NATIONAL ENCOUNTERS WITH THE INTERNATIONAL COURT OF JUSTICE: AVOIDING LITIGATING ANTARCTIC SOVEREIGNTY

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This article examines the two episodes during which the International Court of Justice ('ICJ') came closest to directly considering who has sovereignty over which portion of the Antarctic continent. The first was the period from 1947 to 1955, when the United Kingdom made multiple attempts to take Chile and Argentina to the ICJ. The second was the Whaling in the Antarctic case commenced by Australia in 2010, which concerned Japan's whaling program off the Australian Antarctic Territory. Of the six countries involved in these two episodes, only the UK was favourably disposed to having the ICJ determine the question. Viewed with hindsight, it may well have worked out for the better that the Court did not rule on the matter because if UK confidence had indeed been reflected in the resultant judgment, the UK may not have been prepared to agree to art IV of The Antarctic Treaty, by which claimants agreed not to press their claims while also agreeing to accept that other states would not recognise their sovereignty on the continent. The agreement to disagree as contained in art IV has underpinned the operation of what is widely regarded as one of the most successful of international regimes.

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I INTRODUCTION

The International Court of Justice ('ICJ') has never made a determination on Antarctic sovereignty. The two episodes during which it has probably come closest to addressing the question as to who enjoys sovereignty over which portion of the Antarctic continent date from the 1950s and the 2010s. On the first occasion, the United Kingdom, one of the seven Antarctic claimant states, sought to have its own title found superior to those of Argentina and Chile, but the South American countries were able to block the issue reaching the Court. The second occasion was that on which Australia, another claimant, initiated litigation opposing Japanese whaling within the waters off the Australian Antarctic Territory ('AAT'). The case was brought on the basis of an alleged breach of art VIII of the *International Convention for the Regulation of Whaling* ('*ICRW*').[1] New Zealand intervened in the case. Of the six states encountering the Court on these two occasions, only one, the UK, wanted the Court to make a determination regarding Antarctic sovereignty.

Up to a point, the fact that only one of six states was favourably disposed to their issue reaching the Court is not so surprising, particularly on such a politically sensitive topic, but why was it the UK, why in the 1950s and with what implications for Antarctic governance? While analysis of the judicialisation of world politics over recent decades has tended to assume a simple teleology of continued judicialisation, these episodes may exemplify the limits of beneficial judicialisation. Or, rather more modestly, they may have implications for our understanding of the merits or otherwise of compulsory jurisdiction. Investigating these possibilities certainly underscores just how nuanced and highly curated each of these national encounters with the ICJ has been.

II THE CIRCUMSTANCES IN WHICH STATES CHOOSE INTERNATIONAL LITIGATION

One of the most notable developments in the international legal system of recent decades has been the growth in the number of courts and quasi-judicial institutions. The process by which courts and judges increasingly dominate politics and policy-making has been referred to as 'judicialisation'.[2] Over the last decade, however, there has been a perceived backlash against the trend towards the judicialisation of world politics. Notably, after the initial euphoria at the success of bringing into creation an International Criminal Court, the Court has come under pressure, as has the Appellate Body of the World Trade Organization, and there has been backlash against other international judicial bodies, including the Court of Justice of the European Union, the Inter-American

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[1] *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) art VIII.

[2] Karen J Alter, Emilie M Hafner-Burton and Laurence R Helfer, 'Theorizing the Judicialization of International Relations' (2019) 63(3) *International Studies Quarterly* 449. See also C Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press, 1995).

Court of Human Rights and the East African Court of Justice.[3] Some scholars have turned their attention to whether or not we are witnessing 'de-judicialisation'.[4]

Although in many ways not a 'typical' international court because of its general jurisdiction, state-centric nature and system of optional compulsory jurisdiction, the ICJ remains worthy of analysis as the classic international court, offering lessons for understanding both state behaviour and international dispute resolution. Litigation is costly and takes time, and its outcomes are ultimately unpredictable, and so the odds are, in general, weighted against states choosing to litigate. Where a state does want to embark on litigation, it may well have taken into account a number of factors including: the suitability of the issue for resolution through litigation, the potential role of the Court in levelling the playing field and/or potentially encouraging the other state/s to settle out of court, the impact of the potential case on domestic public opinion, whether litigation could serve as a useful delaying tactic or whether it might actually worsen the dispute, and whether recourse to litigation could be expected to impact global public opinion and whether or not that would be useful.[5] By far the most important considerations, however, are likely the most obvious: the (relative) strength of the state's legal position and whether or not the Court would have jurisdiction to hear the matter.

III ANTARCTIC SOVEREIGNTY AND THE ANTARCTIC TREATY SYSTEM

Antarctica is today formally governed by the Antarctic Treaty System ('ATS'), which was established by *The Antarctic Treaty* of 1959 ('*Antarctic Treaty*').[6] The 12 original signatories were those states that had participated in scientific research in Antarctica during the 1957–58 International Geophysical Year: Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union ('USSR'), the UK and the United States.

At the time that the *Antarctic Treaty* was concluded, seven states claimed rights to territory in Antarctica, with Argentina, Chile and the UK asserting rights to overlapping sections of the continent. Australia, France, New Zealand, Norway and the UK mutually recognised each other's claims,[7] and Chile and Argentina each recognised the other's right to territory, although they did not

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[3] See generally Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, 'Special Issue — Resistance to International Courts: Introduction and Conclusion' (2018) 14(2) *International Journal of Law in Context* 193.

[4] Daniel Abebe and Tom Ginsburg, 'The Dejudicialization of International Politics?' (2019) 63(3) *International Studies Quarterly* 521.

[5] Shirley V Scott, 'Litigation versus Dispute Resolution through Political Processes' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Balance* (Cambridge University Press, 2014) 24.

[6] *The Antarctic Treaty*, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961) ('*Antarctic Treaty*'). The ATS consists of 'the *Antarctic Treaty*, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments': *Protocol on Environmental Protection to the Antarctic Treaty*, opened for signature 4 October 1991, 2941 UNTS 9 (entered into force 14 January 1998) art 1(e).

