

## COMMENTS

### CULTURE CLASH: THE INFLUENCE OF INDIGENOUS CULTURES ON THE INTERNATIONAL WHALING REGIME

#### INTRODUCTION

The cultural values of native populations are a significant source of law, because modern societies develop from the practices and beliefs of indigenous cultures.<sup>1</sup> Over time, indigenous customs and traditions are incorporated into contemporary lifestyles.<sup>2</sup> The strong influence ancient practices have on present cultures is apparent in the religious, dietary, economic and political facets of today's societies.<sup>3</sup>

In turn, modern culture influences the laws of a nation.<sup>4</sup> Societal preferences, practices and traditions are reflected in the regulations a country creates to govern its people.<sup>5</sup> Since modern and ancient cul-

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1. J. Richard Broughton, *The Jurisprudence of Tradition and Justice Scalia's Unwritten Constitution*, 103 W. VA. L. REV. 19, 21-26 (2000); Eric N. Weeks, *A Widow's Might: Nakaya v. Japan and Japan's Current State of Religious Freedom*, 1995 BYU L. REV. 691, 693-94 (1995).

2. Broughton, *supra* note 1, at 21-22.

3. See generally Chaihark Hahm, *Law, Culture, and the Politics of Confucianism*, 16 COLUM. J. ASIAN L. 253, 256-58 (2003) (recognizing the significant role of ancient Confucian beliefs in modern Korean society); A.W. Harris, *Making the Case for Collective Right: Indigenous Claims to Stocks of Marine Living Resources*, 15 GEO. INT'L ENVTL. L. REV. 379, 392 (2003) (discussing the integral role traditional whale hunting plays in the Makah Indians' present day religious, ceremonial and social lives); Tarik Abdel-Monem, *Affixing the Blame: Ideologies of HIV/AIDS in Thailand*, 4 SAN DIEGO INT'L L.J. 381, 407 (2003) (discussing the presence of the historical indigenous Thai tradition of polygamy in modern Thailand); James Cockayne, *Members of the Yorta Yorta Aboriginal Community v Victoria: Indigenous and Colonial Traditions in Native Title*, 25 MELB. U. L. REV. 786, 795 (2001) (recognizing the presence of indigenous traditions in modern Aboriginal society).

4. Rosemary J. Coombe with Jonathan Cohen, *The Law and Late Modern Culture: Reflections on Between Facts and Norms from the Perspective of Critical Cultural Legal Studies*, 76 DENV. U. L. REV. 1029, 1033-35 (1999); Elizabeth A. Brooks, *Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Arguments*, 33 GA. L. REV. 1113, 1148 (1999) (recognizing modern culture is prevalent in modern law).

5. Susan Reynolds, *The Emergence of Professional Law in the Long Twelfth Century*,

tures are so intertwined, indigenous practices have an important impact on modern laws. Accordingly, statutes and legislation are designed to protect the indigenous practices and beliefs deeply rooted in contemporary lifestyles.<sup>6</sup>

Indigenous people are defined as

the living descendants of preinvasion inhabitants of lands now dominated by others. . . . [T]heir ancestral roots are imbedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity.”<sup>7</sup>

Thus, indigenous peoples are considered to be both a part of the present and remnants of the past. Indigenous peoples “develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.”<sup>8</sup>

Many established indigenous practices are aggressively suppressed by colonization and replaced with customs founded on Western political and economic principles. Today, indigenous peoples strive for recognition and self-determination. Modern domestic and international legal systems work to preserve indigenous rights.<sup>9</sup> Some legal systems actively elect to apply indigenous customs to areas of

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21 LAW & HIST. REV. 347, 366 (2003) (arguing that law produced to fulfill the need for legal security in the twelfth century was shaped by preexisting norms, customs and local circumstances); Shawn Boyne, *The Future of Liberal Democracies in a Time of Terror: A Comparison of the Impact on Civil Liberties in the Federal Republic of Germany and the United States*, 11 TULSA J. COMP. & INT’L L. 111, 113 (2003) (discussing how the unique political, historical and cultural traditions of Germany and America shaped the creation of terrorism laws); Ric Richardson, *Governing Western Mineral Resources: The Emergence of Collaboration*, 43 NAT. RESOURCES J. 561, 584 (2003) (attributing Roman tradition and local custom to the formation of local mining laws in the modern mining industry).

6. *Report of the Working Group on Indigenous Populations*, U.N. Commission on Human Rights, 45th Sess., Agenda Item 14, art. 29, U.N. Doc. E/CN.4 (1993) (Article 29 states: “Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. . . . [I]ncluding . . . medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs . . . .”). See also Stephen D. Osborne, *Protecting Tribal Stories: The Perils of Propertization*, 28 AM. INDIAN L. REV. 203 (2003/2004) (discussing current laws protecting Native American cultures).

7. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3 (1996) [hereinafter ANAYA, *INDIGENOUS PEOPLES*].

8. S. JAMES ANAYA, *INTERNATIONAL LAW AND INDIGENOUS PEOPLES* xi (2003) [hereinafter ANAYA, *INTERNATIONAL LAW*].

9. For example, Australia’s *Land Rights Act*, Aboriginal Land Rights (Northern Territory) Act, 1976, no. 191 (Austl.); the United States’ *American Indian Religious Freedom Act*, American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1978); and the United Nation’s *Working Groups on Indigenous Populations*.

modern law. For example, the New Zealand government developed legislation utilizing traditional Māori conflict resolution techniques in the rehabilitation of juvenile offenders.<sup>10</sup>

Even in the absence of protectionist laws, indigenous traditions can survive throughout time. In fact, some indigenous customs become so ingrained in modern society, perhaps they can no longer be considered “indigenous.” Although certain practices derive from the first inhabitants of the land, the majority of the present population adopts these practices. Perhaps these habits are implemented by modern society specifically as a means of *preserving* the rights of indigenous peoples. Alternatively, perhaps certain indigenous customs are subconsciously incorporated into modern practices by subsequent peoples. These practices eventually assume a prominent position in society and are afforded the utmost legal protection.

For example, the present whaling regulations of some countries reflect attitudes about whaling stemming from indigenous peoples’ perceptions of whales. The traditional beliefs and whaling practices of these societies are apparent in the number and type of restrictions on whaling, and the justifications for permitting whaling.

Although international attitudes towards whaling have changed over time, indigenous perceptions of whaling continue to exist. The indigenous cultures who revered the whale influenced laws protecting whales. In contrast, the cultures who considered whales an exploitable natural resource have few, if any, laws protecting whales. Today, only a few countries still take part in whaling, a highly debated practice due to the sanguineous nature of whale hunting.<sup>11</sup>

Whales transcend international borders, traveling the world’s oceans to feed, give birth and engage in complex social behaviors.<sup>12</sup> Widespread concern for the survival of cetaceans has resulted in a number of international agreements, the most significant being the International Convention for the Regulation of Whaling (“ICRW”) signed in 1946.<sup>13</sup> Although the initial objective of the member parties was the sustainability of these natural “resources” (whales), over the past three decades the objective of the International Whaling Commission (“IWC”) has shifted toward the protection and conservation of

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10. Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 419 (2003) (citing Heather Strang, *Restorative Justice Programs in Australia* 4, at <http://www.aic.gov.au/crc/reports/strang/index.html> (Mar. 2001)).

11. For a graphic description of traditional whaling methods, see NATHANIEL PHILBRICK, *IN THE HEART OF THE SEA* 53-54 (2000).

