

2005

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Recommended Citation

Elizabeth M. Bakalar, *Subsistence Whaling in the Native Village of Barrow: Bringing Autonomy to Native Alaskans Outside The International Whaling Commission*, 30 Brook. J. Int'l L. (2005).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol30/iss2/6>

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SUBSISTENCE WHALING IN THE NATIVE VILLAGE OF BARROW: BRINGING AUTONOMY TO NATIVE ALASKANS OUTSIDE THE INTERNATIONAL WHALING COMMISSION

“An Eskimo is born to be an Eskimo, and he may talk like the white man (my grandchildren do more and more), but he will never stop being part of our people.”¹

“We’re not just Eskimos anymore. That’s what my grandmother told me. At first I didn’t know what she meant, but now I do ... [s]he said I’d be lucky if I even remember when I’m older what it used to be like in our village.”²

INTRODUCTION

The Inupiat Eskimo villages of northern Alaska have long relied on the hunting of the bowhead whale (*Balaena mysticetus*) for clothing, food, tools, shelter, and fuel.³ For the Inupiat, or “real people,”⁴ the bowhead whale hunt is tradition-

1. *First and Last Eskimos*, in NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT 428 (Peter Nabokov ed., 1991) (Anonymous Alaskan Eskimo grandmother).

2. *Id.* at 431 (Anonymous Alaskan Eskimo granddaughter).

3. DAVID S. CASE, ALASKA NATIVES AND AMERICAN LAWS 349 (1984). The Native Village of Barrow, on the northern-most coastal tip of the state, is one of ten Alaskan Inupiat whaling villages that has traditionally engaged in the bowhead whale hunt. Gambell, Savoonga, Wales, Little Diomed, Kivalina, Point Hope, Wainwright, Nuiqsut, and Kaktovik are the nine other Alaskan Eskimo whaling villages in the region. Barrow is highlighted for discussion in this note primarily because of its status as the most modernized and populous of the whaling communities. The impact and importance of the subsistence exemption is, arguably, most easily observed when juxtaposed against this backdrop of modernity.

4. Gambell and Savoonga are communities on the northern portion of St. Lawrence Island inhabited by Yup’ik Eskimos. All of the other whaling communities are inhabited by Inupiat Eskimos. *Id.*; See also Stephen R. Braund & Elisabeth L. Moorehead, *Contemporary Alaska Eskimo Bowhead Whaling Villages*, in HUNTING THE LARGEST ANIMALS 258, 261 (Allen P. McCartney, ed., 1995) [hereinafter Braund & Moorehead].

ally characterized as one of the most culturally and nutritionally significant hunting activities in Eskimo life.⁵ Indeed, the hunt forms a cornerstone of Inupiat society, as the whaling crew members who engage in the hunt help cement kinship bonds and community ties.⁶ Furthermore, the sharing of “mattak,”⁷ which is considered to be of unparalleled nutritional value, is one of the primary means by which the Inupiat create a sense of social cohesion and demonstrate generosity toward one another in their communities.⁸

The modern industrial world, acting under the aegis of the International Whaling Commission (IWC), has intruded into the Inupiat culture and poses a threat to its social traditions and community structure.⁹ The International Convention for the Regulation of Whaling (ICRW), of which the United States is a signatory, is the international agreement that currently

5. CASE, *supra* note 3, at 350. The Northern Alaskan Eskimo of Barrow is one of two sub-groups of Inupik speaking peoples. The Inupiat are often considered a sub-group of the Inuit, which inhabit the same region. See A.W. Harris, *Making the Case for Collective Rights: Indigenous Claims to Stocks of Marine Living Resources*, 15 GEO. INT'L ENVTL. L. REV. 379, 390 (2003) citing Henry P. Huntington & Nikolai I. Myrmin, *Bering Strait's Indigenous Peoples Share Knowledge of Beluga Whales in 14 SURVIVING TOGETHER 12* (1996). Throughout this note, the peoples of the native Alaskan whaling communities will be referred to as Native Alaskans or, alternately, by the preferred designation of Inupiat Eskimo or Alaskan Eskimo. The Eskimos of Barrow are sea-mammal hunters (Tauremiut). The other group, caribou hunters (Nunamiut), resides further inland. See generally ARTHUR A. HIPPLER & STEPHEN CONN, *NORTHERN ESKIMO LAW WAYS AND THEIR RELATIONSHIP TO CONTEMPORARY PROBLEMS OF BUSH JUSTICE 3* (1973).

6. MILTON M.R. FREEMAN ET. AL., *INUIT, WHALING AND SUSTAINABILITY 31-32* (1998).

7. *Id.* Mattak is bowhead whale meat, including the skin and fatty tissue underneath the skin. Mattak is sometimes spelled alternatively as “mataq” or “muktuk.”

8. FREEMAN, *supra* note 6, at 31-33.

9. See, e.g., Braund & Moorehead, *supra* note 4, at 273-74.

[C]ommunities could have landed more whales if the [IWC-imposed hunting] quotas had not restricted their harvests ... [o]f all subsistence pursuits, bowhead whaling is the one on which the communities concentrate the most time, effort, money, group organization, cultural symbolism and significance. Indeed, being a whaling community is a large part of a community's cultural tradition and its modern cultural identity.

Id.

governs the commercial, scientific, and aboriginal subsistence whaling practices of fifty-nine member nations.¹⁰ The IWC is a consortium that operates as the enforcement mechanism for the ICRW.¹¹ The IWC however, is an inadequate mechanism for regulating Alaskan subsistence whaling, and the misguided governance of subsistence whaling by the IWC forces Alaskan Eskimos to continually defend their ongoing subsistence practices.¹² Since its inception in 1977, the Alaska Eskimo Whaling Commission (AEWC)¹³, a non-governmental organization (NGO) representing the ten Eskimo whaling villages of the Arctic region, has worked closely with the IWC to ensure that the subsistence needs of its members are not overshadowed by environmental lobbies and commercial whaling agendas.¹⁴ Despite all their cooperative efforts with the IWC, however, Alaskan Eskimos have been unable to secure for themselves a stable and

10. See generally INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING [hereinafter Whaling Convention], available at http://www.iwcoffice.org/_documents/commission/convention.pdf (last visited Jan. 28, 2005); Membership of the International Whaling Commission [hereinafter IWC Membership] at <http://www.iwcoffice.org/commission/members.htm> (last visited Jan. 27, 2005). The current 59 member nations are Antigua & Barbuda, Argentina, Australia, Austria, Belgium, Belize, Benin, Brazil, Chile, People's Republic of China, Costa Rica, Côte d'Ivoire, Denmark, Dominica, Finland, France, Gabon, Germany, Grenada, Guinea, Hungary, Iceland, India, Ireland, Italy, Japan, Kenya, Kiribati, Republic of Korea, Mali, Mauritania, Mexico, Monaco, Mongolia, Morocco, the Netherlands, New Zealand, Nicaragua, Norway, Oman, Republic of Palau, Panama, Peru, Portugal, the Russian Federation, San Marino, St. Kitts & Nevis, St. Lucia, St. Vincent & The Grenadines, Senegal, Solomon Islands, South Africa, Spain, Suriname, Sweden, Switzerland, Tuvalu, the United Kingdom, and the United States of America.

11. See History and Purpose of the International Whaling Commission, at <http://www.iwcoffice.org/commission/iwcmain.htm#history> [hereinafter IWC History & Purpose] (last visited Jan. 27, 2005).

12. See generally Henry Huntington, *Inuit Whaling*, INUIT CIRCUMPOLAR CONFERENCE: Special Issue (June 1992), at <http://www.highnorth.no/Library/Hunts/Other/al-es-wh.htm> [hereinafter Huntington, ICC Special Issue].

13. See RESTATED BYLAWS OF THE ALASKA ESKIMO WHALING COMMISSION at § 1.1 (Mar. 13, 1998) [hereinafter AEWC BYLAWS] available at http://www.uark.edu/misc/jcdixon/Historic_Whaling/AEWC/bylaws_final.pdf.

14. Overview of the AEWC [hereinafter AEWC Overview], at http://www.uark.edu/misc/jcdixon/Historic_Whaling/AEWC/AEWC.htm (last visited Jan. 17, 2005).

permanent subsistence scheme that allows them to continue to practice their cultural traditions unthreatened.¹⁵

The modern international community has been regulating aboriginal subsistence whaling through the IWC, despite the lack of any provision in the Convention specifically assigning it that responsibility.¹⁶ The pressures exerted on the IWC by commercial or non-subsistence whalers¹⁷ and the international conservation movement¹⁸ have negatively affected the subsistence needs of the Alaskan Eskimo¹⁹ such that the IWC should no longer retain such dominion over those rights. A permanent subsistence solution for the Native Village of Barrow and other Alaskan Eskimos is long overdue, and it is incumbent upon the United States to reconsider the needs of its native peoples objectively and in light of the IWC's apparent short-comings.²⁰

15. See, e.g., John Tepton, *Japan Does About-Face on Promise; Alaska Eskimo Whaling Commission Ponders Next Move*, TRIBAL NEWS, Aug. 8 2002 (on file with author); Final Press Release of the 54th Annual Meeting of the IWC [hereinafter 2002 IWC Press Release], at <http://www.iwcoffice.org/meetings/meeting2002.htm> (last visited Jan. 17, 2005). At this meeting, a proposal for providing continued subsistence catches was defeated. See *infra* note 23 and Part III.

16. See generally Whaling Convention, *supra* note 10.

17. See generally Adrienne M. Ruffle, Note, *Resurrecting the International Whaling Commission: Suggestions to Strengthen the Conservation Effort*, 27 BROOK. J. INT'L L. 639 (2002). These pressures began mounting in the 1970s, and, in large measure, took the form of opposition by commercial whaling states to the abandonment of the IWC's previous "laissez-faire" policies in favor of a new "preservationist" agenda being advocated by both old and new IWC members. See, e.g., Catherine Lee Francis, *Bartering for Leviathan* 86 (1996) (unpublished M.A. thesis, Carleton University) (on file with the National Library of Canada). Although commercial whaling was technically banned by the IWC in 1982, states continue to engage in whaling practices that may be characterized as commercial. See *infra* Parts II & III. Throughout this note, whaling outside the scope of aboriginal subsistence will be referred to generally as commercial or non-subsistence whaling.

18. See, e.g., Steinar Andresen, *The International Whaling Commission, in ENVIRONMENTAL REGIME EFFECTIVENESS: CONFRONTING THEORY WITH EVIDENCE* 379-403, 394 (Edward L. Miles et. al., 2002).

19. See Rupa Gupta, *Indigenous Peoples and the International Environmental Community: Accommodating Claims Through a Cooperative Legal Process*, N.Y.U. L. REV. 1741, 1748.

20. The United States and Native Americans are involved in what has been described as a trustee/beneficiary relationship referred to as "the trust doctrine." For a thorough and informative discussion of the trust doctrine, which is beyond the scope of this note, see Benjamin W. Thompson, *The De*

The solution may well lie in a more independent voice for the AEWC, which should ultimately be able to govern Alaskan Eskimo subsistence needs in the international forum.²¹

This note asserts that the IWC is an organization whose mechanism is flawed for regulating Alaskan subsistence whaling, as it is ill-designed for the task. It argues that commercial or non-subsistence whaling and environmental interests hinder the effective management of subsistence whaling needs, and that cooperative, native-run NGOs are better suited to this purpose.²² The note examines the whaling practices of countries regulated by the Convention and of countries, such as Canada, that are not parties to the Convention, and concludes that the AEWC should independently regulate its own subsistence hunt outside and apart from—though not necessarily in breach or in contravention of—the tenets of the Convention.