[7] Karen N Scott and David L Vanderzwaag, 'Polar Oceans and Law of the Sea' in Donald R Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) 724, 738 n 91.

recognise the specific boundaries of the other's territory. The *Antarctic Treaty* addressed the question of sovereignty in Antarctica in art IV, which states:

> 1. Nothing contained in the present treaty shall be interpreted as:
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> (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 States right 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.[8]

Article IV constituted an agreement to disagree regarding Antarctic sovereignty, sometimes colloquially referred to as a 'freezing' of the claims. It was designed to provide for ongoing international cooperation and usage of the continent despite there being several sets of contradictory positions in respect of territorial sovereignty.[9] In addition to the competing positions of the so-called 'claimants', there are at least three other sets of positions. The US and the USSR had reserved their right to make a claim but had not done so. Japan had renounced territorial rights in Antarctica. Belgium and South Africa had not made a claim nor asserted a basis of claim but had declared a right to be involved in any international settlement of the issue.[10]

The ATS is thus premised on non-resolution of the sovereignty question. During negotiations for the *Antarctic Treaty*, the US nevertheless sought to include a provision for the compulsory jurisdiction of the ICJ.[11] At least three states — Argentina, Chile and the USSR — opposed this.[12] Article XI of the *Antarctic Treaty* provides that in the event of a dispute concerning the interpretation or application of the Treaty, the states concerned shall seek to settle it by negotiation, inquiry, mediation, conciliation, arbitration, judicial

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8 *Antarctic Treaty* (n 6) art IV.

9 See, eg, Stuart Kaye, Michael Johnson and Rachel Baird, 'Law' in Marcus Haward and Tom Griffiths (eds), *Australia and the Antarctic Treaty System: 50 Years of Influence* (University of New South Wales Press, 2011) 97, 111.

10 Shirley V Scott, 'Antarctic: Competing Claims and Boundary Disputes' in Karen N Scott and David L VanderZwaag (eds), *Research Handbook on Polar Law* (Edward Elgar Publishing, 2020) 147.

11 'Evidence before the United States' Senate concerning the Scope of the Antarctic Treaty, 14 June 1960' in WM Bush (ed), *Antarctica and International Law: A Collection of Inter-State and National Documents* (Oceana, 1982–88) vol 1, 112, 113.

12 Robert D Hayton, 'The Antarctic Settlement of 1959' (1960) 54(2) *American Journal of International Law* 348, 363 n 49.

settlement or other peaceful means. If the dispute remains unresolved, it shall, with the consent of the parties concerned, be referred to the ICJ, 'but failure to reach agreement on reference to the International Court shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1'.[13]

Articles IV(1)(a) and (b) ostensibly protect the position of the 'claimants', and yet, given the limits on exercising the jurisdictional rights usually associated with sovereignty, it could have been anticipated that art IV(1)(c) might, in practice, serve to weaken their position. In the decades since the establishment of the ATS, there have been several challenges to the ATS, including that by which Malaysia called for the ATS to be replaced by the United Nations,[14] but the ATS has withstood every such challenge.

IV OCCASIONS ON WHICH THE ICJ HAS COME CLOSEST TO ADDRESSING THE ISSUE OF ANTARCTIC SOVEREIGNTY

The first occasion on which the ICJ came relatively close to addressing the issue of Antarctic sovereignty pre-dates the *Antarctic Treaty*, while the ATS was a mature institution by the time Australia initiated the *Whaling in the Antarctic* ('*Whaling*') case in 2010. Of the six litigants or potential litigants involved in these episodes, five were states claiming territory, and one was a non-claimant that had renounced any title to Antarctic territory. As might be expected, most states sought to avoid a determination of Antarctic sovereignty during these episodes. Interestingly, however, the odd one out was not the non-claimant but one of the claimants. This section will review what happened on each occasion and how all but the UK sought to avoid the issue coming before the ICJ, and the following section seeks to answer: why the UK and why in the 1950s?

A *UK Attempts to Have Its Antarctic Title Recognised by the ICJ, 1947–55, and Resistance by Argentina and Chile*

The UK displayed apparent enthusiasm to have the ICJ determine the sovereignty of the Falkland Islands Dependencies.[15] Between 1947 and 1955, the UK proactively sought to have the Court hear the matter on multiple occasions.[16] The first such occasion was in 1947, when by notes of 17 December, the UK

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13 *Antarctic Treaty* (n 6) art XI.

14 See, eg, Marcus Haward and David Mason, 'Australia, the United Nations and the Question of Antarctica' in Marcus Haward and Tom Griffiths (eds), *Australia and the Antarctic Treaty System: 50 Years of Influence* (University of New South Wales Press, 2011) 202, 205.

15 See below nn 66–70 and accompanying text on the relationship between the Falkland Islands and the Antarctic territory claimed by the UK.

16 Interestingly, the UK government would appear to have not wanted the sovereignty of the Falkland Islands to be subjected to the Court's jurisdiction. The UK accession to the *General Act (Pacific Settlement of International Disputes)* and reservation to the optional clause of the *Statute of the Permanent Court of International Justice* had stipulated that the dispute must be 'with regard to situations or facts subsequent to the said ratification', and UK legal advice of 1933 pointed out that the UK had been in possession of the islands for a century previously: see 'Opinion concerning the British Reservation to the Optional Clause of the Statute of the Permanent Court of International Justice to Exclude Disputes regarding the Falkland Islands and South Orkney Islands' (19 December 1933) (Antarctic Documents Database, AU-ATADD-1-BB-GB-58).

government invited Argentina and Chile to invoke the jurisdiction of the ICJ.[17] Neither Argentina nor Chile had accepted the compulsory jurisdiction of the ICJ. The UK government reiterated its proposal to submit the dispute to the ICJ by a note of 23 December 1947, asserting that

> [a]s in the case of Gamma Island, and any other part of the Falkland Islands Dependencies, His Majesty's Government are prepared to accept the jurisdiction of the International Court of Justice at The Hague should the Argentine Government wish to dispute His Majesty's Government's title to Deception Island, and are therefore willing that the Argentine Government should institute proceedings at The Hague.[18]

Argentina rejected Britain's proposal, expressing confidence in its own position and that of Chile, and suggesting instead the establishment of an international conference to 'determine the juridico–political status of [the Antarctic] region'.[19] Chile also rejected the proposal, asserting that

> its rights in the American Antarctic are securely bound to the principles of Continental security and that in defending them unhesitatingly they are merely carrying out the obligations which they have contracted in respect of these principles.[20]

In a press statement of 4 March 1948, the Minister of Foreign Affairs of Argentina similarly stated that '[i]t is opportune to point out that Argentine titles have sufficient legal force to defeat any others which might be presented'.[21]