12. See JEFFREY S. LEVINTON, *MARINE BIOLOGY: FUNCTION, BIODIVERSITY, ECOLOGY* 159 (1995).

13. International Convention for the Regulation of Whaling, with Schedule of Whaling Regulations, Dec. 2, 1946, pmb., 62 Stat. 1716, 161 U.N.T.S. 74 (entered into force Nov. 10, 1948).

whales.<sup>14</sup> This has caused great strife among the IWC members because there are still countries engaging in whale hunting. Countries such as Japan fervently argue the practice of hunting whales is deeply embedded in their history, and thus an integral part of their present-day culture.<sup>15</sup>

In 1982, the IWC applied a moratorium limiting the commercial catch of whales (from 1985 onwards) to zero.<sup>16</sup> However, one exception to this restriction is the “aboriginal subsistence whaling” exemption.<sup>17</sup> The same time the moratorium was passed, a resolution was passed “recognizing ‘the needs of aboriginal people who are dependent upon whales for nutritional, subsistence and cultural purposes.’”<sup>18</sup> In order for native peoples to qualify, a member state must request a waiver from the IWC.<sup>19</sup> The waiver requires a state to establish a specific cultural connection with hunting a certain whale species.<sup>20</sup>

The parameters of what constitutes a cultural connection with whaling are not clearly defined. Is a cultural practice defined by the length of time, the number of people who engage in, or the degree of significance of the practice? The arbitrary application of the “aboriginal exception” to the moratorium is of concern to the anti-whaling countries. For example, although the Eskimos no longer practice most aspects of their historical culture and are accustomed to living in modern society,<sup>21</sup> they fall into the “aboriginal exception.” Despite utiliz-

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14. See Alexander Gillespie, *The Ethical Question in the Whaling Debate*, 9 GEO. INT'L ENVTL. L. REV. 355, 356-58 (1997) [hereinafter Gillespie, *The Ethical Question*].

15. Reuben B. Ackerman, Note, *Japanese Whaling in the Pacific Ocean: Defiance of International Whaling Norms in the Name of “Scientific Research,” Culture, and Tradition*, 25 B.C. INT'L & COMP. L. REV. 323, 334 (2002).

16. Harris, *supra* note 3, at 380.

17. “Aboriginal subsistence whaling is defined as ‘whaling, for purposes of local aboriginal consumption carried out by or on behalf of aboriginal, indigenous, or native peoples who share strong community, familial, social, and cultural ties related to a continuing traditional dependence on whaling and on the use of whales.’” William C.G. Burns, *The Forty-Ninth Meeting of the International Whaling Commission: Charting the Future of Cetaceans in the Twenty-First Century*, 1997 COLO. J. ENVTL. L. & POL'Y Y.B. 67, n.17 (1997) (quoting Human Society International, *Makah Whaling: A Stepping Stone to Undermining the Commercial Whaling Moratorium*, HSI Rep. 4 (1997)).

18. Harris, *supra* note 3, at 381 (quoting Chairman's Report of the Thirty-Fourth Annual Meeting, 33 REP. INT'L WHALING COMM'N 40, 38, app. 3. (1983)).

19. William Bradford, “*Save the Whales*” v. *Save the Makah: Finding Negotiated Solutions to Ethnodevelopmental Disputes in the New International Economic Order*, 13 ST. THOMAS L. REV. 155, 181 (2000); Harris, *supra* note 3, at 381.

20. See Leesteffy Jenkins & Cara Romanzo, *Makah Whaling: Aboriginal Subsistence or a Stepping Stone to Undermining the Commercial Whaling Moratorium?*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 71, 79-82 (1998).

21. RICHARD ELLIS, *MEN AND WHALES* 486 (1991).

ing contemporary technology to the fullest extent possible, the Eskimos still qualify as “aboriginal.”<sup>22</sup>

Although the IWC sets the framework for international regulations, more than ninety percent of all whaling occurs at the national level (within 200 nautical miles of coastal countries).<sup>23</sup> Therefore, it is imperative small-scale whaling practices are regulated as well. Some nations such as New Zealand and the United States have stringent laws protecting whales. Others, such as Japan, do not. The reason for this disparity can best be explained by the historical and cultural differences of such nations.

This Comment examines how cultural whaling practices and beliefs of indigenous peoples have influenced current whaling practices and legislation in New Zealand and Japan. The Māori people of New Zealand and the early small-scale whalers of Japan practiced and justified whaling in very different ways.<sup>24</sup> These contrasting practices and beliefs have shaped the way New Zealand and Japan regulate whaling today. Part I reviews New Zealand’s indigenous whaling practices, present whaling laws and relationship with the IWC. Part II examines Japan’s indigenous whaling practices, modern whaling laws and status within the IWC. Part III then analyzes the influence of indigenous cultures on the international whaling regime and the regulation of national whaling. This section also seeks to resolve conflicting cultural beliefs in the international whaling regime by looking beyond cultural arguments and applying scientific principles. Part IV summarizes the effect traditional whaling practices have on present whaling legislation.

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22. *Id.* Likewise, the Makah Indians fall into the “aboriginal exception” although they utilize modern equipment in their whaling practices. See Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 263-66 (2000) (describing the Makah’s use of modern equipment to hunt whales).

23. Milton M.R. Freeman, *Culture-Based Conflict in the International Whaling Commission: The Case of Japanese Small-type Whaling*, in THE FUTURE OF CETACEANS IN A CHANGING WORLD 33 (William C.G. Burns & Alexander Gillespie eds., 2003). Within the exclusive economic zone, coastal States retain “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living. . . .” U.N. Convention on the Law of the Sea, Dec. 10, 1982, art. 56(1)(a), 1833 U.N.T.S. 3, 397. This zone extends up to 200 nautical miles from the coastline. *Id.* art. 57.

24. “[A] general consensus exists among authoritative international actors that indigenous peoples or populations include the . . . Maori of *Aotearoa* (New Zealand), and at least many of the tribal or culturally distinctive non-dominant peoples of Asia . . . .” ANAYA, INTERNATIONAL LAW, *supra* note 8, at xi.

## I. NEW ZEALAND

At present, New Zealand has some of the most comprehensive marine mammal protection laws in the world. Not only does New Zealand prohibit national whaling, but it has also been at the forefront of the international movement to protect whales. New Zealand's strong adherence to the conservation of whales stems from the beliefs and practices of its indigenous people.

A. *History of Whaling*

The indigenous people of New Zealand, the Māori, associate whales with spirituality.<sup>25</sup> The Māori are of Polynesian descent and trace their origins to the peoples of the mythological land of *Hawai'iki*.<sup>26</sup> The early Māori voyagers used the stars to navigate and if they encountered stormy seas, they lowered their sails and trusted their gods to direct them.<sup>27</sup> The Māori believed as long as their gods were happy they would be safe.<sup>28</sup>

These Polynesians were skilled ocean voyagers. They had *pahi* (canoes) that could transport large numbers of people and supplies.<sup>29</sup> This type of canoe was used by the Māori to voyage to *Aotearoa* (New Zealand) from the Pacific Islands, as well as make round trips from *Aotearoa* to the Cook Islands.<sup>30</sup> Polynesian priests placed these ocean going vessels under *tapu*, by deeming the vessels sacred and thus, untouchable.<sup>31</sup>

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25. Martin W. Cawthorn, *The Changing Face of New Zealand's Whaling Policy*, in WHALING AND ANTI-WHALING MOVEMENT 2 (Inst. of Cetacean Research, 1999), available at [http://luna.pos.to/whale/gen\\_nz.html](http://luna.pos.to/whale/gen_nz.html) (last visited Nov. 15, 2004).

26. Generally most peoples of Polynesian descent trace their origins to *Hawai'iki*. JOAN METGE, THE MAORIS OF NEW ZEALAND 1 (1967); Hawaiian Culture, *Hawai'iki—The Ancient Land*, at <http://www.spiritsouthseas.com/hawaiiki.htm> (last visited Nov. 27, 2004).