Part I of this note provides a brief background history of traditional whaling in the Native Village of Barrow and describes the structure and development of the IWC through the mid-1970s. Part II explores the modern conflict surrounding aboriginal subsistence whaling. It traces developments in the IWC since the mid-1970s, the founding of the AEWC, and states' political conflicts arising at the intersection of a burgeoning environmental conservation movement and commercial whaling interests. Part III details the whaling bans of the 1980s, the subsequent fluctuations in IWC membership resulting from these bans, and the treatment of the aboriginal subsistence exemption at the 2002 and 2003 meetings. It highlights the ad-

Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination, 24 AM. INDIAN L. REV. 421, 424 (2000). Essentially, and most relevantly, the trust doctrine imposes upon the federal government a fiduciary duty to Native Americans wherein the federal government is legally and morally bound to assist Native Americans in protecting their rights and property. *Id.*

21. See, e.g., WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 30 (1995) (noting an increasing trend of indigenous peoples in both the United States and Canada toward cooperative self-government).

22. See generally Whaling Convention, *supra* note 10. At least one commentator has proposed “the structural integration” of native-run NGOs into existing international organizations. See Gupta, *supra* note 19, at 1769. This note departs from that proposition in arguing, *inter alia*, that Alaskan Eskimos are specifically capable of managing subsistence whaling practices independently from—as opposed to integrated with—the IWC.

verse effects that the commercial whaling industry and international conservation efforts have had on the Barrow hunt, as evidenced by developments at these recent IWC meetings.²³ Part IV takes a comparative and critical look at the Canadian approach to aboriginal subsistence whaling and the role of native-run NGOs in subsistence whaling practices. Finally, Part V offers suggestions for implementing a more independent role for NGOs in general, and the AEWC in particular, in regulating subsistence practices.²⁴ The note concludes that the IWC has proven a generally ineffective international body for securing Alaskan subsistence needs.²⁵ In arguing that the IWC is better suited to the regulation of competing commercial and non-subsistence whaling and conservation efforts—not aboriginal subsistence—this note explores the proposition that, at least with respect to Alaskan Eskimos, the responsibility for regulating subsistence quotas should shift almost entirely to NGOs

23. The bowhead whale subsistence exemption was temporarily lost to a Japanese vote at the 2002 meeting, but was restored the following year at a special Inter-Sessional IWC meeting. See 2002 IWC Press Release, *supra* note 15; Final Press Release, IWC Special Inter-Sessional Meeting (Cambridge, UK, Oct. 14, 2002) [hereinafter Cambridge Meeting Press Release], at <http://www.iwcoffice.org/meetings/specmeeting2002.htm> (last visited Jan. 17, 2005). Final Press Release of the 55th Annual Meeting of the IWC, at <http://www.iwcoffice.org/meetings/meeting2003.htm> [hereinafter 2003 IWC Press Release] (last visited Jan. 17, 2005). The 2004 annual meeting was held in Sorento, Italy. See Final Press Release of the 56th Annual Meeting of the IWC, at <http://www.iwcoffice.org/meetings/meeting2004.htm> (last visited Jan. 17, 2005). Japan has expressed increasing dissatisfaction with the IWC, threatening in 2004 to withdraw if Japan did not gain certain concessions relating to the harvesting of minke whales. Andrew C. Revkin, *Asia: Japan: Moves for Commercial Whaling*, N.Y. TIMES, July 21, 2004, at A13.

24. See generally Henry P. Huntington, *The Alaska Eskimo Whaling Commission: Effective Local Management of a Subsistence Resource* (1989) (unpublished M. Phil. thesis, Scott Polar Research Institute) (on file with the University of Washington Library, Seattle) [hereinafter Huntington, *The AEWC: Effective Local Management*].

25. See 2002 IWC Press Release, *supra* note 15; Jeremy Firestone & Jonathan Lilley, *An Endangered Species: Makah Aboriginal Subsistence Whaling and the Right to Self-Determination and Cultural Heritage in a National and International Context*, 34 ENVTL. L. REP. (Environmental Law Institute) 10763, 10766 (Sept. 2004), available at <http://www.ocean.udel.edu/cms/jfirestone/MakahWhalingELR2004.pdf> (observing that international law may be an incomplete rubric for addressing indigenous rights due to the fact that the IWC, at least, has traditionally focused on the interests and values of state actors as opposed to the indigenous populations of those states).

such as the AEW, despite an obvious departure from the cooperation afforded by the uneasy partnership between the Alaskan Eskimos and the IWC. The note further concludes that, in light of its responsible management practices, the AEW is capable of independently balancing the conflicting interests involved in the whaling debate, determining its own needs, and fairly establishing and regulating its own whaling quotas in harmony with the efforts of the international community.²⁷ Therefore, an appropriate measure would be for the AEW to assume regulation of the subsistence exemption outside of the IWC, in keeping with established principles of self-determination and the growing trend in self-regulation by native peoples.²⁸

I. BACKGROUND

A. The Native Village of Barrow: Whaling Traditions and Contemporary Whaling

Barrow, a coastal city on the Chukchi Sea, was traditionally referred to by its native Inupiat inhabitants as “Ukpeagvik,” or the “place where snowy owls are hunted.”²⁹ Ukpeagvik was renamed in 1825 for Sir John Barrow by Captain Beechey of the Royal Navy while he was charting the Arctic coastline of North America.³⁰ Barrow is the economic and administrative hub for the North Slope Borough, a municipality encompassing almost 90,000 square miles in the northernmost arctic region of

26. See generally Huntington, *The AEW: Effective Local Management*, *supra* note 24 (discussing the general efficacy and success of independent subsistence management by the AEW).

27. *Id.*; Final Report of the Inuit Bowhead Knowledge Study, Nunavut Wildlife Management Board at 20, 74 (March 2000) [hereinafter *Nunavut Study*] (observing hearty bowhead whale populations are likely sufficient to sustain subsistence hunting by the Canadian Inuit).

28. See, e.g., KYMLICKA, *supra* note 21, at 30 (noting the increasing trend of indigenous peoples toward cooperative self-government); Firestone & Lilley, *supra* note 25, at 10765 (“[i]n light of the growing awareness surrounding the role of indigenous people in the international arena, their demands to be viewed as separate autonomous actors are increasingly being heard.”).

29. See North Slope Borough, *Barrow: The Community*, at <http://www.north-slope.org/nsb/HomeruleBrochure/BrwInfo.htm> [hereinafter *North Slope Borough, Barrow*] (last visited Jan. 27, 2005).

30. *Id.*

Alaska.³¹ Though remote, Barrow is an economically robust city benefiting from the presence of various community organizations and agencies.³² The North Slope Borough, which has prospered from major investments in community development and is largely responsible for Barrow's healthy economy, is the major employer of area natives.³³

Of Barrow's nearly 4,500 residents, approximately 59% are Inupiat Eskimo, comprising the Native Village of Barrow.³⁴ Many of these native residents are employed in modern workplaces such as schools, oil companies and city government, but continue to hunt and fish for a significant portion of their food.³⁵ Despite familiarity with Western material goods and the availability of Western food supplies, the Inupiat generally believe that there are nutritional benefits to bowhead whale meat that cannot be acquired from other food sources.³⁶ Thus, the Eskimos of Barrow continue to rely on whale meat in their diet, despite contact with Westernized food sources and incorporation of modernity into Eskimo life.³⁷ Barrow natives still express

31. *Id.* Barrow forms the basis of discussion here primarily because it is the most modernized and populous of the whaling communities, and thus presents the most relevant and timely setting for discussion of the current state of the subsistence exemption.

32. Braund & Moorehead, *supra* note 4, at 270.

33. *Id.*

34. See North Slope Borough, *Barrow*, *supra* note 29. In 1940, The Eskimos of Barrow, "in order to have better life and greater security," officially organized into a "Native Village" through the authority granted them by Congress in the Indian Reorganization Act (Wheeler-Howard Act), 25 U.S.C. § 476 ("[a]ny Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws ..."). See CONSTITUTION AND BYLAWS OF THE NATIVE VILLAGE OF BARROW, at Preamble, available at <http://thorpe.ou.edu/IRA/barcons.html> (last visited Jan. 31, 2005). The Constitution provides, *inter alia*, that all persons listed as native residents shall be members of the Village. *Id.* at art. 1. The Constitution further provides that the Village is empowered to "guard and to foster native life, arts and possessions and native customs not against law." *Id.* at art. 4(1).

35. See North Slope Borough, *Barrow*, *supra* note 29.

36. FREEMAN, *supra* note 6, at 36.

37. Rebecca Wittman, *Their Whale Meat, And Our Piety*, Letter to the Editor, N.Y. TIMES, Sept. 18, 2003, at A30 [hereinafter Wittman, Letter to the Editor] ("[s]ince when are the bulldozers, A-1 Steak Sauce or ketchup consumed with 'muktuk' traditionally Eskimo? Haul the whale onto the beach with human strength, not bulldozers ... [a]nd give up TV's, satellite dishes and pickup trucks.").

fear that tribal elders will become ill if whale meat were eliminated from their diet³⁸ and assert that native peoples accustomed to whale meat cannot subsist wholly on Western foods like “butter and beef and chicken fat.”³⁹

In addition to providing food, the hunt for the bowhead whale and consumption of mattak also preserves the culture and traditions of the Alaskan Eskimo.⁴⁰ The start of the bowhead hunt, as well as the whale’s capture and consumption, are accompanied by elaborate ceremony and ritual.⁴¹ Those who advocate an end to whaling altogether question whether the bowhead hunt may still be characterized as truly “traditional,” but there is really little doubt that it can be, and is.⁴² Furthermore, native whalers have been attentive to the concerns of animal rights activists, abandoning traditional killing methods in favor of more modern methods precisely because such methods are more efficient and are considered more humane.⁴³ Ultimately, the hunt is an interaction between human, land and animal, and the successful capture of a bowhead is treated with reverence in recognition of its importance as a source of food, tools, and clothing.⁴⁴ Thus, despite the trappings of modern life in northern Alaskan Eskimo villages, the subsistence whaling culture remains an integral part of the local society and its economy.⁴⁵

B. The ICRW and the IWC: Structure and History (1946–1976)

1. The ICRW and the IWC

The International Convention for the Regulation of Whaling (ICRW) was signed in Washington, D.C., on December 2, 1946,

38. FREEMAN, *supra* note 6, at 37 (statement of A. Solomon during 1983 public hearings in Barrow on proposed oil and gas industry development).

39. *Id.* at 37 (statement of Marie Adams Carroll).

40. *Id.* at 38.

41. *Id.* at 40.

42. See, e.g., Wittman, Letter to the Editor, *supra* note 37; but see Michael L. Chiropoulos, *Inupiat Subsistence and the Bowhead Whale: Can Indigenous Hunting Coexist with Endangered Animal Species?*, 5 COLO. J. INT’L ENVTL. L. & POL’Y 213 (1994).

43. Alexander Gillespie, *Aboriginal Subsistence Whaling: A Critique of the Inter-Relationship Between International Law and the International Whaling Commission*, 12 COLO. J. INT’L ENVTL. L. & POL’Y 77, 125–26 (2001).

