Graham Pasco
Munich 15/1/

GERMAN YEARBOOK OF INTERNATIONAL LAW

JAHRBUCH FÜR INTERNATIONALES RECHT

Volume 26 · 1983
with / mit
General Survey / Gesamtübersicht

founded by

RUDOLF LAUN · HERMANN VON MANGOLDT

Editors:
Jost Delbrück · Wilfried Fiedler
Wilhelm A. Kewenig · Rüdiger Wolfrum
Assistant Editor: Michael Koch

Institut für Internationales Recht an der Universität Kiel

DUNCKER & HUMBLOT / BERLIN

The Falkland Islands in the European Treaty System 1493—1833

Jörg Fisch

I. Hemispherical Monopolies and the Freedom to Acquire Territories

In the debate on the Falkland Islands it has frequently been asserted that the British had, neither in 1764/71 nor in 1833, a right to sail to the islands. Consequently they had, according to this view, much less right to settle there because the South Atlantic, or at least its western part was, as a result of the European treaties in force at that time, a closed sea. Only Spain and Portugal had a right to navigate, while it had been generally admitted in numerous treaties by the other interested powers that they were debarred from trading and acquiring territories in those areas. This rule had even become part of the Public Law of Europe.

The most important advocate of this view is *Julius Goebel* in his fundamental book on the Falkland Islands.[1] It has, even recently, been adopted by several other authors, especially Argentines.[2]

If this contention is true, then during the whole colonial period Spain had lawful monopoly rights excluding all other powers, whose very presence on or around the islands was illegal. If, however, the contention is false, the question as to the legal title to the islands during this period remains open. It is transferred to another level. Provided there were no monopoly rights, title to the islands could only be acquired by one of the generally recognized modes of acquisition of territory, in particular, effective occupation, or discovery, cession, prescription *etc.*

---

[1] *Julius Goebel*, The struggle for the Falkland Islands. A study in legal and diplomatic history. With a preface and introduction by *J. C. J. Metford*, New Haven 1982 (first published in 1927), 120—220, 244—251, 266—270, 425—431.

[2] For example: *Manuel Hidalgo Nieto*, La cuestión de las Malvinas, Madrid 1947, 149—173; *Denise Mathy*, L'autodétermination de petits territoires revendiqués par des états tiers, in: Revue belge de droit international vol. 10 (1974), 167—205; vol. 11 (1975), 129—160 (10, 199); *Camilo Hugo Rodríguez Berrutti*, Malvinas, última frontera del colonialismo, Buenos Aires 1975, 27—31; *Ricardo Zorraquín Becú*, Inglaterra prometió abandonar las Malvinas, Buenos Aires 1975, 114 *et seq.*, *José Arce*, Las Malvinas, Madrid 1950, 161—169.

The purpose of this article is to investigate this preliminary question in order to determine on which of the aforementioned levels the legal issues concerning the Falkland Islands must be settled. I shall attempt to show that it was not possible for Spain, nor later for Argentina, to claim any monopoly rights excluding other interested powers *a priori* from the area, and that prior to the first European settlement full freedom to acquire territory prevailed. This is not however to be misunderstood as an assertion of actual rights of any other power — it is only the assertion of a legally open situation until 1764. Moreover, I do not intend to deal with the legal situation after 1833.

To show that monopolistic claims to the area of the Falklands had no foundation in international law, I shall examine the series of Anglo-Spanish treaties from the discovery of America to the expulsion of Argentina from the Falklands in 1833. Treaties between Spain and other European powers are taken into account to the extent to which they had some bearing on the relations between Spain and Britain or contributed in some particular way to the European treaty system in defining the legal position of the Americas.[3]

II. The Papal Bulls and the Treaty of Tordesillas 1493—1494

Immediately after the discovery of America, Spain procured the famous bulls of 1493. While these documents respected existing rights of other powers, they granted to Spain the exclusive right to trade and navigate to all territories that might be discovered within the western hemisphere.[4] Portugal had previously obtained similar privileges for Africa and Asia.[5] With some modifications, in 1494 the spheres of influence were delimited between the interested parties themselves in the treaty of Tordesillas. The non-Christian

---

[3] The most important collection of treaties for the purpose of this article is *Frances Gardiner Davenport*, European treaties bearing on the history of the United States and its dependencies. 4 vols., 1917—1937, reprinted Gloucester, Massachusetts 1967. It contains practically all the relevant treaties for the period from 1493 to 1815, printing, however, only that part of the text which relates to America. There are excellent introductions to the treaties up to 1713. For the full text of the documents and other treaties see the two most comprehensive collections *Jean Dumont*, Corps universel diplomatique du droit des gens *etc.* 8 vols., Amsterdam, The Hague 1726—1731 (for the treaties up to 1713), and *Clive Parry*, The consolidated treaty series (CTS). 226 vols., New York 1969—1980, for the period from 1648.

[4] *Davenport* (note 3), vol. 1, 56—83, nos. 5—8. There is a vast literature on these documents. The most comprehensive study is *Alfonso García Gallo*, Las bulas de Alejandro VI y el ordenamiento jurídico de la expansión portuguesa y castellana en Africa y Indias, in: Anuario de historia del derecho español vols. 27/28 (1957/58), 461—829.

[5] *Davenport* (note 3), vol. 1, 9—55, nos. 1—4. The most thorough study of these bulls is *Charles Martial de Witte*, Les bulles pontificales et l'expansion portugaise au XVe siècle, in: Revue d'histoire ecclésiastique vol. 48 (1953), 683—718; vol. 49 (1954), 438—461; vol. 51 (1956), 413—453, 809—836; vol. 53 (1958), 5—46, 443—471.

world was divided between Spain and Portugal; no empty space was left for other states either on land or at sea.[6]

Ever since 1493 official Spain and, even more, Spanish and later Latin American authors have derived from these documents, especially from the papal bulls, very extensive claims to the western hemisphere, or at least part of it. If this view were to be accepted, the Falkland Islands were, whether actually discovered or not, *a priori* Spanish territory because they lay in the Spanish sphere.[7]

The first question to decide is, therefore, whether the documents of 1493 and 1494 were binding on other states. It is argued in favour of the papal bulls that in 1493 the Pope was the recognized head of Christianity, his authority not yet being infringed by the Reformation, and that at that time no other power protested against the bulls, so that silence was to be interpreted as tacit consent.[8]

The international law as valid in Europe at the time of the granting of the papal bulls cannot be derived from unilateral declarations by those in whose favour the bulls were issued. Instead, state practice must be analyzed. Most important are the relations between the only two states that were able to perform maritime expeditions overseas on a greater scale at that time, Spain and Portugal.[9]

During the fifteenth century Portugal had a virtual monopoly on expeditions to Africa. It was, however, only a monopoly *de facto*, not *de iure*, as there was simply little competition. Portugal tried to secure a legal mono-

---

[6] 7 June 1494. *Davenport* (note 3), vol. 1, 84—100, no. 9. *Cf.* the reader El tratado de Tordesillas y su proyección. 2 vols., Valladolid 1973—1974.