27. ELSDON BEST, POLYNESIAN VOYAGERS 52 (1954) [hereinafter BEST, POLYNESIAN VOYAGERS]. Māoris also believed whales were “guardians and protectors of those on oceanic voyages.” Cawthorn, *supra* note 25, at 2.

28. BEST, POLYNESIAN VOYAGERS, *supra* note 27, at 64; ELSDON BEST, THE MAORI AS HE WAS: A BRIEF ACCOUNT OF MAORI LIFE AS IT WAS IN PRE-EUROPEAN DAYS 62 (1924) (stating “Māori could do little without relying on his gods for help or protection.”) [hereinafter BEST, THE MAORI AS HE WAS].

29. BEST, POLYNESIAN VOYAGERS, *supra* note 27, at 43; BEST, THE MAORI AS HE WAS, *supra* note 28, at 28-31.

30. BEST, POLYNESIAN VOYAGERS, *supra* note 27, at 43-44.

31. *Id.* at 64.

*Tapu* . . . is a concept existing in many Polynesian societies, including traditional Hawaiian, Tongan, and Māori cultures. It reflects something that is holy or sacred. In Māori . . . tradition, something that is *tapu* . . . is considered inviolable or sacrosanct due to its sacredness. Things or places which are *tapu* must be left alone,

Most ancient Polynesian cultures included marine life in their myths and legends.<sup>32</sup> The god *Tangaroa* symbolized fish while the guardian of the ocean was *Kiwa*.<sup>33</sup> Whales were of particular importance to Polynesians because they were thought to signify spiritual guardians.<sup>34</sup> Whales were considered *ariā*, or visible spirits that took the form of a living creature.<sup>35</sup>

Māori folklore is filled with stories about whales. According to Māori legend, the Māori ancestor *Paikea* came to New Zealand on the back of the whale *Tohoro*.<sup>36</sup> In the legend of *Mata-mata*, one man, *Rakai*, and his family shared a unique bond with the whale *Mata-mata*.<sup>37</sup> This whale is believed to have protected *Rakai* and continues to protect his descendents at sea.<sup>38</sup> In addition to considering whales spiritual guardians, many Māori tribes believe they are actually descended from whales, and the elite Māori were once honored by being compared to whales.<sup>39</sup>

There is no indication the early Māori hunted for whales.<sup>40</sup> Rather, oral tradition states the earliest Māori tribes battled over a stranded sperm whale.<sup>41</sup> When whales beached themselves on the shores of New Zealand, the Māori believed the whale was a gift from the gods.<sup>42</sup> Occasionally they ate the meat from these whales, but

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and may not be approached or interfered with. In some cases, they should not even be spoken of.

Word IQ, *Definition of Tapu*, at <http://www.wordiq.com/definition/Tapu> (last visited Oct. 9, 2004).

32. See generally STEPHEN MARTIN, *THE WHALES' JOURNEY* 14-17 (2001) (describing several Polynesian myths and legends about marine creatures); Benjamin A. Kahn, *The Legal Framework Surrounding Maori Claims to Water Resources in New Zealand: In Contrast to the American Indian Experience*, 35 STAN. J. INT'L L. 49, 59 (1999) (recognizing the presence of marine deities in Māori culture).

33. BEST, *THE MAORI AS HE WAS*, *supra* note 28, at 35.

34. Alexander Gillespie, *Aboriginal Subsistence Whaling: A Critique of the Inter-Relationship Between International Law and the International Whaling Commission*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 77, 116 (2001) [hereinafter Gillespie, *Aboriginal Subsistence Whaling*].

35. METGE, *supra* note 26, at 30 (describing *ariā* as natural phenomenon and living creatures).

36. Whale Watch, *The History of the Maori People*, at <http://www.whalewatch.co.nz/ourmaori.htm> (last visited Oct. 26, 2003).

37. *Id.*

38. *Id.*

39. Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 116.

40. ELLIS, *supra* note 21, at 114; HARRY MORTON, *THE WHALE'S WAKE* 62 (1982).

41. MORTON, *supra* note 40, at 165; L.S. RICKARD, *THE WHALING TRADE IN OLD NEW ZEALAND* 31 (1965).

42. ELLIS, *supra* note 21, at 114-15; Janice Henke, *Editorial: To Strand or not to Strand—People Ask the Question, not Whales*, IWMC WORLD CONSERVATION TRUST, ¶ 1

typically the Māori used the bone of the whales in their crafts and weapons.<sup>43</sup> The early Māori utilized almost all of the parts of the stranded whales they encountered.<sup>44</sup> As evidenced by whale figures appearing frequently in ancient Māori carvings,<sup>45</sup> stranded whales were highly prized.

Although the Māori rarely ate the meat of the whales they found, they certainly possessed the skills to exploit whales.<sup>46</sup> These skills are evident in the methods the Māori used to catch other types of marine life including eels, sharks, groupers, hagfish, parrotfish and even seals; all are ocean dwelling creatures requiring specific knowledge and abilities to catch.<sup>47</sup> The Māori practiced mass captures of eels (which they believed were evil) and birds, both of which involved complicated workmanship.<sup>48</sup> Therefore, it is clear the Māori had careful knowledge of their surroundings and they were able to utilize natural resources to the best of their abilities.<sup>49</sup>

Despite being adept at sea voyaging and possessing the skills to exploit whales, the early Māori chose not to engage in whale hunting (although occasionally, small dolphins and pilot whales were harpooned or driven ashore).<sup>50</sup> As skilled canoe-men, the Māori had every opportunity to hunt the numerous whales frequenting the calm bays of New Zealand.<sup>51</sup> However, the Māori rarely engaged in whale hunting, unlike the culturally comparable Makah Indians of the United States.<sup>52</sup>

Māori culture was eventually influenced by the *Pākehā* (white person). In the early 1800s, the first Europeans were attracted to New Zealand because of the abundance of seals.<sup>53</sup> Once the population of

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(2003), at <http://www.iwmc.org/newsletter/2003/2003-01-02.htm> (last visited Oct. 21, 2004).

43. ELLIS, *supra* note 21, at 114; MORTON, *supra* note 40, at 62, 165.

44. MORTON, *supra* note 40, at 165.

45. MARTIN, *supra* note 32, at 17.

46. MORTON, *supra* note 40, at 165.

47. JAMES BELICH, MAKING PEOPLES: A HISTORY OF THE NEW ZEALANDERS 68-69 (1996); METGE, *supra* note 26, at 13. See also Kahn, *supra* note 32, at 57-58.

48. BELICH, *supra* note 47, at 70; METGE, *supra* note 26, at 13-14.

49. BELICH, *supra* note 47, at 69; METGE, *supra* note 26, at 15.

50. BELICH, *supra* note 47, at 68; Kahn, *supra* note 32, at 58 (citing B.F. LEACH & A.S. BOOCCOCK, PREHISTORIC FISH CATCHES IN NEW ZEALAND 19-20 (1993)).

51. METGE, *supra* note 26, at 15.

52. MORTON, *supra* note 40, at 165 (suggesting one possible reason the Māori did not hunt whales was because Māori canoes were ill-equipped for maneuvering in the manner required to hunt whales).

