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The International Court of Justice, the Whales, and the Blurring of the Lines between Sources and Interpretation

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Abstract

In the contemporary mainstream configuration of most legal orders, a given norm or standard of behaviour is said to be binding upon legal relations between subjects if that norm or standard can be validated by virtue of the doctrine of sources of that legal order. In most legal orders, including international law, the doctrine of sources even enjoys a monopoly on the tracing of bindingness, bearing only remotely or indirectly upon the interpretation of the content of those standards and norms that sources recognize as valid. The idea that the doctrine of sources enjoys a monopoly on the tracing of bindingness and does not constrain interpretation has been seriously eroded by the International Court of Justice in its 31 March 2014 judgment concerning Whaling in the Antarctic. *As will be explained in this article, the Court comes very close to calibrate the interpretive effects of the resolutions of the International Whaling Commission through the doctrine of sources. As will be shown, this blurring between sources and interpretation warrants the attention given the efforts that the Court had, over the years, invested in consolidating two distinct doctrines – that is, the doctrine of sources and the doctrine of interpretation. After briefly recalling how the relation between interpretation and sources was approached by the Court, a critical look is taken at the implications of the judgment from the vantage point of the distinction between bindingness and interpretive effects. This brief article ends with a few remarks on the oscillations between sources and interpretation witnessed in contemporary international legal discourses.*

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1 Prolegomena: The Plurality of Legal Effects in Legal Orders

In the contemporary mainstream configuration of legal orders, a given norm or standard of behaviour is said to be binding upon legal relations between subjects if that norm or standard can be validated by virtue of the doctrine of sources of that legal order. The doctrine of sources is, more specifically, what allows norms and standards to be formally anchored in a legal order and generate therein the highest form of legal effect – that is, bindingness. In most legal orders, the doctrine of sources even enjoys a monopoly on the tracing of bindingness; only those norms and standards validated by virtue of the doctrine of sources can be considered binding upon legal relations established therein. However, this does not mean that the doctrine of sources has the monopoly of the organizations of legal effects within a legal order. Legal effects are also organized through other channels. Indeed, legal relations between subjects of a legal order can also be affected by interpretive effects. These interpretive effects are traditionally the result of an act of interpretation that is constrained not by the doctrine of sources but, rather, a doctrine of interpretation. In most legal orders, legal effects are organized by virtue of two central doctrines: bindingness is traced by the doctrine of sources while interpretive effects are the result of an act of interpretation deployed within the remit of the doctrine of interpretation of the legal order concerned.[1]

Such a twofold dichotomy between bindingness and interpretive effects (and, thus, between sources and interpretation) is observed in most legal orders.[2] International law is no different in this respect. Mainstream international legal

[1] It must be acknowledged that in most legal orders the distinction between bindingness and interpretive effects, however, is not entirely watertight: first, because the application of the doctrine of sources to generate bindingness is itself an interpretive act, for the doctrine of sources ought to be interpreted and, second, because the purpose of interpretation is traditionally to determine the content of those norms and standards that exist by virtue of the doctrine of sources. Indeed, the doctrine of sources usually allows the ascertainment of the norms and standards that are applicable to a given legal relation while the doctrine of interpretation will contribute to the determination of the content of those ascertained norms and standards in their application to the specific factual situation in which that legal relation is being looked at. It is important to realize that, while, in most legal orders, interpretation will contribute to the emergence and materialization of the bindingness created by virtue of the theory of sources, the opposite is not true. The sources, albeit being themselves in need of interpretation, contribute at best indirectly to interpretation by helping to ascertain those norms and standards that, although not formally binding upon the legal relation being interpreted, are generative of interpretive effects on that legal relation. For the rest, the doctrine of sources does not itself guide the interpretation of those norms it helps validate and anchor in the legal order. This is a task reserved to the doctrine of interpretation.

[2] The rationale of this distinction in a legal system is probably more pragmatic than systemic. Of course, there are serious jurisprudential problems associated with a collapse of the distinction between the doctrine of sources and the doctrine of interpretation. See F. Schauer, *Playing by the Rules* (1991), at 199; see also Schauer, 'Amending the Presuppositions of a Constitution', in S. Levinson (ed.), *Responding to Imperfection* (1995) 145, at 150–151: 'In referring to the ultimate rule of recognition as a rule, Hart has probably misled us. There is no reason to suppose that the ultimate source of law need be anything that looks at all like a rule, whether simple or complex, or even a collection of rules … The ultimate source of law, therefore, is better described as the practice by which it is determined that some things are to count

discourses similarly articulate themselves around such a distinction between bindingness and interpretative effects and, correlatively, between the doctrine of sources and the doctrine of interpretation.[3] On the one hand, the identification of norms and standards formally binding upon a legal relation is operated by virtue of the doctrine of the sources of international law that find its most basic expression in Article 38 of the Statute of the International Court of Justice.[4] On the other hand, the determination of the content of the norms and standards applicable to a given legal relation is carried out on the basis of the doctrine of interpretation, which finds its most refined expression in the 1969 and 1986 Vienna Conventions on the Law of Treaties (VCLT).[5]

In international law, it is only incidentally that the doctrine of interpretation makes a resort to the doctrine of sources to ascertain some of the interpretive standards that ought to be relied on.[6] Such incidental zone of overlap, however, does not fault the distinction between the two doctrines and the different types of legal effects