The UK asked Argentina again on 30 April 1951, in a note formally protesting Argentina's establishment of posts in the Antarctic Peninsula.[22] The situation deteriorated, and, by a note of 16 February 1953, the UK government informed the Argentine government of steps that had been taken to remove Argentine buildings and personnel from Deception Island and reiterated that the dispute be submitted to the ICJ, adding that 'failure to do this places on the

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17 'British Note to Argentina Protesting at Argentine Activities within the Falkland (Malvinas) Islands Dependencies Together with an Outline of the Grounds for the British Claim and a Proposal to Submit the Dispute to the International Court of Justice' (17 December 1947) (Antarctic Documents Database, AU-ATADD-1-BB-AR-244); 'British Note to Chile Protesting at the Establishment of a Chilean Base on Greenwich Island in the South Shetland Islands Outlining the Grounds for the British Claim and Proposing to Submit the Dispute to the International Court of Justice' (17 December 1947) (Antarctic Documents Database, AU-ATADD-1-BB-CL-51).

18 'British Note to Argentina concerning Argentine Activities in the South Shetlands Islands Together with an Outline of the Grounds for the British Claim to Those Islands' (23 December 1947) (Antarctic Documents Database, AU-ATADD-1-BB-AR-247) 232–3.

19 'Argentine Note to the United Kingdom Rejecting British Protests at the Establishment of Argentine Stations on Gamma and Deception Islands and Declining to Submit the Dispute to the International Court of Justice' (28 January 1948) (Antarctic Documents Database, AU-ATADD-1-BB-AR-248) 237.

20 'Chilean Note to the United Kingdom Rejecting the British Protest at the Establishment of a Chilean Station in the South Shetland Islands and Declining to Submit to the Dispute of the International Court of Justice' (31 January 1948) (Antarctic Documents Database, AU-ATADD-1-BB-CL-54) 240.

21 'Argentina, Statement by the Foreign Affairs Minister concerning Antarctica in a Press Conference' (4 March 1948) (Antarctic Documents Database, AU-ATADD-1-BB-AR-119).

22 'British Note to Argentina Protesting at the Establishment of Argentine Bases in Paradise Harbour and Marguerite Bay, Antarctic Peninsula' (30 April 1951) (Antarctic Documents Database, AU-ATADD-1-BB-AR-266).

Argentine Government the sole and entire responsibility for any consequences that may ensue from their activities in this area'.[23] A similar note was sent to Chile concerning actions taken to remove Chilean personnel and buildings from Deception Island.[24] Argentina[25] and Chile[26] once again rejected the UK proposal to submit the dispute to the Court.

By a note of 21 December 1954, the UK invited Argentina and, by a separate note of the same date, Chile to agree to an independent ad hoc arbitral tribunal. The UK went on to state that in the event that Argentina (or Chile) failed to accept the offer of arbitration, it 'reserved the right to take such steps as might be open to it'.[27] Argentina and Chile responded by notes of 4 May 1955, rejecting the UK proposal to submit the dispute to an ad hoc arbitral tribunal and expressing their categorical denial of the jurisdiction of the Court to adjudicate on the dispute without their express consent.[28]

In May 1955, the UK submitted to the ICJ applications instituting proceedings against Argentina and Chile, with jurisdiction to be on the basis of *forum prorogatum*.[29] By letters of 15 July 1955[30] and 1 August 1955,[31] Chile and Argentina, respectively, denied the Court jurisdiction. On 31 August 1955, the UK acknowledged to the Registrar that the replies of Argentina and Chile meant rejection of jurisdiction,[32] and, by orders of 16 March 1956, the Court ordered that the cases be removed from the list.[33]

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23 'British Note Informing the Argentine Government of Actions to Remove Argentine Personnel and Buildings from Deception Island, South Shetland Islands' (16 February 1953) (Antarctic Documents Database, AU-ATADD-1-BB-AR-277) 219.

24 'British Note to Chile Informing the Chilean Government of Action Taken to Remove the Chilean Building from Deception Island, South Shetland Islands' (16 February 1953) (Antarctic Documents Database, AU-ATADD-1-BB-CL-65).

25 'Argentine Note to the United Kingdom Protesting at British Action to Remove Argentine Personnel and Buildings from Deception Island, South Shetland Islands' (20 February 1953) (Antarctic Documents Database, AU-ATADD-1-BB-AR-279).

26 'Chilean Note-Verbale to the United Kingdom Protesting at British Actions to Remove a Chilean Building from Deception Island, South Shetland Islands' (20 February 1953) (Antarctic Documents Database, AU-ATADD-1-BB-CL-66).

27 'Application Instituting Proceedings against the Argentine Republic', *Antarctica (United Kingdom v Argentina)* [1956] ICJ Pleadings 8, 35–6 [40]–[41].

28 'Argentine Note to the United Kingdom Giving Reasons for Rejecting the British Proposals to Submit the Dispute over Antarctica to Judicial Settlement' (4 May 1955) (Antarctic Documents Database, AU-ATADD-1-BB-AR-281); 'Chilean Note to the United Kingdom Giving Reasons for Rejecting the British Proposals to Submit the Dispute over Antarctica to Judicial Settlement' (4 May 1955) (Antarctic Documents Database, AU-AU-ATADD-1-BB-CL-68).

29 'Application Instituting Proceedings against the Argentine Republic' (n 27) 36 [41]; 'Application Instituting Proceedings against the Republic of Chile', *Antarctica (United Kingdom v Argentina)* [1956] ICJ Pleadings 48, 73–4 [39]–[40].

30 'Le Ministre du Chili aux Pays-Bas au Greffier' [Minister of Chile to the Netherlands to the Registrar], *Antarctica (United Kingdom v Argentina)* [1955] ICJ Pleadings 94.

31 'L'Ambassadeur d'Argentine aux Pays-Bas au Greffier' [Ambassador of Argentina to the Netherlands to the Registrar], *Antarctica (United Kingdom v Argentina)* [1955] ICJ Pleadings 91.

32 'The Agent for the Government of the United Kingdom to the Registrar', *Antarctica (United Kingdom v Argentina)* [1956] ICJ Pleadings 97.

33 *Antarctica (United Kingdom v Argentina) (Order on 16 March 1956)* [1956] ICJ Rep 12; *Antarctica (United Kingdom v Chile) (Order on 16 March 1956)* [1956] ICJ Rep 15.