53. DOM FELICE VAGGIOLI, HISTORY OF NEW ZEALAND AND ITS INHABITANTS 23 (John Crockett trans., Univ. of Otago Press 2000) (1896); E.J. TAPP, EARLY NEW ZEALAND: A DEPENDENCY OF NEW SOUTH WALES, 1788-1841 6 (1958); ELLIS, *supra* note 21, at 153.



seals was decimated, the *Pākehā* turned to hunting whales.<sup>54</sup> Bay whaling was the first type of whaling these Europeans engaged in, because it was easier and less expensive than hunting in the open ocean.<sup>55</sup> New Zealand's calm bays attracted female whales and calves.<sup>56</sup> The whalers knew to kill the whale calf first. The mother whale, not wanting to leave her calf, would then become easy prey.<sup>57</sup> Base ships were anchored in bays and the dead whales were towed to shore stations to be processed.<sup>58</sup>

Along with disease, alcohol and weapons, the *Pākehā* brought promises of wealth and foreign travel to the Māori.<sup>59</sup> This false idealism convinced numerous Māori men to join the whaling fleets.<sup>60</sup> Many times whalers would sign Māori on as crew in New Zealand, only to abandon the Māori workers when the ship reached Sydney.<sup>61</sup> Those Māori who made it beyond Sydney gained *mana* for experiencing the world outside of New Zealand and because they brought back European goods.<sup>62</sup> In turn, the *Pākehā* whalers living on New Zealand shores depended on the Māori for food, protection from other Māori tribes, and even for wives.<sup>63</sup>

Before the *Pākehā* built a whaling station, they often sought to gain the right to do so from the local Māori tribe, but the whalers ultimately chose the building site.<sup>64</sup> At first, the Māori admired the whalers because they engaged in risky and skillful hunting.<sup>65</sup> However, after time many Māori started to adhere to the same sort of lifestyle as the *Pākehā*; a crude one involving alcohol and weapons.<sup>66</sup>

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54. ELLIS, *supra* note 21, at 153; TAPP, *supra* note 53, at 18.

55. ELLIS, *supra* note 21, at 115.

56. *Id.*

57. J.N. TONNESSEN & A.O. JOHNSEN, THE HISTORY OF MODERN WHALING 220 (R.I. Christophersen trans., Univ. of Cal. Press 1982) (1959).

58. ELLIS, *supra* note 21, at 116.

59. VAGGIOLI, *supra* note 53, at 76; New Zealand Tourism Online, *Colonisation*, at <http://www.tourism.net.nz/new-zealand/about-new-zealand/colonisation.html> (last visited Nov. 10, 2004).

60. See MARTIN, *supra* note 32, at 12 (discussing Māori joining the *Pākehā* whaling fleets).

61. RICKARD, *supra* note 41, at 34.

62. BELICH, *supra* note 47, at 145. The Māori define *mana* as power. See KPBS Adventure Divas, *A Māori Primer*, at <http://www.pbs.org/adventuredivas/nz/dispatches/maori.html> (last visited Oct. 9, 2004).

63. BELICH, *supra* note 47, at 133.

64. VAGGIOLI, *supra* note 53, at 60.

65. *Id.*

66. *Id.* at 76. See also MORTON, *supra* note 40, at 218 (discussing how smoking quickly became prevalent among Māori women and how the Māori gradually took up drinking).

Unfortunately, it was these factors that led the Māori population to decrease seventy-five percent by 1840.<sup>67</sup>

Between 1827 and 1850, over eighty whaling stations were established in New Zealand.<sup>68</sup> Visitors to New Zealand in the mid-1800s commented on the indiscriminate practices of whalers in killing female whales and calves.<sup>69</sup> This overexploitation of whales led to the rapid decline in whale populations and many stations closed in the 1840s.<sup>70</sup> Along with the decrease in whale populations, cheaper vegetable oil was introduced into the markets, causing the demand for whale oil to significantly decrease.<sup>71</sup>

As the whale industry came to a close and nearly a decade before New Zealand officially became a colony, the Treaty of Waitangi (“Treaty”) was created.<sup>72</sup> This treaty was a result of England recognizing the Māori had a close connection and a right to New Zealand’s natural resources.<sup>73</sup> In exchange for sovereignty, the Māori gained all “rights and privileges of British subjects.”<sup>74</sup> Signed in 1840, the Treaty of Waitangi is a *treaty*, thus only enforceable at the international level and not in New Zealand’s courts (unless codified by statute).<sup>75</sup> This fact proved to be one of great conflict in the years to come.

### B. Modern Whaling Practices

The Treaty of Waitangi Tribunal (“Tribunal”) hears issues pertaining to the principle of *te tino rangatiratanga*<sup>76</sup> (authority or sovereignty) over resources and other *taonga*<sup>77</sup> (treasures) such as language and culture.<sup>78</sup> Article II of the Treaty grants the Māori self-regulation

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67. ELLIS, *supra* note 21, at 123.

68. BELICH, *supra* note 47, at 133.

69. VAGGIOLI, *supra* note 53, at 60; TAPP, *supra* note 53, at 154.

70. MARTIN, *supra* note 32, at 13.

71. TAPP, *supra* note 53, at 154.

72. Treaty of Waitangi, Feb. 6, 1840, Eng.-N.Z., 89 Consol. T.S. 473, available at <http://www.treatyofwaitangi.govt.nz/treaty/keydifferences.pdf> (Jan. 15 2004); ELLIS, *supra* note 21, at 124.

73. Kahn, *supra* note 32, at 59.

74. ELLIS, *supra* note 21, at 124.

75. Richard Boast, *Treaty of Waitangi and Environmental Law*, in HANDBOOK OF ENVIRONMENTAL LAW 247 (Christopher D.A. Milne ed., 1992).

76. Graeme W. Austin, Symposium, *Traditional Knowledge, Intellectual Property, and Indigenous Culture*, Article, *Re Treating Intellectual Property? The Wai 262 Proceeding and the Heuristics of Intellectual Property Law*, 11 CARDOZO J. INT’L & COMP. L. 333, 343 (2003).

77. Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 116.

78. Boast, *supra* note 75, at 249; Peter L. Reich, *Litigating Property Under the Guadalupe Hidalgo Treaty: The Sangre de Cristo Land Grant Case*, 5 SCHOLAR 217, 224 (2003).

of resources and ensures any Māori can make a claim to the Tribunal concerning “prejudice by acts or omissions of the Crown, which are contrary to principles of the Treaty of Waitangi.”<sup>79</sup> Generally, claims are based on the infringement upon the Māori spiritual connection with natural resources or places.<sup>80</sup>

The Ngai Tahu Māori of the South Island of New Zealand claim whales and seals are *taonga* for which they have the authority to regulate under Article II of the Treaty.<sup>81</sup> In the New Zealand Court of Appeals case *Ngai Tahu Trust Board v. Director-General of Conservation*,<sup>82</sup> the Ngai Tahu brought suit against the Director of Conservation (“Director”) for issuing permits for whale-watching off of the Kaikoura coast.<sup>83</sup> The Ngai Tahu were “pioneers” of the whale-watching business in Kaikoura,<sup>84</sup> and claimed in granting others permits, the Director had not considered their indigenous rights as set forth in the Treaty.<sup>85</sup>

The Director argued it was not established the Ngai Tahu had been the original “whale-watchers” or that an *iwi* (a unified body of Māori), had created this practice.<sup>86</sup> The Director also argued the Court should not give the Treaty too much deference because the Treaty clearly states the interests of the Māori are to be superseded by conservation concerns.<sup>87</sup>

The Court of Appeals ruled the practice of whale watching by the Ngai Tahu is “so linked to *taonga* and fisheries that a reasonable Treaty partner would recognise that Treaty principles are relevant.”<sup>88</sup> However, the court conceded the Ngai Tahu had never hunted the sperm whales at issue or interfered with the Europeans hunting these whales; thus, they had limited control over this particular fishery.<sup>89</sup> Despite this belief, the court ruled the Director must consider Ngai Tahu Treaty interests, which included protection from outside competitors in the whale-watching business.<sup>90</sup>

79. Treaty of Waitangi Act, 1975, § 6(1) (N.Z.).

80. Boast, *supra* note 75, at 251; Austin, *supra* note 76, at 347.

81. Resource Management Act, 1991, § 6(e) (N.Z.); Boast, *supra* note 75, at 251.

82. [1995] 3 N.Z.L.R. 553.

