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The Legal Effect of Greenland's Unilateral Aboriginal Subsistence Whale Hunt

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THE LEGAL EFFECT OF GREENLAND'S UNILATERAL ABORIGINAL SUBSISTENCE WHALE HUNT

CHRIS WOLD* & MICHAEL D. KEARNEY**

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I. INTRODUCTION

For three decades, two issues have dominated discussions within the International Whaling Commission (“IWC”): the persistence of the moratorium on commercial whaling¹ and Japan’s scientific research whaling² under the International Convention for the

1. International Convention for the Regulation of Whaling art. XI, ¶ 10, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (entered into force Nov. 10, 1948) [hereinafter ICRW]. The Schedule is an integral part of the ICRW. *Id.* art. I(1). The Schedule was last amended at the 65th Annual Meeting of the IWC in September 2014. At the moment, however, the IWC’s website only provides a link to the Schedule as amended in 2012. *See* International Convention for the Regulation of Whaling, Schedule art. III, ¶ 10(e), Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 [hereinafter Schedule]. The 2014 amendments can be found in Int’l Whaling Comm’n [IWC], *Summary of Main Outcomes, Decisions and Required Actions from the 65th Meeting*, at 6 (Sept. 18, 2014), available at <http://iwc.int/iwc65docs> [hereinafter *Summary of Main Outcomes*].

2. Between 1987 and 2001, the IWC has condemned Japan’s so-called

Regulation of Whaling (“ICRW”).³ Indeed, Japan’s scientific research whaling has led, uniquely, to a television show (*Whale Wars*) documenting the efforts of the Sea Shepherd Conservation Society to stop Japanese scientific research whaling in Antarctica,⁴ an episode of *South Park*,⁵ and a decision of the International Court of Justice, which ruled in March 2014 that Japan’s Antarctic whaling was not for purposes of scientific research.⁶

Recently, however, a third issue has created controversy: aboriginal subsistence whaling (“ASW”) and, in particular,

scientific whaling for failing to meet the criteria for scientific whaling and the IWC’s Scientific Committee has stated that Japan’s scientific whaling does not provide data relevant to any critically important management purpose. *See, e.g.*, IWC, *Resolution on Whaling Under Special Permit in the North Pacific Ocean*, IWC Res. 2000-5 (2000); IWC, *Resolution on Whaling Under Special Permit in the Southern Ocean Sanctuary*, IWC Res. 2000-5 (2000); IWC, *Resolution on Whaling Under Special Permit*, IWC Res. 1998-4 (1998); IWC, *Resolution on Special Permit Catches in the North Pacific by Japan*, IWC Res. 1997-6 (1997); IWC, *Resolution on Special Permit Catches in the Southern Ocean by Japan*, IWC Res. 1997-5 (1997); IWC, *Resolution on Special Permit Catches by Japan*, IWC Res. 1996-7 (1996); IWC, *Resolution on Special Permit Catches by Japan in the Southern Hemisphere*, IWC Res. 1994-10 (1994); IWC, *Resolution on Special Permit Catches by Norway*, IWC Res. 1994-11 (1994); IWC, *Resolution on Special Permit Catches by Japan in the Southern Hemisphere*, IWC Res. 1993-7 (1993); IWC, *Resolution on Special Permit Catches by Japan in the Southern Hemisphere*, IWC Res. 1991- App’x 2 (1991); IWC, *Resolution on Special Permit Catches by Japan in the Southern Hemisphere*, IWC Res. 1990-2 (1990); IWC, *Resolution on the Proposed Take by Japan of Whales in the Southern Hemisphere Under Special Permit*, IWC Res. 1989-3 (1989); IWC, *Resolution on Japanese Proposal for Special Permits*, IWC Res. 1987-4 (1987); *see also* Petition to Certify Japan Pursuant to 22 U.S.C. § 1978 for Trading in the Meat of Minke, Bryde’s, and Sperm Whales from the North Pacific and the Southern Hemisphere (Nov. 14, 2000), available at http://law.lclark.edu/clinics/international_environmental_law_project/our_work/whaling (discussing the aforementioned IWC resolutions).

3. ICRW, *supra* note 1, art. VIII.

4. *About Whale Wars*, ANIMAL PLANET (July 13, 2012), <http://www.animalplanet.com/tv-shows/whale-wars/about-this-show/about-whale-wars>.

5. *South Park: Whale Whores* (Comedy Central television broadcast Oct. 28, 2009). In truth, the *South Park* episode, *Whale Whores*, is a satirical look at the efforts and members of the Sea Shepherd Conservation Society and its show *Whale Wars*, which has been broadcast on Animal Planet for several years.

6. *See* Whaling in the Antarctic (Austl. v. Japan), 2014 I.C.J. 148, ¶¶ 35-37 (Mar. 31); *see also* Cymie R. Payne, *Australia v. Japan: ICJ Halts Antarctic Whaling*, 18 AM. SOC’Y OF INT’L L., no. 9, 2014, available at <http://www.asil.org/insights/volume/18/issue/9/australia-v-japan-icj-halts-antarctic-whaling> (criticizing the ICJ’s decision).

Greenland's ASW. Since 1985, a large number of whales have been killed pursuant to ASW—more than 9,700⁷—compared to 16,039 killed pursuant to scientific research whaling permits⁸ and 23,484 whales killed for commercial purposes.⁹ The ICRW's regulations require that the number of whales killed for aboriginal subsistence align with subsistence needs; national governments are responsible for providing the IWC with evidence of the cultural, nutritional, and subsistence needs of their people.¹⁰ The IWC's Scientific Committee makes recommendations on quotas for the stocks,¹¹ and the IWC adopts catch limits, more commonly called quotas, based on the Scientific Committee's recommendations and the advice of the IWC's ASW sub-committee. Since 1997, the IWC has set ASW quotas in five-year blocks,¹² although it now sets them in six-year blocks.¹³

While the IWC has long recognized the importance of ASW for certain aboriginal groups, the approval of ASW quotas has sometimes met resistance. For example, the IWC has challenged Greenland's request for fin and humpback whales¹⁴ as well as the

7. *Catches Taken: ASW*, INT'L WHALING COMM'N (2014), http://iwc.int/table_aboriginal. Under current IWC regulations, aboriginal groups in Greenland, the Russia Federation, St. Vincent and the Grenadines, and the United States may hunt whales. *Catch Limits & Catches Taken*, INT'L WHALING COMM'N (2014), http://iwc.int/index.php?cID=html_76#aborig.

8. *Catches Taken: Special Permit*, INT'L WHALING COMM'N (2014), http://iwc.int/table_permit.

9. *Catches Taken: Under Observation or Under Reservation*, INT'L WHALING COMM'N (2014), http://iwc.int/table_objection.

10. See Schedule, *supra* note 1, ¶ 13(a).

11. *Id.* ¶ 13(a)(3) (“The above provisions will be kept under review, based upon the best scientific advice.”).

12. See *Aboriginal Subsistence Whaling*, WHALE & DOLPHIN CONSERVATION, <http://us.whales.org/issues/aboriginal-subsistence-whaling> (last visited Jan. 31, 2015).

13. Because the IWC now meets every two years instead of every year, it changed ASW quotas from five-year blocks to six-year blocks in 2012. See IWC, *Annual Report of the International Whaling Commission 2012*, at 19 (2013) [hereinafter *IWC Annual Report 2012*] (discussing ASW quotas for bowhead, gray, and humpback whales and the move from five-year to six-year quotas).

14. In 2008, the IWC rejected Greenland's proposal to add humpback whales to its ASW quota. IWC, *Annual Report of the International Whaling Commission 2009*, at 22-23 (2010). In 2010, Greenland's ASW quota was approved only after Greenland agreed to reduce the number of fin whales and humpback whales killed for aboriginal subsistence purposes in its proposal. IWC, *Annual Report of the*

taking of humpback whales by individuals in St. Vincent and the Grenadines.¹⁵ However, the ASW debate significantly intensified in 2012 when the IWC rejected Greenland's request for an ASW quota starting with the 2013 season.¹⁶ IWC members expressed concerns over the size of the quota, Greenland's conversion factors used to calculate the yield of meat from each whale, and evidence of the commercial sale of whale meat in restaurants.¹⁷ According to a recent large-scale study of consumption patterns in Greenland, Greenland's Inuit consume approximately ten kilograms of *cetacean* meat per capita per year (including meat from thousands of small cetaceans, such as belugas, narwhals, and killer whales, killed each year).¹⁸ This is considerably less than twelve to thirteen kilograms of *whale* meat from large whales (bowhead, fin, humpback, and minke) alone that Greenland claimed in its 2012 needs statement¹⁹ and the fifteen kilograms it claimed in its 2014 need statement.²⁰

Despite the IWC's rejection of its ASW request, Greenland unilaterally established an ASW quota for 2013 and 2014.²¹

International Whaling Commission 2010, at 17 (2011).

15. A frequent concern of the IWC is the ongoing killing of what many consider to be calves by those engaged in ASW in St. Vincent and the Grenadines. See, e.g., IWC, *Annual Report of the International Whaling Commission 2000*, at 18 (2001) [hereinafter *IWC Annual Report 2000*]; see also WHALE & DOLPHIN CONSERVATION SOC'Y, ANALYSIS OF THE REPORTS OF THE IWC'S INFRACTION SUB-COMMITTEE FROM 1991 TO 2004: REVIEW OF COMPLIANCE AT THE IWC (2005) (reviewing the history of attempts to label this killing as an infraction).

16. See Press Release, Int'l Whaling Comm'n (2012), available at https://archive.iwc.int/pages/view.php?ref=3476&search=press%2C+release&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=0 (discussing the impasse within the IWC over Greenland with a vote of twenty-five to thirty-four with three abstentions).

17. See *IWC Annual Report 2012*, supra note 13, at 22 (describing concern from Brazil, Ecuador, and Argentina over Greenland's ASW whaling practices).

18. Charlotte Jeppesen et al., *Assessment of Consumption of Marine Food in Greenland by a Food Frequency Questionnaire and Biomarkers*, INT'L J. OF CIRCUMPOLAR HEALTH, May 2012, at 4 (May 17, 2012).

19. IWC, *White Paper on Management and Utilization of Large Whales in Greenland, May 2012* 3 (White Paper Supp. IWC/64/ASW 8, 2012), available at <https://archive.iwc.int/pages/search.php?search=!collection84>.

20. IWC, *Utilization of Large Whales in Greenland: A Need Statement*, at 13, IWC/65/17 (July 2014).

21. See PS, *Whale Quotas Create Rift Between Greenland and Denmark*, COPENHAGEN POST (July 11, 2013), <http://cphpost.dk/news/whale-quotas-create-rift-between-greenland-and-denmark.5962.html>. Prior to establishing its unilateral

Australia,²² Denmark,²³ other IWC members,²⁴ and conservationists²⁵ argued that the IWC's rejection of Greenland's ASW quota precludes Greenland from conducting ASW in 2013 and beyond until the IWC approves a new quota. Nonetheless, Greenland allowed the hunt. The United States,²⁶ St. Lucia,²⁷ and the Alaska

quota, Greenland solicited comments from IWC Members on its proposal to allocate ASW quotas to itself for 2013 and 2014, without IWC approval. Letter from Jens K. Lyberth, Greenland Deputy Minister, Ministry of Fisheries, Hunting, and Agric., to IWC Comm'rs, Regarding Greenland Quotas on Large Whales (Nov. 30, 2012).

22. Letter from Donna Petrachenko, Austl.'s Comm'r to the IWC, to Gitte Hundahl, Den.'s Comm'r to the IWC (Dec. 17, 2012), *available at* iwc.int/document_3159.download (objecting to Greenland's proposal).

23. PS, *supra* note 21 (reporting that "[t]he Danish government argues that by setting its own independent quota, Greenland is contravening IWC regulations"). Denmark also said that it would have to withdraw from the IWC as a result of Greenland's ASW hunt. *Id.*

24. On behalf of EU IWC Commissioners from EU member States, the IWC Commissioner for Cyprus wrote:

Cyprus had already expressed, on behalf of the above-listed EU IWC Commissioners, the coordinated position on the proposal submitted by Denmark (Greenland) at IWC 64 Panama, in July of this year. As we had stated on that occasion, we were ready to support a roll-over proposal from Greenland, just as we supported the other, joint, proposal submitted by the USA, Russia and St. Vincent and the Grenadines. At this stage, I am compelled to inform you that this position remains unaltered and that, consequently, we remain unable to support your suggested approach. We would also be interested to understand how you, together with the Government of Denmark, would see the next steps unfolding, particularly in light of the IWC Rules of Procedure and the possibility of making use of IWC Rule E.4, considering that the next IWC meeting will take place in 2014.

Letter from Myroula Hadjichristoforou, IWC Comm'r to Cyprus, to Minister Lyberth (Dec. 14, 2012) (on file with author); *see also* 2014 IWC 65 Meeting in Slovenia, ANIMAL WELFARE INST., <https://awionline.org/content/2014-iwc-65-meeting-slovenia> (last visited Jan. 20, 2015) (providing that at the IWC's 2014 meeting, Argentina, Chile, Uruguay, and other members of the Latin American group of countries known as the Buenos Aires Group stated that Denmark's failure to report Greenland's ASW as commercial whaling constituted an infraction).

