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THE FALKLAND ISLANDS DISPUTE: A RÉSUMÉ OF ITS BACKGROUND

par Gordon W. SMITH*

The Argentine invasion of the Falkland Islands (las Islas Malvinas) on April 2, 1982, brought to a head the dispute over the islands which has been simmering for well over two hundred years. The ensuing conflict, culminating in the Argentine surrender to the British expeditionary force on June 14, attracted world-wide attention and was given top priority by the news media. Spoken and written comment on the subject since last April has been characterized by a great deal of inaccuracy and exaggeration, revealing all too clearly how distorted are general impressions of the dispute and its background. This sort of misinformation and misunderstanding appears to be widespread in both English-speaking and Spanish-speaking countries, where the typical view is likely to be colored by prejudice of one kind or another. The following résumé attempts to summarize briefly some of the main facts in the background and development of the dispute, taking account of certain details where the truth has not been, and in the circumstances probably cannot be, conclusively established.

The early claims of both Spain and Great Britain to the Falkland Islands had a certain amount of merit, although both were open to challenge. Spanish claims harked back to the Papal Bull of 1493 purportedly dividing the colonial world between Spain and Portugal, to alleged discoveries by Magellan (1520) and Camargo (1540), and to a clause in the Treaty of Utrecht (1713) which Spain interpreted as barring other states from establishing colonies in this region. British claims were based initially upon alleged first discovery by John Davis (1592), alleged first landing by John Strong (1690), and certain other voyages of exploration during this period.

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The trouble with both Spanish and British claims to prior discovery is that neither can be established today as irrefutable fact. Their vulnerability is illustrated by the contention of some authorities that Amerigo Vespucci, sailing under the Portuguese flag, saw the islands in 1502; and if this were true obviously neither Spanish nor British could have been the original discoverer. In any case mere discovery, if unsupported by genuine settlement or other substantive action within a reasonable time, is of limited significance.

The first colony on the islands was French, established on East Falkland in 1764 by the same de Bougainville who was with Montcalm at Quebec in 1759. De Bougainville took two Acadian families with him, so Canada can claim a share of the first settlement there! However the Spanish, who had fought the Seven Years War as allies of the French and were linked to them through the so-called Family Compact, were able to convince their rather unwilling friends that Spain's right was the stronger, so in 1767 France turned the settlement over to Spain.

In the meantime, in 1765, a British expedition under Captain John Byron, grandfather of the poet, had established Port Egmont on Saunders Island just north of West Falkland, and claimed the entire archipelago for Great Britain. In 1766 the British and French met and quarrelled but did not fight; in both 1769 and 1770 the British and Spanish met and finally came to blows. On the first occasion the British had sufficient strength to reject Spanish demands that they leave, but unfortunately for them they had to send word for reinforcements back to Great Britain, while the Spanish could communicate quickly with Buenos Aires. When the showdown came there were five Spanish ships plus over 1,000 soldiers ranged against a single British frigate, and after a brief engagement the British were forced to surrender and depart.

War threatened, and in 1771, in circumstances that still arouse controversy, Spain restored the Saunders Island settlement to Great Britain. The controversial circumstances involve an alleged secret agreement which, according to Spanish (and later Argentinean) claims, required a final British withdrawal after a token period of occupation. The British reply has always been that no documentary or other evidence of such an agreement can be found; the Latin response has been that since the agreement was secret and verbal only, discovery of such evidence cannot be expected. In any case, the British did evacuate the settlement in 1774, leaving a plaque, however, which claimed not only that the site was still British but that all the Falkland Islands were too. If a secret agreement could be proved it would not only nullify this claim but would go a long way towards demolishing the British case. On the other hand it may be accounted for by what one British authority has aptly

referred to, in another context, as the "poetic exuberance of Spanish American politics".

Spain had complete possession of the islands from 1774 to the end of the first decade of the 19th century, during which time there were a dozen or more Spanish governors, their terms generally being short. A small colony was gradually established, but it made little headway. In 1811, faced by revolt throughout her Latin American colonies, Spain abandoned the islands; and they remained unoccupied until the early 1820's except for a polyglot collection of whaling and sealing ships which now frequented them.