B *Australia's Avoidance of a National Encounter over the Australian Antarctic Territory: The Whaling Case*

The *Whaling* case[34] affords an interesting example of a proactive national encounter on an issue related to Antarctic sovereignty being managed by Australia so as to successfully avoid the Court giving any consideration to the question. Australia might likely never have moved to initiate international litigation were it not for the AAT, and yet the Australian government approached the case with a view to minimising any possibility of the case prompting scrutiny of its Antarctic claim. In its statement of claim, Australia alleged that the Japanese Whale Research Program under Special Permit in the Antarctic, Phase II ('JARPA II') was in breach of the obligations assumed by Japan under the *ICRW*, the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* and the *Convention on Biological Diversity*, and that the program could not be justified under art VIII of the *ICRW*.[35]

Australia had sought to regulate, restrict or halt Japanese whaling in the Southern Ocean virtually from when it began in 1934,[36] only one year after the AAT had been established by an Order in Council.[37] On 24 August 1936, a proclamation was issued, bringing into operation the *Australian Antarctic Territory Acceptance Act 1933* (Cth).[38] Australia proclaimed an exclusive economic zone ('EEZ') off the AAT in 1994.[39] Section 225 of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) established the Australian Whale Sanctuary ('AWS'). It is an offence to kill, injure, take, interfere with, treat or possess whales without an Australian permit within the declared EEZ off the AAT.[40]

Australia invoked the jurisdiction of the ICJ on the basis of both countries having made a declaration under art 36(2) of the *Statute of the International Court of Justice*. Australia's optional clause declaration of 2002 excepted, inter alia:

> (b) any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental

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34 *Whaling in the Antarctic (Australia v Japan; New Zealand intervening) (Judgment)* [2014] ICJ Rep 226.

35 'Application Instituting Proceedings Filed in the Registry of the Court on 31 May 2010', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 31 May 2010) 16–18 [35]–[39]. In the oral proceedings, Australia referred only to the *ICRW*: Bill Campbell, 'Australia's Engagement with the International Court of Justice: Practical and Political Factors' (2021) 21(3) *Melbourne Journal of International Law* 596, 609.

36 Shirley V Scott and Lucia Meilin Oriana, 'The History of Australian Legal Opposition to Japanese Antarctic Whaling' (2019) 73(5) *Australian Journal of International Affairs* 466.

37 'Order in Council Placing Certain Territory in the Antarctic Seas under the Authority of the Commonwealth of Australia' in WM Bush (ed), *Antarctica and International Law: A Collection of Inter-State and National Documents* (Oceana, 1982–88) vol 3, 142, 142–3.

38 Commonwealth, *Commonwealth of Australia Gazette*, No 70, 24 August 1936, 1553.

39 Commonwealth, *Gazette: Special*, No S 290, 29 July 1994.

40 *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) ss 229, 229B, 229D–230.

> shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation …[41]

Japan argued that the whaling dispute fell within this reservation. Pointing to the choice of word 'or' in the above paragraph, Japan noted that while the dispute did not relate to the delimitation of maritime zones, it did relate to the 'exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation'.[42] The counter-memorial explained that this was so

> because the JARPA II programme [was] taking place in or around maritime areas Australia claims to be part of its exclusive economic zone (EEZ), the rights of which are generated, according to Australia's claims, by its purported sovereignty over a large part of the Antarctic continent.[43]

The ICJ nevertheless found that both parts of the paragraph required there to be a dispute between the parties concerning maritime delimitation,[44] and, according to the Court, two states can be involved in a delimitation dispute only if they have overlapping claims.[45] This distinction between disputation and contestation means that, even though Japan contests Australia's Antarctic maritime claims, the dispute in question did not fit within Australia's reservation to disputes relating to disputed areas.[46] The ruling on jurisdiction was unanimous.

The way in which Australia constructed its legal claim went a long way to also avoid the consideration of Antarctic sovereignty in the ruling on the merits. The Australian government may be opposed to all lethal whaling, but Australia's application of 31 May 2010 restricted the geographical area of Japan's whaling operations through reference only to the Japanese Whale Research Program under Special Permit in the Antarctic ('JARPA'), not Japan's whaling program in the North Pacific. Donald Rothwell has explained that this was primarily because Australia has a 'direct interest' in activities conducted offshore the AAT in a way that it does not in relation to the North Pacific.[47] Australia avoided mention of the AAT and instead invoked an obligation *erga omnes partes* of

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41 'Declarations Recognizing the Jurisdiction of the Court as Compulsory: Australia', *International Court of Justice* (Web Page, 22 March 2002) <https://www.icj-cij.org/en/declarations/au>, archived at <https://perma.cc/U3GN-P329>. For Japan's declaration, see 'Declarations Recognizing the Jurisdiction of the Court as Compulsory: Japan', *International Court of Justice* (Web Page) <https://www.icj-cij.org/en/declarations/jp>, archived at <https://perma.cc/QU58-FLQ6> ('Declarations Recognizing as Compulsory the Jurisdiction of the Court (Japan)').

42 'Counter-Memorial of Japan', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 9 March 2012) 29 [1.15].

43 Ibid.

44 *Whaling in the Antarctic* (n 34) 244–5 [37].

45 Ibid 245–6 [39].

46 Ibid. Following the case, Japan introduced a reservation to its optional clause declaration to exclude 'any dispute arising out of, concerning, or relating to research on, or conservation, management or exploitation of, living resources of the sea': see 'Declarations Recognizing as Compulsory the Jurisdiction of the Court (Japan)' (n 41) para 3.

47 See Donald R Rothwell, 'The Whaling Case: An Australian Perspective' in Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment* (Brill, 2016) 271, 289–90.

states party to the *ICRW*.[48] Neither party referenced Australia's choice not to challenge Japan's conduct under JARPA II.[49]

Australia had arguably assumed a certain risk that the *Whaling* case would draw unwelcome international attention to its Antarctic sovereignty claim and to the delicate balance regarding sovereignty underpinning the ATS. And, because of previous domestic litigation,[50] there was a need to distinguish between, on the one hand, the application of international law and the provisions of the *ICRW* with respect to JARPA II, and, on the other, the application of Australian law by Australian courts.[51] The potential value of the case was not a foregone conclusion given that legal advice to the Howard government had been that its prospects were marginal.[52] It had not even been clear that a win in court would remove whaling as an issue in Australia–Japan relations.[53] In any event, Japan immediately announced that it would comply with the ruling[54] and did not undertake Southern Ocean whaling during the 2014–15 season, although the government of Japan did not announce an end to Antarctic whaling until 26 December 2018.[55] Even then, Japan also stated its intention to conduct commercial whaling within its territorial sea and EEZ and to withdraw from the International Whaling Commission.