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as law and some things are not'. See also Schauer, 'Is the Rule of Recognition a Rule?', 3 *Transnational Legal Theory* (2012) 173. See also Simpson, 'The Common Law and Legal Theory', in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence* (2nd edn, 1973) 77. A very compelling issue is that of infinite regress. E.g., these studies on the content-determination interpretive process continue to be caught in the infinite regress affecting the rule-based approach. Bianchi, 'Textual Interpretation and (International) Law Reading: The Myth of (In)determinacy and the Genealogy of Meaning', in P. Bekker (ed.), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (2010) 35.
See I. Venzke, 'Post-Modern Perspectives on Orthodox Positivism', in J. Kammerhofer and J. d'Aspremont (eds), *International Legal Positivism in a Postmodern World* (2014) 182. See also Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', 21 *European Journal of International Law* (*EJIL*) (2010) 509, 534. For a discussion of these issues, see d'Aspremont, 'The Idea of "Rules" in the Sources of International Law', 84 *British Yearbook of International Law* (2014) 103.

3 The distinction is clearly upheld in the work of the International Law Commission (ILC) on subsequent agreements and subsequent practice in relation to the interpretation of treaties. See G. Nolte, First ILC Report on Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties, Doc. A/CN.4/660, 19 March 2013, para. 68; G. Nolte, Second ILC Report on Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties, Doc. A/CN.4/671, 26 March 2014, paras 56, 95.

4 For an exposition of the state of the art on the sources of international law, see H. Thirlway, *The Sources of International Law* (2014). Statute of the International Court of Justice 1945, 1 UNTS 993.

5 For a review of recent works on interpretation, see Waibel, 'Demystifying the Art of Interpretation', 22 *EJIL* (2011) 571. See also the essays published in A. Bianchi, D. Peat and M.R. Windsor (eds), *Interpretation in International Law* (2015). On the interpretation of non-conventional legal acts, see International Court of Justice (ICJ), *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Request for Advisory Opinion, 22 July 2010, para. 94. See Papstavridis, 'Interpretation of Security Council Resolutions under Chapter vii in the Aftermath of the Iraqi Crisis', 56 *International and Comparative Law Quarterly* (2007) 83. Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331. Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations 1986, 25 ILM 543 (1986).

6 See, e.g., the notions of 'agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty' (VCLT, *supra* note 5, Art. 31.2(a)), 'instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty' (Art. 31.2(b)), 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' (Art. 31.3(a)), and 'relevant rules of international law applicable in the relations between the parties' (Art. 31.3(c)).

they contribute to cognize and generate. This dichotomy is similarly not put into question by the traditional – albeit very dubious[7] – claim that rules on interpretation constitute customary rules.[8] The possible bindingness of the rules on interpretation

[7] Some serious objections could be raised in connection with the liberty that it takes from the orthodox doctrine of customary international law to contend that the rules on interpretation are of a customary nature. If the doctrine of customary international law is orthodoxly applied, it is not at all certain that the constraints on the interpretation of international law will meet the traditional requirements. First, it seems that the practice is mostly that of authoritative judicial bodies in their own right. It is true that some of them constitute organs of international organizations. Yet, it is not clear that such a practice qualifies as practice attributable to subjects of international law for the sake of the formation of customary law. What is more, it is not certain that those rules on interpretation could ever pass the elementary 'Continental Shelf' test whereby any potential standard is required to be of a 'fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law' to ever generate customary law. This is an aspect of the orthodox customary law doctrine that scholars have constantly neglected. It is well known that, in *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, ICJ Reports (1969) 3, para. 72, the Court assessed the customary character of the equidistance principle enshrined in Art. 6 of the 1958 Convention on the Continental Shelf 1958, 499 UNTS 311. On this occasion, it asserted that the norm at stake had first to be of a 'fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law'. The Court drew on the idea that any conventional rule must contain a directive for it to be able to one day crystallize into a customary international rule. Taking mainly into account the profound indeterminacy of the concept of 'special circumstances', which determines the qualification to the equidistance principle, the Court deemed that the principle of equidistance enshrined in the 1958 Convention was not normative. Because the principle of equidistance did not provide for a given behaviour to be adopted by the parties, the Court concluded that it could not crystallize or generate a rule of customary international law. Likewise, in the famous case *Asylum (Colombia/Peru)*, Judgment, 20 November 1950, ICJ Reports (1950) 266, para. 277, the Court asserted that '(t)he facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy … and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions … ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law'. For an analysis of this aspect of the doctrine of customary international law, see d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials', 19 *EJIL* (2008) 1075; d'Aspremont, 'Les dispositions non normatives des actes juridiques conventionnels à la lumière de la jurisprudence de la Cour internationale de Justice', 36 *Revue belge de droit international* (2003), 496, 518. See also A. Boyle and C. Chinkin, *The Making of International Law, Series Foundations of Public International Law* (2007), at 221.

