

FEAR AND LOATHING IN THE SOUTH POLE: THE NEED TO RESOLVE THE ANTARCTIC SOVEREIGNTY ISSUE AND A FRAMEWORK FOR DOING IT

“Great God! This is an awful place.”

- Captain Robert Scott, 1912¹

I. INTRODUCTION

Antarctica is a continent on the brink. The constant political instability of oil-rich nations, coupled with an increasing global petroleum demand, is fueling the likelihood that the world will turn its thirsty eyes towards this great unexplored frontier in search of natural energy resources. Mineral exploration in Antarctica, however, has been effectively barred since 1959 under the Antarctic Treaty System (“ATS”),² which, in its current form, prohibits mineral exploration as far into the future as 2048.³ The strategic potential presented by this vastly unpopulated continent has not gone unrecognized by the major global political players. To add further strain to this inherently tense environment, seven nation states have publicly expressed sovereignty claims to some part of the continent, with the United States and Russia reserving a right to assert such a claim in the future.⁴

The existing ATS amounts to an agreement to disagree on the issue of sovereignty between claimant states. History has shown that long-unsettled sovereignty disputes can boil over into full-scale military confrontations. Two examples illustrate the fallacy of simply “waiting out” competing claims. First, the Spratly Islands, a group of more than a hundred islands in the South China Sea⁵ that are believed to possess significant oil reserves, have been witness to armed conflicts between claimant states on at least four different occasions.⁶ Second, the longstanding Falkland Islands territorial dispute between Argentina and the United Kingdom boiled over into war in 1982, resulting in numerous casualties on both

1. PETER J. BECK, THE INTERNATIONAL POLITICS OF ANTARCTICA 14 (1986).

2. The ATS is comprised of the Antarctic Treaty of 1959 and the Madrid Protocol of 1991. See *infra* III.A. and III.B. (describing the development of the ATS and other related international agreements).

3. Protocol on Environmental Protection to the Antarctic Treaty art. 1, Oct. 4, 1991, S. TREATY DOC. NO. 102-22, 30 I.L.M. 1455 [hereinafter Madrid Protocol].

4. The seven nation states consist of Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom. The United States expressly does not recognize the sovereignty of any government on the continent and both the United States and Russia have reserved the right to make future claims over territory. BECK, *supra* note 1, at 119-25.

5. CIA World Factbook, Spratly Islands, <https://www.cia.gov/library/publications/the-world-factbook/geos/pg.html> (last visited Mar. 24, 2008).

6. Jeffrey Robertson, *China's Power Hunger Trumps Japan Diplomacy*, ASIATIMES (H.K.), Nov. 2, 2004, available at <http://www.atimes.com/atimes/China/FK02Ad01.html> (explaining that Chinese disputes with Vietnam over the Spratly Islands have resulted in armed conflict on no less than four occasions).

sides.⁷ The time to decide on claims of sovereignty is now, before these powerful nations are tempted to resort to military means. Otherwise, the fundamental principle espoused by the drafters of the initial agreement—that “Antarctica shall be used for peaceful purposes only”⁸—will be jeopardized.

The purpose of this Comment is two-fold: first, to put forth an argument as to why nothing short of a determination of Antarctica’s sovereignty can resolve the minerals exploitation issue; and second, to provide a framework for resolving the conflicting overlapping claims of the United Kingdom, Argentina, and Chile.

Part II of this Comment provides the contextual background behind the issues of a mineral regime and sovereignty in Antarctica. Part III describes the purpose and scope of the existing multinational agreements directly governing Antarctica, as well as other important agreements affecting the continent. Part IV sets forth reasons why this existing system is wholly inadequate to accommodate a sustainable minerals exploitation regime. Part V describes the competing claims on the Antarctic Peninsula by Argentina, Chile, and the United Kingdom, and serves to illustrate the various types of claims over the rest of the continent. Part VI provides a potential resolution, as developed from existing international law, to the territorial sovereignty disputes in the Antarctic Peninsula and explains why the United Kingdom has the strongest claim over the Peninsula.

II. THE PROSPECT OF OIL EXPLORATION IN ANTARCTICA

A. *Antarctica’s Geography*

An appreciation of Antarctica’s extreme elements and singular geography is essential to understanding the issues that surround the development of an Antarctic mineral exploitation regime and the determination of sovereignty. If hell were to freeze over, it would resemble Antarctica. Although the average temperature of Antarctica is difficult to determine because of its variable geography, the only part of the continent to experience temperatures above freezing is the northern portion of the Antarctic Peninsula and, even then, only in the summer months.⁹ Visitors wishing to “beat the heat” of the Peninsula can head south to seek refuge in the continent’s interior, which has seen temperatures reach minus 89.6 degrees Celsius and wind speeds of 215.65 kilometers per hour, making it both the coldest and windiest landmass on Earth.¹⁰

7. Joseph S. Roucek, *The Geopolitics of the Antarctic: The Land Is Free for Scientific Work but Its Wealth of Minerals Has Excited Imperialist Claims*, 45 AM. J. ECON. & SOC. 69, 75 (1986).

8. Antarctic Treaty art. I, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

9. F.M. AUBURN, *ANTARCTIC LAW AND POLITICS* 2 (1982).

10. BECK, *supra* note 1, at 10. By way of comparison, the temperature of “dry ice” is only 78.5 degrees Celsius.

The Antarctic, unlike the Arctic, has an actual continental land mass underlying its immense ice sheet.¹¹ The continental land mass measures approximately 14.2 million square kilometers (5.5 million square miles), roughly ten percent of Earth's land surface.¹² Antarctica's surface area is greater than the combined surface area of the United States and Mexico.¹³ Ninety-five to ninety-eight percent of this area is covered year-round by an ice sheet with an average thickness of 2,450 meters (1.52 miles), and which exceeds 4,500 meters (2.79 miles) in some places.¹⁴ This ice sheet represents approximately seventy percent of all the fresh water on Earth.¹⁵ The sheer weight of it has pushed the bedrock surface down toward the Earth's core as much as 800 meters in some places, and is believed to be responsible for the abnormal depth of water over the continental shelves, approximately four times the world average.¹⁶ If the ice sheet were to melt it is believed that "the surface of the world's oceans would rise an estimated 200 feet, flooding many major cities and inhabited coastal areas."¹⁷

Extending beyond the continental ice sheet are permanent ice shelves that reach over the coastline into the ocean and are responsible for the production of massive fresh water icebergs.¹⁸ There are ten principal ice shelves, with the biggest being the Ross Ice Shelf, which has an "area of at least 325,000 sq. km. (though estimates vary widely), is between 200 and 400 metres thick and projects approximately 30 metres above sea-level."¹⁹ Meanwhile, underneath the ice shelves, water depths reach 1,300 meters.²⁰ Surrounding the continent is a dynamic belt of sea ice that acts as a pulsating monster, ranging from 2.6 million square kilometers in the summer to 19.0 million square kilometers in the winter,²¹ and has proven to be a pelagic Venus flytrap to more than one trekker who overstayed his summer welcome.²² Until the twentieth century, both the physical obstacles

11. KEITH SUTER, ANTARCTICA: PRIVATE PROPERTY OR PUBLIC HERITAGE? 4 (1991).

12. Beck, *supra* note 1, at 8.

13. *Id.*

14. *Id.* at 9.

15. JACK CHILD, ANTARCTICA AND SOUTH AMERICAN GEOPOLITICS: FROZEN LEBENSRAUM 5 (1988)

16. BECK, *supra* note 1, at 9.

17. CHILD, *supra* note 15, at 5.

18. Some icebergs "may be 30-40 km long and up to 200 [meters] thick, although [ice]bergs of 400 km in length and over have been observed." BECK, *supra* note 1, at 9.

19. AUBURN, *supra* note 9, at 32.

20. *Id.*

21. *Id.* at 1.

22. *E.g.*, PHILIP W. QUIGG, A POLE APART: THE EMERGING ISSUE OF ANTARCTICA 20 (1983). (explaining that in 1897, the Belgian *Belgica* became trapped in the middle of the Bellingshausen Sea for nearly a year, during which time "[o]ne man died of heart failure, two went mad, and all suffered from anemia, lethargy, and acute depression or paranoia"); *Russian Ship Rescue "Will Be Slow,"* CNN, June 17, 2002, <http://archives.cnn.com/2002/WORLD/africa/06/17/rescue.ship/index>. (explaining that in 2002 a Russian ship, the *Magdalena Oldendorff*, along with its 107 passengers became trapped for weeks in the pack ice after making a wrong turn).

presented by the Antarctic ice and the belief that the continent provided little commercial benefit deterred sovereignty claims and attempts at large-scale exploitation of mineral resources on the continent.²³

B. The Amount of Oil in Antarctica

Over the last century, the notion of Antarctica's providing commercial benefit to the world has grown with the belief that it may possess significant untapped oil reserves beneath its deep seabed. Estimates of the oil reserves in Antarctica are derived from a combination of geological theory and limited exploration. The belief that there is an abundance of oil along the continental shelf of Antarctica is based upon the generally accepted Gondwanaland Thesis.²⁴ According to this thesis, around 150 to 200 million years ago, there was a subdivision of a supercontinent, Gondwanaland, which was located in the Southern Hemisphere and comprised of Antarctica surrounded by the modern day continents of South America, Africa, Australia, and peninsular India.²⁵ Scientific research indicates that prior to the disintegration of Gondwanaland and the subsequent southern migration of the continent, Antarctica's land mass would have been densely vegetated and contained "freshwater fishes, amphibians and reptiles,"²⁶ all of which could provide the necessary hydrocarbons for transformation into petroleum.

Speculation that the continental shelves of Antarctica may contain oil has also been fueled by discovery of significant oil reserves in the subdivisions of Gondwanaland that were adjacent to Antarctica's.²⁷ Such speculation found support in 1973 when the *Glomar Challenger* found hydrocarbons associated with petroleum deposits in the Ross Sea.²⁸ The following year, the U.S. Geological Survey estimated that there were "deposits of 45 billion barrels of oil... on the continental shelves of West Antarctica."²⁹ Currently, the Energy Information Administration ("EIA"), which maintains the official energy statistics for the U.S. government, estimates that "the Weddell and Ross Sea areas alone are expected to possess 50 billion barrels of oil—an amount roughly equivalent to that of Alaska's estimated reserves."³⁰

23. SUTER, *supra* note 11, at 48-49.

24. BECK, *supra* note 1, at 239.

25. *Id.* at 12-13.