[7] *Paul Groussac*, Las islas Malvinas, Buenos Aires 1936, 147 *et seq.*, 157 *et seq.*; *Camilo Barcia Trelles*, El problema de las islas Malvinas, Madrid 1943, 24—26, 36; *Hidalgo Nieto* (note 2), 115—125; *Zorraquín Becú* (note 2), 111—113; *Arce* (note 2), 140—152; *Rodríguez Berrutti* (note 2), 26; 51: "Las Islas pertenecieron siempre a España, y su descubrimiento era, más que innecessario, imposible en el plano material, e irrelevante y baldío desde el punto de vista jurídico." According to *Hermann Weber*, "Falkland-Islands" oder "Malvinas"? Der Status der Falklandinseln im Streit zwischen Großbritannien und Argentinien, Frankfurt am Main 1977, 61, no state had a valid title to the Falklands before 1764. But *cf. op. cit.*, 62, where it is said that Britain had respected the Spanish monopoly in the South Atlantic in many treaties.

[8] *Hidalgo Nieto* (note 2), 121—125; *Zorraquín Becú* (note 2), 109 *et seq.*; *Groussac* (note 7), 147 *et seq.*; *Arce* (note 2), 140—142. *Cf.* also *Luis Weckmann*, Las Bulas Alejandrinas de 1493 y la teoría política del papado medieval. Estudio de la supremacía papal sobre islas 1091—1493, Mexico 1949, 29—38, 229—260.

[9] A more detailed analysis of the legal value of the papal bulls and the treaties of the fifteenth and sixteenth centuries is in *Jörg Fisch*, Die europäische Expansion und das Völkerrecht, Wiesbaden 1984, chapter 2.

poly as well and obtained papal bulls granting monopoly rights.[10] There was but one serious competitor: Spain. Portugal's attempts to secure a Spanish recognition of its monopoly failed. It was obvious from the beginning that the Spaniards did not consider themselves debarred from activities overseas because of the papal bulls. They claimed the Canary Islands which they conquered during the fifteenth century. Time and again negotiations took place between the two competitors. They led to a final solution only it 1479, in the treaty of Alcáçovas, when Spain made important concessions overseas in exchange for advantages in Europe.[11]

The papal bulls obtained by Portugal were not even mentioned in the 1479 treaty. Nor were they of any noticeable importance in the negotiations of the preceding decades. Portugal never expected that the bulls could replace an agreement with Spain. Thus neither side considered them as valid titles in international law. This does not mean that they were worthless. The Pope was not recognized as the temporal head of Christianity in the late Middle Ages and could not therefore create international law binding all states without their consent. But he was the recognized spiritual head of Christianity and as such had a high authority. If a state could support its claims with papal bulls, its position in negotiations was strengthened — but the bulls themselves were no substitute for negotiations.

The successful first expedition of *Columbus* improved Spain's position considerably as it was thereby able to support new claims which had to be maintained against competitors. It chose the long-established method of obtaining papal bulls to strengthen its position, mainly against Portugal. But nobody ever thought that the bulls had settled the legal questions and that they could replace a direct understanding with Portugal. Negotiations were opened and eventually led to the treaty of Tordesillas in 1494.[12] This treaty showed the value and limitations of the papal bulls. It closely followed the line drawn by the Pope as a border between the Spanish and the Portuguese spheres of discovery. Thus the bulls had influenced the final solution although they were not the solution itself. During the next centuries relations between Spain and Portugal were based on the treaty of Tordesillas; the bulls were legally irrelevant.

If the papal bulls were not considered as valid titles between the two Iberian powers it is difficult to maintain that they were good titles against

---

[10] *Cf.* the studies of *Witte* (note 5) and *García Gallo* (note 4); *Florentino Pérez Embid*, Los descubrimientos en el Atlántico y la rivalidad castellana-portuguesa hasta el tratado de Tordesillas, Sevilla 1948.

[11] 4 September 1479. *Davenport* (note 3), vol. 1, 38 *et seq.*, no. 3.

[12] See, *supra*, note 6.

other states. Silence could not be interpreted as tacit consent. The bulls were not notified to the courts of Europe nor were protests expected — neither Spain nor Portugal had regularly protested against the bulls which the other side had obtained. During the negotiations in the sixteenth century with England and France, Spain tried to secure recognition, not of the bulls, but of the rights contained in them, and was prepared to make important concessions in return[13]. This shows that it did not really expect other states to accept the bulls. From the sixteenth to the eighteenth centuries they were never mentioned in European treaties relating to areas outside Europe. Thus not even Spain considered them as valid titles. They were, however, used as instruments of propaganda from the very beginning, to claim good title to all rights and privileges granted by the Pope. It has been a very successful propaganda to the present day.

Nor was there general silence which could be interpreted as tacit consent. As early as 1496 *John Cabot* sailed to northern America with a royal patent. Many similar voyages ensued in the following years.[14] From 1523/24 France officially supported several voyages to areas within the spheres claimed by Spain and Portugal.[15] It is true that both countries tried to avoid open conflict with Spain. But this was just a precautionary measure, since nobody ever considered recognizing the papal bulls. Later in the sixteenth century French and English opposition became stronger and the papal bulls were time and again vigorously rejected.[16]

The treaty of Tordesillas was, of course, even less binding on other states. It was *res inter alios acta*; the Iberian states could secure from other states neither a renunciation of possible future claims nor the treaty's recognition.

The documents of 1493/94 had, therefore, legal consequences only for the parties immediately involved, while for all other subjects of international law the situation remained unchanged. This meant that Spanish and Portuguese

---

[13] In 1535 Spain offered Milan to France in exchange for a complete renunciation to sail to the Indies, see: *Henry Folmer*, Franco-Spanish rivalry in North America 1524—1763, Glendale, California 1953, 43 *et seq.*; *Gundolf Fahl*, Der Grundsatz der Freiheit der Meere in der Staatenpraxis von 1493 bis 1648, Köln 1969, 49.