83. David Round, *De balaenis noviter inventis*, N.Z.L.J. 164 (May 1996).

84. *Id.* at 165.

85. *Id.*

86. *Id.*

87. *Id.*

88. Thomas Bennion & Geoffrey Melvin, *Ngai Tahu Maori Trust Board & Ors v D-G of Conservation & Ors*, THE MAORI L. REV. (Sept. 1995), at <http://www.bennion.co.nz/mlr/1995/sep.html>.

89. *Ngai Tahu Trust Board v. Director-General of Conservation* [1995] 3 N.Z.L.R. 553, 559.

90. Bennion & Melvin, *supra* note 88, at ¶¶ 2, 7.

The Director argued the decision of this case set a precedent allowing the Māori alone to hunt and control native species, but the Court asserted the holding of this case was limited to the particular facts.<sup>91</sup> The Court justified their ruling by asserting the Ngai Tahu had owned the land where the European whaling stations were based, and the practice of whale watching is similar to fishing, something the Ngai Tahu did have control over.<sup>92</sup> In support, the Court referred to *Te Runanga o Muriwhenua Inc. v. Attorney-General*,<sup>93</sup> establishing that all Māori controlled coastal fisheries prior to the Treaty (1840).<sup>94</sup> In addition, the Court stated there was nothing in New Zealand's Marine Mammal Protection Act ("MMPA") excluding Treaty claims.<sup>95</sup> Therefore, the Ngai Tahu prevailed in asserting their ancestral and Treaty rights, which are based on the Māori belief that whales are of great spiritual importance.

### C. National Whaling Laws

The *Ngai Tahu* case demonstrates the degree of concern for whales, and marine mammals in general, presently in New Zealand. Whales are specifically protected under the MMPA which "protects all mammals from being injured, killed or molested around New Zealand's coasts and out to 200 nautical miles off-shore. If any marine mammal is accidentally injured or killed, the incident must be reported to the Department of Conservation within 48 hours."<sup>96</sup> Once managed by the Fisheries Ministry, in 1990 the Department of Conservation and nineteen regional conservation boards were granted authority over New Zealand's marine mammal regulations.<sup>97</sup>

Under the MMPA, a permit is required to hold a marine mammal in captivity or to take a whale, dead or alive, from any location.<sup>98</sup> As long as the Minister of the Department of Conservation is notified as soon as feasible, permits are not required for parts of the whale that have inadvertently fallen off (bones, teeth or oil).<sup>99</sup> Regulations do not

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91. Elisabeth Garrett, *Commercial Whale Watching*, N.Z.L.J. 43 (Feb. 1996).

92. *Id.*

93. [1990] 2 N.Z.L.R. 641, 646-47.

94. Garrett, *supra* note 91, at 43.

95. *Id.*

96. Mark Bellingham, *Protection of Land, Plants and Animals*, in HANDBOOK OF ENVIRONMENTAL LAW 233 (Christopher D.A. Milne ed., 1992).

97. Richard G. Hildreth, *Managing Ocean Resources: New Zealand and Australia*, 6 INT'L J. ESTUARINE & COASTAL L. 89, 94 (1991).

98. Marine Mammal Protection Act, 1978, § 4 (1)(a), (b) (N.Z.).

99. *See id.* § 4 (5)(a).

apply to imported or exported ornaments or jewelry which incorporate these parts of the whale.<sup>100</sup>

Additionally, under the MMPA certain types of fishing nets are banned at certain times of the year to protect the indigenous Hector's dolphin and Hooker's sea lion.<sup>101</sup> Moreover, New Zealand citizens are prohibited from violating the MMPA at any coastal location in the world, even if their actions are legal under local law.<sup>102</sup> Under section 22 of the MMPA, the Minister of Conservation must give public notice before establishing a marine mammal sanctuary.<sup>103</sup> Any comments from the public must be submitted within twenty-eight days of the notice, after which the Minister proclaims the area a sanctuary.<sup>104</sup> The Minister may also set up advisory, research and technical committees under the MMPA.<sup>105</sup>

In order for the MMPA to fulfill its objective, fishers must actively report the deaths of marine mammals they encounter at sea.<sup>106</sup> Realistically, the ability to prosecute a violator of the MMPA is limited, primarily due to lack of sufficient evidence.<sup>107</sup> However, inspections of boats and seizures of marine mammals by law enforcement are permitted.<sup>108</sup>

New Zealand's relationship with the IWC has been one of strict adherence to regulations since the creation of the ICRW.<sup>109</sup> New Zealand joined forces with Australia and many small island states to introduce a proposal for the South Pacific Whale Sanctuary at the 1999 IWC meeting.<sup>110</sup> The South Pacific region is of special importance because humpback whales migrate there to breed.<sup>111</sup> Although the proposal was turned down, New Zealand continues to lobby for the sanctuary.<sup>112</sup>

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100. *See id.* § 4 (5)(c).

101. Bellingham, *supra* note 96, at 233.

102. Marine Mammal Protection Act § 1(3)(c).

103. *Id.* § 22(1).

104. *Id.*

105. *Id.* § 21(1).

106. Bellingham, *supra* note 96, at 233.

107. *Id.*

108. Marine Mammal Protection Act § 13(1), (5).

109. M.L. Campbell & V.G. Thomas, *Protection and Conservation of Marine Mammals in Canada: A Case for Legislative Reform*, 7 OCEAN & COASTAL L.J. 221, 242 (2002).

110. Yasuo Iino & Dan Goodman, *Japan's Position in the International Whaling Commission*, in THE FUTURE OF CETACEANS IN A CHANGING WORLD 10 (William C.G. Burns & Alexander Gillespie eds., 2003).

111. *See* MARTIN, *supra* note 32, at 225-29.

112. *Id.*

## II. JAPAN

Japan's absence of whaling regulations is based on the early perception that whales are an essential part of the Japanese diet. Whale meat was highly prized in ancient Japan and is equally prized by modern Japanese society. Whales are simply considered big fish, and therefore, an exploitable natural resource.

A. *History of Whaling*

Unlike New Zealand, Japan opposes the South Pacific Whale Sanctuary and argues the existing sanctuaries protecting whales are in violation of the ICRW.<sup>113</sup> Japan's fervent support of whaling can be traced back to the early fishing days of Japan's coastal villages. From the beginning, whales were regarded as another nutritional marine resource.<sup>114</sup> Today, Japan struggles for the ability to continue to hunt whales while the majority of the world fights to preserve the whale.

In ancient Japan, the *semi kujira* (beautiful-backed or right whale) frequented coastal waters.<sup>115</sup> These whales often beached themselves and provided a source of meat and oil for coastal villagers.<sup>116</sup> Soon enough the villagers tired of waiting for the whales to beach, and thus began the practice of whaling in Japan.<sup>117</sup>

Whale remains have been discovered on the northern Japanese island of Hokkaido, dating back to 7000 B.C.<sup>118</sup> However, despite these findings, whales are not prominent in Japanese history.<sup>119</sup> One reason may be that in the sixth and seventh centuries Buddhism prohibited

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113. Nobuyuki Yagi, *The Status of Scientific Research Whaling in International Law*, 8 ILSA J. INT'L & COMP. L. 487, 490 (2002); *International Whaling Commission on Verge of Breakup on 50th Anniversary*, U.S. NEWSWIRE (May 4, 1998).