26. SUTER, *supra* note 11, at 47.

27. AUBURN, *supra* note 9, at 246-47 (explaining that "[t]he Bellingshausen shelf is similar to offshore Chile, which has so far yielded natural gas. South Africa and South America have small oil and gas fields hinting at the same result for the Weddell Sea. The Ross Sea may resemble the Gippsland Basin of Australia, which contains significant amounts of oil and gas.").

28. SUTER, *supra* note 11, at 49.

29. QUIGG, *supra* note 23, at 94.

30. Antarctica: Fact Sheet, <http://www.eia.doe.gov/emeu/cabs/antarctica.html> (last visited Mar. 24, 2008).

C. The Feasibility of Exploitation

The existence of oil in Antarctica has no direct commercial relevance if extraction is not economically feasible. Given the state of current technology, the prohibitive costs involved in penetrating the dense ice sheets will likely make the Antarctic land mass a continental “white elephant” for large-scale mineral exploitation.³¹ Offshore drilling, though rife with formidable physical obstacles³² and uncertain environmental impact,³³ presents the most promising method of oil exploration in Antarctica. Recent advances in technology may overcome many of the physical challenges presented by offshore drilling, such as the unusual depth of the Antarctic waters and the uncertainty of predicting icebergs.³⁴

Furthermore, existing schemes regulating Arctic mineral exploration could be adopted in Antarctica to limit any detrimental environmental impact. The International Maritime Organization (“IMO”), the United Nations agency responsible for shipping regulations, has introduced a number of regulatory measures designed to minimize oil tanker accidents, which have historically resulted in severe—and occasionally permanent—environmental damage.³⁵ Specifically, the IMO has introduced the International Convention for the Prevention of Pollution from Ships (“MARPOL”),³⁶ which designates the Antarctic waters as a “special area” in which the amount of permissible pollution is greatly restricted.³⁷

As of January 25, 2008, the IMO has 167 member states.³⁸ Enforcement of MARPOL provisions requires jurisdiction of the enforcing state. However, under the current ATS state jurisdiction is limited to actions of its nationals who are “observers,” “scientific personnel” and their staff.³⁹ Thus, while oil exploration

31. BECK, *supra* note 1, at 241-42.

32. QUIGG, *supra* note 23, at 95 (explaining that the continental shelves of Antarctica are roughly half as wide and twice as deep as the global norm, weather forecasting is entirely inadequate the season for drilling is uniquely brief, and that icebergs will endanger drillships).

33. AUBURN, *supra* note 9, at 251-56.

34. See QUIGG, *supra* note 23, at 95; see also Press Release, Minerals Mgmt. Serv., U.S. Dep’t of Interior, New World Water-Drilling Record Set in Over 10,000 Feet of Water (Nov. 18, 2003), available at <http://www.gomr.mms.gov/homepg/whatsnew/newsreal/2003/031118.html>; Press Release, Prince William Sound Reg’l Citizen’s Advisory Council, Prince William Sound Iceberg Radar Project Comes Online (Dec. 20, 2002), available at <http://www.pwsrcc.org/newsroom/021220.html>.

35. International Maritime Organization, General Objectives and Policies, <http://www.imo.org> (last visited Mar. 24, 2008) [hereinafter International Maritime Organization].

36. International Convention for the Prevention of Pollution from Ships, Mar. 30, 1983, 34 U.S.T. 3407, 1340 U.N.T.S. 184 [hereinafter MARPOL].

37. *Id.* at Annex I, as amended by the 1990 Amendments.

38. International Maritime Organization, *supra* note 36.

39. Richard B. Bilder, *Control of Criminal Conduct in Antarctica*, 52 VA. L. REV. 231, 237 (1966).

technology and regulation are progressing to allow for economic benefit and continued environmental integrity of Antarctica, the ATS must be updated accordingly.

The existence of genuine questions regarding the feasibility of oil exploitation in Antarctica by no means vitiates the need to determine sovereignty. In fact, the feasibility question only serves to underscore the importance of resolving sovereignty issues in Antarctica *before* such certainty exists.⁴⁰ The discovery of exploitable oil in Antarctica would raise “the political stakes in the discussions and perhaps even [encourage] unilateral rather than multilateral action.”⁴¹ Thus, deferring the sovereignty question jeopardizes the very touchstone espoused in Article I of the Antarctic Treaty, that “Antarctica shall be used for peaceful purposes only.”⁴²

III. THE EXISTING TREATY SYSTEM

A. *The Antarctic Treaty*

The Antarctic Treaty⁴³ was produced because of the convergence of international scientific cooperation,⁴⁴ mounting sovereignty claims,⁴⁵ international anxiety following World War II and a burgeoning Cold War between global superpowers.⁴⁶ In the fifty years preceding the treaty, rapid advances in technology allowed greater access to the once unapproachable land.⁴⁷ This access served a dual purpose for states willing and able to make it to the continent. First, increased access provided the states’ scientists with a venue for geological research in furtherance of the International Geophysical Year’s (“IGY”) aspirations.⁴⁸ Second,

40. BECK, *supra* note 1, at 244-45.

41. *Id.* at 245.

42. Antarctic Treaty, art. I, *supra* note 8, 12 U.S.T. at 794, 402 U.N.T.S. at 71.

43. *See id.* (entering into force in 1961).

44. SUTER, *supra* note 11, at 9.

45. QUIGG, *supra* note 23, at 110-13.

46. BECK, *supra* note 1, at 21-22. The preamble to the Treaty calls to mind these various interests:

Recognizing that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord; Acknowledging the substantial contributions to scientific knowledge resulting from international cooperation in scientific investigation in Antarctica; Convinced that the establishment of a firm foundation for the continuation and development of such cooperation on the basis of freedom of scientific investigation in Antarctica as applied during the International Geophysical Year accords with the interests of science and the progress of all mankind; Convinced also that a treaty ensuring the use of Antarctica for peaceful purposes only and the continuance of international harmony in Antarctica will further the purposes and principles embodied in the Charter of the United Nations.

Antarctic Treaty, *supra* note 8, pmbl.

47. BECK, *supra* note 1, at 27-28.

48. *See* AUBURN, *supra* note 9, at 87 (“The IGY was to run for eighteen months from 1 July 1957 to 31 December 1958 The IGY became a [program] of global cooperation directed at world- or area-wide synoptic measures. It covered geophysics, meteorology, geomagnetism, aurora and air glow, ionosphere, cosmic rays, longitudes and latitudes, glaciology and

such access allowed states to take affirmative measures that would lay the foundation for territorial claims on the continent. In practice, the distinction between these activities was often blurred.⁴⁹ By 1961, seven states—Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom—declared formal territorial claims to some portion of the continent, while the two superpowers—the United States and the Soviet Union—reserved the opportunity to make their own claims at a later date.⁵⁰ Among this milieu of excitement and uncertainty, the Antarctic Treaty, covering the “the area south of 60 degrees South Latitude,”⁵¹ was agreed to by twelve states, including the seven claimant states, the United States, Russia, and three non-claimant states—Belgium, Japan and South Africa.⁵²

During the drafting of the Antarctic Treaty, two realities became apparent: first, the need for a formalized multinational research regime was critical to prudent scientific exploration on Antarctica; and second, claimant states were unwilling to retreat on the issue of sovereignty.⁵³ Article IV of the Antarctic Treaty memorialized the states’ agreement to disagree on the issue of sovereignty in order to allow for continued negotiations aimed at creating a tenable scientific exploration regime.⁵⁴ In order to satisfy the concerns of claimant states, Article IV, Paragraph One of the Antarctic Treaty provides that the act of establishing the treaty would have no effect on either the basis “of any [existing] claim to territorial sovereignty in Antarctica” or “any other State’s . . . claim to territorial sovereignty.”⁵⁵

Paragraph Two of Article IV is pragmatic in that it allows states to take a collaborative approach to scientific research without fear that their existing claims will be diminished, while also removing any incentive for states to set up “strawman” scientific research activities designed to lay the foundation for territorial claims.⁵⁶ While appearing to be a pragmatic solution to otherwise irreconcilable differences, the consequences of Paragraph Two are much more provocative. By setting aside the issue of sovereignty, Paragraph Two has the effect of freezing both the number of claims and the basis of those claims as of 1961. Thus, a claimant states’ factual predicate for its territorial claim is limited to its claim as of 1961. As discussed below, international law precedent blurs this seemingly unambiguous provision.

Article XI of the Antarctic Treaty expressly grants jurisdiction to the

climatology, oceanography, rockets and satellites, seismology and gravimetry, and nuclear radiation.” (citation omitted)).

49. See, e.g., BECK, *supra* note 1, at 28-29.

50. BECK, *supra* note 1, at 119-25.

51. Antarctic Treaty art. VI, *supra* note 8, 12 U.S.T. at 794, 402 U.N.T.S. at 71.

52. *Id.* pmb.

53. Bilder, *supra* note 40, at 236-37.

54. Antarctic Treaty art. IV., *supra* note 8, 12 U.S.T. at 794, 402 U.N.T.S. at 71.

55. *Id.* art. IV, ¶ 1.

56. *Id.* art. I, ¶ 2.

International Court of Justice to resolve disputes “concerning the interpretation or application” of the Antarctic Treaty that Parties are unable to resolve among them.⁵⁷ Article XII of the Antarctic Treaty requires unanimous agreement by the Consultative Parties⁵⁸ for amendment or modification of the treaty⁵⁹ and calls for a review of its effectiveness after a period of thirty years.⁶⁰

B. The Madrid Protocol

In accordance with Article XII of the Antarctic Treaty, the parties met in Madrid in 1991 to reconsider the existing treaty, and at that time successfully established the Protocol on Environmental Protection to the Antarctic Treaty (“Madrid Protocol”).⁶¹ The Madrid Protocol incorporates the Antarctic Treaty by reference and expands on a number of environmental protection issues.⁶² It does nothing, however, to resolve the sovereignty issue. The Madrid Protocol affirms Article IV of the Antarctic Treaty⁶³ and expressly rejects any notion that the ICJ has implied jurisdiction over sovereignty disputes by way of its jurisdiction granted under Article XI of the Treaty.⁶⁴ Additionally, the Madrid Protocol expressly prohibits any exploration or exploitation of mineral resources during its

fifty-year term,⁶⁵ absent the unanimous agreement of a mineral resource regime by

57. Antarctic Treaty art. XI, *supra* note 8, 12 U.S.T. at 794, 402 U.N.T.S. at 71.

58. National Science Foundation, Office of Polar Programs, The Antarctic Treaty, <http://www.nsf.gov/od/opp/antarct/anttrty.jsp> (last visited Mar. 21, 2008) (explaining that although the original text of the Antarctic Treaty names the signatories as “Contracting Parties,” the ATS subsequently made a distinction between “Consultative Parties” and “Contracting Parties” based on the level of scientific activity on the continent. The unanimous agreement requirement by the ATS applies only to Consultative Parties. The twelve states listed in the preamble to the Antarctic Treaty became the original Consultative Parties. Sixteen additional states have achieved Consultative status by acceding to the ATS and conducting substantial scientific research in Antarctica: Brazil; Bulgaria; China; Ecuador; Finland; Germany; India; Italy; Netherlands; Peru; Poland; Republic of Korea; Spain; Sweden; Ukraine; and Uruguay. Another eighteen states have acceded to the ATS as Contracting Parties: Austria; Belarus; Canada; Colombia; Cuba; Czech Republic; Democratic Peoples Republic of Korea; Denmark; Estonia; Greece; Guatemala; Hungary; Papua New Guinea; Romania; Slovak Republic; Switzerland; Turkey; and Venezuela. The Contracting Parties agree to abide by the ATS and may attend consultative meetings as observers.).

