COMMENTS

SOVEREIGNTY IN ANTARCTICA: THE ANGLO-ARGENTINE DISPUTE

I. INTRODUCTION

Since 1925, Argentina and Great Britain have been engaged in a significant diplomatic dispute over sovereign rights on the Antarctic continent.[1] During the last fifteen years, the provisions of the Antarctic Treaty[2] have resulted in a relaxation of tensions between the two countries, but the truce is an uneasy one. Most legal writers on the subject of sovereignty in Antarctica have generally regarded Argentina's claim to disputed Antarctic territory as distinctly inferior to that of Great Britain.[3] Yet a thorough examination of sovereignty in the Antarctic context indicates that resolution of the conflict between the two nations will be a close question.

The dispute between Argentina and Great Britain has its origin in a confusing web of conflicting theories concerning the acquisition of territorial sovereignty. Twentieth century discussions by eminent legal writers are replete with abundant references to such terms as *occupatio, terra nullius, animus occupandi, corpus possessionis,* effective occupation, annexation, sectors, contiguity, continuity, peaceful and continuous display of authority, and discovery. From the midst of these theories arises the present legal confusion over the various national claims to the Antarctic continent.[4] It is no surprise that there has been very little agreement among the claimant states and their proponents over the ultimate disposition of Antarctic claims.

The various theories of territorial sovereignty do not exist solely in an academic vacuum, however. The issue of territorial sover-

1. Memorial of the United Kingdom, Antarctica Cases, I.C.J. Pleadings 8, 26 (1955) [hereinafter cited as Memorial of the United Kingdom].

2. Antarctic Treaty, *done* December 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (effective June 23, 1961). Several countries have made claims to various portions of the Antarctic continent. The Antarctic Treaty operates to place these claims in a suspended state. Those nations with sovereign designs upon the continent have not waived their claims by becoming parties to the Treaty; however, the Treaty prohibits expansion of those claims or the assertion of new ones. This article will focus upon the British and Argentine claims to a particular section of the Antarctic continent. Claims advanced by other nations to the remainder of Antarctica are beyond the scope of this discussion.

3. See, for example, notes 9, 18, 32, & 40 *infra* and accompanying text.

4. P. JESSUP & H. TAUBENFELD, CONTROLS FOR OUTER SPACE AND THE ANTARCTIC ANALOGY 140-59 (1959).

eignty has been addressed in three significant cases which are particularly applicable to the Antarctic problem. The *Island of Palmas Case*[5] concerned a dispute between the Netherlands and the United States over sovereign rights to a small island in the South Pacific. The *Clipperton Island Case*[6] resulted in a determination that France and not Mexico retained sovereignty over an uninhabited guano island off the Mexican coast. Finally, despite Norway's assertions to the contrary, the Permanent Court of International Justice held Denmark to be the rightful sovereign over all of Greenland in the *Legal Status of Eastern Greenland.*[7]

The purpose of this article is to examine the relevant arguments of Argentina and Great Britain and, in light of an analysis of the theories of territorial sovereignty and prior decisions, to suggest that, should the dispute be referred for decision to the International Court of Justice, Argentina has a formidable array of arguments at her disposal. It may be argued that the opportunity for decision by the Court is foreclosed by the existence of the Antarctic Treaty, that the issue of territorial sovereignty in Antarctica is moot. It is submitted, however, that the possibility of a Court determination is a substantial one for three significant reasons.

First, in reference to the dispute between Argentina and Britain, there is already historical precedent for judicial action: in 1955, Great Britain formally filed an application and invited Chile and Argentina to submit to the jurisdiction of the Court in order to obtain a determination of the issue. Chile and Argentina declined, and the cases were dismissed from the Court's list.[8] Second, an examination of articles XII(1)(a), XII(2)(a), and XII(2)(c) of the Antarctic Treaty indicates the relative ease with which a contracting party can extricate itself from the treaty provisions.[9] Assuming for the moment that Argentina has a reasonable opportunity to prevail if the dispute is brought before the Court, there is a distinct possibility that Argentina would not only avail herself of the treaty termination provisions but would initiate Court action herself, in

5. (Netherlands v. United States), 2 R. Int'l Arb. Awards 829, 22 AM. J. INT'L L. 867 (Perm. Ct. Arb. 1928).

6. (Mexico v. France), 2 R. Int'l Arb. Awards 1105 (1931), 26 AM. J. INT'L L. 390 (1932).

7. [1933] P.C.I.J., ser. A/B, No. 53.

8. Antarctica Cases (United Kingdom v. Argentina), [1956] I.C.J. 12; (United Kingdom v. Chile), *id.* at 15. Chile has also advanced a claim to part of the territory involved in the Anglo-Argentine dispute. The two Latin American nations, however, have informally agreed to resolve their dispute subsequent to an invalidation of Britain's claim.

9. Bernhardt, *Sovereignty in Antarctica,* 5 CAL. W. INT'L L.J. 297, 311 (1975).

effect turning the diplomatic tables on Great Britain. Third, the prospects of technological advance and improved accessibility to mineral resources in the Antarctic may prove too great a strain for the treaty to withstand.[10] Should the Antarctic Treaty be renounced, even by relatively few of the contracting parties, the subsequent scramble for mineral wealth would serve to resurrect the tangled complexities of territorial claims. The *Eastern Greenland Case* is proof positive that "such a question can be handled judicially."[11]

II. THEORIES OF TERRITORIAL SOVEREIGNTY

The germinal concept in any discussion of territorial sovereignty is that of peaceful and continuous display of state authority, for it is from this concept that the overwhelming number of variant theories springs. Peaceful and continuous display of authority, simply stated, is the requirement that a state demonstrate that it has acquired valid title over given territory and has continued to exert its authority through "the actual display of state activities."[12] The Permanent Court of International Justice has determined that the concept of peaceful and continuous display of authority consists of two distinct elements: (1) the intention and will to act as sovereign, and (2) some actual display of authority.[13]

The first element is readily cognizable; a state need only assert its sovereign rights to given territory by way of decree in order to comply with the requirement. The second element, however, is less easily applied. The claimant state must display, by means of some outwardly demonstrable exercise, the authority which lends support to its initial desire to incorporate the territory. The Court has emphasized that this display of authority is insufficient if exerted only at the time title is first created. The claimant state is required to continue its display of authority, since the state's effective occupation of the territory "would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right."[14] The Court has indicated that the concept of peaceful and continuous display of authority is the cornerstone of

10. Hambro, *Some Notes on the Future of the Antarctic Treaty Collaboration*, 68 AM. J. INT'L L. 217, 223 (1974).

11. Jessup, *Sovereignty in Antarctica*, 41 AM. J. INT'L L. 117, 119 (1947).

12. Island of Palmas Case (Netherlands v. United States), 2 R. Int'l Arb. Awards at 839, 22 AM. J. INT'L L. at 875.

13. Legal Status of Eastern Greenland, [1933] P.C.I.J., ser. A/B, No. 53, at 45-46.

14. Island of Palmas Case (Netherlands v. United States), 2 R. Int'l Arb. Awards at 839, 22 AM. J. INT'L L. at 876.

territorial sovereignty; it is the "sound and natural criterium" in deciding whether title to given territory is valid as against any other state.[15]

A. Discovery

A relative minority of authority has promulgated the theory that discovery alone, without any further action by the claimant state, is sufficient to acquire title to territory. Great Britain has advanced this theory in order to buttress her claim to certain areas within the Antarctic region.[16] Prior to the sixteenth century, discovery per se was deemed sufficient to acquire sovereign rights, and it has been stated that those states "which are so unfortunate as to be without any coastline facing the Antarctic" and, therefore, unable to avail themselves of the sector theory, discussed below,[17] have been forced to resurrect the ancient discovery theory in order to protect their claims.[18]

The discovery theory, however, has been repudiated by the Permanent Court of Arbitration. Discovery, "without any subsequent act," is insufficient to prove sovereignty over the territory claimed.[19] The court, however, has not entirely denied the utility of discovery in acquiring territorial sovereignty. Rather, discovery alone has been held to be a potential tool for obtaining inchoate title, and this title can be perfected, within a reasonable time, by an effective occupation of the territory claimed. The court has specified that an inchoate title, acquired by means of discovery, cannot prevail over the peaceful and continuous display of authority exercised by a rival state.[20]

The rationale behind the rejection of the discovery theory is readily apparent upon review of the existing situation in the Antarctic. The overlapping claims of Argentina, Chile, and Great Britain demonstrate the confusion over factual bases for establishment of territorial sovereignty. The Court would be confronted with myriad

15. *Id.* at 840, 22 AM. J. INT'L L. at 877.