25. The letter is signed on behalf of the Animal Welfare Institute and nineteen other organizations. Letter from Susan Millward, Exec. Dir., Animal Welfare Inst., to Villy Søvndal, Den.'s Minister of Foreign Affairs (Mar. 4, 2013).

26. In an email, the U.S. Acting IWC Commissioner said the following:

Denmark/Greenland is now considering issuing catch limits for the years 2013 and 2014 at the same levels that Denmark proposed in Panama. The United States supports catch limits that are consistent with a documented needs statement and that are supported by advice of the IWC Scientific Committee. If Denmark/Greenland were to issue catch limits for 2013 and 2014 at the same levels as their 2012 catch limits, it would likely garner wider support within the IWC and create a more positive

Eskimo Whaling Commission (“AEWC”)²⁸ have supported Greenland’s actions, with the AEWC arguing that paragraph 13 of the ICRW Schedule²⁹ allows Greenland and others to conduct ASW hunts in the absence of an IWC-approved quota. The IWC approved an ASW quota for Greenland at its 2014 meeting³⁰ that differed from its 2012 proposal by just twelve minke whales.³¹ Nonetheless, the controversy has not subsided. At the 2014 meeting, Argentina,

atmosphere at IWC65. Further, we support Denmark/Greenland’s intention to propose a new schedule amendment to the IWC in 2014 for catch limits through 2018.

E-mail from Ryan Wulff, Acting U.S. IWC Comm’r, to Gitte Hundaul, Den.’s Comm’r to the IWC, and Greenland Deputy Minister Lyberth (Dec. 14, 2012) (on file with author); *see also* U.S. DEP’T OF COMMERCE, NAT’L OCEANIC & ATMOSPHERIC ADMIN., NAT’L MARINE FISHERIES SERV., DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR ISSUING ANNUAL QUOTAS TO THE ALASKA ESKIMO WHALING COMMISSION FOR A SUBSISTENCE HUNT ON BOWHEAD WHALES FOR THE YEARS 2013 THROUGH 2017/2018 7 (2012) (“It is possible that the IWC might not update the catch limit, notwithstanding IWC Scientific Committee management advice that the hunt is sustainable. If so, it should be noted that NOAA is considering issuing annual quotas for the time periods described in the Alternatives under the current IWC Schedule language”).

27. At the IWC’s 2012 meeting and as reported in the Chairman’s report, St. Lucia noted:

that the proposed Schedule amendment had not been for a zero quota, but instead was for a specific quota. Given that the previous quota was expired, it commented that what the Commission had actually said to Denmark/Greenland was to go forth and manage their fishery on their own. It considered that whaling would continue despite the outcome of the vote because the outcome effectively meant no quota advice was given.

IWC Annual Report 2012, *supra* note 13, at 36.

28. Letter from Johnny Aiken, Exec. Dir., Alaska Eskimo Whaling Comm’n, to Douglas P. DeMaster, U.S. IWC Comm’r (Aug. 31, 2012) [hereinafter AEWC Letter]. The AEWC comprises “members of Alaska Eskimo Whaling Commission are the registered whaling captains and their crew members of the eleven whaling communities of the Arctic Alaska coast. *Our Whaling Villages*, ALASKA ESKIMO WHALING COMM’N, http://aewc-alaska.com/Our_Whaling_Villages.html (last visited Jan. 15, 2015).

29. Schedule, *supra* note 1, ¶ 13.

30. *Summary of Main Outcomes*, *supra* note 1, at 6 (amending the Schedule to allow aboriginal subsistence whaling). The schedule amendment for Greenland’s quota achieved the necessary three-fourths majority with forty-six members voting “yes,” eleven members voting “no,” and three members abstaining. IWC, *Status of Agenda Items at IWC/65 as of Monday, 15 September 2014*, at 1-2, IWC/65/Status (2014), available at <https://archive.iwc.int/pages/view.php?ref=3577>.

31. *See* IWC, *Proposed Schedule Amendment (IWC 64)*, at 1, IWC/64/12 (2012) (providing that the number of minke whales struck from the Central stock and West Greenland stock shall not exceed twelve and 178 respectively for the years 2013, 2014, 2015, 2016, 2017, and 2018).

supported by Mexico, Australia, and other IWC members called on the IWC to designate Greenland's whaling as an infraction.³² If Greenland's ASW for 2013 and 2014 constitutes an infraction, then Denmark, which ratified the ICRW on Greenland's behalf,³³ must punish and prosecute those engaged in the whaling.³⁴ Denmark has so far resisted these efforts.³⁵

Based on the ordinary meaning of paragraph 13 of the Schedule, this article concludes that the ICRW does not establish a right for Greenland (or any other IWC member) to conduct ASW hunts in the absence of an IWC-adopted quota. Moreover, Greenland's subsequent hunt conducted without the required IWC approved ASW quota constitutes an infraction, either as unauthorized ASW or as whaling in violation of the moratorium on commercial whaling. As the International Court of Justice noted in *Whaling in the Antarctic*,³⁶ only three types of whaling exist: scientific research whaling,

32. IWC, *Report of the Infractions Sub-Committee*, at 2, IWC/65/Rep04 (Sept. 11, 2014), available at <https://archive.iwc.int/pages/view.php?ref=3580> [hereinafter *IWC Report of the Infractions Sub-Committee*].

33. Greenland is an autonomous territory within Denmark. When Denmark ratified the ICRW, it did so implicitly on behalf of Greenland. Denmark's instrument of ratification does not explicitly state that Denmark is ratifying on behalf of Greenland. See Email from Francis J. Holleran, Depositary Officer, U.S. Department of State, to Chris Wold, Assoc. Professor of Law, Lewis & Clark Law School (Sept. 15, 2006) (on file with author) (providing the English translation of the Declaration of the Kingdom of Denmark of Accession to the International Convention on the Regulation of Whaling). However, Lord McNair, a renowned international law scholar, has stated that when a treaty does not include a territorial application clause, "the treaty applies to all the territory of the Contracting Party, whether metropolitan or not" unless a government expressly indicates otherwise. LORD MCNAIR, *THE LAW OF TREATIES* 117 (1961). This rule was codified in the Vienna Convention, which states that "unless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party." Vienna Convention on the Law of Treaties art. 29, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter *Vienna Convention*]. As the ICRW does not include any provisions for applying the convention to territories, the general rule applies.

34. ICRW, *supra* note 1, art. IX (requiring prosecution over infractions by the "government having jurisdiction over the offense" and a requirement to report infractions and actions taken to the IWC).

35. See *IWC Report of the Infractions Sub-Committee*, *supra* note 32, at 2 (detailing Denmark's view that Greenland's infraction is not exceptional enough to warrant investigation and punishment, but that a balance struck between the ICRW requirements and Greenland's ASW needs should be struck).

36. 2014 I.C.J. 148 (Mar. 31).

commercial whaling, and aboriginal subsistence whaling.³⁷ Since Japan's whaling did not constitute scientific research whaling, it constituted commercial whaling,³⁸ as it was not for aboriginal subsistence. Similarly, since Greenland has not hunted consistently with paragraph 13 of the Schedule (and its whaling cannot be considered to be for purposes of scientific research), then its whaling must be either commercial in violation of paragraph 10(e) of the Schedule or unauthorized ASW in violation of paragraph 13 of the Schedule. Consequently, it should be recorded as an infraction by the IWC and Denmark must take action, pursuant to article IX of the ICRW, to punish and prosecute those involved in Greenland's ASW.

Although paragraph 13 of the Schedule provides that ASW quotas "shall be established" and states that taking of whales for ASW "is permitted,"³⁹ it also establishes clearly articulated conditions that must be met prior to approval of an ASW quota. In addition, the long-standing practice of the relevant States and the IWC supports the position that IWC-approved quotas are necessary to conduct ASW hunts. Indeed, since the IWC adopted the current language and structure of paragraph 13, no IWC member has ever allowed ASW in the absence of an IWC-approved quota—until Greenland did so in 2013 and 2014. The reasons are obvious; if governments were able to set their own quotas under national legislation, they would undermine the IWC's management scheme.

Finally, rules of logic support the view that paragraph 13 requires the IWC to approve an ASW quota only after it has determined that all the relevant conditions of paragraph 13 have been met. If paragraph 13 establishes a right to ASW, then the role of the IWC would only be to limit ASW quotas of IWC members rather than to authorize ASW quotas. Under these circumstances, it is illogical that an IWC member would need to submit an application to limit its ASW based on subsistence need. Instead, the long-standing practice of the IWC has been to require members to submit an application that demonstrates the subsistence need for an ASW quota, which the

37. *See id.* at 148, ¶¶ 229-30 (finding that the Schedule does not allow for definitions of whaling outside of the definitions provided in article VIII of the ICRW).

38. *Id.* ¶ 231.

39. AEWL Letter, *supra* note 28.

IWC then accepts based on consensus or votes to either approve or reject.

Section II of this article begins by briefly introducing the ICRW. Section III provides a history of ASW in the IWC and parses the provisions of the Schedule relating to ASW. Section IV applies rules of treaty interpretation found in the Vienna Convention on the Law of Treaties to specific arguments made by those supporting the right of Greenland to establish ASW quotas unilaterally. Section V assesses a range of other evidence, including the practice of relevant IWC members that supports the conclusion that the IWC must approve ASW quotas and that IWC members may not unilaterally establish such quotas. Section VI explains that Greenland's unauthorized ASW in 2013 and 2014 constitutes an infraction. Section VII concludes that Denmark, by virtue of its relationship with Greenland, has acted inconsistently with the ICRW and its Schedule by allowing Greenland to conduct ASW in 2013 and 2014 in the absence of an IWC-approved quota and by failing to report Greenland's hunt as an infraction.

II. SHORT INTRODUCTION TO THE ICRW

The ICRW establishes two objectives: the conservation of whales and the orderly development of a whaling industry.⁴⁰ The ICRW itself establishes few rules to achieve those goals. Instead, it creates a commission, the IWC,⁴¹ with the authority to adopt binding regulations "with respect to the conservation and utilization of whale resources."⁴² These regulations may relate to a wide variety of matters, including protected and unprotected species; open and closed seasons; open and closed waters; size limits; and time, methods, and intensity of whaling.⁴³ These regulations, which must be adopted by a three-fourths majority of IWC members,⁴⁴ are included in the ICRW's Schedule. The IWC's Scientific Committee provides scientific and technical advice to the IWC.⁴⁵

40. ICRW, *supra* note 1, pmb1.

41. *Id.* art. III(1).

42. *Id.* art. V(1).

43. *Id.*

44. *Id.* art. III(2).

45. Greg Donovan & Phil Hammond, *Scientific Committee Handbook*, INT'L WHALING COMM'N (2014), <http://iwc.int/scientific-committee-handbook> (stating

IWC members may opt out of regulations through an objection⁴⁶ or reservation.⁴⁷ The ICRW expressly allows objections, provided that an IWC member does so within ninety days of receiving notification of the amendment to the Schedule.⁴⁸ The ICRW does not explicitly allow reservations when ratifying or acceding to the convention, but it does not preclude them.⁴⁹ IWC members have only sparingly taken objections and reservations, although when they do they have been controversial. For example, despite the moratorium on commercial whaling,⁵⁰ Norway hunts whales commercially pursuant to an objection,⁵¹ killing at least 729 minke whales in 2014.⁵² Iceland hunts whales pursuant to a reservation.⁵³ Iceland, although it voted against the moratorium, did not file an objection to the decision, eventually ceased whaling, and withdrew from the

that the IWC established the Scientific Committee in 1950).

46. Under the ICRW, an amendment “shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn.” ICRW, *supra* note 1, art. V(3).

47. A reservation is “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” Vienna Convention, *supra* note 33, arts. 2(1)(d), 19.

48. ICRW, *supra* note 1, art. V(3).

49. The Vienna Convention provides:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Vienna Convention, *supra* note 33, art. 19.

50. Schedule, *supra* note 1, art. III, ¶ 10(e).

51. *Id.* art. III, ¶ 10(e) n.* (providing that the “[g]overnments of Japan, Norway, Peru and the Union of Soviet Socialist Republics lodged objection[s]” to art. III, ¶ 10(e) of the Schedule).

52. Barbro Andersen & Sigurd Steinum, *729 Hval Skutt Under den Beste Sesongen Siden 1993*, NORDLAND JOURNALIST (Aug. 20, 2014), <http://www.nrk.no/nordland/arets-gode-hvalesong-er-over-1.11887970>.

53. Schedule, *supra* note 1, art. III, ¶ 10(e) n.• (referring to Iceland’s instrument of adherence deposited on October 10, 2002 that states Iceland “adheres to the aforesaid Convention and Protocol with a reservation with respect to paragraph 10(e) of the Schedule attached to the Convention”).