[14] *Cf. Goebel* (note 1), 55—112.

[15] *Cf. Folmer* (note 13), 35 *et seq.*

[16] The most famous examples are *Francis's I* question, in 1541, concerning the clause in *Adam's* will disposing of the world in favour of Spain and Portugal, and *Elizabeth's I* rejection of a Spanish protest in 1580, claiming the freedom of the seas and of acquisition of territory for Britain. For *Francis*, see: Letter from *Juan Pardo de Tavera* to *Charles V*, 27 January 1541, in: *H. P. Biggar*, A collection of documents relating to Jacques Cartier and the Sieur de Roberval, Ottawa 1930, 190. *Cf. Luis García Arias*, Una frase famosa en las relaciones marítimas hispano-francesas del siglo XVI, in: Estudios de historia y doctrina del derecho internacional, Madrid 1964, 211—253. For *Elizabeth*: *William Camden*, Annales rerum Anglicarum, et Hibernicarum, regnante Elizabetha. Vol. 1, London 1615, 309.

claims would be legally binding only if the respective rights had actually been acquired by occupation, cession or conquest and perhaps, to some degree, by discovery. But there was no reason whatsoever to assume that Spain and Portugal had been recognized by other states as sovereign powers *a priori* of the whole non-Christian world and of the navigation of the high seas.

III. Anglo-Spanish Treaties 1493—1667: The Stubborn Silence

At the time of the discovery of America the existing treaties between England and Spain provided for free commerce between the two countries, without territorial limitations.[17] These treaties were frequently renewed and modified during the late fifteenth and the first half of the sixteenth century, but no fundamental changes occurred.[18] The Spanish possessions in America were never mentioned. This was not surprising, as there hardly was any English navigation to the Americas, and none at all to the Spanish possessions there. Moreover right from the beginning the Spaniards organized trade with their American colonies in a strictly monopolistic manner. The participation of other countries was never even considered. But this principle was not mentioned in the commercial treaties with England and the other European states. Thus their interpretation could become controversial. If they were taken literally, they provided for freedom of commerce in the respective possessions without territorial limitations. Hence America was to be included. On the other hand Spain could maintain that from the very beginning, no

---

[17] 6 August 1466 (with Castille). *Dumont* (note 3), vol. 3, part 1, 587 *et seq.*, no. 19.
6 July / 10 September 1467 (with Castille). *Op. cit.*, vol. 3, part 1, 588—591, no. 20.
20 October 1468 (with Aragon). *Op. cit.*, vol. 3, part 1, 599 *et seq.*, no. 23.
27 March 1489. *Op. cit.*, vol. 3, part 2, 219—224, no. 125. The second article of this treaty provides for free commerce "tam per Terram, quam per Mare et Aquas dulces, atque ad omnem Locum." *Op. cit.*, vol. 3, part 2, 221 a.

[18] 24 February 1496. *Op. cit.*, vol. 3, part. 2, 336—343, no. 178. The first article provides for free commerce "ubique locorum." *Op. cit.*, vol. 3, part 2, 336 b.
7 July 1497. *Op. cit.*, vol. 3, part 2, 379 *et seq.*, no. 192.
15 May 1499. *Op. cit.*, vol. 3, part 2, 409—412, no. 212.
The treaties of 1496, 1497 and 1499 were concluded with *Philipp of Burgundy*, who in 1506 became *Philipp I* of Spain. The treaty of 1496 thus became the basis of the subsequent treaties with Spain.
9 February 1506. *Op. cit.*, vol. 4, part 1, 76 *et seq.*, no. 42.
15 May 1506. *Op. cit.*, vol. 4, part 1, 83—88, no. 44.
21 June 1510. *Op. cit.*, vol. 4, part 1, 128—131, no. 60.
19 October 1515. *Op. cit.*, vol. 4, part 1, 214—218, no. 101.
13 February 1516. *Op. cit.*, vol. 4, part 1, 220—224, no. 104.
21 April 1520. *Thomas Rymer*, Foedera, conventiones . . . inter Reges Angliae, et alios . . . habita. Third edition, 10 vols., The Hague 1739—1745 (reprinted Farnborough 1967), vol. 6, part 1, 183—185.
5 August 1529. *Dumont* (note 3), vol. 4, part 2, 42—48, no. 31.
11 February 1542. *Rymer*, vol. 6, part 3, 86—89.

trade with the Indies had been allowed and that the old treaties referred to Europe only, as at the time of their conclusion America was not yet known, and that such an important extension would have to be made explicit in the treaties.[19] Both interpretations were possible, although the English position was easier to reconcile with the letter of the provisions. Nor were there any precedents, as expansion overseas was a new phenomenon in Europe. A solution had to be found with which both states could agree.

The dispute became virulent in the second half of the sixteenth century when England began increasingly to attack Spanish trade with the Indies. It claimed freedom of commerce with the Spanish possessions, a demand that was vigorously rejected by Spain. All attempts to find a compromise failed. The only result was, in the peace treaty of 1604, an agreement to disagree. Article 9 of this treaty provided "that there shall be and ought to be free commerce" in all places "where commerce existed before the war, agreeably and according to the use and observance of the ancient alliances and treaties before the war".[20] This sounded like a clear provision. But the reference to the old treaties was simply a reference to their unceasingly disputed terms. The only result was, therefore, that each side could continue to claim that its interpretation of the old treaties was correct.

In the next peace treaty, in 1630, article 7 simply referred to article 9 of 1604 — the existing state of affairs was thereby confirmed.[21]

It was obviously impossible to find a generally acceptable interpretation of the ancient treaties. Nevertheless some conclusions are possible. The most controversial matter was trade with those places in the Indies that were actually occupied by Spain. The Spaniards tried to go further, insisting on their general monopoly of navigation to and trade with the Indies, irrespective of effective occupation, excluding *a priori* all possessions and even navigation and commerce of possible competitors. But there was no legal basis for such claims, unless the papal bulls and the treaty of Tordesillas were recognized, something England had never done. It was impossible to interpret the existing treaties as derogatory to the British right to sail to and trade in all parts of the world not actually held and occupied by Spain. Spain, of course, would not have admitted this. But it was difficult to deny it on the basis of the international law valid at that time.

---

[19] *Cf. Davenport* (note 3), vol. 1, 246—249; *Goebel* (note 1), 122—125.

[20] 28 August 1604. Latin text and English translation in: *Davenport* (note 3), vol. 1, 250—257, no. 27.

