

# COMMENTS

## **The United States' Abuse of the Aboriginal Whaling Exception: A Contradiction in United States Policy and a Dangerous Precedent for the Whale**

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## INTRODUCTION

[T]he . . . point is, whether Leviathan can long endure so wild a chase, and so remorseless a havoc; whether he must not at last be exterminated from the waters, and the last whale, like the last man, smoke his last pipe, and then himself evaporate in the final puff.<sup>1</sup>

Once one of the world's most active commercial whaling nations, the United States has become the world's leading protector of whales.<sup>2</sup> Conservationists in the United States were making efforts to halt the rapid decimation of whale stocks as early as 1920.<sup>3</sup> In 1931 the United States, with twenty-five other nations, signed a treaty called the Convention for the Regulation of Whaling (1931 Convention).<sup>4</sup> Although this treaty was limited to prohibiting only the most extreme forms of waste — such as the killing of calves and nursing females<sup>5</sup> — it represented the formal beginning of the United States' commitment to the conservation of whales. In 1946 the United States reaffirmed this commitment by signing a more comprehensive treaty called the International Convention for the Regulation of Whaling (1946 Convention).<sup>6</sup>

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<sup>1</sup> H. MELVILLE, *MOBY DICK* 409 (1933).

<sup>2</sup> See Wilkinson, *The Use of Domestic Measures to Enforce International Whaling Agreements: A Critical Perspective*, 17 DEN. J. INT'L L. & POL'Y 271, 271-75 (1989) (giving a concise but thorough history of whaling). Wilkinson dates shore-based commercial whaling as far back as the early 17th century in Japan and the American Colonies. *Id.* at 271. By the end of the 18th century, the United States, Great Britain, France, and Portugal all had "pelagic" fleets. *Id.* In pelagic fleets small whaling boats towed their catches to "factory ships," instead of to shore, for processing. K. ALLEN, *CONSERVATION AND MANAGEMENT OF WHALES* 12 (1980). The height of Yankee whaling in the United States spanned from 1820 to 1860, peaking in 1846 when the United States had 736 whaling boats hunting worldwide. Wilkinson, *supra*, at 271.

For other histories of commercial whaling see J. TØNNESEN & A. JOHNSEN, *THE HISTORY OF MODERN WHALING* (1982) and *THE WHOLE WHALE CATALOG* (B. Brooks ed. 1978).

<sup>3</sup> M. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 262 (1983). For an overview of the early efforts to conserve whales, see *THE WHALE PROBLEM: A STATUS REPORT* (W. Schevill ed. 1974).

<sup>4</sup> Convention for the Regulation of Whaling, Sept. 24, 1931, plenipotentiaries, 49 Stat. 3079, T.S. No. 880, 155 L.N.T.S. 349 [hereafter 1931 Convention]. Two major whaling nations, Japan and the Soviet Union, were not parties to the 1931 Convention. *See id.*

<sup>5</sup> *Id.* art. 5. One commentator calls the 1931 Convention "largely ineffectual." M. BEAN, *supra* note 3, at 262.

<sup>6</sup> International Convention for the Regulation of Whaling, Dec. 2, 1946,

The 1946 Convention presently governs most of the world's attempts to conserve whales.<sup>7</sup> It creates the International Whaling Commission (IWC), an organization comprised of a representative from each signatory.<sup>8</sup> The 1946 Convention gives the IWC the broad power to regulate whaling through the establishment of quota, moratoria, and hunting seasons in all of the world's oceans.<sup>9</sup>

Unfortunately, despite the broad powers granted to the IWC, and despite the Convention's stated purpose of "safeguarding for future generations the great natural resources represented by the whale stocks,"<sup>10</sup> the IWC was ineffectual from its inception.<sup>11</sup> Influenced more by the concerns of member nations seeking higher quotas than by the warnings of scientists, the IWC repeatedly allowed whale hunts when the hunts clearly endangered the whales.<sup>12</sup> The IWC acted more as an endorser and approver of the thoughtless whale harvests than as a body that "ensure[d] proper and effective conservation . . . of whale stocks."<sup>13</sup> Critics have accused the IWC as acting for most of its life as the overseer

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62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72 [hereafter 1946 Convention]. The 1946 Convention retains most of the 1931 Convention's substantive provisions. M. BEAN, *supra* note 3, at 262-63. The 1949 Whaling Convention Act, 16 U.S.C. §§ 916-916l (1988), implements the 1946 Convention. Only 15 nations joined the 1946 Convention, but the signatories included the Soviet Union, 1946 Convention, *supra*, plenipotentiaries, a major whaling nation. By the second meeting of the International Commission on Whaling, *see infra* notes 8-9 and accompanying text, Japan, another major whaling nation, agreed to adhere to the 1946 Convention and was thus entitled to appoint a member to the Commission. INTERNATIONAL COMM'N ON WHALING, SECOND REPORT OF THE COMMISSION [1950-51] 3 (1951). As of 1989, 38 countries were signatories to the 1946 Convention. INTERNATIONAL WHALING COMM'N, CHAIRMAN'S REPORT OF THE 41ST MEETING 1 (1989) [hereafter CHAIRMAN'S REPORT: 41ST MEETING].

<sup>7</sup> M. BEAN, *supra* note 3, at 263.

<sup>8</sup> 1946 Convention, *supra* note 6, art. III, para. 1.

<sup>9</sup> *Id.* art. V, para. 1. Perhaps due to the broad powers the 1946 Convention granted to the IWC, only slightly more than one-half of the signatories to the 1931 Convention joined the 1946 Convention. *See supra* notes 4, 6 and accompanying text.

<sup>10</sup> 1946 Convention, *supra* note 6, preamble.

<sup>11</sup> *See* Wilkinson, *supra* note 2, at 273.

<sup>12</sup> *See infra* note 14 and accompanying text.

<sup>13</sup> 1946 Convention, *supra* note 6, preamble. Another express purpose of the 1946 Convention is to properly and effectively conserve whale stocks. *Id.*

of the successive decimations of whale populations.<sup>14</sup>

In the mid-1960s the IWC began to remedy the drastic reduction of whale stocks resulting from its past lenient policies.<sup>15</sup> The United States fostered much of the IWC's conservationist awakening by introducing policy proposals and advocating reforms to further the conservation of whales.<sup>16</sup> Some of the most important of these proposals have advocated a worldwide ban on commercial whaling.<sup>17</sup> After ten years of United States proposals, the IWC approved a moratorium of commercial whaling in 1982.<sup>18</sup> By implementing the moratorium the IWC sent a clear message to whaling nations: until scientific research methods are better

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<sup>14</sup> See M. BEAN, *supra* note 3, at 264; see also Wilkinson, *supra* note 2, at 273. As one commentator noted:

The IWC gave new meaninglessness to the words "management" and "catch limits." Hundreds of thousands of whales died under a quota system that catered to the needs of the industry. The IWC became a "distribution center" for whales, concerned more with "supply and demand" than scientific fact. By the 1970s, eight of the 10 species of great whales were "commercially extinct," not worth the expense of hunting.

MacKay, *Whaling and Dealing*, *Christian Sci. Monitor*, July 12, 1990, at 19, col. 1.

<sup>15</sup> In 1966 the IWC prohibited all commercial taking of blue and humpback whales. *Chairman's Report of the Seventeenth Meeting*, in INTERNATIONAL COMM'N ON WHALING, SEVENTEENTH REPORT OF THE COMMISSION [1965-66] 17, 18-19 (1967). In 1975 the IWC prohibited the commercial taking of fin and sei whales in the North Pacific, *Chairman's Report of the Twenty-Seventh Meeting*, in INTERNATIONAL WHALING COMM'N, TWENTY-SEVENTH REPORT OF THE COMMISSION [1975-76] 6, 8 (1977) [hereafter TWENTY-SEVENTH REPORT]; see INTERNATIONAL COMM'N ON WHALING, REPORT AND PAPERS OF THE SCIENTIFIC COMMITTEE OF THE COMMISSION 48 annex J at 50 (1975) [hereafter PAPERS OF THE SCIENTIFIC COMMITTEE] (classifying fin and sei whales as protected stock), expanding to worldwide prohibitions in 1978. *Chairman's Report of the Thirtieth Annual Meeting*, in INTERNATIONAL WHALING COMM'N, TWENTY-NINTH REPORT OF THE INTERNATIONAL WHALING COMMISSION [1977-78] 21, 23-24 (1979) [hereafter TWENTY-NINTH REPORT] (classifying fin and sei whales as protected stock in all areas). One commentator credits movements such as "Save the Whales" for the alacrity with which United States policy evolved. Wilkinson, *supra* note 2, at 272. Another commentator states that "[g]rass-roots pressure has historically compelled the US to take the lead in obstructing the whaling countries." MacKay, *supra* note 14, at 19, col. 3.

<sup>16</sup> See *infra* Part I(C).

<sup>17</sup> See *infra* notes 85-103 and accompanying text.

<sup>18</sup> See *infra* note 102 and accompanying text.

suites to evaluating the effects of commercial whaling on whale populations, the IWC is unwilling to risk further, possibly irreparable, losses to whale stocks.<sup>19</sup> The moratorium reflects an approach toward whale conservation that is as cautious and conservative as earlier IWC policy was speculative and exploitative.

The 1946 Convention contains two major limitations to the IWC's powers, however, that provide loopholes for member nations seeking to circumvent the IWC's recent efforts to conserve whales. The first limitation is a scientific research exception.<sup>20</sup> Under this exception a member nation may grant itself a special permit authorizing a whale hunt for "scientific research" purposes regardless of IWC regulations.<sup>21</sup> By providing any ostensibly scientific purpose for a catch, a member nation may avoid any restrictions set by the IWC.<sup>22</sup>

The second limitation of the IWC's power to conserve whales is an exception to IWC restrictions for certain species that are hunted by aborigines.<sup>23</sup> Citing this exception as authority, the United States has persuaded the IWC to allow native Alaskan Eskimos to continue hunting bowhead whales in the Bering Sea despite the whales' small numbers.<sup>24</sup> Aside from a temporary reversal in 1977,<sup>25</sup> the IWC has expressly allowed Eskimos to hunt the bowhead since the 1946 Convention.<sup>26</sup> Conservationists have criticized the United States' application of the aboriginal

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<sup>19</sup> See *infra* notes 95-96 and accompanying text.

<sup>20</sup> 1946 Convention, *supra* note 6, art. VIII.

<sup>21</sup> *Id.* art. VIII, para. 1.

<sup>22</sup> Critics have repeatedly accused Japan of misusing the scientific research exception to circumvent the current moratorium on commercial whaling and other quotas. See *infra* note 200 (discussing accusations of Japan's abuse of scientific research exception). But see Sumi, *The "Whale War" Between Japan and the United States: Problems and Prospects*, 17 DEN. J. INT'L L. & POL'Y 317, 320 (1989) (calling characterization of Japanese scientific whaling as commercial whaling a "deplorable misunderstanding").

<sup>23</sup> 1946 Convention, *supra* note 6, sched., para. 2. The 1946 Convention prohibits any whaling of grey or right whales "except when the meat and products of such whales are to be used exclusively for local consumption by the aborigines." *Id.* Right whales are defined as "any whale known by the name . . . bowhead." *Id.* sched., para. 18. While the 1931 Convention contained a similar provision forbidding the taking of right whales, it did not include the bowhead in the definition of right whale. 1931 Convention, *supra* note 4, art. 4.

<sup>24</sup> See *infra* notes 173, 191 and accompanying text.

<sup>25</sup> See *infra* notes 152-58 and accompanying text.

<sup>26</sup> See 1946 Convention, *supra* note 6, sched., para. 2.

whaling exception to the Alaskan Eskimos.<sup>27</sup> Critics argue that the bowhead whale, an endangered species, has a population too small to support the Eskimo hunts.<sup>28</sup>

Recently, Japan renewed the controversy surrounding the aboriginal exception and its application in Alaska. Japan, a member nation that has objected to many of the IWC's conservationist reforms, has argued that it qualifies for a sort of aboriginal exception from the 1982 moratorium on commercial whaling.<sup>29</sup> Specifically, the Japanese argue that certain coastal fishing villages in Japan have the same degree of cultural dependence on the minke whale as the Eskimos do on the bowhead.<sup>30</sup> Since cultural dependence supports the Eskimos' hunt of an extremely diminished species, the Japanese argue, their own cultural dependence should allow them to be excepted from the ban on commercial whaling.<sup>31</sup>

This Comment analyzes the United States' abuse of the Convention's aboriginal whaling exception and the contradiction that the abuse creates in the United States' role as whale protector. Part I discusses the evolution of the IWC.<sup>32</sup> Largely due to the domestic and international efforts of the United States, the IWC has been transformed from a whale industry lobby group to a whale conservation group.<sup>33</sup> Part II analyzes the aboriginal

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<sup>27</sup> The National Marine Fisheries Services (N.M.F.S.) received an overwhelming number of responses from environmental groups to an impact statement N.M.F.S. issued regarding the aboriginal exception. These letters are reprinted in NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC & ATMOSPHERIC ADMIN., U.S. DEP'T COMMERCE, FINAL ENVIRONMENTAL IMPACT STATEMENT, INTERNATIONAL WHALING COMMISSION'S DELETION OF NATIVE EXEMPTION FOR THE SUBSISTENCE HARVEST OF BOWHEAD WHALES 115-247 (October 1977) [hereafter N.M.F.S. ENVIRONMENTAL IMPACT STATEMENT]. See, e.g., Letter from Patricia Forkan, Program Coordinator for the Humane Society of the United States, to Robert Schoning, Director of the N.M.F.S. (Sept. 21, 1977) [hereafter Humane Society Response to N.M.F.S. Environmental Impact Statement] reprinted in N.M.F.S. ENVIRONMENTAL IMPACT STATEMENT, *supra*, at 168.

