626 (VII), 21 December 1952; GA Res. 37 (IX), 14 December 1954; GA Res. 1314 (XIII), 12 December 1958; GA Res. 1514 (XV), 14 December 1960; GA Res. 1515 (XV), 15 December 1960; GA Res. 1720 (XVI), 19 December 1961; GA Res. 1803 (XVII), 14 December 1962; GA Res. 1813 (XVII), 16 December 1962, GA Res. 1831 (XVII), 18 December 1962, GA Res. 2158 (XXI), 25 November 1966; GA Res. 2386 (XXIII), 19 November 1968; GA Res. 2398 (XXIII), 3 December 1968; GA Res. 2581 (XXIV), 15 December 1969; GA Res. 2626 (XXV), 24 October 1970; GA Res. 2692 (XXV), 11 December 1970; GA Res. 2849 (XXVI), 20 December 1971; GA Res. 2994 (XXVII), 15 December 1972; GA Res. 2995 (XXVII), 15 December 1972; GA Res. 2996 (XXVII), 15 December 1972; GA Res. 2997 (XXVII), 15 December 1972; GA Res. 3016 (XXVII), 18 December 1972; GA Res. 3129 (XXVIII), 13 December 1973; GA Res. 3171 (XXVIII), 17 December 1973; GA Res. 3281 (XXIX), 12 December 1974; GA Res. 3362 (S-VII), 16 September 1975; GA Res. 3517 (XXX), 15 December 1975; GA Res. 32/176, 19 December 1977; GA Res. 33/194, 29 January 1979; GA Res. 34/89, 11 December 1979; GA Res. 34/186, 18 December 1979; GA Res. 35/7, 30 October 1980; GA Res. 35/56, 5 December 1980; GA Res. 37/7, 28 October 1982; GA Res. 37/217, 20 December 1982; GA Res. 41/65, 3 December 1986; GA Res. 41/128, 4 December 1986; GA Res. S-18/3, 1 May 1990; GA Res. 45/199, 21 December 1990, etc.; the urgency of natural resource-related issues is confirmed also by Resolutions adopted by the Security Council. More precisely, they deal with Iraq, the Democratic Republic of the Congo and other conflict-zones, in which the flow of natural resources is considered a root-cause of the hostilities, see SC Res. 687, 3 April 1991, para 16; SC Res. 1625, 14 September 2005, para 6; SC Res. 1653, 27 January 2006, paras 16-17; See, also SC Res. 502, 3 April 1982 and SC Res. 505, 26 May 1982.

⁶⁴ Schrijver, *supra* note 61, 4. Doctrinal controversies soon emerged on the principle’s legal nature. Firstly, the development of the PSNR in GA Resolutions exposed it to questions concerning its binding character. Secondly, the matters it covered - such as expropriation of foreign property, compensation, standards of treatment of foreign investors - were delicate and controversial aspects of interstate relations, and this hampered its acceptance. Additionally, the PSNR was associated with important political processes such as the struggles of colonial peoples for political and economic self-determination, and the efforts of developing States to establish a New Economic Order. In addition, the jus cogens character of PSNR is also debated in international law, see, G. M. Danilenko, ‘International Jus Cogens: Issues of Law-Making’, 2 *European Journal of International Law* (1991) 1, 42. A concerted effort aimed at

In the case of the Falklands/Malvinas the problematic aspects stem from the failure to identify an ultimate sovereign power, and hence, the official holder of the title to exploit natural resources. As mentioned, Argentina and the UK have two possible options in order to reach their economic objective and have access to the Islands' natural resources, whilst avoiding the attribution of sovereignty: on the one hand, they could choose, as in fact they did, a cooperative approach; on the other, they could engage in a unilateral conduct. Both the alternatives, however, are conditioned upon the fact that no other actors may advance a legitimate sovereign claim over the Islands.

