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### **DISTRIBUTED SOVEREIGNTY AND THE FALKLAND ISLANDS (MALVINAS) DISPUTE**

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There has been a long-running dispute between successive Argentine governments and British governments concerning sovereignty over a set of islands in the South Atlantic. The dispute even extends to their name: they are known in Britain as the Falkland Islands and in Argentina as Las Malvinas. From here onwards, they will be referred to simply as the Islands. This paper will argue that all three parties to the dispute, in focusing on sovereignty, are thinking in terms of a traditional concept that is no longer relevant to the contemporary world.

The organisation of the world into “states” that were defined as possessing “sovereignty” started in Europe in the seventeenth century and spread via the European empires to cover the whole world in the twentieth century. By 1960, these empires were disintegrating and all their constituent parts were becoming separate states. At the United Nations, the “Falkland Islands (Malvinas) Question” was just one of the many examples of situations where the decolonisation process was complicated by arguments about what could be the successor state. Nearly all these disputes have been resolved, but this particular dispute remains one of the few examples of a colony that has failed to complete the decolonisation process and has no immediate prospect of doing so. However, while the dispute has dragged on during the last fifty years, the nature of statehood has changed. Both Argentina and the United Kingdom have themselves ceased to be “sovereign”, in the traditional sense, and therefore it is pointless to argue in traditional terms about sovereignty over the Islands. Only if we think in terms of the way political authority is actually exercised in the twenty-first century will it be possible for new arrangements to be designed to settle the dispute and reach an agreement acceptable to all those who have a stake in the future of the Islands.

This paper will start by establishing the nature of traditional thinking about states, sovereignty and statehood. In United Nations debates and resolutions, “sovereignty” and “independence” are often bracketed together. Therefore, throughout the paper, discussion of the legal concept of sovereignty will be linked to the related concept of political independence. The legal and political developments that now constrain sovereignty and independence will be outlined. In addition, it will be demonstrated that the process of globalisation has placed substantial limits on the ability of governments to exercise their political authority in an independent manner, especially on the economic and communications questions that are crucial for a remote community of islanders. The argument concludes sovereignty and independent policy-making for a political community no longer comes under a single government. Sovereignty is distributed among multiple authorities. The paper ends with suggestions about the consequences of these arguments for the future of the Islands.

#### **The Confusion when Talking about States**

There is a problem with use of the word “state”. It has three totally distinct meanings that are often used in confusing ways, as if they are interchangeable. The first meaning arises when we speak of the relations between state and society. Within countries, the state refers to all aspects of the structure of

government. In this meaning, civil society is separate from and to some degree autonomous from the state, even though it is regulated by the state. The second meaning arises in international politics, when we refer to countries and the relations between them. In this context, the term “nation-state” is often used, to refer to a group of people who have shared values and operate as a distinct political community. In practice, the United Kingdom is a multi-national state (even though foreigners often falsely equate the English and the British) and Argentina has its English, Welsh, Armenian, Polish, indigenous peoples and other minorities, alongside the mixed Spanish-Italian majority. Despite these distinctions, we do speak of Britain or Argentina taking political action, as if each was a coherent entity. The third meaning occurs in international law, where the state is an abstract legal fiction. It is treated as having continuity across time, ignoring the fundamental changes that may occur when presidents or prime ministers change, and as having a single common purpose, ignoring the political differences within each country. The fiction is necessary for the purposes of international law, just as we have the fiction in domestic law that companies are legal persons, so that they can be taken to court.

The first meaning of a “state” is not compatible with the second and the third. The confusion arises because the state-as-government is only *part* of the political community or part of the legal abstraction. The second meaning of a “state” is unsatisfactory. There is a degree of political community within each country, but the extent to which values are shared, the degree of common identity, the coherence and the unity are usually exaggerated. In particular, politicians like to claim they are acting in a common, supposedly objective, “national interest”, when they are only appealing for political support. In both Britain and Argentina, politicians claim their sovereignty over the Islands is unquestionable, but the policy implications of these claims are contested internally within each country.<sup>1</sup> The third meaning of “state”, as a legal fiction, must be maintained, because it is essential and valid for international law. For the remainder of this paper, discussion of the state will be solely as a legal term.

### *States in International Law*

Modern international law, initially the law between states, evolved in Europe from the Peace of Westphalia. In 1648, the Thirty-Years War ended with peace treaties specifying that each territory would have a ruler, who had the right to determine whether the religion of the area was Catholic or Protestant. This established the beginnings of a system of independent territorial units, states possessing sovereignty and respecting each other’s sovereignty. It progressed further in the nineteenth century, with the impact of the Napoleonic Wars, the end of the Holy Roman Empire, the surrender of church territories, the dissolution of the Spanish empire in Latin America and the expansion of European systems of government to the empires in Africa and Asia. The twentieth century produced another massive change, the dissolution of all the European empires, with the great majority of the colonies becoming independent by the 1970s. A global system of independent states, with similar structures, has only existed for the last forty years.

A definition of a state was agreed in 1933 as the first article of the Montevideo Convention on the Rights and Duties of States.

The state as a person of international law should possess the following qualifications:  
(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.<sup>2</sup>

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<sup>1</sup> In Argentina, a group of intellectuals has called for “An Alternative Vision” that would avoid “false patriotism” and recognise Argentina “was founded on the principle of the self-determination”, see [www.staff.city.ac.uk/p.willetts/SAC/ALT-VISN.HTM](http://www.staff.city.ac.uk/p.willetts/SAC/ALT-VISN.HTM). For dissenting voices in Britain, see Richard Gott, “Lease-Back: An Obvious Strategy for Argentina to Adopt” and the other people he cites, at [www.staff.city.ac.uk/p.willetts/SAC/APR-2011/GOTT.HTM](http://www.staff.city.ac.uk/p.willetts/SAC/APR-2011/GOTT.HTM).

<sup>2</sup> The Convention was adopted by the Seventh International Conference of American States meeting in Montevideo, in December 1933: see [www.oas.org/juridico/english/treaties/a-40.html](http://www.oas.org/juridico/english/treaties/a-40.html).

Malcolm Shaw described this as “the most widely accepted formulation of the criteria of statehood in international law”.<sup>3</sup> The Convention went on to assert the legal equality of states and that “No state has the right to intervene in the internal or external affairs of another”, (Article 8). The Convention added a new legal principle, the obligation not to recognise territorial acquisitions obtained by the use of military force or by any other coercive measures, (Article 11). At this point, when the European empires dominated the globe, the idea of conquest being illegal was revolutionary. A decade later, non-use of force became generally accepted when it was embodied in the “Principles” of the United Nations Charter.<sup>4</sup> This means that, even if the Argentine invasion of the Islands in 1982 had succeeded, Argentine occupation could not have solved the sovereignty dispute. Equally, successive Argentine governments have argued that the British expulsion of the Argentine garrison on the Islands in January 1833 was illegitimate. Whether the principle of the non-use of force can be applied retrospectively is a more difficult question, especially as the Argentine version of events is contested.<sup>5</sup>

The Montevideo Convention was interesting in not directly mentioning the concept of sovereignty, which is also considered to be an essential feature of statehood. This is because the Latin American governments drafting the Convention did not want to endorse the existing patterns of sovereignty. They affirmed the declarative theory of statehood that the “political existence of the state is independent of recognition by the other states”, (Article 3). Such an approach is attractive to anti-colonial governments, as it allows claims to statehood to be made by rebels against colonial empires, before they are in full control of the colonised territory and before they have been recognised. The alternative legal approach, the constitutive theory of statehood, asserts states do not exist until they are recognised by other states. Whatever position is taken on this controversy, it is necessary to go beyond the Convention and note that control over territory is the goal of those seeking recognition. Currently, international lawyers expand the criteria of the existence of a government to there being an effective government.<sup>6</sup> This makes sovereignty a fifth criterion of statehood.

### *The Sovereignty of States*

A state is said to be sovereign when the four characteristics mentioned in the Montevideo Convention come together, so that the government exercises control over the population within the defined territory, without there being any higher external legal authority. It is common to distinguish between internal and external sovereignty. Internal sovereignty is the ability of a government to maintain effective control within the country. Where this does not happen, the news media speak of “failed states”. Thus, Somalia is not an effective state, because the various attempts to form a government in Mogadishu have not in the last two decades led to the exercise of sovereignty outside the capital city. External sovereignty is the legal ability to conduct an independent foreign policy, engaging in diplomatic relations, ratifying treaties and joining international organisations.

The two aspects of internal and external sovereignty come together with the associated doctrine of non-interference in the affairs of each state by other states. There has always been a substantial

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<sup>3</sup> M. Shaw, *International Law*, (Cambridge: Cambridge University Press, sixth edition, 2008), p. 198. For Brownlie, for Craven and for Dixon, the Montevideo Convention is also a starting point for discussing statehood: see I. Brownlie, *Principles of Public International Law*, (Oxford: Oxford University Press, seventh edition, 2008), p. 70; M. Craven, in M. D. Evans (ed.), *International Law*, (Oxford: Oxford University Press, third edition, 2010), p. 220; and M. Dixon, *Textbook on International Law*, (Oxford: Oxford University Press, sixth edition, 2007), p. 115.

<sup>4</sup> UN Charter, Article 2, paragraphs 3-4, see [www.staff.city.ac.uk/p.willetts/UN/CHARTER.HTM#C1](http://www.staff.city.ac.uk/p.willetts/UN/CHARTER.HTM#C1). (This web page consolidates all the separate pages provided on the UN website, for each chapter of the Charter, into a single page.)

<sup>5</sup> G. Pascoe and P. Pepper argue that in 1833 Argentina did not have a governor on the Islands and the British did not expel the Argentine residents, see *False Falklands History at the United Nations*, 23 May 2012, at [www.falklandshistory.org/?q=node/4](http://www.falklandshistory.org/?q=node/4).