<sup>28</sup> Humane Society Response to N.M.F.S. Environmental Impact Statement, reprinted in N.M.F.S. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 27, at 168, 171 (arguing bowhead's number of only 1,000 justifies a zero quota for their taking).

<sup>29</sup> See *infra* notes 200-04 and accompanying text.

<sup>30</sup> See *infra* note 217 and accompanying text.

<sup>31</sup> See *infra* notes 203-04 and accompanying text.

<sup>32</sup> See *infra* notes 37-58 and accompanying text.

<sup>33</sup> See *infra* notes 59-84 and accompanying text.

exception and its abuse by the United States.<sup>34</sup> The Alaskan aboriginal exception satisfies the United States' concern for its native constituents, but using the exception directly contradicts other United States domestic and foreign policy regarding the whale. Part III discusses the dangerous precedent set by the Alaskan aboriginal exception.<sup>35</sup> The Alaskan aboriginal exception provides any country (such as Japan) with a justification of cultural heritage to hunt whales no matter how diminished the species. Part IV contains a proposal addressing the precedential effect of the Alaskan aboriginal whaling exception.<sup>36</sup> This Comment argues that the IWC should re-examine the application of the aboriginal whaling exception in Alaska and conform its treatment of the Eskimos to its general policy of conservative whale management. The IWC should require from the United States, on behalf of the Eskimos, the same high burden of proof that it requires from other member nations. This requirement is consistent with a conservative approach to the conservation of whales.

## I. THE EVOLUTION OF THE IWC

### A. *History of the IWC*

The 1946 Convention establishes the IWC,<sup>37</sup> a commission with many responsibilities and a wide jurisdiction. The 1946 Convention grants the IWC power to designate certain species as protected, fix open or closed hunting seasons or areas, set catch limits, and specify acceptable methods of whaling.<sup>38</sup> The IWC exercises this power through amendments to a part of the Convention known as the Schedule.<sup>39</sup> Amending the Schedule, however, is not easy. Amendment requires the approval of three-fourths of the member nations.<sup>40</sup> In addition, even if the IWC adopts an amendment, a nation may exempt itself from the amendment by filing an "objection" to it within ninety days of the proposed amendment's adoption.<sup>41</sup> These procedures, which

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<sup>34</sup> See *infra* notes 112-97 and accompanying text.

<sup>35</sup> See *infra* notes 198-229 and accompanying text.

<sup>36</sup> See *infra* notes 230-32 and accompanying text.

<sup>37</sup> 1946 Convention, *supra* note 6, art. III, para. 1.

<sup>38</sup> *Id.* art. V, para. 1.

<sup>39</sup> *Id.* art. V.

<sup>40</sup> *Id.* art. III, para. 2.

<sup>41</sup> *Id.* art. V, para. 3. An objecting nation will not be obligated to abide by the amendment. *Id.*; see also Wilkinson, *supra* note 2, at 276 (listing instances in which nations have utilized objection).

make it difficult to implement policy and easy to escape policy finally implemented, may be at least part of the cause of the IWC's early ineffectiveness.<sup>42</sup>

In addition to these structural weaknesses, the whaling industry exerted tremendous influence on the IWC's substantive policies in the early years of the IWC.<sup>43</sup> Although the Convention requires IWC policy to be "based on scientific findings,"<sup>44</sup> quotas the IWC set were not based on scientific evidence, but on the whaling industry's needs.<sup>45</sup> When scientific evidence clashed with industry needs, the industry invariably prevailed.<sup>46</sup> One member of the IWC's Scientific Committee<sup>47</sup> and other commentators have pointed to repeated instances where the IWC manipulated scientific evidence to meet political pressures from its members.<sup>48</sup>

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<sup>42</sup> Wilkinson, *supra* note 2, at 275. Wilkinson blames the "deplorable state of whale conservation efforts" on these "structural defects" of the Convention. *Id.*; see also M. BEAN, *supra* note 3, at 264 (noting individual nations may frustrate coordinated IWC conservation efforts by filing objections).

<sup>43</sup> See *supra* notes 11-14 and accompanying text.

<sup>44</sup> 1946 Convention, *supra* note 6, art. V, para. 2(b).

<sup>45</sup> Wilkinson, *supra* note 2, at 273-74. In addition to scientific findings, however, the 1946 Convention does require the IWC to "take into consideration the interests of the consumers of whale products and the whaling industry." 1946 Convention, *supra* note 6, art. V, para. 2(d). Between these apparently conflicting objectives, the industry's interests appear to have been more influential than scientific findings in the establishment of IWC policies. M. BEAN, *supra* note 3, at 263-64.

<sup>46</sup> Wilkinson, *supra* note 2, at 274 & n.16 (discussing how IWC manipulated whale population data to allow continued whaling despite evidence whaling was seriously depleting whale populations).

<sup>47</sup> Essentially, there are three important tiers of the IWC. They are the Scientific Committee, the Technical Committee, and the plenary session. J. CHERFAS, *THE HUNTING OF THE WHALE* 111-12 (1988). The committees are composed of those members that wish to serve on them. *Id.* The Scientific Committee was created to assess whale stocks. K. ALLEN, *supra* note 2, at 26-27. The Scientific Committee, after assessing the whale stocks, makes recommendations to the Technical Committee. J. CHERFAS, *supra*, at 112. The Technical Committee forwards the information from the Scientific Committee to the plenary of the IWC, where a three-quarter majority of the plenary can change the Schedule. *Id.*

<sup>48</sup> Sidney Holt, a member of the IWC's Scientific Committee stated:

Time and again we have seen situations in which the present annual catch level might be, say 5,000 animals, scientists have said their best guess of the sustainable yield is, say 2,000, and the next catch has been set at 3,500 with a flurry of publicity about how responsible and concessionary the authorities have been,



Instead of regulating whaling activities, the IWC effectively guaranteed whalers *carte blanche* in choosing the manner and amount of their catches.<sup>49</sup> Commercial whaling reached its peak in the 1961-62 season, when commercial whalers harvested 67,000 whales.<sup>50</sup>

Public outcry condemning practices of whaling countries like Japan and the Soviet Union followed the harvests of the early 1960s.<sup>51</sup> This condemnation was first formalized in a resolution passed by the 1972 United Nation Conference on the Human Environment in Stockholm.<sup>52</sup> The resolution called for a ten-year moratorium on commercial whaling.<sup>53</sup> Also in 1972 the IWC made the first notable changes in its policies. That year, for the first time, the IWC attempted to regulate whale killing by species and geographic region.<sup>54</sup> The IWC subsequently has made additional efforts to remedy the effects of its past policies by adopting scientifically sound conservationist policies such as the moratorium on commercial whaling.<sup>55</sup>

The United States has played a major role in enforcing and shaping the IWC's conservationist policies.<sup>56</sup> The United States

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and what great sacrifices the industry has made! When, as so often has been the case, the scientists got it wrong, and the number should have been closer to 1,000, the situation is doubly tragic.

Holt, *Mammals in the Sea*, 15 *AMBIO* 126, 132 (1986). Jeremy Cherfas, a commentator for Britain's *New Scientist* wrote that: "The simple fact is that although the IWC is supposed to base its management on science, it failed for a long time to adopt the suggestions of the majority of its scientists. . . . And even where the scientists were quite certain, and quite unanimous, the IWC did not always listen." J. CHERFAS, *supra* note 47, at 147-48. In 1959 several nations threatened to resign from the IWC if the quotas were not raised. Wilkinson, *supra* note 2, at 274 n.15. The IWC acceded to the threatening nations' requests, rationalizing that the effect of higher quotas would be less detrimental to the stocks because it prevented the nations from quitting the Commission and striking out on their own. FRIENDS OF THE EARTH, *THE WHALE MANUAL* 25 (1978) [hereafter *WHALE MANUAL*] (quoting *Chairman's Report of the 11th Meeting* [of IWC]).

<sup>49</sup> See J. CHERFAS, *supra* note 47, at 114-15.

<sup>50</sup> Wilkinson, *supra* note 2, at 274 (citing GREENPEACE, *WILDLIFE FACT SHEET ON WHALES* 3 (1986)).

<sup>51</sup> See M. BEAN, *supra* note 3, at 264 n.46.

<sup>52</sup> J. CHERFAS, *supra* note 47, at 115-16.

<sup>53</sup> *Id.* at 116.

<sup>54</sup> Wilkinson, *supra* note 2, at 274-75.

<sup>55</sup> See *infra* notes 102-07 and accompanying text.

<sup>56</sup> See M. BEAN, *supra* note 3, at 264.

asserts its position in two major ways: first, by imposing sanctions set by domestic statutes (serving a policing function);<sup>57</sup> and second, by proposing policies that advocate a conservative approach to whale management, such as the moratorium, at IWC meetings (serving a policy-making function).<sup>58</sup>

*B. United States Statutory Levers Used to Enforce IWC Policies*

When the 1946 Convention was being drafted,<sup>59</sup> the United States insisted that the only provision for enforcement of the Convention be removed.<sup>60</sup> Today, in contrast, the “only effective sanctions to implement IWC decisions are provided by the U.S.”<sup>61</sup> One commentator has called the United States the “policeman for the IWC.”<sup>62</sup> The United States fulfills its role as “policeman,” or enforcer, through domestic laws which penalize foreign nations for violating IWC regulations or other conservation measures affecting the whale. The “principal statutory levers”<sup>63</sup> the United States uses to influence foreign nations and enforce IWC policies are the Pelly Amendment to the Fishermen’s Protective Act of 1967 (Pelly Amendment),<sup>64</sup> the Packwood Amendment to the Fishery Conservation and Management Act (Packwood Amendment),<sup>65</sup> and the Marine Mammal Protection Act (MMPA).<sup>66</sup>

Congress passed the Pelly Amendment in an effort to cure Denmark’s refusal to follow salmon fishing quotas set by the Fishermen’s Protective Act.<sup>67</sup> The Amendment provides a two step

<sup>57</sup> See *infra* notes 61-84 and accompanying text.

<sup>58</sup> See *infra* notes 85-103 and accompanying text.

<sup>59</sup> See J. CHERFAS, *supra* note 47, at 111.

<sup>60</sup> Wilkinson, *supra* note 2, at 276 (citing Interview with Thomas Garrett, former Deputy Commissioner and Acting Commissioner for the United States to the IWC (April 12, 1988)).

<sup>61</sup> J. CHERFAS, *supra* note 47, at 113 (terming this a “fine irony”).

<sup>62</sup> Wilkinson, *supra* note 2, at 276.

<sup>63</sup> M. BEAN, *supra* note 3, at 265.

<sup>64</sup> Pelly Amendment to the Fishermen’s Protective Act of 1967, Pub. L. No. 92-219, 85 Stat. 786 (1971) (codified as amended at 22 U.S.C. § 1978 (1988)) [hereafter Pelly Amendment].

<sup>65</sup> Packwood Amendment to the Fishery Conservation and Management Act, Pub. L. No. 96-61, 93 Stat. 407 (1979) (codified at 16 U.S.C. § 1821(e)(2) (1988)) [hereafter Packwood Amendment].

<sup>66</sup> Marine Mammal Protection Act, Pub. L. No. 92-522, 86 Stat. 1027 (1972) (codified at 16 U.S.C. §§ 1361-1401 (1988)) [hereafter MMPA].

<sup>67</sup> 117 CONG. REC. H34,752 (1971) (statement of Rep. Pelly). *But see* Wilkinson, *supra* note 2, at 280 (noting Rep. Pelly mentioned applicability of

process through which the United States may sanction nations that "diminish the effectiveness of an international fishery conservation program."<sup>68</sup> First, the Secretary of Commerce certifies the offending nation.<sup>69</sup> Second, the President makes a discretionary determination whether fish products from the offending nation shall be prohibited from importation.<sup>70</sup> If the President declines to embargo the offending nation, the President must provide Congress with an explanation for the inaction.<sup>71</sup>

In 1979, perhaps due to discontent with the Pelly Amendment's discretionary sanctions, Congress passed the Packwood Amendment.<sup>72</sup> Unlike the Pelly Amendment, the Packwood Amendment applies specifically to the 1946 Convention<sup>73</sup> and removes any discretion in imposing sanctions.<sup>74</sup> The Packwood Amendment provides that once the Secretary of Commerce certifies a nation for diminishing the effectiveness of the 1946 Convention, certain mandatory sanctions shall follow.<sup>75</sup> These sanctions include an immediate fifty percent reduction in the offending nation's quota for fishing in the United States' fishery conservation zone.<sup>76</sup>

The last statutory lever the United States uses to protect whales is the MMPA. The MMPA places a moratorium on all imports containing marine mammal products.<sup>77</sup> Like the Packwood Amendment, the MMPA deletes any discretion in imposing sanc-

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the amendment to whaling when measure was brought to the floor). Ironically, the Pelly Amendment has not yet been used to enforce an international fishing agreement, but has been used eight times in the enforcement of the 1946 Convention. *Id.*

<sup>68</sup> Pelly Amendment, § 1978(a)(1); *see also* Wilkinson, *supra* note 2, at 281.

<sup>69</sup> Pelly Amendment, § 1978(a)(1), (2).

<sup>70</sup> *Id.* § 1978(a)(4).

<sup>71</sup> *Id.* § 1978(b).

<sup>72</sup> Wilkinson, *supra* note 2, at 280-81 (suggesting ineffectiveness of Pelly Amendment in regulating whaling activities was motivation behind Packwood Amendment).