Apparently, either GA Resolutions and the states' practice show a tendency to consider the UK and Argentina as the sole owners of a valid claim over the Islands.

elevating a particular norm to the rank of jus cogens is provided by the negotiations at the Vienna Conference on Succession of States in Respect of State Property, Archives and Debts. One of the most controversial issues at the Conference was the legal nature of the principle of the permanent sovereignty over natural resources proclaimed in a number of the UN General Assembly resolutions. Art. 15(4) requires agreements between a predecessor state and a newly independent state concerning succession to state property not to "infringe the principle of the permanent sovereignty of every people over its wealth and natural resources". Relying on the ILC commentary, which observed that some of the members of the Commission were of the opinion that the infringement of the principle of permanent sovereignty in an agreement between the predecessor state and the newly independent state would invalidate such an agreement, the developing states claimed that the principle of permanent sovereignty over wealth and natural resources was a principle of jus cogens. However, lacking the support of the Western states, which maintained that these efforts were 'an attempt to give legal force to mere notions to be found in various recommendatory material emanating from the General Assembly', is not possible to ultimately argue in favor of a jus cogens nature of the permanent sovereignty, see, Schrijver, *supra* note 61, 374-377: arguments to support the jus cogens nature of the PSNR are to be found in the frequent identification of permanent sovereignty as "inalienable" or "full", or in the Arts 25 and 47 of the two International Covenants on Human Rights. However, in light of Art. 53 of the VCLT, which establishes the mechanism for the formation of a jus cogens norm, the PSNR is yet to be accorded a jus cogens nature, failing to be supported by many states "principally concerned". Additionally, also its non-derogable character is questionable. See also UN, Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 1978 (not yet in force), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/3_3_1983.pdf (last visited 14 April 2011); C. A. Meckenstock, *Investment Protection and Human Rights Regulation* (2010), 70.

The UN Resolutions,⁶⁵ indeed, do not consider the Falklands/Malvinas islanders as entitled to self-determination; rather, the “Question of the Falkland Islands” is portrayed as a “special and particular colonial situation, which differs from others in light of the sovereignty dispute”⁶⁶. The Resolutions confirm the dominant approach among the states. The GA Resolution no. 2065 (XX) of 16 December 1965,⁶⁷ whilst calling on the two Governments to peacefully settle a dispute “covered by the process of decolonization of non-autonomous territories”⁶⁸, also invites them to take into consideration the *interest* - not the *will* - of the Falklands/Malvinas’ population. The “selfness” of the islanders seems hence rejected. GA Resolutions no. 3160 (1973) and no. 31/49 (1976) follow and strengthen this line. Particularly, Resolution 31/49 is decisive. Paragraph 4 of the Resolution⁶⁹ requires the *two states* to refrain from taking decisions or actions that would unilaterally modify the Falklands/Malvinas’ condition, before any agreement between them is reached. Apparently, by calling on the “two states” to refrain from the “unilateral modification” of the circumstances, the Resolution links the event of the “modification of the circumstances” to the sole conduct either of Argentina and the UK (two parties), possibly suggesting that no other sovereign and legitimate claim over the Falklands/Malvinas could effectively alter the Islands’ situation.

⁶⁵ GA Res. 2065 (XX), 16 December 1965; GA Res. 3160 (XXVIII), 14 December 1973; GA Res. 31/49, 1 December 1976; GA Res. 37/9, 4 November 1982; GA Res. 38/12, 16 November 1983; GA Res. 39/6, 1 November 1984; GA Res. 40/21, 27 November 1985; GA Res. 41/40, 25 November 1986; GA Res. 42/19, 17 November 1987; GA Res. 43/25, 17 November 1988.

⁶⁶ Special Committee on Decolonization, ‘Special Committee on Decolonization recommends general assembly reiterate call for resumption of negotiations over Falkland Islands (Malvinas)’, GA/COL/312 (24 June 2010) available at <http://www.un.org/News/Press/docs/2010/gacol3212.doc.htm> (last visited 21 April 2011): “after hearing the petitioners on the question of the Falkland Islands as well as a statement by the Foreign Minister of Argentina, the Special Committee on Decolonization recommended that the General Assembly reiterate its call for direct negotiations between Argentina and United Kingdom over that Non-Self-Governing Territory”. The Committee stressed the content of its draft resolution approved by consensus on the issue, see Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc A/AC.109/2010/L.15, 18 June 2010.