[8] See, e.g., R. Gardiner, *Treaty Interpretation* (2008), at 13S. See generally Sorel, 'Article 31', in P. Klein and O. Corten, *Les Conventions de Vienne sur le Droit des Traités: Commentaire article par article* (2006), at 1289–1334; M.E. Villiger, *Customary International Law and Treaties: A Study of their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (1985), at 334ff; see Bernardez, 'Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1963 Vienna Convention on the Law of Treaties', in G. Hafner *et al.* (eds), *Liber Amicorum Seidl-Hohenveldern* (1998) 721, at 723. See Nolte, First ILC Report, *supra* note 3, paras 8–28. International courts and tribunals have endorsed a similar position. *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, 3 February 1994, ICJ Reports (1994) 6, para. 6; *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, 13 December 1999, ICJ Reports (1999) 1045, para 1059; *LaGrand (Germany v. United States of America)*, Judgment, 27 June 2001, ICJ Reports (2001) 501, para. 99; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136, para. 94. See also *Arbitration Regarding the Iron Rhine Railway (Belgium/Netherlands)*, Award, 24 May 2005, ICJ Reports (2005) 23, para. 45; WTO, *Japan – Alcoholic Beverages – Report of the Appellate Body*, 4 October 1996, WT/DS8/AB/R, 10–12, Part D; WTO, *United States – Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body*, 29 April 1996, WT/DS2/AB/R, 16–17; ECtHR, *Golder v. United Kingdom*, Appl. 4451/70, Judgment of 21 February 1975, para. 32.

themselves – which was itself discussed during their codification process[9] – does not thwart the distinction between bindingness and interpretive effects and, more generally, between sources and interpretation.

This idea that the doctrine of sources enjoys a monopoly on the tracing of bindingness and does not directly constrain the interpretation of those standards and norms that it validates has been seriously eroded by the International Court of Justice (ICJ) in its 31 March 2014 judgment concerning *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*.[10] As will be explained in this article, the Court comes very close to calibrating the interpretive effects of the resolutions of the International Whaling Commission (IWC) through the doctrine of sources. As will be shown, this blurring between sources and interpretation is most unsettling given the efforts that the Court had invested, over the years, in consolidating two distinct doctrines – that is, the doctrine of sources and the doctrine of interpretation. After briefly recalling how the relation between interpretation and sources was approached by the Court in its judgment in *Whaling in the Antarctic*, a critical look is taken at the implications of the judgment from the vantage point of the distinction between bindingness and interpretive effects. This brief article ends with a few reflective remarks on the contemporary oscillations between sources and interpretation witnessed in contemporary international legal discourses.

2 Bindingness and Interpretive Effects in *Whaling in the Antarctic*

In *Whaling in the Antarctic*, one of the main questions with which the ICJ was confronted was that of the legal effects that could possibly be ascribed to the resolutions of the IWC.[11] The question proved particularly contentious because each of the parties

[9] It is interesting to note the doubts expressed by some of the drafters of the VCLT, *supra* note 5, as to the inclusion of rules on interpretation in the draft Convention. E.g., Alfred Verdross raised the question of the nature of the rules of interpretation that the ILC intended to codify, arguing that 'the Commission ought first to decide whether it recognized the existence of such rules'. ILC, 726th Meeting, Doc. A/CN.4/167, 19 May 1964, reprinted in 1 *Yearbook of the International Law Commission* (*YB ILC*) (1964) 20, para. 15. In the same vein, Sir Humphrey Waldock conceded that he 'was decidedly lukewarm on rules on interpretation, including them more because he thought this was expected of him than out of genuine expectation that rules on interpretation would be of much use'. This is discussed by Klabbers, 'Virtuous Interpretation', in M. Fitzmaurice, O. Elias and P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010), vol. 1, 17, at 18.

[10] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, 31 March 2014, ICJ Reports (2014) 226.

[11] For a thorough analysis of the other very contentious aspect of the case, namely the Court's approach to scientific fact-finding, see Peat, 'The Use of Court-Appointed Experts by the International Court of Justice', 84 *British Yearbook of International Law* (2014) 271; see also d'Aspremont and Moïse Mbengue, 'Strategies of Engagement with Scientific Fact-Finding in International Adjudication', 5 *Journal of International Dispute Settlement* (2014) 240. On the question of the standard of review, see Cannizzaro, 'Margin of Appreciation and Reasonableness in the ICJ's Decision in the Whaling Case', in J. Combacau, P. d'Argent and B. Bonafe (eds), *Liber Amicorum Joe Verhoeven: The Limits of International Law* (2014) 89.

made the determination of such legal effects dependent on a different doctrine, one of them embracing a source-based approach and the other embracing an interpretation-based approach.

To capture the conceptual implications of the position of the parties and, thus, the question faced by the ICJ, it is necessary to briefly recall the powers that the International Convention for the Regulation of the Whaling (Whaling Convention) bestows upon the IWC pursuant to Article III.[12] On the one hand, it grants the IWC the power to adopt by a three-fourths majority of votes amendments to some specific parts of the Convention (that is, the so-called Schedule[13]), those amendments being binding on all states party except those who present an objection (the opting-out approach).[14] This specific law-making mechanism is sufficiently formalized and organized under the Convention, and the identification of those binding amendments as well as the determination of those states party bound by such amendments has never been the object of much controversy. On the other hand, the Whaling Convention empowers the IWC to 'make recommendations to any of all Contracting Governments on any matters which relate to whales or whaling and to the objective and purposes of (the) Convention'.[15] It is uncontested that this is a recommendatory power, and these recommendations (which take the form of resolutions or guidelines) are not binding.[16] An important share of the debate in the Grande Salle de Justice of the Peace Palace in *Whaling in the Antarctic* came to revolve around the legal effects that those non-binding resolutions ought to bear for the sake of the interpretation of Article VIII of the Convention.

This debate was provoked by Australia's extensive reliance on the IWC's resolutions and guidelines for its interpretation of Article VIII of the Whaling Convention and the determination that the special permits granted for JARPA II, Japan's whaling programme in the Southern ocean, are not for the purpose of scientific research within the meaning of that provision. More specifically, Australia relied on resolutions of the IWC and its so-called guidelines related to the review of special permits by the Scientific Committee to determine the meaning of 'scientific research' for the purpose of Article VIII.[17] In the eyes of Australia, such resolutions qualified as 'subsequent agreement between the parties regarding the interpretation of the treaty' and 'subsequent

[12] International Convention for the Regulation of the Whaling (Whaling Convention) 1946, 161 UNTS 72.