<sup>73</sup> Packwood Amendment, § 1821(e)(2)(A).

<sup>74</sup> *See* Wilkinson, *supra* note 2, at 281.

<sup>75</sup> Packwood Amendment, § 1821(e)(2)(B).

<sup>76</sup> *Id.*

<sup>77</sup> MMPA, § 1371. In addition, the MMPA directs the Secretary of Commerce to initiate the amendment of any international treaty that will "make such treaty consistent with the purposes and policies" of the MMPA. *Id.* § 1378(a)(4). This instruction enables the United States representative to the IWC to "press vigorously for more stringent conservation measures." M. BEAN, *supra* note 3, at 265.

tions.<sup>78</sup> Progressing a step further than the Packwood Amendment, the MMPA involves no certification process, providing instead an outright ban on all products containing marine mammal products.<sup>79</sup> Up until 1972, when Congress passed the MMPA, many imports into the United States contained whale by-products.<sup>80</sup> The resulting embargo by the United States has greatly diminished the market for goods containing whale bone, oil, and baleen.<sup>81</sup> Indeed, as a result of the MMPA ban, whale bone, oil, and baleen are no longer the primary goal of commercial whalers.<sup>82</sup>

The United States uses the Pelly and Packwood Amendments in two general ways to further the conservationist policies of the IWC. First, the United States uses the amendments to enforce quotas set by the IWC.<sup>83</sup> Second, the United States uses the amendments to persuade nonmember countries to join the IWC, thereby discouraging these countries from undermining IWC attempts to regulate whaling.<sup>84</sup>

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<sup>78</sup> MMPA, § 1371(a).

<sup>79</sup> *Id.*

<sup>80</sup> Wilkinson, *supra* note 2, at 280.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* Today most commercial whalers seek to market whale meat for human consumption. *Id.*

<sup>83</sup> In 1974 Japan and the Soviet Union were certified under the Pelly Amendment for exceeding minke whale quotas. Message from President Gerald Ford to Congress, 1 PUB. PAPERS 47, 47 (Jan. 16, 1975). President Ford rejected imposing sanctions because Japan and the Soviet Union agreed to observe future quotas. *Id.* at 48. In 1985 the Soviet Union was again certified under the Pelly Amendment for exceeding quotas in Antarctica. Wilkinson, *supra* note 2, at 281 (citing letter from Secretary of State Malcolm Baldrige to President Ronald Reagan (Apr. 1, 1985)). President Reagan declined to impose sanctions because the Soviet Union again agreed to abide by the IWC's quotas in the future. President's Message to Congress Reporting on the Whaling Activities of the Soviet Union, 1 PUB. PAPERS 704, 704-05 (May 31, 1985). For other examples of the United States' use of the amendments to enforce quotas see Wilkinson, *supra* note 2, at 281-83.

<sup>84</sup> Wilkinson, *supra* note 2, at 282-83. Even when the IWC imposed numerical quotas and classified protected stocks, the extent of whaling conducted outside of the regime undermined the conservation efforts. *Id.* at 282. Additionally, some member countries provided financing for nonmember countries' whaling, afterwards importing the resulting products. *Id.* (citing generally D. DAY, *THE WHALE WAR* (1987)). In 1976 and 1978 the IWC invited nonmember countries to join the IWC and urged them to stop exceeding IWC quotas. *Id.* (citing background document to

C. *The United States as Policy Proponent: The Moratorium*

In addition to enacting domestic laws that influence foreign nations and enforce IWC policies, the United States has been active in determining IWC policy. The campaign to establish a moratorium on commercial whaling provides perhaps the best illustration of the United States' activism.

The first indication of the United States' commitment to establishing a moratorium on commercial whaling came in 1972.<sup>85</sup> At the 1972 United Nations Conference on the Human Environment the United States recommended a ten-year moratorium on commercial whaling.<sup>86</sup> Then, at the twenty-fourth meeting of the

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letter from Secretary of Commerce Juanita Kreps to President Jimmy Carter (Dec. 14, 1978)). In 1976 the United States issued warnings to several nonmember nations threatening them with sanctions if they did not join the IWC. *Id.* In 1978 the Secretary of Commerce certified nonmembers Peru, Chile, and the Republic of Korea for whaling outside of the Convention. *Id.* at 282-83 (citing letter from Secretary of Commerce Juanita Kreps to President Jimmy Carter (Dec. 14, 1978)). President Carter refrained from issuing sanctions after the countries committed to becoming members of the IWC. Message from President Jimmy Carter to Congress, 15 WEEKLY COMP. OF PRES. DOC. 265, 267-68 (Feb. 13, 1979).

<sup>85</sup> One commentator termed the moratorium a "long-pursued objective" of the United States. M. BEAN, *supra* note 3, at 267.

<sup>86</sup> See Statement by Dr. [Robert M.] White [of United States delegation to United Nations Conference on the Human Environment Held at Stockholm in 1972], reprinted in 67 DEP'T ST. BULL. 112 (1972) [hereafter Statement by Dr. White]. Dr. White, of the National Oceanic and Atmospheric Agency of the United States Department of Commerce, stated:

We feel that strong action in restoring the world whale stocks is a matter of great urgency.

. . . . .  
It is not enough to seek protection for a species only after its numbers have been so reduced as to threaten its existence; when a species is that depleted it no longer represents a resource for human welfare, nor can it play any role in the marine ecosystem.

. . . . .  
A moratorium would allow time for stocks to start rebuilding. A moratorium would allow time to develop a fund of knowledge as basis [sic] for effective long-term management.

*Id.* at 112-13. Japan, opposed to a complete moratorium, proposed that the moratorium be limited to endangered or depleted whale stocks. Sumi, *supra* note 22, at 329 (citing U.N. Press Release, HE/S/51, at 1 (June 9, 1972)). Dr. White responded that so limiting the moratorium would merely preserve the status quo that had endangered the whales in the first place. Statement by Dr. White, *supra*, at 113. The Conference adopted the recommendation for the moratorium. Recommendation 33, REPORT OF THE

IWC, later in 1972, the United States Commissioner moved for a global moratorium on commercial whaling.<sup>87</sup> The Technical Committee rejected the motion,<sup>88</sup> however, opting instead to seek support for increased research efforts and for quotas that reflect the best available knowledge of the state of the whale stocks.<sup>89</sup> The United States proposed the ban again in 1973,<sup>90</sup> and 1974.<sup>91</sup> Each year the ban failed to win the necessary three-quarters support of the member nations in the IWC's plenary sessions.<sup>92</sup>

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UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT at 12, U.N. Doc. A/CONF.48/14/Rev.1, U.N. Sales No. E.73.II.A.14 (1973). Not all commentators were pleased with the outcome of the conference. See Sumi, *supra* note 22, at 330 (characterizing Conference as "full of over zealousness" at the "instigation of the environmentalists").

<sup>87</sup> *Chairman's Report of the Twenty-Fourth Meeting*, in INTERNATIONAL COMM'N ON WHALING, TWENTY-FOURTH REPORT OF THE COMMISSION [1972-73] 20, 24-25 (1974) [hereafter TWENTY-FOURTH REPORT]. The United States Commissioner explained to the Technical Committee that "the state of knowledge of the whale stocks [is] so inadequate that it is only common prudence to suspend whaling; this [is] necessary so that scientific efforts can be redoubled and new research techniques developed." *Id.* at 24.

<sup>88</sup> *Id.* at 25.

<sup>89</sup> *Id.* The Technical and the Scientific Committees agreed on this approach. *Id.* at 24-25; see also *Report of the Scientific Committee*, in INTERNATIONAL COMM'N ON WHALING, TWENTY-THIRD REPORT OF THE COMMISSION [1971-72] 28, 38-39 (1973) [hereafter TWENTY-THIRD REPORT].

<sup>90</sup> *Chairman's Report of the Twenty-Fifth Meeting*, in INTERNATIONAL COMM'N ON WHALING, TWENTY-FIFTH REPORT OF THE COMMISSION [1973-74] 24, 26 (1975) [hereafter TWENTY-FIFTH REPORT]. The 1973 proposal was rejected by the Scientific Committee but approved by the Technical Committee. *Id.* The Scientific Committee argued that a moratorium was not biologically justified and that prudent management required regulation of the stocks individually, not *en masse* by a blanket moratorium. *Id.* Instead of a moratorium, the Scientific Committee recommended that members intensify their research. *Id.* In the plenary session eight delegations voted in favor of the moratorium, five against, and one abstained. *Id.* The motion was rejected because it did not have the requisite three-fourths approval. *Id.*

<sup>91</sup> *Chairman's Report of the Twenty-Sixth Meeting*, in INTERNATIONAL COMM'N ON WHALING, TWENTY-SIXTH REPORT OF THE COMMISSION [1974-75] 24, 25 (1976) [hereafter TWENTY-SIXTH REPORT]. In 1974 the Scientific Committee again rejected the moratorium as unjustified biologically and as imprudent management. *Report of the Scientific Committee*, in TWENTY-FIFTH REPORT, *supra* note 90, at 62, 64. The Commission itself adopted an alternative proposal "designed to classify the whale stocks into categories and to provide for their individual management." TWENTY-SIXTH REPORT, *supra*, at 5; see also *infra* note 93.

<sup>92</sup> See *supra* notes 90-91.

In 1974, almost as a compromise, the IWC adopted the New Management Procedure whereby whale stocks were divided into three categories.<sup>93</sup> These categories were: (1) Initial Management Stocks, (2) Sustained Management Stocks, and (3) Protection Stocks.<sup>94</sup> Under the New Management Procedure, which is still in effect today, the IWC allows commercial whaling of Initial and Sustained Management Stocks only, subject to the advice of the Scientific Committee.<sup>95</sup> The Procedure does not permit any

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<sup>93</sup> *Chairman's Report of the Twenty-Sixth Meeting*, in TWENTY-SIXTH REPORT, *supra* note 91, at 24, 25-26. Australia proposed the resolution on the grounds that management of whale stocks should be based on a number of factors including: (1) the maximum sustainable yield (MSY) of the species, (2) total weight of the whales, and (3) interactions between the species and the marine ecosystem. *Id.* at 25. Australia proposed that dividing whale stocks into three categories based on these factors would provide more effective management. *Id.* at 25-26. The United States Commissioner stated that the United States still supported the ten-year moratorium but voted for the resolution because "it represented a significant step forward in the management of the world's whales." *Id.* at 26.

The New Management Procedure utilized a stock by stock study of whales to oversee their conservation. *Id.* at 25-26. One of the methods used to determine a stock's viability is a determination of the stock's "maximum sustainable yield" or the optimum population level at which the stock is most likely to survive and sustain themselves. See WHALE MANUAL, *supra* note 48, at 68; *Report of the Scientific Committee*, in TWENTY-FIFTH REPORT, *supra* note 90, at 62, 63. This procedure allows whaling quotas if the stock's population is above the maximum sustainable yield level. *Id.* For example, through a determination that the Bering Sea's bowhead whales' population was below the maximum sustainable yield in 1977, the IWC determined that the species could no longer survive the aboriginal hunts. See *infra* notes 152-55 and accompanying text (discussing IWC's assumption of bowhead's MSY).

By utilizing the maximum, as opposed to minimum, sustainable yield as the optimum population level, the IWC conservatively leaves any room for error in favor of the whales. For a survey on methods and models used in whale conservation see K. ALLEN, *supra* note 2. The United States and Australia criticized the stock by stock approach during renewed proposals for the moratorium. See, e.g., *Report of the Scientific Committee*, in INTERNATIONAL WHALING COMM'N, THIRTIETH REPORT OF THE INTERNATIONAL WHALING COMMISSION [1978-79] 42, 45-46 (1980) [hereafter THIRTIETH REPORT].

<sup>94</sup> *Chairman's Report of the Twenty-Sixth Meeting*, in TWENTY-SIXTH REPORT, *supra* note 91, at 24, 26.

<sup>95</sup> *Id.* Initial Management Stocks may be "reduced in a controlled manner to achieve MSY . . . or optimum levels." *Id.* Sustained Management Stocks should be "maintained at or near MSY levels and then at optimum levels." *Id.* Note that while the New Management Procedure is

commercial whaling of the Protection Stocks.<sup>96</sup>

The New Management Procedure appears to have appeased the United States because it made no additional proposals for a moratorium for the next five years. In 1979, however, the United States again proposed a global ban on commercial whaling of all stocks.<sup>97</sup> At the 1979 IWC meeting the United States Commissioner criticized the effectiveness of the New Management Procedure.<sup>98</sup> Yet, again, the proposal for the moratorium failed to win three-quarters support.<sup>99</sup> In 1980<sup>100</sup> and 1981<sup>101</sup> the United States continued to move unsuccessfully for a moratorium.

Finally, at the thirty-fourth Annual Meeting, in 1982, the IWC

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still in effect today, it will likely be amended in 1991. *See infra* notes 106-07 and accompanying text (explaining "Revised Management Procedure").

<sup>96</sup> *Chairman's Report of the Twenty-Sixth Meeting*, in TWENTY-SIXTH REPORT, *supra* note 91, at 24, 26. Protection stocks will be "fully protected." *Id.*

<sup>97</sup> On June 1, 1979 President Carter issued the following statement:

I believe that there is strong international support for efforts to preserve the world's whales. To reflect that support, the United States at this meeting will propose that all nations stop commercial whaling now, until there is an effective, comprehensive conservation program for whales which will guarantee their continued survival.

Sumi, *supra* note 22, at 333 (quoting Statement of the White House, at 2 (June 1, 1979)).