ICRW in 1992.⁵⁴ It acceded to the ICRW and rejoined the IWC in 2002.⁵⁵ Because the ninety-day period for entering objections had expired, Iceland filed a reservation to the commercial ban, which many consider to be invalid.⁵⁶ Iceland then resumed full-scale commercial whaling in 2006.⁵⁷ Japan hunts whales pursuant to the ICRW's provision for scientific research whaling.⁵⁸

Over time, the IWC has established an array of binding regulations. These include, for example, the creation of the Southern Ocean Sanctuary,⁵⁹ catch limits,⁶⁰ size limits,⁶¹ restrictions on the types of harpoons that can be used,⁶² and aboriginal subsistence whaling.⁶³ Paragraph 10 of the Schedule classifies whale stocks into three categories and sets quotas based on the maximum sustained yield ("MSY") target for that category.⁶⁴ Since the 1985/1986 whaling season, catch limits for all stocks for commercial purposes have been set to zero, unless otherwise specified in the tables of

54. *Iceland and Commercial Whaling*, INT'L WHALING COMM'N (2014), <http://iwc.int/iceland>.

55. *Id.*

56. Iceland's reservation has been particularly controversial, with several IWC members lodging objections to it. Schedule, *supra* note 1, art. III, ¶ 10(e) n.# (reporting objections to Iceland's reservation by Argentina, Australia, Brazil, Chile, Finland, France, Germany, Italy, Mexico, Monaco, the Netherlands, New Zealand, Peru, San Marino, Spain, Sweden, the United Kingdom, and the United States). One reason that Iceland's reservation is so controversial is that Iceland cast the decisive vote to approve it, a decision that many regard as fundamentally flawed. See Chris Wold, *Implementation of Reservations Law in International Environmental Treaties: The Cases of Cuba and Iceland*, 14 COLO. J. INT'L ENVTL. L. & POL'Y 53, 91 (2003).

57. See *Catches Taken: Under Observation or Under Reservation*, *supra* note 9 (revealing that Iceland caught seven fin whales and one minke that year).

58. See ICRW, *supra* note 1, art. VIII (allowing governments to provide scientific research permits to nationals for whaling and providing reporting requirements for said permits).

59. Schedule, *supra* note 1, art. III ¶ 7(b) (designating coordinates for the perimeter of the "Southern Ocean Sanctuary").

60. *Id.* ¶ 10(e) (setting the catch limits for commercial purposes to zero).

61. *Id.* ¶¶ 15, 18 (establishing size limits that protect smaller, younger whales for several species).

62. *Id.* ¶ 6 (forbidding use of the "cold grenade harpoon" for many commercial whaling purposes).

63. *Id.* ¶ 13 (creating standards for ASW whaling based on aboriginal needs and maximum sustainable yields).

64. *Id.* ¶¶ 10(a)-(c) (outlining the following categories: Sustained Management Stock, Initial Management Stock, and Protection Stock).

paragraph 10 of the Schedule.⁶⁵ The only whale stock that has a catch limit listed in the tables is the West Greenland stock of fin whales, which sets sixteen animals as the maximum number that may be struck.⁶⁶ The footnotes indicate that this number is available to be struck by aborigines pursuant to paragraph 13(b)(3),⁶⁷ which includes the provisions for Greenlanders to hunt these whales for aboriginal subsistence.

III. THE ICRW'S PROVISIONS RELATING TO ASW

As with other aspects of whaling, the ICRW itself does not include provisions relating to ASW. However, concerns relating to ASW formed an important part of the negotiations relating to the ICRW, concerns which continue to form a critical part of the ongoing work of the IWC.

A. ASW IN THE ICRW'S EARLY YEARS

During the final negotiations of the ICRW in 1946, negotiators from Canada and the Soviet Union objected that the ICRW did not include an exception for ASW.⁶⁸ They also made clear that restricting aborigines to "traditional" methods, such as hunting in canoes without firearms, was unacceptable due to challenging Arctic conditions.⁶⁹

Negotiators responded by including a formal statement in the ICRW's Final Act that declares support for the continued taking of gray whales in the Bering and Chukchi Seas, provided that the meat and other products were used "exclusively for local consumption by the aborigines of the Chokotsk and Korjaks areas."⁷⁰ They also included a provision in the initial Schedule exempting the killing of gray and right (also known as bowhead) whales from a whaling ban,

65. *Id.* ¶ 10(e).

66. *Id.* ¶ 1(C) (defining "strike" as "to penetrate with a weapon used for whaling").

67. *Id.* at 6 n.2.

68. See generally Michael F. Tillman, *The International Management of Aboriginal Whaling*, 16 *REVIEWS IN FISHERIES SCI.* 437, 438 (2008) (providing an excellent overview of the early years of ASW).

69. *Id.*

70. See *id.* at 438-39 (quoting from the Final Act of the Washington Conference at which negotiating States adopted the ICRW).

provided that the meat and other products were used exclusively for local consumption by aborigines.⁷¹ From its inception, the ICRW recognized the important role that whale products play in the nutritional and cultural life of some native peoples.⁷² At the same time, by limiting the purposes for and areas in which ASW could occur, the ICRW also affirmed that the IWC could and would regulate such whaling.

From 1948 to 1961, ASW occurred under these basic provisions. When the IWC started limiting the killing of humpback whales, it included a new ASW exception in 1961 to permit Greenlanders to continue killing up to ten humpback whales annually.⁷³ In 1964, the IWC amended the Schedule to allow a government to kill gray and right whales on behalf of aborigines, provided that the meat and other whale products were used “exclusively for local consumption by the aborigines.”⁷⁴

B. ASW IN THE 1970S AND 1980S

ASW changed dramatically in the 1970s when the Scientific Committee became concerned about the rising number of bowhead whales killed by Alaskan Eskimos, as well as an alarming increase in those whales struck by harpoons but lost (known as “struck and lost” in IWC jargon). Whereas the average number of bowheads killed by Alaskan Eskimos had averaged ten between 1945 and 1969, it averaged thirty between 1970 and 1977.⁷⁵ Moreover, the number of whales struck and lost rose from ten in 1973 to eighty-two in 1977.⁷⁶ Meanwhile, the Scientific Committee estimated that the bowhead population had declined from a historic level between 11,700 and 18,000 to 1,300 in 1977.⁷⁷ As a consequence, the Scientific

71. *Id.* at 439.

72. *Bowhead Whale, Qeqertarsuaq, Greenland*, INT'L WHALING COMM'N (2014), <http://iwc.int/aboriginal> (noting the two major objectives of IWC regulation of ASW is to maintain healthy populations of whale and to allow aboriginal groups to maintain cultural practices of whaling).

73. *See IWC, Twelfth Report of the Commission*, at 31 (1961) (finding nothing wrong with a proposal to allow the killing of ten humpback whales for local consumption in Greenland).

74. *IWC, Sixteenth Report of the Commission*, at 20-21 (1966).

75. Tillman, *supra* note 68, at 439.

76. *Id.*

77. *Id.* (estimating that the population of bowhead whales dropped to seven to

Committee recommended that ASW of bowheads by Alaskan Eskimos should cease.⁷⁸ The IWC agreed, amending the Schedule by deleting the exception for killing right whales (i.e., bowheads) by aborigines.⁷⁹

In the late 1970s and early 1980s, the IWC began exploring a more systematic way of regulating ASW. For example, in 1979, the IWC asked the United States to demonstrate the nutritional, cultural, and subsistence needs of Alaskan Eskimos for bowhead whales,⁸⁰ and the next year extended that requirement to all aboriginal hunts.⁸¹ Although these requests were found in non-binding resolutions, the United States and other IWC members complied with the requests.⁸² As discussed below, demonstrating need later became a requirement included in the Schedule.

The IWC also created a working group to define subsistence use and objectives for managing whales subject to ASW.⁸³ That working

eleven percent of its original size by 1977). Subsequent population estimates showed the bowhead population to be “much larger.” Randall R. Reeves, *The Origins and Character of “Aboriginal Subsistence” Whaling: A Global Review*, 32 MAMMAL REV. 71, 72 (2002).

78. IWC, *Twenty-Eighth Report of the International Whaling Commission*, at 22 (1978) (expressing concern for both killed and “struck but lost” bowheads likely as a result from adoption of shoulder guns instead of dart guns for hunting).

79. *Id.*

80. IWC, *Thirtieth Report of the International Whaling Commission*, at 35 (1980) (stating that the IWC would review and make a determination based on the information provided by the United States).

81. IWC, *Thirty-First Report of the International Whaling Commission*, at 29 (1981) (“[A]ll Contracting Governments under whose jurisdiction aboriginal/subsistence whaling operations conducted under paragraph 12 of the Schedule shall document annually for the information of the Commission: the utilization of the meat and products of any whales taken for aboriginal/subsistence purposes.”).

82. *See, e.g., id.* at 18 (discussing the interim report submitted by the United States in fulfillment of the resolution on the cultural, nutritional, and subsistence needs of Eskimo populations).

83. *See id.* at 17 (stating that the working group would “develop appropriate management principles and guidelines for subsistence catches”).

group recommended the following definitions to help frame aboriginal subsistence whaling:

Aboriginal subsistence whaling means whaling for purposes of local consumption carried out by or on behalf of aboriginal, indigenous, or native peoples who share strong community, familial, social, and cultural ties related to a continuing traditional dependence on whaling and on the use of whales.

Local aboriginal consumption means the traditional uses of whale products by local aboriginal, indigenous, or native communities in meeting their nutritional, subsistence, and cultural requirements. The term includes trade in items which are by-products of subsistence catches.

Subsistence catches are catches of whales by aboriginal subsistence whaling operations.⁸⁴

The working group's report also noted that the use of modern technologies to hunt whales is not inconsistent with these definitions.⁸⁵ In fact, the use of modern technologies could be more humane by reducing the length of time it takes for whales to die (known as "time to death" in IWC jargon) and could have conservation benefits by reducing the number of animals struck and lost. The report thus recognized that cultures evolve and that the IWC is not trying to "lock in" aboriginal cultures to some distant point in the past. The IWC accepted the report of the working group in a 1982 resolution,⁸⁶ but it did not include the definitions in the Schedule.

84. IWC, *Aboriginal/Subsistence Whaling (with Special Reference to the Alaska and Greenland Fisheries)*, at 83 (1982) [hereinafter *Aboriginal/Subsistence Whaling*].

85. *See id.* at 82 (agreeing that hunting techniques be "as humane as possible").

86. IWC, *Chairman's Report of the Thirty-Fourth Annual Meeting*, at 38 (1983) [hereinafter *IWC 1982 Report*].

In the same 1982 resolution, the IWC also adopted the working group's recommended principles for ASW:

To ensure that the risks of extinction to individual stocks are not seriously increased by subsistence whaling;

To enable aboriginal people, to harvest whales in perpetuity at levels appropriate to their cultural and nutritional requirements, subject to the other objectives;

To maintain the status of whale stocks at or above the level giving the highest net recruitment and to ensure that stocks below that level are moved towards it so far as the environment permits.⁸⁷

Unlike the definitions, the IWC formalized these principles in paragraph 13 of the Schedule, marking the first time that the IWC imposed scientific requirements for ASW. At the same time, these principles allowed ASW to increase the risks of extinction to a species, so long as that increase is not "serious." The IWC's willingness to accept this conservation risk reflects a recognition of the cultural and nutritional needs of aboriginal peoples, as well as the historically low numbers of whales killed in ASW relative to commercial operations and ASW's lack of a profit motive.⁸⁸

While one author has called the conceptual distinction between commercial whaling and ASW "crude and ambiguous,"⁸⁹ the legal distinction is clear: ASW occurs pursuant to paragraph 13 of the Schedule and commercial whaling occurs pursuant to the other provisions of the Schedule, particularly paragraph 10. In fact, while the moratorium on commercial whaling has been in place since 1986, the IWC has continued to review and, in most circumstances, allow limited taking of whales for aboriginal subsistence purposes.⁹⁰

87. *Aboriginal/Subsistence Whaling*, *supra* note 84, at 84.

88. Tillman, *supra* note 68, at 441 (stating that the willingness of the IWC to accept additional risks associated with ASW "apparently arises from a commonly shared belief that, whereas commercial operations are driven by market forces to maximize catches, aboriginal hunts tend to be self-limiting in that they only take what is necessary to satisfy basic human needs").

89. Reeves, *supra* note 77, at 77, 96-99 (reviewing various interpretations of "aboriginal subsistence").

90. See Schedule, *supra* note 1, art. III, ¶¶ 10, 13. Much more could certainly be said concerning the history of ASW. The IWC has adopted numerous resolutions concerning ASW for specific whale populations. ASW quotas have

C. ASW TODAY

By incorporating the three principles for ASW in the Schedule, the IWC seeks to ensure that ASW does not seriously increase risks of extinction to individual whale stocks and that aboriginal people are able to hunt whales at levels appropriate to cultural and nutritional requirements “in perpetuity.”⁹¹ National governments, on behalf of an aboriginal group, must submit a “Needs Statement” that provides evidence of the cultural, subsistence, and nutritional aspects of the hunt, products, and distribution.⁹² The IWC’s Scientific Committee provides advice on the sustainability of proposed hunts and safe catch limits. The IWC then considers that advice along with the Needs Statement.⁹³

More specifically, paragraph 13 establishes two sets of conditions for ASW. Paragraph 13(a) provides the first set of conditions, which apply to ASW quotas for *any* stock. Paragraph 13(a) permits ASW quotas “notwithstanding” the provisions of paragraph 10, provided that several conditions are met. Paragraph 13(a) begins by providing that a quota shall be established, but only (i) to satisfy the aboriginal subsistence need, (ii) for each whaling season, and (iii) in accordance with five additional principles.⁹⁴ These five principles relate to the conservation status of the stock, the prohibition against striking or killing calves or suckling calves (depending on the situation), and the need for national legislation that accords with paragraph 13. For example, ASW quotas must be established for those stocks at or above MSY if removals do not exceed ninety percent of MSY; if a stock is below MSY, then quotas are permissible if the quotas allow the stock to move towards MSY.⁹⁵

fluctuated over the years as well. In addition, the IWC now maintains an Aboriginal Subsistence Whaling Working Group. For more on these issues, see generally *IWC Annual Report 2012*, *supra* note 13.