59. Antarctic Treaty art. XII, ¶ 1, *supra* note 8, 12 U.S.T. at 794, 402 U.N.T.S. at 71.

60. *Id.* art. XII, ¶ 2.

61. Madrid Protocol art. 1, S. TREATY DOC. NO. 102-22, 30 I.L.M. 1455.

62. *Id.*

63. *Id.* art. X.

64. *Id.* art. XX. (declaring that “nothing in this Protocol shall be interpreted as conferring competence or jurisdiction on the International Court of Justice [ICJ] . . . for the purpose of settling disputes between Parties to decide or otherwise rule upon any matter within the scope of Article IV of the Antarctic Treaty.”) Previously, under Article XI of the original Antarctic Treaty, parties could give consent to the ICJ for settlement of disputes “concerning the interpretation or application of the [Antarctic] Treaty.” Presumably, this would include interpretation and application of Article IV of the treaty. Antarctic Treaty, *supra* note 8, art. XI.

65. Protocol on Environmental Protection to the Antarctic Treaty, *supra* note 3, art. VII.

the 28 Consultative Parties to the Protocol.⁶⁶

In the decade preceding the signing of the Madrid Protocol, the Parties to the Antarctic Treaty attempted to establish such a mineral regime, resulting in the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities ("CRAMRA").⁶⁷ That system allowed for private exploration entities to apply for approval through a sponsoring state to the CRAMRA Regulatory Committee.⁶⁸ The draft CRAMRA treaty was adopted. However, two Consultative Parties, Australia and France, refused to sign the final document, citing environmental concerns. Because unanimous approval of all Consultative Parties, which then numbered twenty, was required for any amendment or modification of the Antarctic treaty,⁶⁹ the CRAMRA never entered into force.⁷⁰

C. The United Nations Convention on the Law of the Sea

Although the Antarctic Treaty and the subsequent Madrid Protocol comprise the cornerstone agreements of the ATS, the United Nations Convention on the Law of the Sea ("UNCLOS")⁷¹ has bearing on the issues of sovereignty and mineral exploitation in two important and distinct ways. First, there is a fundamental question as to whether the common heritage concept interwoven into UNCLOS replaces the existing ATS's control over Antarctica.⁷² The common heritage concept argues that the area beyond the limits of national jurisdiction, including the seabed and its subsoil, is not subject to any state's "claim or exercise [of] sovereignty or sovereign rights over any part of the Area" or its natural resources.⁷³ Because no part of Antarctica is under a recognized national jurisdiction, under UNCLOS its resources cannot be utilized for the benefit of a few states or private

66. *Id.* art. XXV, ¶ 5(a) (stating that "the prohibition on Antarctic mineral resource activities contained therein shall continue unless there is in force a binding legal regime on Antarctic mineral resource activities."). The Protocol incorporates the unanimity requirement of Article 12 of the Antarctic Treaty. *Id.* art. XXV, ¶ 1.

67. SUTER, *supra* note 11, at 52-55.

68. *Id.* at 56-57.

69. ANTARCTIC TREATY HANDBOOK: REGULATION OF ANTARCTIC MINERAL RESOURCES 384, 433 available at www.state.gov/documents/organization/15282.pdf [hereinafter HANDBOOK].

70. SUTER, *supra* note 11, at 59-65. These environmental concerns were not unfounded; earlier in the year, the world witnessed both the *Exxon Valdez* spill over eleven million gallons of crude oil into Alaska's Prince William Sound and the complications of the cleanup efforts that followed. United States Environmental Protection Agency, *Exxon Valdez Oil Spill*, <http://www.epa.gov/OEM/content/learning/exxon.htm> (last visited Mar. 21, 2008); see also Catherine Redgwell, *Antarctica*, 39 INT'L & COMP. L.Q. 474, 474-75 (1990) (describing the 1989 *Bahia Paraíso* accident in which an Argentinean ship sank with over 900,000 liters of diesel in its hold, leaving behind a nine-to-twelve kilometer-wide oil slick in the Antarctic).

71. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

72. BECK, *supra* note 1, at 278.

73. UNCLOS, *supra* note 72, art. 137, ¶ 1.

parties.⁷⁴ If the common heritage concept in UNCLOS were to apply to Antarctica, it would challenge the validity of the Antarctic Treaty System and undermine all existing and future sovereignty claims.⁷⁵ The common heritage concept may seem attractive when viewed from a position of horizontal sovereignty; however, the concept is of “debatable international acceptability” in its relevance to Antarctica.⁷⁶ Moreover, there is a strong argument that Antarctica be treated as *lex specialis*—excludable from the general rule of common heritage—because at the time of UNCLOS’ adoption in 1982 the various claims in Antarctica were well known.

The desirability of such a pan-national regime based on common heritage is also questionable on practical administrative grounds. If the Antarctic were under the control of a global agency, such as the United Nations, the difficulty in establishing cooperation would be exponentially increased because of the number of parties needed to be consulted and persuaded before any action could occur, including parties that may lack a genuine interest.⁷⁷ The current Antarctic Treaty System is well designed because it ensures that only parties who have made real investments in the continent have the ability to control the decision-making.⁷⁸

The failure of UNCLOS’ “Enterprise” mineral exploration scheme underscores the argument against a pan-national regime.⁷⁹ In the twenty-five years since UNCLOS was completed no deep seabed mining has occurred. The Enterprise scheme set up in Article 153 of UNCLOS is similar in form to the aborted CRAMRA system of state sponsoring. The administrative hurdles of operating through pan-national organizations have caused the failure of both the CRAMRA system and the fruitless UNCLOS Enterprise system.

Second, UNCLOS governs the coastal states’ sovereignty over the adjacent waters and the area covered by that sovereignty. Under well-established international law, the coastal states’ authority to explore and exploit the adjacent waters is an “inherent right” of sovereignty.⁸⁰ Thus, in the case of Antarctica, the successful claimant has an unquestioned and exclusive right to explore and exploit minerals in the waters adjacent to its sovereign land. Because of the deep ice layer covering most of the continent, exclusive rights over adjacent water is especially important as the real opportunity for mineral exploration exists in the surrounding Antarctic sea bed and subsoil.⁸¹ Under UNCLOS, the sovereign rights to explore

74. *Id.* art. 137.

75. BECK, *supra* note 1, at 278.

76. *Id.* at 279.

77. *Id.* at 282.

78. Lynn M. Fountain, Note, *Creating Momentum in Space: Ending the Paralysis Produced by the “Common Heritage of Mankind” Doctrine*, 35 CONN. L. REV. 1753, 1771 (2003).

79. UNCLOS, *supra* note 72, art. 153.

80. North Sea Continental Shelf Cases (F.R.G. v. Den. & F.R.G. v. Neth.) 1969 I.C.J. 3, 22, ¶ 19 (Feb. 20, 1969), available at <http://www.icj-cij.org/docket/files/52/5561.pdf> (stating that “the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources”).

81. Gilbert Guillaume, *Oil as a Special Resource: Problems and Experiences*, in ANTARCTIC RESOURCES POLICY, SCIENTIFIC LEGAL AND POLITICAL ISSUES 185, 188 (Francisco

and exploit the natural resources extend to the outer limit of the exclusive economic zone, two hundred nautical miles offshore.⁸² The unsettled legal classification of the massive ice shelves as either land or high seas and the modern geographical changes in Antarctica from global warming⁸³ make demarcation of the coastal baseline under UNCLOS a task yet to be performed.⁸⁴

IV. SHORTCOMINGS OF THE EXISTING SYSTEM TO ACCOMMODATE MINERAL EXPLORATION

Although the current treaty system allows for the creation of a mineral exploration regime in Antarctica, practical realities would prohibit its enactment. As noted above, Article XXV of the Madrid Protocol allows for the development of a binding mineral resource regime.⁸⁵ CRAMRA signified a near unanimous belief by interested parties that mineral exploitation in Antarctica was not only feasible but also desirable. The failure of CRAMRA, however, demonstrates that the ATS requirement of unanimous consent by the Consultative Parties⁸⁶ makes it unlikely that a regime will emerge organically within the system. Moreover, when CRAMRA failed, there were only twenty Consultative Parties;⁸⁷ today there are twenty-eight.⁸⁸ Thus, there is an even higher hurdle to achieving unanimity today.

The implausibility of obtaining unanimous consent by an ever-increasing membership makes waiting until the expiration of the Madrid Protocol in 2048 the only option for mineral exploitation under the existing ATS. This forty-year prohibition is overly restrictive and does not provide the parties, or the global community, with the flexibility to adjust to future uncertainties in the energy market. According to the U.S. Census Bureau, the world population was

O. Vicuna ed., 1983).

82. UNCLOS, *supra* note 72, art. 56, ¶ 1(a) (“In the exclusive economic zone, the coastal State has sovereign rights for the purpose of exploring and exploiting . . . the natural resources . . . of the seabed and subsoil . . .”).

83. See Intergovernmental Panel on Climate Change, IPCC WGI FOURTH ASSESSMENT REPORT, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, SUMMARY FOR POLICY MAKERS (Feb. 2007) (discussing the impact of melting ice on Antarctica’s mass). “Flow speed has increased for some . . . Antarctic outlet glaciers, which drain ice from the interior of the ice sheets. The corresponding increased ice sheet mass loss has often followed thinning, reduction or loss of ice shelves or loss of floating glacier tongues. Such dynamical ice loss is sufficient to explain most of the Antarctic net mass loss.” *Id.* at 10.

