
Organ Practice in the Whaling Case: Consensus and Dissent between Subsequent Practice, Other Practice and a Duty to Give Due Regard

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Abstract

Whaling in the Antarctic Sea on the admissibility of Japan's whale programme under the Whaling Convention highlights the importance of organ practice for the interpretation of the underlying treaty. Analysing the Court's reasoning against its earlier case-law, this article first assesses and affirms that plenary organ practice amounts to practice 'between the States' and, thus, to a subsequent agreement or subsequent practice within the meaning of Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties (VCLT). It then assesses and denies that this goes with a special rule on subsequent practice to the effect of lowering the requirement for an agreement within treaty organs. While within organs silence is easily taken for a tacit agreement, this cannot overcome dissent. And this holds true with regard to organs within general treaty regimes as well as organs of international organizations with legal personality. Whereas the Court therefore rightly rejected the resolution calling for a proportionality test on lethal sampling as subsequent practice under Article 31 of the VCLT because it was not adopted by consensus, the Court is criticized for relying on resolutions of the International Whaling Commission (IWC) by way of a duty of cooperation to give due regard to organ practice. Instead, the more established category of other confirmatory practice pursuant to Article 32 of the VCLT is introduced, which would have permitted the Court to explicitly buttress its affirmation on a proportionality test by relying on a resolution still reflecting the view of a considerable majority of states parties.

Whaling in the Antarctic illustrates the importance of organ practice, which refers to the practice of organs of international treaties by means of resolutions, for the

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interpretation of the underlying treaty, and highlights a number of issues attached to its interpretative employment.¹ The foremost issue is whether it is possible to link resolutions of treaty organs to the interpretative categories of subsequent agreement and subsequent practice within the meaning of Article 31(3)(a) and (b) or to other practice pursuant to Article 32 of the Vienna Convention on the Law of Treaties (VCLT).² Such a proposition entails a number of consequential issues: first of all, whether organ practice counts as practice 'between the States' at all. If this is the case, the question follows whether this goes with a special rule on subsequent practice to the effect of lowering the requirement for an agreement within treaty organs and, finally, whether the answer to both questions differs with regard to organs within general treaty regimes as opposed to organs of international organizations with legal personality.

After a brief overview of the relevant facts of the case with regard to subsequent practice, we will delve into the two issues outlined above by assessing the International Court of Justice's (ICJ) reasoning against its own case law and other international practice: that is, whether organ practice amounts to subsequent state practice, which this article affirms, and whether a lower standard of agreement for subsequent practice applies within treaty organs, which this article denies. Again, it is argued that a differentiation based on legal personality is not an accurate criterion. Whereas both parties spent considerable effort in arguing in favour of, or against, the existence of a subsequent practice within the meaning of Article 31 of the VCLT,³ the Court applied instead a duty to give due regard to the organ practice it derived from the treaty itself. However, extending the perimeter of analysis to Article 32 of the VCLT, which covers other confirmatory practice not establishing the agreement of the parties, permits an alternative reading more in line with the Court's earlier case law by retrieving resolutions registering dissents in order to buttress the Court's conclusion of a proportionality test on the facts. Thus, Articles 31–32 of the VCLT provide an established framework for assessing the impact of the plenary organ's resolutions according to whether these are adopted by consensus or by a majority vote registering dissents.

1 Article VIII and the Proportionality Test for Lethal Sampling

Australia initiated proceedings against Japan alleging that the Japanese JARPA II whale research programme⁴ violated the 1946 International Convention for the Regulation of

¹ *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, 31 March 2014, ICJ Reports (2014) 226. See *inter alia* Cannizzaro, 'Margin of Appreciation and Reasonableness in the ICJ's Decision in the Whaling Case', in B. Bonafè, C. Combacau and P. d'Argent (eds), *Les limites du droit international: Essais en l'honneur de Joe Verhoeven* (2015) 449; the themed section in *Journal of International Dispute Settlement*, vol. 6 (2015); for a more political analysis, see Clapham, 'Japan's Whaling Following the International Court of Justice Ruling: Brave New World—Or Business as Usual?', 51 *Marine Policy* (2015) 238.

² Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.

³ *Whaling in the Antarctic*, *supra* note 1, Memorial of Australia, 9 May 2011, at 163–176, paras 4.64–4.91, at 187, para 4.118; Counter-Memorial of Japan, 9 March 2012, at 349–369, paras 8.15–8.53; Written Observation of New Zealand, 4 April 2013, at 5–7, paras 11–13.

⁴ JARPA stands for Japanese Whale Research Programme under Special Permit in the Antarctic Phase II and substituted JARPA, which run from the 1987–1988 to the 2004–2005 season.

Whaling (ICRW), of which Japan is a party.⁵ According to Australia, the purported scientific research disguises commercial whaling,⁶ which is prohibited since the entering into force of a moratorium.⁷ The only exception for which states parties may continue to grant special permits to kill, take and treat whales to its nationals is for the purposes of scientific research according to Article VIII, paragraph 1, of the Convention:

Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit.

At the entering into effect of the moratorium for Japan, the respondent state launched its first JARPA research programme, later replaced by JARPA II, the aim of which was, among others, to monitor the effects of the moratorium in view of its possible replacement by catch limits.⁸ The Court thus had to interpret Article VIII and, in particular, the phrase ‘for the purposes of scientific research’ contained therein, in view of determining criteria by which to assess whether Japan’s research programme breaches the ICRW. Given Japan’s relatively high lethal sampling figures in the face of alternative non-lethal means, it had to be determined, in particular, which legal effect a disproportionate lethal use entails and whether this revealed JARPA II as a mechanism to continue processing whale products.⁹ On the interpretative level, the question is therefore whether Article VIII imposes upon states recurring to scientific whaling a proportionality test for lethal means.

To argue for the illegality of JARPA II under the ICRW, Australia relied, *inter alia*, on a number of resolutions and guidelines on special permit whaling of the International Whaling Commission (IWC).¹⁰ This ICRW organ, composed of representatives of all states parties,¹¹ may ‘make recommendations on any matters which relate to whales

⁵ International Convention for the Regulation of Whaling (ICRW) 1946, 161 UNTS 72.