114. ELLIS, *supra* note 21, at 82; Japan Whaling Association, Publication: ISANA, at <http://www.whaling.jp/english/isana.html> (last visited Sept. 12, 2004).

115. ELLIS, *supra* note 21, at 80.

116. See generally Japan Small-Type Whaling Association, *Japanese Small-Type Coastal Whaling—Tradition and Practice*, at <http://homepage2.nifty.com/jstwa/pdf/1996E.pdf> (last visited Oct. 9, 2004) [hereinafter Japan Small-Type Whaling Association, *Japanese Small-Type Coastal Whaling*] (discussing the early use of stranded whales by the Japanese and their transition to modern whaling practices); *History of the Traditional Diet: Japanese and the Whale*, at [http://luna.pos.to/whale/jwa\\_trad.html](http://luna.pos.to/whale/jwa_trad.html) (last visited Oct. 9, 2004) (discussing evidence of the use of stranded whales by the early Japanese and their use of whale meat and oil).

117. ELLIS, *supra* note 21, at 80.

118. *Id.*

119. *Id.* at 82; Alma Soongi Beck, *The Makah's Decision to Reinstate Whaling: When Conservationists Clash with Native Americans Over an Ancient Hunting Tradition*, 11 J. ENVTL. L. & LITIG. 359, 395 (1996).

followers from eating any meat.<sup>120</sup> This of course, included whale meat. However, many Buddhists consumed whale meat despite the restriction and justified doing so by labeling whales as *isana*, or large fish.<sup>121</sup>

The formal practice of whaling did not originate until the sixteenth century.<sup>122</sup> In the earliest stages, villagers chased a whale into a bay, closed off the bay with a net, and then captured the whale with a net.<sup>123</sup> While the whale was still alive, the hunters cut a hole in the whale and ran a rope through it.<sup>124</sup> Upon the death of the whale, the hunters chanted “may its soul rest in peace” three times and then made a tribute to Buddha.<sup>125</sup> *Taiji*, literally meaning whaling, was the first coastal village to practice this method of whaling.<sup>126</sup> It is estimated these coastal whalers took from ninety to one-hundred whales per year, but females and whale calves were not killed.<sup>127</sup>

In the seventeenth century, the Japanese whalers incorporated harpoons and other hunting devices into their whaling methods.<sup>128</sup> Shore processing stations were developed, which turned whale parts into various substances.<sup>129</sup> Unlike their European counterparts, Japanese whalers utilized parts of whales for products such as pesticides, plates and medicines.<sup>130</sup> It is theorized these whaling villages harbored the largest industry in medieval Japan.<sup>131</sup>

### B. Modern Whaling Practices

In the 1860s, some traditional shore whaling was still practiced.<sup>132</sup> However, with the introduction of Western whaling technology, Japanese whalers began to venture into deeper waters to hunt.<sup>133</sup> Japanese pro-whaling advocates claim it was the American and European whal-

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120. ELLIS, *supra* note 21, at 82; Freeman, *supra* note 23, at 40.

121. ELLIS, *supra* note 21, at 82; Japan Whaling Association, *supra* note 114.

122. Japan Small-Type Whaling Association, *Japanese Small-Type Coastal Whaling*, *supra* note 116.

123. *Id.*; ELLIS, *supra* note 21, at 83.

124. ELLIS, *supra* note 21, at 86.

125. *Id.*

126. Japan Small-Type Whaling Association, *Japanese Small-Type Coastal Whaling*, *supra* note 116; Japan Whaling Association, *Chronology of Whaling*, at <http://www.whaling.jp/english/history.html> (last visited Sept. 12, 2004).

127. ELLIS, *supra* note 21, at 88.

128. TONNESSEN & JOHNSEN, *supra* note 57, at 128; Freeman, *supra* note 23, at 40.

129. Freeman, *supra* note 23, at 40-41.

130. ELLIS, *supra* note 21, at 87.

131. Freeman, *supra* note 23, at 41.

132. *Id.*

133. Iino & Goodman, *supra* note 110, at 7.

ers that demolished populations of the slower swimming whales.<sup>134</sup> Thus, the Japanese say they were forced to hunt the faster blue, fin and Bryde's whales.<sup>135</sup> In order to hunt these faster whales, Japanese whalers had to advance their technology by acquiring motorized watercrafts.<sup>136</sup>

In 1908 the Japan Whaling and Fishing Association ("JWFA") was established, in response to the decrease in whale populations.<sup>137</sup> The creation of JWFA was Japan's first attempt at regulating whaling; JWFA attempted to decrease unregulated whaling practices.<sup>138</sup> Despite this intent, the approach to whaling was one of overexploitation, which led to the elimination of gray whales from Japan's waters.<sup>139</sup>

In the 1950s, Japan's whaling focus shifted to the North Pacific and sperm whales.<sup>140</sup> These whales were not used for meat, but their commercially valuable spermaceti oil.<sup>141</sup> The Japanese insisted these whales were killed for human consumption. However, sperm whale meat is high in myoglobin, which makes it very distasteful.<sup>142</sup> As the population of sperm whales in the North Pacific decreased, the Japanese continued to hunt.<sup>143</sup>

Killing whales for dietary consumption was the primary objective even back in the early days of whaling in Japan.<sup>144</sup> After WWII (1947-1949), Japan's primarily small-scale whaling industry turned large-scale in order to provide dietary sustenance.<sup>145</sup> The government's justification for this move was that many small-scale whaling licenses would be replaced with fewer numbers of large-scale li-

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134. Freeman, *supra* note 23, at 41.

135. Institute for Cetacean Research, *Human Relationships with Whales, The Evolution of Japanese Whaling*, at <http://www.icrwhale.org/japan-history.html> (last visited Sept. 14, 2004).

136. Freeman, *supra* note 23, at 41.

137. ELLIS, *supra* note 21, at 267.

138. *Id.*

139. *See generally id.* at 268-69 (discussing Japan's hunting of and the decrease in gray whale populations).

140. *Id.* at 406.

141. *Id.*

142. *Id.*; Journal Staff 2002, *A Review of Developments in Ocean and Coastal Law 2001-2002*, 7 OCEAN & COASTAL L.J. 367, 384 (2002).

143. ELLIS, *supra* note 21, at 407.

144. *See generally id.* at 406-09 (discussing Japan's historic desire for whale meat for food); Richard J. McLaughlin, *Sovereignty, Utility, and Fairness: Using U.S. Takings Law to Guide the Evolving Utilitarian Balancing Approach to Global Environmental Disputes in the WTO*, 78 OR. L. REV. 855, 932 (1999) (stressing Japan's "one thousand year whaling history and the traditional importance of whale meat in the Japanese diet").

145. Freeman, *supra* note 23, at 42.



censes.<sup>146</sup> During this period, the Japanese diet consisted of about forty-five percent whale meat of total meat consumed.<sup>147</sup> Since the creation of the IWC in the 1940s, this percentage has declined.<sup>148</sup>

Today, Japan is the largest consumer of whale meat and one of the only countries that takes whale meat for human use.<sup>149</sup> Whale “cuisine” is varied because every part of the whale is eaten, even if the locals have access to only one whale species.<sup>150</sup> The Japanese argue whale meat is very much an important part of their diet with “regional and social significance.”<sup>151</sup> In one coastal whaling village, whale meat is incorporated into over thirty special occasions including birthdays and weddings.<sup>152</sup> In traditional whaling communities, whale meat is an important part of peoples’ lives due to the hunting, “processing, distribution, consumption and celebration of the whale.”<sup>153</sup>

Japan claims restrictions on whaling primarily affect the three small coastal villages (2,000-4,000 residents) on Honshu Island and the city of Abashiri (43,000 residents) on Hokkaido Island.<sup>154</sup> In these whaling towns, there is an extensive system of customary gift-based ritual exchange occurring prior to, and throughout, the whaling season.<sup>155</sup> These exchanges of whale meat continue within the community throughout the entire year.<sup>156</sup> Eager for whale meat to arrive, the villagers bring gifts (*omiki*) to boat owners and to the boat and crew.<sup>157</sup>

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146. *Id.*

147. Iino & Goodman, *supra* note 110, at 7.

148. *Id.* (citing Japan Whaling Association, Hogeï to Nihon Kokuminkeizai Tono Kanren Ni KAnsuru Kosatsu [Whaling and National Economics of Japan] 33 (1980) [in Japanese]).