16. Comment, *International Law—Claims to Sovereignty—Antarctica*, 28 S. CAL. L. REV. 386, 392 (1955) [hereinafter cited as *Claims*].

17. See text accompanying notes 33-45 *infra*.

18. Note, *The Validity of Claims of Sovereignty over Antarctic Lands*, 5 INTRA. L. REV. 112, 120 (1950) [hereinafter cited as *Validity of Claims*].

19. Island of Palmas Case (Netherlands v. United States), 2 R. Int'l Arb. Awards at 846, 22 AM. J. INT'L L. at 884.

20. *Id.* at 846, 22 AM. J. INT'L L. at 884; *see* O. SVARLIEN, THE EASTERN GREENLAND CASE IN HISTORICAL PERSPECTIVE 55 (1964).

assertions of discovery by a variety of explorers and little hope of eventually sorting out the actual facts. Moreover, the states which base their claims of sovereignty on discovery alone belie their own acceptance of the theory: they continue their attempts to shore up sovereign claims by resorting to a "back door" use of effective occupation.[21] It is therefore clear that discovery per se is not a viable, valid method of acquiring territorial sovereignty.

B. Occupation

The doctrine of effective occupation as a basis for territorial sovereignty is the prevalent theory espoused by modern authority. According to Moore's classic definition, "[t]itle by occupation is gained by the discovery, use, and settlement of territory not occupied by a civilized power."[22] The doctrine has its beginnings in the Roman law of property which embodied the notion that the owner's control over the *res* was an essential element. The logical underpinning of the doctrine was that only the exercise of sufficient control over the property would ensure efficient use of it by those "best in a position" to do so.[23] In applying the occupation doctrine to the acquisition of territory, the state assumes the role of owner and is therefore subject to several requirements in order to maintain clear and effective title. First, regardless of a private citizen's relation to his state, such citizen's discovery and occupation of territory is not sufficient to establish sovereign rights unless that state promptly endorses the citizen's actions.[24] Second, in order to meet the Court's requirement of peaceful and continuous display of authority, the state must ensure that its inchoate title is not invalidated by the subsequent activities of a rival state. Occupation is the positive method to protect against such an eventuality.[25]

During the early years of application of the occupation doctrine, in strict accordance with Moore's definition, settlement was viewed as the only method by which to meet the requirements of effective occupation. In light of such an interpretation, exercise of sovereignty over desolate, uninhabited regions was deemed impossible since the inability to settle such areas precluded satisfaction of

21. *Claims, supra* note 16, at 392.
22. 1 J. MOORE, INTERNATIONAL LAW DIGEST 258 (1906).
23. Bernhardt, *supra* note 9, at 319.
24. *Id.* at 320-21.
25. *Id.* at 321-22.

an element of effective occupation.[26] The modern approach has been to temper such a rigid requirement in view of two significant practical considerations. First, various states, hampered by the stricter view, simply ignored it;[27] second, with the advent of state interest in desolate areas, specifically the polar regions, the need to relax the settlement requirement became particularly apparent.[28] The effect of relaxation of the standard, however, was to create a basic uncertainty: in the absence of permanent settlement, what did effective occupation mean?

According to Bernhardt, "[e]ffectiveness should be viewed as the objective manifestation of a continuous development of control commencing with discovery and subsequent inchoate title and continuing by permanent settlement and administration."[29] This definition of effectiveness, however, contains the requirement of permanent settlement and would seem to preclude the possibility of effective occupation in Antarctica. The author continues:

> To maintain that actual continuous possession is required in a largely uninhabited land is to misconstrue the real nature of *occupatio*. Effective possession requires only that degree of control which is necessary under the totality of the circumstances prevalent in the area to make the presence of authority of the occupying state felt by and against all others. It is therefore a flexible and comparative standard . . . .[30]

The permanent settlement requirement has disappeared, but we are left with a rather indefinite and ambiguous standard as a replacement.

Other authorities have also attempted to come to grips with the meaning of effectve occupation under the less strict view. Von der Heydte has promulgated the principle of virtual effectiveness, but has fallen short of concretizing the meaning of the term:

> The consciousness of an existing power which is capable of being exerted everywhere must penetrate the whole country, even if in fact such power, radiating from some points of support, becomes manifest only in relatively few acts displaying such sovereignty. In a

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26. *See* Balch, *The Arctic and Antarctic Regions and the Law of Nations*, 4 AM. J. INT'L L. 265, 267 (1910).

27. Von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT'L L. 448, 462 (1935).

28. P. JESSUP & H. TAUBENFELD, *supra* note 4, at 141.

29. Bernhardt, *supra* note 9, at 322.

30. *Id.* at 323.

> given case on the one hand, the possibility, and on the other the fear, of a punitive expedition corresponds even more to the intrinsic sense of effectiveness than a police station in every [district].[31]

The indefiniteness of effective occupation continues to exist, despite the valiant efforts of legal writers to place the definition within practical, concrete parameters.[32]

C. Sectors

The sector theory, devised by Canada, was first applied to the Arctic.[33] Under the sector theory, a state with territory which borders the Arctic and which extends within the Arctic Circle

> may claim all of the area between a base line connecting the meridians of longitude marking the limits of its easterly and westerly frontiers, and extending as far north as the final intersection of those meridians at the North Pole.[34]

This division of the polar icecap into "pie slices" has been applied by several claimant states to the Antarctic. Since no state's territory extends within the Antarctic Circle, however, a variation of the Arctic model has been devised. The proponents of the sector theory in Antarctica base the longitudinal borders of their territorial claims on the extent of their discovery and exploration of the region; the outer limit of the "pie slice" is formed by the 60th parallel.[35]

The characteristics of polar sectors have no relation to the principle of peaceful and continuous display of authority. The sector theory is unconcerned with the presence or absence of state control, no matter how ill-defined; rather, the theory posits a unique relationship between the claimant state and the particular territory in question.[36] Since the sector theory presumably departs from the peaceful and continuous display requirement, some authorities have gone to great lengths to distinguish between the Arctic and Antarctic models. Bernhardt offers four significant distinctions: (1) Antarctica possesses a geological land base while the Arctic is formed solely of ice, (2) unlike the claimant states in the Arctic model, no state's continental land mass projects within the Antarctic circle,

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31. Von der Heydte, *supra* note 27, at 465.

32. *Validity of Claims, supra* note 18, at 113. *See, e.g.*, Hyde, *Acquisition of Sovereignty over Polar Areas*, 19 IOWA L. REV. 286, 288 (1934).

33. G. SMEDAL, ACQUISITION OF SOVEREIGNTY OVER POLAR AREAS 54 (1931).

34. Hyde, *supra* note 32, at 289.

35. *Id.* at 291-92; *Validity of Claims, supra* note 18, at 117-18.