V Analysis: Why Was the UK the Only One of Six States Predisposed to an ICJ Determination on Antarctic Sovereignty?

Being able to look at six national experiences across two episodes facilitates consideration of the reasons behind a state's willingness to have an encounter with the ICJ and its contentious jurisdiction. Given that the default position appears to be that a country turns to international litigation only as a last resort,[56] the avoidance of the issue by Australia and New Zealand is unsurprising. It is worth briefly considering the likely reason as to why Japan avoided the issue, but of most interest was the seeming enthusiasm of the UK to have the Court determine the matter. Given that Japan effectively lost the *Whaling* case but, being a non-claimant, conceivably had little to lose by playing the sovereignty card, it is worth considering the degree of legal confidence of both Japan and the

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48 Margaret A Young and Sebastián Rioseco Sullivan, 'Evolution through the Duty to Cooperate: Implications of the *Whaling* Case at the International Court of Justice' (2015) 16(2) *Melbourne Journal of International Law* 311, 316–17.

49 Ibid.

50 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425.

51 See Rothwell (n 47) 293.

52 Campbell (n 35) 598–9. See also Shirley V Scott, 'Australia's Decision to Initiate *Whaling in the Antarctic*: Winning the Case versus Resolving the Dispute' (2014) 68(1) *Australian Journal of International Affairs* 1, 6 ('Australia's Decision to Initiate *Whaling in the Antarctic*').

53 Scott, 'Australia's Decision to Initiate *Whaling in the Antarctic*' (n 52) 6.

54 'Japan to Accept Anti-Whaling Ruling, Says Abe', *The Japan Times* (online, 2 April 2014) <https://www.japantimes.co.jp/news/2014/04/02/national/abe-japan-to-accept-anti-whaling-ruling/>, archived at <https://perma.cc/5E55-5RCT>.

55 'Statement by Chief Cabinet Secretary' (Media Release, Ministry of Foreign Affairs of Japan, 26 December 2018) <https://www.mofa.go.jp/ecm/fsh/page4e_000969.html>, archived at <https://perma.cc/B3Z8-VNBG>.

56 Hilary Charlesworth and Margaret A Young, 'National Encounters with the International Court of Justice: Introduction to the Special Issue' (2021) 21(3) *Melbourne Journal of International Law* 502, 508, discussing Richard Rowe, 'The Diplomatic Dimension: Australia and the *Nuclear Tests* Case' (2021) 21(3) *Melbourne Journal of International Law* 536.

UK before going on to consider other reasons for the attitude of the UK, including the timing of the first episode.

A *Japanese Confidence in the Legality of Its Antarctic Whaling and UK Confidence in the Strength of Its Legal Title to Graham Land*

Although the adroitness with which Australia approached the *Whaling* case meant that there was no obvious avenue by which Antarctic sovereignty was to come to the fore, Japan could potentially have sought to deflect the attention of the bench from its killing of whales to what it might have portrayed as Australian pretensions in claiming the AAT. Japan did refer to Australia's 'purported' sovereignty[57] but did not highlight the issue. Given that this episode took place during the life of the ATS, during which sovereignty is formally a non-issue, it is not obvious how it might have helped Japan to do so. In any event, Japan was very confident in the legality of its Antarctic whaling program and expected its arguments to prevail in court. Foreign Minister Katsuya Okada reportedly suggested internally in 2010 that litigation would actually be helpful because it would confirm that the whaling program was on firm ground.[58]

So far as the UK is concerned, it is true that in the decade following World War II, the UK, with the backing of British international lawyers including CHM Waldock, Chichele Professor of Public International Law at the University of Oxford,[59] was confident in the strength of UK legal rights to Antarctic territory. The UK, on a number of occasions, energetically asserted that the refusal of Argentina and Chile to proceed to court derived from their lack of confidence in their position. Commenting on the rejection by both Argentina and Chile of the first post-World War II British proposal to refer the dispute to the ICJ, a British government official told the UK Parliament that this could only be regarded as 'evidence that [the Argentine and Chilean governments] have no confidence in their ability to dispute [the British] legal title'.[60] A British note of 5 July 1952 asserted similarly that Argentina's failure to accept the jurisdiction of the ICJ 'casts doubt upon the confidence of the Argentine Government in the validity of their claim'.[61] References by the UK to Argentina's 'pretensions to exercise sovereignty' over Graham Land in the application instituting proceedings appeared designed to scoff at the Latin American position:[62]

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57 'Counter-Memorial of Japan' (n 42) 29 [1.15].

58 'Rudd Says Zero "Commercial" Whaling in Southern Ocean by November or Else', *WikiLeaks* (Web Page, 19 February 2010) <http://wikileaks.org/cable/2010/02/10CANBERRA118.html>, archived at <https://perma.cc/QLU3-RNGR>.

59 CHM Waldock, 'Disputed Sovereignty in the Falkland Islands Dependencies' (1948) 25 *British Yearbook of International Law* 311. See also CR Symmons, 'Who Owns the Falkland Island Dependencies in International Law? An Analysis of Certain Recent British and Argentinian Official Statements' (1984) 33(3) *International and Comparative Law Quarterly* 726, 728, 735–6.

60 United Kingdom, *Parliamentary Debates*, House of Commons, 16 February 1948, vol 447, cols 822–3 (Mr McNeil).

61 'British Note to Argentina Protesting at the Establishment of Argentine Stations and Other Facilities at Hope Bay and Elsewhere within the Falkland (Malvinas) Islands Dependencies' in WM Bush (ed), *Antarctica and International Law: A Collection of Inter-State and National Documents* (Oceana, 1982–88) vol 1, 693.

62 'Application Instituting Proceedings against the Argentine Republic' (n 27) 38.