⁶⁷ GA Res. 2065(XX), 16 December 1965.

⁶⁸ G. Cataldi, ‘L’Assemblea Generale delle Nazioni Unite e la controversia sulle Falkland/Malvinas’, in N. Ronzitti (ed.), *La questione delle Falkland-Malvinas nel diritto internazionale* (1984), 79.

⁶⁹ GA Res. 31/49, 1 December 1976, para 4.

Argentina, on this basis, has constantly denounced the presence and activity of the British firms in the North Falklands/Malvinas Basin as a unilateral conduct unlawfully impairing the circumstances in the region.

As for the states' practice, the 9th Meeting (June 2010) of the Special Committee on Decolonization, whilst recommending the General Assembly to reiterate the call for resuming negotiations, summarizes the various arguments and positions of the (specially interested) states.⁷⁰ The majority of the Latin American states, together with the Group of 77, support the Argentine argument. In particular, Cuba refers to the territorial integrity of Argentina as well as to the interests of the islanders, which the UK should respect also by reentering into substantial negotiations. Similarly, Uruguay, Mexico, Bolivia and Venezuela express their view in favor of Argentina's legitimate rights over the Falklands/Malvinas, describing the British conduct as preserving an "anachronistic colonial situation"⁷¹. The declarations of those states reveal the general opinion that Argentina and the UK are the sole relevant parties to this controversy. Specifically, the position of the islanders, their peoplehood⁷² and their right to self-determination do not clearly emerge as a possible counterclaim. The only exception in the Meeting is Sierra Leone, whose statement reiterates the country's support for the islanders' basic human right to self-determination, considering that any solution that failed to embrace their aspiration would be inconsistent with Arts 1(2) and 73(b) of the UN Charter.⁷³

On this account, Argentina and the UK are considered as the sole parties which can validly claim the title to the Falklands/Malvinas' territory. This means also that the states are the two sole parties upon which sovereignty - and its corollaries - could be divided, and this involves

⁷⁰ Special Committee on Decolonization, *supra* note 66.

⁷¹ Special Committee on Decolonization, *supra* note 66.

⁷² S. K. N. Blay, 'Self-determination Versus Territorial Integrity in Decolonization', in M. N. Shaw (ed.), *Title to Territory* (2005), 448-449: "Falkland Islands may be described as 'plantations' of the colonial administration because they are predominantly populated by citizens or subjects of the colonial power who settled in the colonial territories. International law is unclear as to whether such residents are entitled to self-determination. [...] It is not clear from the text of art. 73 UN Charter whether the provision sets up a distinction between people and inhabitants. [...] The General Assembly's approach to the claims of self-determination for the territories of Gibraltar and the Falkland Islands suggests that these resident do not constitute a people and are not entitled to exercise the right to self-determination". See also, UN GA, *supra* note 23.

⁷³ UN GA, *supra* note 23.

separating the title to territory from the title to natural resources is not *per se* unlawful in cases of contested sovereignty. More precisely, the exploitation of natural resources located in a territory whose sovereignty is disputed is lawful to the extent that such exploitation is agreed upon by all the parties legitimately advancing a sovereign claim.

It is in this light that the Joint Declaration for Hydrocarbons will be analyzed. Through this document the states suspended their sovereignty dispute - without, however, obliterating it - and designed an instrument for a cooperative relationship in the exploitation of hydrocarbons situated in a Special Co-operation Area (in the South West Atlantic). The Declaration, which was terminated in 2007,⁷⁴ offers a parameter to evaluate the effectiveness of political agreements as means to regulate resources' exploitation in territories where sovereignty is contested.

F. The Alternatives for Regulating the Access to the Falklands/Malvinas' Oil Deposits

I. The Cooperative Agreement: the 1995 Joint Declaration for Hydrocarbons

Under the Joint Declaration for Hydrocarbons⁷⁵, the States committed themselves to jointly explore and exploit hydrocarbons in a Special Co-operation Area, operating under the control of a Joint Commission. The Declaration followed the Joint Statement issued in Madrid in 1989, which established the so-called "Formula for Sovereignty"⁷⁶: the Formula aimed to lead the parties to a progressive normalization of their relationship, and

⁷⁴ The Argentine decision to terminate the Agreement depends upon the fact that the Special Area created through the Declaration were found devoid of exploitable resources. Presently, as mentioned, the resource-rich zone is located in the North Falklands Basin.