[13] The present Schedule was amended by the Commission at its sixty-fourth annual meeting in Panama City in July 2012.

[14] Whaling Convention, *supra* note 12, Art. III, para. 2.

[15] *Ibid.*, Art. VI.

[16] For some more insights on the law-making process of the IWC, see Gillespie, 'Transparency in International Environmental Law: A Case Study of the International Whaling Commission', 14 *Georgetown International Environmental Review* (2002) 333. For some more considerations of the whole regime put in place by the Convention, see Fitzmaurice, 'The International Convention for the Regulation of Whaling and International Whaling Commission – Conservation or Preservation – Can the Gordian Knot Be Cut (or Untangled)?', 5 *Yearbook of Polar Law* (2013) 451.

[17] *Whaling in the Antarctic*, Judgment, *supra* note 10, para. 74ff, para. 78; see also *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Memorial of Australia, 9 May 2011, ICJ Reports (2011) 165, para. 4.68–4.80.

practice in the application of the treaty which established the agreement of the parties regarding its interpretation' within the meaning of Article 31.3(a) and (b) of the VCLT respectively.[18] New Zealand adopted a similar position.[19]

For its part, Japan disputed the value of those IWC resolutions that were adopted without Japan's support. In this sense, Japan did not seek to deprive those resolutions of any legal effect but, rather, claimed that such legal effects ought to be reserved for those resolutions adopted with Japan's support, which includes resolutions adopted by consensus. For Japan, such resolutions are not 'binding' and, therefore, irrelevant for the interpretation of Article VIII.[20]

In its judgment, the ICJ first acknowledges that, despite being non-binding, those resolutions, 'when they are adopted by consensus or by unanimous vote, … may be relevant for the interpretation of the Convention or its Schedule' and especially to interpret the object and purpose of the Convention in the light of which Article VIII ought to be interpreted by taking into account the Guidelines issued by the IWC for the review of a scientific permit proposal by the Scientific Committee.[21] Thus, the Court does not deny that an interpretive effect could be given to those resolutions for the interpretation of the object and purpose of the Convention. Yet the Court only relies on such resolutions in its judgment to elucidate the object and purpose of the Convention.[22] It takes a very different position when it comes to the interpretation of specific provisions of the Convention. Indeed, as far as the interpretation of the notion of 'scientific approach' in Article VIII, the Court contends that 'Australia and New Zealand, overstate(d) the legal significance of the recommendatory resolutions and Guidelines on which they rely'.[23]

The reasons for playing down the interpretive effects of the resolutions and guidelines of the IWC for the interpretation of the notion of 'scientific research' in Article VIII is of the greatest interest for the sake of the argument made in this article. The justification of the ICJ is twofold. First, the Court holds that those resolutions were adopted without the support of all state parties to the Whaling Convention and, in particular, without the concurrence of Japan. As a result, such an instrument cannot be regarded as providing subsequent agreement to an interpretation of Article VIII in the sense of Article 31.3(a) of the VCLT nor can it be construed as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of Article 31.3(b) of the VCLT.[24] Second, the Court turns to a substantive interpretive argument solely borrowed from those resolutions and

[18] *Whaling in the Antarctic*, Judgment, *supra* note 10, para. 79.

[19] *Ibid.*, para. 81. See also *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Written Observations of New Zealand, 4 April 2013, ICJ Reports (2013) 30.

[20] *Whaling in the Antarctic*, Judgment, *supra* note 10, paras 75ff, 80. See also *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Counter-Memorial of Japan, 9 March 2012, ICJ Reports (2012) 351, paras 8.43–8.53, 365–369.

[21] *Whaling in the Antarctic*, Judgment, *supra* note 10, paras 46, 58.

[22] *Ibid.*, paras 56 to 58.

[23] *Ibid.*, para. 83.

[24] *Ibid.*

guidelines that have been adopted by consensus.[25] Taken together, these two justifications for the rejection of Australia and New Zealand's understanding of the interpretive effects of the resolutions and guidelines of the IWC indicate that the ICJ considers that Japan's explicit or implicit assent (that is, by virtue of an approval by consensus) is determinative of the interpretive effects that such resolutions and guidelines can bear.

It is noteworthy that the ICJ similarly makes dependent on the explicit or implicit support of Japan the possible evidentiary roles that resolutions of the IWC may play. Indeed, when discussing the 'plausibility' of sabotage activities and their contribution to lower catches of minke whales, the Court relies on the IWC's Resolution 2011–2 (which noted reports of dangerous actions by anti-whaling groups and had condemned such actions), explicitly mentioning the fact that such a resolution had been adopted by consensus.[26]

The restrictive position of the ICJ on the interpretive and evidentiary role of those resolutions and guidelines adopted without the implicit or explicit support of Japan does not affect, according to the Court, the obligation of Japan to give due regard to those instruments. Despite denying interpretive and evidentiary effects to resolutions adopted without the implicit or explicit support of Japan, the Court nonetheless recognizes a duty for Japan to give due regard to all of the IWC's resolutions and guidelines irrespective of Japan's possible opposition.[27]