44. FREEMAN, *supra* note 6, at 40.

45. See North Slope Borough, *Barrow*, *supra* note 29.

by fifteen states,⁴⁶ more than a thousand years after Alaskan Eskimos are first estimated to have begun hunting the bowhead whale.⁴⁷ The Convention's goals included protecting and increasing whale stocks, the prevention of over-fishing, the implementation of sustainable whaling practices, and the development of the whaling industry.⁴⁸ This last objective—the continued vitality of whaling—was arguably the most important for the original parties to the ICRW, as the first contracting states were mostly whaling nations eager to protect whale populations to continue a sustainable harvest.⁴⁹ From the outset, the ICRW sought to implement a system of quotas designed to manage whaling on a global scale.⁵⁰ An integral part of the ICRW is its accompanying "Schedule."⁵¹ The Schedule, updated periodically by the IWC, is a general outline containing interpretive definitions of whale species, guidelines for the timing of hunting seasons, methods of capture, procedures for treatment and processing of landed whales, protocols for the supervision and control of whaling operations, and required permits and applicable regulations for reporting catches.⁵² Because the Schedule governs the actual mechanics of the whale hunt for the member states and is subject to amendment from year to year, it has a greater impact on the whaling community than the Convention's articles themselves. The contents of the Schedule determine exactly which species will be designated as protected or unprotected, the dates on which hunting seasons will open and close in certain waters, the size and catch limits for each species, the methods and implements to be used in the

46. Whaling Convention, *supra* note 10, at art. III; art. XI; FREEMAN, *supra* note 6, at 100.

47. Huntington, ICC Special Issue, *supra* note 12.

48. Whaling Convention, *supra* note 10, at Preamble.

49. Sarah Suhre, *Misguided Morality: The Repercussions of the International Whaling Commission's Shift from a Policy of Regulation to One of Preservation*, 12 GEO. INT'L ENVTL. L. REV. 305, 306 (1999). Even today, despite commercial bans, "orderly development of the whaling industry" is still recognized as a priority of the IWC. See IWC History & Purpose, *supra* note 11.

50. *Id.*; See also Whaling Convention, *supra* note 10.

51. Whaling Convention, *supra* note 10, at art. 1.

52. See, e.g., Schedule of the IWC (as amended by the Commission at the 56th Annual Meeting, Sorrento, Italy, July 2004) at §§I-VI, at http://www.iwcoffice.org/_documents/commission/schedule.pdf (last visited Jan. 17, 2005).

hunt, and the maximum catch of whales to be taken in any one season.⁵³ The text of the Convention does not address the effect of these hunting quotas on aboriginals or the aims of aboriginal subsistence whaling, and makes no mention of subsistence goals.⁵⁴

The International Whaling Commission (IWC), the organ charged with enforcing the ICRW, reviews and establishes the quotas periodically, and its current membership consists of fifty-nine states.⁵⁵ Any state that formally adheres to the terms of the 1946 Convention may become a member of the IWC and name a Commissioner to represent it therein.⁵⁶ The stated aims of the IWC are to “provide for the conservation of whale stocks and thus make possible the orderly development of the whaling industry” throughout the world.⁵⁷ The other primary duties of the IWC are to conduct and publish scientific research on various whale species and set the whaling Schedule.⁵⁸

The IWC also currently governs subsistence whaling by aboriginal communities in Denmark, the Russian Federation, The Grenadines, and the United States (Alaska).⁵⁹ Although the text of the original Convention supplies no specific provision regulating aboriginal subsistence,⁶⁰ the IWC draws on the efforts of an Aboriginal Subsistence Whaling Sub-Committee to issue annual reports on subsistence catches for member states with aboriginal populations and to consider their cultural and nutritional needs in light of the most recent scientific findings regarding the status of the various whale populations.⁶¹

53. Whaling Convention, *supra* note 10, at art. 5, paras. 1–2.

54. *See generally id.*

55. IWC History & Purpose, *supra* note 11; IWC Membership, *supra* note 10.

56. *Id.*; Whaling Convention, *supra* note 10, at art. III.

57. IWC History & Purpose, *supra* note 11.

58. *Id.*

59. *Id.*

60. *See generally* Whaling Convention, *supra* note 10.

61. *See, e.g.*, Report of the Aboriginal Subsistence Whaling Sub-Committee, Chair’s Report, Annex D (55th Annual Meeting of the IWC, 2003), at <http://www.iwcoffice.org/meetings/chair2003.htm> [hereinafter ASW Sub-Committee Report] (last visited Jan. 17, 2005).

2. Whaling Under the ICRW: Practice and Enforcement in the IWC

As with many international agreements, the major criticisms of the ICRW and IWC concern institutional failures stemming from ambiguous jurisdiction⁶² and ineffectual enforcement of the Convention.⁶³ Lenient membership criteria⁶⁴ allow almost any nation to join, whether it has a material interest in whaling or a population that engages in any whaling activities.⁶⁵ Thus, nations with adverse interests—that is, “pro-whaling” and “anti-whaling”—member nations disagree about the scope of the Convention’s jurisdiction and its purposes.⁶⁶ The result of this friction, arguably, is a disregard for the Convention altogether by the majority of IWC members.⁶⁷

Whale preservationists accuse whaling nations of committing infractions of the Convention that go unpunished for lack of an effective enforcement infrastructure,⁶⁸ while states with an interest in or history of whaling feel marginalized, accusing the IWC of losing sight of its original aims by yielding to environmentalist pressures.⁶⁹ Furthermore, the structure of the Convention allows for considerable leeway in compliance, since it delegates the ultimate enforcement responsibilities to member

62. It remains unclear, for example, whether the IWC has legal jurisdiction over certain species of small whales or whether Alaskan natives may sell edible whale products. See FREEMAN, *supra* note 6 at 100.

63. Ruffle, *supra* note 17, at 653 (“[n]o procedure exists by which the IWC can itself enforce its regulations at an international level.”).

64. See IWC Commission Information: Membership, at <http://www.iwcoffice.org/commission/iwcmain.htm#membership> (last visited Jan. 28, 2005).

65. Andresen, *supra* note 18, at 397.

66. FREEMAN, *supra* note 6, at 100–01.

67. *Id.*

68. See, e.g., Ruffle, *supra* note 17, at 668–69 (“[t]he history of the IWC has been marked by a series of infractions committed by whaling nations in the interest of profit. These infractions ... are a direct result of poor monitoring and ineffective enforcement mechanisms.”).

69. See, e.g., *Iceland Battles to Resume Whaling*, CNN.com, (July 23, 2001), at <http://www.cnn.com/2001/WORLD/europe/07/23/iceland.whaling.1757/> (comments of Stefan Asmundsson, Opening Statement at the International Convention for the Regulation of Whaling in London (June 2001)) [hereinafter *Iceland Battles to Resume Whaling*, CNN.com].

nations.⁷⁰ Provisions allowing member states to lodge timely objections to amendments in the IWC's Schedule⁷¹ effectively permit whaling activities to continue at the will of the state lodging the objection. Meanwhile, states that remain non-parties to the Convention are essentially free to pursue whaling activities of their own accord, with only admonitions and threats of sanctions from non-whaling nations and the IWC to deter them.⁷² Thus, the IWC relies almost entirely on the honor of its member states to comply with the terms of the Schedule, and has no apparently effective means of punishing infractions.⁷³

3. Whaling in the IWC (1950s and 1960s)

State membership in the IWC and its successes and failures as perceived by signatory and non-signatory states have fluctuated over the course of the Commission's contentious forty-seven year history.⁷⁴ The 1950s saw a great deal of uncertainty in scientific estimates of whale populations, and quotas based on inadequate scientific knowledge arguably led to a depletion

70. Whaling Convention, *supra* note 10, at art. IX(1) (“[e]ach Contracting Government shall take appropriate measures to ensure the application of the provisions of this Convention and the punishment of its infractions against the said provisions in operations carried out by persons or by vessels under its jurisdiction.”).

71. *Id.* at art. V(3)(a) (“... if any Government presents to the Commission objection to any amendment ... the amendment shall not become effective with respect to any of the Governments for an additional ninety days”).

72. *See, e.g.*, President's Message to Congress Transmitting a Report Regarding Certification by the Secretary of Commerce that Canada had Conducted Whaling Activities that Diminish the Effectiveness of a Conservation Program of the International Whaling Commission (IWC), Pursuant to 22 U.S.C. 1978(b) (Feb. 11, 1997), at http://www.highnorth.no/Library/Trade/GATT_WTO/th-us-do.htm [hereinafter Clinton's Message to Congress] (“Canada's unilateral decision to authorize whaling outside the IWC is unacceptable ... I believe that Canadian whaling on endangered whales warrants action at this time ... [President Clinton then went on to state, *inter alia*, that the United States would continue to “urge Canada to reconsider its unilateral decision ... to authorize whaling outside the IWC,” but declined to impose import prohibitions.]).

73. *See* Suhre, *supra* note 49, at 316; Whaling Convention, *supra* note 10, at art. IX.

74. Andresen, *supra* note 18, at 379–81.

in Antarctic whale stocks—a result in direct conflict with the goals of the Convention.⁷⁵

This depletion was particularly sharp in the southern Antarctic region, but by the 1960s populations had improved markedly, due to improved scientific information and more heavily regulated procedures for devising quotas.⁷⁶ At this time, based on lessons learned from the depletions in the Antarctic, the IWC began to more heavily regulate northern whaling areas such as the Atlantic and North Pacific,⁷⁷ the hunting ground of Native Alaskan Eskimos.⁷⁸

II. MODERN CONFLICT

A. Whaling in the IWC (1969-1977)

In 1969, the bowhead whale was federally listed as an endangered species, but subsistence hunts by Arctic natives were still permitted.⁷⁹ Starting in about 1972, several proposals for a moratorium on all commercial whaling were raised, but did not garner sufficient votes within the IWC to sustain them.⁸⁰ During this time, the bowhead take by Alaskan Eskimos experienced a resurgence, as natives continued to hunt the bowhead.⁸¹ By 1976, every hunted whale species had an IWC-imposed quota, in keeping with the increasing regulation of whaling practices that was the hallmark of the 1960s.⁸² Meanwhile, other commercial whaling moratoria, which put a halt to commercial whaling practices, were established for blue, gray, right, and bowhead whales—the last being the quarry of the

75. *Id.* at 384.

76. *Id.* at 385.

77. *Id.*

78. *See, e.g.*, Map of Alaska Eskimo Villages, in Braund & Moorehead, *supra* note 4, at 255.

79. *See* Bering Land Bridge National Preserve, Bowhead Whales, Population Status [hereinafter Bering Land Bridge National Preserve], at <http://www.nps.gov/bela/html/bowhead.htm#relationships> (last visited Jan. 17, 2005).

80. *See* THE INTERNATIONAL HARPOON, Moratorium, at <http://www.highnorth.no/iwc2000/briefings/Moratorium.htm> (last visited Jan. 17, 2005).

81. During this time, the annual take increased from 12 to 30, in addition to whales which were struck but not caught. *See* Bering Land Bridge National Preserve, *supra* note 79.