91. *See Aboriginal/Subsistence Whaling*, *supra* note 84, at 84.

92. *See* Schedule, *supra* note 1, art. III, ¶ 13 (establishing whaling ASW quotas based on data submitted by national governments on aboriginal subsistence needs).

93. *See id.* (balancing maximum sustainable yields with aboriginal needs).

94. *Id.* ¶ 13(a).

95. *Id.* ¶ 13(a)(1)-(5).

Paragraph 13(b) provides the second set of conditions. These conditions apply to ASW quotas for *specific* stocks. The chapeau of paragraph 13(b) states that “catch limits for [ASW] are as follows.”⁹⁶ Paragraphs 13(b)(1)–(4) then set out the conditions under which ASW hunts may occur for specific whale stocks in specific years in specific geographical regions.⁹⁷ For each stock, whale meat and other whale products must be used solely for local consumption.⁹⁸

In addition, paragraph 13(b) establishes specific, numerical quotas for each stock. For example, the ASW quota for bowhead whales in the Bering-Chukchi-Beaufort Seas may not exceed 336 for the years 2013-2018;⁹⁹ the ASW quota for gray whales from the Eastern stock in the North Pacific may not exceed 140 over the same period.¹⁰⁰ Notably, after the 2012 IWC annual meeting, the ASW quotas applicable to Greenland (e.g., Western Greenland stock of minke whales) did not include quotas for the 2013-2018 period. Instead, the Schedule continued to refer to quotas applicable to the years 2010, 2011, and 2012.¹⁰¹ Of course, this changed as a result of the IWC’s 2014 decision approving Greenland’s ASW quotas.¹⁰²

However, not all of the specific provisions for ASW are drafted the same in paragraph 13(b). Paragraph 13(b)(1) is the most clearly drafted. It states that taking of bowhead whales from the Bering-Chukchi-Beaufort Seas stock is permitted “*but only when*” the whale products are used for local consumption by aborigines and “*further provided that*” several additional conditions are met.¹⁰³ One of these

96. *Id.* ¶ 13(b).

97. *Id.* ¶ 13(b)(1)–(4).

98. *Id.*

99. *Id.* ¶ 13(b)(1)(i).

100. *Id.* ¶ 13(b)(2)(i).

101. *Id.* ¶ 13(b)(3).

102. See *Summary of Main Outcomes*, *supra* note 1, at 6.

103. Schedule, *supra* note 1, art. III, ¶ 13(b)(1) (emphasis added). The Schedule also states:

The taking of bowhead whales from the Bering-Chukchi-Beaufort Seas stock by aborigines is permitted, but only when the meat and products of such whales are to be used exclusively for local consumption by the aborigines and further provided that:

(i) For the years 2013, 2014, 2015, 2016, 2017 and 2018, the number of bowhead whales landed shall not exceed 336. For each of these years the number of bowhead whales struck shall not exceed 67, except that any unused portion of a strike quota from any year (including 15 unused strikes from the 2008-2012 quota) shall be carried forward and added to the strike quotas of any subsequent years, provided that no more

additional conditions requires a quota to be granted for a specific year;¹⁰⁴ another requires an annual review by the IWC in light of evidence from the Scientific Committee.¹⁰⁵

Paragraph 13(b)(3) states that taking by aborigines from certain stocks in the waters around Greenland is permitted “*and then only when*” the meat is used for local consumption. Unlike paragraph 13(b)(1), however, it does not end with the phrase “and further provided that.” Instead, paragraph 13(b)(3), as well as paragraph (b)(2) for ASW of gray whales, comes to a full stop before adding quotas for individual whale stocks in sub-paragraphs 13(b)(3)(i)-(v).¹⁰⁶ Notably, the number of fin whales from the West Greenland stock included in paragraph 13(b)(3) is sixteen,¹⁰⁷ consistent with

than 15 strikes shall be added to the strike quota for any one year.

(ii) This provision shall be reviewed annually by the Commission in light of the advice of the Scientific Committee.

Id.

104. *Id.* ¶ 13(b)(1)(i).

105. *Id.* ¶ 13(b)(1)(ii).

106. Section 13(b)(2) states that:

The taking of gray whales from the Eastern stock in the North Pacific is permitted, but only by aborigines or a Contracting Government on behalf of aborigines, and then only when the meat and products of such whales are to be used exclusively for local consumption by the aborigines.

(i) For the years 2013, 2014, 2015, 2016, 2017 and 2018, the number of gray whales taken in accordance with this sub-paragraph shall not exceed 744, provided that the number of gray whales taken in any one of the years 2013, 2014, 2015, 2016, 2017 and 2018 shall not exceed 140.

(ii) This provision shall be reviewed annually by the Commission in light of the advice of the Scientific Committee.

Id. ¶ 13(b)(2).

In contrast, section 13(b)(3) states that:

The taking by aborigines of minke whales from the West Greenland and Central stocks and fin whales from the West Greenland stock and bowhead whales from the West Greenland feeding aggregation and humpback whales from the West Greenland feeding aggregation is permitted and then only when the meat and products are to be used exclusively for local consumption.

(i) The number of fin whales struck from the West Greenland stock

(ii) The number of minke whales struck from the Central stock

(iii) The number of minke whales struck from the West Greenland stock

(iv) The number of bowhead whales struck off West Greenland

(v) The number of humpback whales struck off West Greenland

Id. ¶ 13(b)(3).

107. *Id.* ¶ 13(b)(3) (including the catch limit for the West Greenland stock of fin whales in both Table 1 and in paragraph 13(b)(3) is redundant, particularly since all other ASW catch limits have been removed from Table 1).

Table 1 in paragraph 10. No other stocks for which quotas are set in paragraph 13(b) have catch or strike limits set out in Table 1. Finally, paragraph 13(b)(4) comprises just two sentences allowing humpback quotas for the Bequians of St. Vincent and the Grenadines in specific years for local consumption.¹⁰⁸

Structurally, the differences between these paragraphs are merely cosmetic, the result of drafting these provisions over a wide span of time,¹⁰⁹ and, unfortunately, bad drafting. In fact, subparagraphs 13(b)(1), (b)(2), and (b)(3) are structurally identical, except for the use of “further provided that” in subparagraph 13(b)(1). These similarities, especially when comparing the nearly identical language in the paragraphs, are quite plain when one examines the texts word-by-word.¹¹⁰ Functionally, these subparagraphs serve the same purpose: to impose additional conditions for the establishment of quotas described in the chapeau of paragraph 13(b).¹¹¹

IV. THE VIENNA CONVENTION AND THE ORDINARY MEANING OF THE ASW PROVISIONS

Although the language of the ASW provisions is inconsistent, the meaning of these provisions can be identified by resorting to the rules of treaty interpretation found in the Vienna Convention on the Law of Treaties (“Vienna Convention”).¹¹² The Vienna Convention requires as a general rule that a treaty be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹¹³

108. *Id.* ¶ 13(b)(4) (“For the seasons 2013-2018 the number of humpback whales to be taken by the Bequians of St. Vincent and The Grenadines shall not exceed 24. The meat and products of such whales are to be used exclusively for local consumption in St. Vincent and The Grenadines.”).

109. See IWC, *Report of the Aboriginal Subsistence Whaling Working Group*, at 14, IWC/64/ASW5 Rev1 (May 28, 2012) (providing an historical overview of ASW in the IWC).

110. Compare *Summary of Main Outcomes*, *supra* note 1, ¶ 13(b)(3), and *id.* ¶ 13(b), with *id.* ¶ 13(b)(2)(i), and *id.* ¶¶ 13(b)(1)-(4).

111. See *infra* Part III.A.

112. Vienna Convention, *supra* note 33, art. 31.

113. *Id.* art. 31(1). This textual approach to interpretation, which focuses on the ordinary meaning of terms, has attained the status of customary international law. *Territorial Dispute Case (Libyan Arab Jamahiriya/Chad)*, 1994 I.C.J. 6, ¶ 41 (Feb. 3) (“[I]n accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in

The context can include, *inter alia*, any subsequent practice that establishes the agreement of the parties as to the interpretation or application of the treaty.¹¹⁴ The Schedule, as amended, is an integral part of the ICRW¹¹⁵ and is therefore subject to the rules of treaty interpretation described in the Vienna Convention.¹¹⁶ As a consequence, the Schedule must be interpreted according to the ordinary meaning of the language, taken in context of the object and purpose of the treaty, and in light of practical application.

As described in the following sub-sections, the ordinary meaning of the ASW provisions, in light of the ICRW's context, object, and purpose, supports the conclusion that the IWC must approve ASW quotas and that individual IWC members are not authorized to conduct ASW unilaterally. This analysis provides a good-faith interpretation of the treaty based on its recognized purpose "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry."¹¹⁷ The inclusion of both conservation and use goals in the preamble suggests the need for management, and thus the ICRW should be recognized as a treaty designed to manage whale stocks by the IWC.

good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty."); Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3) ("[T]he first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter."); *see also* 1 OPPENHEIM'S INTERNATIONAL LAW 1271-75 (Robert Jennings & Arthur Watts eds., 9th ed. 2002).

114. *Id.* art. 31(3)(b).

115. ICRW, *supra* note 1, art. I, ¶ 1 ("The Schedule attached thereto which forms an integral part thereof").

116. Vienna Convention, *supra* note 33, art. 5 (stating that the Convention applies to any treaty that is a constituent instrument of an international organization). Although the ICRW pre-dates the Vienna Convention, the Vienna Convention's basic rules on treaty interpretation, including article 31, are considered customary international law. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 608 (5th ed. 1998) (stating that "a good number" although not all, of the provisions of the Vienna Convention express general international law, and those that do not "constitute presumptive evidence of emergent rules of general international law"); IAN M. SINCLAIR, VIENNA CONVENTION ON THE LAW OF TREATIES 5-21 (2d ed. 1984).

117. ICRW, *supra* note 1, pmbl.

The Schedule is the mechanism by which the ICRW and IWC establish rules for managing individual whale stocks, and the Schedule's provisions must be interpreted in light of this purpose. Any interpretation must be careful not to undercut the ability of the IWC to manage whale stocks according to all provisions of the ICRW.

As described below, the ordinary meaning of the terms and provisions used in the Schedule indicate that paragraph 13(a) establishes a number of conditions that must be met before an ASW quota may be approved. Moreover, the ordinary meaning supports the conclusion that the IWC must determine whether the conditions have been met and must establish ASW quotas. Paragraph 13 does not create a right for an IWC member to conduct ASW hunts.

A. THE USE OF “NOTWITHSTANDING” IN PARAGRAPH 13
IDENTIFIES ASW AS AN EXCEPTION TO THE RULES OF PARAGRAPH
10

Paragraph 13(a) of the Schedule begins with the phrase “notwithstanding the provisions of paragraph 10.” The word “notwithstanding” is widely recognized as indicating an exception to a rule. The ordinary meaning of “notwithstanding,” defined as “in spite of,”¹¹⁸ makes that clear: “In spite of” the catch limits and other provisions included in paragraph 10, the IWC may authorize ASW quotas; the ASW quotas are the exception to the primary rules established in paragraph 10. As such, paragraph 13 does not establish an absolute right to ASW, as some have suggested.¹¹⁹

The World Trade Organization (“WTO”)’s Appellate Body has interpreted “notwithstanding” in the same manner. In a trade dispute unrelated to the ICRW, the WTO Appellate Body concluded that use of the term “notwithstanding” creates an exception to a general rule.¹²⁰ It further recognized that a State could use the exception to

118. *Notwithstanding Definition*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/view/Entry/128667?redirectedFrom=notwithstanding#eid> (last visited Jan. 22, 2015).

119. *See, e.g.*, AEWL Letter, *supra* note 28, at 2-3 (stating that the United States “is required to issue aboriginal subsistence catch limits under the plain language of paragraph 13 of the Schedule”).

120. The Appellate Body stated:

deviate from the general rule only if the conditions set out in the exception are met.¹²¹

The structure of paragraph 13(a) and its “notwithstanding” language closely mirror the language analyzed by the WTO Appellate Body. In the Schedule, the general rules are provided in paragraph 10 and paragraph 13(a) creates an exception to the general rules. Further, the exception is triggered only when all of the conditions set forth in paragraph 13 are met. If the conditions have not been met, then the exception is not triggered.

Paragraph 10 reinforces this interpretation. Paragraph 10 sets out the catch limits for each whale stock in Table 1, which are all set at zero except for West Greenland fin whales. Although Table 1 includes a catch limit for West Greenland fin whales, that does not suggest that ASW may take place for that stock in the absence of an IWC-approved ASW quota because footnote 2 of Table 1 makes catch limits for West Greenland fin whales “subject to paragraph 13(b)(3).” Thus, footnote 2 creates an express link between the catch limits established in Table 1 and the ASW quotas established in paragraph 13(b)(3). Consequently, the catch limit in Table 1 must meet the same conditions under paragraph 13(a) and paragraph 13(b) as any other ASW hunt. Even if the catch limit for fin whales remains in Table 1, a specific quota must be granted for “each” year under paragraph 13. Thus, without a specific ASW quota, no ASW for West Greenland fin whales may occur. Because the IWC did not grant a quota for West Greenland fin whales in 2013 and 2014, Greenland was not allowed to conduct ASW unilaterally in those years, consistent with the ICRW and the Schedule.