Interestingly, this very restrictive position of the ICJ regarding the resolutions and guidelines, and especially regarding their interpretive effects, did trigger rather limited reactions among judges on the bench. Among the 11 opinions or declarations appended to the judgment, only two judges explicitly address this issue. In her separate opinion, Judge ad hoc Charlesworth explicitly acknowledges that the absence of bindingness does not bar interpretive effects. In this sense, she takes pains to severe bindingness and interpretive effects. For the rest, she recognizes that the 'resolutions … [which] have attracted a number of negative votes' cannot count as 'evidence of the parties' agreement on the [Whaling Convention]'s interpretation' under Article 31 of the VCLT.[28] She vindicates the interpretive effects of those resolutions adopted by consensus, although she is not explicit as to whether this interpretive effect is that envisaged by Article 31 or another interpretive effect beyond that provision.[29] She also takes a position similar to that of the Court regarding the effects of those resolutions adopted by a vote when it comes to the duty of cooperation, although she seems to restrict that effect to those resolutions 'adopted by a large majority of [IWC] members'.[30] On the whole, Judge ad hoc Charlesworth, even if she comes to disagree with the substance of the Court's interpretation of those IWC resolutions adopted by

[25] *Ibid.*

[26] *Ibid.*, para. 206.

[27] *Ibid.*, para. 83. This is an obligation that was not contested by Japan (see para. 137). The Court eventually found that Japan did not comply with such an obligation (see para. 144).

[28] *Ibid.*, para. 4, Separate Opinion of Judge ad hoc Charlesworth.

[29] *Ibid.*, Separate Opinion of Judge ad hoc Charlesworth.

[30] *Ibid.*, Separate Opinion of Judge ad hoc Charlesworth.

consensus or by unanimous vote,[31] does not challenge that part of the reasoning of the Court and its restrictive approach to the legal effects of the resolutions and guidelines of the IWC.

The other judge who grapples with the question of the interpretive effects of the IWC's resolutions is Judge Greenwood. Like Judge ad hoc Charlesworth, Judge Greenwood does not fundamentally question the approach of the ICJ on this matter. Indeed, he concurs with the Court that resolutions adopted by the IWC can only qualify as subsequent practice of the parties to the treaty in accordance with Article 31.3(b) of the VCLT as long as they are adopted by consensus. According to Judge Greenwood, resolutions adopted by a narrow majority and with Japan as a dissenter 'demonstrate the absence of any agreement and cannot, therefore, be relied on to sustain an international of the Convention which can bind Japan'.[32]

It is interesting to note two ambiguities in Judge ad hoc Charlesworth and Judge Greenwood's overall support for the restrictive interpretive role of the IWC's resolutions. As was alluded to above, Judge ad hoc Charlesworth, despite focusing more particularly on the duty of cooperation, does not exclude completely the possibility of such resolutions generating interpretive effects beyond Article 31.3(a) and (b). It is also noteworthy that she speaks about 'a number of negative votes' as an obstacle to interpretive effects in the meaning of Article 31.3(a) and (b) and does not, in contrast to the ICJ, refer to Japan's explicit or implicit support. Judge Greenwood does not say whether it is the narrow majority by which the resolution is adopted or the opposition of Japan that precludes the resolution from being relied on for the interpretation of the Whaling Convention.

3 The Acrobatic Feat of the ICJ and the Blurring of the Lines between Sources and Interpretation

The previous section has been primarily descriptive. It has recalled the various positions taken on a very specific aspect of the question at the heart of *Whaling in the Antarctic*, namely the legal effects that the ICJ ought to grant to the non-binding resolutions of the IWC and the way it vindicated its position on this matter. The present section seeks to evaluate those positions through the lens of the twofold distinction between bindingness and interpretative effects and between the doctrine of sources and the doctrine of interpretation as it was introduced in first section of this article. Such a perspective will help shed light on the new articulation between sources and interpretation that is envisaged by the Court and that goes far beyond the traditional incidental bridges between these two doctrines.[33]

The account of the positions of the parties in *Whaling in the Antarctic* that was made in the previous section has shown that each party, while recognizing the interpretive effects of the resolution of the IWC, tailored these interpretive effects on different bases.

[31] *Ibid.*, para. 5, Separate Opinion of Judge ad hoc Charlesworth.
[32] *Ibid.*, para. 6, Separate Opinion of Judge Greenwood.
[33] See *supra* note 6.

On the one hand, Australia and New Zealand placed themselves solely on the terrain of interpretation and made the interpretive effects of the resolutions completely independent from the sources of law. Japan, for its part, went as far as claiming that the support of Japan was a condition for such resolution to yield interpretive effects. In doing so, Japan sought to limit the interpretive effects of the resolutions of the IWC by embracing a hybrid construction based on both interpretation and sources. Thus, Japan elevated its assent into a condition for the resolution to yield interpretive effects, thereby resorting to a mixture of a logic of sources and a logic of interpretation. The arguments of the parties regarding the interpretive effects of the resolutions of the IWC, from a purely conceptual point of view, were thus conspicuously irreconcilable.

In its judgment, the ICJ realizes the feat of upholding Australia and New Zealand's interpretation of Article VIII and of the incompatibility of JARPA II therewith, while upholding Japan's hybrid understanding of the interpretive effects of the IWC's resolution. Indeed, on the one hand, the Court vindicates the interpretation of Article VIII and of the compatibility therewith of JARPA II, which is defended by Australia and New Zealand. On the other hand, the Court manages to embrace both a logic of source and a logic of interpretation to calibrate the interpretive effects of the resolutions of the IWC – as had been advocated by Japan – by restricting the interpretive effects that could be organized by virtue of Article 31.3(a) and 31.3(b) to those rules that enjoyed the support of Japan.