82. Andresen, *supra* note 18, at 385.

Alaskan Eskimo.⁸³ One such moratorium prompted the formation of the Alaskan Eskimo Whaling Commission (AEWC) in 1977 to protect Eskimo subsistence.⁸⁴ The IWC imposed the 1977 ban based on information that the bowhead population was dwindling, data that Alaskan Eskimos contended were inaccurate.⁸⁵ The ban was lifted in 1978, only to be replaced by a small quota that was vigorously contested until 1981.⁸⁶ In that year, the AEWC reached an agreement with the federal National Oceanic and Atmospheric Administration (NOAA), whereby the AEWC was to report to the NOAA but exercised governance over the whale hunt, leaving the hunt relatively free from federal interference.⁸⁷

Although Eskimo subsistence was threatened by the 1977 moratorium, this era in IWC history may have been the golden age of harmony between conservationists and sustainable whaling interests because of the general stability of the whale populations⁸⁸ and efforts at cooperative management with the native-run AEWC.⁸⁹

B. *The Alaska Eskimo Whaling Commission*

In light of the importance of whaling in Alaskan Eskimo culture, Alaskan Eskimos banded together in 1977 to form the Alaska Eskimo Whaling Commission (AEWC).⁹⁰ The ban imposed by the IWC on the aboriginal hunting of bowhead whales by Alaskan Eskimos was the impetus for the formation of a local NGO to exercise stewardship over subsistence whale hunt-

83. *Id.*; CASE, *supra* note 3.

84. Huntington, ICC Special Issue, *supra* note 12.

85. *See* Bering Land Bridge National Preserve, *supra* note 79.

86. Huntington, ICC Special Issue, *supra* note 12.

87. FREEMAN, *supra* note 6, at 120; Huntington, ICC Special Issue, *supra* note 12.

88. Andresen, *supra* note 18, at 386; *See* Bering Land Bridge National Preserve, *supra* note 79 (improved methods for conducting censuses on the bowhead raised the western estimate from 600-2000 to 3,800).

89. Specifically, whaling captains from all of the Alaskan whaling villages (except Little Diomedes) organized to form the AEWC, developed a bowhead management plan, attended IWC meetings, and cooperated with U.S. delegates to the IWC in an attempt to rescind the subsistence whaling moratorium. Braund & Moorehead, *supra* note 4, at 257.

90. *See, e.g.*, Huntington, ICC Special Issue, *supra* note 12.

ing.⁹¹ The AEWK is a nonprofit corporation whose stated aims are to preserve and protect the population and habitat of the bowhead whale, protect the subsistence whaling, cultural and nutritional interests of Alaskan Eskimos, and conduct scientific research on bowhead whales to support the health of the species and monitor its population in the region.⁹² The North Slope Borough, home to Barrow and the AEWK registered office,⁹³ now has an annual budget of approximately \$2 million reserved for bowhead whale management and research, of which about \$500,000 is allocated to the AEWK.⁹⁴

The AEWK operates under a set of bylaws structured in a convention-like format similar to that of the ICRW.⁹⁵ *Unlike* the ICRW, however, the bylaws state specifically that the AEWK's objectives are to "preserve and enhance the marine resource of the bowhead whale including protection of its habitat; to protect Eskimo subsistence bowhead whaling; to protect and enhance Eskimo culture, traditions, and activities associated with bowhead whales and bowhead whaling; and to undertake research and educational activities related to bowhead whales."⁹⁶ Thus, the AEWK bylaws reflect preservation and protection objectives similar to those of the ICRW, but different in the specific premium they place on Eskimo subsistence on the bowhead whale.⁹⁷

The membership of the AEWK consists of registered whaling captains (voting members) and crews (non-voting members)

91. *Id.*; FREEMAN, *supra* note 6, at 120–21.

92. AEWK Overview, *supra* note 14.

93. AEWK BYLAWS, *supra* note 13, at art II. §2.1

94. FREEMAN, *supra* note 6, at 121. Funds and resources allocated to the AEWK are managed by the federal government through the NOAA via the Marine Mammal Protection Act (MMPA). *See also* COOPERATIVE AGREEMENT BETWEEN THE NATIONAL OCEANIC ATMOSPHERIC ADMINISTRATION AND THE ALASKA ESKIMO WHALING COMMISSION, in Huntington, *The AEWK: Effective Local Management*, *supra* note 24, at Appendix I ("NOAA has primary responsibility within the United States Government for management and enforcement of programs concerning the bowhead whale ... NOAA may withdraw the authority of the AEWK for management and will manage the bowhead whale hunt in a manner consistent with federal law").

95. *Compare* AEWK BYLAWS, *supra* note 13, with Whaling Convention, *supra* note 10.

96. AEWK BYLAWS, *supra* note 13, at art. 1, §1.2.

97. *See* Whaling Convention, *supra* note 10, at Preamble.

from all ten Alaskan whaling villages,⁹⁸ which collectively represent some 7,500 Inupiat and Yup'ik Eskimos.⁹⁹ The AEWK is governed by an elected board composed of ten commissioners (one representing each village), a Chairman, Vice-Chairman, Secretary, Treasurer, and administrative staff.¹⁰⁰ The board members, known as Commissioners, can revoke the membership of any member who violates any of the organization's policies with respect to bowhead whale harvesting.¹⁰¹

C. Modern States' Conflicts: Environmental Conservation and Commercial Whaling

To understand the events of the 2002 and 2003 IWC meetings with respect to the Alaskan Eskimo subsistence exemption, it is necessary first to analyze the dueling policy objectives of commercial or non-subsistence whaling states and the conservation movement that are at play within the IWC.¹⁰² A brief orientation to the politics of the whaling debate is helpful, for somewhere between the aims of the international conservation community and those of the industrial commercial whaling states lie the interests of small Native American subsistence communities such as the Native Village of Barrow.¹⁰³

98. These villages are Gambell, Savoonga, Wales, Little Diomedea, Kivalina, Point Hope, Wainwright, Barrow, Nuiqsut, and Kaktovik. See also *supra* note 3.

99. AEWK Overview, *supra* note 14; Mary Pemberton, *Japan Drops Opposition to Alaska Eskimo Whaling*, ASSOCIATED PRESS, June 21, 2002, at KENAI PENINSULA CLARION ONLINE, http://peninsularclarion.com/stories/062102/ala_062102ala0040001.shtml. Membership in the AEWK is open to any resident of the aforementioned ten villages who is a registered whaling captain or crew member, although only registered captains may cast votes within the organization to pass policy initiatives and elect board members. See AEWK BYLAWS, *supra* note 13, at arts III, §3.2 & V, §5.3.

100. AEWK Overview, *supra* note 14.

101. AEWK BYLAWS, *supra* note 13, at art. III, §3.3.

102. See generally Suhre, *supra* note 49.

103. Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 168 (2001) (discussing the impact of commerce and conservation on the cultural self-determination of the Makah Indian Tribe of the Pacific North-Western United States).

In exercising their cultural rights, however, several questions arise about ... native whaling: Do [native whalers] have the legal and moral right to determine what their cultural rights are and pursue them even if they conflict with the views of the dominant [non-native]

1. The United States

The United States no longer supports any type of large-scale whaling,¹⁰⁴ but does continue to support subsistence hunts of the gray whale by the Makah Indian Nation of the Pacific North-Western United States and the bowhead whale by Alaskan Eskimos.¹⁰⁵ The United States has also consistently supported international conservation efforts and has decried whaling outside the IWC, including the hunting of bowhead whales under Canadian permits.¹⁰⁶ For example, in 1997, President Clinton condemned the Canadian practice of issuing licenses for the taking of endangered bowhead whales, though he emphasized that he “[understood] the importance of maintaining traditional native cultures” and voiced his support for “aboriginal whaling that is managed through the IWC.”¹⁰⁷

In this regard, the United States has publicly voiced its support for aboriginal subsistence as managed *through* the IWC, but has also been characterized as “[leading] the fight in the international arena”¹⁰⁸ for the continuance of the Alaska Native bowhead whale hunt *despite* the IWC’s protection of the bowhead and the potentially chilling effect on its international reputation as a state generally opposed to whaling.¹⁰⁹ Some say that United States whaling policies are hypocritical and exhibit a “double-standard,”¹¹⁰ because they demonstrate clear support for Inupiat Eskimo bowhead whaling while at the same time

society or the views of some animal rights groups? ... [s]ome people would answer these questions in the negative either because they are whale preservationists who think whale rights to life trump human cultural rights or because they fear [native subsistence] whaling is the first step down a “slippery slope” to the resumption of worldwide commercial whaling.

Id.

104. See World Council of Whalers, Whaling Around the World (United States), at <http://www.worldcouncilofwhalers.com/usa.htm> (last visited Jan. 28, 2005).

105. *Id.*

106. Clinton’s Message to Congress, *supra* note 72.

107. *Id.*

108. Miller, *supra* note 103, at 228.

109. *Id.*

110. Doug Mellgren, *Norwegian Whalers Ask Government to Help Block U.S. Inuit Whaling in Protest*, ASSOCIATED PRESS, Environmental News Network, Oct. 9, 2002 (on file with author) (comments of Bjoren Hugo Bendiksen, deputy leader of the Norwegian Whale Hunters Association).

opposing subsistence whaling of more populous whale species by aboriginals of other IWC member states such as Norway, Iceland, and Japan.¹¹¹ As has been demonstrated at recent IWC meetings, these perceptions have operated to the detriment of Alaskan Eskimos.¹¹²

2. Norway

Norway is a state with strong whaling interests and an established tradition of hunting minke whales (*vagehval*) dating back more than 1,500 years.¹¹³ Minke, the smallest of the baleen whales, is harvested today from the North-East Atlantic under a quota fixed by the Norwegian government.¹¹⁴ There is heated debate, however, over whether the Norwegian minke whale harvest is “strictly regulated,”¹¹⁵ or is in fact “subject to weak regulations” that undermine international whale management.¹¹⁶ The flashpoint of this debate is the legality of Norway’s decision to resume whaling in 1992 despite the fact that the IWC had placed a moratorium on the practice almost ten years earlier.¹¹⁷ Meanwhile, Norwegian whalers have directly

111. Nicholas D. Kristof, *Whale on the Table*, Op. Ed., N.Y. TIMES, Sept. 17, 2003, at A27 [hereinafter Kristof, Op. Ed.] (“for all its ‘save the whales’ piety in international forums [sic], the U.S. has strongly and quite properly backed the right of American Indians and Eskimos to kill whales the way they traditionally have.”).

112. See, e.g., 2002 IWC Press Release, *supra* note 15. The Alaskan Eskimo temporarily lost the subsistence exemption at this meeting.

113. Brian Trevor Hodges, *The Cracking Façade of the International Whaling Commission as an Institution of International Law: Norwegian Small-Type Whaling and the Aboriginal Subsistence Exemption*, 15 J. ENVTL. L. & LITIG. 295, 313 (2000).

114. Marine Hunters: Whaling and Sealing in the North Atlantic, High North Alliance (1997), at <http://www.highnorth.no/Library/Publications/M-hunter/fi-an-wh.htm> (last visited Jan. 17, 2005).

115. *Id.*

116. Greenpeace, Norwegian Whaling: Neither Small Scale Nor Traditional, at <http://archive.greenpeace.org/comms/cbio/norweg.html> (last visited Feb. 9, 2005).