By using the word “notwithstanding”, paragraph 1 of the Enabling Clause permits Members to provide “differential and more favourable treatment” to developing countries “in spite of” the MFN obligation of Article I:1. Such treatment would otherwise be inconsistent with Article I:1 because that treatment is not extended to all Members of the WTO “immediately and unconditionally”. Paragraph 1 thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an “exception” to Article I:1.

Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 90, WT/DSB246/AB/R (Apr. 7, 2004) (adopted Apr. 20, 2004).

121. *Id.*

B. THE IWC MUST INSCRIBE AN ASW QUOTA IN PARAGRAPH 13(b) BASED ON THE PRINCIPLES AND CONDITIONS INCLUDED IN PARAGRAPH 13(a)

The AEWG argues that paragraph 13(a) can be read in isolation of paragraph 13(b). As a result, AEWG concludes that an IWC-approved quota is not needed and that an IWC member may conduct ASW in the absence of an IWC-approved ASW quota.¹²² It achieves this result by claiming that the subparagraphs in paragraph 13(b), including the quotas for specified years identified in each clause (i), are “independent of the rest” of paragraph 13(b).¹²³

This reading of paragraph 13 is anything but ordinary. Paragraphs 13(a) and 13(b) must be read in conjunction with each other; neither composes the entire ASW management scheme in isolation. Paragraph 13(a) refers to quotas with the language “*catch limits for aboriginal subsistence whaling . . . shall be established.*”¹²⁴ Paragraph 13(b) mirrors this language by providing that “[*c*]atch limits for aboriginal subsistence whaling are as follows.”¹²⁵ In other words, paragraph 13(a) establishes general conditions applicable to all ASW quotas and paragraph 13(b) establishes specific conditions for specific whale stocks. These paragraphs complement each other. The use of identical language in paragraphs 13(a) and 13(b)— “[*c*]atch limits for aboriginal subsistence whaling”—further supports the conclusion that paragraphs 13(a) and 13(b) must be read as one comprehensive management scheme and that specific catch quotas, based on the principles in paragraph 13(a), are to be inscribed in paragraph 13(b).

Paragraph 13(a) also specifies that the conditions for establishing ASW quotas included in paragraph 13 must be met in “each whaling season.” This language is straightforward: in each year, a quota must meet all the requirements of paragraph 13 and the IWC alone inscribes ASW quotas for “each whaling season” in paragraph 13(b).

Without an ASW quota from the IWC for the 2013 and 2014 seasons, Greenland did not meet the conditions in paragraph 13(a) of the Schedule that a “catch limit shall be established . . . [for] each

122. AEWG Letter, *supra* note 28, at 8, 10.

123. *Id.*

124. Schedule, *supra* note 1, art. III, ¶ 13(a) (emphasis added).

125. *Id.* ¶ 13(b) (emphasis added).

whaling season.” The IWC refused to set a quota for the Greenlandic ASW hunt. The language in paragraph 13(a) requires that a quota “be established,” which is an affirmative act by some entity. This mirrors the requirement in paragraph 13(a)(2) that the quota is “set at levels.” As noted previously in this section, that quota must be inscribed in paragraph 13(b). The only way a quota may be inscribed in paragraph 13(b) is upon a three-fourths majority vote of IWC members. In other words, while the sentence is written in passive voice, the unnamed entity is the IWC, because only the IWC can adopt amendments to paragraph 13(b).

C. THE GENERAL STRUCTURE OF PARAGRAPHS 13(b)(1)-(4)
SUPPORTS AN INTERPRETATION OF PARAGRAPH 13 THAT
IDENTIFIES THE IWC AS THE ENTITY TO APPROVE ASW QUOTAS

The general structure of paragraphs 13(b)(1)-(4) creates a management scheme that requires the IWC to set quotas before ASW may occur. The drafting of paragraph 13(b)(1) illustrates this conclusion. The phrase “further provided that” underscores the link between the conditions set out in paragraph 13(b)(1) and the additional conditions set out in sub-sections 13(b)(1)(i)-(ii). The phrase indicates that any request for ASW quotas must meet the requirements of these sub-sections before ASW is permitted. The Oxford English Dictionary defines “further” as “going beyond what already exists or has been dealt with; additional, more.”¹²⁶ The Oxford Dictionary also defines “provided that” as “with the provision or condition (that).”¹²⁷ Taken together, the phrase “further provided that” is clearly designed to create conditions in *addition* to those included in the rest of the paragraph. Those additional conditions appear in paragraphs 13(b)(1)(i)-(ii) and include quotas established in specific years. When the IWC has not issued a quota by amending 13(b)(1)(i) of the Schedule, then the conditions of paragraph 13(b)(1) are not met and no ASW hunts may occur.

The AEWC has argued that deleting the numeric ASW quotas in 1977 for specific years in paragraph 13(b)(1)(i) for bowhead whales

126. *Further Definition*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/75715?rskey=hgPrmg&result=2&isAdvanced=false#eid> (last visited Jan. 22, 2015).

127. *Provided Definition*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/153449?redirectedFrom=provided#eid> (last visited Jan. 22, 2015).

would not have resulted in a zero quota. Instead, it would have resulted in no numeric quota being set, thereby allowing a limitless ASW hunt for bowheads.¹²⁸ By extension, the AEWEC argues that the failure of the IWC to adopt an ASW quota has the same effect. AEWEC reaches this conclusion “since clause (i) is a ‘further provided’ clause *that is independent of the rest of paragraph 13(b)(1)*.”¹²⁹ The AEWEC’s argument is completely without merit. As noted in the previous paragraph, the phrase “further provided that” establishes a link between two elements; it does not sever the link. In the case of paragraph 13(b), it links the conditions in paragraph 13(b)(1) to the conditions in sub-paragraphs (i)–(v). The AEWEC is, in fact, interpreting the phrase opposite of the phrase’s ordinary meaning.

While paragraph 13(b)(3) forms the basis for Greenland’s ASW quota, paragraph 13(b)(1) helps frame paragraph 13(b)(3). As noted in Section III(C) above, the structure of each exception in paragraph 13(b) is the same. While differences in language are generally read as intentional, that is not the case here; to treat sub-paragraphs (i)–(ii) of paragraph 13(b)(1) as additional conditions while treating sub-paragraphs (i)–(iv) of paragraph 13(b)(3) as independent provisions would lead to absurd results. In that scenario, the IWC would need to approve ASW quotas for bowheads in the Bering-Chukchi-Beaufort Seas but not for any of the other stocks subject to ASW. That is exactly the kind of absurd result that treaty interpreters must avoid.¹³⁰

Similarly, paragraph 13(b)(3) cannot be read independently of the overall structure of paragraph 13(b). It could be argued that the full stop at the end of paragraph 13(b)(3) permits ASW of the stocks listed so long as the meat and products are used exclusively for local consumption. This would mean that paragraph 13(b)(3) is read as granting permission to conduct ASW unless the sub-paragraphs 13(b)(3)(i)–(iv) contain a quota limiting the hunt. However, this argument is inconsistent with the overall structure of paragraph

128. AEWEC Letter, *supra* note 28, at 10.

129. *Id.* (emphasis added).

130. *See, e.g.*, Polish Postal Service in Danzig, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 11, at 39 (May 16) (“[I]t is a cardinal principal of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.”).

13(b), which begins, in the chapeau, with the phrase “catch limits are as follows.” It does not logically follow that if the purpose of paragraph 13(b) is to set catch limits, then the subsidiary paragraph sets no limit unless qualified. The quotas set in sub-paragraphs 13(b)(3)(i)-(iv) are a limitation on paragraph 13(b)(3), similar to the way paragraph 13(b)(1)(i) limits paragraph 13(b)(1). To read this section otherwise would render the phrase “catch limits are as follows” superfluous.

The interpretation that paragraph 13(b)(3) is designed to serve the same purpose as paragraph 13(b)(1) fits better with the structure of both paragraph 13(b) and paragraph 13 as a whole. Based on logic and practical application, paragraphs 13(b)(1)-(4) are designed to serve the same purpose, despite their different drafting.

The conclusions in this section and in section IV(D) below are supported by the underlying objectives for managing ASW. In 1982, the IWC agreed on the following objectives for ASW:

- (1) To ensure that the risks of extinction to individual stocks are not seriously increased by subsistence whaling;
- (2) To enable aboriginal people, to harvest whales in perpetuity at levels appropriate to their cultural and nutritional requirements, subject to the other objectives; and
- (3) To maintain the status of whale stocks at or above the level giving the highest net recruitment and to ensure that stocks below that level are moved towards it so far as the environment permits.¹³¹

While allowing aboriginal people to meet their cultural and nutritional requirements is an important objective, that objective is *subject to the other objectives* of preventing risks of extinction and maintaining stocks at the highest level of recruitment. In fact, “the highest priority shall be accorded to the objective of ensuring that the

131. *Aboriginal/Subsistence Whaling*, *supra* note 84, at 84.

risks of extinction to individual stocks are not seriously increased by subsistence hunting.”¹³²

Reading paragraph 13(a) in conjunction with paragraph 13(b) best fulfills these objectives. Paragraph 13(a) includes the conditions for ensuring that stocks are not threatened by extinction and maintaining high levels of recruitment. Paragraph 13(b) ensures that meat is actually used to meet cultural and nutritional requirements. It further helps meet the biological goals by ensuring that a quota consistent with all conditions in paragraphs 13(a) and (b) is approved by the IWC and inscribed in paragraph 13(b).

D. THE PHRASES “SHALL BE ESTABLISHED” AND “SHALL BE PERMITTED” DO *NOT* INDICATE THAT EITHER THE IWC OR AN IWC MEMBER IS REQUIRED TO ADOPT AN ASW QUOTA

Paragraph 13(a) provides that ASW quotas “shall be established” and “shall be permitted.” However, these phrases do not create a requirement that members issue quotas when the IWC fails to do so, as the AEWG asserts.¹³³ Rather, the phrase providing that ASW quotas “shall be established” relates to the phrase at the end of the same paragraph: “in accordance with the following principles.” Similarly, the phrase “shall be permitted” relates to the phrase “so long as total removals do not exceed 90 percent of MSY.” In both cases, the use of “shall” is linked to the requirement to meet specified conditions. The AEWG has conveniently ignored the phrases “in accordance with the following principles” and “so long as” which link the directive to set quotas with meeting the specified conditions.

Again, this is consistent with the ordinary meaning of “shall,” which the Oxford English Dictionary defines, in relation to stating a necessary condition, as something that “must” happen “if something else is to happen.”¹³⁴ That is, a quota must be established, provided

132. IWC, *45th Annual Report of the International Whaling Commission*, at 42-43 (1995).

133. AEWG Letter, *supra* note 28, at 13 (“To comply with the plain language of the Schedule and the [Whaling Convention Act (WCA)], the Secretary [of Commerce] *must* permit aboriginal subsistence whaling and establish numeric catch limits under the WCA if none are provided in the Schedule.”).

134. *Shall Definition*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/177350?rskey=nWMzoy&result=2&isAdvanced=false#eid> (last visited

that the relevant conditions are met. Taken together, these phrases demonstrate that the principles enshrined in paragraphs 13(a)(1)-(5) are necessary to meet the general conditions of paragraph 13(a). It does not create an independent requirement for members to issue quotas.

However, the use of “shall” is not superfluous. The IWC must—it “shall”—establish ASW quotas, provided that such quotas are consistent with the principles and conditions established in paragraphs 13(a) and 13(b). If the conditions are met, the IWC may not refuse to establish a quota.

E. THE USE OF PASSIVE VOICE DOES NOT INDICATE THAT EITHER THE IWC OR AN IWC MEMBER MAY IMPLEMENT A PROVISION OF THE ICRW OR THE SCHEDULE

The use of the passive-voice phrase “catch limits . . . shall be established” does not suggest that either the IWC or an IWC member may establish an ASW quota, as the AEWG asserts.¹³⁵ Specifically, the AEWG argues that the IWC specifies in the Schedule when it wants the IWC to undertake an activity by using active voice (“[t]he Commission shall”) or expressly identifying the Commission as the body to undertake the activity (“[t]his provision shall be reviewed by the Commission.”). As a result, according to the AEWG, when the Schedule does not specifically identify the actor, the Commission intended either the IWC or an IWC member to implement the activity. Since paragraph 13 uses passive voice, the AEWG claims that either the IWC or an IWC member may establish ASW quotas.¹³⁶

However, even a casual read of the Schedule shows the fallacy of this argument. Paragraph 10, for example, provides that “[a]ll stocks of whales shall be classified in one of three categories”: Sustained Management Stock, Initial Management Stock, and Protection Stock,¹³⁷ without identifying who will classify stocks into these categories. In addition, paragraph 10(e) establishes a moratorium on commercial whaling. It is perhaps the most important current

Jan. 22, 2015).