<sup>98</sup> *Id.* at 333 (citing Opening Statement of R.A. Frank, United States Commissioner, 2 (July 9, 1979)) (arguing for indefinite moratorium on commercial whaling). Specifically, Commissioner Frank criticized the New Management Procedure as unable to reflect sudden declines in whale populations. *Id.* In addition, member nations had failed to provide sufficient research data or fund the IWC to the extent necessary for the Procedure to operate effectively. *Id.*

Some members of the Scientific Committee believed that a moratorium was appropriate because the stock by stock management procedure was too uncertain. *Report of the Scientific Committee*, in THIRTIETH REPORT, *supra* note 93, at 42, 45-46 (stating that some members believe that the "scientific uncertainty is so widespread . . . that the only appropriate way to assure stocks are not over-exploited is through a moratorium").

<sup>99</sup> *Chairman's Report of the Thirty-First Annual Meeting*, in THIRTIETH REPORT, *supra* note 93, at 25, 26.

<sup>100</sup> *Chairman's Report of the Thirty-Second Annual Meeting*, in INTERNATIONAL WHALING COMM'N, THIRTY-FIRST REPORT OF THE INTERNATIONAL WHALING COMMISSION [1979-80] 17, 18-19 (1981) [hereafter THIRTY-FIRST REPORT].

<sup>101</sup> *Chairman's Report of the Thirty-Third Annual Meeting*, in INTERNATIONAL WHALING COMM'N, THIRTY-SECOND REPORT OF THE INTERNATIONAL WHALING COMMISSION [1980-81] 17, 20 (1982) [hereafter THIRTY-SECOND REPORT].



adopted a moratorium on commercial whaling.<sup>102</sup> The moratorium has provoked criticism and dissent from member countries experiencing domestic pressures to resume commercial whaling. These nations usually argue that the moratorium is not based on scientific evidence, and that, therefore, it violates the 1946 Convention's mandate that IWC policy be "based on scientific findings."<sup>103</sup>

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<sup>102</sup> *Chairman's Report of the Thirty-Fourth Annual Meeting*, in INTERNATIONAL WHALING COMM'N, THIRTY-THIRD REPORT OF THE INTERNATIONAL WHALING COMMISSION [1981-82] 20, 20-21 (1983) [hereafter THIRTY-THIRD REPORT]. Five IWC members submitted moratorium proposals. *Id.* at 20. The five members were the Seychelles, the United Kingdom, the United States, France, and Australia. *Id.* The Technical Committee and then the plenary session finally passed the Seychelles' proposal. *Id.* at 20-21. The final vote was 27 votes in favor, 7 against, and 5 abstentions. *Id.* at 21. The IWC amended the Schedule to contain the following paragraph

[The] catch limits for . . . the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 . . . the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.

*Id.*

<sup>103</sup> 1946 Convention, *supra* note 6, art. V, para. 2. For example, in the 1990 meeting, Iceland, Japan, and Norway all moved for an end to the moratorium arguing that the moratorium was not supported by scientific evidence. *Whale Hunting Ban Upheld by Panel*, Chi. Tribune, July 8, 1990, § 1, at 22, col. 1; *see also* Shabecoff, *Ban on Hunting of Whales Upheld*, N.Y. Times, July 10, 1990, at C4, col. 1. Iceland cited statistics that estimated the stock of minke whales it sought to hunt at twenty to thirty thousand. *Id.* at 4, col. 2. Iceland's Commissioner argued that his entire country depended on the harvests and that the moratorium had caused needless injury to his country. *Id.* at 4, col. 3. Japan's dissent from the moratorium manifested itself in a formally lodged objection to the moratorium from 1982 to 1988. *See infra* note 200. Subsequently, Japan continued whaling under the scientific research exception. *See infra* note 200.

Iceland's Commissioner Gudmundur Eiriksson stated: "We're seeing the politicisation of scientific research." Schoon, *In Search of a Strategy to Save the Whale*, Independent, July 9, 1990 (LEXIS, NEXIS library, Papers file). While nations opposed to the moratorium now argue that the IWC is politicizing science against the commercial whalers, environmentalists, in their attempts to curtail the IWC's early exploitative policies, made the claim that the IWC was politicizing science against the whales. *See supra* notes 45-49 and accompanying text.

D. *The IWC as Whale Conservator*

In 1990 the domestic pressure within some member countries to resume whaling grew so strong that these countries threatened to withdraw from the IWC if the moratorium was continued in 1991.<sup>104</sup> Nonetheless, the IWC voted to retain the moratorium until the Scientific Committee provided a "comprehensive assessment of whale stocks."<sup>105</sup> In addition, the IWC required the Scientific Committee to devise a "Revised Management Procedure" which would set optimum population sizes and corresponding catch sizes for all whale stocks.<sup>106</sup> Apparently, the Revised Management Procedure will supplement and improve upon the New Management Procedure adopted in 1974.<sup>107</sup>

Whether it is continued or replaced by the Revised Management Procedure in 1991, the moratorium on commercial whaling marks the culmination of the IWC's evolution from an industry lobby group to an organization committed to the conservation of whales. The moratorium essentially sends the message to whaling countries that the IWC will not allow whaling to resume until reliable scientific evidence exists showing that whale stocks will survive. The fact that the moratorium may evolve into the

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<sup>104</sup> *International Whaling Ban Upheld*, Chi. Tribune, July 8, 1990 (LEXIS, NEXIS library, Papers file) (reporting Japan's and Iceland's Commissioners threatened to "pull out" of IWC "unless the climate improved at next year's meeting").

<sup>105</sup> Schoon, *supra* note 103, at 15.

<sup>106</sup> *Id.* Apparently these conditions had been discussed and agreed upon at earlier meetings in anticipation of the moratorium's reconsideration in 1990. See CHAIRMAN'S REPORT: 41ST MEETING, *supra* note 6, at 13-21; *Chairman's Report of the Fortieth Annual Meeting*, in INTERNATIONAL WHALING COMM'N, THIRTY-NINTH REPORT OF THE INTERNATIONAL WHALING COMMISSION [1987-88] 10, 13-14 (1989) [hereafter THIRTY-NINTH REPORT]; *Chairman's Report of the Thirty-Ninth Annual Meeting*, in THIRTY-EIGHTH REPORT OF THE INTERNATIONAL WHALING COMMISSION [1986-87] 10, 15-16 (1988) [hereafter THIRTY-EIGHTH REPORT].

<sup>107</sup> See *supra* notes 93-96 and accompanying text (discussing New Management Procedure). The "Revised Management Procedure" improves on its predecessor by evaluating stock sizes more frequently and by being tied more stringently to the maximum sustainable yield. See CHAIRMAN'S REPORT: 41ST MEETING, *supra* note 6, at 16-17. In addition, one of the goals of the Revised Management Procedure is to identify the level below which the stock is at risk of depletion. *Id.* at 14 (citing *Report of the Scientific Committee*, in THIRTY-EIGHTH REPORT, *supra* note 106, at 36). Many IWC members have expressed the desire that this risk be as close to zero as possible. *Id.* at 15.

Revised Management Procedure does not detract from this message. When the IWC refused to end the moratorium until scientific evidence attests that the whale stock may withstand commercial whaling, it affirmed its commitment to whale conservation.

The IWC's adoption of a conservative approach to whale management is entirely consistent with the mandates of the 1946 Convention.<sup>108</sup> The 1946 Convention requires the IWC to manage whale stocks based on scientific evidence while concurrently considering the interests of the whale industry.<sup>109</sup> The moratorium and the Revised Management Procedure allow the IWC to fulfill the Convention's requirements conservatively and safely. The moratorium and the Revised Management Procedure have essentially shifted the burden of proof to the whaling nations. Instead of requiring only minimal evidence for a nation to hunt whale stock, as it did in its early days, the IWC now requires extensive scientific evidence that guarantees a stock will survive the hunt.<sup>110</sup> Although whaling nations may complain that the shift in the burden of proof is insensitive to their interests, it fulfills the express purposes of the Convention to "safeguard" the world's whale stocks and to "ensure the[ir] proper and effective conservation."<sup>111</sup> Only after these objectives have been realized will the interests of the industry be considered.

## II. THE ABORIGINAL WHALING EXCEPTION

### *A. The Exception*

The 1946 Convention prohibits any whaling of gray and right whales<sup>112</sup> due to their extremely small numbers.<sup>113</sup> This species-specific ban is unrelated to the 1982 moratorium on commercial whaling and illustrates an early concern for the species' survival.<sup>114</sup> Yet, within the same provision, the Convention allows

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<sup>108</sup> See *infra* note 111 and accompanying text.

<sup>109</sup> 1946 Convention, *supra* note 6, art. V, para. 2.

<sup>110</sup> See *infra* notes 209-11 and accompanying text.

<sup>111</sup> 1946 Convention, *supra* note 6, preamble.

<sup>112</sup> *Id.* sched., para. 2.

<sup>113</sup> See K. ALLEN, *supra* note 2, at 21-22.

<sup>114</sup> Indeed, the prohibition's presence in the 1946 Convention, when the policies of the IWC were characteristically exploitative, suggests that the species' situation was especially urgent. Unfortunately, there is no record of discussions at the Convention regarding the provision. In 1970 the bowhead was listed as endangered under the Endangered Species

for the taking and killing of these whales by aborigines.<sup>115</sup> The aboriginal whaling exception, though not utilized frequently by IWC member countries, reflects the concern of the drafters of the Convention for various cultures' heritage and traditional dependence on the whale. The exception, however, also reflects an implicit assumption that the impact that aboriginal hunting has on whale stocks will be minimal compared to the impact of larger ventures such as commercial whaling. The exception does not appear to supersede other mandates,<sup>116</sup> such as the mandate to "safeguard" whale stocks and the mandate to "ensure" whale conservation.<sup>117</sup> When read in the context of the rest of the Convention, therefore, the aboriginal whaling exception may be applied only when its application does not endanger the hunted stocks.

In fact, in most of the instances in which member nations have used the aboriginal whaling exception, the hunts have had little impact on the stocks and have created no conflict with other Convention provisions.<sup>118</sup> In one instance, however, use of the

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Conservation Act of 1969, 35 Fed. Reg. 18,320 (1970). The bowhead remains listed as endangered under the Endangered Species Act of 1973, Pub. L. 93-205, 56 Stat. 1354 (codified at 16 U.S.C. §§ 1531-1544 (1988)) at 48 Fed. Reg. 34,182 (1983), 50 C.F.R. § 17.11 (1989). The Endangered Species Act of 1973 also contains an exception allowing the Eskimos to hunt bowhead whales. Endangered Species Act of 1973, 16 U.S.C. § 1539 (e)(1) (1988).

<sup>115</sup> 1946 Convention, *supra* note 6, sched., para. 2. The provision states that "[i]t is forbidden to take or kill gray whales or right whales, except when the meat and products of such whales are to be used exclusively for local consumption by aborigines." *Id.* The 1946 Convention defines right whale as including the bowhead whale. 1946 Convention, *supra* note 6, sched., para. 18. Neither "aborigine" nor "consumption" are defined in the Convention.

<sup>116</sup> See J. CHERFAS, *supra* note 47, at 112.

<sup>117</sup> 1946 Convention, *supra* note 6, preamble.

<sup>118</sup> There appear to be three member nations, in addition to the United States, currently applying the exception: the U.S.S.R., St. Vincent and the Grenadines (acting as a single IWC member), and Greenland. The U.S.S.R. took 150 Eastern North Pacific gray whales in 1988 under the aboriginal whaling exception. CHAIRMAN'S REPORT: 41ST MEETING, *supra* note 6, at 27. In 1988 the population of this stock was estimated at 21,113 animals, *Chairman's Report of the Fortieth Annual Meeting*, in THIRTY-NINTH REPORT, *supra* note 106, at 10, 20. The U.S.S.R. aboriginal hunts, therefore, do not appear to endanger the species. *See id.*

St. Vincent and the Grenadines had a single aborigine whaler who was 67 years old in 1988. *Id.* at 22. Because the aborigine was old, and the IWC

aboriginal whaling exception places the hunted whales in almost assured danger of extinction. Ironically, it is the United States, protector of the whale and enforcer for the IWC, that advocates the use of the aboriginal whaling exception in this instance.

*B. Application of the Exception to the Alaskan Eskimos*

We are the People of the Whale. The taking and sharing of the whale is our Eucharist and Passover. The whaling festival is our Easter and Christmas, the Arctic celebration of the mysteries of life.<sup>119</sup>

1. History

Archaeological evidence dates Alaskan Eskimo whale hunting to as early as 8,000 years ago.<sup>120</sup> The Eskimos developed methods allowing for a regular catch as long ago as 1,000 years.<sup>121</sup> From this prehistoric base,<sup>122</sup> whaling became the most important hunting practice and the most fundamental part of Alaskan

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already had granted St. Vincent and the Grenadines a quota of three whales per year, applying the exception to St. Vincent and the Grenadines seems inconsequential. *See id.* In 1989 St. Vincent and the Grenadines took no whales. CHAIRMAN'S REPORT: 41ST MEETING, *supra* note 6, at 29.

Greenland is the last member nation currently applying the aboriginal whaling exception. Unfortunately, the application of the aboriginal whaling exception in Greenland is almost as problematic as its application in Alaska. The Greenlanders, also of Eskimo origin, INTERNATIONAL WHALING COMM'N, ABORIGINAL/SUBSISTENCE WHALING 50 (Special Issue 4, 1982) [hereafter ABORIGINAL/SUBSISTENCE WHALING], take about ten minke whales from the West Greenland stock every year under the exception. *Chairman's Report of the Fortieth Annual Meeting*, in THIRTY-NINTH REPORT, *supra* note 106, at 10, 20-21. In 1990 the stock was estimated at between 1,702 and 5,718 animals. CHAIRMAN'S REPORT: 41ST MEETING, *supra* note 6, at 27. The Scientific Committee is uncertain about whether or not to continue to allow the subsistence hunts. *See id.* The Committee, however, is also debating the definition of the stock boundaries which, if expanded, would increase the stock's size. *Id.* A study of the Greenland case can be found in ABORIGINAL/SUBSISTENCE WHALING, *supra*, at 51-73.

