



The Treaty- Making Process

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U.S. Authorities and Considerations for
the Global Plastics Agreement

Environmental Law Institute

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UNEA RESOLUTION 5/14 (MARCH 2022) SETS OUT ROADMAP

“Full life cycle” analysis, including all aspects for production, use, and disposal.

Address all aspects of “sustainable production and consumption on plastics,” including adoption of circular economy approaches (c.f. EU ROHS directive on electronics). This plus life cycle analysis should promote sustainable trade in plastics and products containing plastics

Specific coverage of microplastics.

Differentiation: “flexibility,” “taking into account national circumstances”

Roles for “all stakeholders, including the private sector.”



**I DID NOT VOTE FOR THE UN TO
DICTATE IF I CAN USE PLASTIC**



**I SAY NO TO
THE UN!**

Please Visit www.plasticsavoslives.ca
Sign The Petition Take A Stand - Say No!

 **The Coalition of Concerned Manufacturers & Businesses of Canada**





CHOICE OF INSTRUMENT EXECUTIVE AGREEMENTS

Still unresolved: critical question of choice of instrument – executive agreement (perhaps constrained by existing statutory authority) or article II section 2 treaty (requires Senate advice and consent by 2/3 majority)

U.S. is modified dualist legal system – international and domestic legal systems decoupled

From 1939 through 2012 the United States concluded about 17,300 executive agreements, by contrast with approximately 1,100 treaties in the Constitutional sense – about 93% of all international agreements are executive agreements, no Senate action



Choice of Instrument

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(binding under international law)



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Article II Section 2 Treaties

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Executive Agreements

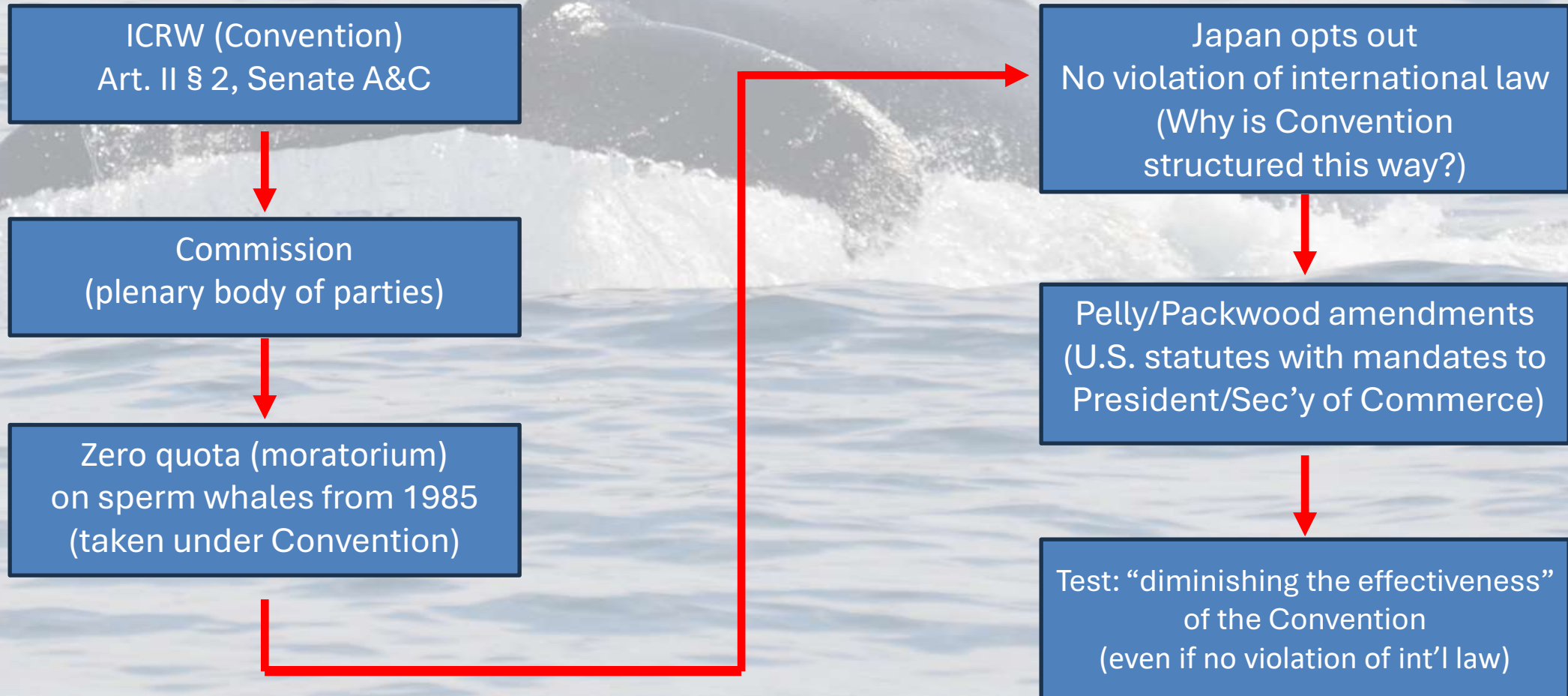
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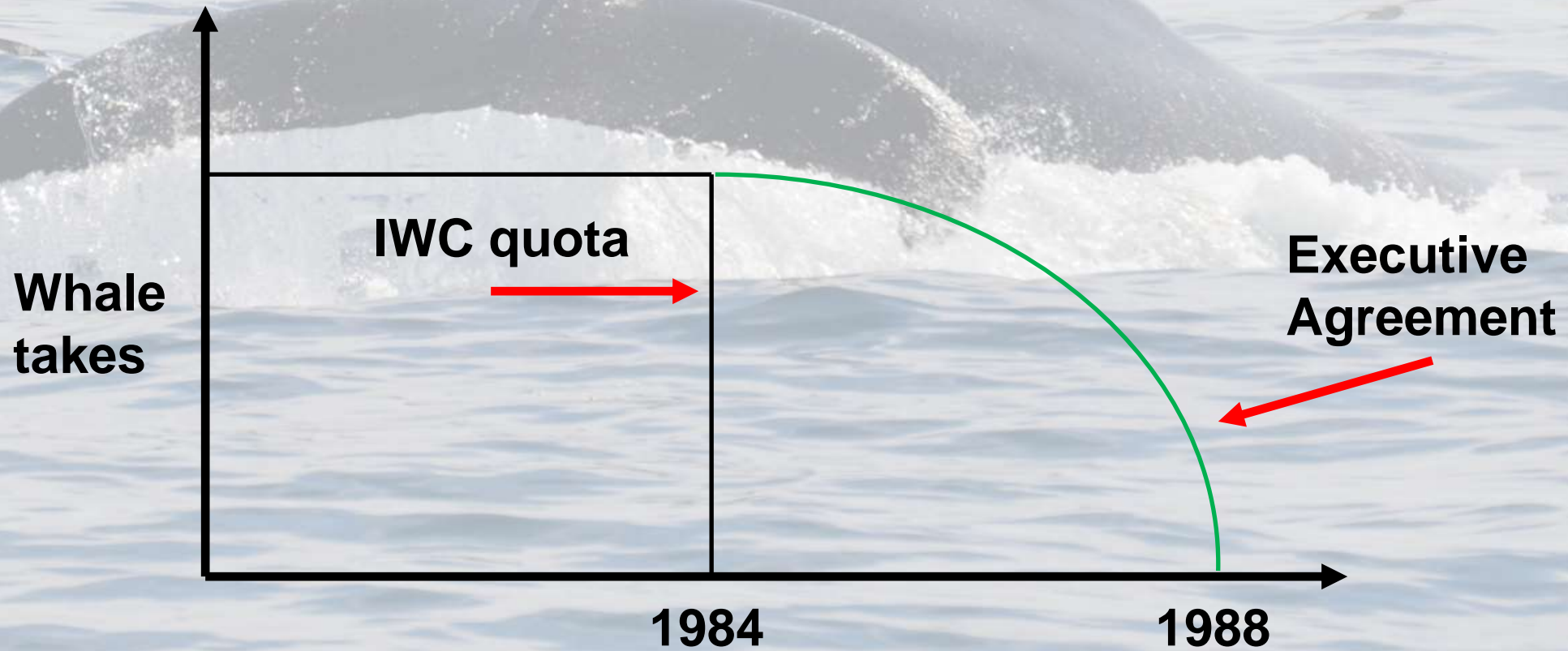
Executive Agreements in Application