<sup>6</sup> See the discussion by Brownlie, Craven, Dixon and Shaw, following each of the references given above.

element of hypocrisy in the politics of non-interference in internal affairs. Governments will readily complain when domestic decisions are subject to external criticism and they may even make a formal diplomatic protest. However, government leaders simply smile with pleasure when a prestigious foreign politician offers public support for their domestic policies. The extension of the principle of non-interference to “external affairs” was in the Montevideo Convention, but was not repeated in the UN Charter. It reappeared in the first paragraph of a UN General Assembly declaration in 1965.<sup>7</sup> The principle is occasionally asserted in current diplomacy. Again there is the hypocrisy that support is welcomed, but negative responses are denounced. Taken literally, non-interference in external affairs would prevent the normal practices of diplomacy, through which attempts are made to win support from other governments and to change their foreign policy. Thus, a core legal feature of sovereignty, being free from interference, has always in practice had elements of political charade.

Among diplomats, there is a deep intellectual resistance to acknowledging that, in the current world, no states have full sovereignty. Partly this is a linguistic problem. If states are defined by their sovereignty, then it is just a circular argument to say that states are sovereign. Breaking out of this circle is difficult, because there is no word to cover the possession of partial sovereignty. It is usually seen as an all-or-nothing attribute: a country is either completely sovereign or it is subject to some other sovereign. Among politicians, there is greater acceptance that governments cannot act independently. When we consider the practical processes of formulating policy, it is clear that governments must respond to substantial pressures from external actors. It will be argued below that all governments are subject to constraints imposed by intergovernmental organisations and by transnational corporations. In addition, governments of smaller countries are constantly aware of the impact, both intended and unintended, upon their “policy space” of decisions taken in larger countries. Declarations by developing countries are liable to bracket sovereignty, with territorial integrity, non-intervention, sovereign rights, sovereign equality and political independence for all countries. The general, abstract, legal principle of sovereignty is closely related to the specific, practical, political goal of resisting limitations on independent action.

### *Treaties as Limitations on the Sovereignty of States*

The reality of international politics is more complex than the myths of sovereignty, independence and non-interference maintained by diplomats. Interestingly, international lawyers are willing to lay bare the myths. Professor Eli Lauterpacht has said

the invocation of national sovereignty in this sense (i.e. in the sense of total absence of restriction) in the contemporary – or indeed any – political scene is quite unrealistic and largely meaningless  
... the notion of sovereignty – in the comprehensive sense of a plenitude of power remaining within the uncontrolled discretion of states – has been significantly eroded.<sup>8</sup>

Lauterpacht points to customary international law having always imposed limitations arising from the obligations of each state to other states. He goes on to outline the growing body of treaty law that constrains policy.

Traditionally it has been argued that states (via their governments) consent to being parties to a treaty. Hence being subject to constraints imposed by treaties represents the exercise of sovereignty. As Rosenne says, “there is growing artificiality in the bare statement of principle”.<sup>9</sup> The expansion of the international co-operation agenda into detailed discussion of the principles for domestic policy

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<sup>7</sup> UNGA Resolution 2131 (XX), “Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty”, of 21 December 1965.

<sup>8</sup> E. Lauterpacht, “Sovereignty – myth or reality?”, *International Affairs*, 1997, Vol. 73, pp. 137-50: quotes from p. 140 and p. 141; the placing of the dashes in the first quote had been corrected, but the bracketed text was in the original.

<sup>9</sup> S. Rosenne, “A Role for the International Court of Justice in Crisis Management”, in G. Kreijen et al, (eds.), *State Sovereignty and International Governance*, (Oxford: Oxford University Press, 2002), p. 195. For general criticism of the doctrine of consent, see Dixon, *op.cit.*, pp. 16-18.

formulation and the monitoring of policy implementation completely erodes the boundary between internal affairs and foreign policy. For example, domestic environmental policy has been formulated predominantly in the context of negotiating a range of environmental treaties and it is implemented in terms of fulfilling the treaty obligations. Similarly, even without there being specific treaty commitments, development policy is no longer solely a matter of domestic politics, but is enmeshed in the agenda set by the Millennium Development Goals. This is a constraint both on developed country governments on how they deliver aid and on developing country governments on how they utilise finance. As long ago as 1977, the word “intermestic” was proposed to describe such issues that are important both in international politics and in domestic politics.<sup>10</sup>

Some treaties go further than imposing the constraints required to achieve effective co-operation. The Statute of the International Criminal Court overturns the “sovereign immunity” of government leaders to be exempt from prosecution in other countries for any acts undertaken in their role as state executives. If war crimes, crimes against humanity or genocide are not taken to trial, then the alleged criminals should be prosecuted in the ICC.<sup>11</sup> Article 27 of the Statute explicitly asserts that abolition of sovereign immunity applies right up to the level of “a Head of State or Government”. The ICC Statute follows the precedent of the two international tribunals created to prosecute those responsible for the horrific crimes in Yugoslavia and in Rwanda in the 1990s. The tribunals have completed a wide range of cases and the ICC completed its first case in March 2012.

In practical terms, the Convention Against Torture is much more far reaching. Firstly, it is not restricted to widespread or systematic crimes, but can apply to the act of a single torturer against a single victim. Secondly, the crime of torture is *defined* as an act of the government, when pain or suffering is inflicted with the consent or acquiescence of a public official.<sup>12</sup> Thirdly, although there is no supranational court covering torture, prosecutions can occur against the wishes of the offending government. Jurisdiction arises for a party to the Convention, not only when the offence has taken place on their territory or when the offender is a national, but also when the victim is a national. Government officials can in principle be prosecuted in any country where the Convention has been ratified. This was shown when the former President of Chile, General Pinochet, was held under arrest in Britain during 1998-1999 at the request of a Spanish prosecutor for complicity in torture in Chile of a Spanish citizen. In Pinochet’s final hearing before the House of Lords, it was ruled that the Convention took precedence over the doctrine of sovereign immunity.<sup>13</sup>

The development of the international criminal law is being complemented by a political process at the United Nations. In 2001, a Canadian commission proposed a collective responsibility to protect a population which is suffering serious harm, as a result of an internal break-down of law and order. This supranational principle is slowly gaining support.<sup>14</sup> In 2005 the UN General Assembly endorsed it for the first time.<sup>15</sup> Further change has been seen recently in the global response to the Syrian government’s killing of domestic opponents in 2011-2012, which is in the sharp contrast to the response to similar events in Hama in February 1982.

The ICC Statute, the Convention Against Torture and the responsibility to protect have been emphasised, because they strike at the core of sovereignty. Nothing is more clearly a matter of the

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<sup>10</sup> B. Manning, “The Congress, the Executive and Intermestic Affairs: Three Proposals”, *Foreign Affairs*, Vol. 55, No. 2 (Jan., 1977), pp. 306-324.

<sup>11</sup> The Statute of the ICC was adopted in Rome by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 and entered into force on 1 July 2002. It was ratified by Argentina on 8 February 2001 and by the UK on 4 October 2001.

<sup>12</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the UN General Assembly as Resolution 39/46 on 10 December 1984 and entered into force on 26 June 1987. It was ratified by Argentina on 24 September 1986 and by the UK on 8 December 1988.

<sup>13</sup> See C. Wickremasinghe, in Evans, pp. 402-3.

<sup>14</sup> For the development of this principle, see [www.responsibilitytoprotect.org/index.php/about-rtop/core-rtop-documents](http://www.responsibilitytoprotect.org/index.php/about-rtop/core-rtop-documents).

<sup>15</sup> UNGA Resolution 60/1, “2005 World Summit Outcome”, of 16 September 2005, paragraph 139.

internal affairs of a country than the definition of criminal offences, the prosecution of criminals and the handling of civil unrest. The UN intervention in Syria may be weak when measured against the oppression that is occurring, but it is a significant challenge to the sovereign right to non-interference. However, the creation of international criminal law is a legal revolution. No political intervention could be a more extreme interference in internal affairs than putting government officials or political leaders of one country in jail in another country.

### **Intergovernmental Organisations and Constraints upon States**

Technically, the agreements, charters, constitutions or conventions that establish intergovernmental organisations (IGOs) are simply a special form of treaty. On this basis, the doctrine of state consent is still argued at times. The decision to become a member is supposed to be a prior endorsement of the acts of bodies such as the United Nations or the European Union.<sup>16</sup> However, to argue that a member state has consented to all the unforeseen and unforeseeable obligations arising from membership is not just artificial: it is absurd. The assumption of prior knowledge is untenable; the assumption of continuity in state interests (government policy goals) over long periods of time is mythical and hence to deduce there has been informed consent to the acts of IGOs is invalid.

#### *Interference in the Internal Affairs of States*

The politics of the United Nations illustrates the loss of sovereignty in many ways. The evolution of treaty negotiations and other forms of policy-making in many fields, such as the environment and development, has already been mentioned, but many might not regard such changes as being of fundamental significance. As with international criminal law, the politics of human rights, affecting the relations between a government and its citizens, unambiguously goes to the core of sovereignty. The UN Charter firmly proclaims the principle of non-interference:

Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ... Article 2 (7).

But the Charter also contains seven mentions of affirming or promoting human rights, including the requirement for the Economic and Social Council to establish a Commission on Human Rights.<sup>17</sup> These two commitments, to non-interference and to human rights, directly contradict each other. Article 2 (7) is not compatible with discussion of civil and political rights and how the government treats its citizens with respect to economic and social rights, all of which are matters of domestic jurisdiction. In 1947, at its first session, the Commission resolved the contradiction, with Article 2 (7) overriding the commitment to human rights, by deciding “it has no power to take any action in regard to any complaints concerning human rights”.<sup>18</sup>

The situation did not change until May 1970, when the Commission set up a compromise procedure to consider exceptional situations “which appear to reveal a consistent pattern of gross and reliably attested violations of human rights”.<sup>19</sup> By 2006 the UN had gone to the other extreme of human rights overriding Article 2 (7). A new, higher status, Human Rights Council replaced the Commission and it was agreed that all governments, without exception, would be subject to a regular Universal Periodic Review of their complete human rights record.<sup>20</sup> Governments are subject not just to a range of treaty commitments on human rights (which are legally separate from the UN), but also to a range of “Charter-based mechanisms”. There are currently ten special rapporteurs or independent

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<sup>16</sup> Brownlie expressed this argument, without making it clear to what extent he endorsed it: see Brownlie, *op. cit.*, p. 292. It was rather strange that this text on “Membership of Organizations” in the chapter of “Sovereignty and Equality of States” remained unaltered in all the six editions from 1973 to 2008.