<sup>119</sup> ABORIGINAL/SUBSISTENCE WHALING, *supra* note 118, at 36 (quoting Hopson, *The People of the Whale: a Fight for Survival*, 98 INDIAN AFFAIRS 7-8 (1979)).

<sup>120</sup> *Id.*; *see also* Doubleday, *Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law*, 17 DEN. J. INT'L L. & POL'Y 373, 376 (1989).

<sup>121</sup> Doubleday, *supra* note 120, at 376.

<sup>122</sup> *See generally* R. MCGHEE, CANADIAN ARCTIC PREHISTORY 74-82 (1978) (discussing ancestral Eskimo whaling).

Eskimo culture.<sup>123</sup>

Although the Eskimos have faced all sorts of challenges from the environment over the centuries, the most wrenching challenge occurred in 1848 with the arrival of the first commercial whaling boat.<sup>124</sup> With the discovery of vast numbers of bowhead whales, commercial whalers began the bowhead's decimation.<sup>125</sup> The Eskimos, adept with harpoons and knowledgeable about the bowhead, were hired to work as harpooners for the commercial whalers.<sup>126</sup> The opportunity to work on the ships drew many Eskimos away from the subsistence hunt into a symbiotic relationship with the whalers.<sup>127</sup> For their services as harpooners, the Eskimos received meat and blubber in addition to trade goods.<sup>128</sup> The commercial whalers provided a system of exchange through which the whale meat was distributed to the Eskimo people.<sup>129</sup> The Eskimos became accustomed to both this system of distribution and to the commercial whaling tools and ships with which they worked.<sup>130</sup>

The bowhead whaling industry collapsed in 1908 when scarcity drove up the price of the whales' baleen, the major product derived from the bowheads.<sup>131</sup> The commercial whalers moved to other parts of the globe leaving in their wake a dependent culture and severely depleted stocks of bowheads.<sup>132</sup> Aboriginal

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<sup>123</sup> ABORIGINAL/SUBSISTENCE WHALING, *supra* note 118, at 36; *see also* N.M.F.S. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 27, at 35.

<sup>124</sup> ABORIGINAL/SUBSISTENCE WHALING, *supra* note 118, at 36-37

<sup>125</sup> *Id.* at 37. It is estimated that in 60 years commercial whalers killed 20,000 bowheads. *Id.* Estimates of the initial stock size, however, vary. Scientists often use estimates of the initial stock size to calculate the whale species' maximum sustainable yield. *See* J. CHERFAS, *supra* note 47, at 132 (explaining maximum sustainable yield). Some IWC estimates have set the initial stock size of the bowhead whale at approximately 18,000. *Report of the Scientific Committee*, in INTERNATIONAL WHALING COMM'N, TWENTY-EIGHTH REPORT OF THE INTERNATIONAL WHALING COMMISSION [1976-77] 38, 66-67 (1978) [hereafter TWENTY-EIGHTH REPORT].

<sup>126</sup> Doubleday, *supra* note 120, at 378.

<sup>127</sup> *See id.* at 379.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> The baleen, a bone around the bowhead's mouth, was used primarily for corset stays. ABORIGINAL/SUBSISTENCE WHALING, *supra* note 118, at 37. Steel was found to be a cheap substitute in about 1908, catalyzing the collapse of the industry. *Id.*

<sup>132</sup> *See* Doubleday, *supra* note 120, at 379.

whaling<sup>133</sup> returned after the commercial whalers departed.<sup>134</sup> Within ten years the number of crews fell close to the aboriginal level and has remained fairly constant ever since.<sup>135</sup>

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<sup>133</sup> Eskimos traditionally hunt the bowhead whale using an intricate system of lines, harpoons, boats, drags, and floats. *Id.* at 376. Eskimos hunt whales in the spring and fall when the bowheads migrate close to the shore, see N.M.F.S. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 27, at 35 (discussing migrations), in boats with four or five crewmembers and a captain. Doubleday, *supra* note 120, at 376. When a whale is sighted the boats give chase. *Id.* When the whale is close enough, the Eskimos harpoon the whale twice: once to paralyze it and again to kill it. *Id.* Towing the whale to shore may take an entire day and the crew sings hunting songs, or *aigoan*, "to make the whale light and easy to tow." *Id.* Traditional Eskimo folklore holds that the bowheads surface and swim toward the crews, sacrificing themselves to feed the Eskimos. *Eskimo Whale Hunters Successful*, U.P.I. BC Cycle, Apr. 27, 1988 (LEXIS, NEXIS library, Wires file).

Once brought to shore, the whale is pulled by scores of Eskimos up onto the ice for butchering. ABORIGINAL/SUBSISTENCE WHALING, *supra* note 118, at 38. Butchering takes from 3 to 30 hours. N.M.F.S. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 27, at 46. Traditionally, every part of the whale was used, but today much of it is left on the ice at the butchering place. See *id.* at 45-47. The skin, meat, and blubber were used for food, the bones for building, the baleen for nets. Doubleday, *supra* note 120, at 377. The meat and the *muktuk* — a layer of skin with blubber attached — remain the most important part. N.M.F.S. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 27, at 45-46. In addition, the gums, flukes, flippers, brain, tongue, small intestine, kidneys, liver, and, frequently, the stomach were used. *Id.* Blubber, no longer used for dog food, is now discarded on the ice. *Id.* at 46. Depending on the village, the whale skull backbone, jaw, ribs, and some internal organs may also be left at the butchering site. *Id.* at 46-47.

Villages distribute the whale parts using a variety of methods. *Id.* at 47. Generally, the crews distribute many parts through the village where they took the whale. *Id.* The distribution itself is a strong aspect of the Eskimo cultural identity, reflecting factors such as the vessel membership, family and social networks, and, to some extent, need. *Id.* at 53.

After each successful whaling season, the communities celebrate in a ceremony, the *nalukataq*, spanning several days. ABORIGINAL/SUBSISTENCE WHALING, *supra* note 118, at 38. The *nalukataq* will bring together disparate parts of the village or perhaps several villages for thanksgiving. *Id.* One group of commentators has stated that the *nalukataq* guarantees "the continuity of customary patterns into the modern era." *Id.* The commentators term this celebration "a powerful reaffirmation of Eskimo values and identity." *Id.*

<sup>134</sup> ABORIGINAL/SUBSISTENCE WHALING, *supra* note 118, at 37.

<sup>135</sup> *Id.* From 1920 to 1970 crews have been based continuously in five Alaskan communities and for a lesser time in four others. *Id.* Whaling has been continuous in Barrow, Wainright, Point Hope, Wales, and Gambell.

After acclimating to the arrival of commercial whalers in the 1860s and reacclimating at their departure in 1908, the Eskimos have integrated gracefully with western culture.<sup>136</sup> Although Eskimos participate to a small extent in the commercial economy, "they remain heavily dependent and emotionally attached to their environment and its natural resources."<sup>137</sup> The Eskimo social and political structure continues to be interwoven with the whale hunt:<sup>138</sup> "Village feasts and festivals, art and religious items revolve around the spring hunt and its products."<sup>139</sup> Subsistence activity, of which whaling is the most prominent, consumes much of the Eskimo life, accounting for about six to eight months of family work each year.<sup>140</sup> The political organization continues to be centered around the whale hunt leader, the *unmealig*.<sup>141</sup>

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*Id.* Other whaling communities are Savoonga, Point Lay, Kivalina, and Kaktovik. *Id.*

<sup>136</sup> *Id.* at 37. "The gradual introduction of western institutions allowed the Eskimos . . . to accommodate change without destroying the fundamental nature of the Eskimo culture." *Id.* But see Raspberry, *An Eskimo Comes to Washington*, *Washington Post*, Apr. 4, 1988, at A17, col. 1. Raspberry describes the contradictions between the Eskimos' traditional beliefs and western institutions such as the oil industry. *Id.* Eskimo contact with the oil industry, however, is reportedly minimal. ABORIGINAL/SUBSISTENCE WHALING, *supra* note 118, at 37.

<sup>137</sup> ABORIGINAL/SUBSISTENCE WHALING, *supra* note 118, at 37.

<sup>138</sup> See N.M.F.S. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 27, at 52-54.

<sup>139</sup> *Id.* at 53; see also ABORIGINAL/SUBSISTENCE WHALING, *supra* note 118, at 36. The IWC Cultural Anthropology Panel, see *infra* note 169-71, 181-86 and accompanying text, discussed the whale cult as one involving all members of society, even young children. ABORIGINAL/SUBSISTENCE WHALING, *supra* note 118, at 36. "There is . . . no animal . . . whose hunting is so hedged by strict taboo, magic formulas and the use of amulets." Lantis, *The Alaskan Whale Cult and its Affinities*, 40 AM. ANTHROPOLOGY 438, 450 (1938) (quoting K. BIRKET-SMITH, *THE ESKIMOS* (1936)). In her comparative summary of whaling cultures in the North Pacific, Bering Sea, and American Arctic regions, Lantis lists such culture elements as: instructional periods and initiation rites to introduce young men into the whaling cult; ritualistic behaviors practiced by the whalers' wives to assure a successful hunt; and the passing down from father to son of whaling appurtenances, knowledge of caches, and uses of whaling amulets. *Id.* at 440-41, 445.

<sup>140</sup> N.M.F.S. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 27, at 45.

<sup>141</sup> *Id.* at 54.



## 2. IWC Support for, and the Temporary Deletion of, the Alaskan Aboriginal Exception

The 1946 Convention has permitted the Alaskan Eskimos to hunt the bowheads through the aboriginal whaling exception since its inception.<sup>142</sup> It was not until 1972 that the IWC's Scientific Committee expressed concern about bowhead whales, especially stocks migrating in the Bering Sea and hunted by the Eskimos.<sup>143</sup> The Committee criticized the "scanty material" on the Bering Sea stock of bowheads and encouraged member nations to submit reports on their aboriginal whaling of the bowhead.<sup>144</sup> In 1972<sup>145</sup> and again in 1973<sup>146</sup> the IWC asked the United States to reduce the number of bowheads struck but lost by Alaskan Eskimo whalers. Additionally, the Scientific Committee requested that the United States research the status of the stock in relation to the stock's maximum sustainable yield.<sup>147</sup>

In 1974<sup>148</sup> and 1975<sup>149</sup> the Scientific Committee continued to express its concern at the lack of knowledge concerning the stock and continued its urging for more research. In 1976 the Scientific Committee's recommendations grew more urgent,<sup>150</sup> and the

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<sup>142</sup> The exception is part of the original 1946 Convention. 1946 Convention, *supra* note 6, sched., para. 2.

<sup>143</sup> *Report of the Scientific Committee*, in TWENTY-THIRD REPORT, *supra* note 89, at 28, 34. IWC Reports make only passing and somewhat sporadic mention of the aboriginal catches up until 1972. See N.M.F.S. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 27, at 37. The annual Alaskan bowhead harvest averaged 10 whales from 1946 to 1970. *Id.* This average rose to 29 annually from 1970 to 1976. *Id.*

<sup>144</sup> *Report of the Scientific Committee*, in TWENTY-THIRD REPORT, *supra* note 89, at 28, 34.

<sup>145</sup> *Id.*

<sup>146</sup> *Report of the Scientific Committee*, in TWENTY-FOURTH REPORT, *supra* note 87, at 39, 47.

<sup>147</sup> *See id.*

<sup>148</sup> *Report of the Scientific Committee*, in TWENTY-FIFTH REPORT, *supra* note 90, at 62, 72. At the 1974 meeting the Committee also expressed concern about an increase in the amount of whales taken by the Alaskan Eskimos. *Id.* "The Committee expresses its continuing concern on lack of information on the status of this stock, on the reported high loss rate and on the increase in catch in the last two seasons." *Id.*

<sup>149</sup> *Report of the Scientific Committee*, in PAPERS OF THE SCIENCE COMMITTEE *supra* note 15, at 13. In 1975 the Committee reviewed a report concerning whales struck and lost, but still requested information about the past and present size of the stock. *Id.*

<sup>150</sup> *Report of the Scientific Committee*, in TWENTY-SEVENTH REPORT, *supra* note 15, at 36, 45. The Report stated that "[t]he initial size of the stock and its

IWC plenary session adopted a Resolution recommending that “the Contracting governments as early as possible take all feasible steps to limit the expansion of the fishery and to reduce the loss rate of struck whales.”<sup>151</sup>

Finally, in 1977, the Scientific Committee unanimously recommended that “on biological grounds exploitation of this species must cease.”<sup>152</sup> It also recommended that the Schedule be amended to delete the exception of subsistence whaling of “right” whales,<sup>153</sup> including the bowhead.<sup>154</sup> The Scientific Committee noted that the bowhead was the most endangered of all

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present condition are still unknown. The Committee most strongly urges that this situation be rectified . . .” *Id.* The Report stated further that “[t]he Committee strongly recommends that necessary steps be taken . . . to reduce the loss rate.” *Id.*

<sup>151</sup> TWENTY-SEVENTH REPORT, *supra* note 15, at 33.

<sup>152</sup> *Report of the Scientific Committee*, in TWENTY-EIGHTH REPORT, *supra* note 125, at 38, 67.