117. One side of the debate supports current Norwegian whaling practices, contending that Norway’s hunt is legal, ultimately “economically insignificant” in the global market, and does not violate the ICRW because Norway had officially registered its objection to the moratorium. The other side of the debate contends that Norwegian whaling is “neither small-scale nor traditional,” and is geared toward an “export-oriented industry” aiming to profit from trading in whale meat. This conservation-oriented argument, advanced

asked their government to oppose traditional Inuit whale hunts.¹¹⁸ Norwegian fishing and whaling interest groups have urged Norway to block future United States requests for bow-head subsistence quotas, previously set at 280 whales.¹¹⁹ Norwegian whalers have expressed frustration at the United States setting its own quotas for Alaskan Eskimos and then “immediately resuming [its] crusade against other whaling countries.”¹²⁰

In whatever terms Norwegian whaling practices are characterized, it is obvious that whaling is an integral part of Norway's economy.¹²¹ Norwegians depend on whaling for the continued financial solvency of their fishing communities,¹²² and yet endeavor to understate this element of their commerce. In 2002, for example, the government of Norway was encouraged by four of its fishing and whaling associations to oppose traditional Alaskan whaling at the 2002 IWC meeting. The groups lobbied the Norwegian foreign ministry to oppose the specious distinction between “so-called aboriginal hunts” and “so-called commercial hunts.”¹²³ International environmental lobbies like Greenpeace maintain that this distinction is very real, and that in fact Norway is effectively using other states' aboriginal subsistence whaling practices as a means to justify its own commercial whaling ends.¹²⁴

3. Japan

Japan has been instrumental in spearheading the effort against the Eskimo subsistence exemption, as it has long been

by, among others, Greenpeace, further asserts that Norwegian minke whaling has consistently depleted the minke whale population, and calls for the Norwegian government to withdraw what are viewed as illegal objections to the IWC moratorium. *Id.*; compare Hodges, *supra* note 113, at 313–14, with Revised Management Scheme of the IWC, at <http://www.highnorth.no/iwc2000/briefings/RMS.htm> (last visited Jan. 17, 2005).

118. Mellgren, *supra* note 110.

119. *Id.*

120. *See id.* (comments of Rune Frovik of the High North Alliance).

121. *See, e.g.*, NORWEGIAN INSTITUTE FOR URBAN AND REGIONAL RESEARCH, WHALING IN NORWEGIAN WATERS IN THE 1980'IES [sic]: THE ECONOMIC AND SOCIAL ASPECTS OF THE WHALING INDUSTRY AND THE EFFECTS OF ITS TERMINATION 65 (1990).

122. *See, e.g., id.*

123. Mellgren, *supra* note 110.

124. *Id.*

opposed to the IWC's failure to grant Japanese coastal peoples a subsistence exemption of their own for the harvest of minke whales.¹²⁵ Japan argues that the United States unfairly awards its natives a subsistence quota while refusing to recognize Japanese small type coastal whaling (STCW) as a form of aboriginal subsistence, a sentiment that is a large part of the reason for the Japanese stance against the Alaskan Eskimo subsistence exemption.¹²⁶ Yet Japan, where whale meat is considered a delicacy, has engaged in a notoriously aggressive commercial whaling campaign over the years, which the state frames as a defense of subsistence exemptions and scientific research.¹²⁷ In fact, the Japanese vote at the 2002 meeting—which temporarily put an end to the Eskimo subsistence hunt—was a direct response to United States and British efforts to block Japan's attempts to lift the IWC's commercial whaling ban.¹²⁸ Shortly after the June 2002 meeting, Japan reversed its vote and released a statement indicating that it would not oppose subsistence whaling by Alaskan Eskimos,¹²⁹ only to reaffirm its original opposition to such practices on August 7 of the same year and return the members of the AEWC to a tenuous, quota-less position where further attempts to meet subsistence needs would put AEWC members in direct contravention of an IWC consensus.¹³⁰

4. Alaskan Eskimos: Effects and Responses

The relative impact of the “tiny subsistence hunts of Arctic natives,”¹³¹ conducted from wooden frame boats paddled in pursuit of individual whales that are towed ashore once caught,¹³² are readily distinguishable from the “million-dollar whale

125. See Tepton, *supra* note 15; 2002 IWC Press Release, *supra* note 15; Andrew C. Revkin, *Asia: Japan: Moves for Commercial Whaling*, World Briefing, N.Y. TIMES, July 21, 2004, at A13.

126. Harris, *supra* note 5, at 382.

127. See Ruffle, *supra* note 17, at 651–52; Kristof, Op. Ed., *supra* note 111 (“the Japanese ‘scientific’ whaling effort is more about sushi than science.”).

128. See Pemberton, *supra* note 99.

129. *Id.*

130. See Tepton, *supra* note 15.

131. Richard N. Mott, (V.P. for International Policy for the World Wildlife Fund), *Hunting Whales*, Letter to the Editor, N.Y. TIMES, Sept. 20, 2003, at A12 [hereinafter Mott, Letter to the Editor].

132. Braund & Moorehead, *supra* note 4, at 270.

hunts¹³³ of these commercial whaling states that have been alleged to employ factory-like boats complete with on-board whale-meat processing operations.¹³⁴ Additionally, Alaskan Eskimos have responded to IWC concerns by forsaking some of their traditional hunting methods for more modern means that are deemed more efficient and humane.¹³⁵

Thus, international objections to the Alaskan Eskimo subsistence hunt seem to be driven more by political tensions between the United States and major whaling states like Japan and Norway.¹³⁶ The apparent hypocrisies and double standards therefore do not necessarily reflect preferential treatment by the United States of its native peoples over those of other IWC member states.¹³⁷ Rather, they illustrate the difficult position in which the United States finds itself as it attempts to support the international conservation movement,¹³⁸ which may sometimes interfere or conflict with its responsibilities to support its own native peoples' cherished traditions.¹³⁹ The United States seeks to preserve Alaskan Eskimo whaling needs, which are admittedly far less substantial than, for example, those of Norway and Japan.¹⁴⁰ However, it is also bound to the IWC by a certain degree of conservationist political pressure. Greenpeace, for example, has voiced strong opposition to commercial whaling while supporting some subsistence hunting by native Alaskan Eskimos.¹⁴¹ While a Greenpeace spokesperson commented after the 2002 IWC meeting that "aboriginal peoples in Alaska ... cannot be held hostage for Norwegian commercial

133. Mott, Letter to the editor, *supra* note 131.

134. Greenpeace, *supra* note 116.

135. Gillespie, *supra* note 43, at 126.

136. *See, e.g.*, Mellgren, *supra* note 110.

137. *See, e.g.*, Mott, Letter to the Editor, *supra* note 131.

138. This support is possibly best illustrated by the Fishermen's Protective Act (Pelly Amendment), 22 U.S.C. §§1971-1979 (1995). The Pelly Amendment "authorizes the President to prohibit the importation of products from countries that allow fishing operations that diminish the effectiveness of an international fishery conservation program or that engage in trade or taking that diminishes the effectiveness of an international program for endangered or threatened species." *Id.* at Overview.

139. *See, e.g.*, discussion of the trust doctrine in Thompson, *supra* note 20, at 424.

140. Kristof, Op. Ed., *supra* note 111.

141. Mellgren, *supra* note 110.

whaling,¹⁴² the 2002 IWC meeting demonstrated just how quickly such a hostage situation can unfold. The United States may in fact be engaging in “hypocrisy”¹⁴³ to the extent that it voices inconsistent policies by criticizing nations such as Canada for whaling outside the IWC,¹⁴⁴ permits Alaskan Eskimos to whale “notwithstanding the protection of bowheads by the IWC,”¹⁴⁵ and still seems to expect the global whaling community to support the Alaskan subsistence exemption. Despite recent press attention,¹⁴⁶ global factions, enforcement failures, and inter-state strife within the IWC unfortunately seem to remain part of the Commission’s standard operating procedure.¹⁴⁷ One commentator has observed the IWC’s inability to effectively and uniformly regulate the whaling activities of states that deviate from the IWC Schedules, noting the danger that “failing to make concessions to the needs of [the IWC’s] pro-whaling states will fragment the IWC into regional, self-regulating whaling organizations.”¹⁴⁸

But the management of aboriginal whaling through the IWC has, over time, proven itself ineffective. Indeed, today’s Alaskan Eskimos have their own “management regime that most hunters view as responsive to their needs and that many outsiders regard as a model for effective management,”¹⁴⁹ and even the IWC’s own Aboriginal Subsistence Sub-Committee in 2003 expressed its appreciation for Alaskan local hunters’ coopera-

142. *Id.* (comments of Frode Pleyrn, Greenpeace campaigner).

143. Kristof, *Op. Ed.*, *supra* note 111.

144. Clinton’s Message to Congress, *supra* note 72.

145. Miller, *supra* note 103, at 228.

146. *See, e.g.*, Kristof, *Op. Ed.*, *supra* note 111.

147. *See generally* Suhre, *supra* note 49; Alex Kirby, *Whale Commission Future ‘In Jeopardy’*, BBC NEWS WORLD EDITION, June 19, 2003, available at <http://news.bbc.co.uk/2/hi/Science/nature/3005120.stm> (“[t]he IWC has ended its [2003] meeting leaving many delegates with a resounding sense that nothing has changed.”); Alex Kirby, *Japan Plans Pro-Whaling Alliance*, BBC NEWS WORLD EDITION, July 14, 2004, available at <http://news.bbc.co.uk/1/hi/sci/tech/3892909.stm> (“[t]he IWC remains deadlocked between the countries opposed to a resumption of commercial whaling and those, led by Japan, which say it should go ahead.”); *see also* Andrew C. Revkin, *Save the Whales! Then What?*, N.Y. TIMES, Aug. 17, 2004, at F3.

148. Hodges, *supra* note 113, at 328.

149. FREEMAN, *supra* note 6, at 117.

tion with IWC scientific research objectives.¹⁵⁰ Self-regulation might therefore be a positive development for the Alaskan Eskimo,¹⁵¹ and the international community at large, even if this increased autonomy ultimately redefines the relationship between the United States and the IWC.

III. WHALING BANS, RESPONSES & THE IWC IN 2003

A. *Bans of the 1980s and Membership Responses*

In 1982, the IWC imposed a complete ban on all commercial whaling, which entered into force for the 1985 and 1986 seasons.¹⁵² The IWC's decision promised that, by 1990, the Commission would comprehensively assess the effects of the ban on whale stocks in consideration of modifying the decision or lifting the ban to provide for new catch limits.¹⁵³ That year, Canada withdrew from the IWC and has refused to rejoin the Commission at least in part based on its perception that the IWC is inattentive to subsistence whaling needs.¹⁵⁴ In 1988, Japan became the last nation to officially cease commercial whaling, although it still arguably whales commercially under cover of a scientific research exemption.¹⁵⁵ This wholesale commercial ban was imposed mostly in response to increasing pressures from environmental NGOs that were shifting public opinion, and in turn IWC policy, to a stance that made non-whaling synonymous with sound environmental policy.¹⁵⁶ The 1982 ban—which

150. ASW Sub-Committee Report, *supra* note 61 (“[t]he Committee appreciated the fact that in Alaska, landed whales are measured and sampled in cooperation with local hunters.”).

151. See, e.g., Huntington, *The AEW: Effective Local Management*, *supra* note 24, at 51–55. (“[t]he AEW has forcefully shown the effectiveness of local, hunter-oriented management in the context of subsistence hunting.”).

152. See “Commercial Whaling Catch Limits,” at <http://www.iwcoffice.org/conservation/catches.htm> (last visited Jan. 17, 2005).

153. *Id.*

154. See *Canadian Inuits Say No to IWC*, THE HIGH NORTH NEWS, no. 7, (Apr. 10, 1994) (comments of Rosemari Kupanat, President of the Canadian Inuit Council, noting the Council's “support [for] Canada's historical position that the IWC should be dedicated to the conservation and sustainable use of whales”), at http://www.highnorth.no/Library/Management_Regimes/IWC/ca-in-sa.htm.

