

Melting claims: The normative force (and weakness) of territorial claims in Antarctica

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Abstract

Since 1959, the year in which the Antarctic Treaty (AT) was signed by 12 countries, the territorial claims of seven of the original signatories have remained untouched or *frozen*. In this paper, I analyze the normative force of the arguments given to support these claims, in the light of the two main types of theories of territorial rights. Moreover, I point to how we should assess them were they to *melt* – that is, were the AT to radically change or come to an end. I suggest that, on the one hand, arguments based on some past and/or present-looking connection serve to justify much more restricted types of control over much more restricted areas than the ones actually claimed. On the other hand, arguments founded upon some present or forward-looking function that the claimant fulfills to protect the territory seem more promising, but again imply heavily redrawing the contours of the original claims. In conclusion, I suggest that the normative force of the seven original territorial claims to Antarctica is only enough to get the claimants much more modest portions of the territory. This leaves pending the question of sovereignty over most of the White Continent.

Keywords

Antarctica, territorial claims, connection-based theories, function-based theories

1. Preliminaries

‘Often, among the varied topics brought forward in the cabin in the long winter evenings, arose the question of the ownership of the South Orkneys. And after many long discussions we arrived at the pleasing conclusion that even in this age of imperialism the South Orkneys had escaped the grasp of any country, and that we enjoyed the privilege of living in No-man’s Land. But I fear it is no longer so.’¹

The lines above were written in 1906, by R.N. Rudmose Brown, one of the members of a Scottish expedition that established a meteorological station on Laurie Island, in the sub-antarctic archipelago known as the South Orkneys. It was the time when seal hunting and whaling in the area were flourishing, and when the political, economic and strategic interest of a few countries over the Antarctic and sub-antarctic regions started mounting. In the decades to follow these interests (sometimes conflicting and overlapping) led to a territorial race for the White Continent – a race characterized by what the American jurist Thomas Willing Balch described as a ‘lordly, and even pontifical, fashion to dispose of islands and lands’ by some of the contestants², and by pretty desperate and childlike displays of sovereignty. Among them: painting buildings from foreign companies in the national colors³, erecting flagstaffs (and swastikas!) here and there, and leaving written claims under cairns so that they might be preserved as a proof of occupation for posterity.⁴ Official claims to the Antarctic continent

1 R.N. Rudmose Brown, author of *The voyage of the Scotia* (Edinburgh, 1906) quoted in Wilson 1964, p. 19.

2 Quoted in Winfield 1912, p. 327. Balch was referring here to what he called the ‘sweeping annexation’ of the British of much of West Antarctica (Balch 1910, p. 268).

3 This was mentioned in the British proceedings against Argentina, presented to the International Court of Justice in 1955: ‘In January, 1943, another British warship, H.M.S. Carnarvon Castle, was dispatched to the South Orkneys and South Shetlands... to investigate Press reports of purported acts of sovereignty at Deception Island by the Argentine naval transport *Primero de Mayo*. H.M.S. Carnarvon Castle landed a party at Deception Island in the South Shetlands on January 8, and there obliterated from the walls of the Hektor Whaling Company’s factory the national colours of Argentina, which appeared to have been painted on them recently by the *Primero de Mayo*, and also removed the Argentine notice of claim...’ (International Court of Justice, hereinafter ICJ 1955, p. 28).

4 Regarding the German claims, the ex officer in charge of Antarctic Affairs in the Department of State of the U.S. in 1957-8, Robert E. Wilson, recalls that ‘the German party dropped markers claiming the land for the Reich. Ernst Hermann, the geographer, later reported that the party landed on the ice shelf and raised the swastika a few hundred metres from the edge. “This is the outward sign that we Germans have trod this no-man’s land and claimed it for Greater Germany”, wrote Hermann. “The first German colony!”, he added. A “native” waddled forward to meet them and they greeted him with a “Heil Hitler!” “The penguin”, Hermann reported, was not impressed”’ (Wilson 1964, p. 21). Regarding the American claims, Wilson tells that ‘President Franklin D. Roosevelt sent Admiral Byrd [who overflew Antarctica several times] a letter of instruction dated November 25, 1939 – not made public until many years later – authorizing members of the Service to “take appropriate steps such as the dropping of written claims from airplanes, depositing such writing in cairns, etc., which might assist in supporting a sovereignty claim by the United States Government”’ (Wilson 1964, p. 21).

were made from 1908 (when the first Letter Patent from the United Kingdom was issued⁵) until 1940, when Chile proclaimed sovereignty in a section that much overlapped with the Argentinian and British claims. In between, New Zealand (1923), France (1924), Argentina (1927), Australia (1933), and Norway (1939) all posed their own claims. With the exception of Norway (who limited its claim to the coastal areas) all the others extended them all the way to the South Pole.⁶

After the end of World War II, Antarctica came to be seen as a potential site for Cold War hostilities. With this in mind, in 1958 the U.S. invited all interested countries that had participated in the International Geophysical Year of 1957-8 in Antarctica to a conference where it would be discussed how the main points of agreement among them could be kept in the future. These points were: ‘(1) that the legal *status quo* of the Antarctic Continent remain unchanged; (2) that scientific cooperation continue; (3) and that the continent be used for peaceful purposes only (‘Antarctic Treaty’, U.S. Department of State, available at <http://www.state.gov/t/avc/trty/193967.htm>, accessed April 15, 2015).