<sup>153</sup> *Id.* The Committee based its recommendation on several factors. First, the Committee concluded that the Bering Sea stock of bowheads was minuscule, numbering between 600 and 2,000 whales. *Id.*

Second, the Committee surveyed the increasing numbers of whales that the Alaskan Eskimos landed, killed but lost, and struck but lost for the 1976 and 1977 seasons. *Id.*; see also ABORIGINAL/SUBSISTENCE WHALING, *supra* note 118, at 1. Ray Gambell, Secretary to the IWC in 1979, attributed the Scientific Committee’s concern, in part, to the increased amounts of whales being affected by the hunt. *Id.* Gambell estimated that from the beginning of the century to 1969 an average of 11 bowheads were landed each year. *Id.* Gambell estimated that from 1970 to 1977 the catch averaged 29 whales landed per year. ABORIGINAL/SUBSISTENCE WHALING, *supra* note 118, at 1. Even higher increases were occurring in the number of whales struck and lost (the majority of which are thought to die from their wounds), and killed and lost. *Id.* In 1977 at least 26 whales were landed, 2 killed and lost, and 77 struck and lost. *Report of the Scientific Committee*, in TWENTY-EIGHTH REPORT, *supra* note 125, at 38, 67.

Third, the Committee concluded that the Bering Sea bowhead whale population was only 6-10% its estimated initial size. *Id.* at 67. The bowhead species as a whole was only 2-3% of its initial size. *Id.* Although, it did not calculate the maximum sustainable yield for bowheads, the Committee determined that the maximum sustainable yield for the sei whale, another baleen species, was 60% of the initial stock size. *Id.* at 51. Finally, the Scientific Committee recognized that fluctuations in the stock’s environment caused by the oil industry could have “critical consequences” for the bowhead. *Id.* at 67. The Committee stated:

[a] particularly serious consequence of this high rate of exploitation of a small stock is the attendant instability of the system in the face of environmental perturbations. Such problems . . . are exacerbated when a stock is at a low level

whale species despite protection from commercial harvesting for forty years.<sup>155</sup> On the Scientific Committee's recommendation, the IWC adopted the amendment by a nearly unanimous vote (the United States abstained).<sup>156</sup> At the meeting the United States Commissioner explained the "domestic dilemma concerning Eskimos people's subsistence rights"<sup>157</sup> but agreed to implement the IWC regulation when the "legislation problems are resolved."<sup>158</sup>

The United States had three possible responses to the Resolution, two of which posed significant problems for United States foreign or domestic policies. The first alternative was for the United States to follow the resolution and curtail the hunts, as the United States IWC representative had promised. This choice would have been most consistent with the United States' advocacy of conservationist policies in the IWC, but would have posed a significant threat to the United States Government's relationship with the Eskimos. The second alternative was for the United States to file an objection to the resolution, exempting itself from the amendment to the Schedule.<sup>159</sup> This choice would have appeased the Eskimos, but would have directly contradicted previous United States advocacy of a conservative approach to whale

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relative to its initial size; the Committee agrees that the bowhead whale stocks are in such a state.

*Id.*

<sup>154</sup> See *supra* note 115 and accompanying text.

<sup>155</sup> *Report of the Scientific Committee*, in TWENTY-EIGHTH REPORT, *supra* note 125, at 38, 67. In response to the United States Commissioner's inquiry as to why a small hunt might not be possible, the Committee replied:

In the absence of exploitation, environmental fluctuations will be expected over time to reduce the population below a critical level where extinction is likely. . . . [W]here the population is subject to exploitation this problem is considerably exacerbated . . . . Accordingly there is a clear scientific case to be made for a moratorium on this species.

*Id.*

<sup>156</sup> N.M.F.S. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 27, at 19.

<sup>157</sup> *Chairman's Report of the Twenty-Ninth Meeting*, in TWENTY-EIGHTH REPORT, *supra* note 125, at 18, 21-22.

<sup>158</sup> *Id.* No further explanation of the "legislation" problems appears in the report.

<sup>159</sup> See *supra* notes 41-42 and accompanying text (explaining objection procedure under 1946 Convention).

management, exemplified by the commercial moratorium.<sup>160</sup>

The United States did neither but instead opted for the third alternative of lobbying the IWC to permit the Eskimos to take a limited number of whales.<sup>161</sup> The IWC held a Special Meeting in December 1977 to reconsider the total ban on bowhead whale hunting.<sup>162</sup> At this meeting the United States proposed a "modest take"<sup>163</sup> to satisfy the cultural and subsistence needs of the Alaskan Eskimos. The United States assured the IWC that the catch would be accompanied by "a scientific programme and regulatory measures."<sup>164</sup> The Scientific Committee rejected the proposal.<sup>165</sup>

Despite recommendation from the Scientific Committee, the IWC plenary session agreed at the Special Meeting to a "limited and strictly controlled hunt" of twelve landed or eighteen struck whales in 1978.<sup>166</sup> The United States was required merely "to minimize the adverse effects" on the Bering Sea stock.<sup>167</sup> At the following regular IWC meeting in June 1978, the United States proposed allowing Eskimos to kill thirty whales to meet their subsistence needs.<sup>168</sup> To address the United States' proposals to increase catches, the IWC established a committee to review the

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<sup>160</sup> See *supra* notes 85-103 and accompanying text (discussing United States' battle for moratorium).

<sup>161</sup> M. BEAN, *supra* note 3, at 267.

<sup>162</sup> *Chairman's Report of the Special Meeting, Tokyo, December 1977*, in TWENTY-NINTH REPORT, *supra* note 15, at 2, 2.

<sup>163</sup> *Id.* at 3.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* The Scientific Committee cited research showing that without a catch, it would take the stock 372 years to rebuild to its initial size in 1850, and 186 years to recover to the maximum sustainable yield. ABORIGINAL/SUBSISTENCE WHALING, *supra* note 118, at 2. *But see supra* notes 152-55 and accompanying text (discussing IWC's assumption of bowhead's MSY). The Scientific Committee found that if as many as 15 whales were killed each year, the bowhead would assuredly become extinct. *Id.*

<sup>166</sup> *Chairman's Report of the Special Meeting, Tokyo, December 1977*, in TWENTY-NINTH REPORT, *supra* 15, at 2, 2-3. The resolution followed a series of unsuccessful proposals by the United States asking that the Eskimos be allowed to take greater numbers of the whales. *Id.*

<sup>167</sup> ABORIGINAL/SUBSISTENCE WHALING, *supra* note 118, at 2.

<sup>168</sup> *Id.* The Commission finally adopted a limit of 18 landed or 27 struck for the 1978-79 period. *Id.* At the end of the meeting, however, the United States requested two additional whales to be taken in the fall hunt. *Id.* The IWC agreed to this request "as an act of understanding and sympathy for the particular problems of the peoples concerned." *Id.*

aboriginal whaling problem.<sup>169</sup>

The review committee convened at the Panel Meeting of Experts on Aboriginal Subsistence Whaling, held in Seattle in February of 1979.<sup>170</sup> The experts were split into three panel groups to review three areas of the Alaskan aboriginal whaling controversy: wildlife, nutrition and cultural anthropology.<sup>171</sup> Each of the three panel groups met separately and produced their own reports.<sup>172</sup> The Wildlife Panel estimated the current size of the Bering Sea bowhead population to be about 2,264, a small percentage of its original size in 1850.<sup>173</sup> Not surprisingly, the Panel agreed with the Scientific Committee that "from a biological point of view, the only safe course is to reduce the kill . . . to zero."<sup>174</sup>

The IWC charged the Nutrition Panel with analyzing the nutritional requirements of the Eskimos.<sup>175</sup> The Panel found that despite the Eskimos' traditionally narrow diet of meat, fish, and eggs, a diet of western foods was capable of sustaining nutritional health in nearly all Eskimos.<sup>176</sup> The dietary constraints, formed over thousands of years of living in the Arctic, had not created unique nutritional requirements.<sup>177</sup> The Panel also found that the bowhead were not unique in their nutritional contents; the seal, beluga, and walrus were all equal to the bowhead in nutritional value.<sup>178</sup> The Eskimos, therefore, would not necessarily have to rely on imported foods to replace the bowhead, but could find comparable nutrition and calories in other indigenous foods.<sup>179</sup> The Panel concluded that "[a]ny risk to the survival of the bowhead whale which may be posed by the continuance of

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<sup>169</sup> *Id.* at 3.

<sup>170</sup> *Id.* preface.

<sup>171</sup> *Id.* at 3-4.

<sup>172</sup> *Id.* preface; see *Report of the Wildlife Panel, id.* at 11; *Report of the Nutrition Panel, id.* at 23; *Report of the Cultural Anthropology Panel, id.* at 35.

<sup>173</sup> ABORIGINAL/SUBSISTENCE, *supra* note 118, at 12.

<sup>174</sup> *Id.* at 19. The Wildlife Panel also urged that threats posed by "secondary effects of man" such as environmental effects of oil drilling necessitated increased study of the protection and maintenance of the whales' habitat. *Id.*

<sup>175</sup> *Id.* at 23.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 30. The Panel also pointed out, however, that it would take 430 phocid seals to equal the amount of calories in a single bowhead. *Id.*

<sup>179</sup> See *id.*

aboriginal whaling cannot be justified on nutritional grounds.”<sup>180</sup>

The IWC charged the Cultural Anthropology Panel with analyzing the role of whaling in Eskimo culture, society, and economy.<sup>181</sup> The Panel’s findings suggest that the IWC allow the Eskimos to continue their whaling.<sup>182</sup> The Panel found that the “complex of whaling and associated activities is perhaps the most important single element” in the Eskimos’ culture and society.<sup>183</sup> The Panel further found that whaling had retained its cultural significance despite societal change during “the modern era.”<sup>184</sup> The Panel also found that the increase in whaling activity which had alarmed the IWC’s Scientific Committee was the result of a “revitalized interest in traditional culture among younger Eskimos.”<sup>185</sup> Finally, the Panel found that alternative resource species cannot replace whales in the Eskimo culture.<sup>186</sup>

The three panels submitted their proposals to a Technical Committee reviewing group.<sup>187</sup> Although members of the Technical group disagreed on the proposal to be submitted to the

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<sup>180</sup> *Id.* The Panel qualified its conclusion with recommendations on the appropriate nutritional substitutes for the whale. *See id.*

<sup>181</sup> *Id.* at 35.

<sup>182</sup> *See id.* The Cultural Anthropology Panel consisted of five panelists from the United States, two from Canada, and one from Denmark. *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* Presumably, “the modern era” refers to the period of the inundation of the commercial whalers into the arctic and the aftermath.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* The Panel recognized that the Eskimos could substitute both imported and native foods for the bowhead. The Panel cautioned, however:

It is equally important to understand that such alternative resources would not *replace* bowhead whales. Whales are much more than food for the north Alaskan Eskimos. From this perspective, nothing can compensate for the absence of bowhead whale meat, *maktak* and other whale products; and certainly no activity can replace whaling as a focal subsistence tradition among these Eskimos.

*Id.* at 43 (emphasis in original).

The Cultural Anthropology Panel did not address the effects the hunts would have on the whales, only stating summarily that the quota system “seems to permit stabilization of harvests despite an increase in the number of crews engaged in whaling.” *Id.* at 35.

<sup>187</sup> Donovan, *Postscript* to INTERNATIONAL WHALING COMM’N, ABORIGINAL/SUBSISTENCE WHALING 79 (Special Issue 4, 1982) [hereafter Donovan, *Postscript*]. The members of the reviewing group are not disclosed in the postscript.

IWC, all members agreed to allow a continued hunt.<sup>188</sup> For the next three years, while the Scientific Committee advocated a zero catch limit for Bering Sea bowheads, the IWC adopted quotas for landed and struck bowheads through 1984.<sup>189</sup> The quotas were adopted despite increasingly stronger evidence that the population of Bering Sea bowheads “may . . . be stable or decreasing” even without an aboriginal hunt.<sup>190</sup>

From 1982 to 1990, perhaps due to increases in United States research efforts, IWC estimates of the size of the Bering Sea bow-

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<sup>188</sup> See *id.*

<sup>189</sup> At the 1979 IWC meeting the Scientific Committee, for the third time, advocated a zero catch limit for Bering Sea bowheads. *Report of the Scientific Committee*, in THIRTIETH REPORT, *supra* note 93, at 42, 55. Nevertheless, the IWC adopted a quota of 18 landed or 26 struck for the 1980 season. *Chairman's Report of the Thirty-First Annual Meeting*, in *id.*, at 25, 30. Australia, seconded by New Zealand, proposed a zero quota which was defeated by a vote of six in favor, eight against, and nine abstentions. *Id.*

At the 1980 IWC meeting the Scientific Committee reiterated that “the only safe course” was for no bowhead whales to be taken. *Report of the Scientific Committee*, in THIRTY-FIRST REPORT, *supra* note 100, at 51, 65. The Scientific Committee also noted that “the Commission has consistently rejected this recommendation on grounds other than scientific ones” and recommended that if a catch is allowed it be limited to sexually immature calves. *Id.* The Scientific Committee estimated that the present population was 6-23% of the original size and that the population would decline even in the absence of subsistence hunting. *Id.* Despite this warning, the IWC adopted a proposal allowing for a catch limit of 45 landed or 65 struck for the following three years. *Chairman's Report of the Thirty-Second Annual Meeting*, in THIRTY-FIRST REPORT, *supra* note 100, at 17, 18. The proposal limited the catch in any one year to 17 whales. *Id.*

At the 1980 meeting the United States admitted that “a sustained harvest of bowhead whales at current levels over an extended period of time would endanger the herd and would jeopardize the Eskimo's [sic] own interest.” Donovan, *Postscript*, *supra* note 187, at 82. Further, the United States promised to “progressively reduce the quota.” *Id.*

In 1981 the Scientific Committee again recommended a zero quota. *Report of the Scientific Committee*, in THIRTY-SECOND REPORT, *supra* note 101, at 43, 56. That year aerial surveys were taken into account. See Donovan, *Postscript*, *supra* note 187, at 83. The Scientific Committee wrote that “aerial counts were generally higher and more reliable than ice or ship based counts.” *Id.* Despite these more reliable estimates, the Committee still recommended a zero catch as “the only safe course for the Commission to take.” *Id.* Despite the strength of the increased evidence, there was no proposal in the 1981 IWC meeting to change the three year quota adopted in 1980. *Id.* at 85.