[21] 15 November 1630. Latin text and English translation in: *Op. cit.*, vol. 1, 308—314, no. 35.

IV. Reciprocal Commercial Monopoly 1667—1670

The arrangement of 1630 remained unchanged for the next few decades, as neither side was able to impose its own interpretation upon the other. Only in 1667 was a real solution found. But it showed that Spain was still reluctant to compromise. In the first part of the treaty the old provisions relating to the freedom of commerce were more or less repeated. But they obviously did not relate to America. The American trade and navigation was dealt with in article 8: Spain granted to Britain "all that is granted to the States of the United Provinces of the Netherlands and their subjects in their treaty of Münster, 1648".[22] Spain was anxious not to grant more than it had been compelled to grant to the Dutch on an earlier occasion.

In the 1648 peace treaty between Spain and the Netherlands commerce to the Indies had been regulated in two articles. In the fifth article the contracting powers had reciprocally recognized their possessions in the East and the West Indies; each was to have the exclusive right to trade with its territories. In the sixth article this was specified for America:

> And as to the West-Indies, the subjects and inhabitants of the kingdoms, provinces and lands of the said Lords, the King and States respectively, shall forbear sailing to, and trading in any of the harbours, places, forts, lodgments or castles, and all others possessed by the one or the other party, viz. the subjects of the said Lord the King shall not sail to, or trade in those held and possessed by the said Lords and States, nor the subjects of the said Lords and States sail to or trade in those held and possessed by the said Lord the King.[23]

Thus neither side had been fully able to realize its old claims. Freedom of commerce with the Spanish possessions was quite out of the question. Instead a rigid monopolistic system was maintained: each side had the exclusive right to trade with its own colonies and was completely debarred from commerce with those of the other side. The Spanish possessions in America were at that

---

[22] 23 May 1667. Latin text and English translation in: *Op. cit.*, vol. 2, 100—109, no. 55.

[23] 30 January 1648. *Charles Jenkinson*, A collection of all the treaties of peace, alliance and commerce between Great Britain and other powers. Vol. 1, London 1785 (reprinted New York 1969), 15. The French original is in *Davenport* (note 3), vol. 1, 364, no. 40: "Et quant aux Indes Occidentales, les subjects et habitants des royaumes, provinces, et terres desdits Seigneurs Roy et Estats respectivement, s'abstiendront de naviger et trafiquer en touts les havres, lieux et places garnies de forts, loges ou chasteaux, et touttes autres possedées par l'une ou l'autre partie; sçavoir, que les subjects dudit Seigneur Roy ne navigeront et trafiqueront en celles tenues par lesdits Seigneurs Estats, ni les subjects desdits Seigneurs Estats en celles tenues par ledit Seigneur Roy." Also in: *Dumont* (note 3), vol. 6, part 1, 429—435, no. 231 and in CTS (note 3), vol. 1, 3—118 (the original, however, was in French and Dutch, not in Latin).

time much more important than those of the Dutch and the British. Therefore the monopoly to trade with the former was far more valuable than the monopoly to trade with the latter. From this point of view Spain was quite successful. But it had to abandon its old claim to a general hemispherical monopoly, totally debarring any activity by any other power except Portugal. By now it was obvious that the papal bulls and the treaty of Tordesillas had no place in international law as regards third parties. As Spain had never been able to enforce its claims which, moreover, were not valid in general international law, the Spanish concessions were, however, rather limited. The Dutch and the British were unable to enforce freedom of commerce with the Spanish colonies, but at least their own possessions and their right to navigate to and trade with them were now recognized by the Spaniards.

Nevertheless *Goebel* maintains that the treaties of 1648 and 1667 gave Spain an exclusive right to commerce and navigation in the South Atlantic, debarring the Netherlands and Britain from any attempt not only to settle but also to navigate there. This would have included the Falkland Islands. For *Goebel*, the proof is in the words "and all others possessed by the one or the other party" in the treaty of 1648:

> In view of the antecedent negotiations, and particularly the Spanish claims of possession to the large stretches of uninhabited lands lying between their scattered settlements, it was undoubtedly intended to limit the Dutch to what they actually held and to exclude them not only from trade in the Spanish ports but from access to the wild shores where they might found settlements or at least do business with natives.[24]

This is probably a fairly accurate statement of Spanish intentions. But it neither takes into account Dutch (and, *mutatis mutandis*, British) intentions nor does it necessarily follow from the wording of the treaty. Article 6 of 1648 was not at all clear on the subject, and this was, in all probability, no coincidence. Each side recognized the possessions of the other. But neither the treaty of 1648 nor that of 1667 contained any delimitation of the respective territories. Thus it was a kind of basic recognition, without indication of its exact extent. In this sense it was primarily a success for the Dutch and the British, because there had never been any doubt about the recognition of the actual Spanish possessions in America by other European powers, while Spain before 1648 and 1667 had stubbornly refused to recognize its competitor's colonies. So there were no longer any doubts as to the basic legitimacy of these possessions, while their limits remained undefined. It is unlikely that the Dutch and the British were willing to recognize the Spanish claims to the whole South American continent, as there were still many free areas between the Spanish

[24] *Goebel* (note 1), 127.

settlements at that time. At least this cannot be concluded from the wording of article 6 of 1648. Nor does it agree with *Goebel's* own contention, to which he dedicates a whole chapter, that at that time in international law discovery could not even convey the shadow of a title, but that only effective occupation was recognized as the root of valid title.[25] It was impossible to claim that the whole of South America was effectively occupied by Spain (and Portugal) in 1648 or in 1667. Thus Spain was unable to obtain an unequivocal recognition of its territorial claims from the Dutch and the English. And as long as this recognition was not granted, the only source to decide the question in a legal sense was general international law which, according to *Goebel*, only recognized effective occupation.

Even if *Goebel's* assertion is accepted, it can still hardly be applied to the Falkland Islands. By 1667 the islands were discovered, but there had as yet been no successful landing. The archipelago was scarcely known to the Spaniards,[26] and it was impossible to derive a Spanish title to it from the treaties of 1648 and 1667. The only legal foundations that could be adduced were the papal bulls and the treaty of Tordesillas — documents recognized neither by the British nor by the Dutch.