155. Andresen, *supra* note 18, at 388; Ruffle, *supra* note 17, at 640.

156. Andresen, *supra* note 18, at 394.

remains in effect today—was a complete ban on whaling except for the purposes of minimal aboriginal subsistence and scientific research.¹⁵⁷

Iceland withdrew from the IWC in 1992. The Icelandic delegate to the IWC subsequently referred to the IWC as “a non-whaling commission rather than a whaling commission,”¹⁵⁸ a reference to what Iceland has argued is the IWC’s demonstrated bias toward the position of environmental NGOs over the concerns of whaling states.¹⁵⁹ Eleven years later, in 2001, Iceland rejoined the IWC because it concluded that the IWC had demonstrated more of a commitment to cooperative management and was working toward sustainable whaling.¹⁶⁰ In contrast, Canada has stayed out.¹⁶¹

B. The Alaskan Eskimo: Responses to Aboriginal Subsistence

Recent scholarship examining the rights of the Inuit to continue and sustain whaling activities for subsistence purposes in light of these prior whaling bans has reached varying conclusions regarding the efficacy of the IWC in regulating subsistence rights.¹⁶² One argument is that the IWC ultimately is an effective regulator of subsistence practices because it is sensitive to the aboriginal subsistence exemption and pays “close attention to indigenous rights.”¹⁶³ An alternative and somewhat opposing view calls for greater Inuit involvement in the conservation discourse under a revised human rights framework, holding that the Inuit subsistence exemption is in constant

157. Hodges, *supra* note 113, at 297 (citing IWC Schedule, para. 10(a) Feb. 1983).

158. See *Iceland Battles to Resume Whaling*, CNN.COM, *supra* note 69.

159. *Id.*

160. *Id.* Mr. Asmundsson pointed out that many of these same problems still remained, but that there were indications that the IWC member states were working toward sustainable whaling and that Iceland now preferred to be part of these discussions rather than allow them to continue without Icelandic input.

161. The Icelandic and Canadian defections may thus be merely illustrative of the larger problem the IWC has had in retaining credibility as an organ of international enforcement.

162. Compare Harris, *supra* note 5, with Gupta, *supra* note 19.

163. See generally Harris, *supra* note 5.

danger of termination by the vote of any single member state of the IWC.¹⁶⁴

Proponents of this latter argument have recognized the Native Village of Barrow as one of several indigenous groups whose long-standing cultural traditions are threatened for lack of native input.¹⁶⁵ One commentator discusses the importance of increased involvement for NGOs and other non-state actors.¹⁶⁶ This view suggests that NGOs such as the AEWG may hold the key to greater self-government of Inuit subsistence needs while at the same time maintains that international organizations remain “the appropriate dispute-resolution mechanism” for settling disagreements over indigenous subsistence exemptions.¹⁶⁷

The suggestion that international organizations like the IWC are generally and theoretically viable dispute-resolution mechanisms for disagreements over subsistence exemptions may be accurate.¹⁶⁸ But the IWC—which arguably still retains the greatest influence over the fate of Alaskan Eskimo subsistence whaling—has failed to demonstrate its viability as a mechanism for consistent and predictable dispute resolution over all whaling issues.¹⁶⁹ The ICRW, under which the IWC assumes its authority, is likewise a nebulous document that provides little security for native peoples seeking to ensure permanent subsistence hunting activities.¹⁷⁰

164. Gupta, *supra* note 19, at 1751–52 (anticipating events akin to those of the 2002 IWC meeting in Shimonoseki, when the Japanese vote temporarily eliminated the Alaskan subsistence exemption).

165. *Id.* at 1763.

166. *Id.* at 1769.

167. *Id.* at 1770.

168. See Harris, *supra* note 5, at 381 (observing that the “bowhead quota had been sustained without interruption since 1977,” and that the loss of the quota in 2002 was quickly remedied by an inter-sessional meeting of the IWC).

169. Hodges, *supra* note 113, at 304; Yasuo Iino & Dan Goodman, *Japan's Position in the International Whaling Commission in THE FUTURE OF CETACEANS IN A CHANGING WORLD* 4–6 (William C.G. Burns & Alexander Gillespie eds., 2003); see also *supra* notes 146, 147.

170. See generally Whaling Convention, *supra* note 10.

C. *The IWC's 54th and 55th Annual Meetings (2002–2003):
Fighting for Subsistence*

Events at recent meetings of the IWC have shed light on these inefficacies, illustrating that the IWC may be incapable of effectively managing native subsistence issues, and demonstrating that the presence of a cooperative tribal voice alone may not be enough to secure a permanent subsistence exemption for the Alaskan Eskimo.¹⁷¹ The state of the Alaskan Eskimo subsistence exemption between the IWC meetings of 2002 and 2003 illustrates the extent to which the IWC holds Alaskan Eskimo subsistence culture in the balance.¹⁷²

In 2002, Alaskan Eskimos lost their quota for the aboriginal subsistence exemption,¹⁷³ when fewer than three quarters of the IWC voted for it.¹⁷⁴ Barrow, with forty-four whaling captains plus their crews, is usually permitted twenty-two whales per year, but in part as a result of the IWC's defeat of the subsistence exemption, Barrow whalers harvested only three during the 2002 season.¹⁷⁵ The exemption was defeated in 2002 despite reports from the IWC's Scientific Committee that year that the bowhead whale population was hearty enough to endure the subsistence harvest, and the fact that the IWC was well informed of Eskimo cultural and subsistence needs.¹⁷⁶

The defeat of the subsistence exemption left the native population of Barrow with no bowhead whale quota for 2003, and since they were forbidden to whale by the IWC, Barrow natives were left with very little whale meat to carry them through the winter.¹⁷⁷ The pre-2002 quota was ultimately reinstated at a special inter-sessional meeting of the IWC in October of 2002,¹⁷⁸

171. See, e.g., 2002 IWC Press Release, *supra* note 15. It was at this meeting that the Alaskan Eskimos lost the subsistence exemption as a result of the Japanese vote, despite their cooperative role in IWC dialogue.

172. The 54th and 55th annual meetings of the IWC were held in Shimomoseki, Japan and Berlin, Germany respectively. See 2002 IWC Press Release, *supra* note 15; 2003 IWC Press Release, *supra* note 23.

173. The quota consisted of 280 bowhead over five years with an annual average harvest of 67 whales for the Alaskan Inupiat and native population of Chukotka, Russia. See Cambridge Meeting Press Release, *supra* note 23.

174. 2002 IWC Press Release, *supra* note 15.

175. Tepton, *supra* note 15.

176. 2002 IWC Press Release, *supra* note 15.

177. Tepton, *supra* note 15.

178. Cambridge Meeting Press Release, *supra* note 23.

making the AEWEC's rigorous campaign to re-instate the exemption successful.

Before the 55th annual IWC meeting in June 2003 in Berlin,¹⁷⁹ the Alaskan Eskimo subsistence exemption had already been reinstated at the special meeting (in October of 2002).¹⁸⁰ Fortunately for the native Alaskan whaling villages, this quota remained undisturbed at the 2003 meeting, with the IWC noting that the Scientific Committee was continuing to make strides toward helping aboriginal whalers manage whale stocks.¹⁸¹ Despite these strides, however, it was also noted in 2003 that some of the small Arctic bowhead populations were suffering because of catches made outside of IWC regulations, including one made by Canadian Eskimos in 2002.¹⁸² Apparently, the IWC "attached great importance to trying to improve the survivorship of these stocks."¹⁸³ Yet at the same time, the Revised Management Procedure (RMP)¹⁸⁴ accepted and endorsed at the 2003 meeting, acknowledged that there was scientific uncertainty over the population levels of different whale species.¹⁸⁵ Given the loss of the exemption at the 2002 meeting and the unreliable data presented in 2003, it is not difficult to imagine the Alaskan Eskimo losing its subsistence exemption or bowhead quota again in the future.¹⁸⁶

179. See 2003 IWC Press Release, *supra* note 23.

180. See Cambridge Meeting Press Release, *supra* note 23. During this meeting, the bowhead whale quota was set at 280 whales for the 2003-2007 period, with no more than 67 whales to be struck in one year and with a provision requiring the Scientific Committee's review of the quota from 2004 onward.

181. See "Catch Limits for Aboriginal Subsistence Whaling," in 2003 IWC Press Release, *supra* note 23.

182. See "Status of Whales," *in id.*

183. *Id.*

184. See "The Revised Management Procedure" (RMP), at <http://www.iwcoffice.org/conservation/rmp.htm> (last visited Jan. 17, 2005). The RMP is a complex and ever-changing corpus of data assembled by the IWC Scientific Committee. The basic purpose of the RMP is to assess the status of whale populations and manage catch limits accordingly.

185. *Id.*

186. See, e.g., Gupta, *supra* note 19, at 1749. ("[The Inuit subsistence exemption] is itself under continual attack ..."). It is worth noting that no changes were made to the bowhead catch limits at the 56th annual IWC meeting in Sorrento, Italy. See Final Press Release of the 56th Annual Meeting of the IWC, at <http://www.iwcoffice.org/meetings/meeting2004.htm> (last visited Jan. 17, 2005). Nonetheless, this does not mean that subsistence whaling is

IV. THE CANADIAN APPROACH AND OTHER WHALING NGOS: ALTERNATIVE MANAGEMENT SCHEMES?

A. Canadian Aboriginal Subsistence Whaling

Canada is considered to be one of the largest whaling nations in the world,¹⁸⁷ with several active aboriginal whaling communities.¹⁸⁸ Like the Alaskan Eskimo, Canadian Aboriginals have been whaling for thousands of years,¹⁸⁹ and the unforgiving temperatures and harsh Arctic climate are similar to the environment of the Northern Alaskan Eskimos in Barrow and neighboring villages.¹⁹⁰ Canadian Inuit live in both the eastern and western Arctic, and hunt primarily for beluga and narwhal whales.¹⁹¹ Canada is cognizant of and committed to indigenous rights, and those rights are explicitly codified and provided for in the Canadian Constitution.¹⁹² While the AEWG remains at the mercy of the IWC's annual subsistence quota vote,¹⁹³ Canada's refusal to rejoin the IWC at the behest of that country's whaling communities is viewed by some tribal leaders, such as World Council of Whalers Chairman Chief Tom Mexsis Happynook of the Nuu-chah-nulth Tribe, as evidence of Canada's "increasing awareness of the central importance of [aboriginal] rights, and the effectiveness of local management regimes based

sufficiently protected from future reductions. The 57th annual IWC meeting is scheduled for May 2005 in Ulsan, Republic of Korea.

187. See Membership of the World Council of Whalers, at <http://www.worldcouncilofwhalers.com/worldframe.htm> (last visited Jan. 17, 2005).

188. Chief Tom Mexsis Happynook, *Traditional Rights versus Environmental Protection of a Species*, presented at The Conference on Environmental Law and Canada's First Nations, PAC. BUS. & L. INST. (Nov. 18-19, 1999), available at <http://www.worldcouncilofwhalers.com/Resources/Mexsis1.html>. The main Canadian aboriginal whaling communities are the Western Arctic Inuvialuit, the Eastern Arctic Inuit, and the Nuu-chah-nulth.

189. See *id.*

190. See map of Alaska Eskimo Villages, in Braund & Moorehead, *supra* note 4, at 255; map of Canadian Inuit Villages, in Nunavut Study, *supra* note 27, at 5.

191. See Membership of the World Council of Whalers, at <http://www.worldcouncilofwhalers.com/worldframe.htm> (last visited Jan. 17, 2005).

