



CONFIDENTIAL
Foreign and Commonwealth Office
London SW1A 2AH

31 March 1982

ms

Prime Minister

Dear John,

A. J. C. 31.

ms

South Georgia:
International Arbitration

/ As requested, I enclose a note on the question of referring the South Georgia incident to international arbitration.

Yours ever,

Francis Richards

(F N Richards)
Private Secretary

A J Coles Esq
10 Downing Street

SOUTH GEORGIA: INTERNATIONAL ARBITRATION

1. The attached paper summarises the legal position regarding British sovereignty over the Falkland Islands and their Dependencies. The matter has not been submitted to the International Court of Justice (ICJ) or to any other international tribunal. In 1947 and subsequently, HMG offered to submit the dispute over the Argentine claim to the Dependencies to the ICJ; and in 1955, HMG applied unilaterally to the Court against encroachments on British sovereignty in the Dependencies by both Argentina and Chile. However, the matter could not be pursued since both Argentina and Chile declined to submit to the Court's jurisdiction in the matter.
2. In 1966 the question arose as to whether, in the course of negotiations with the Argentines, the UK should offer to refer the dispute over the Falkland Islands themselves to the ICJ. The Law Officers were asked to advise whether the strength in law of the British case for sovereignty over the Falkland Islands and Dependencies was sufficient to justify such a reference. The Law Officers, in an opinion dated 25 November 1966, expressed the view that the strength in law of the British case was probably sufficient to justify such a reference. But they could not exclude the possibility that the ICJ might find against the UK, particularly over the South Sandwich Islands.
3. The question was not, however, pursued further. This was partly because reference to the Court would not have been acceptable to Argentina (since Argentina does not accept the compulsory jurisdiction of the ICJ, any reference to the Court could only be made with the agreement of the Argentine Government); but also because the composition of the Court had by then become less favourable for the UK on what is seen by most other members of the UN as a colonial problem.

4. FCO Legal Advisers have recently been consulted again. They do not dissent from the views expressed by the Law Officers in 1966, but nor do they consider the composition of the ICJ as any more favourable to the UK position than in 1966. The ICJ is currently composed of 15 judges from the following states: UK, Nigeria, Senegal, France, Poland, USSR, India, FRG, Japan, Italy, Algeria, Brazil, Syria, USA and Argentina.

5. Given the Law Officers' view ^{the} on/strength of the British title to South Georgia there could be presentational and tactical advantage in offering to refer the present dispute to the ICJ. We could not however expect such an offer to have any practical effect since Argentine agreement would still be required before the ICJ could have jurisdiction. It is unlikely that the Argentines would agree now to what they have refused in the past; and to accept the jurisdiction on South Georgia would be all the more difficult for them in view of their opposition to ICJ jurisdiction in their dispute with Chile over the Beagle Channel. But for us to offer this course would enable us to demonstrate clearly to international opinion that we were convinced of our title to South Georgia and that the Argentines were less sure of their claim.

6. There are however grounds for caution. It might not be easy to deal with South Georgia in isolation. If the Argentines were to change their previous position, it might be necessary to refer the whole sovereignty dispute over the Falkland Islands, South Georgia and the South Sandwich Islands. In view of the known attitude to colonial questions of the countries whose judges are represented on the Court, there would be a risk that, despite our view on the strength of our title, the ICJ would find against us. This risk would be lessened, but would still exist, if the dispute were to be referred to an ad hoc arbitration tribunal, assuming we could agree with the Argentines on the composition of a truly neutral tribunal.

7. Before proposing to the Argentines a reference to the ICJ or to some other form of international adjudication of either the particular South Georgia issue or the whole Falkland Islands dispute, we would therefore need to consult the Law Officers again.

FALKLAND ISLANDS AND DEPENDENCIES: LEGAL POSITION

1. In December 1946 the Law Officers were asked to advise on the strength in law of the British title to the Falkland Islands. Their main conclusion (dated 28 January 1947) was:

"In our view, whilst it is not easy to express views with confidence in the unsettled state of International Law in relation to acquisition and loss of territory, Great Britain has a reasonably strong claim to have acquired the Falkland Islands by acquisitive prescription in the nature of usucaption* consisting in its de facto possession and occupation of the Falkland Islands since the year 1833."

2. The Law Officers added that although a considerable body of opinion existed which questioned whether a prescriptive title of usucaption was recognisable in international law, the greater volume of opinion did accept the doctrine as part of the law of nations:

"In our view, by international law Britain has acquired a prescriptive title to the Falkland Islands, and we accordingly think that, if the matter were adjudicated upon, Britain would be successful in establishing her case on these lines."

3. On 12 March 1947 the Law Officers gave their opinion on the basis in law to the British title to the Falkland Islands Dependencies. The Law Officers said of South Georgia that they could advise "with confidence ... that Great Britain had acquired a title to South Georgia". As to the South Sandwich Islands, the Law Officers had considerably less confidence that Britain could establish a title to them. They added that if Great Britain had no title, the South Sandwich Islands are "clearly still terra nullius".

4. The Law Officers were asked to advise on the question of British title to the Falkland Islands and Dependencies again in 1966 and expressed themselves in broad agreement with the opinions given by their predecessors in 1947.

*Usucaption: the acquisition and possession, undisturbed and uninterrupted of a territory which was formerly under another State's sovereignty or occupation.