Peace, science and ‘not rattling the bar of territorial claims’ thus became the foundational values of what turned to be the Antarctic Treaty (AT), signed in 1959 in Washington by twelve countries (Hemmings 2012, p. 143).⁷ By virtue of the AT the original claims were thus *frozen*. In short, this meant that no further acts by the claimant countries (such as the building of bases, the appointment of military and/or scientific personnel, the birth of their nationals in Antarctica, etc.) would count as additional grounds for strengthening or extending the existing claims. But it also meant that no acts or activities taking place while the AT was in force would give grounds to assert new claims or deny the original ones.⁸ Signatories of the AT thus fell into three different categories: the seven original *claimants*, *non-claimants* (who could refuse or accept the claims of the former, but not make new claims), and *potential claimants* (basically the U.S and the USSR, who made no claim, recognized

5 This had to be amended in a second Letter Patent in 1917, given that it had blithely included a sizeable chunk of Argentinian and Chilean Patagonia, including much of Tierra del Fuego, under the British dominion.

6 For the purposes of this article I understand ‘Antarctica’ as comprising the land and seas below 60° South Latitude.

7 These included, apart from the original seven claimants, Belgium, Japan, South Africa, the U.S. and the USSR.

8 In full, Article IV of the Treaty stipulates that... ‘1. Nothing contained in the present Treaty shall be interpreted as: a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica; b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise; c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State’s rights of or claim or basis of claim to territorial sovereignty in Antarctica. 2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.’

none and reserved their right to make their own claim in the future).

Today, after 56 years, the AT has 29 Consultative Parties (who adopt measures, resolutions and decisions by consensus at the annual meetings), and 23 Non-Consultative Parties (who can participate in these deliberations, but have no vote). This is, 52 countries out of the 193 members of the United Nations, including China, India and Brazil. While the AT is regarded by many as a most ingenious and surprisingly successful diplomatic feat, there are also many critics who point at its growing anachronism, its lack of representativeness and at the many challenges it will have to face in the near future – among them, a renewed global interest in Antarctica, the rising number of visitors (including tourists, scientists and commercial operators), the competition for valuable natural resources (for example, through bio-prospecting), and climate change (see, for example, Peterson 1980, Loan 2004 and Dodds 2012).

In this context, it is worth asking what would happen if the seven original claims which remain *frozen* under the AT ever *melted*. In other words, what would happen to them if the AT were dropped or modified in such a way that the rattling of the bar of territorial claims revived. The main purpose of this article is thus to assess the force (or weakness) of these claims as they stood in 1959 and as they would stand today, were Antarctica's *sovereignty freeze* to come to an end. This is a necessary first step in a more complete assessment, where it remains to be seen whether – in spite of what Article IV of the AT stipulates – any acts and/or changes in circumstances between 1959 and the present ought to give rise to new claims, dispatch some of the old ones, or modify the framework of claim-making in Antarctica.

Three clarifications are in place before proceeding. First, the assessment I am interested in is normative, not political or legal. By this I mean that I am interested in exploring the different arguments from the point of view of certain universal values that we think should be upheld by agents making territorial claims – like justice, equality or the promotion of the well-being of their members. While legal and political assessments of these have abounded since the Treaty was signed (among many others see, respectively, Bernhardt 1974, Triggs 1986 and Conforti 1986; and Hemmings et al. 2012, and Dodds 2012), a normative assessment still remains to be done.⁹ While the latter may converge with the others in some respects, it may also look at the legal and political with a critical eye.

⁹ An exception is Cara Nine who, in *Global Justice and Territory*, proposes that no collective territorial rights may be meaningfully applied to Antarctica. Her analysis, however, is extremely brief (Nine 2012).

A second clarification regards the use of the word *claim*. A *claim* can refer to a normative or moral demand that may or may not be expressed through written documents, and may or may not be reflected in the actual laws and regulations. In the introduction to Section 2, where I lay out the two main types of theories of territorial rights and point to their assessment of territorial claims, I use the word in this first sense. Thereafter, however, I use the word *claim* mostly to refer to the actual demands that have been made by existing States to particular territories – independent of their normative or moral validity. To avoid confusion, it is important to keep the two senses apart.

A third clarification is that I understand the claims that have actually been made to comprise the three main aspects of territorial rights: that is, jurisdictional rights, full border control, and exclusive control of land and natural resources (Miller 2012, p. 253). In other words, I understand the arguments offered as designed to justify full sovereignty over the antarctic territories in question. The problems and challenges that I pose to the arguments offered are therefore problems and challenges for this type of claim. The conclusions could be different if what was at stake were more restricted demands – for example, to exercise jurisdiction over persons in a territory without necessarily demanding exclusive control over its available resources.

The structure of the article is as follows. I first present two main kinds of theories of territorial rights and analyze under their light the main arguments offered by the seven original claimants to the Antarctic. I then point to the limitations and challenges that these arguments confront, and finish with some reflections on what we should therefore conclude were those frozen claims to melt – i.e. were they to revive if Antarctica's sovereignty freeze came to an end.

2. Territorial claims in Antarctica

Until quite recently, the questions of what moral grounds States have for claiming a *particular* geographical territory, and what moral grounds States have *in general* for dividing almost the entire earth among them had been either overlooked or taken for granted by political theory (Simmons 2001, p. 304). During the last decade, however, a new wave of theorists emerged to address these fundamental issues. Notwithstanding their differences, their arguments can be classified under two main types.