149. DAVID R. McCracken, FOUR MONTHS ON A JAP WHALER 110 (1948); Judith Berger-Eforo, Note, *Sanctuary for the Whales: Will this be the Demise of the International Whaling Commission or a Viable Strategy for the Twenty-First Century?*, 8 PACE INT’L L. REV. 439, 468 (1996).

150. Freeman, *supra* note 23, at 51.

151. Iino & Goodman, *supra* note 110, at 7.

152. The Government of Japan, *Quantification of Local Need for Minke Whale Meat for the Ayukawa-Based Minke Whale Fishery*, in THE 42ND ANNUAL MEETING OF THE IWC IN NOORDWIJK, THE NETHERLANDS 175, 179 (1990), available at [http://homepage2.nifty.com/jstwa/pdf/hardcover/HC\\_42nd.pdf](http://homepage2.nifty.com/jstwa/pdf/hardcover/HC_42nd.pdf) (last visited Oct. 9, 2004) [hereinafter The Government of Japan, *Quantification of Local Need for Minke Whale Meat*].

153. Freeman, *supra* note 23, at 51.

154. *Id.* at 42; Japan Small-Type Whaling Association, *Cultural Significance and Needs of Japan’s Small-Type Coastal Whaling*, 3, at <http://homepage2.nifty.com/jstwa/pdf/2000E.pdf> (last visited Jan. 30, 2004) [hereinafter Japan Small-Type Whaling Association, *Cultural Significance*].

155. Japan Small-Type Whaling Association, *Cultural Significance*, *supra* note 154, at 5; Freeman, *supra* note 23, at 44.

156. *Id.*

157. The Government of Japan, *Distinguishing Between Japanese STCW and LTCW in Relation to Coastal Whale-Fishery Management*, in THE 42ND ANNUAL MEETING OF THE IWC

These gifts are ceremonially presented to the boat owner, and the owner makes a return gift of whale meat for the *omiki* received.<sup>158</sup> Whales are said to symbolize “prosperity” and “security,” especially in whaling towns.<sup>159</sup>

The Japanese contend whales are also associated with important religious practices.<sup>160</sup> Ceremonies are performed to show gratitude to their gods and to ensure whales are plentiful.<sup>161</sup> “Throughout the whaling season, female members of whalers’ families visit their local shrines to pray for whalers’ safety, for a good catch, and for the souls of whales.”<sup>162</sup> Each boat has a small Shinto altar on board where Shinto priests perform purification ceremonies.<sup>163</sup>

Buddhist ceremonies are conducted as well: memorial services for the souls of the whales killed and for the souls of whalers who “seek forgiveness and spiritual compensation for the loss of karmic merit that results from the taking of life.”<sup>164</sup> Ceremonies take place in Buddhist temples, where death registers of the names and details of dead whales are kept.<sup>165</sup> “[R]eligious obligations to whales (*kujira kuyo*) and celebrations of whaling (*kujira matsuri*) do not end when a village stops whaling . . . .”<sup>166</sup>

Initially Japan used the “aboriginal subsistence exception” argument in order to convince the IWC to raise whaling quotas. However, the IWC requires whale meat placed on the consumer market to be consumed at the local level.<sup>167</sup> It was difficult for the Japanese to prove to the IWC their commercial whaling industry was merely small-scale.

The Japanese formulated a new defense when they realized the IWC would not allow them to use the “aboriginal subsistence exception.” The Japanese argue that if they do not fall into the “aboriginal subsistence exception” it is simply because the IWC has never prop-

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IN NOORDWIJK, THE NETHERLANDS 166 (1990), available at [http://homepage2.nifty.com/jstwal/pdf/hardcover/HC\\_42nd.pdf](http://homepage2.nifty.com/jstwal/pdf/hardcover/HC_42nd.pdf) (last visited Oct. 9, 2004) [hereinafter The Government of Japan, *Distinguishing Between Japanese STCW and LTCW*]; Japan Small-Type Whaling Association, *Cultural Significance*, *supra* note 154, at 5.

158. Japan Small-Type Whaling Association, *Cultural Significance*, *supra* note 154, at 5.

159. Freeman, *supra* note 23, at 48.

160. The Government of Japan, *Quantification of Local Need for Minke Whale Meat*, *supra* note 152, at 178-79.

161. Freeman, *supra* note 23, at 48.

162. *Id.* at 49.

163. *Id.*

164. *Id.*

165. The Government of Japan, *Quantification of Local Need for Minke Whale Meat*, *supra* note 152, at ix (death register rolls are called *kako-cho*).

166. Freeman, *supra* note 23, at 48.

167. *Id.* at 54.

erly defined “subsistence whaling.”<sup>168</sup> However, the term “aboriginal” is often associated with indigent communities with little food resources, and it is highly questionable if the Japanese fall into this category.<sup>169</sup> The Japanese continue to argue the cultural aspect of whaling grants them the “aboriginal” status.<sup>170</sup>

The reason, the Japanese argue, their commercial whaling industry flourished was because non-local buyers needed new sources for the demands of their trading partners.<sup>171</sup> Because of the IWC restrictions of the 1980s, buyers had to purchase the surplus of local markets.<sup>172</sup> Thus, the former small-scale whales, such as the beaked and pilot whale, are now available in the larger commercial market.<sup>173</sup>

Many members of the IWC that are against whaling believe the Japanese want to continue whaling simply for financial gain.<sup>174</sup> Japan argues money has been involved in its whaling practices since the seventeenth century.<sup>175</sup> The early whalers who used nets paid the rulers of the area to show their devotion to the local community.<sup>176</sup> Villages were compensated “for the inconvenience” of serving as a shore base for the whalers.<sup>177</sup> The interplay between economics and social stability enforces the cultural significance of money in the whaling industry of Japan.<sup>178</sup>

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168. *Id.* at 54-55; see generally Jenkins & Romanzo, *supra* note 20, at 72 (discussing how Japan would like IWC whale quotas to be based on “tenuous cultural need[s]”).

169. See generally Freeman, *supra* note 23, at 55 (noting modern societies are not associated with people that depend on whales for subsistence); Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 78 (discussing the criteria for the IWC’s aboriginal subsistence whaling exception).

170. Freeman, *supra* note 23, at 55. See generally Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at n.33 (noting Japan’s continuous arguments for whaling include the cultural needs of Japanese communities).

171. Freeman, *supra* note 23, at 57.

172. *Id.*

173. *Id.* (citing Government of Japan, Report to the Working Group on Socio-Economic Implications of a Zero Catch Quota, IWC/41/21 at 33-34 (1989); Government of Japan, Distinguishing between Japanese STCW and LTCW in Relation to Coastal Whale-Fishery Management, TC/42/SEST3 at 166-67 (1990)).