<sup>17</sup> UN Charter, Preamble and articles 1 (3), 13 (1)(b), 55 (c), 62 (2), 68 and 76 (c).

<sup>18</sup> UN ECOSOC document E/259, October 1947, and repeated in Resolution 728 F (XXVIII) of 30 July 1959.

<sup>19</sup> ECOSOC Resolution 1503(XLVIII) of 27 May 1970.

<sup>20</sup> UNGA Resolution 60/251 of 15 March 2006 created the Human Rights Council and operative paragraph 5(e) created a mechanism for a Universal Periodic Review of each government’s “human rights obligations and commitments”.

experts with country mandates, each of whom reviews the overall situation in an individual country. In addition, there are 35 thematic mechanisms, covering group rights, such as those on racism, indigenous peoples or violence against women; individual civil and political rights, such as freedom from torture, arbitrary detention or summary execution; and economic and social rights, such as the right to water, housing or education.<sup>21</sup> These themes are pursued by rapporteurs or working groups covering practice in all countries. Thus, by a process of political evolution, the principle of non-interference has been overturned and, to this extent, sovereignty has been lost, simply by virtue of being a member of the UN.

### *Assessment of the Supranational Authority of Intergovernmental Organisations*

IGOs have much greater significance than providing specific examples of the loss of sovereignty and/or political independence. Many, but not all, of them undermine the very nature of statehood, by containing provisions for imposing new legal obligations upon their members. In situations where this can be done against the explicit objections of a government, the doctrine of consent completely evaporates. Sovereignty has been lost when the IGO possesses supranational authority, but the assessment of when this has happened is quite complex. While politicians around the world are regularly expressing their concerns about the loss of sovereignty, it is astonishing that diplomats, journalists, academic lawyers and political scientists rarely address the topic. Brownlie is an exception and he does provide a set of criteria for evaluating encroachment on domestic jurisdiction and statehood:

The line is not easy to draw, but the following criteria of extinction of personality [the loss of sovereignty] have been suggested: the obligatory nature of membership; majority decision-making; the determination of jurisdiction by the organization itself; and the binding quality of decisions of the organization apart from consent of the members.<sup>22</sup>

Put simply, whenever an international body can take a legally-binding decision, by some form of majority voting, sovereignty has been lost by any state that cannot block the decision.

The first point to make is additional to Brownlie's list. All the IGOs we will consider in this paper have international legal personality.<sup>23</sup> This means they have rights and obligations as a subject of international law that are separate from and independent from the rights and obligations of their member states. Such personality is necessary to be able to make demands upon members, such as giving their staff diplomatic status. For supranationality to arise more is required: additional authority must be conferred upon the organisation by its constituent document. We will now consider the extent to which Brownlie's criteria are met and supranational authority exists for the major intergovernmental organisations that the United Kingdom and Argentina have joined. It will be more convenient to consider them in a different order, taking membership and jurisdiction first, then asking whether decisions are binding and ending with the voting requirement for a decision to be adopted. In drawing conclusions using these criteria, the impact will be separated into two components: whether sovereignty is lost by interference in the internal affairs of countries or the existence of supranational legal authority, and whether political independence is constrained. While sovereignty and independence are analytically distinct, they relate closely to each other.

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<sup>21</sup> The country mandates are listed at [www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx](http://www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx) and the thematic mandates at [www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx](http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx).

<sup>22</sup> Evans and Dixon do not mention the topic, while Shaw in a 1,542 page volume just has two single sentences (p. 57 and p. 488). The quote is from Brownlie, 2008, p. 292, with the words in brackets added.

<sup>23</sup> The WTO Director-General, Pascal Lamy, said in a speech on 15 June 2008 that Article VIII of the *Marrakesh Agreement Establishing the World Trade Organization*, accords the WTO "international legal personality", but in fact the word "international" is not in Article VIII, (see [www.wto.org/english/news\\_e/sppl\\_e/sppl94\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl94_e.htm)). The absence of this word does somewhat question the status of the WTO.

## *The United Nations*

Membership of the UN is now virtually universal. The absence of Taiwan, Western Sahara, Palestine and Kosovo is not voluntary and relates to widespread claims that they are not proper states. The existing members cannot leave the UN, because there is no provision for this in the UN Charter. In political terms, membership of the UN is obligatory, in order to function in normal diplomacy. In addition, the jurisdiction of the UN is determined by the UN itself. The UN Charter does not contain any provisions for interpretation of the Charter. No individual government has any mechanism to challenge the jurisdiction of the UN or to contest the authority to take any action. Brownlie's remaining criteria, about UN decision-making, must be considered separately for the General Assembly and the Security Council.

### *Binding Decisions by the UN General Assembly*

The UN General Assembly has a wide authority to discuss any questions within the scope of the Charter and to make "recommendations" to the members or to the Security Council.<sup>24</sup> It is generally held that this authority does not entail any loss of sovereignty, because recommendations do not have to be obeyed. However, there are two exceptions to this general rule. Firstly, when resolutions are passed with little or no opposition, are regularly reaffirmed and are widely cited in other legal documents, they may come to be regarded as evidence of customary international law. On this basis, the Universal Declaration on Human Rights and the Declaration on Decolonisation can be regarded as examples of resolutions that are legally binding upon both UN members and non-members.<sup>25</sup> Secondly, the Assembly does have final binding authority over various internal UN questions. It shares with the Security Council responsibility for a variety of decisions, including admitting new members to the UN and appointing the Secretary-General. On its sole authority, the Assembly determines the regular budget of the UN and decides the composition of most other UN bodies, including election of the non-permanent members of the Security Council.

Taken individually, the binding authority over the different UN questions may not seem very significant, but collectively they have a great deal of political impact on the relative status of governments and some impact on statehood. It was a major change in the world of diplomacy when the Assembly decided to seat communist China rather than Taiwan in October 1971.<sup>26</sup> Equally, the South African apartheid regime was severely undermined by losing its seat in the Assembly in November 1974.<sup>27</sup> Currently, suggestions that Israel might be suspended or Palestine admitted to the UN are central to their legitimacy as states.

All the procedural decisions of the General Assembly are taken by a simple majority vote and "important" questions require a two-thirds majority. In calculating whether there is a majority, the delegations that abstain or are absent are not counted. As there are now 193 UN members, it will usually require *at least* 75 governments to stop a procedural decision being taken or 50 governments to vote "No" to block a resolution. When individual governments vote against the majority, they have no choice but to accept the outcome. Outside the field of human rights there may be little direct effect upon legal sovereignty, but there is significant effect on the political independence of governments. They must sit with delegates whose legitimacy they do not recognise, co-operate with procedures they rejected and pay for budget items they sought to delete from the budget.

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<sup>24</sup> UN Charter, Article 10, see [www.staff.city.ac.uk/p.willetts/UN/CHARTER.HTM#C4](http://www.staff.city.ac.uk/p.willetts/UN/CHARTER.HTM#C4).

<sup>25</sup> UNGA Resolution 217 A (III) of 10 December 1948 and Resolution 1514 (XV) of 14 December 1960, respectively.

<sup>26</sup> UNGA Resolution 2758 (XXVI) of 25 October 1971.

<sup>27</sup> UNGA Resolution 3206 (XXIX) of 30 September 1974 approved the Report of the Credentials Committee, rejecting South Africa's credentials. The ruling of the President of the General Assembly that as a result South Africa could no longer participate in the Assembly's work was upheld, by a procedural vote on 12 November 1974.



### *Binding Decisions by the UN Security Council*

The Security Council has a narrow scope, in that it only has “responsibility for the maintenance of international peace and security”, but it has strong authority.

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter (Article 25).

For some years, it was unclear what “decisions” were covered by Article 25. Under Chapter VI of the Charter, the Council can make “recommendations”, which are non-binding, so it would be illogical to say Article 25 must apply to Chapter VI decisions. From the 1960s, it became clearly established that Council resolutions were only binding under Article 25, if they came under Chapter VII as a response to any “threat to the peace, breach of the peace, or act of aggression”. This authority has to be explicitly evoked by direct reference to these words or to Chapter VII or to one of the articles within Chapter VII.

Since the earliest days of the UN, the Security Council has passed a variety of types of binding resolutions. They have called for cease-fires, imposed diplomatic sanctions, declared certain actions to be null and void, imposed trade embargoes, banned the supply of weapons to conflict situations, imposed arms control measures, frozen the financial assets of individuals, established the Yugoslav and Rwanda tribunals, referred cases to the International Criminal Court, engaged in peace enforcement with UN military operations, and authorised UN members to use force. Since the end of the Cold War, the scope of these resolutions has increased substantially. In each case, every member of the UN has been obliged to accept the resolution and ensure that their citizens are obliged under domestic law to implement the Council's decisions.

The Security Council is composed of five permanent members – China, France, Russia, the UK and the USA, known as the P5 – and ten members elected by the General Assembly, to represent the different regions of the world. Resolutions have to obtain at least nine affirmative votes from the fifteen members. In addition to obtaining majority support, a resolution must not receive a negative vote from any of the permanent members. This provision gives each of the P5 an independent, unilateral veto on all resolutions (except on procedural questions).