On the one hand, *connection-based theories* purport to show that the claim to a particular territory is grounded on some normatively relevant link between the agent and *that* territory. This link can be

focused on the past (as in first occupancy theories), or in the past and present. In the latter case, theories may be based on added material or symbolic value (see, for example, Lockean theories such as those of Simmons 2001 and Nine 2012; and Kolers 2009, who develops a *sui generis* account of territorial rights founded on the concept of *plenitude*). Connection-based theories may also be based on attachment, when they stress the importance of a gradual unfolding of a common history and culture in the territory (see Meisels 2009 and Miller 2012).

On the other hand, *function-based* theories justify territorial claims in terms of the functions fulfilled by the territorial agent (paradigmatically the State) – like protecting basic human rights, or establishing property laws that comply with some basic legitimacy conditions (see, respectively, (Buchanan 2004 and Stilz 2009). Arguments that justify claims over territory on the basis of strategic considerations also fit this category – like keeping a pool of natural resources for the use of present and future generations, keeping control over a geographical area for security reasons, etc. For functionalists, then, the link between the people and the territory is seen as a contingent fact: what matters is that people have *a* territory that can enable them to fulfill certain important functions, rather than *this* or *that* territory. Moreover, they tend to focus in the present and future state of affairs rather than on the past in order to ground their claims.

Having said this, one can turn to the arguments given by the antarctic claimants and see whether they are connection or function-based. These arguments rely on first discoveries and exploration; historical and legal documents; commercial and extractive activities; effective occupation and administration; national vocation; geographic continuity and contiguity, and the Sector Principle. Below, I explain each of them briefly and give some examples of how they have been invoked by the different countries. I then classify them as connection or function-based or both, and point in the next section to the main problems and challenges that they thereby confront.

i. First discoveries and exploration

This argument is given by the British as the strongest and most powerful reason on their favor, but is also advanced by the Norwegian, French and Australians, who claim their respective sectors based on the discoveries made by their citizens. It also appears as a secondary consideration in the claims made by Chile and Argentina.

In its Proceedings against Argentina and Chile, presented to the International Court of Justice (ICJ) in

1955, the UK claimed that ‘the first discoveries of South Georgia, the South Sandwich Islands, the South Orkneys, the South Shetlands, [Coats Land] and Graham Land were all made by British nationals’ and that, on the basis of these discoveries ‘Great Britain possessed... accompanied by a formal claim in the name of the British Crown [the Letters Patent of 1908 and 1917], an original root of title to all the territories concerned (ICJ 1955, pp. 12-13). Norwegians, meanwhile, remind us that it was one of their own, Roald Amundsen, who first reached the South Pole in 1911; Australians underline their ‘pioneering work in the area of Antarctica directly to Australia’s south and south-west’ (Nicholson 1987, p. 4), as well as their participation in the main British expeditions to the area; and the French base their claim on Dumont D’Urville’s discovery of Adélie Land in 1838.

Connection-based, this argument appeals to the historical attachment of the country in question to the regions discovered and explored by its nationals. Through these discoveries and explorations, Antarctica is considered to have become part of the national imagery, while those who participated in these deeds have been turned into national heroes.

ii. Legal and historical documents

The Latin American claimants, especially Chile, argue that after they gained their independence from Spain, the principle to delimit their territories was *uti possidetis iuris* (literally, ‘as you possess under law’); that is, ‘each new republic had absolute dominion over the lands situated within the frontiers that the Mother Land had assigned to them by royal charters or other documents’ (Pinochet de la Barra 1954, p. 27). Chile goes all the way back to the Treaty of Tordesillas between the kingdoms of Spain and Portugal, in 1494, where the New World was divided between both countries by a line that ran at 370 leagues West of Cape Verde Islands, from the Arctic to the Antarctic. Even though the existence of the White Continent was at that time and until a few centuries later only speculation, every royal decree and official document since then, according to the Chilean jurist, Pinochet de la Barra, reiterated that Spanish sovereignty ran all the way down to the South Pole.

Meanwhile, whereas the UK does not ground its claim on the two Letter Patents issued in 1908 and 1917, it does underline that, by virtue of them, it became the first country to officially make a claim over Antarctica, and that the silence of the other claimants during many years equaled consent. Australia and New Zealand, finally, rely on a transfer of title from the British Empire to ground their claims. In the case of New Zealand, this goes back to 1923, when the Ross Dependency was

established and given to the Governor General of New Zealand.

Like first discoveries and exploration, the appeal to legal and historical documents underlines the special connection of these countries to Antarctica, based on historical attachment. As we have seen, this attachment did not need to be founded on any concrete and certain knowledge of the actual land, but could be limited to what the said countries hypothesized about the unknown southern continent.

iii. Commercial and extractive activities

Fishing and seal hunting in the Southern Ocean and the sub-antarctic islands were undertaken as early as the eighteenth century. It is estimated that, ‘by 1778, the British had brought back from South Georgia and other sub-antarctic islands and from the regions adjacent to the Straits of Magellan not less than 40,000 seal skins and 2,000 tons of elephant seal oil, of which only the latter were worth 40,000 pounds... In 1791, no less than 102 sailing boats of 200 tons on average, with 3,000 men, hunted seals *in the same Spanish regions* at an estimated value of 235,000 pounds’ (Pinochet de la Barra 1976, p. 74, my emphasis). And even though fishing and hunting was regulated by the Nootka Sound Convention between Spain and the UK (1790), the British continued to sail these waters in search of marine riches.