⁶ *Whaling in the Antarctic*, *supra* note 1, at 261, para. 101; Australia’s Submission No. 4 that JARPA II is not for the purpose of scientific research pursuant to Article VIII ICRW, *ibid.*, at 239, para. 25; Australia furthermore alleged, which the Court accepted, violation of para. 10(d) on the use of factory ships and para. 7(b) on the Southern Ocean Sanctuary, *ibid.*, at 239 and 299, paras 25 and 247.

⁷ ICRW, *supra* note 5, Schedule, which pursuant to Article I, paragraph 1 of the Convention forms an integral part of the Convention, was amended in 1982 so as to include a moratorium on commercial whaling in paragraph 10(e): ‘Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.’ Although Japan first objected to the amendment, the objection was withdrawn in 1986, apparently under pressure from the USA and became effective for Japan in the 1987–1988 season.

⁸ *Whaling in the Antarctic*, *supra* note 1, at 261, para. 103.

⁹ *Ibid.*, at 261, para. 101.

¹⁰ *Ibid.*, at 256, paras 78–79; Memorial of Australia, *supra* note 3, at 165, para. 4.68. The 30 resolutions are reproduced in Australia’s Memorial Annexes 7–41. All resolutions can be downloaded from the International Whaling Commission’s (IWC) website, available at <http://iwc.int/resolutions> (last visited 1 November 2016).

¹¹ See ICRW, *supra* note 5, Arts III, V. The IWC is charged, *inter alia*, with amending the Convention ‘based on scientific findings’ in order ‘to carry out the objectives and purposes of this Convention’. To this end, the Commission constituted the Scientific Committee as a sub-organ composed of experts, to which,

or whaling and to the objectives and purposes of this Convention'.¹² In its guideline Annex Y, later updated to Annex P,¹³ which was adopted by consensus, the Commission stated that a proposed special permit shall include: '(iii) an assessment of why non-lethal methods, methods associated with any ongoing commercial whaling, or analyses of past data have been considered to be insufficient.'

On the other hand, IWC Resolution 1995–9 on Whaling under Special Permit was not adopted by consensus and, particularly, did not receive the vote of Japan,¹⁴ and it states:

Whereas Article VIII of the Convention provides that any Contracting Government may grant to any of its nationals a special permit ... the Commission ... recommends ... that scientific research involving the killing of cetaceans should only be permitted in exceptional circumstances where the questions address critically important issues which cannot be answered by the analysis of existing data and/or use of non-lethal research techniques.

The question is whether these resolutions and guidelines amount to subsequent practice pursuant to Article 31(3)(b) of the VCLT or otherwise carry any interpretative weight. Whereas the guideline adopted by consensus imposes, as a matter of substance, only a procedural requirement on the state party proposing a special permit to set out why it considers lethal means to be necessary, Resolution 1995–9 requires that lethal means be used only as a last resort when non-lethal means cannot answer the issue. The guideline, in other words, fits better with Japan's argument for a state's subjective discretionary power based on Article's VIII 'as the Contracting Government thinks fit'. Resolution 1995–9, on the contrary, implies an objective proportionality test for lethal sampling.¹⁵

2 Non-Binding Practice of Plenary Organs

The VCLT includes the subsequent practice within the general rule of interpretation in Article 31,¹⁶ and the ICJ has considered this means of interpretation on a number

according to paragraph 30 of the Schedule, special permits under Article VIII must be submitted for review and comment.

¹² *Ibid.*, Art. VI.

¹³ 'Process for the Review of Special Permit Proposals and Research Results from Existing and Completed Permits', Revised Annex P, available at http://iwc.int/document_3100 (last visited 1 November 2016). Annex Y is reproduced in *Whaling in the Antarctic*, Memorial of Australia, *supra* note 3, Annex 48.

¹⁴ IWC Resolution 1995–9 on Whaling under Special Permit, 1995, reprinted in 46 *Report of the International Whaling Commission* (1996) 46.

¹⁵ The principle of proportionality has been defined as the prohibition on using a 'steam hammer to crack a nut, if a nutcracker would do'. In this case, killing would be the steam hammer, whereas non-lethal means the nutcracker. *R. v. Goldstein* [1983] 1 WLR 151, cited in Andenas and Zleptnig, 'Proportionality: WTO Law – In Comparative Perspective', 42 *Texas International Law Journal* (2006) 371, at 382.

¹⁶ On treaty interpretation and subsequent practice, see, e.g., R. Gardiner, *Treaty Interpretation* (2008); U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007); W. Karl, *Vertrag und spätere Praxis im Völkerrecht* (1983); Sorel and Boré-Eveno, 'Article 31', in O. Corten and P. Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (2011) 804; le Bouthillier, 'Article 32' in Corten and Klein, *ibid.*, 841; M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), at 415–449; G. Nolte (ed.),

of occasions.¹⁷ Article 31 of the VCLT, which places the subsequent practice alongside the treaty text, the object and purpose and the context of which it is a part, establishes no hierarchy between the means of interpretation. Instead, treaty interpretation consists in a 'single combined operation' in which the means are to be thrown 'into the crucible'.¹⁸ The subsequent practice nonetheless stands out as an 'authentic means of interpretation' since through this means the states parties speak directly to the interpreter as 'masters of the treaty'.¹⁹ Therefore, by 'taking into account' the subsequent practice, its content is to be 'read into the treaty'.²⁰ The subsequent practice 'between the parties' of Article 31 of the VCLT requires nonetheless an attribution of the relevant practice to the contracting states. Such attribution is not an issue within the framework of conferences of states parties, where the states gather in their very capacity as contracting parties and not as members of treaty organs.²¹ On the other

Treaties and Subsequent Practice (2013). The first two reports of the chairman of the study group, G. Nolte, on subsequent practice constitute a valuable repertory of the jurisprudence on this topic: Nolte, 'Introductory Report for the Study Group on Treaties over Time: Jurisprudence of the International Court of Justice and Arbitral Tribunals of *ad hoc* Jurisdiction Relating to Subsequent Agreements and Subsequent Practice'; Nolte, 'Second Report for the ILC Study Group on Treaties over Time: Jurisprudence under Special Regimes Relating to Subsequent Agreements and Subsequent Practice', both reprinted in Nolte, *Treaties and Subsequent Practice*, *ibid.*, at 169–306.