36. Hyde, *supra* note 32, at 289.

(3) unlike its northern counterpart, the Antarctic region is likely to become a center of increasing activity, and (4) the Antarctic sectors themselves, as presently delimited, are "contradictory and impractical."[37] Hyde's distinction between the two models rests upon the application of the theories of continuity and contiguity, discussed below. Since these theories have some application in the Arctic, they provide a foundation for the sector theory as utilized there. These two theories, however, are presumed to have no application in the Antarctic, and the sector theory therefore loses its foundation.[38] Hayton's difficulty with the Antarctic model is based upon the use of the 60th parallel as the outer limit of the territorial claim:

> Sectors . . . should properly begin with their base on the mainland and project *toward* the offshore territories. As it is, the Antarctic sectors are based on an arbitrary Parallel on the high seas and project toward an alien mainland.[39]

Waldock, a proponent of the British sector theory, asserts that the distinctions between Arctic and Antarctic sector models are exaggerated. He contends that Antarctic sectors are not arbitarily delimited but are "framed as geographical extensions of land claimed, whether rightly or wrongly, to be already under the sovereignty of the sector states."[40]

By far the greatest objection to the sector theory is that it has no foundation in or application to traditional precepts of international law. The theory has been variously described as "a watered-down concept of acquisition,"[41] "legally irrelevant,"[42] "contrary to every legal system and entirely unwarranted,"[43] and as not having "achieved the status of a legal principle in international law."[44] There are those, however, who assert that the Antarctic situation, because of its unique problems, has given the sector theory a cloak of legal respectability: "the sector principle as applied at least to Antarctica is now a part of the accepted international legal order."[45]

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37. Bernhardt, *supra* note 9, at 336-37.

38. Hyde, *supra* note 32, at 291.

39. Hayton, *The "American" Antarctic*, 50 AM. J. INT'L L. 583, 603 (1956).

40. Waldock, *Disputed Sovereignty in the Falkland Islands Dependencies*, 25 BRIT. Y.B. INT'L L. 311, 340 (1948).

41. Bernhardt, *supra* note 9, at 338.

42. Hayton, *supra* note 39, at 606.

43. *Validity of Claims*, *supra* note 18, at 121-22.

44. Bernhardt, *supra* note 9, at 338.

45. Reeves, *Antarctic Sectors*, 33 AM. J. INT'L L. 519, 521 (1939); *see, e.g.*, Waldock, *supra* note 40, at 341. *Contra*, Elder, *Decision on Polar Sovereignty by Student Moot Court*, 41 AM. J. INT'L L. 656, 656-57 (1947).

D. Contiguity, Continuity-Hinterland, Uti Possidetis

1. CONTIGUITY

The contiguity doctrine has been advocated at times by states attempting to lay claim to islands located off their coastlines but outside the limits of their territorial waters. The fact that an island is located within relative proximity to the claimant state is purported to be a "geographical connexion" between the two land masses and, therefore, a foundation for the exercise of territorial sovereignty.[46] It should be noted that the traditional view of the concept is that it encompasses only the acquisition of islands, not continental land masses. The modern justification for the concept is that the state relies upon the island claimed as a source of sustenance.[47]

The contiguity theory, as applied to the Antarctic, has been vigorously attacked on the grounds that it flies in the face of effective occupation requirements. Antarctica, it is argued, is a continent in and of itself with no "geographical connexion" to any other continent. "No State can claim that it is 'adjacent' or 'contiguous,' or that it controls the coastline at any point."[48] Chile and Argentina, on the other hand, maintain that the highlands of the Antarctic continent are merely extensions of the Andes range, part of which is submerged between the South American and Antarctic land masses. The two Latin American countries support their claim by reference to geological data.[49] This argument, while forceful, ignores the traditional emphasis placed on the continent-*island* relationship of the contiguity doctrine. Von der Heydte, however, dismisses the strict traditional interpretation. He argues that the contiguity doctrine, properly applied, has its roots in the principle of virtual effectiveness, and there is, therefore, no justification or logic in restricting its application solely to islands located off a claimant state's coast.[50] Von der Heydte's analysis reaches a position diametrically opposed by the authorities previously mentioned: "[b]esides effective occupation, geographic contiguity is recognized to be a full and sufficient sovereign title."[51]

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46. Waldock, *supra* note 40, at 341.
47. Bernhardt, *supra* note 9, at 341.
48. *Validity of Claims, supra* note 18, at 117; Bernhardt, *supra* note 9, at 341.
49. *Claims, supra* note 16, at 395.
50. Von der Heydte, *supra* note 27, at 470-71.
51. *Id.* at 463.

2. CONTINUITY-HINTERLAND

The continuity-hinterland theories are close relatives of the contiguity doctrine. They are discussed here together because they embody, generally speaking, the same principle. The theories hold that a state which occupies or controls a coastal area may extend its claim inland "up to either the middle line of the continent, the outer reach of the water shed or some other obvious natural boundary."[52]

The continuity-hinterland theories are sometimes used in support of the sector principle, as applied in the Antarctic. The east-west boundaries of the claimant state, formed by the extent of discovery and exploration along the Antarctic coastline, are projected inland to the South Pole completing formation of the "pie slice."[53] The argument is made, however, that effective control is a necessary prerequisite to a valid claim of sovereignty, and on this basis the continuity-hinterland theories, though in vogue during the nineteenth century, were never recognized as valid.[54]

3. UTI POSSIDETIS

The *uti possidetis* doctrine is advanced exclusively by the Latin American nations which claim sovereign rights in the Antarctic. Simply stated, the doctrine holds that Argentina and Chile, when they ceased to be colonies of Spain, succeeded to Spanish rights of sovereignty as granted by the Papal Bull, *Inter Caetera.*[55] Under the *uti possidetis* doctrine, therefore, no territory in the Western Hemisphere is considered *res nullius,* and all holdings of the former Spanish empire are transferred, by way of succession, to the Latin American nations as the "legitimate heirs" of Spain.[56]

The Argentine-Chilean invocation of *uti possidetis* as the foundation of their claims to territory in the Antarctic is generally acknowledged to be of little utility. The validity of the Papal Bull itself is seriously questioned,[57] and, assuming for the moment that the Bull is valid, Argentina and Chile have inherited, at best, an inchoate title to the territory claimed. The two countries would simply assume the position of Spain in regard to the inchoate titles

52. *Validity of Claims, supra* note 18, at 114; Bernhardt, *supra* note 9, at 342-43.
53. Hayton, *supra* note 39, at 605.
54. Bernhardt, *supra* note 9, at 345.
55. *See* von der Heydte, *supra* note 27, at 451-52.
56. *Claims, supra* note 16, at 394.
57. Hayton, *supra* note 39, at 598 n.69a.

and would still be required to follow the general precepts of territorial acquisition: discovery followed by effective occupation. Decrees are not sufficient; the successor claimant state must prove the perfection and maintenance of its title.[58] The doctrine of *uti possidetis* "has proved to be so indefinite and ambiguous that it has become somewhat discredited,"[59] and one authority has gone so far as to assert that invocation of the doctrine would receive short shrift by disinterested judges or arbiters.[60]

III. SOVEREIGNTY BEFORE THE COURT: THE CASES

As has been previously stated, the foregoing theories of acquisition of territorial sovereignty do not exist in a vacuum. The issue of sovereignty has been squarely addressed in three significant cases. One commentator has advanced the argument that the three cases discussed below would be of little assistance in clarifying the situation as it exists in the Antarctic. The argument is that, if the Court were asked for an advisory opinion or judgment on sovereignty in Antarctica, there would be nothing in the way of precedent upon which the Court could base its decision:

> This would mean that the Court must decide a completely new question of law with no rules or precedents to serve as guides. The Eastern Greenland, Palmas Island, Clipperton Island and other cases are sufficiently different on their facts to be inapplicable. In nearly all, there was a long history of exploration and assertion of sovereignty extending over several hundred years. Very few of the reported cases concern territory completely uninhabited at the time of discovery, and none involve an area completely incapable of habitation at the time of the decision.[61]

It is submitted that such distinctions do not in fact exist and that the three cases examined below are particularly applicable to the Antarctic situation. First, a long history of exploration and assertion of sovereignty is irrelevant to the issue at hand. Judge Huber stated in the *Island of Palmas Case:*

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58. Bernhardt, *supra* note 9, at 346; Hayton, *supra* note 39, at 601; Waldock, *supra* note 40, at 326-27.