The Argentinians tell that, at the beginning of the nineteenth century, their seal hunters already frequented the sub-antarctic islands, and requested permission from their authorities ‘to exploit the valuable skins of those wretched creatures who fell by the hundreds of thousands under the mallets of avid sea merchants that hid with zeal the cold places where they carried out the slaughter’ (Daverede 1987, p. 3). Speaking on behalf of the Chileans, meanwhile, Pinochet de la Barra notes that, when seals became extinct in Tierra del Fuego, hunters continued to Cape Horn, Diego Ramírez and the South Shetlands, and that ‘[this] exploitation of the natural resources of such regions constitutes a completely satisfactory juridical basis’ for the Chilean claim (Pinochet de la Barra 1954, p. 32).

Whaling in the Southern waters, meanwhile, started growing at the end of the nineteenth century, and was carried out mainly by Norwegians, but British, Chileans, Argentinians and other nationals were also involved. By the beginning of the century, the Norwegians had already established whaling stations in Grytviken (South Georgia), and Deception Island (South Shetlands). Their remains can still be seen.

The argument from commercial and extractive activities fits function-based theories. From this

standpoint, countries could invoke their right to the territory given the latter's importance for the functioning of their economies and, ultimately, for the well-being of their population. In this regard, the claimants could underline the key role that some particular antarctic resources played within their societies. For example, whale oil was used in newly industrialized Britain to light private homes, mills, lighthouses, mines, but also street lighting, which eventually contributed to the public safety.

iv. Effective occupation and administration

In international law, this principle is commonly related to the extension of sovereignty to *terra nullius*, and it is for that reason that it has been applied to Antarctica. Its key element is that there must be some sign of State activity, especially acts of administration, but it does not necessarily require actual settlement and a physical holding. Actually, in some occasions the connection between claimant and territory can be quite tenuous (Brownlie 2008, p. 133).¹⁰

The three contenders over the Antarctic peninsula and its surrounding islands (Chile, Argentina and the UK) invoke effective State occupation in order to support their overlapping claims. In all three cases, the effectiveness of the occupation is measured both by the State regulation of economic activities in the area (through concessions, official decrees, etc.) and by the actual presence of government officials in the territories in question.

In the case of Chile, Pinochet de la Barra affirms that the inchoate title that the country had always held over Antarctic territory was perfected in 1906, when three things happened. First, the Chilean government authorized two nationals, Enrique Fabry and Domingo De Toro Herrera, by Supreme Decree, 'to occupy the south part of Chilean Tierra del Fuego and the islands Guamblin, Gordon, Hoste, Wollaston, Diego Ramírez, Shetland and those lands further south, for 25 years.' Among the obligations acquired, the concessionaires had 'to exercise the administrative acts that the Government of Chile considers necessary *to safeguard its interest in the said regions*,' bearing in mind 'the advisability of positively exercising a *due vigilance over the national goods in those regions*' (Pinochet de la Barra 1976, pp. 87-88, my emphases).¹¹ Second, the Magallanes Whaling Company (formed by a

10 To this is sometimes added that there must be an *animus possidendi* by the State; that is, a subjective intention to act as a sovereign (Brownlie 2008, p. 134). Historically, the principle of effective occupation comes from the Berlin Conference of 1884-85, to regulate European colonization and trade in Africa. To its critics, its main purpose was to justify political control over vast areas where actual control was very weak.

11 The Chilean government had been giving fishing concessions since 1902, and in 1892 it had passed a resolution setting rules for the catching of fur seals and walruses in the sub-antarctic regions (Pinochet de la Barra 1954, p. 35).

multinational group) was authorized by official decree in 1906 and operated until 1910 in Deception Island. Third, in 1906 the first official expedition to the Chilean Antarctic territories was organized, although it had to be canceled due to the earthquake that affected the northern part of the country that year. After 1906, moreover, the Chileans continued to be present in antarctic and sub-antarctic territories, and in 1916 the Chilean navy helped to rescue the survivors of Shackleton's expedition to Antarctica.

Argentina also mentions official documents and permits for seal hunting in the sub-Antarctic islands given by government officials. 'In 1818 a Buenos Aires merchant went to the Consulate – which was at that time the sea and commercial authority – asking for authorization “to hunt seals in some of the uninhabited islands close to the South Pole”' (Daverede 1987, p. 7). The authorization was granted that same year. In 1829, the Political and Military Headquarters of the Falkland Islands and the Islands Adjacent to Cape Horn was created, and during the rest of the nineteenth and beginning of twentieth century the government continued issuing permits and licenses to support commercial activities in the area. The strongest Argentinian card, however, was the administration of a meteorological station in the South Orkneys since 1904 – the oldest permanently inhabited settlement in Antarctica. Ironically enough, this was left to them by the Scottish expeditioner, William S. Bruce.