At the surface, the judgment of the ICJ may look rather orthodox as it seemingly dovetails with the mainstream doctrine of interpretation of international law as it is spelled out in Article 31 of the VCLT. In particular, its understandings of Article 31.3(a) (regarding any subsequent agreement on interpretation) and Article 31.3(b) (regarding subsequent practice establishing an agreement on interpretation) are unlikely to be contested. As far as Article 31.3(a) is concerned, although the agreement in the meaning of Article 31.3(a) ought not to be binding,[34] the mainstream position seems that such an agreement must be between all of the parties to the treaty being interpreted.[35] As far as Article 31.3(b) is concerned, it is generally contended that subsequent practice must not be produced by all parties, but, rather, must have been accepted by all parties, if the practice is to generate an agreement.[36] In the light of such a cursory reading, the position of the Court on these two provisions could be considered consistent with the mainstream understanding of Article 31, at least as it manifests itself in the position of the International Law Commission (ILC), whereby if there exists an objection from one party, there cannot be an agreement under Article 31.3(a) and 31.3(b).[37]

[34] See Nolte, First ILC Report, *supra* note 3, para. 68; Nolte, Second ILC Report, *supra* note 3, paras 56, 95.

[35] Nolte, First ILC Report, *supra* note 3, para. 79. For the ILC, subsequent agreements between a small number of parties can bear some interpretive value as a supplementary means of interpretation within the meaning of Art. 32 of the VCLT, *supra* note 5. Nolte, First ILC Report, *supra* note 3, paras 81–83.

[36] See Nolte, Second ILC Report, *supra* note 3, Draft conclusion 9, paras 60, 75. See also *Case Concerning the Temple of Preach Vihear (Cambodia v. Thailand)*, Merits, 15 June 1962, ICJ Reports (1962) 23; WTO, *EC – Chicken Cuts – Report of the Appellate Body*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005.

[37] See Nolte, Second ILC Report, *supra* note 3, paras 104, 111.

It is argued here that this orthodox – and supposedly mainstream – reading of Article 31.3(a) and (b), however, is far from self-evident. First, the requirement of an explicit or implicit support by Japan contradicts the ICJ's earlier case law on the matter as is illustrated by its advisory opinions on *Certain Expenses of the United Nations* (1962) and *Legal Consequences of the Construction of a Wall* (2004).[38] Second, it should be recalled that the word 'agreement' in Article 31.3(a) and (b) was substituted to the original word 'understanding' at the Vienna conference simply to put more emphasis on the common character of the understanding of the parties.[39] In this sense, these provisions are meant to refer to a certain 'understanding' of the treaty rather an agreement *stricto sensu*.[40] As a result, the question with which the Court was confronted was less whether there is an 'agreement' between the parties to the Convention but more whether the IWC resolutions adopted without the assent of Japan could nonetheless qualify as an 'understanding' of the treaty, at least provided that they were adopted by a wide majority.

There is a third – and maybe more fundamental – reason why conditioning the interpretive effects of the resolutions of the IWC to Japan's support is, even from the standpoint of the doctrine of interpretation itself, unusual. The position of the ICJ regarding the interpretive effects of such resolutions to elucidate the content of Article VIII of the Whaling Convention actually denies the possibility of generating interpretive effects outside Article 31 of the VCLT. It is submitted here that Article 31 does not have a monopoly on the organization of interpretive effects. Whether under the banner of Article 32 of the VCLT[41] or through more informal processes not mentioned in the VCLT, interpretive effects can be recognized in such resolutions irrespective of whether they manifest an 'agreement' on interpretation. In particular, there is a strong argument to grant interpretive value to subsequent practice, even if it does not establish an agreement in interpretation among the parties.

[38] *Certain Expenses of the United Nations*, Advisory Opinion, 20 July 1962, ICJ Reports (1962) 151; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136. This point is made by Arato, 'Subsequent Practice in the Whaling Case, and What the ICJ Implies about Treaty Interpretation in International Organizations', *EJIL:TALK!*, 31 March 2014, available at www.ejiltalk.org/subsequent-practice-in-the-whaling-case-and-what-the-icj-implies-about-treaty-interpretation-in-international-organizations/#more-10605 (last visited 3 October 2016). He explains that 'in both *Certain Expenses* and *Wall*, the ICJ expressly relied on resolutions of the General Assembly as a proxy for the subsequent practice of the membership, and thus as authentic criteria for the interpretation of the U.N. Charter – despite the fact that in both cases several of the key resolutions were taken by majority vote, with heavy and representative dissents. In *Wall*, the Court went so far as to rely on such (disputed) "practice of the organization" to hew dramatically from the Charter's plain text, thereby recognizing what some consider an informal modification of the U.N. Charter'. For a thorough analysis of these earlier cases, see Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations', 38 *Yale Journal of International Law* (2013) 290.

[39] See *Official Records of the United Nations Conference on the Law of Treaties* (1971), at 169, para. 60. See also Nolte, Second ILC Report, *supra* note 3, para. 56.

[40] Reprinted in 2 *YB ILC* (1966) 221, paras 15–16.

[41] See Le Bouthillier, 'Article 32', in O. Corten and P. Klein (eds), *Les Conventions de Vienne sur le Droit des Traités: Commentaire article par article* (2006), at 1339–71.