Japan Whaling v. American Cetacean Soc'y 478 U.S 221 (1986)



Executive Agreements in Application

Executive Agreement
(exchange of letters/notes)
(NO Senate A&C):



Executive Agreements in Application

Japan Whaling: Judicial Review

Procedural History

District Court

American Cetacean Soc'y v. Secretary of Commerce

Japan Whaling Ass'n
Intervenors on gov't side

Cetacean Soc'y wins in D. Ct.
Court of Appeals (same caption) affirms

Intervenors petition S. Ct. for writ of certiorari

Japan Whaling Ass'n v. Am. Cetacean Society
Petitioners Respondents



Executive Agreements in Application

Executive Agreements: Judicial Review

Adequacy of domestic legal authority is reviewable, a question of law...

...but, what is the standard of review?

West Virginia v. EPA, U.S. (June 30, 2022)

Set aside Obama Clean Power plan, relying on “major questions” doctrine

Loper Bright Enterprises, Relentless, U.S. (June 14, 2024)

**Overruled Chevron v. NRDC (1984) and
deference to agency interpretations of questions of law**

Both have dampening effect on exercise of executive agreement power, but...



Executive Agreements in Application

Judicial Review

...substantial deference to Executive (President) in foreign relations law

E.g., Harold Koh, Why the President (Almost) Always Wins in Foreign Affairs, 97 YALE L.J. 1255–342 (1988)

President is commander in chief, chief executive, as well as diplomat in chief

Lack of judicial expertise in areas literally “beyond the waters’ edge”
(e.g., political question doctrine)

Separation of powers: avoid appearance or actuality of regulating
(or constraining) President’s conduct of foreign affairs

Executive agreement continues in force as international law (binding treaty) even if court finds absence of underlying legal authority

→ Near total absence of judicial decisions finding domestic legal authority lacking
(cf. Japan Whaling, typical in harmonizing executive agreement and statute)





Other Considerations

Congress

-oversight?

-Senate as institution has no role in executive agreements, gets cut out in executive agreement format (and House out of implementing legislation – also quite important)

-Especially pronounced in situations of divided government, political as well as legal skepticism about President of opposite party (e.g., Paris Agreement, 2015)

and...





Other Considerations

U.S. Election

???