Goebel goes one step further. According to him

> the agreement not to trade with the Spanish Indies was to operate so as to make not only the littoral but the high seas off the Spanish possessions closed seas.[27]

This again is a true statement of Spanish intentions, but no more. There is no evidence for this principle in the treaties of 1648 and 1667. *Goebel* derives it from his conclusion that all the unoccupied lands between the Spanish settlements were included in the treaties as Spanish and that, therefore, other powers had neither reason nor right to approach these coasts, as all activities on them were prohibited anyhow. It is obvious that his inference is no more convincing than the assertion that the whole mainland was included in the recognition of the Spanish possessions, and it applies even less to unoccupied islands far off the continent.

The restrictive interpretation of article 6 of the treaty of 1648 was confirmed by the next Anglo-Spanish treaty in 1670. Basically it renewed the provisions of 1667. There was an even more explicit recognition of the British possessions by Spain (article 7).[28] According to the eighth article both

---

[25] *Op. cit.*, 47—119 (chapter II: Discovery and occupation in international law).
[26] *Cf. Groussac* (note 7), 157.
[27] *Goebel* (note 1), 128.
[28] 18 July 1670. Latin text and English translation in: *Davenport* (note 3), vol. 2, 189—196, no. 65.

parties were to refrain from sailing to or trading in all places which the other side held. The wording was similar to that of the Dutch treaty of 1648:

> To the ports and places provided with forts, wharehouses, or castles, and all others which either party occupies in the West Indies.[29]

There was again the enigmatic "and all others". But this time it was not connected with "possession" but with "occupation". The latter was a clearer term than "possession", which might refer to claims of a very general nature, including unoccupied areas. But it was difficult to maintain that, after the enumeration of well-defined places in article 8, "aliaque omnia" in connection with "occupantur" did not just refer to similar places, but to a whole continent at large, which could hardly be said to be occupied in the strict sense of the word. It was certainly not an obvious interpretation, and as long as there is no evidence that it was accepted by both sides, according to the general rules of interpretation the narrower meaning has to be accepted as authoritative.

There was another somewhat enigmatic stipulation in the treaty, in article 15:

> The present treaty shall detract nothing from the pre-eminence, right, or dominion of either ally in the American seas, straits, and other waters; but they shall have and retain them in as ample a manner as is their rightful due.[30]

There was no explanation as to which rights *etc.* were meant. So one might imagine that a Spanish monopoly of navigation in the South Atlantic was intended. But there is no further evidence for this, while the other provisions of the treaty show no signs that the reciprocal restrictions of trade and navigation applied to more than the actually occupied areas of America.[31]

The result of the treaties of 1667 and 1670 was therefore a mutual recognition of the respective possessions in America and of the exclusive right to trade with them. The exact extent of these possessions, however, remained undefined, which meant that no further restriction as to the access to the American coasts and to the navigation in the seas around America could be inferred. This applied particularly to the Falkland Islands, which up to this time had been neither claimed nor occupied by any power.

V. The System of 1713

For the next few decades the treaty of 1670 remained the basis for Anglo-Spanish relations in America. Only in 1707 were the British able to secure

[29] "Abstinebunt cavebuntque sibi a commerciis et navigatione in portus a loca fortalitiis, stabulis mercimoniarum, vel castellis instructa, aliaque omnia quae ab una vel ab altera parte occupantur in Occidentali India." *Op. cit.*, vol. 2, 191.

[30] *Op. cit.*, vol. 2, 192/196.

[31] *Goebel* (note 1), 130 sees in article 15 an additional proof for his interpretation.

from *Charles (III)*, the Austrian pretender to the Spanish crown, the right either to found a trading company with the Spaniards or to trade each year with 10 ships of 500 tons in America.[32] *Charles*, however, did not succeed; the Bourbon *Philipp V* became King, and the treaty did not materialize.

At the end of the war of the Spanish succession, in 1713, four treaties brought some important modifications.[33] Britain could secure the *asiento*, the monopoly of the slave trade with the Spanish colonies. Previously it had been in the hands of the French. In addition the British were allowed to send one ship of 500 tons a year for trade to the Viceroyalty of New Spain (Mexico).[34] In the preliminary peace treaty the provisions of 1667 and 1670 were otherwise renewed (article 11). As the English could not obtain more trading rights for themselves, they wanted at least to prevent other countries from gaining similar or even greater advantages. Thus Spain had to make a pledge that it would

> not grant in future any license or permit to any foreign nation, barring none, for any reason or pretext whatsoever, to go for trade to the Spanish Indies.

"Ingress to the Indies and trade there" were "absolutely prohibited to all nations".[35] These promises were easy to obtain, as Spain had an interest in maintaining its monopoly. But Britain had to make an important concession too, which modified the system of 1670. Article 14 prohibited British navigation in the South Sea and, in a more general manner, "trade in any other region of the Spanish Indies".[36] Thus a difference was made between the South Sea, with the American west coast, and other areas. The former was recognized as a monopoly sphere of the Spaniards. They had finally been able to secure the recognition of the claims they had maintained since 1493. It was immaterial whether the South Sea and the adjacent coasts were actually occupied and controlled by Spain; Spain's rights were prior to their realization. But they were not recognized for the whole hemisphere. Article 14 indirectly shows that there was no similar general prohibition of navigation for the South Atlantic and hence for the Falkland Islands — otherwise the separate arrange-

---

[32] 10 July 1707. Latin text and English translation in: *Davenport* (note 3), vol. 3, 126—132, no. 95.

[33] 26 March 1713: Asiento. *Op. cit.*, vol. 3, 167—185, no. 98.
27 March 1713: Peace preliminaries. *Op. cit.*, vol. 3, 186—192, no. 99.
13 July 1713: Peace. *Op. cit.*, vol. 3, 223—231, no. 102.
9 December 1713: Commerce. *Op. cit.*, vol. 3, 234—238, no. 104.

[34] 26 March 1713, additional article. *Op. cit.*, vol. 3, 184, no. 98.

[35] 27 March 1713, art. 13. Spanish text and English translation in: *Op. cit.*, vol. 3, 189/192, no. 99.

[36] *Op. cit.*, vol. 3, 190.

ments for the South Sea would make no sense.[37] To the eastern parts of America only the prohibition of trade as stipulated by article 14 applied. The article was valid for "the Spanish Indies." This was a much less precise definition than in 1648 and 1670, when the prohibition had been related to places occupied or possessed in America. But as there is no definition of the exact extent of the Spanish Indies, it is unlikely that there had been an agreement to extend the limits of the areas in which trade and navigation were prohibited, compared with the provisions of 1670. Thus the *status quo* seems to have been maintained.