⁷⁵ 'Declaration of the British Government with Regard to the Joint Declaration signed by the British and Argentine Foreign Ministers on Cooperation over Offshore Activities in the South West Atlantic' (27 September 1995) available at <http://www.falklands.info/history/95agree.html> (last visited 21 April 2011) [Joint Declaration for Hydrocarbons].

⁷⁶ The 'Madrid Formula' was agreed by Argentina and the UK on 19 October 1989. Accordingly, the countries pursue cooperation while accepting that the position of either side on sovereignty over the Falklands remain reserved. See, K. Sun Pyo, *Maritime Delimitation and Interim Arrangements in North East Asia* (2004), 152.

indeed resulted in cooperative arrangements on both fisheries (1990) and hydrocarbons (1995).⁷⁷

The Declaration is an interesting model for studying the outcomes of a cooperative approach aimed to separating the attribution of the title to the territory from the attribution of the title over natural resources.

Considering its content, one should note that a safeguard clause opens the declaration: accordingly, nothing in the document shall be interpreted as changing, or recognizing, the UK's or Argentina's claims over "sovereignty or territorial and maritime jurisdiction over the Falkland Islands". Similarly, no third party's activity carried out as a result of the agreement should constitute a basis for supporting, affirming, or denying such claims. Art. 2 continues stating that the two Governments "agreed to cooperate and to encourage offshore activities in the South West Atlantic", specifying that "activities" stands for "exploration and exploitation" of hydrocarbons. The document warrants the establishment of a Joint Commission, composed of delegates of both States, in charge of supervising the business activities, submitting recommendations and proposing standards for the protection of the environment, by coordinating the actions in the "Areas for Special Cooperation". These areas shall be controlled by a sub-committee, which will, among other tasks, "encourage commercial activities in each tranche" and "promote the exploration for and the exploitation of hydrocarbons in maritime areas of the South West Atlantic subject to a controversy on sovereignty and jurisdiction". The Declaration concludes by affirming that "the parties will create the conditions for substantial participation in the activities by companies from the two sides", will share information concerning exploratory and exploitative actions, and will refrain from any conduct possibly frustrating the carrying out of hydrocarbon developments. Finally, the declaration is portrayed as "an interdependent whole", for the implementation of which the Governments shall co-operate "throughout the different stages of offshore activities undertaken by commercial operators".

The political nature of the Declaration is self-evident and it constitutes both the strong and the weak point of this document.⁷⁸ Although, in fact, a

⁷⁷ R. R. Churchill, 'Falkland Islands: Maritime Jurisdiction and Co-operative Arrangements with Argentina', 46 *The International and Comparative Law Quarterly* (1997) 2, 463.

⁷⁸ The preponderant political nature of the Document nullifies any binding inference from it. For instance, in the Annexed Declaration of the British Government, it is declared that "appropriate legislation will be introduced in order to take account of the Joint Declaration", thereby conveying the idea of the normative and binding value of

political nature may prove useful from the point of view of the implementation process, a major disadvantage is shown in its transitory character. The Declaration, indeed, created a cooperative regime deemed to remain stable and self-sustaining insofar as the interests and choices of the parties converged.⁷⁹ Whilst from a short-term perspective this solution may prove effective to avoid disputes, from a long-term standpoint it could by no means guarantee peaceful relations, as the current events in the Falklands/Malvinas show. Indeed, the Declaration failed immediately after the finding that no exploitable resources were available in the Special Cooperation Area: this material fact, together with the political essence of the instrument, caused - and allowed for - the withdrawal of Argentina, leading to the termination of the agreement.