In this respect, it is important to note that the ILC in its work on subsequent agreements and subsequent practice in relation to the interpretation of treaties[42] as well as many international tribunals[43] have recognized the necessity to distinguish between subsequent practice in the meaning of Article 31.3(b) and subsequent practice as a means of interpretation outside Article 31.3(b) – that is, subsequent practice that does not necessarily give rise to an 'agreement' by all of the parties in the meaning of that provision. According to this position, the subsequent practice which fulfils all the conditions of article 31.3(b). 'is not the only form of subsequent practice by parties in the application of a treaty which is relevant for the purpose of treaty interpretation'.[44] It is true that it is often acknowledged that the interpretive weight of the subsequent practice does not establish an agreement in the meaning of Article 31.[45] Yet the possibility of subsequent practice to generate interpretive effects outside Article 31 enjoy wide support. Even the ICJ itself – for instance, in *Kasikili/Sedudu Island (Botswana/Namibia)* – seems to have recognized an interpretive value to subsequent practice outside Article 31.3(b).[46]

The possibility of generating interpretive effects outside Article 31 brings us back to the question of the requirement of explicit or implicit support by Japan for such interpretive effects to be generated. Mention must be made in this respect to those cases where international courts – including the ICJ – have recognized an interpretive value to subsequent practice that does not qualify for Article 31.3(b) where there was never any requirement of implicit or explicit support by all parties. The ILC in its work on subsequent agreements and subsequent practice in relation to the interpretation of treaties similarly speaks of subsequent practice that 'covers any application of the treaty *by one or more parties*', hereby implying that support by all parties is not required.[47] From this perspective, an interpretive value can be recognized for those IWC resolutions that were adopted short of Japan's support, irrespective of Article 31.3(b).[48]

[42] See Nolte, First ILC Report, *supra* note 3, paras 92–110. The ILC rejected the narrow definition of the WTO Appellate Body in *Japan: Alcoholic Beverages – Report of the Appellate Body*, 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R.

[43] Judgment, *The M/V 'Saiga' (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)* (ITLOS Case no. 2), 1 July 1999, paras 155–156; Decision on Objections to Jurisdiction, *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case no. ARB/01/87), Tribunal, 17 July 2003, para. 47; ECtHR, *Loizidou v. Turkey* (Preliminary Objections), Appl. no. 15318/89, Judgment of 23 March 1995, para. 73.

[44] Nolte, First ILC Report, *supra* note 3, para. 93.

[45] *Ibid.*, para. 95.

[46] *Kasikili/Sedudu Island*, *supra* note 8, para. 80

[47] Nolte, First ILC Report, *supra* note 3, para. 110 (emphasis added). The first report also contends that such broad subsequent practice ought to be that of 'the parties', thus not necessarily all the parties (*ibid.*, Draft conclusion 2, para. 64).

[48] It is interesting that the ILC finds support for such a position in Hilary Charlesworth's separate opinion appended to *Whaling in the Antarctic*, Judgment, *supra* note 10. See Nolte, Second ILC Report, *supra* note 3, para. 95. As was explained earlier, the separate opinion of Judge Charlesworth does not exclude such a possibility, but her opinion remains most ambiguous on this point (see, in particular, *Whaling in the Antarctic*, Judgment, *supra* note 10, para. 4).

It must also be recalled here that the ICJ had preliminarily highlighted that, despite being non-binding, those resolutions 'may be relevant for the interpretation of the Convention or its Schedule' and especially to interpret the object and purpose of the Whaling Convention in the light of which Article VIII ought to be interpreted by taking into account the guidelines issued by the IWC for the review of a scientific permit proposal by the Scientific Committee.[49] At face value, such a statement could be construed as a recognition of the interpretive effects of resolutions outside Article 31.3(a) and Article 31.3(b). Yet, as was highlighted above, the Court never lives up to this preliminary statement for the interpretation of the object and purpose of the Convention and, regarding the interpretation of Article VIII of the Convention is, went as far as restricting such general interpretive effects for those resolutions 'adopted by consensus or by unanimous vote',[50] thereby conditioning the organization of interpretive effect outside Article 31.3(a) and (b) to the implicit or explicit support of Japan.

It is this permanent and repeated conditioning of interpretive effects to the assent of Japan that makes the ICJ very suspect of a return to the doctrine of sources for the generation of interpretive effects. Even if the Court occasionally seems to place itself outside Article 31, it continues to require the explicit or implicit support of Japan. In doing so, the Court comes very close to amalgamating interpretation and sources into one fat doctrine of interpretation that operates on the basis of the doctrine of sources. It should be made clear that the conditioning of interpretive effect on the assent of Japan, strictly speaking, does not make such legal effects dependent on the pedigree validation of the doctrine of sources. Indeed, assent is not a formal source of law, contrary to some popular myths.[51] Yet the requirement of the assent makes the question of interpretation arise exactly like (and along the lines of) a question of the generation of bindingness that is traditionally exclusively addressed from the vantage point of the sources. Indeed, assent has never been a central condition of the operation of interpretation *stricto sensu*. Rather, it is in relation to the identification of rules of international law (for example, treaties) that questions of assent arise. In this sense, the Court comes very close to calibrate the generation of interpretive effects on the basis of notions that traditionally permeate the doctrine of sources.

This blurring of the lines between interpretation and sources – and, thus, between the organization of interpretive effect and the tracing of bindingness – is probably even more conspicuous in the opinion of Judge Greenwood. Judge Greenwood does not only vindicate – like Judge ad hoc Charlesworth – the blended approach of the ICJ. He goes as far as to expressly condition interpretive effects of the IWC resolutions on their bindingness. Indeed, Judge Greenwood speaks about 'an interpretation of the

[49] *Whaling in the Antarctic*, Judgment, *supra* note 10, paras 46, 58.