Most, but not all, states have lost their sovereignty over all questions addressed by the Security Council under Chapter VII of the Charter. The five permanent members retain their sovereignty, because they do have the ability, using the veto, to prevent anything being decided without their consent. The remaining ten Council members are required to obey, even when they have voted against the resolution. Indeed, in each year 178 of the 193 members of the UN must obey Council resolutions, despite having no right to vote on any resolution during that year.

### *The United Kingdom and Membership of the European Union*

Initially, the members of the European Economic Community could not withdraw from membership. When legal personality was transferred to the European Union, by the Treaty of Lisbon in December 2009, a provision was added to allow countries to leave.<sup>28</sup> Legally this means that an EU member has not lost sovereignty by being subject to supranational EU decisions, because consent can be withdrawn, by leaving the Union. However, this is no more than a notional technicality. While political groups in some countries may argue for withdrawal, the probability of any member actually leaving the EU is near zero.

The EU has full internal jurisdiction over its own actions. The European Court of Justice interprets the EU treaties and the implementation of decisions made by EU organs, under those treaties. The Commission, which is the EU's independent secretariat, can bring cases against member governments. In addition, companies, organisations or individuals can bring cases against

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<sup>28</sup> Treaty on European Union (TEU), Article 50, in A. Cowgill et al (eds.), *The Treaty of Lisbon in Perspective*, (Stroud: British Management Data Foundation, 2008), pp. 22-3. This contains the full text of the EU treaties.

governments. Finally, the domestic courts of member countries must treat the European Court as the supreme court for their application of EU law. Court rulings can strike down domestic laws or require governments to take new action to implement EU law. Furthermore, their extensive powers have been interpreted so liberally that the Court is widely seen as actively promoting European integration. The EU institutions have supranational jurisdiction, because “the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of the Member States”.<sup>29</sup>

The EU treaties provide for a highly complex array of decision-making procedures on all conceivable aspects of government. However, it is not necessary to examine all the details in order to demonstrate the extent to which sovereignty has been affected. The areas of policy-making have been divided into the following categories:

- *Exclusive competence* for the Union – the customs union, including policy in the World Trade Organisation, competition policy, monetary policy (primarily for those whose currency is the Euro) and marine conservation;
- *Shared competence* between the Union and its members – agriculture and fisheries, the internal market, the environment, justice, energy and transport;
- *Co-ordination* of policy-making by the members – economic and employment policies, plus the Common Foreign and Security Policy; and
- *Support* by the Union for the actions of the members – health, education, industry, culture, tourism, sport, disaster prevention and administrative co-operation.<sup>30</sup>

The term “shared competence” is a misnomer, because in these areas the “Member States shall exercise their competence to the extent that the Union has not exercised its competence”.<sup>31</sup> The EU has joined intergovernmental organisations and been treated as a state, when the organisations cover the policy areas over which the EU has exclusive or shared competence.

Within the EU, when EU law is being created, there are two forms of decision-making. When voting must be unanimous, known as acting in an intergovernmental manner, each government has a veto and therefore there is no loss of sovereignty. This primarily applies to the Common Foreign and Security Policy, defence questions, harmonisation of taxes and aspects of justice, family law and police co-operation. The alternative is to have qualified majority voting in the Council of Ministers of the EU and a simple majority in the European Parliament. This applies to all the areas of exclusive competence and shared competence, plus establishing guidelines both for co-ordination and for actions where the EU supports its members.

Since 1957, when qualified majority voting (QMV) has been used, each government has voted on the policy question, but the number of votes for each country has been roughly based on the size of their population. Currently, they range from the smallest country, Malta, with three votes, through to the largest countries, Germany, France, the UK and Italy, with 29 votes each. No one country can veto a decision. The larger countries have much more impact, but the 14 smallest countries can unite to block a decision.<sup>32</sup> Under the ordinary legislative procedure, the Council must reach agreement with the European Parliament, which also has a form of weighted voting, in that the number of members elected from each country is also roughly based on the population. However, they act as individuals and predominantly organise through transnational party groups rather than as blocks of votes from each country.

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<sup>29</sup> “Declaration Concerning Primacy”, attached to the Treaty of Lisbon, in A. Cowgill et al, p. 216.

<sup>30</sup> Treaty on the Functioning of the European Union (TFEU), Title I, in A. Cowgill et al, pp. 26-7. The language in the bullet points is to some extent a simplification.

<sup>31</sup> TFEU, Article 2 (2), in A. Cowgill et al, p. 26.

<sup>32</sup> The situation until November 2014 is actually somewhat more complex, but the additional provisions do not affect the argument about sovereignty.

The range of policy coverage, the depth of the institutional collaboration between domestic and EU civil servants, the existence of transnational political parties and transnational lobbying organisations, the frequency of interactions between the governments and the authority of the EU's collective institutions mean that distinctions between interference in the internal affairs of EU members, supranational legal authority and loss of political independence fall by the wayside. In terms of this paper's emphasis on distributed sovereignty, the UK has lost sovereignty and independence to a high degree in many policy areas and to a lesser extent in most others.

### *Argentina and Membership of Mercosur*

The Treaty of Asunción, which established the Common Market of the Southern Cone (Mercosur), was agreed by the governments of Argentina, Brazil, Paraguay and Uruguay in March 1991 and entered into force in November 1991.<sup>33</sup> In December 1994 at Ouro Preto, Mercosur was strengthened by agreement on a Protocol on the Institutional Structure.<sup>34</sup> The Treaty allows members to withdraw from Mercosur without notice, except that the provisions for the common market would remain in force for two years after withdrawal.<sup>35</sup> While the EU Commission can act with international legal personality, Mercosur's Administrative Secretariat cannot do so. Mercosur's legal personality is explicitly vested in the Council, which is no more than an intergovernmental body.<sup>36</sup> The Secretariat cannot develop any new activities, except at the specific request of the political bodies.<sup>37</sup> The provisions for withdrawal, on personality and on the Secretariat are designed to ensure Mercosur cannot become supranational.

One month after Mercosur was formed a dispute settlement system was established. The initial provisions were replaced by a strengthened system in January 2004. This covers both trade disputes and the interpretation of the Mercosur treaties. When one party notifies a dispute, if no solution can be negotiated within a few weeks, the dispute goes to an Ad Hoc Arbitration Court, with each party appointing one arbitrator and the parties agreeing on a third arbitrator of a different nationality, who will preside. The main change in 2004 was to add an appeal process, by creation of a Permanent Review Court, which is restricted to legal questions. Both the arbitration awards and the appeals are decided by a majority vote and pressure on the courts is limited by the voting and discussions in the court being secret. Despite the strong element of governmental co-operation in this system, the combination of compulsory jurisdiction, majority voting and binding decisions does mean Mercosur has full internal jurisdiction over its own institutions. The system has a very limited scope: there is no possibility of actions comparable to the European Court of Justice when it overrides the laws of member states.

The Treaty of Asunción aimed to create a customs union, with no internal trade barriers, by the end of 1994, plus the gradual co-ordination of macro-economic policy and a common external tariff (CET). Despite differences between the governments, arising from the two smaller countries wanting lower tariffs on imports and the two larger countries wanting higher tariffs, implementation did start in January 1995. However, agreement on the CET was only possible by allowing for the designation of exceptions and each country is still only applying a common tariff on a small proportion of its imports. Currently, economic problems are generating political and economic impediments to trade within Mercosur, especially between Argentina and Brazil. In a patchwork manner, co-operation has

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<sup>33</sup> Treaty Establishing a Common Market, available in English at [www.sice.oas.org/trade/mrcsr/TreatyAsun\\_e.asp](http://www.sice.oas.org/trade/mrcsr/TreatyAsun_e.asp). All the treaties and protocols cited are available in Spanish in *Instrumentos Fundacionales del MERCOSUR*, (Montevideo: MERCOSUR Secretariat, June 2007).

<sup>34</sup> Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR, signed 17 December 1994 and entered into force for all four members on 16 February 1996, available in English at [www.sice.oas.org/trade/mrcsr/ourop/ourop\\_e.asp](http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp).

<sup>35</sup> Treaty of Asunción, Articles 21 and 22, respectively.

<sup>36</sup> Protocol of Ouro Preto, available at [www.sice.oas.org/trade/mrcsr/ourop/ourop\\_e.asp](http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp), Article 34 and Article 8 (III).

<sup>37</sup> Protocol of Ouro Preto, articles 31 and 32, covering requests from the Council, the Group or the Commission.

extended beyond the common market to questions such as environmental protection, animal and plant health, drug trafficking and aspects of education, telecommunications and transport.

Mercosur does not have any of the authority that has been given to the EU. The Protocol of Ouro Preto creates a Council, a Common Market Group and a Trade Commission. The decisions of each of these political bodies are described as being “binding”.<sup>38</sup> Despite such language, there are no supranational features whatsoever. They are all described as being “intergovernmental organs” and each “shall be co-ordinated by the Ministers for Foreign Affairs”.<sup>39</sup> The decision-making is by consensus and there is no system of majority voting.<sup>40</sup> In other words, each member of Mercosur has a permanent veto over the development of any new activities. For this reason there is no loss of sovereignty to these Mercosur bodies.

The Protocol of Ouro Preto also created a Joint Parliamentary Commission, which was formed by members of parliament appointed by the parliaments of the member countries. In December 2005 it was agreed to replace this Commission with a directly elected Mercosur Parliament, known as *Parlasur*.<sup>41</sup> The parliament is given a wide range of political procedures to hold to account Mercosur’s other bodies. It can also establish its own budget, hold debates about the integration process, propose the harmonisation of national laws, interact with civil society, and receive petitions from individuals about Mercosur’s work.<sup>42</sup> *Parlasur* is due to evolve. From January 2007 to December 2010, it was composed of 18 members from the Congress of each of the four countries. During a transition period, the composition is being expanded, in two stages, to give a greater number of seats to the two larger countries. In 2012, the Council must establish a Mercosur Citizens’ Day for direct elections to be held on the same day in 2014 in all the countries.<sup>43</sup> The Parliament has minimal legal authority. It can do no more than control its own procedures and manage its own budget. There is no direct legislative authority. However, in political terms, it can do much more. Promoting transnational democracy, advocating integration and suggesting legislation would be interference in the internal affairs of the four countries.