Through the Joint Declaration, Argentina and the UK regulated the operational aspects of their cooperative relationship on the exploration and exploitation of the Falklands/Malvinas' hydrocarbons. Furthermore, the Declaration served as a basic text on which also the licenses with third, commercial parties could rely, so that the two states' business activities are not affected by their failure to settle their sovereignty and jurisdiction dispute. Yet, the interplay between the title to territory and the PSNR seems to suggest that the former is the basis for the enjoyment of the latter, and this is entirely consistent with the principle of non-interference and the concept of domestic jurisdiction,⁸⁰ as well as the sovereign equality of states.⁸¹ The Declaration, however, is to be interpreted as dividing the PSNR between the two sole parties upon which sovereignty could reside: as para. 4 of the Resolution 31/49 may suggest, the dispute over the Falklands does

the instrument concerned, capable of prompting an adaptation process in the national legal system. However, reading the opening passage of the Annexed Declaration one could note that the 1995 Agreement is referred to as an "understanding" reached with Argentina on "cooperation over offshore activities". Thus, also the legislative arrangements mentioned in the Annexed Declaration appear as a *motu proprio* initiative of the UK, neither aimed to implement the Declaration, nor emanating from the parties' intention to create legal obligations upon themselves. More precisely, such legislation seems intended to regulate the activities of the two states' corporations and commercial partners in the Falklands. See Joint Declaration for Hydrocarbons, *supra* note 75.); on the UK Constitutional Rules see E. Denza, 'The Relationship between International and National Law', in M. D. Evans (ed.), *International Law*, 2nd ed. (2006), 433-435.

⁷⁹ In fact, by discovering that no exploitable resources were present in the Special Area, the goal set in the Document was exhausted and Argentina terminated it.

⁸⁰ Art. 2(7) of the UN Charter.

⁸¹ Art. 2(1) of the UN Charter.

not seem to involve any other (state) party.⁸² In addition, the Resolution urges the states to avoid any “unilateral modification” of the circumstances in the Islands, indirectly conveying the idea that a modificatory, but bilateral, agreement may respect the GA recommendation, not affecting any other legitimate claim.

Two conclusions can thus be drawn. First, the Joint Declaration provides evidence that the title to territory and to natural resources may *in the practice* be treated separately, and that this is legitimate as long as all the parties possibly entitled to advance a sovereign claim over the territory are involved;⁸³ secondly, the Joint Declaration illustrates the limits of a cooperative model.

⁸² Considering the State Actors, as noted, it does not seem that any other member of the international community could validly advance any sovereign claim over the Falklands. Either considering the national statements at the Decolonization Committee and the traditional approach to the issue in the UN Resolutions, it appears rather uncontroversial that the dispute is involving only Argentine and UK. See, UN GA, *supra* note 23.

⁸³ See, GA Res. 31/49, para. 4; A final instrument according to which the separation of the title to territory and to natural resources in the Falklands/Malvinas may be interpreted is the UN Convention on the Law of the Sea (1982), to which both the UK and Argentina are parties. Two assumptions could be proposed in this regard. Either the UK-Argentina Joint Declaration regulating the access to natural resources is favored by the UNCLOS; or, the Declaration fails to meet its requirements. The answer depends upon how we interpret the aim of the Convention, either as calling for a negotiation effectively capable to resolve the subject-matter of the dispute (sovereign title), or as deeming it sufficient to cope with one of its corollaries (access to natural resources), provided that an agreement is reached. Evidently, it is only in the second case that the Declaration fulfills the UNCLOS call. The Convention establishes that islands are entitled to the same maritime zones as other land territories (Art. 121). Furthermore, it explains that the State of which the island forms part of, has sovereignty over its territorial sea and holds sovereign rights for the purpose of exploring it and exploiting its natural resources; this, in relation both to the EEZ and to the Continental Shelf, both of which extend up to 200nm from the baseline from which the territorial sea is measured (Arts 55-57, 74 and 76-77, 83). The Convention, moreover, requires the parties involved in a dispute to peacefully settle it, to achieve an equitable solution (Arts 74 and 83). Arguably, a joint cooperation agreement may provide the “equitable solution” called for in the Convention. Indeed, the case of the Falklands shows the intention of Argentina and UK to equally share the access to the resources and thereby balance their condition from that perspective. Yet, such agreement allowed them to suspend their conflict but not to settle it. In fact, the dispute involving Argentina versus the UK has been worsening during the last months, giving evidence of the volatility of such agreements and the ensuing unstable interstate relationships that they may create. United Nations Convention on the Law of the Sea, 10 December 1982), 1833 U.N.T.S., 3; In addition, one should note that the