135. AEWG Letter, *supra* note 28, at 8, 9.

136. *Id.*

137. Schedule, *supra* note 1, art. III, ¶ 10.

provision in the Schedule. Yet, while it provides that the moratorium “will be kept under review,” it does not identify which entity will conduct the review.

If the views of the AEWG are accepted, each IWC member could identify whale stocks as falling within one of the three categories. In this scenario, some members could identify a stock as a Protection Stock while others could designate it as a Sustained Management Stock subject to commercial whaling. If the commercial whaling moratorium is removed, individual IWC members would have authority to set independent catch limits for all whale stocks except for the most highly protected category, and could unilaterally reclassify whales as a Sustained Management Stock (lowest level of protection). Similarly, either the IWC or each individual IWC member could review the moratorium, a result that would be nonsensical. Both of these actions would result in complete chaos and would negate the purposes of the ICRW to conserve whales and develop a whaling industry in an orderly manner.

F. THE REQUIREMENT TO ADOPT NATIONAL LEGISLATION IN
PARAGRAPH 13(a)(5) DOES NOT INDICATE THAT ASW QUOTAS
MAY BE UNILATERALLY ADOPTED

Paragraph 13(a)(5) provides that ASW “shall be conducted under national legislation that accords with this paragraph.” This language does not suggest that IWC members may conduct ASW unilaterally without an IWC-approved quota, as the AEWG believes.¹³⁸ Rather, the provision simply states that national legislation is required as part of the overall ASW management scheme; the IWC may not approve an ASW quota and an IWC member may not conduct ASW in the absence of national legislation conforming to paragraph 13.

138. The AEWG argues the following:

Absent a numeric catch limit in the Schedule, it is simply not possible for a Contracting Government to comply with paragraph 13(a) without establishing a catch limit through its own national legislation, which of course is precisely what paragraph 13(a)(5) of the Schedule instructs Contracting Governments to do. Without a numeric catch limit set either at need or at the applicable level to safeguard whale stocks, how does a Contracting Government meet its obligation to ensure compliance with the requirements of paragraph 13(a)?
AEWG, *supra* note 28, at 12.

Interpreting paragraph 13(a)(5) as a prerequisite to the IWC approving ASW quotas is consistent with the ordinary meaning of the provisions in light of its purpose and context. Allowing individual IWC members to set their own quotas would create compliance problems with the MSY provisions in 13(a)(1)-(2) by creating the conditions for a tragedy of the commons where no one member bears responsibility if its particular quota causes a stock to slip below MSY levels. Paragraph 13(a) is a comprehensive section that up to this point has managed all ASW activity. The alternative interpretation would likely result in failure of any sort of management scheme.

V. OTHER EVIDENCE SUPPORTING IWC-APPROVED QUOTAS AS A PREREQUISITE TO ASW HUNTS

Other evidence further suggests agreement and practice among IWC members and within certain governments that the IWC must approve ASW quotas before a member may conduct ASW hunts. Article 31(3)(c) of the Vienna Convention allows treaties to be interpreted in light of subsequent agreement and subsequent practice of the parties.¹³⁹ The prevailing view in international law, however, is that subsequent agreement or subsequent practice may be used to interpret a treaty only when *all* parties to the relevant treaty have subsequently agreed or acted in a particular way.¹⁴⁰ For example, a WTO panel established in the *EC-Biotech*¹⁴¹ dispute concluded that it

139. See Vienna Convention, *supra* note 33, art. 31(3)(c). Article 31 provides:
3. There shall be taken into account, together with context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

Id.

140. See John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 67-69 (2004) (noting that scholars and tribunals have stated that “parties” under article 31 of the Vienna Convention means all parties bound by a treaty, and thus an act by a single party or even a group of parties is insufficient to establish subsequent agreement or practice for purposes of treaty interpretation).

141. Panel Reports, *European Communities – Measures Affecting the Approval*

was not required to take into account the Biosafety Protocol to interpret the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") because Argentina, Canada, and the United States are not parties to the Biosafety Protocol but are parties to the SPS Agreement.¹⁴² Nonetheless, the panel stated that it could use the Biosafety Protocol to interpret the SPS Agreement if it found it informative.¹⁴³

Viewed in this light, the evidence described below, including previous reactions to the IWC's failure to approve an ASW quota, likely does not rise to the level of state agreement or state practice

and Marketing of Biotech Products, ¶ 4.543, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006) (adopted Nov. 21, 2006).

142. *Id.* ¶¶ 7.70–71, 7.75. Paragraph 7.70 provides the panel's core conclusion and reasoning. Paragraphs 7.70 and 7.71 state:

Taking account of the fact that Article 31(3)(c) mandates consideration of other applicable rules of international law, and that such consideration may prompt a treaty interpreter to adopt one interpretation rather than another, we think it makes sense to interpret Article 31(3)(c) as requiring consideration of those rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted. Requiring that a treaty be interpreted in the light of other rules of international law which bind the States parties to the treaty ensures or enhances the consistency of the rules of international law applicable to these States and thus contributes to avoiding conflicts between the relevant rules

[I]t is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by other rules of international law which that State has decided not to accept.

Id. ¶¶ 7.70–71.

143. *Id.* ¶¶ 7.92–93. The International Law Commission has criticized the panel's analysis:

[The *EC–Biotech* Panel] interpreted article 31(3)(c) so that the treaty to be taken account of must be one to which all parties to the relevant WTO treaty are parties. This latter contention makes it practically impossible ever to find a multilateral context where reference to other multilateral treaties as aids to interpretation under article 31(3)(c) would be allowed. The panel buys what it calls the "consistency" of its interpretation of the WTO Treaty at the cost of the consistency of the multilateral treaty system as a whole. It aims to mitigate this consequence by accepting that other treaties may nevertheless be taken into account as facts elucidating the ordinary meaning of certain terms in the relevant WTO treaty. This is of course always possible and, as pointed out above, has been done in the past as well. However, taking "other treaties" into account as evidence of "ordinary meaning" appears a rather contrived way of preventing the "clinical isolation" as emphasized by the Appellate Body.

Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 450, U.N. Doc. A/CN.4/L.682 (Apr. 8, 2006).

that must be considered. Nonetheless, the evidence is informative, which a treaty interpreter could use to help determine the ordinary meaning of a treaty provision. Further, it can be used to illustrate how the IWC members have gravitated towards the ordinary meaning of paragraph 13 discussed in section IV as the most reasonable interpretation of the ICRW and the Schedule. In addition to the reactions to past quota rejections, U.S. Department of State documents, the circumstances surrounding the denial of Greenland's quota (including Denmark's indication that it had to withdraw from the IWC as a result of Greenland's unauthorized ASW hunt), IWC resolutions and terms of reference, Greenland's national legislation scheme, and U.S. court decisions all support interpreting paragraph 13 as requiring the IWC to adopt ASW quotas before ASW may occur.

A. PAST REJECTIONS OF ASW QUOTAS SUPPORT THE CONCLUSION THAT IWC-APPROVED ASW QUOTAS ARE REQUIRED

The actions of the United States and other IWC members after the IWC rejected ASW quotas indicate that they believe the IWC must approve ASW quotas prior to conducting ASW. For example, in 1977, the IWC suspended the ASW quota for bowhead whales taken by native people of Alaska (United States) and Chukotka (Russia) in the Bering-Chukchi-Beaufort Seas over concerns about the size of the hunt and its impact on populations, and inadequate surveillance and enforcement measures to ensure that ASW hunts on bowheads were in compliance with the ICRW.¹⁴⁴ Rather than engage in ASW by self-allocating a quota in the absence of an IWC-approved quota, the United States called a special meeting of the IWC in December 1977 seeking IWC adoption of a quota.¹⁴⁵ Fifteen of the seventeen IWC members attended the special meeting in 1977, and a vote for a reduced quota passed with ten in favor, three against, and two abstaining.¹⁴⁶ Significantly, no IWC members stated that the special meeting was irrelevant because the United States and Russia could impose their own quota. To the contrary, all IWC members took their responsibility to evaluate proposals for ASW quotas seriously,

144. IWC, *Chairman's Report of the Twenty-Ninth Meeting*, at 22 (1978) (noting that five recognized stocks should retain their Protection Stock status).

145. See IWC, *Chairman's Report of the Thirtieth Meeting*, at 26 (1979).

146. See *id.* at 23.

attended the meeting, and ultimately approved the quota.

Similarly, when the IWC rejected an ASW quota for bowheads taken by native people of Alaska and Chukotka in the Bering-Chukchi-Beaufort Seas in 2002,¹⁴⁷ the United States and Russia did not unilaterally authorize an aboriginal subsistence hunt. Instead, the United States again called for a special meeting, held in October 2002, at which time the IWC approved a quota.¹⁴⁸

The IWC denied Greenland's ASW quota request for humpback whales in 2007¹⁴⁹ and 2008¹⁵⁰ and deferred a decision on the matter in 2009.¹⁵¹ That quota was later revisited and approved in 2010.¹⁵² As with the United States, Greenland did not authorize hunts for humpback whales between 2007 and 2010.

In both instances when the IWC rejected the bowhead ASW quota, the United States proceeded by calling a special session of the IWC and neither the United States nor Russia authorized ASW hunts. This suggests that, at least as far the bowhead whale stock of the Bering-Chukchi-Beaufort Seas was concerned, the United States and Russia recognized that a quota adopted by the IWC was necessary before ASW hunts could occur.¹⁵³ Greenland did not call a special session, but instead complied with the IWC's decision by not conducting any ASW hunts on humpback whales before the IWC approved an ASW quota at a later meeting. This suggests a common understanding that

147. See generally IWC, *Chair's Report of the 54th Annual Meeting*, at 19-22 (2002).

148. See IWC, *Chair's Report of the 55th Annual Meeting*, at 14 (2003).

149. See generally IWC, *Chair's Report of the 59th Annual Meeting*, at 19-22 (2007) (explaining that Denmark withdrew its request for a quota for humpback whales because of increasing negative pressure).

150. IWC, *Chair's Report of the 60th Annual Meeting*, at 23 (2008) (reporting that the proposed amendment did not pass because it received twenty-nine votes in favor, thirty-six against, and two abstentions).

151. *Annual Report of the International Whaling Commission 2010*, *supra* note 14, at 22-23 (finding, however, that the IWC Commission deferred the decision to an intersessional meeting, that intersessional meeting was not quorate, and the IWC could not take a decision on the matter); IWC, *Chair's Report of the 61st Annual Meeting*, at 23 (2009).

152. *Annual Report of the International Whaling Commission 2010*, *supra* note 14, at 22-23.

153. See *Chair's Report of the 59th Annual Meeting*, *supra* note 149, at 21 (noting that the United States could not support the requested takes of bowhead and humpback whales).

ASW hunts require an IWC-approved quota before they may proceed.

B. U.S. ACTIONS SUPPORT THE CONCLUSION THAT IWC-APPROVED ASW QUOTAS ARE REQUIRED

The actions of the United States also support the interpretation that the IWC must approve ASW quotas before ASW may occur. After the IWC denied the U.S. request for a bowhead quota in 2002, the U.S. IWC Commissioner Rollie Schmitten told the press that:

In [fifty-six] years of history in the IWC . . . that was the most unjust, unkind, unfair vote that was ever taken. That vote literally denied people (the ability) to feed their families We will leave no stone unturned. It is so critical that we want to see if we can revive it today Governments can play games, but you can't play with families.¹⁵⁴

Similarly, a State Department spokesperson stated the following after the IWC failed to approve the bowhead ASW quota:

So we'd like to see the Commission's decision reconsidered internally or inter-sessionally, now that the meeting has ended. The International Whaling Commission could hold a special meeting to reconsider the quota. It also has procedures, I understand, whereby they could conduct a postal ballot. So we'll be looking into options there to try to see that this quota be approved as it has been for so many years.¹⁵⁵

Clearly, these statements indicate that the United States understood that the IWC's rejection of the bowhead quota prevented ASW on bowheads.

The U.S. view is highlighted in a description of the process for establishing ASW quotas under U.S. law, in which the United States writes, "[o]nce the IWC approves a request for an aboriginal subsistence whaling quota . . . and sets catch limits for each whale stock in five-year increments, the [U.S. Whaling Convention Act] provides the mechanism for the U.S. to implement these quotas."¹⁵⁶

154. Mick Corliss, *IWC Meeting Ends in a Bitter Divide*, JAPAN TIMES (May 25, 2002), <http://www.japantimes.co.jp/text/nn20020525a3.html>.

155. Philip T. Reeker, Deputy Spokesman, Remarks at the State Department Briefing (May 24, 2002), *available at* <http://www.usembassyisrael.org.il/publish/peace/archives/2002/may/052504.html>.

156. U.S. DEP'T OF COMMERCE, NAT'L OCEANIC & ATMOSPHERIC ADMIN.,

The position of the United States is clear: the IWC first approves and sets quotas and then the United States implements those quotas through domestic legislation.