<sup>190</sup> *Report of the Scientific Committee*, in THIRTY-SECOND REPORT, *supra* note 101, at 43, 55-56.

head stock rose.<sup>191</sup> Some commentators have argued that these increases are sufficient to justify continued application of the aboriginal whaling exception in Alaska.<sup>192</sup> Yet even the most recent and most favorable estimate of the Bering Sea bowhead population of 7,800 is arguably still too small to support the Eskimos' hunts. Even with the increased population estimates the bowhead remains a protected stock. Although the IWC has never established the maximum sustainable yield for the bowhead (due, perhaps, to its clearly protected status), it has established the maximum sustainable yield for a similar baleen species, the sei whale, at 60% of the stock's initial size.<sup>193</sup> If the bowhead's maxi-

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<sup>191</sup> In 1982 the Scientific Committee estimated the stock size at 3,857. *Report of the Scientific Committee*, in THIRTY-THIRD REPORT, *supra* note 102, at 43, 58. In 1983 the Scientific Committee estimated the stock size at 3,871. *Report of the Scientific Committee*, in INTERNATIONAL WHALING COMM'N, THIRTY-FOURTH REPORT OF THE INTERNATIONAL WHALING COMMISSION [1982-83] 35, 52 (1984) [hereafter THIRTY-FOURTH REPORT]. In 1984 the Scientific Committee repeated its 1983 estimate. *See Report of the Scientific Committee*, in INTERNATIONAL WHALING COMM'N, THIRTY-FIFTH REPORT OF THE INTERNATIONAL WHALING COMMISSION [1983-84] 31, 48 (1985) [hereafter THIRTY-FIFTH REPORT]. In 1985 the Scientific Committee estimated the stock size at 4,417. *Report of the Scientific Committee*, in INTERNATIONAL WHALING COMM'N, THIRTY-SIXTH REPORT OF THE INTERNATIONAL WHALING COMMISSION [1984-85] 30, 49 (1986) [hereafter THIRTY-SIXTH REPORT]. In 1986 the Scientific Committee repeated its 1985 estimate. *See Report of the Scientific Committee*, in INTERNATIONAL WHALING COMM'N, THIRTY-SEVENTH REPORT INTERNATIONAL WHALING COMMISSION [1985-86] 28, 49 (1987) [hereafter THIRTY-SEVENTH]. In 1987 the Scientific Committee estimated the stock size at 7,200, a considerable increase from previous estimates. *Report of the Scientific Committee*, in THIRTY-EIGHTH REPORT, *supra* note 106, at 32, 49-50. The Committee explained the increase by pointing to new data-collection methods, acoustic as well as visual, and to a new type of "tracking algorithm." *Id.* at 50. In 1988 the Scientific Committee estimated that the Bering Sea stock contained 7,800 animals. *Report of the Scientific Committee*, in THIRTY-NINTH REPORT, *supra* note 106, at 33, 50. This estimate was repeated in 1989. CHAIRMAN'S REPORT: 41ST MEETING, *supra* note 6, at 26. The estimates for 1990 are unavailable. As the population estimates rise, however, so do the numbers of whales sought to be caught by the Eskimos. *See Eskimo Whale Hunters Successful*, *supra* note 133 (reporting that in 1988, despite rise in quota to 35 whales, Alaskan villages complained they needed still higher quota).

<sup>192</sup> *See Heidecker, Success Story: Woman at the Top of the World; Marie Adams in Alaska*, WORKING WOMAN, Mar. 1984, at 31 (profiling executive director of Alaska Eskimo Whaling Commission and reporting Eskimo arguments that the hunts are even more justified due to increases in population estimates).

<sup>193</sup> *See supra* note 93 (discussing concept of maximum sustainable yield).



imum sustainable yield is comparable to the sei, it is clear that the population is too small to hunt. The IWC's Scientific Committee has estimated the Bering Sea bowhead's initial stock size to have been approximately 18,000.<sup>194</sup> A stock size of 7,800, the most liberal estimate of the stock's population, is just 43% of the estimated initial stock size. Unless and until the IWC removes the bowhead's Protected Stock status or establishes that the bowhead has reached its maximum sustainable yield, allowing the hunts is not supported by scientific evidence. Even using population figures most favorable to the Eskimos, the bowhead's population is nowhere near maximum sustainable yield estimates for comparable species.

No matter what the current population size, allowing the hunt without clear evidence of the population's maximum sustainable yield, is not consistent with a conservative approach to whale management. Indeed, it echoes the manipulation of statistics which characterized earlier IWC policy.<sup>195</sup> In addition, one might argue that it is not this higher estimated population size that should be used in calculating the maximum sustainable yield. Using lower estimates would be more consistent with a conservative approach to whale management. The Eskimos might argue, on the other hand, that such an approach, while appropriate for commercial whalers, fails to take into account the interests of the Eskimos in preserving their culture.<sup>196</sup>

The drafters of the 1946 Convention apparently recognized the need to take into account aboriginal cultural interests in the world's efforts to preserve whales. The drafters' inclusion of the aboriginal whaling exception evidences this recognition. One must ask, however, if by including the exception the drafters condoned aboriginal hunts at the expense of the whale's survival. In the Alaska case, there is a direct conflict between the interests of the Eskimos in retaining a *significant facet of their culture* and the interests of the bowhead in its *species' survival*. In the IWC's balancing of interests, it appears that the IWC has not adequately

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<sup>194</sup> See *supra* note 125.

<sup>195</sup> See *supra* note 48 and accompanying text.

<sup>196</sup> In several IWC meetings the United States has responded to proposals to end the Alaskan hunts with the plea that a balancing of biological and aboriginal interests must occur. *Chairman's Report of the Thirty-First Annual Meeting*, in THIRTIETH REPORT, *supra* note 93, at 25, 30; *Chairman's Report of the Thirty-Second Annual Meeting*, in THIRTY-FIRST REPORT, *supra* note 100, at 17, 18.

considered the interest of the whales.<sup>197</sup>

### III. THE DANGEROUS PRECEDENT SET BY THE UNITED STATES' ABUSE OF THE ABORIGINAL EXCEPTION

The United States' support for hunts that endanger the bow-head whales is irreconcilable with its advocacy of conservative policies like the moratorium. The United States' advocacy of the Alaskan aboriginal whaling exception is directly contrary to its roles as enforcer<sup>198</sup> and policy proponent<sup>199</sup> of the IWC. The aboriginal whaling exception has shown that the United States is not willing to remain a whale protector when it would be unpopular with a portion of its own constituents. Its abuse of the aboriginal whaling exception has seriously undermined the United States' credibility as protector of the whale.

Worse, the United States has undermined the credibility of the IWC. By persuading the IWC to grant it permission for the hunts, against all scientific evidence, the United States has forced the IWC to revert to its exploitative practices of the past. In effect, the United States has asked the IWC to look the other way when a member nation's domestic policy favored a hunt. The Alaskan aboriginal exception has resurrected an IWC whose only function was to facilitate the exploitative wishes of its members even if those wishes result in the further endangerment of an already diminished species.

The United States' support for the Alaskan aboriginal exception not only compromises the United States' credibility as protector of the whale, it also provides other nations with a dangerous precedent to justify their own continued whaling. Simply by arguing cultural dependence on the whale, other nations may be able to legitimate objections to the moratorium and other IWC quotas or prohibitions. The IWC's acceptance of the Eskimos' aboriginal hunts supports an argument for aboriginal whale hunting even when the hunt endangers the hunted species.

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<sup>197</sup> This is especially true when estimates of whale populations were as low as 600. See *Report of the Scientific Committee*, in TWENTY-EIGHTH REPORT, *supra* note 125, at 67. Even with today's estimates of 7,800, however, continued hunting of bowheads is directly contrary to scientific evidence and the interests of the whales. See *supra* notes 165, 189-90 and accompanying text.

<sup>198</sup> See *supra* notes 59-84 and accompanying text.

<sup>199</sup> See *supra* notes 85-103 and accompanying text.

Japan has recently raised the issue of the precedential effect of the Alaskan aboriginal exception.<sup>200</sup> Beginning in 1986 Japan has argued that its coastal villages should be allowed to whale, despite the moratorium on commercial whaling, under the aboriginal

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<sup>200</sup> Japan has found it particularly difficult to abide by the IWC's conservationist awakening. When the IWC finally passed the resolution calling for the moratorium, Japan lodged an "objection" and continued whaling "under objection" from 1982 to 1988. THIRTY-FOURTH REPORT, *supra* note 191, at 1 (summarizing 1982 meeting and events following). Japan, Peru, Norway, and the Soviet Union all lodged objections to the ban. *Id.*; THIRTY-FIFTH REPORT, *supra* note 191, at 1 (Japan continues its objection); THIRTY-SIXTH REPORT, *supra* note 191, at 1 (Japan continues its objection); THIRTY-SEVENTH REPORT, *supra* note 191, at 1 (in 1985 Japan continued its objection, catching about 300 minke whales); THIRTY-EIGHTH REPORT, *supra* note 106, at 1 (Japan continued its objection, catching almost 2400 minke whales); THIRTY-NINTH REPORT, *supra* note 106, at 1 (Japan finally withdrew its objection, but reported having caught over 300 minke whales prior to withdrawal).

In 1988, after finally withdrawing its objection, Japan issued itself a special permit for continued catches of minke whales under the scientific research exception. THIRTY-NINTH REPORT, *supra* note 106, at 1. In 1988 Japan claimed to have caught 300 minke whales "as a part of a feasibility study for a wider ranging and longer term research programme in the area." *Id.* These "research" catches have been heavily criticized by commentators as sham attempts to keep the industry alive. See, e.g., MacKay, *supra* note 14, at 19, col. 1 (characterizing catches as "exploit[ing] a loophole that allows the slaughter to continue under the guise of science"); Clover, *Ban on Whaling Goes on Despite Plea by Japan*, Daily Telegraph, July 7, 1990 (LEXIS, NEXIS library, Papers file) (reporting environmental groups "claim [Japanese research] is a cover for commercial hunting"). In 1989 the IWC itself issued a resolution criticizing Japan's plans to kill whales for scientific research. CHAIRMAN'S REPORT: 41ST MEETING, *supra* note 6, app. at 51 (stating "the proposed research does not contribute information essential for rational management of the stock, . . . nor has it been established that the proposed research addresses critically important research needs"); see also Fritsch, *Panel Refuses Japan's Whaling Request*, L.A. Times, June 17, 1989, pt. 1, at 33, col. 1 (reporting United States' Commissioner Evans, in supporting resolutions, stated that it is not necessary to kill whales to research them).

Currently, Japan has a special permit to take 300 minke whales each year for "scientific research." Clover, *supra*. Japan proposed taking at least 400 minke whales during the 1989-1990 winter, but apparently took only 300. Armstrong, *US Makes Few Gains at World Whale Meeting*, Christian Sci. Monitor, June 19, 1989, at 7, col. 1. Japan, Norway, and Iceland all have been doing scientific research since 1986. van de Krol, *Three Nations Press for Commercial Whale Kills to Start Again*, Financial Times, July 5, 1990, at 3, col. 1, col. 2.

whaling exception.<sup>201</sup> The basis for the Japanese argument is derived directly from the Alaskan precedent.<sup>202</sup> Japan argues that the small fishing villages along its coast are similar to the Alaskan villages.<sup>203</sup> Japan argues further that Japanese whalers from these small villages meet the criteria for the aboriginal whaling exception as it is applied in Alaska.<sup>204</sup>

Additionally, Japan claims that, according to scientific data, minke whale populations will support a limited harvest in the southern hemisphere and in the coastal waters surrounding Japan.<sup>205</sup> Indeed, when compared to the scant numbers of bowheads,<sup>206</sup> the number of minke whales appears almost astronomi-

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<sup>201</sup> See *infra* notes 210-12 and accompanying text (describing Japan's proposals and IWC's negative reception); see also *supra* notes 112-15 and accompanying text (explaining aboriginal whaling exception in general). Apparently, Japan borrows the cultural-dependence rationale, which is grounds for an exception from the ban on hunting bowheads, and utilizes it as grounds for an exception from the more general moratorium on all commercial whaling.

<sup>202</sup> Indeed, at least one Japanese whaler, Hiroji Shoji, is reported to have travelled twice to Barrow, Alaska to study the Alaskan example of the IWC's aboriginal whaling exception. Schoenberger, "Research Hunt" Criticized: Japan Tries New Tactics to Keep Whaling Industry, L.A. Times, Feb. 22, 1988, pt. 1, at 4, col. 1.

<sup>203</sup> See *id.*; see also *Chairman's Report of the Thirty-Ninth Annual Meeting*, in THIRTY-EIGHTH REPORT, *supra* note 106, at 10, 18; Armstrong, *supra* note 200, at 7, col. 2 (reporting Japanese claimed at 1990 IWC meeting that its small fishing villages are "economically and culturally dependent on whaling").