192. The Constitution Act, 1982, art. II ("Rights of the Aboriginal Peoples of Canada").

193. See, e.g., 2002 IWC Press Release, *supra* note 15; 2003 IWC Press Release, *supra* note 23.

on science and traditional resource management knowledge.”¹⁹⁴ Chief Happynook observes that much of the language of international conventions such as the ICRW pays only “lip service” to the subsistence rights of indigenous people.¹⁹⁵ In the late 1990s, the Inuit assumed control over the beluga whale hunt absent a quota, which may indicate that Canadian aboriginals are moving toward greater autonomy in their subsistence hunting practices.¹⁹⁶

Like the Eskimo communities of northern Alaska, eastern Canadian whaling communities have also hunted the bowhead whale.¹⁹⁷ After European and American whalers began to commercially whale these waters in the early 1900s, however, the bowhead population was depleted, leaving few whales for aboriginal subsistence hunting.¹⁹⁸ When this commercial whaling came to an end, Canadian Inuit harvested bowheads only sporadically, and the bowhead hunt has not resumed with regularity.¹⁹⁹ The bowhead hunt is considerably smaller than the beluga and narwhal hunts, and just six bowheads were taken by Canadian Inuit between 1991 and 1998.²⁰⁰ Nonetheless, the bowhead remains culturally significant and there has been some effort by the Canadian Inuit to resume the bowhead hunting tradition in both eastern and western Canadian Arctic waters.²⁰¹ There is also a general consensus among Canadian Inuit that a return to sustainable bowhead whaling would be cultur-

194. Happynook, *supra* note 188.

195. *See id.*

196. *See id.*

197. In 1995, a formal study of Canadian Inuit bowhead whaling practices in Nunavut, Canada, was conducted by a special research committee pursuant to the Nunavut Land Claim Agreement of 1993. The study included analysis of the whaling practices in ten of the 18-20 eastern Arctic bowhead whaling communities in Nunavut. The communities studied were Igloolik, Hall Beach, Coral Harbour, Repulse Bay, Kimmirut, Cape Dorset, Kugaaruk, Pangnirtung, Qikiqtarjuaq, and Clyde River. *See Nunavut Study, supra* note 27, at 1-3, 55.

198. *Id.* at 9.

199. *Id.* at 10.

200. *See* Membership of the World Council of Whalers, at <http://www.worldcouncilofwhalers.com/worldframe.htm> (last visited Jan. 17, 2005).

201. *See* Clinton's Message to Congress, *supra* note 72. (President Clinton criticized Canadian natives for taking both eastern and western bowheads in 1991 and 1994 without Canadian permits, and for taking both eastern and western bowheads in 1996 with permits issued by the Canadian government).

ally and nutritionally valuable.²⁰² In interviewing members of the Canadian Inuit communities, researchers have found that, similar to Native Alaskans in Barrow and nearby whaling villages, the bowhead whale hunt holds traditional significance.²⁰³ Furthermore, studies have suggested that bowhead whale populations in the region have either remained stable or have been steadily increasing since the 1950s, such that a more regularized, sustainable hunt would be feasible.²⁰⁴

Conservationists who oppose whaling under almost any circumstances, however, view Canadian whaling practices as a serious threat to the future of certain whale species.²⁰⁵ Additionally, scholars argue that Canada has been slow to adopt fundamental principles of international environmental law,²⁰⁶ and that the Canadian government should consider seriously the values and principles of environmental treaties even where those treaty obligations have not been specifically implemented.²⁰⁷ Those who would argue, however, for a stronger implementation of environmental practices and principles codified in international treaties also concede that such treaties are often too broad and general to make effective use of international law within Canada.²⁰⁸

Many also criticize “so-called ‘traditional’ [whale] hunts,”²⁰⁹ concerned about threats to population size and convinced that a growing market demand for certain whale parts is influencing

202. Nunavut Study, *supra* note 27, at 74.

203. *Id.* at iii; *see generally* Chiropolos, *supra* note 42.

204. *See* Nunavut Study, *supra* note 27, at 20, 74. Much of the population information gathered here was based on the observations of local whalers.

205. These concerns rest, in particular, with the status of the beluga whale population. *See* Kieran Mulvaney & Bruce McKay, *Small Cetaceans: Status, Threats and Management* [hereinafter Mulvaney & McKay] in *THE FUTURE OF CETACEANS IN A CHANGING WORLD* 194 (William C.G. Burns & Alexander Gillespie eds., 2003).

206. Elizabeth Brandon, *Does International Law Mean Anything in Canadian Courts?*, 11 *J. ENV. L. & PRAC.* 399, 401 (2001).

207. *Id.*

208. *Id.* (“The slowness of the Canadian legal community to make use of international law, and particularly environmental treaties and principles ... may ... be attributed to the breadth of issues often covered by environmental treaties, and the general objectives that tend to be used in them instead of specific measures.”).

209. Mulvaney & McKay, *supra* note 205, at 194.

these hunts.²¹⁰ Yet, even these critics concede that catch statistics used to monitor the whale populations hunted by Canadian indigenous peoples are unpredictable,²¹¹ and that the commercial component of the hunt in these communities is dubious.²¹²

B. Other Alaskan Eskimo Whale Management NGOs: The WCW and the ICC

The Alaska Eskimo Whaling Commission is one of several whale management NGOs currently addressing subsistence whaling needs.²¹³ Alaskan Eskimos are active in two of these NGOs, The World Council of Whalers (WCW) and the Inuit Circumpolar Conference (ICC).²¹⁴

The WCW is an international NGO formed in 1997 by whaling states interested in specific and decidedly pro-whaling objectives.²¹⁵ The WCW's stated objectives may be construed to

210. *Id.* ("Because of the value of the spiraled tusk of mature [narwhal whale] males, a commercial element has been introduced").

211. *Id.* ("Accurate overall catch statistics are difficult to gather.").

212. *Id.* ("Historically, the [Arctic] hunters have used the catch for subsistence rather than selling it.").

213. Three of the primary NGOs addressing whaling issues are The North Atlantic Marine Mammal Commission (NAMMCO), The World Council of Whalers (WCW), and the Inuit Circumpolar Conference (ICC). NAMMCO members include the Faroe Islands, Greenland, Iceland and Norway. See Final Press Release of the Twelfth Meeting of the NAMMCO Council, at <http://www.nammco.no/news/N-12%20Press%20release%20dr5.pdf> (last visited Jan. 28, 2005). NAMMCO was forged by the member states "having regard to their common concerns for rational management, conservation and optimum utilization of the living resources of the sea in accordance with generally accepted principles of international law...", and does not focus in particular on Alaskan Eskimo subsistence whaling. See Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic, at <http://www.nammco.no/Agreement.htm> (last visited Jan. 28, 2005).

214. Membership of World Council of Whalers, at <http://www.worldcouncilofwhalers.com/worldframe.htm> (last visited Jan. 17, 2005); Welcome to the Inuit Circumpolar Conference, at <http://www.inuitcircumpolar.com> (last visited Jan. 17, 2005).

215. The objectives of the WCW are, among others, to "support communities engaged in sustainable whaling by providing a cooperative forum for whalers ... providing a collective informed voice for whaling peoples around the world ... [promoting] sustainable and equitable resource use by incorporating the needs, knowledge and teachings of whaling peoples, and including them in the decision-making process." See Objectives of the WCW, at <http://www.worldcouncilofwhalers.com/profileframe/htm> (last visited Jan. 17, 2005).

support both commercial and aboriginal subsistence whaling.²¹⁶ The first official meeting of the WCW was held in Victoria, British Columbia, in 1998, with more than 100 delegates representing some nineteen countries,²¹⁷ as well as “sympathetic observers, committed to community-based management as a conservation and development tool and the preservation of the world’s rich variety of cultures and traditions.”²¹⁸ Through its stated objectives, the WCW serves the interests of those states where whaling cultures form an integral component of the national identity.²¹⁹ These states are sometimes willing to risk sanctions imposed by formidable international powers, such as the United States, in order to continue whaling,²²⁰ and bristle at environmentalists who would try to alter their practices based on accusations that those practices are covertly commercial.²²¹ The WCW does not claim to directly manage any of the hunted whale species, but is effectively a forum to encourage and provide support for whaling among aboriginal and non-aboriginal peoples alike.²²²

The Inuit Circumpolar Conference is an NGO representing approximately 150,000 Inuit.²²³ Like the AEWG, the Inuit Cir-

216. One objective of the WCW is “to encourage respect for cultural, social and economic needs and concerns of whaling communities.” *Id.*

217. These states include Antigua & Barbuda, Australia, Canada, Dominica, the Faroe Islands, Greenland, Grenada, Iceland, Indonesia, Japan, New Zealand, Norway, the Philippines, Russia, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, Tonga, and the United States. *See Whaling Around the World*, at <http://www.worldcouncilofwhalers.com/worldframe/htm> (last visited Jan. 17, 2005).

218. *Id.*

219. *See* Lizette Alvarez, *Drop that Harpoon! Whale Hostilities Revisited*, N.Y. TIMES, Sept. 25, 2003, at A4 (reporting on importance of whaling to Icelandic culture).

220. *Id.* The United States threatened sanctions against Iceland for whaling, even though it is engaging in whaling under the scientific research exemption to the ICRW and its “actions [thus] fall squarely within international law.” *Id.*

221. *See, e.g., id.* (discussing the environmental opposition to Icelandic whaling practices).

222. Howard S. Schiffman, *The Competence of Pro-Consumptive International Organizations to Regulate Cetacean Resources*, in *THE FUTURE OF CETACEANS IN A CHANGING WORLD* 163–64 (William C.G. Burns & Alexander Gillespie eds., 2003).

223. *See* Inuit Circumpolar Conference, General Information, at <http://www.inuit.org/index.asp?lang=eng&num=2> (last visited Jan. 27, 2005).

cumpolar Conference was formed in 1977,²²⁴ and has strong ties to Barrow, the site of its first meeting.²²⁵ One of the objectives of the ICC is the management of sustainable whaling, but, more generally, the ICC was formed in order to promote Inuit unity.²²⁶ The ICC operates under a charter, which states as its goals among other things, strengthening Inuit unity, promoting Inuit rights and interests internationally, and providing for the sustainable management of resources—including arctic and sub-arctic wildlife—in the circumpolar region with the development of Inuit economies as a priority.²²⁷ The ICC was instrumental in bringing together Inuit from Canada, Greenland, Russia, and Alaska, thus melting the “ice curtain.”²²⁸ This enabled different groups of Inuit from across the Arctic to come together in Barrow in order to celebrate a common ancestry and address common concerns.²²⁹ While whaling is certainly one of the concerns of ICC members, this NGO takes a broader approach to issues with potentially adverse implications for the Inuit and the Arctic.²³⁰ Over the course of the past decade, the major concerns of the ICC have been geared toward issues related to Arctic sus-

These Inuit reside in Russia (Chukotka), Canada, Denmark (Greenland), and the United States (Alaska).

224. See ICC Alaska, About Us, at <http://www.iccalaska.org/aboutUs.html> (last visited Jan. 27, 2005).

225. *Id.*; Francis, *supra* note 17, at 69.

226. See Inuit Circumpolar Conference, General Information, at <http://www.inuit.org/index.asp?lang=eng&num=2> (last visited Jan. 27, 2005); Inuit Circumpolar Conference (Canada homepage), at http://www.ainc-inac.gc.ca/ch/dec/circon_e.html (last visited Jan. 27, 2005).