Using Brownlie’s strict criteria, Argentina has not lost sovereignty to Mercosur. Only the dispute settlement has a legal element of supranationality. This has little significance because Argentina retains a veto in all the decision-making bodies. *Parlasur* does have the potential to interfere in Argentina’s internal affairs and to apply some external political pressure, but it remains to be seen to what extent this will develop supranationally, as and when direct elections have been held.

### *The Impact of the International Financial Institutions on both Countries*

There is a large literature that attacks the International Monetary Fund and the World Bank, for depriving governments of their political independence, but little has been written about their legal status. Members have the legal freedom to withdraw from the IMF and the Bank without notice, but withdrawal would deprive the government of access to financial support from the Fund and the Bank. Almost certainly, it would also prevent the government, private banks and major companies having access to private capital markets for any projects based in the country. The Fund and the Bank each

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<sup>38</sup> *Ibid.*, articles 9, 15, 20 and 42.

<sup>39</sup> *Ibid.*, articles 2, 7, 11 and 17, respectively.

<sup>40</sup> The Treaty of Asunción provided in Article 16 for decisions to be taken by consensus “during the transition period” until the end of 1994. This practice was continued permanently by inclusion in the Rules of Procedure of the Council and the Group, (in Council Decisions CMC/Dec.2/98 and CMC/Dec.4/91, available from the Normativa-Decisiones section of [www.mercosur.int](http://www.mercosur.int)) and of the Commission (in Group Resolution GMC/Res.61/96, available from the Normativa-Resoluciones section).

<sup>41</sup> Protocolo Constitutivo del Parlamento del MERCOSUR, signed in Montevideo on 9 December 2005 and entered into force 24 February 2007, available in Spanish at [www.mercosur.int/2005\\_protocoloparlamentomcs\\_es.pdf](http://www.mercosur.int/2005_protocoloparlamentomcs_es.pdf) and in *Instrumentos Fundacionales*. There does not appear to be any authoritative English text.

<sup>42</sup> *Ibid.*, Article 4 covers all the authorised activities.

<sup>43</sup> The Transitory Provisions are spelt out in an annex to the Montevideo Protocol.

have jurisdiction over their own affairs, through political rather than legal bodies. Any disputes about interpreting their respective Articles of Agreement are taken initially to their Executive Board and an appeal would be taken to the Board of Governors.

The IMF was originally intended to provide foreign exchange to assist members facing problems funding balance of payments deficits. The Bank was to complement this by funding specific investment projects to promote economic growth. Now, when there is a market crisis, agreement of the government with the IMF to implement a new economic programme will usually stabilise the market. From 1999, the Fund was supposed to have become less focused on financial deficits and more focused on poverty reduction and growth. Whether it was the United Kingdom in 1976 or Argentina in 2000-2002, there was a widespread feeling that the conditions imposed by the IMF in return for loans and the related cuts in public expenditure, for each country, amounted to an unacceptable loss of their political independence. In neither case was IMF control as substantial as its critics liked to suggest. During the respective crises, the role of the banks, the ratings agencies and the foreign exchange dealers were of more immediate impact. The most important political influence of the IMF arises when its decision whether or not to lend to governments reassures or disconcerts the other market participants.

Officially the economic programmes are presented by governments to the IMF in a Letter of Intent. In practice, IMF staff have a major say in the content of the programme, using the threat of the IMF refusing to provide a loan, in order to ensure their proposals are adopted. Technically, there is no loss of sovereignty because the Letter of Intent is written by the government and not by the IMF. However, governments may feel compelled by political and economic pressures to reach an agreement with the IMF. In addition, the IMF has a little-known, legal authority over its members. A country cannot be a member of the World Bank unless it is a member of the IMF.

The major policy-making decisions of the Fund and the Bank are taken by the annual joint meetings of their Boards of Governors, with each member providing a Governor. Implementation of policy is decided by separate Executive Boards for each organisation, which both meet several times per week. In the IMF Board of Governors, provision has been made for decisions to be taken by majority voting, with each member having a number of votes roughly proportional to an index of their country's role in the global economy. In the IMF Executive Board, each Director casts all the votes of the members he/she represents. For most major IMF decisions the required majority is 85% of the total voting power. As the United States possesses more than 15% of the votes, it has a veto on major decisions. The voting arrangements for the Bank are similar, except that the US has lost its veto on some decisions, because its voting power has declined over the years. In any case, the boards of both the IMF and the Bank strive to operate by consensus. This does not mean all members are equal. The system could be described as producing a "weighted consensus". Those with the greatest number of votes do tend to have a much greater influence on the outcomes.<sup>44</sup>

The Brownlie criteria produce a complex assessment of the Fund and the Bank. The loss of legal sovereignty is minimal. While each institution has jurisdiction over its own authority and the Boards' decisions are legally binding, governments can withdraw from membership and few decisions affect members, unless they choose to apply for funding. On the other hand, the statistical and policy monitoring of each country is significant interference in the members' internal affairs and the interference becomes substantial once conditional funding is agreed. The IMF, as the bell-wether or referee for private markets, and the Bank, by setting standards for development policy, each act to limit the political independence of the world's governments in economic policy-making.<sup>45</sup>

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<sup>44</sup> This paragraph simplifies a complex set of provisions, in the Articles of Agreement for each institution.

<sup>45</sup> The Bank's role in setting standards for development policy is shared with the OECD Development Assistance Committee and the UN Development Programme, but the Bank's annual World Development Report is highly influential.

### *The Impact of the World Trade Organisation on both Countries*

The WTO came into being in January 1995 through the institutionalisation and expansion of the mandates of the trade agreements that had been operating since the 1940s. It is gradually moving towards global membership and the UK and Argentina were founder members. Members can withdraw from the WTO by giving six months notice. This is a more plausible option than withdrawing from the Fund and the Bank, provided the member exports goods or services that are sufficiently in demand from its trading partners.

The WTO has a strong Dispute Settlement Mechanism (DSM) for interpreting the trade agreements, when specific aspects of policy in one country are alleged to be discriminatory against trade from another country. If a political solution is not possible, one party may request the WTO to establish a dispute Panel composed of three individual experts. The Panel acts as a legal tribunal and its rulings are subject to appeal to a permanent Appellate Body on issues of law. The Panel or the Appellate Body may rule that the defendant's policy is totally or partially incompatible with its WTO obligations. The case then returns to the political arena, as the rulings have to be adopted by the member governments, acting as the final Dispute Settlement Body. In most cases, when the ruling goes against a government, it responds by revising the offending policy, including by asking its legislature to repeal or amend domestic statutes. In some cases, the parties agree on compensation being given by the defendant to the complainant. Finally, if there is no positive response, the complainant will be authorised to apply retaliatory measures, against the defendant's own exports. Before 1995, reports had to be adopted by consensus, which meant the losing party could choose to block adoption of a report. In the WTO, it is necessary to have the reports endorsed by a "reverse consensus". Panel rulings are automatically adopted, unless there is a consensus in favour of rejecting them. Thus, there is a supranational process for the interpretation of all the WTO agreements. This complex system does involve the WTO establishing its own collective internal jurisdiction.<sup>46</sup>

The WTO cannot expand into new policy areas, so the question does not arise whether the political bodies can take binding decisions. The WTO has a weak institutional structure, with a very low budget and a small staff. The Director-General is not given the authority to exercise political leadership. There is no small committee of elected members to act as a policy-making executive. The functions of the WTO are little more than ensuring the trade agreements are honoured and new ones can be negotiated. In summary, the WTO structure was originally designed to avoid creating new commitments for its members, unless they are created by new treaties. Since 2001, with the Doha Development Agenda negotiations, the WTO has been drawn deeper into discussing the politics of development, the environment and public health. It is starting to promote aid to facilitate the trade of developing countries. It remains to be seen whether the deadlocked negotiations might eventually be resolved, with the WTO becoming more involved in policy-making.

It is difficult to evaluate whether WTO members would cede sovereignty through majority voting, if it were to become a more active political institution. The ministerial conferences and the various councils appear to have the same one-country, one-vote, majority voting system as the UN. However, these bodies should only resort to voting when "a decision cannot be arrived at by consensus".<sup>47</sup> In practice, the WTO has stuck to seeking consensus, even in such matters as electing the Director-General. Strictly speaking, this means every government has a veto on all WTO decisions, but developing-country delegations do not feel there really is a consensus, when they are excluded from some of the crucial "Green Room" meetings. Thus, legally, decision-making could be by supranational

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<sup>46</sup> D. Delaunay of the DG for External Policies of the EU has baldly stated the DSB is "a permanent body with its own jurisdiction", while M. E. Footer says neither the panels nor the Appellate Body "enjoys the inherent power .. to establish its own jurisdiction": see "The European Union and the World Trade Organisation", p. 3, at [www.europarl.europa.eu/ftu/pdf/en/FTU\\_6.2.2.pdf](http://www.europarl.europa.eu/ftu/pdf/en/FTU_6.2.2.pdf) and *An Institutional And Normative Analysis of the World Trade Organization*, (Leiden: Martinus Nijhoff, 2005), p. 77, respectively. Given their different focus, these two statements are not as contradictory as they appear at first glance.

<sup>47</sup> *Marrakesh Agreement*, Article IX (1).

majority voting, but this appears to be inoperative, because of decision-making by consensus. Politically, delegations from larger economies have much more influence than those from smaller economies. The system might be described as weighted-consensus, high-majority voting.