Finally, in a separate article, Britain guaranteed the Spanish possessions all over the world. This meant *a fortiori* a renunciation to acquire territories belonging to Spain. But again the extent of these territories was not defined. Thus the provision was of little value in cases where the title to a territory was disputed.

The final peace treaty of 13 July 1713 confirmed the provisions of the preliminary treaty. Moreover, Spain was expressly prohibited from alienating any of its American territories.[38] This was directed against French attempts to get hold of Spanish possessions. For Britain the consequences were the same as those resulting from the guarantee in the separate article of the preliminary treaty. The crucial and unresolved question was still whether the whole of the South American continent (apart from the Portuguese possessions), with the adjacent islands, belonged to Spain, or whether the unoccupied areas (which certainly existed) were to be considered as *terrae nullius*, that could be acquired by any state by means of effective occupation. As long as the treaties remained silent on this point, the only legal basis was the generally recognized international law, in which actual occupation and possession, but no general monopolistic claims, were recognized. Even if there had been uncertainties about the legal position of the mainland — the status of unoccupied islands far off the coast was beyond doubt.

The legal situation created by the treaties of 1713 subsisted, with slight modifications, until 1790. The old treaties were freqently renewed, while the provisions relating to trade were from time to time somewhat altered. Thus the yearly ship and the *asiento* were discontinued in 1750.[39] In a treaty of 1739

---

[37] *Zorraquin Becú* (note 2), 114 believes that the prohibition applied, by analogy, also to the South Atlantic.

[38] 13 July 1713, art. 8. Latin text and English translation in: *Davenport* (note 3), vol. 3, 225/229, no. 102.

[39] 5 October 1750. *Op. cit.*, vol. 4, 79 *et seq.*, no. 142.
Cf. the following minor Anglo-Spanish treaties of the period:
14 December 1715: Commerce. *Op. cit.*, vol. 3, 252—255, no. 107.
26 May 1716: Commerce, Asiento, *Op. cit.*, vol. 4, 4—10, no. 109.

a provision to draw a border between the respective possessions in America was agreed for the first time.[40] Further territorial provisions were included in the peace treaties of 1762, 1763 and 1783.[41] But beyond the borders actually drawn there was no comprehensive description of the possessions at large, which meant it was still open to doubt to which territories mutual recognition and guarantee applied.

VI. The Legal Status of the Falkland Islands 1764—1774

This state of affairs applies, therefore, also to the period from 1764 to 1774, during which time the Falkland Islands were disputed among Britain, France and Spain. According to *Goebel*, a British expedition to the islands was, at that time,

> in direct violation of the terms of the Treaty of Utrecht and of the express guaranty pledged by England in 1713. . . . It is clear that the Spanish regarded any approach to their dominions in the South Atlantic and Pacific as an infraction of the terms of the treaty.[42]

Again *Goebel*'s proof is not taken from the treaty itself but from the interpretation that could be derived from the Spanish interests. Moreover, the clear distinction made in 1713 between the South Sea and other parts is discarded. There had never been a general prohibition of British navigation to the South Atlantic, nor could it be inferred from the existing treaties that the Falkland Islands were recognized as Spanish possissions. The same applied, *mutatis mutandis*, to the situation of other European powers in the South Atlantic, especially to France. Hence it was impossible to claim that there were any

---

13 February 1721. *Op. cit.*, vol. 4, 25 *et seq.*, no. 115.
13 June 1721. *Op. cit.*, vol. 4, 27 *et seq.*, no. 116.
6 March 1728. *Op. cit.*, vol 4, 43—45, no. 123.
9 November 1729. *Op. cit.*, vol. 4, 46—49, no. 124.
8 February 1732. *Op. cit.*, vol. 4, 52 *et seq.*, no. 126.
The asiento and the article of the annual ship were also confirmed by the preliminaries and the peace treaty of Aix-la-Chapelle between France, Great Britain and the Netherlands, to which Spain acceded:
30 April 1748, art. 10 *Op. cit.*, vol. 4, 68, no. 135. Spanish accession:
28 June 1748. CTS (note 3), vol. 38, 255 *et seq.*
18 October 1748, art. 16. *Davenport* (note 3), vol. 4, 75, no. 139. Spanish accession:
20 October 1748. CTS (note 3), vol. 38, 340 *et seq.*

[40] 14 January 1739, art. 2: border between Florida and Carolina. *Davenport* (note 3), vol. 4, 57, no. 129.

[41] 3 November 1762: Preliminaries, artt. 16, 18, 19. *Op. cit.*, vol. 4, 88, no. 148.
10 February 1763, artt. 17, 19, 20. *Op. cit.*, vol. 4, 95, no. 150.
20 January 1783: Preliminaries, artt. 3—5, 7. *Op. cit.*, vol. 4, 150 *et seq.*, no. 170.
3 September 1783, artt. 5—7, 9. *Op. cit.*, vol. 4, 159 *et seq.*, no. 174.
Cf. 14 July 1786. *Op. cit.*, vol. 4, 162—164, no. 175.

[42] *Goebel* (note 1), 267 *et seq.*

restrictions to the free access to the Falkland Islands as long as they remained unoccupied, unless it is assumed that the claims derived from the papal bulls and the treaty of Tordesillas were valid in international law.

There are, however, two events that seem to support *Goebel*'s interpretation. Already in 1748/49 Britain planned an expedition to the Falklands. Spain protested vehemently against this project, because it feared attacks on its possessions on the neighbouring mainland. In the end Britain abandoned the plan.[43] This incident cannot, however, be considered as implicit recognition of a Spanish right to the islands or of the prohibition of navigation by Britain. Nor did Spain on this occasion claim a title to the Falklands. The whole episode is of little importance from the point of view of international law, as neither side tried to interpret the existing treaties in its favour. Both acted according to political expediency and with political arguments.

The second incident is *Bougainville*'s cession of his claims to the islands to Spain in 1766 for a financial compensation. In the agreement the French settlement is called "établissemens illégitimes dans les Iles Malouines appartenant à Sa Majesté Catholique".[44] Here the Spanish tried with success to claim that the islands had always been theirs. But it was not even a treaty between the Spanish and the French crowns, but only an agreement with *Bougainville*, who was more interested in getting his money than in maintaining a legal position, the results of which he was going to renounce anyway. The clause had of course no bearing on the legal situation between Spain and Britain and all other states.

There is thus no doubt that in 1764 there were no valid restrictions in international law for navigation to and settlements on the Falkland Islands. Legally, the situation was completely open. Claims to the islands could not be based on general hemispherical or other monopolies, but only on occupation and settlement. Mere discovery was rarely recognized as conveying full title at that time, and in the particular case of the Falklands none of the claimants could prove discovery.[45] Thus the dispute over the islands was legally unaffected by claimed prior general rights, as such rights did not exist.