¹⁷ See *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, 13 December 1999, ICJ Reports (1999) 1045, at 1076, para. 50: 'Indeed in the past, when called upon to interpret the provisions of a treaty, the Court has itself frequently examined the subsequent practice of the parties in the application of that treaty (see, for example, *Corfu Channel, Merits, Judgment*, ICJ Reports 1949, p. 25; *Arbitral Aivard Made by the King of Spain on 23 December 1906, Judgment*, ICJ Reports 1960, pp. 206–207; *Temple of Preah Vihear, Merits, Judgment*, ICJ Reports 1962, pp. 33–35; *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion*, ICJ Reports 1962, pp. 157, 160–161 and 172–175; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment*, ICJ Reports 1984, pp. 408–413, paras. 36–47; *Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment*, ICJ Reports 1994, pp. 34–37, paras. 66–71; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, ICJ Reports 1996 (I), p. 75, para. 19).'

¹⁸ 'The Commission, by heading the article "General rule of interpretation" in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.' ILC Commentary to Draft Article 27, which later became Art. 31 of the VCLT, *ILC Yearbook, Vol. II* (1966) 219–220, para. 8; see also Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission', in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (2011) 105.

¹⁹ ILC Report of the Sixty-Fifth Session, Doc. A/68/10 (2013), Chapter IV on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Commentary to Draft Conclusion 5, para. 11.

²⁰ '[A]n agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.' *ILC Yearbook 1966*, *supra* note 18, at 221, para. 14. This reading was endorsed by *Kasikili/Sedudu Island*, *supra* note 17, at 1076, para. 49.

²¹ These are periodical gatherings of the contracting states, which often adopt resolutions that touch upon the interpretation of the constituent treaty and may amount to subsequent agreements. On the Conference of the States Parties, see Nolte, 'Third Report of the Study Group on Treaties over

hand, the attribution requirement excludes that an organ with limited membership establishes subsequent practice as such, although its practice may constitute a catalyst for states parties to agree on a certain interpretation.²²

The analysis thus concentrates on organs consisting of representatives of all states parties. Organs of international organizations with legal personality pose the thornier issue. The autonomy of the organization with legal personality may tend to interrupt the attribution link by establishing a veil between the organization and its organs, on the one hand, and the constituent states, on the other. However, the fact that a subsequent agreement or practice is not subject to any particular form or procedure pierces the veil.²³ What counts is that the states parties agree on a particular interpretation and not how this agreement has come about nor why the states gathered in the first place. International jurisprudence and practice reject any limitation on the capacity of states to establish a subsequent agreement because they are gathered as organs of international organizations with legal personality.

Thus, in *Legality of the Use by a State of Nuclear Weapons*, the ICJ implicitly accepted the practice of the United Nations General Assembly (UNGA) as potentially amounting to subsequent practice between the parties.²⁴ The Appellate Body of the World Trade Organization (WTO), an organization with legal personality,²⁵ followed suit by considering the practice of the ministerial conference as a subsequent agreement within the meaning of Article 31 of the VCLT.²⁶ Some commentators agree in not considering the legal personality as an obstacle to attribution.²⁷ The International Law Commission (ILC) adopted a more cautious approach by accepting that the practice of organizations with legal personality may give rise, or express subsequent practice,

Time: Subsequent Agreement and Subsequent Practice of States Outside of Judicial or Quasi-Judicial Proceedings', in Nolte, *Treaties and Subsequent Practice*, *supra* note 16, 370; ILC Report of the Sixty-Sixth Session, Doc. A/69/10 (2014), Chapter VII on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Draft Conclusion 10 with Commentary.

²² See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971) 16, at 22, para. 22.

²³ Gardiner, *supra* note 16, at 216–217; ILC Report of the Sixty-Sixth Session, *supra* note 21, Draft Conclusion 6, para. 2.

²⁴ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 66, at 74–75, para. 19.

²⁵ Agreement Establishing the World Trade Agreement (WTO Agreement) 1994, 1867 UNTS 154, Art. VIII.

²⁶ WTO, *United States – Measures Affecting the Production and Sale of Clove Cigarettes – Report of the Appellate Body*, 4 April 2012, WT/DS406/AB/RW2, paras 267–268; WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Banana III) – Report of the Second Recourse to Article 21.5 Panel*, 7 April 2008, WT/DS27/RW2, para. 7.443; WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Banana III) – Report of the Second Recourse to Article 21.5 Appellate Body*, 26 November 2008, WT/DS27/AB/RW2, paras 389–393; see also WTO, *European Communities – Customs Classification of Certain Computer Equipment – Report of the Appellate Body (EC – Customs Classification)*, 5 June 1998, WT/DS62/AB/R, para. 90.

²⁷ Gardiner, *supra* note 16, at 87–92; J.E. Alvarez, *International Organizations as Law-Makers* (2005), at 87–92.

within the meaning of Article 31 of the VCLT, but it does not constitute subsequent practice of the parties itself. It may constitute, however, other practice pursuant to Article 32 of the VCLT or contribute to the object and purpose.²⁸ Such caution, however, is due to the ILC opting for the broader category of ‘practice of an international organization’, which goes beyond that of plenary organs.

If the autonomy inherent in a distinct legal personality is insufficient to interrupt the attribution link, the same conclusion follows even more with regard to the more feeble autonomy of organs not linked to international organizations with legal personality. This second category, residual to the former only as a matter of definition, consists of organs established within general treaty regimes and includes organs such as the Free Trade Commission of the North American Free Trade Agreement (NAFTA).²⁹

The IWC comes within this latter category of organs of general treaty regimes. Strictly speaking, it could be questioned whether the following inferences also hold true for organizations with legal personality. However, lacking any contrary indications, such may be presumed. The Court in *Whaling in the Antarctic* recognized the relevance of resolutions adopted by consensus for interpreting the ICRW and confirmed to that effect that organ practice needs not be drawn from binding instruments: ‘These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule.’³⁰

The Court, however, did not expressly qualify the resolutions adopted by consensus as subsequent practice within the meaning of Article 31(3)(b) of the VCLT. And, moreover, later in the judgment, it instead considered these resolutions from the perspective of a duty to cooperate, which could indicate an alternative path to subsequent practice within the meaning of Article 31 of the VCLT.³¹ It would nevertheless go too far to read this as rejecting organ practice from being considered as subsequent practice, considering that the Court nowhere alluded to the issue of organ and state practice, which only could have led it to such a negative conclusion.