59. Waldock, *supra* note 40, at 325.

60. Hayton, *supra* note 39, at 603.

61. *Validity of Claims, supra* note 18, at 123. While the decisions of the Permanent Court of International Justice and the International Court of Justice are not governed by the principle of stare decisis, nevertheless, the analysis and rationale of the early sovereignty cases are heavily relied upon in subsequent Court determinations.

> it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed . . . long enough to enable any Power . . . to have . . . a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.[62]

Second, the *Clipperton Island Case* concerned territory which was completely uninhabited. Finally, Antarctica is not now, nor would it be at the time of decision, completely incapable of habitation. Argentina has manned an observatory on Laurie Island, in the South Orkneys, since 1904 on a continuous, year-round basis.[63]

An examination of the decisions in the following cases provides a familiarity with the guidelines used in approaching the issue of territorial sovereignty over isolated, desolate areas. Such an examination cannot help but provide the necessary tools for an analysis of the legal status of territorial claims in the Antarctic.

A. *The Island of Palmas Case*

The *Island of Palmas* decision is founded upon the seminal concept of peaceful and continuous display of state authority. This concept receives primary emphasis and is regarded as *sine qua non* in the acquisition of territorial sovereignty. Of what exactly does the display of authority consist? Since the display of state authority and the right of sovereignty which it confers cannot under international law exist as an exercise of sovereignty in the abstract, such display must be accompanied by "concrete manifestations."[64] These manifestations may take on different forms depending upon various conditions of time and place, and Judge Huber specified that the habitability of the region claimed is a significant factor in determining the extent of manifestation required.[65] There is, however, an additional requirement. Not only must the display of authority be evidenced by concrete manifestation, but it must also be continuous and "follow the conditions required by the evolution of law."[66] In applying the foregoing principles to the facts of the case, Judge Huber determined that the United States, which had acquired title to Palmas Island through discovery, recognition by treaty, and con-

62. Island of Palmas Case (Netherlands v. United States), 2 R. Int'l Arb. Awards at 867, 22 Am. J. Int'l L. at 908.

63. Hayton, *supra* note 39, at 587.

64. Island of Palmas Case (Netherlands v. United States), 2 R. Int'l Arb. Awards at 839, 22 Am. J. Int'l L. at 876.

65. *Id.* at 840, 22 Am. J. Int'l L. at 877.

66. *Id.* at 845, 22 Am. J. Int'l L. at 883.

tiguity, nevertheless possessed an inferior claim to the island. The United States had "not established the fact that sovereignty so acquired was *effectively displayed at any time.*"[67] In effect, despite the abstract title purportedly created in the United States by virtue of the theories advanced, the United States had never furnished the Netherlands or the court with concrete manifestations of the exercise of sovereignty. Although Moore's settlement requirement[68] has been vitiated and replaced by a more relaxed standard, some act or series of acts, continuous in nature, must be exhibited.

Bernhardt states that Judge Huber was "the first to circumscribe" the growing body of exceptions to the effective occupation doctrine "by putting relative bounds on it."[69] The minimum degree of effective control is the peaceful and continuous display of state authority, evidenced by concrete manifestations which may vary according to the circumstances of time and place. How does this principle affect the various claims to Antarctic territory? Have there been concrete manifestations of display of authority by the claimant states sufficient to meet the *Palmas Island* standard? Bernhardt maintains that there were not permanent settlements or continuous state activities on the Antarctic continent until the 1950's.[70] He therefore concludes that Antarctica "fails to fulfill the exceptions enunciated in the *Palmas [Case].*"[71] The claimant state must still establish that it can exercise control over the region claimed, and bare assertions of claims, without proof of the power to exercise control, will not suffice as proof of sovereignty. Hyde is in substantial agreement with this position since he contends that "relaxation should be confined to the waiving of settlement as a necessary condition for the perfecting of a right of sovereignty."[72]

The positions of Bernhardt and Hyde, based upon a narrow construction of the principle enunciated in the *Palmas Case,* would seem to close the door to all states claiming sovereign rights in the Antarctic. Such contentions, however, are an oversimplification of that principle. The concept of continuous and peaceful display of state authority was sufficiently qualified to allow the possibility of valid claims to portions of Antarctic territory.

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67. *Id.* at 867, 22 AM. J. INT'L L. at 907 (emphasis added).
68. See note 22 *supra* and accompanying text.
69. Bernhardt, *supra* note 9, at 329.
70. *Id.* at 318.
71. *Id.* at 331.
72. Hyde, *supra* note 32, at 293-94.

While asserting that the court is inclined to give greater weight to acts of display of state authority, Judge Huber nevertheless stated that there may well be circumstances where such acts of display will not be required:

> The fact that a state cannot prove display of sovereignty as regards [partly uninhabited or unsubdued portions] of territory cannot forthwith be interpreted as showing that sovereignty is inexistent. Each case must be appreciated in accordance with the particular circumstances.[73]

In discussing the need for concrete manifestation of display of authority, Judge Huber left another slight crack in what Bernhardt and Hyde view as an impenetrable wall. The display of authority required, and the nature of such display, should be in precise relation to the territory in dispute. Bernhardt maintains that the minimum requirement for such display is some form of effective administration,[74] but Judge Huber indicated that "[i]t is not necessary that there should be a special administration established in [the] territory."[75] It therefore logically follows that, absent some particular requirement for "special administration" of given Antarctic territory, Bernhardt's minimum requirement of effective administration could be waived without prejudice to a claimant state's sovereign rights.

There are three other principles set out in the *Palmas Island Case* which are relevant to the discussion of Anglo-Argentine rights. The first principle concerns a question which arises again in the *Eastern Greenland Case:* if one state, at some time in the past, recognized or admitted to the sovereignty of another state over given territory, does such recognition or admission create a presumption of sovereignty in the second state? Judge Huber's response is categorical: "no presumptions of this kind are to be applied in international arbitrations, except under express stipulation. It remains for the Tribunal to decide . . . ."[76]

The second principle is perhaps more subtle, and it is easily glossed over in the context of its presentation. After examining the evidence marshalled by the Netherlands and the United States in

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73. Island of Palmas Case (Netherlands v. United States), 2 R. Int'l Arb. Awards at 855, 22 Am. J. Int'l L. at 894.

74. Bernhardt, *supra* note 9, at 332.

75. Island of Palmas Case (Netherlands v. United States), 2 R. Int'l Arb. Awards at 857, 22 Am. J. Int'l L. at 896.

76. *Id.* at 864, 22 Am. J. Int'l L. at 904-05.

support of their respective claims, Judge Huber concluded: "[t]here is moreover no evidence which would establish any act of display of sovereignty over the island by Spain or another Power, such as might *counter-balance* or annihilate the manifestations of Netherlands sovereignty."[77] Clearly, the notion of counter-balance could prove to be a critical one, particularly in its application to the situation in the Antarctic. After reviewing Judge Huber's exhaustive analysis of the concept of peaceful and continuous display of authority, it is easy to conclude that in any given case there is but one state which could meet the criteria required for the exercise of sovereignty. But the notion of counter-balance dispels such a conclusion.