Indeed, the deterioration of the UK-Argentine relationship shows that the Declaration was not an effective tool for governing the concurring, economic interests of two states disputing over sovereignty. The Document established only an “interim regime”, to be overturned at the change of the parties’ interests - and this is exactly what happened when oil deposits were discovered in the North Falklands/Malvinas Basin. Furthermore, the Declarations have a political, thus non-binding character: hence, although it is in the parties’ interest to resume negotiations and reach, eventually, a settlement of the dispute, this voluntary element seems absent and there is no effective international law norm to force its materialization.⁸⁴ Arguing that the states are under an obligation to negotiate is still not plausible, since the formally non-binding nature of the GA Resolutions prevents this conclusion. Too many economic interests are intertwined with the historical claims of the states, for them to peacefully negotiate upon a reallocation of rights and duties.

II. The UK and its Unilateral Activity in the Falklands/ Malvinas: What are the Implications?

As observed, a number of English corporations are unilaterally accessing the natural resources of the Falklands/Malvinas. Obviously the UK is persuaded of the legitimate nature of their activity, which it justifies on the basis of its sovereign claim over the Islands. However, the status of contested sovereignty that characterizes the Falklands/Malvinas does not allow for a simplistic solution.

Indeed, the situation must be analyzed also from the Argentine standpoint. Argentina holds an equally valid sovereign claim over the

UN Special Rapporteur on Shared Natural Resources recently suggested at the 62nd ILC Session not to pursue any further the topic of oil and gas, being the matter bilateral in nature, as relying on the agreement of the parties. The recommendation of the UN Rapporteur that “the Working Group decide that the topic of oil and gas will not be pursued any further”, is noteworthy. According to Murase, this outcome expresses a general trend in the international community, which is either against a universal international rule and in favor of interstate, bilateral, cooperative agreement mechanisms, as for the management of oil and gas reserves (point C). The UNCLOS is interpreted in this light. See, International Law Commission, Shared Natural Resources: Feasibility of Future Work on Oil and Gas, UN Doc. A/CN.4/621, 9 March 2010.

⁸⁴ None of the parties will presumably decide to bring the case before an international Court or Arbitration, as none would run the risk of ultimately losing the possibility to assert its rights over the Islands’ resources.

Islands, and the UK unilateral conduct might permanently affect the substance of Argentine rights. To clarify, one should distinguish between the impact that a violation might have on the “title to territory”, from the impact that a violation might have on the “title to (exhaustible) natural resources”. In terms of damages and reparations, the two situations are substantially different. Having access, and therefore exploit, the oil deposits of the Falklands/Malvinas means that the reservoir of this non-renewable resource is progressively depleted. Such a damage does not allow for any reparation or restitution in the future - i.e.: the *status quo ante* cannot be restored - , and the title to natural resources that might belong to Argentina is therefore irreversibly altered - or, rather, nullified. A violation of the title to territory, on the contrary, may be judicially ascertained and the injured state may be entitled to reparations. After that, the title is restored to the legitimate sovereign, and no irreversible damage occurs.

As a consequence, the unilateral behavior performed by the UK may be considered by far unlawful. As it not only contravenes para. 4 of the GA Resolution 31/49, explicitly calling the parties to refrain from unilateral modification of the situations in the Falklands/Malvinas, pending the contestation over sovereignty;⁸⁵ but also aggravates the sovereignty dispute,⁸⁶ by having a permanent effect on the title to natural resources.

Although being mainly a case of contested sovereignty, it is on its corollary - namely the title to natural resources - that the most significant and immutable effects of the dispute materialize. Arguably, the legitimacy of the Argentine sovereign claim suggests that it is entitled to have the Falklands/Malvinas’ natural resources unaffected - meaning unexploited and non-exhausted - by others. This results from a negative interpretation of the permanent sovereignty over the Falklands/Malvinas’ resources, to which both Argentina and the UK are entitled, insofar as a formal and individual

⁸⁵ This statement needs to be considered in light of the non-binding nature of the GA Resolutions.