In the early 1820's the new, independent United Provinces of the Rio de la Plata (later Argentina), claiming to be the inheritors of Spanish rights, undertook to repossess and resettle the islands. After some delay the colony was set up on the site of the old French-Spanish settlement at Berkeley Sound, north of present Port Stanley. A governor, Louis Vernet, was installed in 1829, this drawing a protest from Great Britain, who maintained that she had never renounced her claim.

There were at least two sources of trouble in the islands at this time. One was the nondescript collection of whalers and sealers, mostly American and British, who had been carrying on without restraint and were virtually a law unto themselves. Of this collection the most culpable element from the United Provinces point of view was the American. When Vernet seized an American sealing ship on charges of disregarding regulations and took it to Buenos Aires for trial, its master escaped to the U.S. warship *Lexington,* whose hot-headed captain Silas Duncan promptly set sail for the islands, laid waste the settlement, and removed Vernet's deputy Matthew Brisbane and several others in irons. In so doing he had the support of some American officials in Buenos Aires and received, retroactively, a measure of support from Washington.

The other chief source of trouble was a miscellaneous and unruly gang of soldiers, sailors, and others from the United Provinces themselves, many of whom were being sent as deportees to man a penal settlement at San Carlos. This was not uncommon practice at the time, but in this case it turned out badly, as some of this gang mutinied and murdered Major Mestivier, the officer who had been sent out as acting governor during the absence of Vernet. Others continued to threaten the few in the colony who had administrative responsibilities and, ostensibly, a measure of authority. This latter element comprised, oddly enough, a heterogeneous group of mostly non-Spanish background, who nevertheless were loyal to the new regime in Buenos Aires.

It was in this troubled and unstable situation that the British warship *Clio,* having already called at Port Egmont, appeared in Berkeley Sound on

January 2, 1833. Don José Pinedo, commander of the colony schooner and now acting as governor, was informed by the *Clio's* commander J.J. Onslow that he (Onslow) had been instructed to take possession of the islands and that the administration of Buenos Aires must end. Pinedo, already overwhelmed with the problems of trying to establish law and order in the colony, protested bitterly; but in the circumstances resistance was futile and he was obliged to leave.

Unfortunately the British takeover was, initially, only the signal for more trouble. Onslow, having done little more than raise the British flag, left only a few days after Pinedo had sailed; and for about a year there was no sign of British authority except for several British ships which called briefly and then sailed away. In the continuing disorder and confusion a small band of the unruly element — "gauchos and Indians" in the terminology of some authorities — attacked the small, beleaguered group headed by the administrative officials, and murdered almost all of the leaders, including the Irish adventurer Matthew Brisbane, who had returned to act again as Vernet's deputy. It was not until Lt. Henry Smith arrived on H.M.S. *Challenger* as appointed governor in January 1834 that establishment of civil order began. Needless to say he and his small band of sailors and marines were looked upon as deliverers, and it would appear that at least the more peaceful element in the settlement, regardless of national origin, had little difficulty in accepting the new British rule. Henceforth progress was slow and the colony remained small, but peace and tranquillity prevailed.

The Buenos Aires government formally protested the British takeover on several occasions during the following decade, but the response was negative. A long and determined attempt was also made to get compensation from the United States for the depredations of the *Lexington,* and it was not until the mid-1880's that the first administration of President Cleveland finally rejected Argentine claims. Louis Vernet had somewhat better luck in his stubborn effort to get personal compensation for his losses from Great Britain, but after years of negotiation he received only a fraction of what he had originally demanded. Regarding the fundamental issue of sovereignty over the Falkland Islands, Argentina continued periodically to protest the British occupation, and has never relinquished her claim that she is the rightful owner. However, she never undertook to use force in support of her claim until April 1982.

In summation, the most basic facts in the background of the dispute appear to be as follows.

1. Both Great Britain and Spain established early claims through assertions of discovery, etc, but the claims of both were of dubious validity.

2. The actual sequence of settlement was French, British, and Spanish (taking over French) in that order, in the 1760's.
3. The Spanish ejected the British by force in 1770.
4. After the restoration in 1771 the British left their single, small settlement once again in 1774, and then showed no official interest in the islands until 1829.
5. The Spanish, and then the Argentines, claimed that a secret agreement in 1770-1771 provided for permanent British withdrawal, but this claim has never been proved.
6. Except for a period of abandonment between 1811 and the early 1820's, the islands between 1774 and 1833 were in the possession of Spain and then, more precariously, the United Provinces.
7. Great Britain forced the termination of the Buenos Aires administration, such as it was, in 1833.
8. After 1833 the islands remained completely in the possession of Great Britain.
9. Argentina has never accepted nor become reconciled to British sovereignty over the islands, but never attempted any violent measures to end British rule until April 1982.