> The United Kingdom Government … considers that the manifest priority in time of the British possession of the territories, dating back to periods varying between 110 and 180 years ago, and the complete absence during virtually the whole of those periods, until a quite recent date, of any activities of a sovereign character, other than British, in the territories, is indicative of a self-evident British title, which it is for any country challenging that title to rebut.[63]

1 *Was UK Confidence Warranted?*

It was apposite that the UK was confident of a positive outcome from litigation. The UK was an experienced participant in ICJ proceedings, being involved in all major cases before the ICJ from the late '40s until the mid-'50s,[64] and it had been closely involved in the evolution of the world court since the drawing up of the *Statute of the Permanent Court of International Justice*.[65] The law applied by the UK was the law of territorial acquisition as developed through the new imperialism of about 1870–1910, through which European states gained extensive territory on the African continent. Territorial acquisition was based on discovery, followed by annexation and effective occupation, although there was some debate as to how much occupation was required in the case of non-populated territory. The acquisition of Antarctic territory by Australia, France, Great Britain, New Zealand and Norway was something of a postscript to that imperial episode.

There is an historical link between the UK claim to Graham Land on the Antarctic continent and its claim to the Falkland Islands.[66] According to a document prepared by the British government in 1926, the 'first step taken to assert British control over any part of the Antarctic mainland' was the creation of the Falkland Islands Dependencies by Letters Patent of 21 July 1908.[67] The Falkland Islands Dependencies included South Georgia, the South Orkney Islands, the South Sandwich Islands, the South Shetland Islands and parts of

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63 Ibid 37. An almost identical paragraph was included in the UK's application instituting proceedings against Chile: 'Application Instituting Proceedings against the Republic of Chile' (n 29) 74 [42].

64 Margaret A Young, Emma Nyhan and Hilary Charlesworth, 'Studying Country-Specific Engagements with the International Court of Justice' (2019) 10(4) *Journal of International Dispute Settlement* 582, 593.

65 Ibid 594.

66 The legal link between the British Antarctic claim and the Falkland Islands was severed when the British Antarctic Territory was established by statutory instrument in 1962, to consist of the British-claimed Antarctic mainland territory, the South Shetland Islands and the South Orkney Islands: *British Antarctic Territory Order in Council 1962* (UK) SI 1962/400, ord 3; JES Fawcett, 'The Falklands and the Law' (1982) 38(6) *World Today* 203, 203. FM Auburn speculated in 1982 that the objective of the 1962 separation of the two may have been to insulate British Antarctica from any future settlement with Argentina over the Falkland Islands. Auburn considered that the separation might in fact serve to weaken the claim of the UK to the Antarctic: FM Auburn, *Antarctic Law and Politics* (C Hurst & Company, 1982) 55.

67 Imperial Conference (Foreign Policy and Defence) Sub-Committee, Committee of Imperial Defence, 'British Policy in the Antarctic' (1926) (The National Archives, CAB 32/44).

mainland Antarctica.[68] Letters Patent of 1917 clarified the extent of Graham Land.[69] British title to the Dependencies does not derive from the Falkland Islands, however, and the UK has emphasised on a number of occasions, including during the Falklands War, that Graham Land had been treated as a Dependency 'only for reasons of administrative convenience'.[70]

In its 1955 application to the ICJ, the UK contended that it 'possesses, and at all material dates has possessed', sovereignty over the territories of the Falkland Islands Dependencies, and in particular the South Shetland Islands and Graham Land.[71] It summarised the basis of this contention as being: historic British discoveries, 'long-continued and peaceful display of British sovereignty' in and in regard to those territories, the incorporation of these territories in the dominions of the British Crown and their formal constitution in Royal Letters Patent of 1908 and 1917 as the Falkland Islands Dependencies.[72]

The international law regarding how to effect sovereign title to uninhabitable territory was not settled in the early 20th century. During the interwar period, the UK's position appeared to gain support from, inter alia, the award in the *Clipperton Island* arbitration[73] as well as the judgment in the *Legal Status of Eastern Greenland* case before the Permanent Court of International Justice.[74] Both emphasised the *relative* degree of exercising sovereign rights as more important than a settled population. According to the UK government, administrative acts, including for example a 1906 whaling ordinance, had not been protested by Argentina and Chile, whose nationals had generally respected the whaling ordinances.[75] It was reasonable for the UK to be confident of the legality of its position.

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68 After ratification of *The Antarctic Treaty*, Robin Edmonds, who was Assistant Head of the American Department,

> was instrumental in proposing that a British Antarctic Territory be created which would have the effect of separating (geographically and legally) British claims to the Falkland Islands and remaining Dependencies from those to the Antarctic peninsula and the South Shetlands.

Klaus Dodds, 'The End of a Polar Empire? The Falkland Islands Dependencies and Commonwealth Reactions to British Polar Policy, 1945–61' (1996) 24(3) *Journal of Imperial and Commonwealth History* 391, 412 ('The End of a Polar Empire?').

69 'Letters Patent Providing for the Further Definition and Administration of the Falkland (Malvinas) Islands Dependencies' in WM Bush (ed), *Antarctica and International Law: A Collection of Inter-State and National Documents* (Oceana, 1982–88) vol 3, 264, 265.

70 Symmons (n 59) 727.

71 'Application Instituting Proceedings against the Republic of Chile' (n 29) 74 [43(1)].

72 Ibid.

73 'Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island' (1932) 26(2) *American Journal of International Law* 390, 394.

74 *Legal Status of Eastern Greenland (Denmark v Norway) (Judgment)* [1933] PCIJ Rep (ser A/B) No 53, 46.

75 Symmons (n 59) 729.

2 *The South American Perspective*

Although Argentina and Chile expressed some views during the course of the diplomatic correspondence, there is no equivalent statement from that period by Argentina or Chile as to the precise basis of their asserted territorial rights on the Antarctic continent.[76] Argentina and Chile had viewed Antarctica rather differently than had the UK and can be understood as having operated within a South American regional regime.[77] Spain had acquired the land that became Chile and Argentina during a previous wave of imperialism. Chile and Argentina, which gained their independence in 1810 and 1816 respectively, both considered themselves to have inherited all the land that had belonged to Spain, such that their territory extended to the South Pole. They agreed that no terra nullius remained and that they would tolerate no future colonisation or foreign intervention.[78] They perceived their legal task in relation to Antarctica as being not the acquisition of territory but the determination of their mutual boundary. During the 19th century, Chile and Argentina had settled their mutual boundary in the Magellan Straits, Patagonia and Puna de Atacama, resorting to arbitration where negotiations were inadequate. They turned their attention to their mutual Antarctic boundary in negotiations of 1907–08 and again in the 1940s.[79]