It is interesting to note that a special Consultative Board, set up by the WTO's Director-General in 2003 to review the future of the WTO, felt the need to address a whole chapter of its report to the question of sovereignty. It started by asking "is the notion of 'sovereignty' real?", continued by asserting sovereignty is not unitary, "It covers disaggregated 'slices' of relationships", and concluded the "WTO does have competences and powers that were previously the monopoly of states".<sup>48</sup> The impact arising from the commitment to free trade, the obligations in the WTO agreements and the rulings of the DSM is substantial. When governments fail to implement their trade policy in accord with their WTO obligations, they are generally brought into line, domestic vested interests are challenged and legislation is changed. While there is little loss of sovereignty over policy formulation, there is a substantial loss of sovereignty and political independence in implementation of policy commitments made in the WTO treaty agreements.

### *Assessment of the Impact of Intergovernmental Organisations upon Sovereignty*

In the introduction to the discussion of constraints imposed by intergovernmental organisations (IGOs) upon states, it was argued that membership of global or regional bodies might entail a change in the nature of statehood. In considering the specific examples, it became plain that there was no general pattern. The impact of each IGO has to be considered separately.

**Table 1 The Overall Impact of the Main Intergovernmental Organisations**

	<i>Brownlie's Four Criteria for Supranational Authority</i>				<i>Conclusions</i>	
	<i>Membership Withdrawal</i>	<i>IGO has Own Jurisdiction</i>	<i>Binding Policy Decisions</i>	<i>Majority Voting</i>	<i>Loss of Legal Sovereignty</i>	<i>Loss of Political Independence</i>
<i>United Nations General Assembly</i>	No provision	Yes	No, except internal UN questions	Yes	Limited authority, high interference	Substantial impact over time
<i>United Nations Security Council</i>	No provision	Yes	Yes and scope not predictable	Yes, except P5 vetoes	Absolute, under Chapter VII of the Charter	Substantial, both Chapter VI and VII
<i>European Union</i>	Yes, with two years notice or by agreement	Yes, via European Court of Justice	Yes and scope not predictable	Yes	Absolute, when majority voting applies	Substantial, even when not majority voting
<i>Mercosur</i>	Yes, with two years notice	Dispute settlement courts	Yes, but only with prior consent	No, unanimity is required	No authority, some interference	Low, but liable to increase
<i>IMF</i>	Yes	Yes, via its Boards	Yes, but only when borrower requests funds	Yes, except US veto	No authority, but high interference *	Substantial impact via markets
<i>World Bank</i>	Yes	Yes, via its Boards	Yes, but only when borrower requests funds	Yes	No authority, but high interference	Substantial impact over time
<i>WTO</i>	Yes, with six months notice	Dispute Settlement Mechanism	Yes, but only, over treaty implementation	Yes, but not used	Substantial, on treaty implementation	Mainly via the impact of the legal processes

\* The IMF has supranational legal authority on one specific question: it controls access to the World Bank.

<sup>48</sup> Peter Sutherland et al, *The Future of the WTO*, (Geneva: WTO, 2004): two quotes from p. 29 and one from p. 34. This report is available at [www.wto.org/english/thewto\\_e/10anniv\\_e/future\\_wto\\_e.htm](http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm).

The summary in Table 1 demonstrates that there is high variation in the impact on sovereignty and political independence made by the main IGOs upon the United Kingdom and Argentina. Mercosur has minimal significance for Argentina, but the European Union effectively deprives the UK of sovereign independent statehood on most policy questions. Argentina has lost sovereignty to the UN Security Council, whereas the UK is not subject to any supranational decisions by the UN, except for its obligation to make its contributions to the regular budget. Both Argentina and the UK are affected by the general global political change produced by the UN over the decades, through the change in global norms. For example, Argentina's military regime was delegitimised by the UN monitoring of its human rights record and the British Empire was delegitimised by the UN promotion of decolonisation. Of course, both these processes were also affected by other internal and external pressures for change, but under the traditional model of statehood substantial political change is not subject to sustained external interference. Compared to the EU and the Security Council, the global economic organisations have much less legal authority, but they do substantially constrain a government's ability to challenge neo-liberal economic orthodoxy, particularly when the country is facing financial and/or trade problems. Overall, neither Argentina nor the United Kingdom has lost all its sovereignty nor all its political independence. Each has different degrees of sovereignty and independence in the different areas of policy-making. The distinction between the legal and political processes was important, because the constraints on independent political action are greater than the formal loss of legal sovereignty to intergovernmental organisations.

### **Globalisation and the Constraints upon States**

A variety of processes of change at the end of the twentieth century led to a more general sense of change in the nature of global politics. This was captured by popularisation of the new concept of globalisation. Technological change has, from the mid-1960s, massively increased the density and the speed of communication networks and reduced the costs of using them. Global air travel and telephone systems became available; then satellites were provided for commercial computing and television; and shipping and air freight capacities increased, while their costs were reduced. Finally, the Internet started to develop in the 1980s and the world-wide web expanded explosively from 1995 onwards. The technological change was both necessary for and part of a process of global economic integration. Political change led to reductions in the barriers to trade and foreign investment.

Transnational corporations (TNCs) had been established in the nineteenth century, mainly, but not solely, as part of the expansion of the European empires. Indeed, British companies were important in the development of the railways, meat-processing and banking in Argentina in the late nineteenth century. Globalisation enabled the existing TNCs and new ones to expand dramatically in their geographical spread, the scale of their activities and the scope of their activities. TNCs must have their legal headquarters in one country and operate through affiliates in other countries. These affiliates may be branches of the parent company, partially or totally owned subsidiary companies or nominally independent companies operating through franchising, licensing or other types of joint operations.<sup>49</sup> TNCs control the majority of world trade both in goods and in services. A large proportion of this trade between countries occurs within TNCs. Such trade, between different branches and/or different subsidiaries of a single company, is known as intra-firm trade. The existence and the operation of TNCs in a globalised world generates a range of different problems for governments.

The most important legal problem is extraterritoriality, the exercise of jurisdiction by a government outside its own territory. The possibility of this occurring is intrinsic to every TNC. Let us consider a TNC with its headquarters in Spain and a subsidiary company in Argentina. The parent company is subject to Spanish law and the subsidiary is subject to Argentine law. However, both governments expect the parent company to exercise authority over its subsidiary. Consequently, Spanish law may be

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<sup>49</sup> This definition of a transnational corporation is rather broader than that used by many writers, but it is the one used for the *World Investment Report*, produced annually by the United Nations.



applied to the subsidiary in Argentina. To the extent that such extraterritoriality occurs, one state is violating the sovereignty of the other state. Governments will not notice this when they have similar policies or when the practices of the subsidiary have little relevance to the host government. On the other hand, extraterritoriality can generate intense conflict, such as the battle in 1982 when Mrs Thatcher refused to allow President Reagan's administration to prevent participation by a British company in building a gas pipeline in the Soviet Union. More routinely, the expansion of TNCs generates questions over which governments can apply their competition policy, their environmental regulations or their anti-corruption laws to the companies' activities. This can also generate reverse extraterritoriality, for example when the European Union forbids two American companies to merge, if this would lead to market dominance within Europe.

When a TNC engages in intra-firm trade, the question arises of how to value such trade. A transfer price is recorded for the purpose of government trade statistics, but for the TNC the price only affects its internal book-keeping. It can set the transfer price higher or lower than the market price (if a market price actually exists), in order to evade taxation in one country, to remit profits, to manage foreign exchange funds or to avoid controls on flows of capital. Such activities can prevent governments implementing their financial and economic policy. Similarly, TNCs can engage in regulatory arbitrage, which involves moving their activities from one country to another, in order to avoid the costs associated with legislation on environmental protection, employment conditions and social welfare obligations. The political impact is even greater when the threat by a TNC to move to another country prevents legislation being enacted or taxation being levied. The steady global slide to lower levels of corporation taxes illustrates the ability of TNCs collectively to constrain the political right of governments to increase government expenditure.

The inability of governments to control cross-border transactions also limits their political independence. This is most obvious in the case of radio, television, telephone and Internet communications. Some governments may not have the technical capacity to block communications and all governments have to consider whether the political and economic costs of blocking communications outweigh the perceived benefits. The same problem arises in a different manner with the physical movement of people and goods. Here the triangulation of communications via a third country prevents governments from imposing sanctions upon another country. For example, for several years after the 1982 war, the Argentine government officially prevented any trade between Argentina and the United Kingdom. This did not mean communications were broken. People could fly on a single ticket between Buenos Aires and London, by changing flights in Rio de Janeiro or Madrid. Companies could trade via their affiliates in third countries. One major British company even triangulated its exports to Argentina in this period, by simply sending invoices from a third country, while sending the goods by the direct route.

The combined effects of extraterritorial jurisdiction, manipulation of transfer pricing, regulatory arbitrage, the costs of controlling trans-border telecommunications and the avoidance of physical controls by triangulation mean governments cannot exercise comprehensive legal sovereignty over TNCs. They also cannot act on a range of policy questions with political independence from external pressures applied by TNCs.

### **The Management of Global Public Goods**

A third category of limits upon the ability of governments to act in an independent manner arises from the nature of some global problems. A variety of desirable policy outcomes can only be shared and are known as public goods. They include such benefits as clean air, minimal climate change, open-access information systems and freedom from infectious diseases. These public goods are in principle equally available to everybody. Consumption in one place does not reduce their availability elsewhere and it is impossible for the suppliers to prevent anyone benefiting from them. When these goods are available in more than one country, or strictly speaking in all countries, they are known as

global public goods.<sup>50</sup> Governments are not sovereign in such areas of policy-making, because, by definition, they cannot control such public goods by independent legal or political action. The management of global public goods requires collective decision-making and collective action by many or all governments. This is done through policy-making in the UN specialised agencies, such as the World Health Organisation, or through special treaties, such as the environmental treaties. The Internet is an exception, in that some of the crucial policy-making occurs in private regulatory bodies. Global public goods are not a topic in international law, because lawyers cannot conceptualise sovereignty in relation to activities that are not specific to individual countries. Global public goods can at times be very high on the political agenda of governments and other actors. International legal regimes are in effect expressions of shared sovereignty and shared political control, through collective policy-making.