227. Francis, *supra* note 17, at 76 (citing the ICC Charter, art. 2). See also ICC BYLAWS, available at <http://www.inuit.org/index.asp?lang=eng&num=208> (last visited Jan. 17, 2005).

228. Francis, *supra* note 17, at 70. The “ice curtain” is a phrase that has been invoked to describe the vast geographical distances separating Inuit groups from one another. *Id.*

229. *Id.*

230. Every four years, the ICC determines the scope of its focus at General Assembly meetings. Recently, the major focus has been on sustainable development, the transport of pollutants, and climate change. See The Inuit Circumpolar Conference, at <http://www.inuitcircumpolar.com/index.php?ID=40&Lang=En> (last visited Jan. 28, 2005).

tainability, with an emphasis on subsistence and harvesting among indigenous people.²³¹

V. SELF-REGULATION OF ALASKAN ESKIMO SUBSISTENCE

A. *Toward an Independent Role for NGOs?*

As outlined above, Alaskan Eskimos remain active in several non-governmental organizations focusing on whaling issues.²³² Indeed, there is an increasing trend toward self-government by indigenous groups.²³³ As one minority rights scholar observes, "Indian tribes/bands have been acquiring increasing control over health, education, family law, policing, criminal justice, and resource development. They are becoming, in effect, a third order of government, with a collection of powers that is carved out of both federal and state/provincial jurisdictions."²³⁴ Self-government and self-regulation by indigenous peoples is an internationally recognized priority.²³⁵ But, because of the reality that indigenous groups such as the Alaskan Eskimo and Canadian Inuit are physically located in states and provinces, their self-government must somehow be coordinated with those state and provincial governments and agencies.²³⁶ Because native groups striving for self-regulation must necessarily interact somehow with extant federal and provincial governments, "[t]he exact scope and mechanisms of indigenous self-government ... remain unclear."²³⁷ The blurry lines of this interaction may also be illustrated by the 1996 establishment of the Arctic Council,

231. Circumpolar Sustainable Development: A Report by the Inuit Circumpolar Conference, *available at* <http://www.inuitcircumpolar.com/index.php?ID=32&Lang=En> (Publications) (last visited Jan. 28, 2005).

232. *See, e.g.*, Membership of World Council of Whalers, *at* www.worldcouncilofwhalers.com/worldframe.htm; The Inuit Circumpolar Conference, *at* <http://www.inuitcircumpolar.com>; <http://www.inuit.org> (last visited Jan. 17, 2005).

233. KYMLICKA, *supra* note 21, at 30.

234. *Id.*; *see also, e.g.*, CONSTITUTION AND BYLAWS OF THE NATIVE VILLAGE OF BARROW, *supra* note 34.

235. *See, e.g.*, DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, U.N. Commission on Human Rights Sub-Commission on the Prevention of Discrimination and Protection of Minorities, at VII, art. 31, U.N. Doc. E/CN.4/1995/2 (1995) [hereinafter DRAFT DECLARATION].

236. KYMLICKA, *supra* note 21, at 30.

237. *Id.*

an international *governmental* organization formed by the eight states that border the Arctic circle.²³⁸ The Joint Communiqué and Declaration on the Establishment of the Arctic Council²³⁹ is the Council's founding document,²⁴⁰ and is intended to promote the cooperation and coordination among Arctic States on common regional issues with the *involvement* of Arctic indigenous communities.²⁴¹ The Arctic Council accords certain indigenous NGOs such as the ICC, for example, the status of "Permanent Participant."²⁴² The Council, however, requires that the number of Permanent Participants always be less than the number of member states, and it is those states that are the ultimate arbiters of who may join the Council as Permanent Participants.²⁴³

Native Alaskans are entitled to tribal sovereignty under fundamental principles of Native American law to the same extent as other Native American tribes.²⁴⁴ While the intricacies of the relationship between the federal government and Native Americans are beyond the scope of the whaling debate, the normative debates at play do inform the discussion.²⁴⁵ One commentator has observed that even in the midst of an ongoing trend toward increasing self-determination among Native Americans, Native Alaskans, in particular, are facing threats to their tribal sovereignty at the hands of the federal government as a result of various treaties the United States has entered into.²⁴⁶ These threats are compounded by deficiencies in the federal government's trust relationship with Alaska Natives²⁴⁷

238. These are Canada, Denmark (including Greenland), Finland, Iceland, Norway, Russia, Sweden, and the United States. See JEFFREY L. DUNOFF ET. AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 242 (2002) [hereinafter DUNOFF ET. AL.].

239. JOINT COMMUNIQUÉ AND DECLARATION ON THE ESTABLISHMENT OF THE ARCTIC COUNCIL, 35 I.L.M. 1382 (1996).

240. DUNOFF ET. AL., *supra* note 238.

241. JOINT COMMUNIQUE AND DECLARATION ON THE ESTABLISHMENT OF THE ARCTIC COUNCIL at para. 1(a), 35 I.L.M. 1382 (1996) (emphasis supplied).

242. *Id.* at para. 2(b) ("The category of Permanent Participation is created to provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council.").

243. *Id.* at para. 2.

244. Thompson, *supra* note 20, at 438.

245. See generally, *id.*

246. *Id.* at 432.

247. William M. Bryner, *Toward a Group Rights Theory for Remediating Harm to the Subsistence Culture of Alaska Natives*, 12 ALASKA L. REV. 293,

and by the treatment of indigenous whaling in the international arena in general.²⁴⁸

B. The AEWIC as Independent Manager of Eskimo Subsistence Whaling

The Draft Declaration of the Rights of Indigenous Peoples,²⁴⁹ while not yet adopted by the U.N. General Assembly or necessarily destined to become binding law, is evidence of a customary view within the international community that an integral part of the indigenous right to self-determination includes autonomy in management of environmental resources.²⁵⁰ That the AEWIC is the NGO best suited to achieving this goal for the Alaskan Eskimo bowhead whale hunt was suggested long before events at the 2002 and 2003 IWC meetings threatened the Eskimo subsistence exemption anew.²⁵¹ That the IWC is ill-suited to regulate issues of culture and subsistence is likewise a proposition that was suggested before the events of those meetings.²⁵² In fact, it has been argued that for all of the IWC's attempts to effectively regulate aboriginal subsistence, only two broad guidelines regarding such regulation have been estab-

308 (1995) (“... [F]ederal trust responsibilities toward Alaska Natives, standing alone, provide neither rights nor remedies that enable federal law to redress harm to Alaska Native Culture.”).

248. Firestone & Lilley, *supra* note 25, at 10786 (“... [i]nstruments such as the ICRW were conceived and crafted by dominant societies and imposed on indigenous peoples based on the values, interests and norms of those societies.”).

249. *See generally*, DRAFT DECLARATION, *supra* note 235.

250. *Id.* at Part VII, art. 31. The text of article 31 reads, in relevant part, “[i]ndigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their ... economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.” *Id.*

251. Huntington, *The AEWIC: Effective Local Management*, *supra* note 24, at 55.

[The AEWIC's] success has been in achieving its goal of protecting bowhead whaling and also in proving by example the ability of Native hunters to provide leadership in proper management of a subsistence resource. The former is the AEWIC's contribution to the whaling villages; the latter, to the general practices of wildlife management. *Id.*

252. *See* Gillespie, *supra* note 43, at 119–20 (“[t]he function of the IWC is to regulate the catching of cetaceans, not to affect the focus of anthropological discourse.”).

lished to date in order for an exemption to be appropriate—namely that the act of whaling must be central to a culture, and that the loss of that exemption would be detrimental to that culture.²⁵³ Furthermore, in the case of Alaskan Eskimos, the IWC has been inconsistent and unclear in delineating what constitutes subsistence whaling practices.²⁵⁴

In recent years, the AEWC and the United States government have been cooperatively reporting to the IWC regarding the status of bowhead whale populations and continued subsistence needs of Alaska Natives.²⁵⁵ It has become apparent from bowhead whale population data collected through these efforts that Alaska Natives are capable of sustainably hunting the bowhead to meet their subsistence needs.²⁵⁶ But the events at the IWC 2002 and 2003 meetings underscore the need for “native peoples ... to remain ever vigilant and always ready to defend ... their cultural practices.”²⁵⁷ In the interest of such vigilance, it would make sense for the AEWC to assume independent stewardship over the bowhead whale hunt, particularly in light of the fact that, increasingly, indigenous groups such as the Alaskan Eskimo are viewed as separate, self-governing entities.²⁵⁸

CONCLUSION

The Native Village of Barrow and other northern Alaskan whaling communities rely on the bowhead whale for nutritional and cultural sustenance.²⁵⁹ In a global society that must become increasingly conscious of shared resources, it may seem regressive policy for Native Alaskans to disassociate themselves from the IWC and forge an insular, self-governing unit to manage their own subsistence practices. Yet the AEWC has been successfully regulating the bowhead whale hunt since the organi-

253. *Id.* at 120.

254. *Id.* at 136–37.

255. Miller, *supra* note 103, at 228.

256. *Id.*

257. *Id.* at 167.

258. Firestone & Lilley, *supra* note 25, at 10765 (“[while the ICRW] treated indigenous peoples as being the responsibility of the nation state in which they were located, today indigenous groups are increasingly seen as separate entities with their own voice in the decision-making process.”).

259. *See, e.g.,* CASE, *supra* note 3, at 349.

zation's inception over twenty-five years ago.²⁶⁰ The 2002 and 2003 IWC meetings, between which the Alaskan subsistence exemption was preserved only by the thinnest margin,²⁶¹ highlight the inadequacies of the IWC as an international forum capable of properly protecting the interests of Native Alaskans. In light of the United States' prominent role in the IWC,²⁶² its withdrawal from the Commission is wholly unrealistic and unnecessary to meet the objective of protecting Alaskan Native subsistence whaling.

The international community's willingness to grant aboriginal peoples such as the Alaskan Eskimo subsistence exemptions at all reflects acknowledgement that these communities are viewed as somehow distinct from the states within whose boundaries they reside.²⁶³ The interests of these communities are historically different from those of both commercial or non-subsistence whalers and the conservation movement, and the IWC is perhaps too preoccupied with these latter concerns to adequately protect Alaskan Eskimo subsistence. The IWC should officially relinquish management of the bowhead whale hunt to the AEWC and other native-run NGOs, at least to the extent that the subsistence exemption can no longer be voted away by the international community. Practically, this would relieve the IWC of a thorny regulatory task. As policy, it would have positive implications for the self-determination and cultural preservation of Native Alaskans.

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260. See Braund & Moorehead, *supra* note 4, at 258.

261. 2002 IWC Press Release, *supra* note 15.

262. See, e.g., Suhre, *supra* note 49, at 305, 316.

263. See, e.g., Firestone & Lilley, *supra* note 25.

* B.A. Brown University, 1999; J.D. Brooklyn Law School, 2005 (expected). I would like to thank my parents, Nick Bakalar and Dr. Francine Cournos, and my grandparents, Ruth and the late Alan Bakalar, for their unconditional support of my education, as well as my partner, Geoff Kirsch, for his patience and encouragement. I am extremely grateful to Professor Maryellen Fullerton of Brooklyn Law School and the staff at the *Brooklyn Journal of International Law* for their generous supervision. Any remaining errors are, of course, my own. This note is dedicated to Mark Regan of Alaska Legal Services. Mark's selfless advocacy on behalf of his clients is an inspiration and a reminder. His work is greatly admired and his friendship is deeply valued.