What about the legal side of this long and involved dispute, and the merits of the rival postures of Great Britain and the Argentine? The principal contentions of the two parties have already been indicated. In addition, Argentina has maintained that under the concept of the Monroe Doctrine (or a corollary of it) and various pronouncements of the Organization of American States, the Falklands are properly not subject to the "colonial" rule of any European power. She has maintained also that geographically the islands are inalienably a part of the western hemisphere and the South American continent, and logically appurtenant to the Argentine mainland. Great Britain, always disinclined to accept either that the Monroe Doctrine ever had any legal validity or that Spain ever had any exclusive right to the region, has argued that British interest in the islands developed at a time when Spanish rule abroad, to which the Argentines claim to be the successors, was at least as "colonial" as Britain's was. She has maintained that so far as the islands are concerned Argentina had no clear-cut or decisive right to inheritance from Spain, and that the present inhabitants have rights to the territory they occupy similar to those the Argentines claim for themselves in Argentina. Regarding the geographic factor in the Argentine contention, this is largely nullified by the well-known rejection by international legal authorities of contiguity as a significant factor in deciding rights of sovereignty, Judge Huber's denunciation of contiguity in the Palmas Island case (1928) being the classic illustration. And even if the principle had any validity, she

says, the distance separating islands from mainland (250-300 miles) is too great for it to apply.

Broadly speaking, it may be said that the Latins had the better of the dispute before, and the British after, the decisive takeover in 1833. It appears fairly certain that if there had been a world court at that time, and the dispute had been presented to this court, the new Latin American state would have been granted possession of the islands. On the other hand it is still more certain that if the dispute had been presented to the world court at any time in recent years, Great Britain would have won. The difference is simply that brought about by 150 years of continuous, peaceful, and uninterrupted, though not unchallenged, occupation, administration, and possession. The validation for British sovereignty over the Falkland Islands would have to rest upon these 150 years of virtually complete possession, more than upon the uncertain and debatable events of the years preceding.

This is doubtless as it should be, even though there is something unsatisfactory in such situations. No one today would try to make a serious legal case that white Australians should quit that subcontinent and leave it for the aborigines, or even that the remaining Indians in the Argentine should be able to repossess all the lands that the Spanish ancestors of the present Argentineans took from them. These are obviously not exact parallels; for one thing, there were no aboriginal people on the Falklands before the arrival of Europeans. But the same point must ultimately apply, otherwise the world would have to stumble along in an even greater state of uncertainty about territorial rights than is unfortunately the case today.

Great Britain has offered several times to submit the dispute over the so-called Falkland Islands Dependencies (South Georgia, South Orkneys, South Shetlands, South Sandwich Islands, Graham Land) to international adjudication. (It should be noted that in 1962 a British order in council separated the South Orkneys, South Shetlands, and the British-claimed portion of Antarctica from the Falkland Islands Dependencies, and named them the British Antarctic Territory.) Argentina, like Chile, has always refused these offers. So far there has been little indication of any move to resolve the dispute over the Falkland Islands themselves by the same method. If "the lean and ascetic visage of the law" should be interposed to settle the issue, it would have to take into account both the remote background of the dispute and the recent and present realities. The remote background is confused and unsatisfactory, but the recent and present realities are overwhelmingly in favor of Great Britain. Unpalatable though it sometimes may be, the law in such matters must eventually catch up with, and recognize, established fact. For this reason the British, unlike the Argentines, could face the outcome of such a resolution of the dispute with confidence.

Whatever historic rights Argentina might have would be compromised by the fact that she would either have to impose upon the islanders an unwelcome alien rule, or have them removed lock, stock, and barrel. If she could prove clear title to the islands one of these alternatives might well become necessary, but, as stated, this is most unlikely.

In brief, Argentina would in all probability lose a legal case on the islands; her invasion of them was clearly in violation of the United Nations charter (e.g., Articles 1, 2); and the islanders themselves want no part of Argentine rule. It can only be said, therefore, that her invasion was legally unjustifiable, morally indefensible, and, as it turned out, militarily disastrous.

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