The UK also mentions granting licenses for whaling and seal hunting from 1905 onwards, including to Chilean, Argentinian and Norwegian companies. that the latter sought its permit amounted for the UK to the acceptance and recognition of its claim over those territories. Moreover, for the purposes of controlling exploitation, they created in 1906 'a detailed and comprehensive code of whaling law for the [Falkland Islands] Dependencies', and 'a somewhat less elaborate' one for seal hunting three years later (ICJ 1955, pp. 16, 17).¹² They add to this the permanent or intermittent presence of public servants: 'As early as 1909, a resident magistrate was sent to South Georgia, and there has been a British administration in that group continuously since that date. Customs and police officers were added to the magistrate's staff, and in 1912 a post office was established at Grytviken [A British colony with a Swedish name!]' They further add that customs and whaling officers spent a few months in different islands around the same period and in subsequent years (ICJ 1955, p. 19).

12 The former had as its main aim 'the conservation of stocks by regulating the number and tonnage of whaling vessels, the number of whaling licenses, the number of whales to be taken by each license-holder, by protecting whale calves and by other measures' (ICJ 1955, p. 16).

Moreover, starting with the establishment of the Argentinian meteorological station in 1904 in Laurie Island, and especially in the years after the end of the Second World War, all of the claimants set their own military bases and/or research stations in the more accessible areas of the White Continent, as a further means to strengthen their reclamations.

Effective occupation may be interpreted both as a connection or function-based argument. It is connection-based insofar as it appeals to the material value added to the territories both by the actual presence of people and by the establishment of some basic regulations directed at the management of the territory. It is function-based insofar as the claiming State administers the territory in such a way that avoids the depletion of natural resources and cares for their sustainability. By setting up a legal code of whaling and seal-hunting, for example, the UK could say to be fulfilling the important function of preserving those resources for present and future generations. And, what better display of sovereignty than responsible stewardship?

v. National vocation

Argentina in particular has used an argument based on its Antarctic *vocation* or *conscience* to further support its claim. As defined by the Argentinian representative in a big gathering of Antarctic experts and government representatives that took place in Madrid, in 1987: ‘A vocation is something that has an origin, a genesis, that is then embodied in an individual, and also in a people, and that necessarily lead to externalization... A vocation recognizes causes and has objectives. It imposes at the same time some overriding needs, and it frustrates those who possess it and cannot manifest it’ (Daverede 1987, p. 2). This vocation or conscience, subjective as it sounds, is founded, according to Daverede, on objective facts such as his country’s ‘prolonged link with Antarctica, the efforts displayed in that region by many generations of Argentinians, the resources and human lives devoted to that heroic deed’ (Daverede 1987, p. 24).

This antarctic vocation is a connection-based argument that appeals to the historical attachment of the people to the territory. It is ultimately grounded, then, on the national sensibility formed as a result of the performance of acts of discovery and exploration by one’s countrymen in the territory, or from the quest of many generations of hunters and fishermen.

vi. Geographic continuity and contiguity

Its position as the closest nation to Antarctica coupled with its geographic continuity and contiguity

have been repeatedly offered as reasons to support the Chilean claim in the White Continent. These two concepts are closely related in international law: while the principle of continuity was often invoked by colonial powers in Africa to justify control of the *hinterland* (the regions lying inland from the coasts), the principle of contiguity has been used to justify claims to land separated by water from the territory of the claimant State (Heron 1954, p. 663). In the particular case of Chile, geological continuity is also mentioned: if one sees the Antarctic Peninsula as the continuation of the Andes (which are submerged under the Drake Sea and then reappear), it has been argued by some that the dividing border between Chile and Argentina should be respected all the way down (Wilson 1964, p. 23).

The concept of gateway cities comes into the picture here as well. Punta Arenas, Ushuaia, Hobart and Christchurch are respectively mentioned by Chile, Argentina, Australia and New Zealand as their tangible connections with the White Continent. These are the cities from where the main historical expeditions started, and where the commercial traffic to and from Antarctica took place.

Geographic continuity and contiguity is a mixed argument. It is connection-based in that it appeals to the historical attachment to the antarctic territories of those living in the vicinity. It is function-based in that it underlines the strategic importance of that territory for the safety and integrity of the nearby countries.

vii. The Sector Principle

An invention of the Canadian Senator Pascal Poirier, the Sector Principle was proposed in 1907 to sort out territorial claims in the Arctic, and only by extension did it come to be used in Antarctica. In simple terms, it proposes that countries that are adjacent to the polar regions have a right to all the lands extending poleward, which makes sense for geographic, cultural-economic and strategic reasons. The way to delimit the sector is by drawing lines from the extreme ends of the circumpolar territories that converge at the pole (Pinochet de la Barra 1954, p. 42).

Based on their direct vicinity to the White Continent, Chile, Argentina and Australia drew their lines according to this principle and made the territory between them part of their claim. The UK, France and Norway, however, also appealed to it, drawing their lines from the islands under their sovereignty adjacent to Antarctica.

The Sector Principle may be justified both on connection and function-based grounds. Regarding the

former, it appeals to the historical attachment of a country to those nearby territories that are under no one else's sovereignty (in the Arctic case, it explicitly appealed to the historical presence of native inhabitants in those lands). Regarding the latter, the Sector Principle underlines the economic and strategic value that a given territory may have for a State. Guaranteeing the security of the State and the well-being of its inhabitants is thus an essential part of its rationale.

3. Problems and challenges

I have shown in the last section that the seven main arguments used by the original claimants to Antarctica are mostly connection-based or mixed (i.e. connection and function-based). While arguments based on first discovery and exploration, legal and historical documents and national vocation fit the first category, those based on effective occupation and administration, geographic contiguity and continuity, and the Sector Principle fit the second. The only argument that is only function-based is the one appealing to commercial and extractive activities.