²⁸ ILC Report of the Sixty-Seventh Session, Doc. A/70/10 (2015), Chapter VIII on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Draft Conclusion 11 and Commentary, paras 34, 37.

²⁹ North American Free Trade Agreement (NAFTA) 1992, 32 ILM 289, 605 (1993). See, e.g., the debate around an interpretative note of the NAFTA Free Trade Commission consisting of representatives of the three NAFTA members, which centred on whether the note illegitimately amended the NAFTA agreement, while the attribution to the three states was not an issue. Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’, 104 *American Journal of International Law* (2010) 179.

³⁰ *Whaling in the Antarctic*, *supra* note 1, at 248, para. 46; see, however, dissenting opinion Judge Bennouna, 341, at 344: ‘The Court seeks to remedy the lack of such an obligation by invoking (Judgment, paragraph 144) the inadequacy of Japan’s analysis of non-lethal methods, and its failure to give due regard to IWC resolutions and Guidelines, despite the fact that, by their nature, these are not binding upon that State. We may well ask ourselves how a legal obligation can derive from the inadequacy of an analysis, or from a failure to have regard to acts of international bodies which carry no normative force in relation to those to whom they are addressed.’

³¹ See section 4.A in this article.

On the contrary, more arguments point to the Court in *Whaling in the Antarctic* implicitly considering the practice of treaty organs as amounting to a subsequent practice of the states. First, the irrelevance of the non-binding character of the resolutions fits well with this category. If seen as a subsequent practice under Article 31 of the VCLT, non-binding instruments express the opinion of states parties on the interpretation of the treaty to be read into it, and their normative force, if any, derives from the content establishing a subsequent practice and not from the instrument itself. And, more importantly, the Court rejected some resolutions as subsequent practice because they were not adopted by consensus. This would imply, *a contrario*, that those adopted by consensus constitute subsequent practice under Article 31 of the VCLT:

83. Article VIII expressly contemplates the use of lethal methods, and the Court is of the view that Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties.

3 Organ Practice and the Standard of Agreement for Subsequent Practice

The question that follows is whether organ practice amounts to subsequent practice only if – and, thus, consistent with the general rule – it establishes the agreement of the parties or whether a special rule on subsequent practice has developed within treaty organs that overlooks the requirement for an agreement. The special rule thesis rests on a line of advisory opinions on organ practice, which apparently recognized subsequent practice despite the opposition of some states parties and thus a lack of agreement. This raises the question whether *Whaling in the Antarctic* is innovative against these precedents as a return to stricter requirements on Article 31 of the VCLT because it considers that a lack of consensus prevents a resolution from establishing subsequent practice.³²

The ICJ thus relied on the evolving practice of both the UNGA and the United Nations Security Council (UNSC) in *Construction of a Wall*³³ in order to affirm that Article 12 of the Charter of the United Nations (UN Charter)³⁴ had evolved in such a way as to

³² See Arato, 'Subsequent Practice in the Whaling Case, and What the ICJ Implies about Treaty Interpretation in International Organizations', *EJIL:Talk!*, available at www.ejiltalk.org/subsequent-practice-in-the-whaling-case-and-what-the-icj-implies-about-treaty-interpretation-in-international-organizations (last visited 1 November 2016).

³³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136.

³⁴ Art. 12 of the UN Charter reads: 'While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each

permit the UNGA to deal with issues on the agenda of the UNSC, although the resolutions cited by the Court as corroborating practice, such as UNGA Resolution 1600(XV) on the Congo and 1913(XVIII) Regarding Portuguese Colonies, were adopted by the majority and registered negative votes.³⁵ The Court likewise relied on the UNGA's practice in *Certain Expenses of the United Nations*³⁶ in order to assess whether 'expenses of the Organization', according to Article 17(2) of the UN Charter, included operational expenses in addition to administrative ones, despite the lack of consensus in annual budget resolutions.³⁷

The conflict between *Whaling in the Antarctic* and the Court's earlier case law, however, is more apparent than real. In *Whaling in the Antarctic*, the Court recognized a substantive dissent of Japan and others, which was not the case in *Construction of a Wall* and *Certain Expenses*. Both the *Construction of a Wall* and *Certain Expenses* advisory opinions dealt with issues of competence, while the states voting against the UNGA resolutions did not dissent only on this competence – that is, because they opposed the inclusion in the organization's budget of non-administrative items or the UNGA's incursion into the UNSC's exclusive competence on peace and security. In *Whaling in the Antarctic Sea*, on the other hand, the lack of consensus for Resolution 1995–9, and, notably, the contrary position of Japan, concerned the resolution itself and the proportionality test, which the IWC's resolution would have incorporated into the ICRW. *Whaling in the Antarctic* is thus in line with the Court's earlier case law.

The *Construction of a Wall* and *Certain Expenses* advisory opinions should therefore be placed in the framework of an agreement established by silence – that is, when the circumstances are such that the lack of reaction or opposition may reasonably count

session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.'

³⁵ *Construction of a Wall*, *supra* note 33, at 149–150, para. 27: 'As regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda. ... However, this interpretation of Article 12 has evolved subsequently. ... Indeed, the Court notes that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security.' UNGA Res. 1600(XV), 15 April 1961, was adopted by 60 affirmative votes over 16 negative votes and 23 abstentions; UNGA Res. 1913(XVIII), 3 December 1963, was adopted by 91 affirmative votes, 2 negative votes, 11 abstentions and 7 non-voting. For the voting records, see General Assembly of the United Nations, available at www.un.org/en/ga/documents/voting.asp (last visited 1 November 2016).

³⁶ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, 20 July 1962, ICJ Reports (1962) 151.