⁸⁶ The International Court of Justice whilst considering the request for provisional measures in the *Costa Rica v. Nicaragua* case, indicates at para 86(3) that “Each Party shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.” Although the case of the Falklands/Malvinas is not before the Court, this recent statement underlines that, where sovereignty is disputed, the claiming parties should avoid behaviors that might cause irreparable prejudices, so that the *status quo ante* cannot be restored. See, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Request for Indication of Provisional Measures, 8 March 2011, ICJ Press Release.

sovereign power is identified. Furthermore, to legitimately dispose of the right – i.e.: the right to use the natural wealth and resources of the Falklands/Malvinas - , the UK should be entirely entitled to it; conversely, the contested nature of the sovereign title and, consequently, of its corollary, pinpoints that the right at hand is not incontrovertibly vested in the UK.

This reasoning is significant in prospective terms. Indeed, assuming that the dispute is settled either by conferring the sovereign title to Argentina, or by reaching an agreement between the parties, the Argentine title to natural resources seems irreversibly impaired, depriving thereby the Argentine state of one of the fundamental attributes of sovereignty.

III. A Tentative Option: The Condominium

The Joint Declaration effected a separate treatment of the title to territory and to natural resources; however, it revealed inconclusive and unstable outcomes, which are not encouraging as to the effectiveness of cooperative model to address the regulation of economic interests, within the Falklands/Malvinas contested-sovereignty area. Yet, starting from the assumption that the *Argentina v. UK* dispute could not be settled by exclusively imputing the sovereign status to one party, since the states evidently lack the will thereof, the Joint Declaration regulated the most fundamental corollary of the dispute – the access to natural resources – confirming thereby its limited scope.

In a more politically challenging alternative, the complex set of rights and duties associated to the Falklands/Malvinas' sovereignty could have been divided upon the states, being uncontested that no other third party may legitimately advance a sovereign claim over the Islands.⁸⁷ Such a result may, for instance, be reached through the phenomenon of condominium.

Under a condominium, two or more states equally exercise sovereignty with respect to a territory and its inhabitants.⁸⁸ Generally, it is

⁸⁷ On the concept of “shared sovereignty”, see S. D. Krasner, ‘The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law’, 25 *Michigan Journal of International Law* (2004) 4.

⁸⁸ M. N. Shaw, *International Law*, 6th ed. (2008), 228-229; V. P. Bantz, ‘The International Legal Status of Condominia’, 12 *Florida Journal of International Law* (1998) 2, 77. The author argues that in international law a number of definitions of ‘condominium’ do exist: “According to Lauterpacht, a territory subject to a condominium is clearly under a division of sovereignty, or joint sovereignty, or both. For Arrigo Cavaglieri, there are many examples where delineating a border would have caused so many problems that it was impossible for the interested states to reach

assumed that the co-owners act together, avoiding unilateral (legal) actions⁸⁹ that could affect the whole ownership;⁹⁰ moreover, as specified by the International Court of Justice in the *El Salvador v. Honduras* case, a condominium “being a structured system for the joint exercise of sovereign governmental powers over a territory could be created both by agreement and as a juridical consequence of a succession of states”⁹¹. However, in the *El Salvador v. Honduras* case, the Court’s decision to recognize the joint sovereignty of the three coastal states of Nicaragua, El Salvador, and Honduras over the waters of the Gulf of Fonseca beyond the three-mile territorial sea, was based on “the historic character of the Gulf waters, the consistent claims of the three states involved, and the absence of protest from other states”⁹². In the case of the Falklands/Malvinas, on the contrary, the situation is further complicated by the lack of consistency in the states’ claims over time, as well as by the islanders’ assertion of the British sovereign power over the territory. In fact, whilst the Joint Declaration is a mere political document that does not alter the legal status of the territory, a condominium would imply the establishment of a legal regime and the formal attribution of sovereignty to both the UK and Argentina, an outcome which is likely to be opposed by the population. Yet, the choice for a condominium administration would finalize this dispute and dodge the repercussions of the unilateral conduct of the UK. In addition, the status of