84. See generally Christopher C. Joyner, *Ice-Covered Regions in International Law*, 31 NAT. RES. J. 213, 225-231 (1991) (discussing the unique legal issues surrounding the classification of ice-shelves and the determination of a “baseline” under UNCLOS, as well as a number of plausible solutions).

85. Protocol on the Environmental Protection to the Antarctic Treaty, *supra* note 3, art. XXV, ¶ 5(a).

86. *Id.* art. XXV, ¶ 1; Antarctic Treaty, *supra* note 8, art. XII.

87. HANDBOOK, *supra* note 70, at 433.

88. U.S. Antarctic Treaty Program: The Antarctic Treaty, <http://www.usap.gov/theAntarcticTreaty/> (last visited Mar. 24, 2008).

approximately 5.4 billion in 1991, when the Madrid Protocol was signed.⁸⁹ By 2048, the world population is expected to exceed 9.3 billion.⁹⁰ Even more striking is the EIA's anticipated increase in daily oil demand to 118 billion barrels per day by 2030, a dramatic increase from 66.6 billion barrels per day in 1990.⁹¹ By prohibiting any mineral exploration until 2048, the Madrid Protocol is claiming to know the unknown, namely, that the energy market will not benefit from exploration in the Antarctic region.

V. OVERLAPPING CLAIMS: THE CASE OF THE ANTARCTIC PENINSULA

The Antarctic Peninsula dispute⁹² presents an appropriate case study for analyzing sovereignty issues in Antarctica for two reasons. First, territorial sovereignty claims are determined on a relative basis, where any claim derives its validity from comparisons to the strength of a competing claim or claims.⁹³ Although seven states have laid claim to some part of the continent, only the claims of the United Kingdom, Argentina, and Chile overlap.⁹⁴ Second, as described in Part II, the Antarctic Peninsula and adjacent waters are believed to contain significant oil deposits.⁹⁵ Sovereignty over the peninsula will not only provide the titled nation with exclusive rights to the two-hundred mile economic zone in the Weddell Sea, but it will also provide a strategic shipping advantage because of its relative proximity to the Americas.

A. *The United Kingdom Claim*

The first formal claim by the United Kingdom to Antarctic territory was made in 1908,⁹⁶ based on the theories of first discovery and peaceful, continuous display of sovereignty over the land.⁹⁷ Although speculation as to the existence of a massive southern continent dates back to the time of antiquity,⁹⁸ the existence of such a landmass was not confirmed until the voyage of British Captain James

89. U.S. Census Bureau, Total Midyear Population for the World 1950–2050, *available at* <http://www.census.gov/ipc/www/idb/worldpop.html> (last visited Mar. 24, 2008).

90. *Id.*

91. Energy Information Administration, World Oil Consumption by Region, Reference Case, 1990–2030, *available at* http://www.eia.doe.gov/oiaf/ieo/pdf/ieoreftab_4.pdf.

92. For the purposes of this paper, the territory will be referred to as the “Antarctic Peninsula,” although it is called “Graham Land” by Great Britain, “Tierra O’Higgins” by Chile, and “Tierra San Martin” by Argentina. Roucek, *supra* note 7, at 72.

93. AUBURN, *supra* note 9, at 5–6 (noting that “[p]rovided that another State cannot make out a superior claim, tribunals have often been satisfied with very little in the way of the actual exercise of sovereign rights Even if the claim is not good, it may be ‘better.’”).

94. Bilder, *supra* note 40, at 235.

95. The Weddell Sea, one of the seas mentioned, runs along the length of the eastern coast of the Peninsula. Antarctica: Fact Sheet, *supra* note 31.

96. Roucek, *supra* note 7, at 72. The British claim was further defined in 1917 as consisting of South Orkney, South Sandwich, and South Shetland islands; South Georgia; and the Antarctic Peninsula. QUIGG, *supra* note 22, at 110.

97. BECK, *supra* note 1, at 28–29.

98. According to Beck, “[t]he ancient Greeks believed in the necessity for a southern continent in order to counter-balance the Arctic.” *Id.* at 24.

Cook in 1772-1775, when he became the first person to circumnavigate the continent.⁹⁹ It is disputed as to whether Captain Cook ever saw the continental land mass, or whether he was prevented by (or confused by) the vast sea ice surrounding Antarctica.¹⁰⁰ Regardless of the extent of Cook's discovery, James Weddell, a British whaler, holds the claim for the first to venture into the sea that surrounds the Antarctic Peninsula.¹⁰¹ Furthermore, the United Kingdom also claims that the British explorer John Biscoe was the first to discover the Antarctic Peninsula in 1821.¹⁰²

Although the United Kingdom's activity for a majority of the next century was mainly limited to commercial whaling exploitation in the waters off the Antarctic Peninsula, its authority to regulate activity in the area has been long recognized by foreign and domestic actors. Since the early twentieth century, foreign national companies operating in the Antarctic, including Chilean and Argentinean whaling companies, have regularly paid the U.K. government for the right to use the harbor and shore facilities in the islands adjacent to the Antarctic Peninsula.¹⁰³ In fact, the United Kingdom delineated its territorial claim based on which adjacent seas were most profitable.¹⁰⁴

The United Kingdom has maintained a permanent scientific research presence on Antarctica since 1943.¹⁰⁵ The British Antarctic Survey ("BAS") was formed in 1962 and has been conducting research projects on the Antarctic Peninsula ever since.¹⁰⁶ The United Kingdom's logistical center for research in Antarctica, the Rothera Base, was established in 1975 to replace the exiting British Adelaide station,¹⁰⁷ currently conducts year-round activities involving biology, geoscience, glaciology, and atmospheric sciences.¹⁰⁸ Manned throughout the year, the

99. AUBURN, *supra* note 9, at 2.

100. BECK, *supra* note 1, at 24.

101. Encyclopedia Britannica - James Weddell, <http://britannica.com/eb/article-9076403/James-Weddell> (last visited Mar. 24, 2008). *But see* William H. Hobbes, *The Pack-Ice of the Weddell Sea*, 29 ANNALS ASS'N. AM. GEOGRAPHERS 159, 159-166 (1939) (challenging the validity of Weddell's claim in light of notations made on travel logs of impenetrable obstacle presented by pack-ice from numerous subsequent voyages, including powerful steam ships, from 1822-1915; including descriptions that stood in stark contrast to the "open water, both going and returning" and "no pack ice . . . only icebergs" described by Weddell's autobiographical account).

102. William S Bruce, *Antarctic Discovery at the British Association*, 40 GEOGRAPHICAL J. 541, 542 (1912) (noting that "Biscoe had discovered Graham Land, a long peninsula . . . extending far to the north of the Antarctic [C]ircle.").

103. QUIGG, *supra* note 23, at 120.

104. *Id.* at 110.

105. Foreign & Commonwealth Office, Focus International: Britain and Antarctica, Mar. 2000, available at http://www.fco.gov.uk/resources/en/pdf/pdf6/fco_pdf_britainantarctica [hereinafter Foreign & Commonwealth Office].

106. Charles Swithinbank, *The Antarctic Connection*, 149 GEOGRAPHICAL J. 8 (1983).

107. The Adelaide station was in operation from 1961-1977. British Antarctic Survey, Natural Environmental Research Council, Rothera Research Station, http://www.antarctica.ac.uk/living_and_working/research_stations/rothera/ (last visited Mar. 24, 2008).

108. *Id.*

maximum occupancy of the station is 130 people, but averages just occupants twenty in the winter.¹⁰⁹ Although Chile and Argentina maintain larger populations on the Peninsula, the United Kingdom's productivity in research is unmatched.¹¹⁰ From the earliest days of its permanent residence on the continent in 1947, the United Kingdom has made clear that its scientific research objective is secondary to maintaining a strategic occupation.¹¹¹ Currently, the BAS maintains that part of its presence is to serve as a proxy for the government beyond mere research activities and to "put into practice [g]overnment policies on topics such as commercial exploitation."¹¹²

In addition to scientific research, the United Kingdom has carried out a number of administrative activities on its claimed territory. Upon publicly claiming title to Antarctica in 1908, the governor of the Falkland Islands—at the time a British settlement—was appointed "to administer, on behalf of the Crown, undefined lands lying to the south."¹¹³ In 1917, the United Kingdom finally delimited the territory encompassed by its 1908 claim and drew boundaries to gain control of the best whaling areas in the Southern Ocean.¹¹⁴ No official protests were asserted until the early 1940s, when Chile and Argentina made their claims.¹¹⁵ This dispute became concrete in 1946 when the United Kingdom established a postal system, complete with commemorative stamps depicting their territory, including the Antarctic Peninsula.¹¹⁶ Currently the United Kingdom maintains a functioning legal system in the territory, including magistrates and a court of appeals.¹¹⁷ In 1994, the British Parliament passed the Antarctic Act, establishing a permit system for all British expeditions to Antarctica and regulating entry into protected areas.¹¹⁸

B. The Chilean Claim

Chile contends that it possesses the oldest sovereignty rights towards its claimed territory in Antarctica.¹¹⁹ Chile bases its claim on four main theories of sovereignty: historic right, first discovery, effective occupation, and continuity

109. *Id.*

110. In 1982, Argentina's summer population of 254 produced eighteen total publications, while Chile's 201 produced only two. Meanwhile, in the same year, the U.K.'s ninety scientists amassed 181 total publications. Swithinbank, *supra* note 107, at 8.

111. BECK, *supra* note 1, at 32-33.

112. British Antarctic Survey, National Environment Research Council, Global Science in the Antarctic Context: British Antarctic Survey Strategy to 2012 12 (2005), available at http://www.antarctica.ac.uk/about_bas/publications/jo_strategy.pdf.

113. QUIGG, *supra* note 23, at 110.

114. *Id.*

115. *Id.*

116. Task Force 68, The United States Navy Antarctic Developments Project 1946-1947, <http://www.south-pole.com/p0000150.htm> (last visited Mar. 24, 2008).

117. Commonwealth Secretariat, United Kingdom – British Antarctic Territory, http://www.thecommonwealth.org/YearbookInternal/140416/140419/british_antarctic_territory/ (last visited Mar. 24, 2008).