In addition, the U.S. Department of State issued a fact sheet explaining the position of the U.S. government on ASW quotas. In this statement, the Department of State expressed U.S. support for quotas for the Alaska Eskimo Whale Commission and the Makah Indian Tribe of Washington State.¹⁵⁷ The State Department also explained that the IWC sets quotas by geographical stock, rather than by country.¹⁵⁸ Management based on regional stocks takes into account the specific biological needs of the stock and the aggregate effects of hunts.¹⁵⁹ Management must be able to promote the endurance of the stock across its entire geographic distribution, and, to that end, ICRW Contracting Governments have given management authority to the IWC because it is better positioned to manage shared resources than individual nations. For this reason, the IWC does not set quotas on a country-by-country basis, and it is inappropriate for countries to set quotas of any kind on a unilateral basis. The U.S. State Department supported this view when it explained that “[t]he [United States] and Russia allocate the IWC quotas among the native hunters, so that the limits are not exceeded.”¹⁶⁰ This language shows that the United States (and implicitly Russia) understood that they had no right to hunt without a quota set by the IWC and that IWC members allocate ASW quotas only after the IWC adopts them. The fact that the U.S. State

NAT'L MARINE FISHERIES SERV., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR ISSUING ANNUAL QUOTAS TO THE ALASKA ESKIMO WHALING COMMISSION FOR A SUBSISTENCE HUNT ON BOWHEAD WHALES FOR THE YEARS 2008 THROUGH 2012 6 (2008).

157. *Aboriginal Subsistence Whaling*, U.S. DEP'T OF STATE (May 15, 2002), <http://2001-2009.state.gov/p/eur/rls/fs/10224.htm> [hereinafter *Aboriginal Subsistence Whaling-U.S. Dep't of State*].

158. *Id.*

159. Starting in 1972, proposals began to move Aboriginal Whaling and the ICRW towards a more ecological approach. This coincided with abandoning the Blue Whale Unit and introducing species quotas for the Antarctic. In addition, concern arose that nonmembers operating outside of IWC regulations undermined effectiveness. See PATRICIA W. BIRNIE, INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE WATCHING 425-30 (1985).

160. *Aboriginal Subsistence Whaling-U.S. Dep't of State*, *supra* note 157.

Department raised this issue in conjunction with support for a renewed ASW quota suggests that the United States viewed denial of the quota as restricting its ability to issue a unilateral quota.

Moreover, the circumstances under which the IWC denied Greenland's quota in 2012 illustrate the reasons for not allowing IWC members to set ASW quotas unilaterally. Greenland/Denmark came to the IWC asking for an ASW quota larger than its quota in previous seasons.¹⁶¹ It would frustrate IWC management measures and conservation of whale stocks if the IWC's rejection of a proposed increase in a quota allowed the proponent IWC member to conduct unlimited whaling. If one accepted that argument, then the IWC would not vote to approve a quota, but rather to limit ASW or, if it rejected a quota, to remove the quota so that members could engage in unlimited ASW on that whale stock. Such an interpretation is absurd. The IWC denied Greenland's quota request because some IWC members believed that the proposed quota included an unacceptable degree of commercialization and was higher than necessary to meet subsistence needs.¹⁶² These reasons for denying the quota suggest that the members that voted against the quota understood that their vote would restrict Greenland's hunting activities rather than allow Greenland to hunt unchecked.

C. IWC RESOLUTIONS SUPPORT THE CONCLUSION THAT IWC-APPROVED ASW QUOTAS ARE REQUIRED

IWC resolutions and terms of reference for IWC committees over an extended period of time support the conclusion that the IWC has sole authority to set ASW quotas. For example, when the IWC approved the quota for bowheads in the Bering-Chukchi-Beaufort Seas at the special meeting in 1977, it also passed a resolution that welcomed improved surveillance and enforcement measures by the United States that would help "ensure that the number of whales struck does not exceed the *limit* established by the [IWC]."¹⁶³ By

161. See generally *Proposed Schedule Amendment (IWC 64)*, *supra* note 31.

162. See IWC, U.K. Comm'r Report, *64th Annual Meeting of the International Whaling Commission*, at 3 (2012), available at <http://archive.defra.gov.uk/wildlife-pets/wildlife/protect/whales/documents/iwc64-uk-commissioners-report.pdf> (discussing concerns about the need for the increased quotas given that many investigations that revealed the whale meat was being served to tourists).

163. IWC, *Chairman's Report of the Special Meeting, Tokyo, December 1977*,

focusing the resolution on ensuring U.S. compliance with the IWC-approved limit on ASW, the IWC itself indicated its belief that the IWC must approve ASW quotas. If the quotas were mere recommendations, it is unlikely that the IWC would adopt a resolution focused on “ensuring” that the United States does not exceed a limit established by the IWC. The language suggests a broad understanding among IWC members that members must comply with the IWC-approved ASW quotas. The IWC’s rejection of a quota is not a license to hunt freely. It naturally follows that rejection of a requested quota sets the quota at zero, rather than resulting in no numeric limit on ASW hunts.

At its thirty-fourth meeting in 1982, the IWC passed a resolution highlighting the importance of cooperation with aboriginal peoples in ASW management. The resolution stated that “[t]he [IWC] agrees to manage aboriginal subsistence whaling in accordance with management principles to be set forth in the Schedule.”¹⁶⁴ This resolution contains two important points. First, the IWC has agreed to manage ASW. It seems clear from this language that IWC members anticipated that the IWC would have sole authority with regard to ASW. The resolution does not mention individual IWC members having independent management authority over ASW as an alternative to IWC management. Unilateral action by IWC members to adopt and manage ASW quotas unilaterally runs counter to the purpose of delegating authority to the IWC and undermines the IWC’s management measures. Just as in the 1977 resolution concerning ASW for bowheads, the 1982 resolution mentions IWC management of ASW. This adds strength to the argument that members have a general understanding that the IWC is the primary body with authority to manage ASW. Second, the resolution states that management must be in accordance with the principles set forth in the Schedule. This recognizes the Schedule as the mechanism for managing ASW. Taken together, these clauses show that IWC members understood that the IWC has sole authority to manage ASW, and that the Schedule is the mechanism by which the IWC manages ASW. This supports the conclusions reached in Section IV that the Schedule comprises a comprehensive management scheme

at 4 (1977).

164. *IWC 1982 Report*, *supra* note 86, at 39, Appendix 3.

requiring the IWC to approve ASW quotas, and that IWC members do not have the authority to set ASW quotas unilaterally.

At its forty-eighth meeting in 1996, the IWC established the current terms of reference for the IWC's Aboriginal Subsistence Whaling Sub-Committee that support the interpretation that the IWC has primary authority for management of ASW. The terms of reference state that this Sub-Committee shall consider nutritional, cultural, and subsistence needs to provide advice to the IWC for "its consideration *and determination of appropriate management measures.*"¹⁶⁵ In this resolution, the IWC acknowledges that it determines the appropriate ASW management measures. This shows further recognition of the IWC's role in setting ASW management, particularly in setting ASW quotas.

The two resolutions, adopted by consensus,¹⁶⁶ and these terms of reference constitute multiple declarations over a twenty-year period in which IWC members have articulated essentially the same thing: that the IWC is the body that has authority to set ASW quotas. These statements by the IWC help shed light on the meaning of the language in the Schedule and help interpret the ICRW. In fact, the International Court of Justice commented that resolutions, while non-binding, "may be relevant for the interpretation of the Convention or its Schedule" when adopted by consensus or unanimous vote¹⁶⁷ and that parties to a treaty have an obligation to give "due regard" to such resolutions.¹⁶⁸

165. IWC, *Chairman's Report of the Fiftieth Annual Meeting*, at 31 (1998) (emphasis added).

166. Whether the 1977 resolution relating to bowheads was adopted by consensus is less clear. The chairman's report notes that the IWC voted on the "proposal" to amend the Schedule to include an ASW quota for bowheads. It further states that the IWC agreed to an additional paragraph to the resolution. It is not clear whether the "proposal" on which the IWC voted included the resolution or whether IWC adopted the resolution separately. *See IWC 1982 Report, supra* note 86, at 29. Resolutions are adopted by a simple majority and Schedule amendments by a three-fourths majority, suggesting separate votes for the two items. However, it is clear that the Schedule amendment and resolution were part of a package, suggesting that the vote was taken as a single item. *Chairman's Report of the Special Meeting, supra* note 163, at 4.

167. Whaling in the Antarctic (Austl. v. Japan), 2014 I.C.J. 148, ¶ 46 (Mar. 31).

168. *Id.* ¶¶ 83, 144 (concluding that Japan's expanded use of lethal methods in its new Antarctic whaling program, as compared to its previous program, was "difficult to reconcile with Japan's obligation to give due regard to IWC

D. GREENLAND'S NATIONAL LEGISLATION SUPPORTS THE CONCLUSION THAT IWC-APPROVED ASW QUOTAS ARE REQUIRED

As discussed in Section IV(F), IWC members are required under paragraph 13(a)(5) to implement the requirements of the ICRW through national legislation. Greenland implements the ICRW through an executive order of the Greenland Home Rule Government. The English translation of the original executive order provided to the IWC suggests that Greenland recognizes the necessity of acquiring an ASW quota from the IWC prior to allowing ASW hunts. The relevant provision requires the government to consult with the municipal governments and the hunter's organization to decide the number of whales that can be taken from each municipality.¹⁶⁹ It further requires that "[t]he allocated IWC quotas are the basis of the annual quota."¹⁷⁰ While this language is not explicit that the IWC quota restricts Greenland's hunts, a contrary interpretation does not make sense: without an allocated IWC quota, Greenland has nothing on which to base its annual quota. Greenland's own implementing legislation is thus consistent with the view that the IWC must first adopt ASW quotas before an ASW hunt may be authorized.

E. U.S. COURT CASES SUPPORT THE CONCLUSION THAT IWC-APPROVED ASW QUOTAS ARE REQUIRED

Two U.S. judicial opinions also support the view that only the IWC may approve ASW quotas. In the wake of the 1977 quota denial for the Bering-Chukchi-Beaufort Seas bowhead whale stock, two lawsuits in U.S. federal courts challenged government decisions relating to the IWC's removal of the quota. These cases provide an independent legal analysis of the obligations of the United States and insight into how U.S. courts may deal with these issues if the quotas are ever revoked in the future.

resolutions and Guidelines and its statement that JARPA II uses lethal methods only to the extent necessary to meet its scientific objectives").

169. See IWC, *White Paper on Management and Utilization of Large Whales in Greenland*, at 76, IWC/64/ASW 7 (June 18, 2012).

170. *Id.*

The first case, *Hopson v. Kreps*,¹⁷¹ was brought on behalf of Alaskan Eskimos challenging regulations adopted by the U.S. government pursuant to the ICRW. Plaintiffs claimed that the IWC had exceeded its jurisdiction under the ICRW by removing the ASW provisions and that the Secretary of Commerce had acted illegally by promulgating the regulations.¹⁷² The Ninth Circuit recognized that “a major purpose of the Convention was the creation of an international commission with power to fix [seasonal quotas for the taking of whales].”¹⁷³ The Ninth Circuit also explained that an IWC member may avoid application of the Schedule by lodging an objection within ninety days.¹⁷⁴ The court recognized that not only does the IWC have the power to set quotas, but also that IWC members are obligated to comply with the Schedule unless they object.

The second case, *Adams v. Vance*,¹⁷⁵ was a challenge by the Inupiat Eskimos to the decision of the Secretary of State not to file an objection to the IWC amendments to the Schedule that removed the Bering-Chukchi-Beaufort Seas bowheads from ASW hunts.¹⁷⁶ The D.C. Circuit noted that the United States could avoid application of the Schedule by making an objection to the decision, but that the United States chose not to object.¹⁷⁷ The D.C. Circuit recognized that modification of the Schedule by the IWC amounted to a ban on whaling that possibly could cause irreparable injury to the Eskimos.¹⁷⁸ The court is clear that the removal of a quota is a ban on ASW.

These cases taken together indicate that U.S. federal courts believed that the United States acted consistently with its legal obligations under the ICRW by promulgating regulations that halted

171. 622 F.2d 1375 (9th Cir. 1980).

172. *Id.* at 1377 (“Since Congress enacted the Whaling Convention Act of 1949 solely to implement the Convention, the Commerce Department was not authorized to adopt Commission regulations that exceeded the scope of the Commission’s jurisdiction”).

173. *Id.* at 1376 (citing *Hopson v. Kreps*, 462 F. Supp. 1374, 1375 (D. Alaska 1979)).

174. *Id.* at 1377.

175. 570 F.2d. 950 (D.C. Cir. 1987).

176. *Id.* at 952.

177. *Id.*

178. *Id.* at 953 (noting that hunts of bowhead after the ban carried with it the potential for criminal prosecution).

ASW hunts, and that the United States could avoid these obligations only by lodging an objection to the Schedule within ninety days. Further, the courts recognize that the power to set quotas lies with the IWC and that removal of a quota is equal to a ban. The analysis of these U.S. federal courts is consistent with and further supports the ordinary meaning interpretation that only the IWC may approve ASW quotas.

These two U.S. federal court cases indicate that in 1977, when the IWC removed the ASW quota for bowheads, the United States government had the option to object to the amendment to the Schedule within ninety days. In this situation, the IWC was actually deleting the reference in the Schedule to aboriginal whaling for bowhead whales (called right whales at the time).