Lastly, the theory of contiguity is examined in the *Island of Palmas Case.* Notwithstanding von der Heydte's assertion of the validity of the principle,[78] Judge Huber appears to have dismissed it entirely:

> [I]t is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size).[79]

Bernhardt apparently accepts this generalization and concludes that the principle of contiguity "has now for all practical purposes fallen into desuetude and has no adherents in modern international law."[80] This, too, may be an oversimplification, for Judge Huber, while refusing to place the imprimatur of international law on the contiguity theory, nevertheless conceded that the principle may well have its place *outside* the realm of the law:

> The principle of contiguity, in regard to islands, may not be out of place when it is a question of alloting them to one State rather than another, either by agreement between the Parties, or *by a decision not necessarily based on law . . . .*[81]

Once again, Judge Huber has refrained from turning the key in the lock.

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77. *Id.* at 868, 22 AM. J. INT'L L. at 909 (emphasis added).

78. See note 51 *supra* and accompanying text.

79. Island of Palmas Case (Netherlands v. United States), 2 R. Int'l Arb. Awards at 854, 22 AM. J. INT'L L. at 893 (emphasis added).

80. Bernhardt, *supra* note 9, at 342.

81. Island of Palmas Case (Netherlands v. United States), 2 R. Int'l Arb. Awards at 854, 22 AM. J. INT'L L. at 893 (emphasis added).

B. The Clipperton Island Case

In order fully to appreciate the significance of the *Clipperton Island Case,* decided three years after the *Palmas* decision, a brief recitation of the facts is necessary. France discovered the island in 1857. In 1858, a French commercial ship, *L'Amiral,* returned to the island in order annex it to France. On board was a commissioner of the French government who drew up an act, in accordance with instructions from the Minister of Marine, in which sovereignty over the island was proclaimed for France. The ship itself was never able to reach the island, but some members of the crew went ashore by means of a small boat. The crew returned to the ship without having left "any sign of sovereignty" ashore, and *L'Amiral* departed on November 20, 1858. From that date until the end of 1887, at which time France lodged a protest with the United States over the presence of American citizens collecting guano on the island, "no positive and apparent act of sovereignty can be recalled either on the part of France or on the part of any other Powers."[82] In 1897, Mexico dispatched a gunboat to the island, despite the French claim of sovereignty, and proclaimed that Clipperton was territory "belonging to her for a long time." In opposition to the French position, Mexico, invoking the *uti possidetis* doctrine, claimed that the island had been first discovered by the Spanish and therefore belonged to Mexico as Spain's successor.[83] The dispute was submitted to Victor Emmanuel III, the King of Italy, for arbitration.

The arbiter dismissed Mexico's invocation of *uti possidetis* on the grounds that Mexico had failed to demonstrate first, that Spain had had the right to incorporate the island and, second, that either Spain or Mexico "had effectively exercised the right."[84] In the absence of such effective exercise, Clipperton Island, at the time of the French proclamation of November, 1858, "was in the legal situation of *territorium nullius,* and, therefore, susceptible of occupation."[85] Victor Emmanuel then turned to the French claim and proceeded to apply, and expand, the principles enunciated in the *Island of Palmas Case.*

The principle of peaceful and continuous display of authority receives a slightly different interpretation in the *Clipperton Island*

82. Clipperton Island Case (Mexico v. France), 2 R. Int'l Arb. Awards at 1108, 26 AM. J. INT'L L. at 391.

83. *Id.* at 1109, 26 AM. J. INT'L L. at 392.

84. *Id.* at 1110, 26 AM. J. INT'L L. at 393.

85. *Id.*, 26 AM. J. INT'L L. at 393.

Case. The two elements of intent and actual display are present, but the second element is phrased in a significant manner:

> It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi,* the actual, and not the nominal, taking of possession is a necessary condition of occupation. The taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there.[86]

In applying this principle to the factual situation in the *Clipperton Island Case,* it is readily apparent that France indicated her intent to exercise sovereignty; the proclamation of November, 1858, satisfies the first requirement. But by what act, or series of acts, did France reduce the island to her possession? The French government performed only two acts during the time period examined: (1) the proclamation of annexation in 1858, and (2) the protest lodged with the United States in 1887. In light of Judge Huber's insistence, in the *Island of Palmas Case,* upon *continuous* display of authority through concrete manifestations, it would seem that the French claim must fail. The arbiter, however, noted that, while some form of active, continuous administration is ordinarily required to comply with the second element, such activity is only a *procedural* step in the taking of possession. In fact, he stated that there may be no need for such activity at all:

> There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.[87]

In effect, the continuous display of authority, so heavily underscored by Judge Huber, has been waived in a case concerning uninhabited territory. The single act of proclamation by the French has been held sufficient to validate the claim of French sovereignty.

In applying the *Clipperton* rationale to the Antarctic situation, Bernhardt concludes that the case must be distinguished. He asserts that the *Clipperton* formula is designed for an uninhabited but small island which is nevertheless susceptible of territorial occupa-

86. *Id.,* 26 AM. J. INT'L L. at 393.
87. *Id.,* 26 AM. J. INT'L L. at 394.

tion and administration. The Antarctic continent, he concludes, "is not amenable to so cavalier a treatment."[88] But the grounds for such a distinction between Clipperton and the Antarctic are invalid, for it must be emphasized that, although Clipperton may very well have been *susceptible* to some form of occupation or administration, the arbiter nevertheless expressly dispensed with the necessity for such activity. In addition, the language of the decision was not directed merely at islands; rather, the subject matter was termed uninhabited "territory." The unmistakable result of the *Clipperton Island Case* is a further relaxation of the traditional standards for acquisition of territorial sovereignty.

C. *The Eastern Greenland Case*

The *Eastern Greenland Case* represents the final rung on the chronological ladder of standard-relaxation. The case indicates that the concept of peaceful and continuous display of state authority has clearly expanded beyond the guidelines so clearly outlined in the *Island of Palmas Case.* The change in approach is not a sudden one, however, and the Court noted, while describing the nature of the principle, that its lenient view had its foundation in the development of prior case law:

> It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.[89]

Having prefaced its opinion with a view toward leniency, the Court nevertheless asserted that some actual display of authority is necessary. The Court has not totally abandoned the two-element requirement for valid claims to sovereignty. As in the *Clipperton* case, the intent to exercise sovereign rights is not seriously questioned or analyzed, but what activities qualify to fulfill the requirement of actual display of authority? The Court provided two examples. The first is legislation concerning the disputed area by the state seeking to prove its claim. Legislation is regarded as "one of the most obvious forms of the exercise of sovereign power . . . ."[90]

88. Bernhardt, *supra* note 9, at 330-31.
89. Legal Status of Eastern Greenland, [1933] P.C.I.J., ser. A/B, No. 53, at 46.
90. *Id.* at 48.

Almost as an afterthought, the Court asserted that even if such legislation were directed toward a particular area of colonization in a given territory, such fact is not grounds for holding that the legislation is "restricted to the colonized area."[91] In effect, then, legislation directed at a relatively small area of territory may be sufficient to fulfill the actual display requirement for the *entire* territory. In addition to legislation, "concessions granted for the erection of telegraph lines" are deemed manifestations of the exercise of sovereignty,[92] and the Court concluded that these and other similar acts, combined with a variety of scientific activities, are sufficient to show that the claimant state has met the two-element requirement and has established a valid claim of sovereignty.[93]

In his dissent, Judge Vogt maintained that Denmark did display the requisite *animus possidendi* but asked rhetorically whether Denmark did in fact have the *corpus possessionis.*[94] One authority has concluded, with Judge Vogt, that the answer to the question is a categorical no. He maintains that Denmark prevailed despite "the obvious weaknesses" in her position.[95] What, then, is the status of the peaceful and continuous display requirement in light of the Court's arguably lenient decision? Bernhardt maintains that the requirement for actual display is still very much in evidence but adds that the extent of such display "is a relative and not an absolute concept; that is, the requisite degree depends on the activities of other states in the disputed area."[96] It is questionable whether the notion of relative display is of any assistance in clarifying the respective positions of rival claimant states. Relative display is simply an alternate way of expressing the problem, not of positing a workable solution. A more realistic appraisal of the decision is provided by Svarlien. He maintains that the Court, while affirming the general concept of peaceful and continuous display, "merely changed its content,"[97] and the net effect of such change was to reduce the resulting content "to an ill-defined minimum."[98] Another commentator concludes that the Court's decision demonstrates an abandonment of the two-element requirement altogether.