agreement. Under such circumstances, the territory was put *pro indivisio* under the contesting powers’ joint authority. And Lassa Oppenheim believes that a condominium is a “piece of territory consisting of land or water... under the joint tenancy of two or more States, [with] these several States exercising sovereignty conjointly over it, and over the individuals living thereon”. Fauchille argues that one can find cases of joint ownership, condominium or co-imperium, other than international servitudes, where two sovereignties jointly exercised authority over the same territory. For Max Sorensen, “some territories have been subject to a division of authority between two or more states, [and] the most frequent form of this kind of divided authority over the same territory is termed ‘condominium’ or ‘coimperium’”. Finally, for Marcel Sibert, there is a condominium when two or more states together exercise joint sovereignty on the same territory, and such sovereignties mutually limit their activities, at least in principle, on the grounds of the legal equality. In the nineteenth century, A. G. Heffter noted that two states could also exercise divided or undivided sovereignty over a foreign territory (condominium), while Alphonse Rivier noted that a territory or a portion thereof, whether land or water, could belong *pro indivisio* to two or more states” (89-91).

⁸⁹ Shaw, *supra* note 88, 228-229.

⁹⁰ Bantz, *supra* note 88, 77-151.

⁹¹ *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, Judgment, ICJ Reports 1992, 601.

⁹² Shaw, *supra* note 88, 230.

the parties in respect of the Islands would be equalized, reaching a politically as well as legally valuable result.

Nevertheless, this option seems unlikely to be favored by the states. None of them is in fact willing to compromise over its claim for sovereignty, and given the urgency of issues related to demand, supply, and control of limited energy sources, the room for negotiations seems more and more confined.

G. Conclusions

This contribution attempted an analysis of the Falklands/Malvinas' case from the perspective of the exploitation of natural resources. The overarching question on which the focus is shifted, is whether it is possible to uncouple the title to territory from the title to natural resources, which constitutes the key interests of both Argentina and the UK in the Islands. Starting from the *de facto* assumption that the controversy between Argentina and the UK for sovereignty over the Islands cannot be realistically solved by imputing the title to territory to one of the two states, it is argued that two other paths remain available in order to access the oil deposits located in the North Falklands/Malvinas Basin.

The first option is a cooperative agreement: evidently, Argentina and the UK already pursued this solution when concluding the 1995 Joint Declaration for Hydrocarbons. This attempt, however, failed with the withdrawal of Argentina in 2007. Most probably, the reasons for this failing outcome are to be found in both the political - that is, non-binding - nature of the Declaration and in the finding that no exploitable resources were available in the Special Cooperation Area established through the document. Nonetheless, the Joint Declaration is an interesting model, which shows that uncoupling the title to territory from the title to natural resources is not *per se* unlawful. Rather, the document demonstrates that a separate treatment of sovereignty and its corollary complies with international law to the extent that all the parties that hold a legitimate sovereign claim are involved.

The second option to accessing the oil deposits in the Falklands/Malvinas' seabed is the unilateral action of each party. Yet, this corresponds to the current conduct of the UK in the Falklands/Malvinas: English corporations are indeed performing their activity in the North Falklands/Malvinas Basin, whilst further investments are urged. The compatibility of this conduct with international law is doubted. It is argued that the Argentine title to natural resources might be permanently affected by the English (mis)use of an exhaustible natural resource as oil. In

addition, as the sovereignty over the Islands is contested, the UK is yet to be vested with the right to dispose of the natural wealth and resources of the Falklands/Malvinas according to international law.

The case of the Falklands/Malvinas is the story of an endless “struggle” between Argentina and the UK, whose ancient roots makes it unlikely to be settled even in the long run. Furthermore, the present conduct of the UK seems to aggravate the status of the dispute by irreversibly impairing Argentina’s title to natural resources. Although, being an interesting case of a separate treatment of title to territory and to natural resources, the case of the Falklands/Malvinas provides evidence that violations of the latter might be much more problematic than violations of the title to territory, not allowing for the *status quo ante* to be restored.