With this in mind, here I examine some problems and challenges that these arguments face. These problems and challenges may be divided in two kinds. On the one hand, there are those that affect the arguments as they stood at the time when the AT was signed and as they would stand today if the claims melted, were the AT to come to an end. These are the boundary problem, and the arbitrariness of historical and legal documents and of the Sector Principle. On the other hand, there is a problem that did not apply to the arguments at the time when the AT was signed, but would apply today if the claims melted. This is the anachronism of the arguments based on commercial and extractive activities, and on effective occupation and administration. I suggest that, to the extent that claims are based on these grounds, they should be superseded or, at least, carefully revised. This is due to the profound environmental, economic and political changes that have taken place in the world since the AT was signed.

a. The boundary problem

The main problem for the arguments given in support of antarctic claims is the mismatch between what they present as a justification for their claims and the actual extension of the latter. This *boundary problem* affects arguments based on first discoveries and exploration, effective occupation and administration, national vocation and geographic contiguity and continuity.

The American philosopher John Simmons discusses the boundary problem in connection with the

Lockean theory of labor whereby, by mixing one's labor with the land, one comes to be the owner of the latter. But, of how much? As Simmons says, 'It is not obvious that labor can ground a clear right to *anything* if it is not possible to specify the boundaries of what is acquired by [it]' (Simmons 1992, p. 268). While Simmons's analysis is at the individual level, it is perfectly possible to pose the question of how much land a State is entitled to by virtue of 'mixing its labor' with it. In the case in point, by bringing the antarctic lands into the world map, by establishing permanent settlements and by enforcing regulations in them, countries can appeal to the *material value* they have added to Antarctica. Moreover, countries can also appeal to the *symbolic value* that the White Continent has acquired by virtue of its incorporation into the national imagery and 'vocation'.

Simmons's answer regarding Locke's theory of original appropriation is that our purposive activities help to specify the maximum possible extent of property that we get, so that '[w]e can take that which is necessary to our projects (and perhaps reasonable windfall products of these activities), but our property runs only to the boundaries of our implemented projects (and not just to whatever we might envision)' (Simmons 1992, p. 276). While acknowledging that drawing the limits of our purposive activities is in itself no easy task, one can still regard Simmons's approach as a reasonable way of specifying the boundaries in the case at hand. If not positively, this method should at least help us to determine what should definitely *not* be regarded as the proper limits of antarctic claims. By this token, countries would only be allowed to appropriate as much land as they *actually* use to implement their projects (and not just to whatever they might envision – for example, in an imperial manner, or as a way to secure their access to natural resources for the next 500 years). If this is the case, it turns out that six of the seven original claimants in Antarctica are claiming far more than what they are entitled to.¹³

The normative value of the argument of discoveries and exploration may be cashed out in at least three ways. First, following Israel Kirzner, one could argue that discoverers and explorers bring *new* natural resources into economic existence and should therefore be entitled to those resources – just as entrepreneurial discoverers create new resources *ex nihilo* and should be entitled to profit from them (Kirzner 1997). Second, one can appeal to the effort made by the first discoverers and explorers to find new lands, an effort that should be rewarded by granting them certain rights over those lands. Third, one could justify the granting of these rights instrumentally, on the hope that this will encourage further

13 Norway is the exception, claiming only the coastal areas explored, discovered and used by Norwegians.

discoveries and explorations. Having said this, however, it looks like a leap of faith (not to say an act of effrontery) to go from the assertion that one's nationals sighted some coastal land, to the appropriation of a whole chunk of continent comprising thousands of square kilometers extending inland from the sighted area. Indeed, stand-alone claims of this kind look like that of the Nozickian character, who spilled a can of tomato juice in the sea on the hope of becoming its owner (Nozick 1974, pp. 174-175).¹⁴

Regarding effective occupation and administration, it seems that these are enough to justify territorial claims in some sub-antarctic islands and very limited areas of the Antarctic Peninsula, but no more.

Next, even if we grant that a subjective criterion like a country's vocation is enough to ground a territorial claim based on the symbolic value of the land in question, it seems uphill work to show the exact extension that this vocation should give one a right to.

Finally, geographic contiguity and continuity may give countries a ground for claiming their nearest adjacent or contiguous areas, based on their historical attachment to them, or on the strategic function that they have for the countries in question. In the antarctic case, however, the problem is to determine what should count as *contiguous* and *continuous*. If one bears in mind that the closest country, Chile, lies 440 nautical miles away (708 kilometers from Cape Horn to the Antarctic Peninsula), one wonders how far these concepts may be stretched without losing their plausibility.

Summing up, just as Simmons is critical about the fact that '[m]ost current systems of property permit exclusive rights in things that are not being used by their owners and in things that are in no way centrally related to the good of self-government' (Simmons 1992, p. 277), so should one be critical, in the case of Antarctica, of the big justificatory gap between the grounds for claims and their purported scope.