³⁷ *Ibid.*, at 160: 'The budget of the Organization has from the outset included items which would not fall within any of the definitions of "administrative budget" which have been advanced in this connection. ... It is a consistent practice of the General Assembly to include in the annual budget resolutions, provision for expenses relating to the maintenance of international peace and security.' See on these cases also the analysis of Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations', 38 *Yale Journal of International Law* (2013) 289, at 316–332.

as agreement. The drafting history of Article 31(3)(b) of the VCLT is well known, where the ILC changed the phrase agreement ‘of *all* parties’ into ‘of *the* parties’ in order to underline that not all parties must actively engage in a subsequent practice.³⁸ In fact, in case of a multilateral treaty with a great number of contracting parties, this would be almost impossible to prove, even assuming a wide notion of practice. The Court likewise has used the practice of some states assuming the tacit acceptance by others of the UNSC’s voting procedure in *Legal Consequences for States of the Continued Presence of South Africa in Namibia*.³⁹ Both the European Court of Human Rights (ECtHR)⁴⁰ and the WTO’s Dispute Settlement Body (DSB) adopted an analogous reasoning.⁴¹

However, although the Court recognized in *Legality of the Use by a State of Nuclear Weapons* that the constituent instruments of international organizations are treaties of a particular type, and, hence, the organ practice deserves particular attention,⁴² it has not compromised on the premise that there is no subsequent practice pursuant to Article 31 of the VCLT in the face of the opposition of a number of states.⁴³ The same approach was again followed by both the ECtHR⁴⁴ and the WTO DSB in *US – Zeroing (EC)*:⁴⁵

7.218 In any event, even if it were established conclusively that all the 76 Members referred to by the European Communities have adopted a practice of applying Article 2.4.2 to duty assessment, this would only mean that a considerable number of WTO Members have adopted an approach different from that of the United States. ... We note that one third party in this proceeding submitted arguments contesting the view of the European Communities. ... Therefore, ... that practice is not a practice ‘which establishes the agreement between the parties regarding the interpretation’ of Article 2.4.2.

By not accepting resolutions as subsequent practice under Article 31(3)(b) of the VCLT because of Japan’s and others’ dissent, the Court denied in *Whaling in the Antarctic* the

³⁸ *ILC Yearbook 1966*, *supra* note 18, 221–222, para. 15.

³⁹ *Legal Consequences in Namibia*, *supra* note 22, at 22, para. 22: ‘This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization’; see also *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, 25 March 1959, ICJ Reports (1960) 150, at 168.

⁴⁰ See, e.g., ECtHR, *A. v. the United Kingdom*, Appl. no. 35373/97, Judgment of 17 December 2002, at paras 80, 83.

⁴¹ See, e.g., WTO, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Report of the Panel*, 30 May 2005, WT/DS269/R, at para. 7.253; WTO, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Report of the Appellate Body*, 12 September 2005, WT/DS269/AB/R, at para. 259.

⁴² *Nuclear Weapons*, *supra* note 24, at 74–75, para. 19.

⁴³ *Ibid.*, at 81, para. 27: ‘Resolution WHA46.40 itself, adopted, not without opposition, as soon as the question of the legality of the use of nuclear weapons was raised at the WHO, could not be taken to express or to amount on its own to a practice establishing an agreement between the members of the Organization to interpret its Constitution as empowering it to address the question of the legality of the use of nuclear weapons.’

⁴⁴ See, e.g., ECtHR, *V. v. United Kingdom*, Appl. no. 24888/94, Judgment of 6 March 1998, at para. 73.

⁴⁵ WTO, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) – Report of the Panel (unopposed)*, 31 October 2005, WT/DS294/R.

existence of a special rule with regard to organ practice that would lower the requirement for an agreement in subsequent practice. Given that the ICRW does not establish an organization with legal personality, the question remains what *Whaling in the Antarctic's* assertion means for those that do. If *Whaling in the Antarctic's* denial of a special rule were inconsistent with the ICJ's case law on international organizations with legal personality, namely the UN, a distinction based on whether an organ has legal personality or not would in fact be warranted. A special rule would then be excluded for general treaty regimes such as the ICRW but would persist and, *a contrario*, be confirmed for international organizations with legal personality such as the UN.⁴⁶ *Whaling in the Antarctic*, however, as has been shown above, is not innovative but in line with the Court's earlier case law. The presumption of a common rule for treaty regimes and international organizations regardless of their legal personality is therefore not confirmed by *Whaling in the Antarctic* but not rebutted either. At the same time, such a conclusion does not deny the possible existence of a special rule within singular organizations pursuant to Article 5 of the VCLT, but such a special rule would need to be proven *ad hoc* for this particular organization.⁴⁷

The ICJ's jurisprudence does not require the express consent of every single contracting state but may assume an agreement by the practice of some states and the silence of others, when the circumstances call for a reaction.⁴⁸ Within treaty organs and conferences of states parties, the burden on states to expressly dissent is greater, particularly when voting on resolutions.⁴⁹ Silence is thus easily taken for an agreement. However, when a dissent is clearly expressed and concerns not only procedural issues but also the content of a resolution, no agreement exists, and, hence, there is no subsequent practice under Article 31 of the VCLT. Within organs, there is thus no special rule lowering the requirement for an agreement, but organs imply a procedural framework that facilitates an agreement by silence.

4 A Duty to Give Due Regard versus Articles 31 and 32 of the VCLT

A The Court's Reliance on a Duty to Cooperate

In *Whaling in the Antarctic*, the ICJ principally took account of IWC resolutions within the framework of a duty to cooperate in order to give them an interpretative effect,⁵⁰

⁴⁶ A distinguishing based on legal personality is suggested by Arato, *supra* note 32.

⁴⁷ Art. 5 of the VCLT reads: "The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization"; see also ILC Report of the Sixty-Seventh Session, *supra* note 28, Draft Conclusion 11, para 40; see, in particular, Peters, 'Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?', 3 *Göttingen Journal of International Law* (2011) 617, at 638, who contemplates a quasi-customary established practice of the organization amounting, as the case may be, to a rule of the organization within the meaning of Art. 5 of the VCLT, which may loosen the agreement requirement for subsequent practice.

⁴⁸ ILC Report of the Sixty-Sixth Session, *supra* note 21, Draft Conclusion 9, para. 2.

⁴⁹ Peters, *supra* note 47, at 638–640.