[50] *Ibid.*

[51] On the idea that the sources of international law do not rest on a voluntaristic paradigm, see d'Aspremont and Kammerhofer, 'The Future of International Legal Positivism', in J. Kammerhofer and J. d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (2014) 1.

Convention which can *bind* Japan'.[52] He even adds: '[A]ny assessment of the potential relevance of resolutions as an aid to the interpretation of the Convention must take into account the relationship between resolutions, which (as their name suggests) are not mandatory, and regulations, which are not legally binding'.[53] After recalling the requirements for the exercise of the regulatory power by the IWC, he also adds: 'It would be entirely at odds with that carefully constructed power to treat recommendations, adopted by a simple majority and without any procedure for objection, as capable of producing effects similar to those of regulations.'[54] The Court severely obfuscates the distinction between interpretation and sources and, thus, between the tracing of bindingness and the organization of interpretive effect. Judge Greenwood simply obliterates it.

Whether the Court – and Judge Greenwood – are aware of the jurisprudential implications of their respective positions is something that it would be vain to speculate on. More plausible is the supposition that the Court was at least mindful of the dramatic restrictions it imposed on the organization of interpretive effects. In this sense, it does not seem far-fetched to surmise that it is in order to compensate such restriction that it validated the – not less contentious[55] – idea of an obligation to cooperate with such resolutions, including those that had not been explicitly or implicitly supported by Japan.

4 Concluding Remarks: The Whales and the Changes in International Legal Discourses

There is certainly nothing alarming in the ICJ's blurring of the lines between sources and interpretation. Such idiosyncrasy can be played down if this construction of the Court is read as being strictly limited to interpretation in connection with the 1946 Whaling Convention and the sophisticated institutional regime established under that instrument. What is more, it should be remembered that the distinction between bindingness and interpretive effect – and, thus, the distinction between sources and interpretation, only carry value as a matter of empirical recurrence in legal orders. Yet it should be made clear that a legal order – and legal discourses in general – are not intrinsically better because such a distinction is upheld. In a discipline where validity of legal arguments is primarily based on social acceptance, what matters at the end of the day is that the doctrines that are deployed by international lawyers are still able to generate authoritative legal arguments and are not immediately ridiculed by other professionals. In this respect, it is unlikely that the conceptual nonchalance of the ICJ in its judgment in *Whaling in the Antarctic* and the blurring of the lines between sources and interpretation that have been discussed in this article will be derided.[56]

[52] *Whaling in the Antarctic*, Judgment, *supra* note 10, para. 6, Separate Opinion of Judge Greenwood (emphasis added)

[53] *Ibid.*, para. 7, Separate Opinion of Judge Greenwood.

[54] *Ibid.*, Separate Opinion of Judge Greenwood.

[55] This construction has been criticized by many judges in their opinions appended to the judgment.

[56] See, however, Arato, *supra* note 38.

Social acceptance of the ICJ's idiosyncratic position seems even more probable given that it benefits from the support of strong allies in its dimming enterprise. First, all courts and tribunals are often bound to obfuscate the distinction between the logic of sources and the logic of interpretation when they apply the doctrine of customary international law where law identification and content determination can hardly be distinguished.[57] Second, the special rapporteur of the ILC on the identification of customary international law has not hesitated to consider that interpretive declarations of international organizations can constitute not interpretive practice but, rather, practice for the sake of the establishment of customary international law.[58] Such an association between interpretive practice of international organizations and practice for the sake of the formation of customary law manifests the exact same dimming of the distinction between interpretation and sources.[59] In this context, blurring the lines between bindingness and interpretive effects – and, thus, between sources and interpretation, as the ICJ does in *Whaling in the Antarctic* – may well turn to be a new *en vogue* structure of legal discourses. It may even be that the fundamental distinction between sources and interpretation (and, thus, between the tracing of bindingness and the organization of interpretive effects) is fading away in the contemporary argumentative practice of international lawyers. If this is the case, international lawyers will at least be able to boast that their armchair revolution in legal discourses was also fought to save the whales in the Antarctic.

[57] This practical difficulty is one of the reasons why the distinction between content determination and law ascertainment is sometimes contested or at least played down. See also O. Corten, *Méthodologie du droit international public* (2009), at 213–215. On the difficulty to distinguish the two in the case of customary international law, see J. d'Aspremont, *Formalism and the Sources of International Law* (2011), ch. 7.

[58] See the Michael Wood, Second Report on the Identification of Customary International Law, Doc. A/CN.4/672, paras 41.9, 76.7. For some discussion of this aspect of the work of the ILC, see French and d'Aspremont 'The ILC Project on the Identification of Customary International Law: Saving the Temple from Submergence', *Opinio Juris*, November 2014, available at http://opiniojuris.org/2014/11/17/guest-post-ilc-project-identification-customary-international-law-saving-temple-submergence/ (last visited 3 October 2016). See also d'Aspremont, Customary International Law as a Dance Floor', Part 2, *EJIL:TALK!*, 15 April 2014, available at www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-ii/ (last visited 3 October 2016).

[59] This similarity in terms of blurring the lines between the special rapporteur of the ILC on the identification of customary international law and the ICJ is subject to an important qualification. While the Court in *Whaling in the Antarctic* made the generation of interpretive effects dependent on sources, the ILC in its work on customary international law elevates interpretive effects into an element of the formation of new customary rules: it is not the sources that determine interpretation but, rather, the interpretation that nourishes the sources.