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91. *Id.* at 49.
92. *Id.* at 53.
93. *Id.* at 62-63.
94. *Id.* at 102.
95. O. SVARLIEN, *supra* note 20, at 68.
96. Bernhardt, *supra* note 9, at 326.
97. O. SVARLIEN, *supra* note 20, at 63.
98. *Id.* at 68.

> By [the time of the *Eastern Greenland Case*], it had become a matter of expediency; faced with the problem of awarding territory to one or another State, the court merely gave it to the one with the better claim, regardless of how weak that claim was in itself.[99]

In accordance with Svarlien's analysis of the *Eastern Greenland* decision, the consolidation of "territorial titles can best be understood in terms of the evolution and growth of public international law."[100]

IV. GREAT BRITAIN AND ARGENTINA BEFORE THE COURT

The Anglo-Argentine dispute over Antarctic territory has been a bitter one, marked by several incidents of a serious nature. The expedition of the Argentine ship *Primero de Mayo* in 1942 proclaimed the annexation of an Argentine Antarctic sector and installed commemorative bronze plaques on Deception and Wiencke Islands. The following year, the British Ambassador personally returned one of the plaques to the Argentine government.[101] Crewmen of the *H.M.S. Carnavon Castle* removed the national colors of Argentina from the walls of a whaling factory located on Deception Island; the colors had apparently been painted there by members of the *Primero de Mayo* expedition.[102] Argentina has refused to process mail bearing British stamps produced in the Falkland Islands.[103] In 1952, the Argentine navy, resorting to the use of gunfire, compelled a British scientific expedition to withdraw from the Hope Bay area, and, in 1953, a British official assisted by a small military squad dismantled huts on Deception Island which had previously been constructed by Argentine and Chilean nationals. Two Argentines were arrested.[104] In light of the foregoing incidents, the frequently cited decision of a student moot court,[105] which held that allowing polar areas to continue as *terra nullius* would not generate international tensions which could lead to war, is decidely inappropriate. With the possible termination of the Antarctic Treaty, a resolution of the Anglo-Argentine dispute by the International

99. *Validity of Claims*, *supra* note 18, at 114.
100. O. SVARLIEN, *supra* note 20, at 58.
101. Hayton, *supra* note 39, at 589.
102. Memorial of the United Kingdom, *supra* note 1, at 28.
103. P. JESSUP & H. TAUBENFELD, *supra* note 4, at 149.
104. *Id.*
105. Elder, *supra* note 45, at 658.

Court of Justice is a distinct possibility and, in Shakespeare's phrase, "a consummation devoutly to be wish'd."[106]

A. The Case for Great Britain

Great Britain relies, for the most part, upon the sector theory as the nucleus of her Antarctic claims. Some authorities have accepted the sector theory, if not as proof of territorial sovereignty, at least "as a method of asserting territorial claims."[107] The British adopted the theory in 1917 and proclaimed the boundaries of their Antarctic sector to be the lines 20° and 80° west longitude; the territories within those boundaries are known as the Falkland Islands Dependencies.[108] Great Britain's claims to the Antarctic mainland are based upon the delimitation of this sector, but a distinction is made between the theories which support the sector claim. The land bases which form the outer boundaries of the British sector are said *not* to be the Falkland Islands; rather, the boundaries are formed by points on the Antarctic mainland which mark the outer edge of discoveries and exploration of the continental land mass itself.[109] It is argued, therefore, that the British sector has its foundation in the continuity-hinterland theory and not in the contiguity theory espoused by Argentina. The result is that Great Britain has arguably paid tribute to the accepted modes of territorial acquisition, viz., discovery and occupation, whereas Argentina, by endorsing the contiguity theory as a basis for its sector claim, has ignored those accepted modes.[110] Regardless of this fine distinction made between supporting theories, there is authority for holding that Great Britain "has a very substantial case for many individual territories within [her] sector."[111]

In line with her recognition of the traditional modes of territorial acquisition, Britain has taken great pains to demonstrate the validity of her claims by detailing the discovery and effective occupation of various territories within her sector. The discovery of Graham Land in 1820 is attributed to E. Bransfield, a British naval officer, and it is contended that the first discoveries of South Georgia, the South Shetland Islands, the South Orkney Islands, and the

106. W. SHAKESPEARE, HAMLET, Act III, Scene I.
107. G. VON GLAHN, LAW AMONG NATIONS 285 (3d ed. 1976).
108. Reeves, *supra* note 45, at 519.
109. Waldock, *supra* note 40, at 340.
110. *Id.* at 341.
111. Hayton, *supra* note 39, at 584.

South Sandwich Islands were made by British citizens.[112] In addition, "acts of annexation" were performed in the name of the British Crown. In juxtaposition to these activities, it is asserted that neither Spain nor Argentina, as Spain's successor, made any discoveries whatsoever in the disputed area.[113] These British acts of acquisition were confirmed by the issuance of Letters Patent in July of 1908[114] and in March of 1917[115] wherein the territorial boundaries of the sector were proclaimed.

In addition to these arguments in support of her establishment of primary title, a catalogue of activities is set out as proof of Great Britain's numerous manifestations of sovereignty. Whaling and sealing laws are submitted as examples of direct British control over the area.[116] In fact, such laws are used as a springboard to introduce what may be a very novel concept: the "reasonable sovereign" standard. Great emphasis is placed upon the fact that Argentina took no steps to regulate whaling and sealing activities in the region and therefore did not act "as a prudent *sovereign* would have done, or sought to do . . . ."[117] As further examples of British manifestations of sovereignty, reference is made to the establishment of the *Discovery Committee,*[118] the activities of the *British Graham Land Expedition,*[119] the organization of the *Falkland Islands Dependencies Survey,*[120] and, finally, to a list of active British bases maintained in various parts of the disputed territory.[121] Thus, it is argued, the numerous activities of Great Britain within the area of the Falkland Islands Dependencies proves beyond doubt that it "displayed and exercised its sovereignty"[122] in accordance with the principle of peaceful and continuous display of state authority as enunciated in the *Palmas Island, Clipperton Island*, and *Eastern Greenland Cases.*[123]

Permanent settlement has not been advanced or mentioned as

112. Memorial of the United Kingdom, *supra* note 1, at 12.
113. *Id.* at 12-13.
114. U.S. NAVAL WAR COLLEGE, *Declarations Concerning Antarctic Territories,* in [1948-49] INT'L LEGAL DOCS. 217, 231-32 (1950).
115. *Id.* at 233.
116. Memorial of the United Kingdom, *supra* note 1, at 17.
117. *Id.* at 27.
118. *Id.* at 20.
119. *Id.* at 21.
120. *Id.* at 29.
121. *Id.*
122. *Id.* at 32.
123. *Id.* at 33-34.

a rationale for the British claim. The various manifestations of British activity in the disputed sector are all of a temporary nature: summer visits, expeditions, intermittently manned outposts. Waldock, a proponent of the British claims in the Antarctic, discounts this absence of permanent activity or occupation by emphasizing the relaxation of standards outlined in the three sovereignty cases:

> It is enough if the state displays the functions of a state in a manner corresponding to the circumstances of the territory, assumes the responsibility to exercise local administration, and does so in fact *as and when occasion demands.*[124]

Great Britain will very likely strengthen her position by vigorous attack upon the Argentine claims. Assuming the existence of a previous, clear Spanish title to the disputed territory, there are six possible resulting situations,[125] in regard to territorial sovereignty, under presently accepted precepts of international law. Regardless of the possibility chosen, Argentina is faced with a serious problem: presuming an inchoate title is possessed by Argentina, no matter how obtained, there is a noticeable absence of evidence to indicate that she has perfected or maintained such title over the disputed territory.[126] In addition, as Great Britain has previously emphasized, Argentina knew of the British claims in 1909 but offered no opposition or protest to such claims when the British Letters Patent of 1908 were brought to the attention of the Argentine Foreign Minister. In fact, the British Minister concluded from the Argentine official's reaction that Argentina did "not dispute the rights of Great Britain . . . ."[127] On the basis of these weaknesses in the Argentine position and in view of the extensive activities of the British government within her sector, Waldock asserts that "there is plainly a

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124. Waldock, *supra* note 40, at 336.