The French, therefore, undeniably acquired a good title to the archipelago, or at least to part of it when *Bougainville*, in 1764, formally took possession and founded a settlement. Spain could not adduce any internationally recog-

---

[43] *Op. cit.*, 194—202; *Groussac* (note 7), 114—116; *Ricardo R. Caillet-Bois*, Una tierra argentina. Las Malvinas. Second edition. Buenos Aires 1952, 52—57.

[44] 4 October 1766. Text in: *Goebel* (note 1), 228. *Cf. op. cit.*, 226—230.

[45] Most books on the Falklands deal extensively with the question of the discovery of the islands. There are many different theories about first discoverers in the sixteenth century, from *Vespucci* onwards. But the only discovery on which most authors agree is one as late as 1600, by the Dutchman *Sebald de Weert*.

nized title against them. These rights, however, were transferred to Spain when it acquired the islands from France in 1766.[46] The British took possession of the islands on a different site and founded their own settlement after the French, but before the cession of the French rights to Spain. Thus it was impossible for them to acquire the whole archipelago by occupation, while their claim to prior discovery had no sound basis. If the archipelago was considered as a unit, no rights at all were left after the French occupation; if it was considered as divisible, Britain could only claim part of it.

VII. The Opening of the South Sea 1790

In 1789/90 a new colonial conflict between Spain and Britain in America occurred. A Spanish expedition occupied the Nootka Sound, on Vancouver Island on the north-west coast of America. Britain claimed the territory for itself, on the ground that there had been an earlier British expedition which, however, had not resulted in a permanent establishment. The particular merits of this case need not be analyzed here. Unlike the Falkland crisis of 1770/71, Britain was now able to realize its claims to a large extent.[47] In a convention concluded on 28 October 1790, Spain agreed to return the territory occupied and the vessels captured.[48]

The convention of 1790 contained several provisions of a more general interest, which modified the system created in 1667 and 1713. In the third article navigation and fishery were declared to be free for both parties in the Pacific Ocean and in the South Sea. Moreover it was allowed to land

> on the Coasts of those Seas, in Places not already occupied, for the Purpose of carrying on their commerce with the natives of the Country, or of making Settlements there.[49]

Thus the prohibition of the navigation of the South Sea which the British had had to accept in 1713 was abolished, and they even received the freedom to settle and, consequently, to acquire territory outside the places actually occupied by Spain. As the exact extent of the Spanish possessions had never been defined between the two contracting powers, it was open to doubt which

---

[46] See, *supra*, note 44.

[47] *Cf. Goebel* (note 1), 425—431.

[48] French text in: *Davenport* (note 3), vol. 4, 169 *et seq.*, no. 178. French text and English translation in: *Georg Friedrich von Martens*, Recueil de traités . . . depuis 1761 jusqu'à présent. Second edition, 8 vols., Göttingen 1817—1835, vol. 4, 492—499 (the secret article is only in *Davenport* (note 3), vol. 4, 170). *Cf.* also the exchange of declarations on 24 July 1790. *Martens*, vol. 4, 488—491; *Davenport* (note 3), vol. 4, 168, no. 177.

[49] "Sur les côtes qui bordent ces mers dans des endroits non deja occupés, afin d'y exercer leur commerce avec les naturels du pays, ou pour y former des établissemens." *Davenport* (note 3), vol. 4, 169 / *Martens* (note 48), vol. 4, 495.

places were to be considered as unoccupied; whether, for instance, a few scattered settlements on a long coast were enough to render the whole coast a "place already occupied."

Article 4 contained some specifications and restrictions, but it did not shed much light on the question of unoccupied places either. Britain undertook to prevent navigation and fishery in the South Sea becoming a pretext for illicit trade with the Spanish settlements. The monopoly of trade remained unaffected. To enforce it, navigation and fishery were not allowed "within the Space of ten Sea Leagues from any Part of the Coasts already occupied by Spain".[50] Again the extent of these coasts remained undefined. But obviously it was taken for granted that some parts of the coasts were not occupied by Spain. Otherwise the specification "Coasts already occupied by Spain" would have been superfluous and even misleading. Instead, British ships would have been excluded from a zone of ten nautical miles all along the west coast of South America. *Goebel* concludes that the freedom to trade and settle extended to the north-west coast of America only, because he takes it for granted that all of the central and south American coasts were considered as occupied by Spain at that time.[51] But there is no evidence for this assertion. Spain was unable to secure such a recognition from Britain. Thus the British could not be said to be debarred from landing, trading and settling in places where there were no Spanish settlements nearby. If article 4 was interpreted to its letter, they could claim this right at any point which was at a distance of more than ten nautical miles from the nearest Spanish place.

Both provisions applied to the west coast of America only. By inference, however, they could be extended to the east coast. Britain had never renounced its right to navigation and fishery in the Atlantic, not even in its south-western part. The only prohibition mutually recognized in the treaties was that of trade with and navigation to the respective settlements in the area. Neither the exact extent of the possessions nor the distance from the settlements within which navigation and fishery were prohibited had ever been defined. Thus it seems likely that the provisions introduced for the west coast also applied to other parts of America. At least no other principles could be claimed as mutually recognized.

Article 5 brought a further specification. Both sides were to have free access to all places on the north-west coast of America to the north of the existing Spanish settlements.[52] This was a British concession for the Spanish renun-

---

[50] "À la distance de dix lieues maritimes d'aucune partie des côtes deja occupées par l'Espagne." *Davenport* (note 3), vol. 4, 169 / *Martens* (note 48), vol. 4, 497.

[51] *Goebel* (note 1), 429.