⁵⁰ *Whaling in the Antarctic*, *supra* note 1, at 269–270, para. 137.

which the Court drew from the procedural requirements of paragraph 30 of the Schedule⁵¹ and the fact that such a duty was undisputed by Japan.⁵² The question is why the Court preferred such duty to the concept of 'subsequent practice'. Since 'giving due regard' to a resolution resembles the 'taking into account' in accordance with Article 31 of the VCLT, the different path still leads to the same outcome. One possible explanation is that the Court did not consider organ practice as subsequent practice due to the autonomy of organs with regard to states and, hence, looked for an alternative path. Why this explanation seems unlikely has been spelled out above.⁵³ A second possible explanation is that the Court wanted to give effect to the resolutions not adopted by consensus by sidelining the requirement for an agreement under Article 31 of the VCLT. While the Court's wording suggests this, the outcome points to the Court effectively applying the duty only to the resolutions adopted by consensus, since the resolutions on the proportionality test adopted by a majority vote remained outside:

[T]he relevant resolutions and Guidelines that have been approved by consensus call upon States parties to take into account whether research objectives can practically and scientifically be achieved by using non-lethal research methods, but they do not establish a requirement that lethal methods be used only when other methods are not available.

The Court however observes that the States parties to the ICRW have a duty to co-operate with the IWC and the Scientific Committee and thus should give due regard to recommendations calling for an *assessment* of the feasibility of non-lethal alternatives.⁵⁴

Judge *ad hoc* Hilary Charlesworth, on the other hand, drew a different distinction in her separate opinion by considering the resolutions adopted by consensus as subsequent practice under Article 31 of the VCLT and viewing those adopted by a majority vote in light of a duty of cooperation:

Most IWC resolutions on special permit whaling have attracted a number of negative votes, which precludes them as evidence of the parties' agreement on the ICRW's interpretation. However, there remain some significant resolutions that were adopted by consensus and thus must inform the interpretative task. I note that resolutions adopted by a vote of the IWC have some consequence although they do not come within the terms of Article 31.3 of the Vienna Convention. Particularly when they are adopted by a large majority of IWC members, the resolutions are relevant to the duty of co-operation, discussed below.⁵⁵

Judge *ad hoc* Charlesworth's separate opinion carries the advantage of drawing more explicitly a distinction based on the consensus/agreement of the parties. The role of

⁵¹ On the Schedule, *supra* note 7.

⁵² *Whaling in the Antarctic*, *supra* note 1, at 297, para. 240: 'The Court observes that paragraph 30 and the related Guidelines regarding the submission of proposed permits and the review by the Scientific Committee (currently, Annex P) must be appreciated in light of the duty of co-operation with the IWC and its Scientific Committee that is incumbent upon all States parties to the Convention, which was recognized by both Parties and the intervening State.'

⁵³ See section 2 in this article.

⁵⁴ *Whaling in the Antarctic*, *supra* note 1, at 257, para. 83 (emphasis added); see also at 269–270, para. 137, for its application.

⁵⁵ *Ibid.*, at 453–454, para. 4, Separate Opinion of Judge *ad hoc* Charlesworth.

the states parties' agreement as characterizing an authentic interpretation should indeed not be blurred by applying a duty to give due regard to all resolutions alike. It also avoids stripping resolutions establishing the opinion of the very large majority of states of any normative effect, which is an outcome Judge Christopher Greenwood endorsed.⁵⁶

B An Alternative Reading: In Particular, Other Practice Pursuant to Article 32 of the VCLT

The better proposition, however, seems to view the resolutions not adopted by consensus as being other practice not reflecting the agreement of the parties in the sense of Article 32 of the VCLT.⁵⁷ In fact, since the interpretative weight of an authentic interpretation that must be read into the treaty is limited to the subsequent practice 'which establishes the agreement of the parties regarding its interpretation',⁵⁸ the question remains what interpretative value, if any, is to be attributed to practice not establishing the agreement of the parties. In *Kasikili/Sedudu Island*, the ICJ applied uncontested factual findings in order to confirm its interpretation:

The Court finds that these facts, while not constituting subsequent practice by the parties in the interpretation of the 1890 Treaty, nevertheless support the conclusions which it has reached by interpreting Article III, paragraph 2, of the 1890 Treaty in accordance with the ordinary meaning to be given to its terms.⁵⁹

This confirmatory role points to Article 32 of the VCLT, whose open list of supplementary means is well suited to cover practice not meeting the requirements of Article 31(3)(b) of the VCLT, although the ICJ did not expressly mention this article. The provision, unlike the closed list approach of Article 31, refers to 'supplementary means, ... including' the *travaux préparatoire* and the circumstances of the treaty's conclusion. The report of the ILC to the UNGA in 1964 also linked practice not establishing the agreement of the parties to Article 32 of the VCLT:

Subsequent practice of the latter kind evidences the agreement of the parties as to the interpretation of the treaty ... The practice of individual States in the application of a treaty, on the other hand, may be taken into account only as one of the 'further' means of interpretation mentioned in article 70 (later 32).⁶⁰

⁵⁶ *Ibid.*, at 407–408, para. 6, Separate Opinion of Judge Greenwood: 'Far from establishing the agreement of the parties to the Convention, these resolutions demonstrate the absence of any agreement and cannot, therefore, be relied on to sustain an interpretation of the Convention which can bind Japan.'

⁵⁷ New Zealand urged the Court to consider the resolutions also under Art. 32 of the VCLT. *Whaling in the Antarctic*, *supra* note 1, Written Observations of New Zealand, para. 13: 'Both as evidence of subsequent practice under Article 31(3)(b), or as supplementary means of interpretation under Article 32, of the Vienna Convention, such decisions and resolutions shed valuable interpretative light on the meaning of the terms of Article VIII and their proper application. In so doing, they do not modify the terms of Article VIII, but rather confirm the interpretation that flows from their ordinary meaning in their context.'

⁵⁸ See Art. 31(3)(b) of the VCLT.

⁵⁹ *Kasikili/Sedudu Island*, *supra* note 17, at 1096, para. 80.

⁶⁰ *ILC Yearbook 1966*, *supra* note 18, 204, para. 13: 'The practice of an individual party or of only some parties as an element of interpretation is on a quite different plane from a concordant practice embracing all the parties and showing their common understanding of the meaning of the treaty.'