### **The Implications of Distributed Sovereignty for the Future of the Islands**

Sovereignty in the sense of the ability to exercise legal authority clearly still exists, but it is no longer a unified and indivisible authority, possessed by a single political actor. Sovereignty does not reside solely with governments acting on behalf of independent states. Sovereignty is distributed between governments and intergovernmental organisations to varying degrees for different states and to varying degrees for different areas of policy-making. Equally, the political independence of governments is limited. Debates in bi-lateral and multi-lateral diplomacy and in the news media result in governments interfering in the internal affairs of other countries. The role of non-governmental organisations has not been discussed in this paper, but they are also participants in political debates in the media, at the country level, transnationally and in intergovernmental organisations. Finally, transnational corporations constrain the sovereignty and the political independence of governments. We should now consider how the dispute over the sovereignty of the Falkland/Malvinas Islands can be analysed against patterns of distributed sovereignty.

The following proposals are *not* offered as the basis for a permanent settlement of the Falklands-Malvinas dispute. They are offered to suggest how it is possible to think about distributed sovereignty, in a manner that is quite different from the all-or-nothing traditional approach. Ideas such as these will not begin to receive serious consideration while current verbal hostilities continue. If the entrenched attitudes in London, Stanley and Buenos Aires were to change, then the three parties could each produce their own proposals, based on distributed sovereignty, to contribute to a new, more complex, governance system for the Islands.

#### *The Territory and the People*

The United Nations sets the framework for the settlement of diplomatic disputes in the contemporary world. In particular, the Declaration on Decolonisation sets the framework for settlement of the Falklands-Malvinas conflict. There are pressures at the UN upon both the Argentine and the British governments, unacknowledged by either side, for them to abandon their attitudes to sovereignty. The British cannot expect to gain endorsement of the *status quo*, for what is still regarded at the UN as a British colony. The Argentines could not expect the integration of the Islands with Argentina to be endorsed by the UN, unless it were approved through a formal act of self-determination by the Islanders. Equally, the Islanders cannot indefinitely appeal to the right to self-determination without acknowledging that, at the UN, self-determination means making a positive choice in favour of some new non-colonial status, embodied in a new non-colonial constitution.<sup>51</sup>

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<sup>50</sup> See two publications for the United Nations Development Programme, I. Kaul et al (eds.) *Global Public Goods. International Co-operation in the 21st Century*, (Oxford: Oxford University Press, 1999) and I. Kaul et al (eds.) *Providing Global Public Goods. Managing Globalization*, (Oxford: Oxford University Press, 2003).

<sup>51</sup> The arguments in this paragraph are derived from the follow-up by the General Assembly to the Declaration on Decolonisation (Resolution 1514). Three options for decolonisation to be recognised are give in Resolution 1541 (XV) of 15 December 1960, as discussed below, under “A Role in Diplomacy”. The Declaration on the Principles of

As soon as we consider the claims made by the Argentine and the British governments, it is clear that they give different content to sovereignty. The Argentine government always argues about territory and the British government always argues about the right of the Islanders to self-determination. If sovereignty can be distributed in a variety of different ways, this means it is theoretically possible for the Argentine and British governments each to achieve their prime goal. In principle, however remote the possibility now seems, the British could agree that the land belongs to Argentina and the Argentine flag could be flown at some symbolic points on the Islands, such as the Argentine cemetery.<sup>52</sup> In return, the Argentine government could agree that no Argentine laws would apply to the Islands and only the Islanders could decide who would become permanent residents.

A more radical idea would be to create a new concept of South Atlantic citizenship. In practice, local law has already moved in this direction by the creation of a “Falkland Island Status”, which provides the right to vote. The Islanders have no cultural or political identification whatsoever with Argentina, even though some of them have partial Argentine ancestry. Equally, there has been some antagonism at times towards British business people and British civil servants, some of whom have had superior attitudes towards the Islanders. As a Member of the Legislative Assembly put it recently, the Islanders are “a strong, tight-knit community ... most when asked would say that they are Falkland Islanders first and British second”. Falkland Island Status is not granted automatically to British citizens and it may be granted, after seven-years residence, to citizens of other states. Perhaps, the Argentines, the British and the Islanders could each gain some satisfaction from international recognition of a distinct Island identity and citizenship that is neither Argentine nor British.

#### *Local Government*

Clearly, any remote island community should have high autonomy over its local affairs. As part of a settlement, legal authority and political decision-making over all public services for the Islanders could be provided, as they are at present, by a local legislature. However, the Islanders will not be fully autonomous until their constitution is amended to remove the considerable authority to go against the legislature’s wishes that still rests, at least in theory, with the British-appointed governor. There are already several very small communities around the world that act autonomously without being normal states. Andorra, the Åland Islands, Aruba, the Isle of Man and Niue provide a variety of different models. Self-government under one of these models, if approved by the Islanders in an act of self-determination, could meet the UN’s criteria for decolonisation.

#### *A Role in Diplomacy*

There have been no indications that the Islanders wish to be fully involved in the United Nations. A delegation from the Islands does attend the annual session of the UN Special Committee on Decolonisation, in order to put their case for self-determination. There appears to be no demand for obtaining UN membership, as the world’s smallest state. Having to formulate policy on all aspects of global politics would be onerous. The standard process of decolonisation leading to independent statehood is not a serious option.

The UN recognises two other potential outcomes as meeting the requirement for decolonisation. One option is integration into another state. On the one hand, it is doubtful that the Islanders would wish to be fully integrated with the United Kingdom. In any case, the Argentine government would be deeply hostile to the idea and would probably gain greater support for its cause than it does currently from the other Latin American governments. On the other hand, the Islanders will not contemplate integration with Argentina for the foreseeable future and no British government could

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International Law in Resolution 2625 (XXV) of 24 October 1970 allows for a general so-called “fourth option” of “the emergence into any other political status freely determined by a people”.

<sup>52</sup> This idea was put to Islanders by an Argentine journalist, Nicholas Tozer, in February 1999: see “Bundle of Ideas”, from the Falklands-Malvinas Forum Archives, at [www.staff.city.ac.uk/p.willetts/SAC/DOCS/BUNDLE.HTM](http://www.staff.city.ac.uk/p.willetts/SAC/DOCS/BUNDLE.HTM)

obtain parliamentary approval to override the wishes of the Islanders. The Åland Islands provide a model for limited integration of the Islands with Argentina, with a degree of autonomy that is close to independence.<sup>53</sup> This was considered seriously as a possible option by the Argentine government, when Guido di Tella was the Foreign Minister, but the current level of conflict makes it unacceptable to the Islanders.

The third decolonisation option that would be endorsed by the UN is “free association” of the Islands with another larger country that would take responsibility for their foreign relations. Canada would be a candidate for this role. They have a long record of supporting the UN and of assistance to developing countries. In particular, they represent eleven Caribbean countries on the Executive Board of the World Bank and ten at the IMF. The Islands could officially become part of the Americas, in a manner that might be acceptable to the Islanders, by having free association with Canada. This would move in the direction of Argentine arguments about traditional sovereignty, by transferring diplomatic sovereignty away from Britain, while maintaining a separate non-Argentine identity for the Islanders as part of the Commonwealth.

### *Fisheries Conservation and Management*

From the mid-1970s, a large fishery developed in the waters around the Islands, with the most valuable stocks being two species of squid, illex and loligo. In October 1986, the British government unilaterally declared a Falkland Islands Interim Conservation and Management Zone and since then the fees charged for fishing licences have provided a massive increase in the funds available to develop the Islands. The main fishing fleets come from far away and the main markets for squid are in Southern Europe and East Asia. The illex squid only have a one-year life cycle and they migrate annually from the high seas to the waters off the Argentine mainland and then the waters around the Islands.<sup>54</sup> The improvement in Argentine-British relations that occurred after President Menem took office in July 1989 quickly led to the creation of a bilateral South Atlantic Fisheries Commission. This did much useful scientific work and provided limited co-ordination for management of the fish stocks. Co-operation on management of fishing came to end after President Néstor Kirchner took office and started a campaign to win support for traditional nationalist sovereignty claims. In particular, following the Falkland Island Government decision in August 2005 to issue 25-year fishing licences, the Argentine representatives tried to discuss sovereignty at the Commission, with the result that its work stopped.

Fishing in the South Atlantic has some aspects of a global public good, in that full control of both the mainland coastal zone and the Islands’ waters could not guarantee control of the fish stocks, most of which straddle and migrate across the boundary between the Exclusive Economic Zones and the high seas. (Loligo squid is an exception in that the main fishery is totally within the waters around the Islands.) In recent years, there have been several poor seasons for the illex (notably 2004, 2005 and 2009) and fishing has been restricted in the Island’s waters. There is always the danger that a combination of poor environmental conditions and over-fishing could eliminate the stock, so there is urgent need for comprehensive and effective management of the illex. The fishing is affected by aspects of globalisation, in that the majority of the catch is taken by boats sent by large transnational fishing companies. It is an ideal policy area to manage through an intergovernmental regime, bringing together the coastal countries and the countries where the transnational companies are based. The legal framework for pooling sovereignty in this way already exists in the UN Agreement on conservation and management of straddling fish stocks. This entered into force in December 2001 and has been ratified by most of the relevant governments, including the UK, Spain, the European

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<sup>53</sup> See D. J. Bullock and C. Mitchell, *The Åland Island Solution*, (SAC, Occasional Paper No. 3, March 1987).

<sup>54</sup> For more information on the situation in the 1970s and 1980s, see P. Willetts, *Fishing in the South-West Atlantic*, (SAC Occasional Paper No. 4, March 1988).