By this time, however, they risked being overtaken by developments within the regime of territorial acquisition. Chile's decree defining the territorial limits of the Chilean Antarctic Territory, and Argentina's of 1943 and subsequent maps, were viewed by the UK as responses to their own acts of effective occupation. But even here there was some confusion. The very term 'occupation' had meaning both in assisting to determine a South American boundary[80] and in assisting a 'new imperialist' to assert a territorial claim. In most of the English-language literature on Antarctica, Chile and Argentina are presented as latecomers in a race for territorial title, apparently attempting to belatedly lay claim to territory much of which had already been accounted for by Graham Land. Viewed within the regime of territorial acquisition, the actions of Argentina and Chile appeared as 'counter-actions'[81] and 'counter claims'.[82] As we have seen, there is a certain degree of truth to this interpretation, but it

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76 Less detailed than the 1955 UK application to the Court but of a similar degree of detail are the 'views' of each country included in the 1984 report of a UN study requested by the General Assembly: *Question of Antarctica: Study Requested under General Assembly Resolution 38/77*, 39th sess, Agenda Item 66, UN Doc A/39/583 (Part II) (29 October 1984) vol I, 5 (Statement of Argentina); vol II, 16 (Statement of Chile).

77 Shirley V Scott, 'Universalism and Title to Territory in Antarctica' (1997) 66(1) *Nordic Journal of International Law* 33 ('Universalism').

78 S Durán-Bachler, 'The Latin American Doctrine of Uti Possidetis' (Diploma Memoir, Graduate Institute of International Studies — Geneva, 1972) 61.

79 Shirley V Scott, *The Political Interpretation of Multilateral Treaties* (Martinus Nijhoff Publishers, 2004) 67.

80 'Occupation' was used in conjunction with 'uti possidetis' to establish where a boundary had existed in practice even if it was not specified in Spanish Royal Decrees: see Gordon Ireland, *Boundaries, Possessions, and Conflicts in South America* (Octagon Books, 1971) 329.

81 See, eg, Symmons (n 59) 735.

82 Letter from Sir Jack Ward to Henry Brain, 10 January 1960, quoted in Dodds, 'The End of a Polar Empire?' (n 68) 411.

misses important political and historical nuances regarding the issue to which relevant regimes of international law had evolved as a response.

If the Antarctic cases were to have proceeded, it was highly likely that the question considered by the ICJ would have been one of title to territory rather than its delimitation, of Antarctic sovereignty as opposed to boundary delimitation, reflecting the dominant legal regime of the day. Whether this would still be the outcome today is less certain, and the matter might well hinge on the question as to whether the portion of Antarctic territory claimed by the UK had indeed been *terra nullius* at the time of its Letters Patent in the early 20th century.

B *The Broader Historical and Geopolitical Context*

We have seen that the UK was confident of its legal position in respect of Antarctic sovereignty, but this does not explain the timing. Here, the broader geopolitical context seems to have been key. Most fundamental was the increased influence of the US after World War II[83] and its determination to be involved in Antarctic affairs. There was considerable tension on the Antarctic Peninsula in the 1940s and early 1950s, which culminated in the so-called Hope Bay incident of 1952.[84] And yet British officials were to find US policy more problematic than its disputes with Argentina and Chile.[85] The US had, in the early 20th century, presented as an anti-imperial emerging world power, and despite its nationals having been active on the continent, the US had made no Antarctic claim. There remained one unclaimed 'Pacific' sector, but this was not a particularly desirable portion of the continent, and the US declined to confirm or deny whether it might press its own formal claim to Antarctica.[86] It never did so. There was nevertheless a US view, at least on the part of some commentators, that the US could make a stronger bid for Antarctic territory than had other claimant states were it to choose to do so.[87]

A Soviet memorandum of 7 June 1950 stated that '[t]he Government of the USSR [could not] agree to such a question as that of the Antarctic regime being settled without its participation'.[88] The UK would have liked the US to support its position and that of the other Commonwealth claimants, but the US made it very clear that it would back neither the claim of the UK nor those of the South Americans.[89] It was just at this point that Argentina became increasingly assertive, such that its activities of 'effective occupation' posed an enhanced threat for the UK claim.[90]

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83 See generally Walter LaFeber, *The American Age: United States Foreign Policy at Home and Abroad since 1750* (WW Norton & Company, 1989) 455–8.

84 Argentina attempted to prevent reconstruction of a British base; the following year, the British destroyed an Argentine hut on Deception Island: Peter Beck, *The International Politics of Antarctica* (Croom Helm, 1986) 35–6.

85 Klaus Dodds, *Pink Ice: Britain and the South Atlantic Empire* (IB Tauris Publishers, 2002) 75 ('*Pink Ice*').

86 Dodds, 'The End of a Polar Empire?' (n 68) 397.

87 See, eg, Todd Jay Parriott, 'Territorial Claims in Antarctica: Will the United States Be Left Out in the Cold?' (1986) 22(1) *Stanford Journal of International Law* 67, 117.

88 Peter A Toma, 'Soviet Attitude towards the Acquisition of Territorial Sovereignty in the Antarctic' (1956) 50(3) *American Journal of International Law* 611, 624.

89 Dodds, 'The End of a Polar Empire?' (n 68) 395.

90 Ibid 399–400. It is worth noting that the UK–Argentine relationship was more tense than the UK–Chilean relationship: at 402.