125. Hayton considers five situations where some stage of Antarctic sovereignty is reached by a claimant state. The sixth situation is Antarctica as *terra nullius:*

(1) Spanish inchoate title persisting;

(2) Spanish title perfected, sovereignty maintained;

(3) Argentine or Chilean inchoate title by proven succession, or rediscovery and annexation of lapsed Spanish titles;

(4) Argentine or Chilean sovereignty, as successor to perfected title or by maintenance of title perfected after 1810;

(5) *Terra nullius;*

(6) Inchoate title or sovereignty of a third state established.

Hayton, *supra* note 39, at 602.

126. *Id.* at 602-03.

127. Memorial of the United Kindgom, *supra* note 1, at 22-23. For the counter-argument, see note 76 *supra* and accompanying text.

substantial prima-facie case both in fact and in law for the United Kingdom's" claim to sovereign rights in the Antarctic.[128]

A further, extra-legal, consideration is the 1955 British application for judicial determination of the issue by the Permanent Court of International Justice. It can be viewed as a positive advantage in two respects. First, the application was a demonstrable consolidation of British rights:

> While the practical wisdom of this type of [application] proceeding may sometimes be open to question, there can be no doubt that to propose arbitration or judicial settlement in appropriate circumstances is a necessary precautionary measure for a State wishing to safeguard its rights.[129]

Second, by placing its application before the Court, Britain has made her claim, and the legitimate arguments supporting that claim, a matter of public record. By so doing, Britain may be said to have captured the advantage in the arena of world diplomacy.[130]

B. The Case for Argentina

Argentina originally expressed official opposition to the sector theory, presumably due to the fact that the British had seen fit to adopt it.[131] Eventually, however, Argentina did embrace the theory and proclaimed her sector to extend from 25° to 74° west longitude, an area located entirely within the boundaries established by Great Britain.[132] While Britain bases its adherence to the sector theory upon the principle of continuity-hinterland, Argentina supports her adoption of the theory with the principle of contiguity. Although the Antarctic continent is approximately 700 miles from the Argentine coast, it is contended nevertheless that the Palmer Peninsula (labelled Graham Land on British maps) is an extension of the South American continent and that the two land masses are connected by a continental shelf.[133] It has been noted, despite Waldock's valiant attempt to demonstrate otherwise, that Great Britain's sector is based upon the outward projection of longitudinal lines from the Falkland Islands and not from points of discovery along the Antarc-

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128. Waldock, *supra* note 40, at 353.

129. S. ROSENNE, THE TIME FACTOR IN THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 30 n.5 (1960).

130. *See* S. ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 161 (1962).

131. Hayton, *supra* note 39, at 588.

132. *Id.* at 590.

133. P. JESSUP & H. TAUBENFELD, *supra* note 4, at 143.

tic mainland.[134] It appears somewhat paradoxical that Great Britain can assert, on the one hand, that the Falkland Islands form some unique relationship with the Antarctic continental land mass and, on the other hand, that the Argentine claim of a contiguous relationship with the same land mass is somehow illegal and invalid. The British position is even more questionable in view of the fact that the Argentine mainland is significantly closer to the continental land mass than are the Falkland Islands.[135] It should be remembered that the sector theory has its origin in the Arctic model, first proposed by Canada.[136] One of the requirements for use of the Arctic model was that the claimant state's territory extend within the Arctic Circle. While no claimant state can meet that requirement in the case of the Antarctic model, it is nevertheless significant that the South American continent projects farther south than any other. In view of this fact, and in view of Argentina's alleged contiguity with the Antarctic mainland, Argentina's "failure technically to penetrate the Antarctic Circle may not be crucial."[137] Finally, in contrast with the British reliance upon the Falkland Island connection, the Argentine sector model is strategically superior: Argentina's direct proximity with the disputed territory renders its sector more easily defensible,[138] and this fact goes straight to the issue of exertion of state authority or control.

Argentina maintains a "low profile" with respect to the traditional mode of discovery as a tool for territorial acquisition. The doctrine of *uti possidetis* is substituted for discovery, and, despite the fact that the existence of the Antarctic continent was unknown during the time of the early Spanish explorations, Argentina posits the validity of Spanish claims, placing heavy emphasis on the fact that these claims "went undisputed for several hundred years . . . ."[139] Despite the fact that a majority of authority finds relatively little merit in the invocation of *uti possidetis,* one authority has concluded that the holding in the *Eastern Greenland Case* lends credence to the doctrine. The fact that the Court placed significant emphasis upon the ancient claims of Denmark, while it proportionately relaxed the requirement of occupation, it is argued, demon-

134. Jessup, *supra* note 11, at 119.
135. Hayton, *supra* note 39, at 604 n.91.
136. See note 33 *supra* and accompanying text.
137. Hayton, *supra* note 39, at 603.
138. *Claims, supra* note 16, at 396.
139. P. Jessup & H. Taubenfeld, *supra* note 4, at 146.

strates the Court's acceptance of a principle similar to the *uti possidetis* doctrine.[140] While such an argument could be advanced by Argentina, it is admittedly not a strong one.[141] In lieu of submitting discovery arguments of her own, Argentina might well attack the basis of British discovery claims on the grounds that discovery, without more, is insufficient to validate a claim of sovereignty. Reference, by analogy, to British claims in Eastern Antarctica may prove fruitful:

> Britain . . . laid claim to a great expanse of Antarctic territory in 1933, when it was stated at an Imperial Conference that the raising of the British flag at various points . . . gave that State sovereignty over "all islands and territories" within [specified] limits.[142]

Claims made in such a fashion were rejected out of hand by Judge Huber in the *Island of Palmas Case.*[143]

Argentina has also proclaimed and confirmed the establishment of primary title to Antarctic territory by means of official statements. In 1927, a Note addressed to the Director of the Universal Postal Union declared that "Argentine territorial jurisdiction extends *de jure* and *de facto* to the continental area . . . and to polar territories which have not been delimited."[144] In a Note to the Chilean Ambassador, the Argentine Minister of Foreign Relations made reference to the existence of Argentina's permanent observatory on Laurie Island and stated that Argentina is the only country " 'which maintains in real form the rule of its sovereignty in the lands of the Antarctic.' "[145] The content of these statements was repeated in subsequent official communications including a Note to the British Foreign Minister in 1953[146] and a Decree-Law published in 1957.[147]

"Argentina fully realizes that administrative organization of territory is considered a major act of sovereignty in the perfection and maintenance of titles."[148] In accordance with that realization,

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140. Daniel, *Conflict of Sovereignties in the Antarctic,* [1949] Y.B. OF WORLD AFF. 252, 267-68.

141. *Claims, supra* note 16, at 395.