The ILC, which has dealt with the topic of subsequent practice since 2008,⁶¹ confirmed such other practice, based on the jurisprudence of a number of international courts,⁶² as a third implicit category of practice in Article 32 of the VCLT, in addition to the two explicit categories of subsequent agreement and subsequent practice in Article 31 of the VCLT.⁶³ The only requirement is that practice within the meaning of Article 32 be ‘in the application of the treaty’ since otherwise no link to the treaty would exist.⁶⁴

Both the subsequent agreement and subsequent practice under Article 31, which differ in their material evidence for an agreement – respectively, a single common act or a series of acts establishing a common position⁶⁵ – represent an ‘authentic interpretation’ of the parties to be ‘taken into account’ within the general rule of interpretation under Article 31 of the VCLT.⁶⁶ Other practice under Article 32 of the VCLT, on the other hand, does not reflect such authentic interpretation and carries less interpretative value.⁶⁷ First, although the ‘crucible approach’ implies that the specific interpretative value of a particular means of interpretation depends on the circumstances at hand and cannot be determined in the abstract, subsequent practice under Article 32 carries less weight in the ‘crucible’ than subsequent practice under Article 31.⁶⁸

Second, recourse to Article 32 of the VCLT is limited to two cases: to confirm the meaning derived from the interpretative means of Article 31 of the VCLT and to determine the meaning, when the application of Article 31 leaves the meaning ambiguous or leads to an unreasonable result.⁶⁹ Practice, however, has interpreted the conditions for applying Article 32 rather liberally.⁷⁰ Especially the extent of the confirmatory role of supplementary means cannot clearly be determined beforehand, which leaves the interpreter with a rather wide margin of discretion. Nonetheless, this limited gateway

⁶¹ See for the current state of the work, Analytical Guide to the Work of the International Law Commission, available at http://legal.un.org/ilc/guide/1_11.shtml (last visited 1 November 2016).

⁶² ILC Report of the Sixty-Fifth Session, *supra* note 19, Commentary to Draft Conclusion 4, paras 22, 36. See for further reference to the jurisprudence of international tribunals, paras 25–33.

⁶³ The ILC uses the terms ‘agreed subsequent practice’ or ‘subsequent practice in a narrow sense’ when referring to Art. 31 of the VCLT and ‘other subsequent practice’ or ‘subsequent practice in a broad sense’ when referring to Art. 32 of the VCLT. See, e.g., the use in ILC Report of the Sixty-Fifth Session, *supra* note 19, Commentary to Draft Conclusion 4, paras 15, 34, 36. Although the ILC distinguishes the two categories, it has not as yet forged a clear terminological divide.

⁶⁴ *Ibid.*, para. 23.

⁶⁵ *Ibid.*, paras 9–10; with further reference to jurisprudence on the distinction (paras 7–12).

⁶⁶ *ILC Yearbook 1966*, *supra* note 18, 221–222, para. 15.

⁶⁷ ILC Report of the Sixty-Fifth Session, *supra* note 19, Commentary to Draft Conclusion 4, para. 34.

⁶⁸ See note 18 above.

⁶⁹ This gateway in the passage from Art. 31 to Art. 32 of the VCLT was built in as a result of the debate between objective and subjective interpretation during the work of the Commission. In fact, a subjective approach to treaty interpretation relies on the *travaux préparatoire* as a principle means of interpretation in order to establish the intention of the parties, whereas the objective approach focuses on the treaty text and is hence wary of any non-textual element such as the discussions leading to the adoption of a treaty-text. The VCLT, which eventually upheld the objective approach, consequently limits recourse to the *travaux* and other supplementary means, including other subsequent practice, to the two cases referred to above. See Gardiner, *supra* note 16, at 303–306.

⁷⁰ *Ibid.*, at 302–303; le Bouthillier, *supra* note 16, at 846–849.

and the fact that such practice is not ‘to be read into the treaty’ like a subsequent agreement or practice within the meaning of Article 31 guarantees dissenting states parties from having imposed upon them a meaning they oppose. This means of interpretation, in fact, does not compete with, but confirms, the meaning that already flows from the general rule of Article 31.⁷¹ At the same time, it provides a framework for considering the opinion expressed by a majority of states parties, while the duality subsequent practice/other practice is still safeguarded by retrieving fruitful debates on species of practice within this latter category.⁷²

Had the Court in *Whaling in the Antarctic* accepted a qualification as subsequent practice under Article 31 of the resolution not adopted by consensus, the proportionality requirement would have entered into the ICJ’s first level assessment, together with the text as well as the object and purpose. Given the coherence with these latter means of interpretation within the ‘crucible’, such authentic interpretation of the parties would have led to the proportionality test being read into Article VIII of the ICRW. Instead, the Court arrived at a proportionality test analogous to that contained in the resolution not adopted by consensus irrespective of the interpretative effect of the IWC resolutions. Based on the textual interpretation of the notion of ‘scientific purpose’ in accordance with Article 31 of the VCLT, the Court effectively went beyond the requirement of a subjective feasibility assessment for non-lethal means on the part of Japan and applied a reasonableness standard of review⁷³ that includes an objective proportionality test in determining the scope of JARPA II:

67. When reviewing the grant of a special permit authorizing the killing, taking and treating of whales, the Court will assess, first, whether the programme under which these activities occur involves scientific research. Secondly, the Court will consider if the killing, taking and treating of whales is ‘for purposes of’ scientific research by examining whether, in the use of lethal methods, the programme’s design and implementation are reasonable in relation to achieving its stated objectives. This standard of review is an objective one.

⁷¹ At first sight, the same would not seem to apply in case of ambiguity or unreasonableness. However, it is the implicit risk a state assumes when agreeing on an ambiguous formulation that it later must cope with the prevalence of one of many possible meanings. In practice, it is very rare that the meaning remains ambiguous or unreasonable after resorting to the object and purpose and to good faith, and such cases thus remain mostly hypothetical. See le Bouthillier, *supra* note 16, at 849–851.

⁷² See Boisson de Chazournes, ‘Subsequent Practice, Practices and “Family-Resemblance”’: Towards Embedding Subsequent Practice in Its Operative Milieu’, in Nolte, *supra* note 16, 53.