Meanwhile, the US had taken the lead in seeking an internationalised solution to differences regarding territorial title in Antarctica. With the 1948 US proposal for a UN trusteeship,[91] '[m]ost seasoned observers agreed that the culture of territorial claims had been thoroughly dislocated'.[92] The UK suggested an eight-power condominium instead.[93] Twice, India requested that the 'question of Antarctica' be addressed by the UN General Assembly;[94] this shocked the British Commonwealth and prompted an 'uneasy alliance' between Britain, Argentina and Chile in opposition to the proposal.[95] This in turn forestalled the development of an 'anti-imperial' coalition and paved the way for the negotiations that resulted in the 1959 *Antarctic Treaty*.[96] With the Cold War in full swing, both the US and the USSR became increasingly assertive on Antarctica after the International Geophysical Year of 1957–58.[97] By 1959, the British viewed the ATS as an 'escape route'.[98]

VI Implications for the Judicialisation — and De-Judicialisation — of World Politics and the Merits or Otherwise of Compulsory Jurisdiction

Before concluding, let us consider whether these analyses have implications for our understanding of international dispute resolution more generally. In respect of the first example, it may be worth conjecturing whether — if the ICJ *were* to have heard a case and decided in favour of the UK — the UK would have then agreed to art IV of the *Antarctic Treaty*. If the UK were to have had its claim upheld — as it clearly anticipated would be the outcome — then it might have been less inclined to accept the terms of art IV. Although formally 'freezing the status quo' so far as territorial claims are concerned, by not requiring non-claimant states to respect the asserted sovereignty of territorial states, art IV was arguably less than fully satisfactory for claimant states. They likely agreed to it only because their legal rights were in any case threatened by geopolitical change. The benefits of art IV are ostensibly universal, but over time it may have bolstered the position of non-claimants more so than that of the claimants.[99] Given that the success of the ATS has been such that it is regarded as a model of international cooperation,[100] its proponents might be excused for thinking that in

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91 'United States Draft Agreement Placing Antarctica under a United Nations Trusteeship' in WM Bush (ed), *Antarctica and International Law: A Collection of Inter-State and National Documents* (Oceana, 1982–88) vol 3, 461.

92 Dodds, *Pink Ice* (n 85) 81.

93 Neal H Petersen et al (eds), *Foreign Relations of the United States 1948* (United States Government Printing Office, 1972–76) vol 1, pt 2, 992–3.

94 Beck (n 84) 272.

95 Adrian Howkins, 'Defending Polar Empire: Opposition to India's Proposal to Raise the "Antarctic Question" at the United Nations in 1956' (2008) 44(1) *Polar Record* 35, 35.

96 Ibid.

97 Dodds, 'The End of a Polar Empire?' (n 68) 408–9.

98 Ibid 409.

99 Shirley V Scott, 'Ingenious and Innocuous? Article IV of the Antarctic Treaty as Imperialism' (2011) 1(1) *Polar Journal* 51, 59.

100 Olav Schram Stokke, 'The Relevance of the Antarctic Treaty System as a Model for International Cooperation' in Arnfinn Jørgensen-Dahl and Willy Østreng (eds), *The Antarctic Treaty System in World Politics* (Palgrave Macmillan, 1991) 357.

this instance, the failure of the UK to have the Court rule on the respective merits of its claim has likely worked out for the better.

As regards the second episode, environmentalists might have considered it suboptimal if Japan were to have successfully prevented the ICJ hearing the case on the merits because of a jurisdictional exclusion related to Australia's sovereignty claim and associated contested maritime zones. And it would have likely been suboptimal if the issue were to have been subjected to judicial scrutiny during the merits, given that the ATS is premised on an agreement to disagree. This raises the possibility that Antarctic sovereignty represents an issue that is sui generis and an example of the inherent limits of judicial dispute resolution. Perhaps so, but the analysis may speak more directly to questions that are less broad, including the merits or otherwise of compulsory jurisdiction and the significance of the precise definition of an issue being subjected to juridical determination.

Jurisdiction is the legal mechanism through which states mediate their initial encounter with the ICJ. A state wishing to have a matter determined by the Court will need to establish that the Court has jurisdiction to hear the case, and a state wishing to avoid the Court examining a particular issue has usually done what it could to forestall such a possibility. Differing stances over the merits of compulsory jurisdiction meant that the ICJ was established with a somewhat cumbersome system of optional compulsory jurisdiction. A majority of states has omitted making a declaration under art 36(2) of the *Statute of the International Court of Justice*.[101] A more nuanced approach to the possibility of a future national encounter is to make an optional clause declaration inclusive of reservations so as to exercise greater control over the specific nature and timing of any potential encounter. There may then be an ongoing dance, as a state gracefully removes one declaration and replaces it with another inclusive of different reservations. The examples considered in this article suggest the benefits of states being free to thereby exclude specific issues from determination by the Court.

Interestingly, in examining the de-judicialisation of international politics, Daniel Abebe and Tom Ginsburg define de-judicialisation as 'the complete removal from judicial cognizance of a policy issue that had previously been subject to judicialization'.[102] Defined thus, these episodes do not represent de-judicialisation, but they do point to the vital importance of the precise definition of an issue as determinative of the preparedness of a state to consider litigation, and to the historical and political relativity of issues in international law. It would have been hugely risky for Chile or Argentina to accept a UK definition of the dispute as being one of sovereignty — particularly sovereignty to the Falkland Islands Dependencies — with the potential that it would be adjudicated on the basis of the law of territorial acquisition. Despite the ideal of universal international law, many regimes emerge in response to a perceived

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101 Nor have they a declaration made under the *Statute of the Permanent Court of International Justice* still in effect. The texts of the 74 declarations are available at 'Declarations Recognizing the Jurisdiction of the Court as Compulsory', *International Court of Justice* (Web Page) <https://www.icj-cij.org/en/declarations>, archived at <https://perma.cc/5NEK-BFQV>.

102 Abebe and Ginsburg (n 4) 521.

need of a small subsection of the international community to address an issue of mutual concern, and they therefore reflect the issues as understood within that region or grouping of states.[103]

VII CONCLUSION

Detailed analysis of specific encounters with the ICJ in respect of the sensitivities around Antarctic sovereignty has provided a vehicle by which to consider the ways in which encounters are highly managed, very specific and directed at particular issues. Of the six states involved in the two episodes under examination, only the UK, in the pre-*Antarctic Treaty* years, was keen on litigation, but its moves were assiduously blocked by Chile and Argentina. Within a few years, the sovereignty question had been 'put on ice' by art IV of the *Antarctic Treaty*. Although not without its own challenges, the ATS is widely regarded as one of the most successful of international regimes. The claimant states accepted art IV because it seemed preferable to the alternatives, which for the UK included the prospect of ongoing tension with Argentina and Chile. From the perspective of international cooperation, it may be just as well that the ICJ had not stepped in to 'resolve' the dispute because there is no certainty that a win for the UK would, in any case, have altered the geopolitical consciousness of the South American states. Third-party dispute resolution has an important function in world politics, but it appears that there may well be limits to beneficial judicialisation. It is unlikely that this conclusion would come as a surprise to experienced litigants, but it may be less readily apparent to those assiduously committed to expanding the reach of the international rule of law.

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103 Scott, 'Universalism' (n 77).