142. *Validity of Claims, supra* note 18, at 119.

143. See note 19 *supra* and accompanying text.

144. U.S. NAVAL WAR COLLEGE, *supra* note 114, at 218.

145. *Id.* at 221.

146. P. JESSUP & H. TAUBENFELD, *supra* note 4, at 146 & n.41.

147. Hanessian, *Antarctica: Current National Interests and Legal Realities,* [1958] AM. SOC. INT'L L. PROC. 145, 152 n.17.

148. Hayton, *supra* note 39, at 590.

Argentina, too, has marshalled evidence of her manifestations of state authority within the disputed area. A substantial number of bases has been established in the South Shetlands, Graham Land, and Coats Land.[149] Argentina has issued special postage stamps which indicate her Antarctic claims. Of considerable significance, however, is the establishment of *permanent* outposts in the Antarctic region: "[m]ore important, actual postoffices serving the year-round bases have been in operation since 1947. Argentina's Laurie Island (South Orkneys) postoffice dates technically from 1904."[150] In light of Great Britain's failure to establish permanent bases prior to those of Argentina, the latter nation's most significant argument in regard to the principle of effective occupation is her maintenance of a permanent observatory within her designated sector. "Foremost among Argentine claims . . . is the fact of a meteorological observatory in *continuous operation since February 22, 1904,* on Laurie Island in the South Orkneys, just inside accepted 'Antarctic latitudes.' "[151] The permanent, continuous nature of this outpost has given Argentina, if not an advantage over, at least occupation arguments as persuasive as those of Great Britain. And the significance of this fact has not been lost on her competitors. "[A]ll major claimants are now following the Chilean and Argentine lead in the establishment of permanent (year-round) military, weather service and scientific encampments in order to be able to show 'continuous settlement.' "[152]

Argentina is certainly not without recourse to the *Palmas Island, Clipperton Island*, and *Eastern Greenland Cases.* The end result of the chronological development of those cases was that little more than a demonstrable intent to exercise sovereign rights is required to sustain a state's claim, provided no rival state can demonstrate a *superior* claim.[153] Given the more logical approach of the Argentine sector theory, in addition to Argentine manifestations of state authority, Argentina possesses an equal if not superior claim to that of Great Britain and therefore has met the judicial prerequisites for a valid claim to sovereignty. Argentina has not limited herself to advancing a single theory; rather, she has "alleged a valid claim on any and all theories which might be available."[154]

149. Memorial of the United Kingdom, *supra* note 1, at 31.
150. Hayton, *supra* note 39, at 588 n.26.
151. *Id.* at 587 (emphasis added); *see Claims, supra* note 16, at 396.
152. Hayton, *supra* note 39, at 599-600.
153. O. SVARLIEN, *supra* note 20, at 69.
154. *Validity of Claims, supra* note 18, at 119-20.

Argentina might well use an additional argument against the validity of the British claim: the anti-colonial pronouncements of the Monroe Doctrine as embodied in the Argentine reservation to the Rio Treaty.[155] At the time of the British application to the Permanent Court of International Justice, Argentina cited the provisions of the treaty as grounds for not submitting to the jurisdiction of the Court. She claimed that the dismantling of Argentine huts on Deception Island and the arrest of two Argentine nationals there "were acts of an 'extracontinental Power' against Argentine 'territorial Patrimony.' "[156] In regard to the Monroe Doctrine itself, the Latin American nations have asserted that it has particular application to the Western Antarctic,[157] and despite the fact that the United States has refused to recognize any claim of territorial sovereignty in the Antarctic, the American position is clearly in support of Argentina in its dispute with Britain:

> In [1939] Secretary of State Cordell Hull declared that "considerations of continental defense make it vitally important to keep for the twenty-one American Republics *a clearer title to that part of the Antarctic continent south of America than is claimed by any non-American country,*" a statement currently invoked by Chile and Argentina in their disputes with Britain.[158]

As one authority has stated, the hemispheric nature represented by such treaties and pronouncements forms a "cornerstone" of the Argentine claim to Antarctic territory.[159]

V. CONCLUSION

A critical weakness in the British position and one which is especially vulnerable to Argentine attack is the designation by Great Britain of the Falkland Islands as the hub of Antarctic activity and the linchpin of the British sector claim. The Falkland Islands, by virtue of the Letters Patent of 1908 and 1917, were made the source of administrative authority in the British Antarctic; indeed, Great Britain has underscored this fact by terming the various

155. Inter-American Treaty of Reciprocal Assistance, *done* September 2, 1947, 62 Stat. 1681 (1948), T.I.A.S. No. 1838, 21 U.N.T.S. 77 (effective Dec. 3, 1948). For full text of the Argentine reservation, see Final Act of the Inter-American Conference for the Maintenance of Continental Peace and Security, Sept. 2, 1947, 21 U.N.T.S. 116, 173, 175.

156. Hayton, *supra* note 39, at 593.

157. *Claims, supra* note 16, at 396.

158. P. JESSUP & H. TAUBENFELD, *supra* note 4, at 155 (emphasis added).

159. Hayton, *supra* note 39, at 593.

British Antarctic claims as "the Falkland Islands Dependencies."[160] By so doing, Great Britain has disadvantaged herself in two critical respects. First, she treats such territories as South Georgia and the South Sandwich Islands, both *north* of the 60th parallel, as "at most sub-Antarctic,"[161] but her acts in reference to all her Antarctic claims take place, to a significant extent, in the immediate area of these islands. Such a position has been recognized as a serious weakness in Britain's application to the Court in 1955.[162] Second, Argentina does not recognize the British claim to the Falkland Islands themselves. As long ago as 1927, Argentina declared its opposition to British occupation of the islands: "*[d]e jure,* the Archipelago of the Malvinas [Falklands] also belongs to this jurisdiction, but it cannot be exercised *de facto* because of the occupation maintained by Great Britain."[163] And in 1957, Argentina extended her administration over the Falklands, going so far as to designate Ushuaia as the capital city.[164] Regardless of the outcome of the dispute over the Falklands themselves, Great Britain's chain of sovereignty has arguably been stretched to its tenuous limit.

Finally, it must be stated that in reference to extra-legal arguments in support of her position, Argentina's case is far from inferior. The fact that the British were the first to have applied to the Court for settlement of the sovereignty issue is a sword which cuts both ways. "As Judge Lauterpacht says, applications of this nature may be mere political devices intended to embarass the state whom it is sought to make defendant."[165] Should the British move be so viewed, it may well work to the advantage of Argentina rather than Great Britain. This potential advantage, however, is a minor one when compared to the other extra-legal considerations which could well tip the balance in Argentina's favor.

World opinion is an extraordinarily potent force and one the effect of which will not be lost upon the International Court. Great Britain is faced with its image as a colonial power, and colonialism is seriously frowned upon by the world community. Argentina, on the other hand, has nationalism, with its concomitant values of self-determination and burgeoning industrialization, on its side. As

160. *Id.* at 588.

161. P. JESSUP & H. TAUBENFELD, *supra* note 4, at 313 n.1.

162. Hayton, *supra* note 39, at 597 n.67.

163. U.S. NAVAL WAR COLLEGE, *supra* note 114, at 218.

164. Hanessian, *supra* note 147, at 152.

165. R. ANAND, COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 125 (1961).

one of the world's developing nations, it cannot help but elicit sympathy and support from major powers and underdeveloped countries alike.[166] It has even been suggested, in view of the formidable potency of world opinion, that Great Britain assign her Antarctic claims in return for other considerations.[167] While Great Britain's position is far from being classified as insignificant, nevertheless "some battles, such as this one over Antarctic sovereignty, are not worth fighting."[168]

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166. Hayton, *supra* note 39, at 608.
167. *Id.*
168. *Id.* at 609.