118. Foreign & Commonwealth Office, *supra* note 106.

119. BECK, *supra* note 1, at 121.

(sector theory); and secondary scientific theories.¹²⁰ The first public claim of sovereignty by Chile was made through a presidential decree in 1940 claiming “the Chilean Antarctic . . . to be all lands, islands, islets, reefs, glaciers (pack-ice), already known or to be discovered, and their respective territorial waters. . . [between longitudes] 53° and 90° west.”¹²¹ The United Kingdom immediately rejected Chile’s claim and Argentina voiced its reservations.¹²² The following year, after consultation with Argentina, Chile agreed that only it and Argentina had exclusive rights over the “South American Antarctic.”¹²³ The Antarctic partnership that formed between Chile and Argentina produced a number of jointly issued statements and bilateral agreements between the nations. In the two decades preceding the signing of the Antarctic Treaty, these statements and agreements generally recognized the validity of each other’s claims as well as the exclusivity of their combined title.¹²⁴

Although Chile first publicly defined its territory in 1940, it asserts that title has existed since its independence from Spain. The claim of historic right or “ancient right” originates from a fifteenth-century Papal decree issued by Pope Alexander VI awarding the “New World” to Spain.¹²⁵ Subsequently, in 1539, the Spanish throne granted official authority over the continent to Chile by anointing a Chilean as governor of the continent. This grant of authority was reinforced through a number of official statements by the throne in recognition of this power.¹²⁶ Chile’s leaders thus concluded that under the doctrine of *uti possidetis juris* (retain possession by right), the territory was inherited by Chile at the time of its independence from Spain in 1810.¹²⁷

120. In 1947 Chilean Foreign Minister Gomez stated to the Chilean Senate that “[t]he boundaries of Chile in said polar region . . . constitute a natural prolongation of the national soil . . . (and are based on) historical data (e.g. Acts and discoveries by Spain)[;]... geographical continuity of the Chilean Antarctic as regards the southern end of the American Continent[;]... geographic contiguity (e.g., geological links)[;]... scientific factors (e.g., climatic and glaciological influences)[;]... sector theory[;]... different manifestations of sovereignty represented by the acts of occupation realized throughout our history[;]... diplomatic facts[;]... [and] administrative antecedent.” *Id.*

121. Robert D. Hayton, *The “American” Antarctic*, 50 AM. J. INT’L L. 583, 586 (1956) (quoting President Aguirre Cerda’s Decree No. 1747, Boletín Oficial, Nov. 6, 1940).

122. *Id.*

123. *Id.*

124. *Id.* at 581.

125. QUIGG, *supra* note 23, at 113.

126. CHILD, *supra* note 15, at 108.

127. QUIGG, *supra* note 23, at 114.

Independent of its claims to inheritance, Chile has also claimed that its discovery and exploration of the Antarctic Peninsula date back the sixteenth century, over a hundred fifty years before Cook's British expedition.¹²⁸ Furthermore, Chile asserted that one of its ships, the *Dragon*, was the first to make landfall on the continent, specifically the Antarctic Peninsula, in 1820.¹²⁹ There is evidence of Chile's sovereignty dating back to an 1833 assertion in the form of a letter from Bernard O'Higgins, a founder of the Chilean state, to Captain Coghlan, a British officer, asserting Chilean possession of the Antarctic Peninsula and surrounding islands.¹³⁰

In support of its position that it has effectively occupied the Antarctic Peninsula, Chile has maintained a consistent administrative presence there, beginning with a 1906 grant of authorization to certain Chilean nationals to establish a commercial whaling company, and continuing until modern times.¹³¹ Beyond commercial authorization additional evidence of a Chilean administrative presence in Antarctica is scarce in the decades leading up to World War II.¹³² However, after making its claim public, Chile modified existing treaties to account for their claim in the Antarctic territory and established a research program on the continent.¹³³ In 1947, Chile established a permanent research base on the Peninsula, and more bases have followed.¹³⁴ Chile also initiated a tradition of regular official governmental visits, which continues today and started with President Gabriel Gonzaliz Videla's visit to the Peninsula in 1948 to reassert Chile's right to the territory.¹³⁵ In the following decade, the Chilean legislature incorporated Chile's Antarctic territories into the administration of its governmental affairs.¹³⁶

Chile also grounds its title claim on less traditional bases, such as theories of contiguity, geological affinity, and sector. The contiguity claim is based on the idea that the Antarctic Peninsula is an extension of the Chilean land mass, albeit with hundreds, (and in places thousands), of miles of sea in between.¹³⁷ Under the geological affinity argument, "since structurally the Antarctic Peninsula . . . [is] a

128. CHILD, *supra* note 15, at 108-109.

129. *Id.* at 109.

130. Adrian Howkins, *Icy Relations: The Emergence of South American Antarctica during the Second World War*, 42 POLAR RECORD 153, 160 (2006).

131. CHILD, *supra* note 15, at 109.

132. Chile did not establish a permanent base until 1947. QUIGG, *supra* note 22, at 118; *see also* CHILD, *supra* note 15, at 111 (listing Chile's pre-WWII activities of the grants of fishing concessions off the Peninsula, an aborted expedition to the continent and the 1916 rescue of Shackleton's ship).

133. CHILD, *supra* note 15, at 109. Chile came to aid of esteemed British Captain Shackleton during his 1914-1916 voyage, rescuing them from Elephant Island (now named "Piloto Pardo," in honor of the Chilean captain who commanded the rescue vessel).

134. QUIGG, *supra* note 23, at 115; CHILD, *supra* note 15, at 112 (describing how Antarctic research was brought under the control of the National Institute of Chilean Antarctic, an organ of Chile's Ministry of Foreign Affairs, in 1963).

135. QUIGG, *supra* note 23, at 115.

136. *Id.* at 117.

137. *Id.* at 115.

continuation of the Andes, these regions are natural extensions of Chile.”¹³⁸ Finally, under the sector theory, Chile’s portion of Antarctica is delineated by drawing a meridian line from the eastern and western extremities of the country to the South Pole.¹³⁹

C. The Argentine Claim

Although the factual bases vary, in many respects the Argentine claim parallels that of Chile. Like Chile, Argentina bases its claim on theories of historic rights, effective occupation, continuity, and geological affinity. Further, Argentina, like Chile, was by World War II prompted into publicly claiming its sovereignty.¹⁴⁰ However, there is evidence that the Argentine government made statements to the Universal Postal Union, an international organization,¹⁴¹ as early as 1927 proclaiming territorial jurisdiction over “[p]olar lands not yet delimited.”¹⁴² In 1942, an Argentine expedition delimited its territory as all of the land within “25° and 68° 34’ West longitude South of 60° south.”¹⁴³ To mark the occasion, Argentine officials promptly conducted a formal ceremony on the Antarctic Peninsula to acknowledge the taking of possession.¹⁴⁴ While no formal recognition of the claim was made by the Chilean government, the ceremony was, attended by Captain Cordovez, a member of the Chilean Antarctic Commission.¹⁴⁵ The Argentine government made its formal public proclamation regarding the specific bounds of its Antarctic claim 1946, when an official Argentine map incorporated the sector between 25° and 74° West longitude. The government maintains, however, that this area was already Argentina’s, and not made so by way of the official map depiction.¹⁴⁶

Like Chile, Argentina also lays claim to a historic right by way of its succession from Spain through their independence, with one notable exception: unlike Chile, Argentina does not claim a right in the Antarctic territories prior to its independence from Spain in 1810.¹⁴⁷

Argentina’s permanent research activities in the Antarctic date back to 1904, when it began to operate a meteorological station. Argentina commenced whaling

138. *Id.*

139. *Id.*

140. QUIGG, *supra* note 23, at 112.

141. Universal Postal Union, UPU at a Glance, http://www.upu.int/about_us/en/upu_at_a_glance.html (last visited Mar. 21, 2008) (“Established in 1874, the Universal Postal Union (UPU) with its Headquarters in Berne (Switzerland), is the primary forum for cooperation between postal-sector players and helps to ensure a truly universal network of up-to-date products and services.”).

142. Hayton, *supra* note 122, at 587.

143. *Id.* at 589.

144. *Id.*

145. Howkins, *supra* note 131, at 153.

146. Hayton, *supra* note 122, at 590.

147. QUIGG, *supra* note 23, at 114.

soon thereafter.¹⁴⁸ In the previous year, the Argentinean Navy successfully rescued a stranded Swedish expedition. Besides these activities, and public statements opposing British claims in lands north of the Peninsula, Argentina was largely devoid of sovereignty asserting activities in the area until the outbreak of the World War II.¹⁴⁹

Between 1941 and 1945, Argentina made a number of expeditions to the continent in order to bolster its claim, including the placement of a commemorative plaque in 1942.¹⁵⁰ The British ambassador responded by returning the plaque to the Argentinean government the following year.¹⁵¹ In 1947 and 1948, tensions increased between Chile, Argentina, and the United Kingdom as all three sent warships to claimed territory.¹⁵² In 1953, attempting to remove Argentinean and Chilean bases from British territory, the Royal Navy was dispatched to Deception Island.¹⁵³ Ultimately, the United Kingdom left the men to man the station, which is still active today.¹⁵⁴

Argentina has engaged in a number of legislative and administrative acts in its claimed territory. For example, Argentina claims the first post office and radio station in the territory, as well as a registry of marriages, deaths, and births.¹⁵⁵ In the 1950s, Argentina incorporated its Antarctic territory into its domestic government administration by placing it under the authority of provincial governors.¹⁵⁶ Although the 1955 legislative measure established a provincial capital in the area,¹⁵⁷ the real control rests with the Argentine Antarctic Institute, an arm of the Ministry of the Army.¹⁵⁸

Argentina was the first nation state to maintain the only relatively “normal human settlement” on the continent, Esperanza base, located at the tip of the Peninsula.¹⁵⁹ Founded in 1952 and in continuous operation ever since, the activities on the base were limited to scientific research until the mid-1970s, when the nature of the base became more residential. In 1976, the base established the first church in Antarctica and, two years later welcomed Emilio Marcos de Palma, the first human born in Antarctica.¹⁶⁰ Recognizing that Antarctic-born children could help secure territorial claims, the Argentine government promptly provided Emilio with a nursery, a kindergarten, and an elementary school at the base in 1978.¹⁶¹ The

148. Howkins, *supra* note 131, at 160.

149. *Id.* at 155.

150. CHILD, *supra* note 15, at 72.

151. Hayton, *supra* note 122, at 589.

152. CHILD, *supra* note 15, at 73.

153. QUIGG, *supra* note 23, at 121.

154. *Id.*

155. The post office and radio station were established in 1904 and 1927, respectively. CHILD, *supra* note 15, at 69.

156. QUIGG, *supra* note 23, at 117.

157. Hayton, *supra* note 122, at 590.

158. QUIGG, *supra* note 23, at 117.

159. *Id.* at 118.

160. *Id.* at 117.