<sup>204</sup> Schoenberger, *supra* note 202, at 4, col. 2 (quoting Japanese whaler claiming that "our standard of living may not be the same, but our cultures and philosophies are very similar").

<sup>205</sup> Japan cites research indicating that there were approximately 750,000 minke whales in the stocks that Japan proposed to hunt in 1990. North, *Must We Save all the World's Whales?*, The Sunday Times, July 8, 1990, § 3, at 5, col. 1, col. 3. In addition, unlike the bowhead, minke whales are not listed as endangered under the Endangered Species Act of 1973. See *supra* note 114 (discussing bowhead listed as endangered). The IWC's Scientific Committee apparently approved of the hunt and placed the population even higher at 760,000. van de Kroll, *supra* note 200, at 3, col. 2. van de Kroll reported there is less consensus on the populations in the Atlantic, where Iceland and Norway seek to hunt. *Id.* The Scientific Committee estimates the Atlantic population to be between 74,700 and 145,200. Hirschler, *Whaling Body Bars Resumption of Commercial Hunting*, Reuters, July 5, 1990, AM Cycle (LEXIS, NEXIS library, Wires file).

<sup>206</sup> See *supra* note 191 and accompanying text.

cal.<sup>207</sup> Yet the IWC has refused to grant the Japanese relief from the ban, via an aboriginal exception, for the coastal whaling villages.<sup>208</sup>

Japan first made its proposal, apparently with insufficient documentation, in 1986.<sup>209</sup> Japan argued that its "small-type whaling" in coastal seas was similar to accepted aboriginal whaling in other countries.<sup>210</sup> The IWC's Aboriginal and Subsistence Sub-Committee rejected the proposal, requesting clarification and additional information in some areas.<sup>211</sup> In 1987 Japan returned with additional documentation supporting the "Japanese view of the similarity of its small-type minke whaling to whaling operations recognized as aboriginal subsistence."<sup>212</sup> The Technical Committee thwarted the proposal when other IWC members expressed concern that even though caught and consumed by the villages, the meat would technically enter into "commerce."<sup>213</sup> The Technical Committee referred the matter to the Aboriginal Subsistence Sub-Committee for consideration the following year.<sup>214</sup>

In 1988 the Technical Committee endorsed recommendations that included "no additions be made to the category of Aboriginal

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<sup>207</sup> See *supra* note 205.

<sup>208</sup> The Japanese proposal was defeated by a vote of 15 against, 5 for, and 8 abstentions. PR Newswire, July 6, 1990 (LEXIS, NEXIS library, Wires file).

<sup>209</sup> *Chairman's Report of the Thirty-Eighth Annual Meeting*, in THIRTY-SEVENTH REPORT, *supra* note 191, at 10, 18.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* Unfortunately, the IWC Report does not indicate the areas where clarification and additional information were required.

<sup>212</sup> *Chairman's Report of the Thirty-Ninth Annual Meeting*, in THIRTY-EIGHTH REPORT, *supra* note 106, at 21. Further, Japan submitted a proposed amendment to the Schedule stating, in part, that "[t]he taking by native whalers of minke whales from the Okhotsk Sea-West Pacific stock is permitted, but only when the meat and products are to be used exclusively for local consumption." *Id.*

<sup>213</sup> *Id.* at 21-22. It is unclear exactly how the meat would be traded in commerce or what catch would be characterized as "commercial." The Japanese delegation, however, requested that an ad hoc working group be established to define "whaling for commercial purposes, aboriginal subsistence whaling, and other categories." *Id.* at 22. It appears this group was named the Definitions Working Group. *Id.* Japan requested that this group report at the next meeting. *Id.*

<sup>214</sup> *Id.* The deferral apparently was to give the Aboriginal Subsistence Whaling Sub-Committee time to confer with the ad hoc Definitions Working Group. *Id.*

Subsistence Whaling.”<sup>215</sup> Japan claimed that its coastal small-type whaling shares characteristics with both commercial whaling and aboriginal subsistence whaling, but is not properly characterized under either description.<sup>216</sup> Further, Japan cited to a workshop, held in April 1988, in which a panel had identified “socio-economic, cultural, religious and nutritional factors that were important to the continued existence of small-type coastal whaling communities.”<sup>217</sup> The Technical Committee responded to Japan’s pleas for “compassionate consideration” by referring the matter to the IWC’s plenary.<sup>218</sup> The plenary, in turn, merely formed a working group to “consider various types of small-type whaling.”<sup>219</sup> In 1989 the IWC again rejected Japan’s requests that Japanese coastal villages be allowed to hunt minke whales under the aboriginal whaling exception<sup>220</sup> despite claims from the

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<sup>215</sup> *Chairman’s Report of the Fortieth Annual Meeting*, in THIRTY-NINTH REPORT, *supra* note 106, at 10, 23.

<sup>216</sup> *Id.* at 22-23.

<sup>217</sup> *Id.* at 22. The workshop was comprised of 12 experts from 6 countries. *Id.* Among other findings, this panel concluded:

(1) that the [Japanese whaling of minke whales] was historically based with centuries of tradition; (2) it is small scale but functional, exploiting unendangered species and is remarkably stable; (3) a significant proportion of the products is distributed through non-commercial channels including gifting throughout many elements of the community; (4) the [whaling] activity has some commercial characteristics but is not totally market oriented; (5) it satisfies regionally diverse diet preferences — no community uses all parts of the whale but a historically organised distribution network ensures total use; (6) the activity has a socio-religious basis.

*Id.*

<sup>218</sup> *Id.* at 23-24.

<sup>219</sup> *Id.* at 24. The plenary responded to Japan’s pleas for compassion by agreeing that “the Japanese position would be a matter of priority.” *Id.*

<sup>220</sup> Fritsch, *supra* note 200, at 33, col. 1; Armstrong, *supra* note 200, at 7, col. 2 (stating “the international body . . . put off for another year a request by Japan to allow residents in four coastal villages to be given emergency relief from the moratorium). In 1989 the working group, formed a year earlier, recommended that the group continue its review of documentation. CHAIRMAN’S REPORT: 41ST MEETING, *supra* note 6, at 6. Members of the Technical Committee expressed a concern for “increase[d] comprehension” of the issues, and the plenary deferred the matter for consideration for another year. *Id.* at 32-33. In the plenary some members expressed a concern for the lack of data on the minke stocks, and other members, such as the United States, expressed a desire not to “compromise the moratorium” before it was re-evaluated in 1990. *Id.*

Japanese government that the ban is causing “a lot of suffering” in the coastal villages.<sup>221</sup>

It is impossible to reconcile the IWC’s rejection of the Japanese proposal for small-type coastal whaling with its allowance of the Alaskan aboriginal whaling exception. Granted, Japan’s history of circumventing IWC regulations<sup>222</sup> makes a certain degree of IWC wariness toward Japanese proposals understandable. Yet, even with Japan’s history taken into account, an examination of the proposals shows that Japan has made a showing at least comparable to that made for the Alaskan exception.<sup>223</sup> Under the Alaskan precedent a showing of cultural dependence is sufficient to overcome a ban placed on a species whose numbers are close to extinction.<sup>224</sup> Japan has offered proof of a cultural dependence — albeit one that involves the exchange of money — as deeply rooted and “traditional” as that shown in Alaska. This showing, if the Alaska exception has any precedential value, is sufficient by itself for the Japanese to overcome the moratorium on commercial whaling. In addition, Japan has gone one step further than the United States in establishing that the exception should be applied: *Japan has provided evidence that the stock of whales might survive the hunt.*<sup>225</sup> The huge population of minke whales adds a convincing element to the Japanese argument lacking in the Eskimos’ situation: the hunt may not endanger the whales.<sup>226</sup>

There are three possible explanations for the IWC’s disparate treatment of the applications of the aboriginal whaling exception in Alaska and Japan, only one of which is analytically acceptable. The first explanation is that the Alaskan exception has no precedential value. Under this explanation the IWC will apply the exception randomly and for different reasons. This interpretation is undesirable because it renders whimsical the IWC’s application of the exception. The exception was provided out of concern for cultural heritage; its application to various cultures should be similar and systematic. If the IWC applies the excep-

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<sup>221</sup> Armstrong, *supra* note 200, at 7, col. 3. Japan threatened to increase killings of small cetaceans to help alleviate the suffering caused by the ban on the whaling. *Id.*

<sup>222</sup> See *supra* note 200 and accompanying text.

<sup>223</sup> See *supra* notes 203-07, 216-17 and accompanying text.

<sup>224</sup> See *supra* notes 162-67 and accompanying text.

<sup>225</sup> See *supra* notes 205-08 and accompanying text.

<sup>226</sup> Due to the small numbers of bowheads, the United States has never even attempted to argue that the hunt might not endanger the stocks.

tion unsystematically, member nations will lose respect for the IWC.

A second explanation for the IWC's disparate treatment is that the application of the exception depends on the member nation requesting it. When the powerful United States, enforcer for the IWC, requests IWC approval for application of the exception, there is a low burden of proof. When the "black sheep" Japan requests it, the IWC requires a higher burden of proof. This explanation echoes remarks by one Japanese official that the Commission is ethnocentric, racist, and unsympathetic to the Japanese ways.<sup>227</sup> This explanation is unattractive because it is discriminatory and, again, unsystematic. If the IWC gauges the application of its policies on such a standard, it will lose the respect of its members.

The third, and most likely, explanation for the IWC's disparate treatments of Japan's and the United States' use of the exception is that one of the treatments is simply wrong. As stated above, the application of the aboriginal whaling exception in Alaska is inconsistent with virtually every conservationist policy proposal advocated by the United States and approved by the IWC. It directly contradicts the conservative approach to whale conservation which characterizes United States and IWC policy for the past twenty years. It also directly contradicts the express purposes of the 1946 Convention to safeguard whale stocks and "ensure" their "effective conservation."<sup>228</sup> Indeed, the Alaskan aboriginal whaling exception resurrects the IWC's exploitative and thoughtless policies of the past.

If one accepts the Alaskan aboriginal exception as wrong, or inconsistent with other IWC policy and the 1946 Convention, then explaining the IWC's refusal of the Japanese proposal becomes easier. One may respond to the Japanese proposal that it too is inconsistent with a conservative approach to the conservation of whales. Until the conditions established in the 1990 meeting of the IWC are fulfilled,<sup>229</sup> the commercial moratorium should remain and the Japanese request should be rejected. If

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<sup>227</sup> Schoenberger, *supra* note 202, at 8, col. 1 (quoting Junichiro Okamoto, an assistant director in Japan's Fishery Agency, who states that "[s]ome of our top officials complain that the anti-whaling campaign is racist, that it discriminates against Japan. . . . Sometimes we are forced to pay attention to such opinions").

<sup>228</sup> 1946 Convention, *supra* note 6, preamble.

<sup>229</sup> The conditions are the comprehensive review of stocks and the



one classifies the Alaskan precedent as wrong, the Japanese will not be able to use the precedent to argue that the interests of maintaining cultural heritage outweigh the interests of a species' survival.

#### IV. PROPOSAL

The aboriginal whaling exception in the 1946 Convention recognizes that a human right to cultural heritage may conflict with an animal species' right to survival. When that exception is applied, the IWC must balance the interests of the humans against the interests of the animals. This Comment has attempted to address, and criticize, only one instance where these rights were not adequately weighed. When the United States advocated, and the IWC approved, the aboriginal whaling exception to the ban on taking bowhead whales, they endorsed the preservation of cultural heritage at the cost of an almost guaranteed extinction of a species.<sup>230</sup> This single instance of misjudgment is totally inconsistent with the rational and conservative approach to whale management that otherwise characterizes the United States' and the IWC's current policy toward the whale. By so easily circumventing the IWC's conservative approach to whale conservation, the United States has seriously undermined both its own credibility and the credibility of the IWC.

The IWC should reassert its commitment to a conservative approach to whale conservation. This reassertion will require the IWC to treat member countries consistently in the application of the aboriginal whaling exception. Specifically, the IWC should require the United States to increase its research efforts and justify its allowance of the aboriginal whaling with scientific evidence. As research techniques continue to improve, and the estimates of the population grow, this showing will be easier to make. Until there is scientific support for the proposition that aboriginal whaling poses no threat to the Bering Sea bowhead stocks, however, the IWC should require the United States to stop the hunts.<sup>231</sup>

The IWC should also establish the true reasons for its denial of

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implementation of the Revised Management Procedure. *See supra* notes 104-07 and accompanying text.

<sup>230</sup> *See supra* notes 152-55 and accompanying text.

<sup>231</sup> At the bare minimum, this showing should establish that the stocks have reached their maximum sustainable yield.

the exception to Japan. The IWC should explain that the small-type coastal whaling proposal violates the IWC policy of conservative whale management. If Japan points to the Alaskan exception as also violative of such a policy, the IWC may have to admit its error in allowing the exception. By concurrently imposing requirements on the United States that are consistent with a conservative approach to whale management, at least the IWC will be able to point to its correction of this mistake.

Without incontrovertible evidence of a stock's ability to sustain an aboriginal hunt, the IWC should deny use of the aboriginal whaling exception by any of its members. By requiring a showing that is consistent with a conservative and rational policy of whale management, from both Japan and the United States, the IWC will be able to maintain its mission of rebuilding whaling stocks. In addition, by consistently pursuing a conservative and rational whale management program, the IWC will fulfill the 1946 Convention's express purposes to "safeguard[ ] for future generations the great natural resources represented by whale stocks" and to "ensure [their] proper and effective conservation."<sup>232</sup>

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<sup>232</sup> 1946 Convention, *supra* note 6, preamble.