[52] *Davenport* (note 3), vol. 4, 169 *et seq.* / *Martens* (note 48), vol. 4, 497.

ciation of the claim to the Nootka Sound. But it cannot be inferred from this article that the British right to settle and to trade was restricted to the north-west coast.[53]

The meaning of a final clause was more difficult to grasp. Maybe its complex language was adopted on purpose:

> It is further agreed, with respect to the Eastern and Western Coasts of South America, and to the Islands adjacent, that no settlement shall be formed hereafter, by the respective subjects, in such parts of those Coasts as are situated to the South of those parts of the same Coasts, and of the Islands adjacent, which are already occupied by Spain.[54]

It was, however, permitted to land and to erect temporary buildings for the purpose of fishing. The article contained a reciprocal prohibition to form settlements on the South American coasts and on the adjacent islands to the south of the existing Spanish settlemens. This could only apply to Southern Patagonia and Tierra del Fuego, to the south of the southernmost Spanish establishments. If settlements on islands were taken into account, the area was restricted to the stretches south of 51° 40' south, the latitude of the Spanish settlement on the Falklands. On the mainland, the southernmost Spanish place was at that time Puerto Deseado, at 47° 44' on the Atlantic coast.[55] Thus the extent of the provision was extremely limited, although at first sight it seemed to contain a general prohibition to settle. It came down to a mutual abandonment of attempts to gain control over the Strait of Magellan and Cape Horn.

Thus, Spain had been unable to obtain a British promise not to settle in other unoccupied areas. This interpretation is borne out by a secret article concluded on the same day. It stipulated that article 6 of the Convention was to be valid only so long as no third power made any establishments in that area.[56] Neither of the contracting parties was prepared to allow another power to control the passage from the Atlantic to the Pacific Ocean.

Article 6 sheds light on another controversial point. It speaks of "those parts of the same Coasts" (*i. e.* of the "Eastern and Western Coasts of South America") "and of the Islands adjacent, which are already occupied by Spain." Nothing in these words allows the conclusion that there was a continuous Spanish occupation of all the South American coasts right down to Patagonia. There was, of course, Brazil. But the wording of the article does not only suggest this exception but gives the image of a patchwork of occupied and

[53] *Goebel* (note 1), 429.

[54] "Que les sujets respectifs ne formeront à l'avenir aucun établissement sur les parties des côtes situées au sud des parties de ces mêmes côtes et des isles adjacentes deja occupées par l'Espagne." *Davenport* (note 3), vol. 4, 170 / *Martens* (note 48), vol. 4, 497.

[55] *Vicente D. Sierra*, Historia de la Argentina. Vol. 3 (1700—1800), Buenos Aires 1959, 583.

[56] *Davenport* (note 3), vol. 4, 170.

unoccupied parts of those coasts. In any case it is difficult to see in the clause a British recognition of a Spanish claim to all the South American coasts and islands apart from Brazil and the far south, especially if articles 3 and 4, granting the right to found establishments within ten nautical miles of Spanish settlements, are taken into account. The situation was kept open — and this was in all probability done on purpose. The British victory in the Nootka Sound Convention was greater than is usually acknowledged.

Between 1790 and 1833 no new treaties defining the mutual rights in America on a general level were concluded, either between Britain and Spain or between Britain and Argentina.

VIII. The Legal Status of the Falkland Islands 1790—1833

Contrary to what is usually asserted, article 6 of the Nootka Sound Convention, as has been shown, did not apply to the Falkland Islands.[57] It was restricted to territories lying farther south. What, then, were the consequences of the other provisions of the convention for those islands?

From 1767 to 1811 there was a Spanish settlement on East Falkland. If the Nootka Sound Convention was interpreted literally, the consequence was the prohibition of trade, settlement, navigation and fishery for Great Britain within ten nautical miles of this settlement. As the archipelago was larger, it was possible to settle beyond this limit. If, however, the archipelago was considered as a unit, then it was closed to British activities, unless Britain could claim rights to West Falkland or at least to the small Saunders Island, on which the British settlement had been situated until 1774. Whether such rights still existed between 1790 and 1811 is controversial. But if they existed, they were unaffected by the Nootka Sound Convention, as it did not contain a British relinquishment of such rights. On the other hand, Britain could not legally claim the whole archipelago, as it had never possessed such rights and Spain had lawfully acquired its settlement from the French. Thus Spain had at least a good title to an area of ten nautical miles around its settlement and, according to the state practice of the time, at least to East Falkland.

In 1811 Spain withdrew its colony without giving up its claims to the islands. From 1820 they were claimed and from 1826 colonized by Argentina. This situation prevailed in 1833, when Britain occupied the Falkland Islands,

---

[57] For the opposite view, see, *Goebel* (note 1), 428—431; *Mathy* (note 2), 199; *Weber* (note 7), 88; *Barcia Trelles* (note 7), 93—95; *Rodríguez Berrutti* (note 2), 29 *et seq.* *Bernd Hillekamps*, Der Streit um die Falklandinseln. Thesis, Köln 1978, 163, rejects the application of the Nootka Sound Convention to the Falklands not on the ground of an analysis of the text but because he supposes that Spain and Britain did not intend to apply the convention to the Falklands and because the Spanish empire no longer existed in 1833.

expelling the Argentines. It is obvious that the Nootka Sound Convention is of little use in determining the legal situation that year. There were no Spanish settlements in South America any longer, either on the continent or on the Falklands. Article 6 of 1790 had thus lost its object, at least between the original contracting parties.[58] Had Argentina become Spain's successor in the treaty, so that its prohibitions were still binding for Britain? It is very difficult to give a final answer to this question. But even if the convention did apply, it had no important legal consequences. The situation would in this case have been exactly the same as in 1790: there was an Argentine settlement on East Falkland, and the British were prohibited from coming within ten nautical miles of it. If, on the other hand, the convention did not apply, the British had no more right to disregard or displace the Argentine settlement than in the case of its validity, unless they could produce a better title — which would have been valid regardless of the convention of 1790. But such a title did not exist in 1833 any more than between 1765 and 1771. At best the British could claim the western part, but not the whole of the archipelago, as long as it had not become *terra nullius* again.

Thus it is not possible to derive from the general European treaties of the period up to 1833 any rights and titles to the Falkland Islands. The legal situation of the islands was unaffected by those treaties, and everything depended on the titles that could be derived from acts on the islands on the one hand and from the transactions between the European powers relating expressly to the Falklands on the other. The only transaction of this kind was the exchange of declarations between Spain and Britain in 1771, by which Spain restored the settlement of Port Egmont on Saunders Islands to Britain.[59] Otherwise only the general international law concerning free, unoccupied territory and discovery, occupation *etc.* applied.

---

[58] *Cf. op. cit.*, 163 *et seq.*

[59] French text in: *Martens* (note 48), vol. 2, 1—3; English translation in: *Goebel* (note 1), 358—360. *Cf. op. cit.*, 316—410; *Zorraquín Becú* (note 2); *Hidalgo Nieto* (note 2), 199—231 and *José Torre Revello*, La promesa secreta y el convenio anglo-español sobre las Malvinas de 1771, Buenos Aires 1952.