161. Council of Managers of National Antarctic Programs, Stations and Bases, Argentina Esperanza, <http://pdf.comnap.aq/comnap/comnap.nsf/P/StationsByName/ARespe> (last visited

station is currently comprised of forty-three buildings, supported by an energy infrastructure, water and sewage treatment facilities, and a functional medical suite.¹⁶²

Argentina, like Chile, also bases its claim on the principle of contiguity.¹⁶³ Argentina further argues that the geological and geographical affinity with Antarctica gives it a superior claim over the United Kingdom.¹⁶⁴ Argentina employed this theory, as well as the doctrine of *uti possidetis juris*, as a basis for its sovereignty claim over the Falkland Islands, a series of small islands to the north of the Antarctic Peninsula.¹⁶⁵ The longstanding sovereignty dispute between Argentina and the United Kingdom over the Falkland Islands led to a war between the nations in 1982. The war cost Argentina nearly a thousand lives and the United Kingdom a quarter as many.¹⁶⁶ Argentina's application of this principle to the Antarctic territories serves as a sobering reminder of the consequences of allowing long-standing sovereignty disputes to go unsettled. This prospect is especially disquieting in light of the strong nationalistic attitudes and interrelatedness regarding both territories¹⁶⁷ and the potential for valuable resources surrounding the Peninsula.

VI. LIKELY OUTCOME OF AN INTERNATIONAL COURT OF JUSTICE DECISION

Although parties to a sovereignty dispute can submit claims to an *ad hoc* arbiter for adjudication, the only venue with sufficiently perceived credibility, expertise, and independence to handle such a case is the ICJ.¹⁶⁸ As set forth by the Statute of the ICJ, the ICJ is not bound by precedent.¹⁶⁹ Review decisions by the ICJ's predecessor, the Permanent Court of International Justice ("PCIJ"), and international arbitral decisions serve as persuasive authority. While not binding on the ICJ, review of the PCIJ and international arbitration decisions would aid in

Mar. 24, 2008).

162. *Id.*

163. Because of their respective geographical positions to Antarctica, the contiguity claim slightly favors Chile over Argentina. QUIGG, *supra* note 23, at 115.

164. QUIGG, *supra* note 23, at 117.

165. *Id.* at 121-123. The Falkland Islands lay north of Antarctica, outside of the area affected by the current overlapping claims. *Id.* at 121.

166. Roucek, *supra* note 7, at 75.

167. "[G]enerations of Argentines have been taught that not only the Malvinas, as they call the Falklands, but all the other islands to the south and east, plus the Antarctic Peninsula, are their sacred patrimony, failure to hold the Falklands may serve to redirect Argentine jingoism to Antarctica." QUIGG, *supra* note 23, at 121.

168. For a full discussion on the benefits of using international tribunals to resolve territorial disputes, and why states elect to use them, see Beth A. Simmons, *Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes*, 46 J. CONFLICT RESOL. 829 (2002). *But see* Ted L. McDorman, *Global Ocean Governance and International Adjudicative Dispute Resolution*, in INTERNATIONAL OCEAN LAW, MATERIALS AND COMMENTARIES 421 (2005).

169. Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, 3 Bevans 1153 [hereinafter ICJ Statute].

identifying the state of international law regarding sovereignty disputes. Even if the ICJ is not the appropriate venue to bring an action, any deliberating body and the contending parties would certainly draw from the same sources of international law. The four main settled international arbitrations dealing with sovereignty disputes are the *Island of Palmas Case*,¹⁷⁰ the *Clipperton Island Case*,¹⁷¹ the *Legal Status of Eastern Greenland*,¹⁷² and *The Minquiers and Ecrehos Case*.¹⁷³ These decisions will be used to evaluate the strength of the competing claims of sovereignty made by the United Kingdom, Chile, and Argentina to the Antarctica Peninsula.

A. Events Subject to Consideration

As a preliminary finding, the ICJ must determine a “critical date”¹⁷⁴ for considering evidence of sovereignty presented by the parties. Generally, the “critical date” is the point at which a formal challenge to sovereignty arose, not necessarily when the parties applied to the Court for arbitration.¹⁷⁵ Prior cases show, however, that the critical date is not absolute. In the *Minquiers and Ecrehos Case*, the ICJ found that acts between the critical date and the date the parties submitted for arbitration may be considered, unless they are undertaken merely to support sovereignty claims.¹⁷⁶ The nature of the activities which may be considered after the critical date are those that “developed gradually long before the dispute as to sovereignty arose, and it has since continued without interruption and in a similar manner.”¹⁷⁷ Likewise, in *The Island of Palmas Case*, the ICJ stated that “events subsequent to [the critical date] must in any case be ruled out” but may be helpful in evaluating the period “immediately preceding” the critical date.¹⁷⁸

The Antarctic Peninsula presents a unique challenge for fixing a critical date. Previous ICJ decisions involving a critical date were bilateral; the Antarctic Peninsula dispute is trilateral. There is a passage of time between Chile’s 1940 claim to land previously claimed by the United Kingdom and Argentina’s delineation of its own overlapping claim in 1942. Argentina had an existing presence on the territory during that span which continued in a similar manner

170. *Island of Palmas Case* (U.S. v. Neth.), 2 R.I.A.A. 831, 831 (1932), Hague Ct. Rep. 2d (Scott) 83 (Perm. Ct. Arb. 1928), *reprinted in* 22 AM. J. INT’L L. 867, 906-907 (1928).

171. *Clipperton Island* (Fr. v. Mex.) (1931), 2 R.I.A.A. 1105, 1105 (1932), *reprinted in* 26 AM. J. INT’L L. 390, 391 (1932).

172. *Legal Status of Eastern Greenland* (Den. v. Nor.) 1933 P.C.I.J. (ser. A/B) No. 53, at 20 (Apr. 5).

173. *The Minquiers and Ecrehos Case* (Fra. v. U.K.) 1953 I.C.J. 47, 59 (Nov. 17).

174. *Id.*

175. In *The Minquiers and Ecrehos Case*, the ICJ found France’s public claim to the islets in 1886 and 1888 constituted a challenge to the United Kingdom’s existing local administration on the islets. *Id.* at 59-60. In the *Island of Palmas Case*, the arbitral tribunal found that a public claim made by a provincial Governor of the Netherlands upon visiting the islands indicate a dispute. *Island of Palmas*, 2 R.I.A.A. at 836, *reprinted in* 22 AM. J. INT’L L. at 872-873.

176. *Minquiers and Ecrehos*, 1953 I.C.J. at 59-60.

177. *Id.*

178. *Island of Palmas*, 2 R.I.A.A. at 866, *reprinted in* 22 AM. J. INT’L L. at 906-907.

between 1940 and 1942. In light of its 1927 statement to the UPC, it is likely that the Court would consider 1942 as the critical date for the parties involved.

Article IV of the Antarctic Treaty presents another unique challenge to determining what events can be considered in resolving the Antarctic Peninsula dispute. In *Minquiers and Palmas*, the Court relied upon bilateral agreements made by the parties pursuant to litigation to set a date at which no subsequent events could be independently used in support of a claim.¹⁷⁹ Paragraphs 1 and 2 of Article IV could be interpreted to constitute an agreement between the parties that subsequent actions taken while the treaty was in effect would not be considered by the ICJ. If so, this would bar the ICJ from considering the long history of symbolic acts and grandstanding since the Antarctic Treaty entered into force in 1961.

The PCIJ had occasion to consider a similar agreement between Norway and Denmark in the *Legal Status of Eastern Greenland Case*.¹⁸⁰ During the Convention of July 10, 1924, Norway and Denmark expressly set aside the issue of sovereignty in disputed Eastern Greenland in order to create a workable commercial regime encompassing the disputed territory.¹⁸¹ The parties exchanged signed notes

“to the effect that they signed the Convention in order to avoid disputes and to strengthen friendly relations between the two Powers, and that it reserved its opinion on questions concerning Greenland not dealt with in the Convention, so that by the Convention nothing was prejudged, abandoned or lost related to sovereignty claims.”¹⁸²

Accordingly, the PCIJ found that neither party could “derive support from the Convention” for their claims.¹⁸³

The mutual agreement between Denmark and Norway in *Legal Status of Eastern Greenland* was only as broad as Paragraph 1 in Article IV of the Antarctic Treaty. The mutual agreement between Denmark and Norway expressly rejected any notion that the mere act of entering into an agreement with other parties would renounce, abandon, or prejudice any existing sovereignty claims. In contrast to the agreement underlying *Legal Status of Eastern Greenland*, Paragraph 2 of Article IV of the Antarctic Treaty addresses the significance of future acts of the contracting states by freezing the validity of claims at 1961. The Paragraph 2 language unequivocally denies parties the ability to use “acts or activities taking place while the present Treaty is in force [to] constitute a basis for asserting,

179. The Special Agreement of 1950 granting the court jurisdiction to decide “present” sovereignty was interpreted to mean the ICJ could consider actions until 1950. *Minquiers and Ecrehos*, 1953 I.C.J. at 59-60. Likewise, in *Palmas*, the arbitral tribunal relied, in part, on the parties’ 1915 agreement accepting its jurisdiction that events after 1906 should not be considered. *Island of Palmas*, 2 R.I.A.A. at 866, reprinted in 22 AM. J. INT’L L. at 906-07.

180. *Legal Status of Eastern Greenland*, 1933 P.C.I.J. at 20.

181. *Id.*

182. *Id.* at 21.

183. *Id.* at 56.

supporting or denying a claim to territorial sovereignty in Antarctica.”¹⁸⁴ Although the reach of Paragraph 2’s limitation is unprecedented, it is unlikely that the ICJ would refuse to enforce it in light of its reluctance to interfere with prior treaties delimiting sovereignty.¹⁸⁵ Thus, the ICJ would likely consider events by the claimants occurring prior to 1942, with 1940 being the earliest possible date for such consideration. Subsequent activity that “developed gradually long before the dispute as to sovereignty arose, and . . . [that has] continued without interruption and in a similar manner”¹⁸⁶ until the Antarctic Treaty entered into force in 1961 would then be considered. Any activities subsequent to 1961 could only be viewed for the limited purpose of shedding light on the status of the legal claims before 1961.