Union, Korea and Japan, but neither Argentina nor Taiwan.<sup>55</sup> Indeed, in July 2004, before Argentine-British co-operation on fishing broke down, the two governments agreed that “the timely establishment of a multilateral agreement would provide the necessary long-term mechanism to ensure the sustainability of fish stocks in the high seas of the South West Atlantic”.<sup>56</sup> This is now the only area of the world’s oceans that is not covered by a regional fisheries management organisation, implementing the UN Agreement.<sup>57</sup> In the long-run, all the large transnational fishing companies and the small companies, both from Argentina and those local to the Islands, can only benefit from sovereignty over fishing in the whole eco-system being transferred to a multi-country fishing regime for the South-West Atlantic region.

### *Oil and Gas Exploration and Extraction*

Academic geological investigation of the ocean floors, including seismic work in the South Atlantic, started in the 1950s. Since the first drilling of rock cores by the Deep Sea Drilling Project in April-May 1974 and January-February 1980 and the more detailed seismic work by the Lamont-Doherty Geological Observatory in 1977-78, a few British and Islander enthusiasts have been looking forward to the imminent discovery of oil.<sup>58</sup> A major debate took place in the Islands in response to the circulation of a government pamphlet, *The Falkland Islands and Oil*, in November 1993 and a more detailed consultants report, *Oil Development Strategies for the Falklands Islands*, in June 1994. Even at this point significant worries were expressed about the potential environmental impact on fishing and wildlife, and about the social impact of the oil industry’s employees upon the way of life of a small community.

In September 1995, Argentina and the United Kingdom issued a Joint Declaration on Co-operation in Offshore Activities in the South West Atlantic. The two governments encouraged commercial exploration activities in a Special Co-operation Area, which straddled the median line between the waters around the Islands and the waters off the Argentine mainland. The bi-lateral Southwest Atlantic Hydrocarbons Commission was less successful than the fisheries commission. Differences arose about how any oil production might be taxed and about arrangements for exploration in other areas of the seas around the Islands. The last meeting of the Commission was held in July 2000 and the Argentine Government in March 2007 formally announced its termination of the co-operation arrangements.

The Falkland Islands Government first issued exploration licences in November 1995 for commercial seismic and oceanographic surveys and production licences in 1996 for exploratory drilling. In principle, the geological conditions are favourable, but to date only two of the five companies engaging in exploration have found any prospects that might eventually be commercially viable. Rockhopper Exploration PLC started seismic surveys in 2006 and drilling in 2010, announcing an oil discovery north west of the Islands in May 2010. A later entrant, Borders and Southern, announced a gas condensate discovery south east of the Islands in April 2012. These developments have added to the nationalist rhetoric in Argentina about the claim to sovereignty over the Islands.

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<sup>55</sup> Japan used to be very active in the fishery, but has had a minimal presence since 2004. For the fishery statistics, see [www.fis.com/falklandfish/html/publications.html](http://www.fis.com/falklandfish/html/publications.html), For the text and the status of the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, see [www.un.org/depts/los/convention\\_agreements/convention\\_overview\\_fish\\_stocks.htm](http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm).

<sup>56</sup> South Atlantic Fisheries Commission, Joint Press Statement of the Twenty-Fifth Meeting, 1-2 July 2004, available at <http://en.mercopress.com/2004/07/14/south-atlantic-fisheries-commission>.

<sup>57</sup> For the current state of the world’s fisheries, see UN document A/CONF.210/2010/1 of 4 January 2010.

<sup>58</sup> Initial Reports of the Deep Sea Drilling Project, Vol. XXXVI, at [www.deepseadrilling.org/36/dsdp\\_toc.htm](http://www.deepseadrilling.org/36/dsdp_toc.htm), and Vol. LXXI, at [www.deepseadrilling.org/71/dsdp\\_toc.htm](http://www.deepseadrilling.org/71/dsdp_toc.htm).

Currently, the major oil companies are not involved in exploratory activities and some years of preparatory activities would be needed before any oil or gas production could begin. It is generally assumed that extraction would occur using floating storage and off-loading vessels (FSOs) that would supply tankers, without oil or gas being stored on land. Nevertheless, there would have to be land-based facilities to provide operating and maintenance supplies for vessels and platforms. Staff would require transport and communications facilities, to provide food supplies, recreation, mail, medical support, emergency health facilities and access to the rest of the world for rest periods. Substantial provisions would be needed to handle oil spillages, accidents and industrial emergencies. No decisions are yet possible on how the oil would be supplied to refineries or indeed where the refineries might be located. In addition to the practical problems, the Argentine government in March 2012 attempted to prevent any development without Argentine involvement, by sending a letter to banks and companies making investment reports, threatening legal action against oil companies. This was followed-up in April by letters to the five exploration companies, demanding recognition that they should have authorisation from the Argentine government for their activities, and in June the “immediate launch” of criminal proceedings was announced.

Whatever political arrangements may be made, the exploration, extraction, transport, refining and marketing of hydrocarbons lie under the control of a variety of transnational corporations. They are predominantly privately-owned, but some also have various governments as shareholders. In particular, action was initiated in April 2012 by the Argentine government, to take control from Repsol of 51% of the shares in their Argentine subsidiary company, YPF. If and when oil and/or gas extraction from the waters around the Islands becomes a serious commercial proposition, we can expect the small exploration companies either to establish strong partnerships with much bigger TNCs or to be taken over by them. The large TNCs would not wish to undertake high levels of investment and a commitment to sustained production without assurances that their operations were free from political risks. It is difficult to imagine this happening without a new, creative approach to sovereignty over the hydrocarbon resources.

Hydrocarbons will not be developed solely under the authority of the Argentine government, because the Falkland Islands Government (FIG) has effective control of the prospective fields. Hydrocarbons will not be developed solely under the authority of the FIG and the UK, because they will need participation by a variety of TNCs. In normal circumstances, the companies would need helicopter airfields, shipping facilities, storage depots and offices, plus ready access to supplies, near to the oil/gas vessels and platforms. The Islands do not currently have sufficient infrastructure to sustain all these activities for a major development and, if the infrastructure was built, it would threaten the Islanders’ way of life. The companies would prefer not to bear the extra costs of maintaining and supplying the infrastructure from another continent, but the current Argentine government would prevent access to the adjacent mainland coastline. The Islanders are over-confident that hydrocarbon production could be developed as simply as the current exploration, with the oil companies managing their logistics from Europe. There is speculation that co-operation with companies in Chile, Uruguay and Brazil might provide a more practical answer, but this could generate high political conflict with the current Argentine government. Finally, the obvious market for hydrocarbons from this area is South America in general and Argentina in particular. It is very difficult to imagine commercial hydrocarbon extraction being practical without the large companies having significant facilities both on the Islands and on the South American mainland.

In such a situation, the optimal authority to regulate the social, economic and environmental impact of the transnational companies would be a governance system involving some South American government agencies located on the mainland, the Islanders, the companies themselves and other stakeholders, such as the tourist industry, the fishing fleets and environmentalists. Special arrangements would have to be negotiated for regulation of employment, safety, protection of the environment, taxation and payment of royalties. The Argentine administration under President Cristina Kirchner is becoming so isolated that the Falkland Islands Government may be able to go

ahead in collaboration with the TNCs, with or without facilities in Chile, Uruguay or Brazil. Much depends upon the size of the hydrocarbon prospects, production costs and energy prices. Much also depends upon whether the next Argentine president decides to seek a joint regime or continues with the current policy of attempting to prevent any production from the waters around the Islands.

### *The Currency*

One of the omni-present symbols of sovereignty is the use of a currency. Currently, the Falkland Island pound is used in the Islands and its value is pegged to the UK pound. As a symbol of the separate identity of the Islands, the currency could be changed. It would be inconvenient and costly to create a new currency just for the Islands. However, an alternative major currency could be adopted for use in the Islands. The most straightforward choice would be to follow the practice of some other small territories and use the United States dollar. It is already the currency for two other British Overseas Territories, the Virgin Islands and Turks and Caicos, and three small South American countries, Panama, Ecuador and El Salvador.

There would be no practical difficulties and clear practical benefits. The fishing companies would be happy to pay for their licences in dollars. Oil is priced in dollars, so all the accounting would be simplified. Oil workers presumably would prefer to be paid in a currency that they could use in the Islands, in South America and in their home country. This aspect of sovereignty, control of the currency, would be exercised by the United States Treasury and the Governors of the Federal Reserve System.

### **Conclusion**

The aim of this paper is to challenge the standard view of undivided sovereignty possessed by a single actor. We are now in a world where all countries are subject to distributed sovereignty, exercised on different issues by different actors. Any settlement of the Falklands/Malvinas dispute will require everybody to stop talking about the abstract, outdated, irrelevant concept of undivided sovereignty and instead focus on practical questions of collaboration for mutual benefit. A peaceful settlement that is acceptable to the Argentines, the British, the Islanders and the United Nations is not going to be achieved so long as the current climate of political hostility exists. Nevertheless, when the three parties are each willing to consider negotiating a settlement, it will be easier to reach agreement by all the parties abandoning traditional patterns of thought. Sovereignty over the Islands might be distributed among at least seven distinct sovereign authorities – Argentina having symbolic title to the land and flying its flag at the cemetery; a local legal office deciding who would possess South Atlantic citizenship and the right to reside in the Islands; a local legislature providing local services; the Canadian Ministry of Foreign Affairs handling diplomacy; a multi-lateral intergovernmental regime managing fishing; a unique multi-actor governance system of all the stakeholders regulating hydrocarbon extraction; and US financial institutions maintaining the dollar as the Islands' currency. Other questions to be addressed might include environmental conservation and relations with the Antarctic Treaty System. No doubt, a future settlement based on distributed sovereignty would result in some of the ideas in this paper being rejected and other ideas being incorporated.

The shimmering mirage of the traditional image of sovereignty is today no more than a reflection of a distant vision from the nineteenth century. In the twenty-first century, sovereignty over activity in any territory is distributed among many actors – governments, intergovernmental organisations, non-governmental organisations and transnational corporations. If no states are sovereign and peoples in all territories are subject to distributed sovereignty, then the future of the Islands will also have to be based on sovereignty being distributed in different ways for different policy domains.

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