14 An added challenge for the argument of first discoveries and exploration regards their factual contestability. As the Spanish jurist, Antonio R. Brotons, has put it: 'Each one can contemplate Antarctica from different latitudes and imagine, because he saw snow or an ice barrier, because he was the first to approach a nearby archipelago, or because he was the first to circumnavigate the continent, that he was Antarctica's discoverer' (Brotons 1987, p. 3). Regarding the Antarctic Peninsula, for example, there is an unresolved debate between American and British geographers as to who was the first to spot it and it is unlikely that the debate will ever be settled satisfactorily (Wilson 1964, p. 15, and Heron 1954, p. 666). The British claim that the discoverer of Graham Land was Edward Bransfield, R.N. who, in 1820, 'sighted, *in hazy weather*, the outline of parts of the Antarctic mainland and one or two coastal islands' (ICJ 1955, p. 12, my emphasis). In turn, their American contenders claim that Bransfield really saw an island, and that it was the American Captain Nathaniel Brown Palmer who that same year saw first, in more reliable weather conditions, the area that they now call Palmer Land.

While the boundary problem has been usually invoked to challenge the territorial rights of big countries with small populations, it is exacerbated in Antarctica, where the conventional ways of controlling territory hardly apply. For some international jurists, this should lead us to redefine concepts like effective occupation when it comes to antarctic claims, relaxing the standards normally applied in order to justify sovereignty nonetheless. Pinochet de la Barra quotes the Russian theorist V. Lakhtine to defend this view, saying that ‘to apply the rules of effective occupation in terrestrial lands to the polar territories “must be acknowledged as absolutely irrational”’ (Pinochet de la Barra 1976, p. 127). Starting from Lakhtine’s quote, however, it is equally plausible to propose, instead, that what one ought to do is give up the idea of States extending their exclusive territorial monopolies over Antarctica, let alone of them claiming full sovereignty where more modest versions of it would perhaps be more suitable.

b. The arbitrariness of legal documents and of the Sector Principle

Arbitrariness is many times at the heart of international law, but this fact should not deter one from asking whether, from a normative standpoint, a given treaty or resolution are defensible. With this in mind, it is hard to buy the treaty of Tordesillas from 1494, whereby the kingdoms of Spain and Portugal divided between themselves the whole ‘unconquered’ earth, all the way from the Arctic to the Antarctic. While one may respect the validity of this arrangement within its historical context and between the two parties that made it, it is a different story to accept it as founding the standing claims of some countries to Antarctica (to wit, Chile and Argentina, who affirm to have ‘inherited’ their rights from Spain).

The Sector Principle is prone to similar worries. While it might have been a good idea when it was invented, to keep the Arctic powers in check and in harmony, it is a different thing to accept its application to Antarctica today – especially bearing in mind the important disanalogies in the geographic, cultural-economic and strategic situations of the Arctic and the Antarctic. Geographically, the principle of propinquity (upon which the entire theory of polar sectors is based), has no analogous application in Antarctica, where even the closest countries are hundreds of kilometers away. Moreover, whereas all countries surrounding the Arctic have had a historic presence there (through their indigenous populations and through the exercise of different economic activities), this is not the case of the countries adjacent to Antarctica. There were no indigenous inhabitants in the White Continent, and those who carried out economic activities were not necessarily those from the neighboring countries. It

therefore seems arbitrary to apply such a principle to the antarctic case.

c. Anachronism

While the two previous challenges affect the arguments independently of their historical context, there is a third challenge for those arguments that may have been reasonable or acceptable at the time when they were formulated, but do not seem reasonable anymore. This charge of anachronism affects arguments based on commercial and extractive activities, and on effective occupation – when the focus of the latter has been the building and establishment of permanently inhabited settlements.¹⁵

To recall, one of the arguments given by Pinochet de la Barra concerning the Chilean claim acknowledges that the reason why Chilean seal hunters started visiting the sub-antarctic islands was that, by the end of the nineteenth century, the resource had been over-exploited to the point of extinction in the continental area. This led them to continue the over-exploitation southward – which counted, for this author, as a clear display of Chilean sovereignty. With the wisdom of hindsight, however, we can ask today whether it would be a good idea to grant control over a territory to a State which has behaved unsustainably and/or unresiliently in the past (Kolers 2009).¹⁶

Although it would be unfair to judge these countries for having performed these activities at a time when there was little or no environmental conscience, and research on ecological sustainability and resilience was practically non-existent, it seems reasonable to question whether these activities may serve to ground a valid territorial claim today. In other words, while economic activities that turned out to be over-exploitative and unsustainable may have grounded territorial claims in the past (absent the requisite knowledge and environmental conscience that we possess today), they may no longer ground territorial claims in the future.

The argument of effective occupation based on the existence of permanent settlements in Antarctica suffers from a similar weakness. Whereas, at its time of inception, it may not have been controversial that humans were called to inhabit and populate every corner of the earth, today there is a growing conscience that preserving certain natural areas uninhabited and minimally intervened by human beings is a good idea. Minimizing rather than maximizing human impact in Antarctica would thus seem to be a

15 As I will show in the concluding section, there is another sense in which effective occupation may ground claims in Antarctica.

16 A country that behaves *resiliently* has the ability to absorb foreseeable or not so improbable ecological shocks and get back to a state of equilibrium.

desirable goal for those making claims today.¹⁷ To be clear, I am not saying that those who succeed in minimizing human impact on the Antarctic should thereby be granted rights over it, but rather that those who do not minimize their impact should not be granted rights, or should have their claims *superseded* by the new environmental, economic and political circumstances. Climate change and the rapid loss of biodiversity, the increasing pressure over natural resources such as fresh water, the rising number of tourists and researchers in Antarctica, and the steady growth of a global political conscience are among the factors that cannot be ignored if we are to evaluate the original claims under today's lights.