B. Ancient Title

Both Argentina and Chile ground their claims to title upon a historic right passed on from Spain under the *uti possidetis juris* doctrine. To determine the validity of their claims it is essential to first determine whether Spain had valid title, as Spain could technically only transfer the rights that it possessed at the time.¹⁸⁷ Spain’s claim to title is based on a fifteenth century Papal decree granting the it “New World.” This carries little weight, however, because Pope Alexander VI, like Spain, could not transfer a right he did not possess. As the Pope had no right to transfer, Spain had no right to transfer. Therefore, Spain’s subsequent acts recognizing the Chilean provincial governor’s authority and administration are hollow proclamations. Assuming, *arguendo*, that a valid historic right could be found, a present claim would fail because of the absence of a manifestation of Spain’s sovereignty over Antarctica, or alternatively, the failure of Chile or Argentina to timely perfect a title post-independence.¹⁸⁸

An analogous case is *Clipperton Island*, which considered the validity of the same Papal decree passing down Clipperton Island to Mexico by way of succession from Spain. Italian Emperor Victor Emmanuel III, acting as arbitrator and giving Mexico the benefit of the doubt, found that even if Mexico had a historic right to Clipperton Island based on the Papal decree, it lost such a right when it failed to publicly dispute France’s 1858 proclamation of sovereignty over the island until 1897.¹⁸⁹ Mexico claimed that because its historic right predated the French proclamation, France’s occupation of the island was illegal.¹⁹⁰ The Emperor rejected this assertion by finding that “the mere conviction that this was territory belonging to Mexico, although general and long standing, cannot be

184. Antarctic Treaty art. IV, ¶ 2, *supra* note 8, 12 U.S.T. at 794, 402 U.N.T.S. at 71.

185. *See, e.g.*, Case Concerning the Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.; Nicar. intervening), 1992 I.C.J. 351, 401 (Sept. 11) (refusing to question a prior boundary fixed by El Salvador and Honduras through the General Treaty of Peace of 1980).

186. *Minquiers and Ecrehos*, 1953 I.C.J. at 59-60.

187. *Island of Palmas*, 2 R.I.A.A. at 842, *reprinted in* 22 AM. J. INT’L L. at 879 (stating that incidentally, “[i]t is evident that Spain could not transfer more rights than she herself possessed.).

188. *Id.* at 884.

189. *Clipperton Island*, 26 AM. J. INT’L L. at 391.

190. *Id.* at 392.

maintained” independent of other acts of sovereignty.¹⁹¹ Based on this reasoning, the Chilean and Argentinean claims that either country held title to the Antarctic Peninsula by way of succession from Spain, without more, is unpersuasive. Evidence of Chilean and Argentinean activities in the area between the time of independence and the critical date of 1942 are predominantly commercial in nature, limited to exploitation of marine resources, and show “little regard for the establishment, perfection or maintenance of titles.”¹⁹²

Interestingly, though the Court is not likely to base a sovereignty decision on the theory of historical right, these claims have the potential to undermine a British claim that the land was *terra nullius* (“land belonging to no one”) upon their first discovery. In *Minquers and Ecrehos*, the ICJ relied on effective occupation to determine sovereignty. It stated, however, that because both parties based their claim on “ancient or original title[,] . . . [t]he present case does not therefore present the characteristics of a dispute concerning the acquisition of sovereignty over *terra nullius*.”¹⁹³ The United Kingdom could distinguish the present dispute from *Minquers and Ecrehos*, where the basis of historic right emanating from a single source was uncontested. By contrast, the United Kingdom would be unwilling in this case to concede the existence of a historic right in the Antarctic Peninsula dispute.

C. First Discovery

Both Chile and the United Kingdom proffer first discovery as a basis for their title to the Antarctic Peninsula. Relying on first discovery alone is not likely to “seal the deal” for either state because international law has consistently emphasized that discovery alone only grants inchoate title requiring perfection in a reasonable period of time.¹⁹⁴ Here, even if each first discovery claim could stand on its own merits, there is no evidence of perfection within a reasonable time by either party. Chile dates its claim of first discovery to the early sixteenth century, but it did not establish a permanent settlement sufficient to qualify as “effective occupation” until more than four centuries later, in 1947. Likewise, the span of time between the United Kingdom’s alleged first landfall in 1820 and its permanent settlement in 1943, although shorter than Chile’s claim, extends beyond what could be considered reasonable.

The legal groundwork for a claimant to prove title through first discovery was established in the *Clipperton Island* decision where the court held that discovery alone is not enough to perfect title; rather, discovery plus an overnight stay are required.¹⁹⁵ However, reliance on *Clipperton Island* is likely misplaced. First, there was undisputed evidence of an actual discovery of Clipperton Island.¹⁹⁶ Evidence

191. *Id.* at 393.

192. Hayton, *supra* note 122, at 603.

193. *Minquiers and Ecrehos*, 1953 I.C.J. at 53.

194. *Island of Palmas*, 2 R.I.A.A. at 845, *reprinted in* 22 AM. J. INT’L L. at 884.

195. *Clipperton Island*, 26 AM. J. INT’L L. at 393-394.

196. *Id.* at 391.

of the actual discovery of the Antarctic Peninsula is currently subject to much debate, and cannot be fixed to a specific date or event. Second, in *Clipperton Island*, only twenty-nine years passed from the first discovery until the discovering country returned.¹⁹⁷ Here, all of the states claiming first discovery of the Antarctic Peninsula must concede a century or longer dormancy. Third, the discovering state in *Clipperton Island* immediately defended her title upon foreign occupation through words and action.¹⁹⁸ By contrast, all of the parties disputing the Antarctic Peninsula were long aware of each other's presence on and around the territory but did not protest through anything more than words until the 1940s. The United Kingdom did not protest the Chilean or Argentinean settlements of the early twentieth century until the late 1940s. The Chilean letter asserting title, sent to the British Captain Coghlan a century earlier, should be afforded little weight in light of the absence of additional measures taken to support its claim. Finally, the area disputed in the case is minuscule compared with the claims over the Antarctic Peninsula, and something more than snowshoe lattice-prints should be required.

D. Contiguity & Geographical Proximity

The theories of contiguity and geographic proximity were decided through both positive and natural law by the arbitral tribunal in the *Island of Palmas* decision. The Court noted the absence of any rule of positive law in support of extending the theory of geographic proximity beyond islands situated inside territorial waters.¹⁹⁹ The Court found that such a principle would dispense with the fundamental tenet of sovereignty: the relationship between the right to exclude and the obligation to display authority of a state.²⁰⁰ Moreover, the theory of geographic proximity was found to be "wholly lacking in precision and would in its application lead to arbitrary results."²⁰¹ Similar to the troublesome application of the contiguity theory to the disputed archipelago in *Island of Palmas*, its application to Antarctica is especially unwieldy because the continent is "not relatively close to one single continent, but forms . . . a large [land mass] in which strict delimitation between the different parts [is] not naturally obvious."²⁰² Thus, absent an agreement between the parties, it is unlikely that the Court would award the territory to either Chile or Argentina based on their geological affinity with the Antarctic Peninsula.

197. *Id.*

198. *Id.* at 392.

199. *Island of Palmas*, 2 R.I.A.A. at 845-46, reprinted in 22 AM. J. INT'L L. at 893.

200. *Id.*

201. *Id.*

202. *Id.* at 894.

E. Effective Occupation

The “effective occupation” standard remains the dominant analysis in determining territorial disputes under international law.²⁰³ In the case of Antarctica, an issue as to the extent of the predicate effective occupation arose. In the *Legal Status of Eastern Greenland Case*, the Court noted a relaxed requirement of “actual exercise. . . in thinly populated or unsettled”²⁰⁴ areas of “inaccessible character.”²⁰⁵ Likewise, the *Clipperton Island* decision suggests that a lessened standard of “effective occupation” should be applied to territory that was previously “completely uninhabited.”²⁰⁶ Thus, given the difficulties in accessibility in the years leading up to 1961, as well as the scarcely populated nature of the continent, a lesser showing of actions constituting occupation will likely be required in the case of Antarctica. Not all acts, however, constitute a showing of sovereignty. The Court in the *Legal Status of Eastern Greenland Case* provides some guidance for evaluating whether acts manifest effective occupation, focusing on “the intention and will to act as sovereign, and some actual exercise or display of such authority.”²⁰⁷ Traditionally, the ICJ and its predecessors look for this predicate “intention” and “actual exercise” through evaluation of legislative and administrative authority over the territory, incorporation of the territory into the existing political system, extent of state activity in the territory, defense of title, and recognition of valid title by foreign states.

1. Legislative and Administrative Authority

In *Legal Status of Eastern Greenland*, the Court found that the manifestation of authority through administrative and legislative acts “is one of the most obvious forms of the exercise of sovereign power” over area covered by such regulation.²⁰⁸ The extent of the area covered by these legislative acts is important because the effect of legislation on sovereignty is limited to the scope of the legislation.²⁰⁹ Under *Legal Status of Eastern Greenland*, if legislation were restricted to the regulation of colonies, then its persuasive effect in a dispute over sovereignty would be greatly limited. Prior to 1961, all three claimants engaged in some level of legislative and administrative authority over the claimed territory. The United Kingdom and Argentina laid nearly identical legislative footprints in the territory, while Chile demonstrated less. Additionally, both the United Kingdom and Argentina granted commercial fishing licenses to nationals prior to 1942.

203. QUIGG, *supra* note 23, at 117-118.

204. *Legal Status of Eastern Greenland*, 1933 P.C.I.J. at 28.

205. In the *Legal Status of Eastern Greenland* case, a substantial area of the uninhabited territory was covered in ice. *Id.* at 32.

206. *Clipperton Island*, 26 AM. J. INT’L L. at 393-394.

207. *Legal Status of Eastern Greenland*, 1933 P.C.I.J. at 27-28.

208. *Id.* at 30.

209. *Id.* at 47-48.

2. Incorporation into Domestic Administration

Official intragovernmental recognition of an “administrative or judicial district” in the disputed area is also a manifestation of sovereignty.²¹⁰ In the case of the Antarctic Peninsula, each claimant’s government has recognized provincial districts. In 1908, the United Kingdom granted representatives on the Falkland Island Dependencies administrative authority over a broadly defined territory stretching southward, which was to be refined nine years later.²¹¹ Likewise, Argentina and Chile followed their claims of the 1940s with legislation in the following decade that delimited the administrative provinces of the claimed territory.²¹² The important difference between these claims is one of timing. The United Kingdom had incorporated its Antarctic territories into its domestic authority prior to the critical date in 1942, while Chile and Argentina did not do so until the mid-1950s. Therefore, unless Chile and Argentina can demonstrate a recognized incorporation of the Antarctic territories prior to this time, they must concede this argument to the United Kingdom. The amount of support this lends to the United Kingdom’s overall claim will be dictated by the extent of actual authority, keeping in mind the diminished standard of “effective occupation” set forth in *Legal Status of Eastern Greenland*.