⁷³ According to Cannizzaro, the Court applied a looser standard of review with regard to ‘scientific research’ and a stricter one with regard to ‘for purposes of’. This article goes a step further and sees this second stricter reasonableness test as one of proportionality. Cannizzaro, *supra* note 1, at 452–453. Tully criticizes the Court’s recourse to an objective reasonableness test, which risks leading it beyond its judicial function, although in the present case, the parties’ submissions lead the Court to such standard of review. Tully, ‘“Objective Reasonableness” as a Standard for International Judicial Review’, 6 *Journal of International Dispute Settlement (JIDS)* (2015) 546, at 566–567, while Gros views the objective reasonableness test as a middle course between total deference and total refusal to consider the scientific evidence. Gros, ‘The ICJ’s Handling of Science in the *Whaling in the Antarctic* Case: A Whale of a Case?’, 6 *JIDS* (2015) 578, at 619–620. Both authors, however, do not link the objective reasonableness test to one of proportionality as this article suggests.

The concrete application confirms this reading since the ICJ finally qualified JARPA II as being commercial because of its excessive lethal sampling compared to its stated research objectives.⁷⁴ The Court, in fact, did not consider lethal sampling, as such, to be unreasonable, but its use with regard to the stated research objective was found to be excessive, and thus disproportional. This effectively made the Court's test one of proportionality. More importantly, the proportionality test should guide Japan in bringing its future research programmes in conformity with the Court's judgment. At this point, the Court could and should have retrieved the resolutions not adopted by consensus as other practice within the meaning of Article 32 of the VCLT in order to confirm its conclusion: that is, the scientific purpose of lethal whaling entails a proportionality test pursuant to the Treaty's object and purpose (Article 31 of the VCLT), as is confirmed by IWC's majority resolutions (Article 32 of the VCLT).

Indeed, the ICJ in *Kasikili/Sedudu Island* used practice not establishing the agreement of the parties to confirm its interpretation based on the ordinary meaning.⁷⁵ And in circumstances similar to that in *Whaling in the Antarctic*, the WTO's Appellate Body criticized the Panel for not having considered decisions by an organ with full membership, notwithstanding the dissent of the then European Communities:

90. A proper interpretation also would have included an examination of the existence and relevance of subsequent practice. We note that the United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO ... The European Communities observed that it had introduced reservations with regard to these decisions ... However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant; and, therefore, they should have been examined by the Panel.⁷⁶

5 Consensus and Dissent between Subsequent Practice, Other Practice and a Duty to Give Due Regard

Whaling in the Antarctic highlights the importance of organ practice by means of resolutions for the interpretation of the underlying treaty. Whereas the ICJ rejected a resolution calling for a substantive and objective proportionality test on lethal sampling as subsequent practice under Article 31 of the VCLT, because it was not adopted by consensus and notably with the dissent of Japan, the Court relied on other resolutions, which were adopted by consensus and imposed on states a mere procedural obligation to assess and set out why they consider lethal means to be necessary. In order to do so, the Court evoked a duty to cooperate that it derived from the Treaty itself, instead of explicitly referring to subsequent practice pursuant to Article 31. However, 'giving due regard' within the framework of a duty to cooperate basically corresponds to 'taking into account' of Article 31. The Court's earlier case law accepts organ practice as amounting to practice 'between the States' pursuant to Article 31 despite the autonomy of an organization.

⁷⁴ *Whaling in the Antarctic*, *supra* note 1, at 292–293, paras 224–225.

⁷⁵ *Kasikili/Sedudu Island*, *supra* note 17, at 1096, para. 80.

⁷⁶ *EC – Customs Classification*, *supra* note 26, para. 90.

Not being subject to any form or procedure, what counts is that states parties agree on a particular interpretation and not how this agreement has come about nor why states gathered in the first place. *Whaling in the Antarctic* builds on this assumption. At the same time, the ICJ confirmed its earlier case law that no special rule on subsequent practice has developed to the effect of lowering the requirement for an agreement within treaty organs. Such agreement does not necessarily warrant the express consent of every single contracting state, but the practice of some with the silence of the other states may suffice when the circumstances call for a reaction. Thus, organs imply a procedural framework that facilitates an agreement by silence. However, when a dissent is clearly expressed and concerns not only procedural issues but also the content of a resolution, no agreement exists, and, hence, there is no subsequent practice under Article 31 of the VCLT. *Whaling in the Antarctic* concerns an organ within a general treaty regime without legal personality, but the presumption that the same rule applies to international organizations with legal personality alike has not been rebutted.

Beyond the IWC's resolutions, the ICJ finally applied a reasonableness standard of review, which includes an objective proportionality test based on a textual interpretation of 'scientific purpose' in Article VIII of the ICRW and qualified Japan's research programme as commercial because of its excessive lethal sampling in view of its stated research objectives. At this point, the Court could and should have retrieved the resolution not adopted by consensus as other practice within the meaning of Article 32 of the VCLT in order to buttress its conclusion. This category of practice, not establishing the agreement of the parties, comes within the open list of supplementary means of interpretation and is recognized by both the ILC and the Court's earlier case law. In contrast to subsequent practice under Article 31, other practice within the meaning of Article 32 does not represent an 'authentic interpretation' of the parties and is not 'to be read into the treaty'. Thereby, such practice, according to Article 32, can only confirm the meaning arrived at by the general rule of interpretation – the text, the context as well as the object and purpose – or come into play when the resulting meaning is ambiguous or absurd.

Dissenting states parties such as Japan in this case are guaranteed against having imposed upon them a meaning they oppose, since this means does not compete with, but, rather, confirms, the meaning that already flows from the general rule of Article 31 of the VCLT. A duty of cooperation, on the other hand, lacks the legal rigour of Articles 31–32, which differentiate the effect of organ practice based on whether it reflects or not an agreement of the parties. And these categories come with plenty of case law. In *Whaling in the Antarctic*, the Court could have elaborated more explicitly on these categories and, by doing so, better clarify for future cases the interpretative effect of resolutions registering dissent as compared to those adopted by consensus. By not considering Article 32, the Court lacked a category for the resolution containing a proportionality test. Still, the fact that the majority of judges found comfort in having the interpretative meaning arrived at supported by the large majority of contracting states is not too audacious to assume.