4. Concluding remarks

In the famous fairy tale of the *Sleeping Beauty*, the newborn princess Aurora is cursed by a jealous fairy to die by pricking her finger in a spindle when she turns 16. Unable to destroy the spell, a good fairy manages instead to soften it, so that Aurora will not die, but sleep until a loving kiss wakes her up. As predicted, the day of her sixteenth birthday, the young and beautiful princess pricks her finger in an old spindle hidden in a corner of the castle and falls asleep, together with everyone else in the court. A hundred years pass, after which a young prince finds the castle with everyone sleeping in it, including Aurora. Struck by her beauty, he kisses her and she wakes up, together with everyone else around her. Broken the spell, they fall in love and live happily ever after.

The story of Antarctica during the last century and the beginning of this one is in some ways similar to the story of the *Sleeping Beauty*. Fearing that an escalation of military power and territorial conquest would thwart the peace in the last uninhabited continent, the Parties who signed the AT in 1959 did to some extent for Antarctica what the good fairy did for Aurora: to soften the spell by putting her to sleep. But, whereas the young princess had to wait for a hundred years to come back to life, it is hard to guess how many will take for the AT to come to an end and, consequently, for Antarctica to 'wake up' to sovereign claims again. Moreover, whereas Aurora and her surroundings were left unaffected for as long as the spell lasted, Antarctica has been changing in ways that were unpredictable back in 1959. When she wakes up, thus, it will be in a very different shape from when she went to sleep.

17 Until recently, however, some of the original claimants have still been fighting to increase the human presence in Antarctica. Perhaps the most illustrative example was the birth of the Argentinian Emilio Palma in Esperanza Base, at the tip of the Antarctic Peninsula, in 1978, followed by that of the Chilean Juan Pablo Camacho at Frei Base, in 1984. Also telling is the fact that conventional occupation through the establishment of scientific stations was until 1990 a requirement to become a Consultative Party of the AT. That year, the Netherlands challenged this requirement on environmental grounds and won (Dudeney and Walton 2012, p. 2).

With this in mind, I offer some concluding thoughts as to what should happen if (or when) today's frozen claims melt. I point to the justificatory gap of many of the arguments and the extent to which they have been superseded by the changing circumstances; the need to rethink the traditional understanding of sovereignty, and the promise of one type of function-based argument when it comes to justifying territorial rights in Antarctica.

First, as was seen in Section 3, there is a notorious justificatory gap between some of the arguments given to support the seven original territorial claims in Antarctica and the actual scope they purport to cover. While first discoveries and exploration, effective occupation and administration, national vocation, and geographic contiguity and continuity have some normative force (based mainly on the material or symbolic value that the claimants have added to the territory in question), they are a long way from justifying sovereignty over the huge extensions that have been actually claimed. At the most, I suggested, what these arguments may justify are much more restricted reclamations to some sub-antarctic islands and archipelagos, and maybe to some areas in the northern tip of the Antarctic Peninsula, but little more. This means that, if these frozen claims melted today, they should shrink dramatically, leaving most of the Antarctic Continent under no single State's sovereignty. I further suggested that at least two of the arguments given by the original claimants – i.e. those based on commercial and extractive activities and effective occupation – should be superseded. This is due to important changes in the environmental, economic and political circumstances that have taken place in the last 60 years. Despite of what Article IV of the Treaty stipulates, it is not possible to abstract oneself from these changes when evaluating the original claims in a contemporary setting.

Second, faced with the prospect of shrinking claims, some might object that – contrary to Rudmose Brown's wish in the opening quote of this article – leaving big areas of Antarctica as No-man's Land would be a bad idea not only in political and strategic terms, but also in terms of the preservation of the environment. This objection, however, relies on two questionable assumptions: namely, that only States can exercise sovereignty, and that sovereignty cannot be parceled, but must always be exercised in full. Regarding the former, however, one can think of other types of agents fulfilling this function, like for example a supra-national body. Regarding the latter, meanwhile, Antarctica could become the perfect locus for trying out novel forms of sovereignty that fall neither under a No-Man's land regime, nor under the traditional understanding of full State sovereignty. For example, one could allow the jurisdictional control of a certain State over a certain area without necessarily allowing that State to

freely exploit the natural resources in the latter (resources that could be administered by the supranational body suggested above).

Third and finally, there is one function-based type of argument that may be promising when it comes to justifying territorial claims in Antarctica today. This relates to effective occupation and administration understood as regulating and controlling the territory so as to avoid the depletion of its natural resources. What the British purportedly did to control whaling and seal-hunting in their 'Falkland Islands' Dependencies' during the 20th century fits this model. Accepting this, however, implies recognizing the normative weakness of most of the original claims, not founded upon this argument. Moreover, it implies recognizing that any claim founded upon this basis would be in effect much more limited in scope than any of the standing ones.

In conclusion, if there is any normative force in the arguments given to support the seven original *frozen* claims in Antarctica, it does not take them nearly as far as they actually go. If these claims *melted* in a post-AT world, therefore, they would justify, at the most, much more modest portions than those aspired at. This leaves pending the question of the territorial status of most of the White Continent. To answer it would require looking at what has actually happened in the world since the AT was signed, and evaluating the proposals of, for example, those who would like to see Antarctica turn into a truly global arena and a common heritage of mankind. This second part in the assessment remains to be done.

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