Whether an IWC member may object to the IWC's rejection of an ASW quota depends on whether the Schedule is amended by deleting the relevant paragraphs of the Schedule. In the case of Greenland's quota, the IWC retained paragraph 13(b)(3) with the expired dates, presuming apparently that Greenland would seek renewal of its quota at a future IWC meeting. Under these circumstances, Denmark, on behalf of Greenland, would not have an opportunity to object because there is no Schedule amendment to object to. If the IWC had amended the Schedule by deleting paragraph 13(b)(3), then Denmark would have had the opportunity to object. The objection, however, would have no practical effect because the IWC must still approve Greenland's quota subject to the conditions of paragraphs 13(a) and (b) of the Schedule. Under either scenario, Greenland would not be allowed to conduct ASW.

The inability of Denmark to object to the IWC's rejection of Greenland's proposal raises no questions of unfairness because Denmark and other IWC members had the opportunity to object when the ASW provisions were adopted. If an IWC member had wanted to object to the IWC's authority to approve ASW quotas, then it should have lodged an objection at that time. When States enter into international agreements, they exercise their national sovereignty in ways that may limit their regulatory options. This is a well-recognized concept in international law.¹⁷⁹ In the case of ASW,

179. Customary law or the State's consent to be bound by a treaty may restrict that State's use of a power within its reserved domain; "no subject is irrevocably

the ICRW contracting parties have limited their ability to object now by agreeing to the ASW management scheme found in paragraph 13 and failing to object to it. It is now well established that the IWC has authority to regulate ASW and, as part of that management scheme, approve ASW quotas.

This situation is not unique to the ICRW. For example, the parties to the Convention on International Trade of Endangered Species of Wild Fauna and Flora ("CITES")¹⁸⁰ have developed a regime for approving sales of African elephant ivory to specific countries.¹⁸¹ If the parties reject a proposal to allow trade to a specific country, that country has no means to make a formal reservation to that decision. The CITES parties had an opportunity to make a reservation when the parties amended the CITES Appendices to establish the rules for trade in African elephant ivory.

VI. THE CONSEQUENCES OF GREENLAND'S UNAUTHORIZED WHALING

As noted previously, in 2012, the IWC rejected Greenland's request for an ASW quota starting with the 2013 season for a number of reasons.¹⁸² Greenland's proposal failed to get a three-fourths majority because some IWC members expressed concerns over the size of the quota, Greenland's conversion factors used to calculate the yield of meat from each whale, and the commercial aspects of the hunt, including the sale of whale meat in restaurants.¹⁸³

Greenland responded first by sending a letter to IWC members seeking comment on its proposal to establish a unilateral ASW quota.¹⁸⁴ Members raised several objections to Greenland's proposal,

fixed within the reserved domain." BROWNLIE, *supra* note 116, at 293; *see also* BENEDETTO CONFORTI, INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS 133 (René Provost trans., 1993) (providing that international law, whether custom or treaty, acts to restrict the power of sovereign States).

180. *See generally* Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975).

181. *See id.* Appendices I-III.

182. Press Release, *supra* note 16.

183. *See IWC Annual Report 2012*, *supra* note 13, at 21.

184. PS, *supra* note 21 (reporting that "[t]he Danish government argues that by setting its own independent quota, Greenland is contravening IWC regulations."); Letter from Jens K. Lyberth, Greenland Deputy Minister, Ministry of Fisheries,

stating, for example, that any ASW quota required approval by the IWC and that Denmark, on Greenland's behalf, could submit a new proposal, which the IWC could vote on by postal vote.¹⁸⁵

Nonetheless, Greenland unilaterally established an ASW quota for the 2013 and 2014 seasons¹⁸⁶ and allowed the hunt to occur, with Greenland hunters killing 198 whales in 2013.¹⁸⁷ Greenland's unilateral killing of whales set off the next round of legal debate, with the coalition of countries known as the Buenos Aires Group arguing that Denmark's failure to report Greenland's ASW as commercial whaling constituted an infraction.¹⁸⁸ Argentina, supported by Chile, Mexico, and Australia, made the following statement in the IWC's Infractions Sub-Committee:

[T]he IWC recognises aboriginal subsistence catches but that a quota for aboriginal subsistence catches in Greenland for the period 2013 to 2018 was not agreed at IWC64. Therefore it considered that the catches in East and West Greenland . . . took place without the authorisation of the IWC and should be reported as infractions according to Article IX of the Convention.¹⁸⁹

Denmark responded by stating that the catches had been reported as aboriginal catches, and that "portraying its aboriginal take as an infraction does not reflect the exceptional circumstances faced by Denmark, Greenland and the IWC following the last meeting."¹⁹⁰

Hunting, and Agric., to IWC Comm'rs, Regarding Greenland Quotas on Large Whales (Dec. 6, 2012) (on file with author).

185. Note Verbale from the Embassy of Brazil in the United Kingdom on behalf of the Governments of Argentina, Chile, Colombia, Costa Rica, Dominican Republic, Mexico and Panama (Dec. 21, 2012), available at <http://iwc.int/private/downloads/37bq3ttg9voks0gso0kgkkgwc/IWCCCG1038.pdf>; Letter from Donna Petrachenko to Gitte Hundahl, *supra* note 22 (objecting to Greenland's proposal).

186. *Whaling in Greenland: Re. Greenland Aboriginal Subsistence Whaling*, GOV'T OF GREENLAND, <http://naalackersuisut.gl/en/About-government-of-greenland/Whaling-in-Greenland> (last visited Jan. 19, 2015); see also Letter from Lyberth to IWC Comm'rs, *supra* note 184.

187. *Catches Taken: ASW*, *supra* note 7 (reporting 192 whales killed in East Greenland and six in West Greenland 2013 and noting that the data for 2014 is not yet available).

188. See *2014 IWC 65 Meeting in Slovenia*, *supra* note 24.

189. *IWC Report of the Infractions Sub-Committee*, *supra* note 32, at 2.

190. *Id.*

Denmark further remarked that portraying Greenland's whaling as an infraction:

fails to note that all Greenlandic catches are strictly regulated and follow the advice of the Scientific Committee. Furthermore it does not address the comprehensive efforts made by Denmark, Greenland to resolve the issue to be able to continue its work within the IWC nor does it recognise the subsistence needs of the indigenous people of Greenland. Denmark is, together with others, working hard to find a carefully balanced solution which addresses concerns on all sides for the future and is grateful to those who have participated in the process.¹⁹¹

Unable to resolve the issue, the Infractions Sub-Committee forwarded the issue to the IWC. However, the IWC could not resolve the issue either. Instead, after some discussion, the IWC chair characterized the issue as an operational issue—“[a] procedural issue pertaining to Schedule amendments”¹⁹²—and referred it to a Finance and Administrative Committee working group on operational efficiency and cost saving measures.¹⁹³

Labeling Greenland's activities as an infraction is no small matter. The ICRW requires all IWC members to take appropriate measures to punish and prosecute infractions of the Convention.¹⁹⁴ They are also required to submit full details of each infraction and measures taken (such as penalties assessed) to address the infraction to the IWC.¹⁹⁵ If Greenland's ASW constitutes an infraction, then Denmark is required to take action against Greenland's aboriginal whalers and members of Greenland's government who authorized such whaling (neither the IWC nor the Infractions Sub-Committee has the authority to punish infractions).¹⁹⁶ Resolution of this issue seems to

191. *Id.*

192. IWC, Summary of Main Outcomes, Decisions and Required Actions from the 65th Annual Meeting (Initial Draft) (undated) (on file with author).

193. Summary of Main Outcomes, *supra* note 1.

194. ICRW, *supra* note 1, art. IX, ¶ (1) (mandating that “Each Contracting Government shall take appropriate measures”).

195. *Id.* ¶ (4).

196. IWC Annual Report 2000, *supra* note 15, at 19 (noting that on one occasion, the Infractions Sub-Committee appeared to support the position that an accidental take, such as the incidental catch of a whale in a fishery or the misidentification of a whale purposefully killed but only after DNA testing found to be a protected species, should be recorded as infractions “but that normally no

be much more than a “procedural issue.”

Neither the ICRW nor the IWC has defined “infraction.” As a consequence, and as illustrated by the debate over whether Greenland’s ASW in 2013 and 2014 constituted an infraction, the members accused of infractions deny that an infraction has occurred or fail to submit relevant information.¹⁹⁷ Some members, such as Japan, have argued that no infraction has occurred when the action is not clearly prohibited by the ICRW or its Schedule.¹⁹⁸ St. Vincent and the Grenadines, which has been granted a small ASW quota for humpback whales that prohibits the taking of calves,¹⁹⁹ has resisted attempts to label the killing of small humpbacks as an infraction, arguing that the definition of “calf” is unclear.²⁰⁰

According to one analysis, the accused IWC member recognized alleged infractions as infractions in just ten of forty-six cases from 1991 to 2004.²⁰¹ In nineteen cases, the member denied that the incidents constituted infractions, and in twenty-six cases they failed to provide additional information even though the Infractions Subcommittee requested the information.²⁰² One long-time IWC observer notes that “[o]ver time, members increasingly showed an unwillingness to cooperate and infractions mostly remained unpunished”²⁰³ and that the IWC’s handling of infractions is “weak and ineffective.”²⁰⁴

penalties are imposed by national governments”).

197. SANDRA ALTHERR, PRO WILDLIFE & OCEAN CARE, NON-COMPLIANCE WITHIN THE IWC: REQUIREMENTS FOR AN EFFECTIVE IWC COMPLIANCE REVIEW COMMITTEE 4 (2006).

198. See, e.g., *Chair’s Report of the 55th Annual Meeting*, *supra* note 148, at 40.

199. Schedule, *supra* note 1, art. III, ¶ 13(b)(4).

200. See *Chair’s Report of the 52nd Annual Meeting*, *supra* note 15, at 18; see also WHALE & DOLPHIN CONSERVATION SOC’Y, *supra* note 15, at 3-4 (reviewing the history of attempts to label this killing as an infraction).

201. WHALE & DOLPHIN CONSERVATION SOC’Y, *supra* note 15, at 7; *Chair’s Report of the 55th Annual Meeting*, *supra* note 148, at 39 (highlighting that the Republic of Korea reported the illegal, deliberate catch of one minke whale by a Korean national and fined the captain eight million won (about \$7,000 US at the time), revoked the vessel owner’s fishing license, and confiscated the meat and sold it publicly).

202. WHALE & DOLPHIN CONSERVATION SOC’Y, *supra* note 15, Annex.

203. ALTHERR, *supra* note 197, at 4.

204. *Id.* at 22.

With respect to Greenland, however, the case is relatively straightforward and the conduct should be declared an infraction. Without an IWC-approved quota, Greenland is not authorized to engage in ASW. In the absence of an IWC-approved quota, Greenland's hunt is either commercial whaling in violation of the moratorium on commercial whaling, included in paragraph 10(e) of the Schedule, or unauthorized ASW in violation of paragraph 13 of the Schedule. Whether Denmark reported Greenland's catch as commercial or ASW is immaterial; either way, the catch violated binding provisions of the Schedule and constituted an infraction by Denmark, the relevant IWC member.

VII. CONCLUSION

With Greenland's unilateral establishment of an ASW quota and hunt for the 2013 and 2014 seasons, aboriginal subsistence whaling joined the moratorium on commercial whaling and Japan's whaling for scientific purposes as among the most important and controversial issues facing the IWC. IWC members have disagreed over the legal effect of Greenland's actions. While some argue that only the IWC may approve ASW quotas and that Greenland's subsequent hunt constituted a punishable infraction, others disagree.

Based on an analysis of the ordinary meaning of the ICRW and the Schedule, this article concludes that only the IWC may approve ASW quotas and that IWC members may not conduct ASW in the absence of a quota approved by the IWC. Although paragraph 10 of the Schedule sets out the general prohibition against killing whales, paragraph 13 establishes a narrow exception that is only triggered when all substantive conditions have been met. These conditions require, among other things, that the IWC adopt a quota for each season. Consequently, killing whales pursuant to a unilaterally established ASW quota constitutes an infraction, either for violating the moratorium on commercial whaling in paragraph 10 or as unauthorized ASW.

The overall structure of paragraph 13 and the subsidiary paragraphs create a regulatory scheme that would be undermined if individual IWC members were able to set their own ASW quotas. This ordinary meaning interpretation is supported by the actions of the IWC and its members, Greenland's implementing legislation,

U.S. federal court decisions, U.S. Department of State documents, and the circumstances surrounding the denial of Greenland's quota. All of the evidence supports the general understanding among IWC members that an IWC-approved ASW quota is necessary before a member may conduct ASW hunts. This evidence has been consistent over a long period of time and derives from the actions of a number of IWC members, including the actions of Greenland and the United States when the IWC denied their requests for ASW quotas. As such, the IWC's denial of Greenland's request for an ASW quota at its 2012 meeting acted as a bar to any ASW activity by Greenland for the 2013 season and subsequent seasons until the IWC approved an ASW quota for the relevant stocks. Greenland was not allowed to establish ASW quotas for 2013 and 2014 unilaterally, as it did. It was required either to request a special session of the IWC or a postal vote to gain approval for its quota or submit a request for an ASW quota at a future meeting of the IWC, which it did in 2014. However, because it allowed ASW for 2013 and 2014 in the absence of an IWC-approved quota, Denmark, on Greenland's behalf, must report the hunt as an infraction and take appropriate measures to punish and prosecute those involved in the whaling.