3. Extent of State Activity

The extent of a national government’s presence is also important to the validity of a claim. The arbitral tribunal in *Island of Palmas* broadly defined “government activities” by finding that actions of nationals engaged in commercial activity could carry the same legal effect as acts of the state.²¹³ The tribunal found that when a private party engaged in a commercial pursuit is given “public powers for the acquisition and administration of colonies,” the party’s actions are assimilated into the actions of the state.²¹⁴ From the early nineteenth century until a moratorium in 1986,²¹⁵ the United Kingdom, Chile and Argentina have all engaged in commercial whaling of the seas adjacent to the Antarctic Peninsula.²¹⁶ The United Kingdom, however, was the only party to combine commercial pursuits with colonial ambition. In 1908, the United Kingdom became the first country to claim title by delimiting the territory in which its commissioned vessels had been operating.²¹⁷ Therefore, although all of the parties have engaged in nationally-

210. See, e.g., *Island of Palmas*, 2 R.I.A.A. at 851, reprinted in 22 AM. J. INT’L L. at 889.

211. QUIGG, *supra* note 23, at 110. The British claim was further defined in 1917 as consisting of “the South Orkney, South Sandwich, and South Shetland islands; South Georgia; and the Antarctic Peninsula.” *Id.*

212. *Id.* at 117.

213. *Island of Palmas*, 22 AM. J. INT’L L. at 897.

214. *Id.*

215. The International Whaling Commission (IWC) regulates commercial whaling for member states. The IWC, of which Argentina, Chile and the United Kingdom are members, has maintained a universal ban on commercial whaling since 1986. International Whaling Commission, IWC Information, <http://www.iwcoffice.org/commission/iwcmain.htm> (last visited Nov. 1, 2008).

216. Roucek, *supra* note 7, at 72.

217. QUIGG, *supra* note 23 at 110.

granted commercial activities, the United Kingdom has the strongest claim since it took this commercial activity further by assimilating commercial and colonial actions while Chile and Argentina appeared to keep both pursuits separate.

All three claimants also maintain a permanent state presence through their ongoing scientific research programs. Argentina is the only claimant to have maintained a permanent research base prior to the critical date of 1942.²¹⁸ Both the United Kingdom and Chile established their first permanent bases later in the 1940s.²¹⁹ Placing too much weight on the significance of the “permanence” of a research station is improper for two reasons. First, the *Clipperton Island* decision demonstrates that the character of the territory is important in evaluating the extent of activity required.²²⁰ Therefore, due to the remoteness and the harsh conditions presented by the Antarctic, the establishment, or lack thereof, of a permanent base should not be dispositive. Second, given the size of Argentina’s claim, many question whether the “maintenance of such a small station on an island off the tip of the Peninsula” should be the basis for claiming vast expanses of the continent.²²¹

The more reasonable approach for weighing the level of state action derived from scientific research is to look at such activity not through narrow “permanent” versus “non-permanent” distinction, but generally through Antarctic research and exploration. Prior to the critical date of 1942, all three parties contend that they engaged in some level of scientific research and exploration, as each made a number of expeditions to survey the land and conduct astronomical research. Therefore, under the *Minquers and Ecrehos* standard, the court can consider such activities subsequent to the critical date that “developed gradually long before the dispute as to sovereignty arose, and [which have] since continued without interruption in a similar manner.”²²² Further, it would be reasonable to consider scientific activities continuing until 1961. The implication derived from the *Minquers and Ecrehos* standard is to allow for the consideration of genuine activities, while dispensing with activities that possess only a symbolic meaning. Thus, it would also be beneficial for the Court to look at activities occurring after 1961 for the limited purpose of evaluating the genuineness of research activities carried out before 1961. In the case of the Peninsula, the genuineness of the Chilean and Argentinean research programs is susceptible to a large share of speculation. In 1982, Argentina’s summer research population of 254 produced eighteen total publications; Chile’s population of 201 produced only two.²²³ Meanwhile, in the same year, the U.K.’s ninety scientists amassed 181 total

218. Howkins, *supra* note 131, at 155-156.

219. Foreign & Commonwealth Office, Focus International: Britain and Antarctica, Mar. 2000, available at <http://www.fco.gov.uk/Files/kfile/antarctica,0.pdf> (Britain); QUIGG, *supra* note 22, at 115.

220. *Clipperton Island*, 26 AM. J. INT’L L. at 394.

221. CHILD, *supra* note 15, at 71.

222. *Minquiers and Ecrehos*, 1953 I.C.J. at 59-60.

223. Swithinbank, *supra* note 107, at 8.

publications.²²⁴ This staggering difference casts an ominous shadow over the pre-1961 research activities carried out by Chile and Argentina and strongly bolsters the United Kingdom's claim.

4. Defense of Title

In international law, the right of a state to defend against challenges to sovereignty is fundamental.²²⁵ In the case of territorial sovereignty disputes, the timely exercise of that right is usually required to maintain valid title. In the *Clipperton Island Case*, Emperor Emmanuel III, ruling for France, took special note to contrast the thirty-nine years it took Spain to protest France's claim to sovereignty against the month that it took France to protest the Spanish incursion.²²⁶ Likewise, in ruling for the United Kingdom in *Minquiers and Ecrehos*, the Court cited the ten-year lapse between France's protest of British sovereignty over the Ecrehos and sovereignty over this same land.²²⁷

All three claimants have a history of presence on the Antarctic Peninsula and the surrounding areas. Furthermore, both Argentina and Chile claim that they have retained valid title since at least 1810.²²⁸ Neither, however, put forth a public claim until the 1940s. Argentina has the longest history of year-round exploration in the area, beginning in 1904.²²⁹ For all of the benefit Argentina may derive from being the first claimant to permanently occupy the disputed territory, its failure to protest the United Kingdom's 1908 claim for nearly forty years demonstrates a lack of the "will and intention" to act as a sovereign as required by *Legal Status of Eastern Greenland*.²³⁰ Argentina, of course, could argue that the existence of their colony in 1904 increased the level of occupation required by the United Kingdom at the time of its 1908 claim, since the land was no longer uninhabited. The problem is that Argentina's acquiescence to the United Kingdom's public claim serves only to magnify the latter's "will and intention" to act as a sovereign, and highlights Argentina's lack of the same. Likewise, Chile's decision to begin granting commercial whaling licenses to its nationals in 1906 was a display of sovereignty, however it too failed to protest the United Kingdom's claim made just two years later. The contrast of the United Kingdom's reaction against Chile and Argentina is

224. *Id.*

225. *See, e.g.,* Island of Palmas, 22 AM. J. INT'L L. at 893.

226. Clipperton Island, 26 AM. J. INT'L L. at 393. The Emperor noted that within a month of learning of Mexico's act of planting the Mexican flag on the island, the French "reminded [Mexico] of its rights over Clipperton." 26 AM. J. INT'L L. at 392.

227. In 1876, the French government protested against the British Treasury Warrant of 1875 and the United Kingdom's sovereignty claim in general, but did not advance its own claim until 1886. *Minquiers and Ecrehos*, 1953 I.C.J. at 322.

228. QUIGG, *supra* note 23, at 114.

229. Howkins, *supra* note 131, at 155.

230. *Legal Status of Eastern Greenland*, 1933 P.C.I.J. at 27-28.

stark; the United Kingdom immediately protested both the Chilean and Argentinean claims at the time they were made, or shortly thereafter.²³¹

5. Foreign Recognition

Recognition by other states and their nationals is also perceived as a strong indication of sovereignty. In the *Island of Palmas* case, evidence of taxation of the native inhabitants was indicative of the Dutch exercise of authority over the territory.²³² In the case of the Antarctic Peninsula, the fact that Chile and Argentina paid British nationals for the use of the harbor and shore facilities around the time of the British claim is certainly a strong indication that the nationals of Chile and Argentina acknowledged the United Kingdom's authority in the area prior to either state putting forth a claim.²³³ Argentina has the relative upper hand over Chile because of Chile's participation in the ceremonies commemorating the recognition of the Argentine Antarctica.²³⁴

The Chilean and Argentine strategy of dual recognition since the 1940s actually serves to undermine the validity of their respective claims against the British claim. Their position has the effect of creating a perception that neither claim is strong enough to stand on its own and that neither state is serious about defending its title from all claimants. These sentiments are magnified in light of the refusal on the part of those states to submit the issue to arbitration in the 1950s.²³⁵

F. Likely Outcome

After evaluating each claim under prior international tribunal decisions, the United Kingdom has the strongest case to title over the Peninsula. Britain's pre-1961 activities in the territory claimed, especially when viewed in light of its continued occupation, demonstrate the most persuasive predicate of "effective occupation" of all three claimants. Furthermore, the United Kingdom has consistently defended this title both through unequivocal official statements as well as through prompt military action. By contrast, decades passed before either Chile or Argentina protested British claims. Thus, the United Kingdom has demonstrated both the intentional and actual actions required to establish sovereignty in the Antarctic Peninsula.

VII. CONCLUSION

Now is the time for peaceful resolution of territorial claims in Antarctica. If the parties to the Antarctic Treaty System are truly committed to preserving

231. Hayton, *supra* note 122, at 589, 586.

232. *Island of Palmas*, 22 AM. J. INT'L L. at 906.

233. QUIGG, *supra* note 23, at 120.

234. Howkins, *supra* note 131, at 153.

235. After first agreeing to ICJ jurisdiction to resolve the sovereignty dispute, both Argentina and Chile backed out before pleadings began. *Antarctica Cases (U.K. v. Arg., Chile)* 1956 I.C.J. 4. (Mar. 15th).

Antarctica as the only continent never to have known war, they must look realistically at the need for oil exploration in the Antarctic and the limitations on the creation of a viable regime imposed by the existing ATS. The Anglo-Argentine conflict in the Falkland Islands shows what can happen when there is a failure to resolve a longstanding territorial dispute and the dispute boils over into war. This is especially daunting in light of the potential for vast economic riches in the southern continent.

What I have set out is a framework for resolution of the overlapping territorial claims in the Antarctica Peninsula by the International Court of Justice. The United Kingdom has the strongest case for title to Antarctica. The United Kingdom's pre-1961 activities in the claimed territory demonstrate the most persuasive predicate of "effective occupation" of all three claimants. Furthermore, the United Kingdom has consistently defended this title both through unequivocal official statements as well as through prompt military action. The United Kingdom has time and again demonstrated both the intentional and actual exercise required to establish sovereignty in the Antarctic Peninsula.

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