174. Int’l Fund for Animal Welfare, *IWC Criticisms of Japan’s Scientific Whaling*, at <http://www.ifaw.org/ifaw/general/default.aspx?oid=86899> (last visited Nov. 15, 2004); Sarah Suhre, *Misguided Morality: The Repercussions of the International Whaling Commission’s Shift from a Policy of Regulation to One of Preservation*, 12 GEO. INT’L ENVTL. L. REV. 305, 313 (1999).

175. The Government of Japan, *Distinguishing Between Japanese STCW and LTCW*, *supra* note 157, at 159-60.

176. *Id.* at 159.

177. Freeman, *supra* note 23, at 59.

178. Iino & Goodman, *supra* note 110, at 29.

Japan believes the sole objective of the ICRW treaty (to manage whale resources) is no longer the focus of most members of the IWC.<sup>179</sup> Article V(2) of the ICRW states members should consider:

(a) . . . optimum utilization of the whale resources; . . . (c) shall not involve restrictions on the number or nationality of factory ship or land station . . . ; (d) shall take into consideration the interests of the consumers of whale products and the whaling industry.<sup>180</sup>

The argument Japan consistently relies on is that the IWC fails to carry out these objectives in “good-faith.”<sup>181</sup> Japan asserts the IWC’s implementation of the moratorium and the development of the Southern Ocean Sanctuary violates the purpose and objectives of Article V of the ICRW treaty.<sup>182</sup> Every year Japan urges the IWC to return to its original objective and to base sustainable use on scientific evidence.<sup>183</sup> Because Japan has no need for dietary supplements and whaling does not significantly contribute to their economy, they now justify the need for whaling based on principle; whales are a marine resource the Japanese feel they have a right to exploit.<sup>184</sup>

Japan conducts its fisheries management using scientific principles. Whaling is considered a part of *fisheries management* because Japan believes whales are a serious threat to the health of Japan’s fishing industry.<sup>185</sup> Japan’s “so-called” scientific research states “cetaceans consume three to five times the amount of marine resources” caught for the commercial market.<sup>186</sup> Therefore, whales need to be *managed* in order to insure humans have the desired amount of seafood at their disposal.<sup>187</sup>

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179. See Japan Whaling Association, Questions and Answers, *Why was the International Whaling Commission established?*, at <http://www.whaling.jp/english/qa.html> (last visited Nov. 15, 2004).

180. Iino & Goodman, *supra* note 110, at 4.

181. *Id.* at 5 (citing William Aron et al., *Flouting the Convention*, 283(5) ATLANTIC MONTHLY 22, 24 (May 1999)).

182. See *International Whaling Commission on Verge of Breakup on 50th Anniversary*, U.S. NEWSWIRE (May 4, 1998).

183. Iino & Goodman, *supra* note 110, at 6 (citing IWC Doc. IWC/52/OS/IUCN, IWC/51/OS/IUCN and IWC/50/OS IUCN).

184. *Id.* at 8.

185. Michael Donoghue, *Whales—The New Scapegoat for Overfishing*, in THE FUTURE OF CETACEANS IN A CHANGING WORLD 383 (William C.G. Burns & Alexander Gillespie eds., 2003).

186. Iino & Goodman, *supra* note 110, at 12 (citing Tsutomu Tamura & Seiji Ohsumi, *Regional Assessments of Prey Consumption by Marine Cetaceans in the World*, IWC Doc. SC/52/E6 (2000)).

187. *Id.* at 12-13.

Killing whales for “scientific research purposes” is permitted under Article VIII of the ICRW.<sup>188</sup> Since the 1982 moratorium only applies to commercial whaling and not research, Japan has convinced the IWC it kills whales in the name of science.<sup>189</sup> Japan asserts it must kill whales in order to conduct scientific analysis of the whales’ “ear plugs for age determination . . . reproductive organs for examination of maturation, reproductive cycles and reproductive rates, stomachs for [dietary] analysis . . . [and] blubber thickness . . . for pollution studies.”<sup>190</sup> These killings, Japan argues, create no threat to the abundance of whales and only the smallest number required for proper statistical scientific analysis are taken.<sup>191</sup> Japan supplements this argument by asserting the number of Bryde’s and sperm whales used for research are below the required sample size for statistical results.<sup>192</sup>

Under the ICRW, countries can issue special permits for research lethal to whales.<sup>193</sup> Proposals for lethal research must be submitted to the Scientific Committee of the IWC for review and comment, and the Committee reviews the proposal to determine whether the research meets certain criteria.<sup>194</sup> The main criteria when reviewing the research proposal are: the necessity for the comprehensive assessment of the whale stock, whether results can be obtained by non-lethal means, if sound results will be produced from this method, and whether the research will have an adverse effect on the whale stock.<sup>195</sup>

Science alone does not influence a government’s decision to conduct research under these special permits.<sup>196</sup> Political and social factors often play a prominent role in a government’s decision to issue a special permit.<sup>197</sup> For example, Japan often defies the IWC’s request not to issue special permits under the justification that it has a sovereign right to conduct scientific research.<sup>198</sup>

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188. Eldon V.C. Greenberg et al., *Japan’s Whale Research Program and International Law*, 32 CAL. W. INT’L L.J. 151, 151 (2002).

189. *Id.* at 154-55.

190. Iino & Goodman, *supra* note 110, at 18. See generally S.J. Mayer, *A Preliminary Review and Evaluation of Scientific Whaling from 1986 to 1996*, LITTON SCI. & POL’Y RES. GROUP (1996), at 13, available at [http://www.wdcs.org/dan/publishing.nsf/c525f7df6cbf01ef802569d600573108/43f20b985ba31218802568f10035e91f/\\$FILE/whaling.pdf](http://www.wdcs.org/dan/publishing.nsf/c525f7df6cbf01ef802569d600573108/43f20b985ba31218802568f10035e91f/$FILE/whaling.pdf) (discussing various research techniques for studying whales).

191. Iino & Goodman, *supra* note 110, at 18-19, n.62.

192. *Id.* at 19.

193. Mayer, *supra* note 190, at 1.

194. *Id.*

195. *Id.*

196. *Id.* at 3.

197. *Id.*

198. Japan Small-type Whaling Association, *Japan’s Twelve-Year Battle for Coastal Minke Whaling: Twelve Years of Frustration*, IWC/51/OS JSTWA, at <http://homepage2>.

There are two whale research programs in Japan, one in the Antarctic Ocean (“JARPA”) and one in the western North Pacific Ocean (“JARNP”).<sup>199</sup> Member states of the IWC felt scientific information about whales in the Antarctic was inadequate, and in response, JARPA was created in 1987.<sup>200</sup> In addition, JARNP was established in 1994 and was originally a five year program.<sup>201</sup> The main objectives of JARNP are to study the population structure and feeding ecology of minke whales.<sup>202</sup> The Scientific Committee of the IWC reviews JARNP every year.<sup>203</sup> JARNP II was subsequently developed to study the feeding ecology of whales including prey consumption and preferences.<sup>204</sup>

Japan claims their research shows minke whales eat at least ten different species of fish including many commercially valuable species, and therefore, the objective of JARNP II is vital to fisheries.<sup>205</sup> Although the primary species for this research is the minke whale (the most edible), in 2000 sperm whales were added.<sup>206</sup> Japan’s decision to study sperm whales is not consistent with the main objective of JARNP II. Sperm whales feed solely on deep-sea squid, which are not a valuable commodity in the commercial fishing industry.<sup>207</sup>

As of 2002, the IWC permitted JARNP II to take ten sperm whales per season for scientific purposes.<sup>208</sup> The meat of the sperm whales caught in the 2002 season could not be consumed due to the high level of contaminants in the whales.<sup>209</sup> This was a violation of the ICRW, which requires the “by-products” (whale meat) of scientific research be processed.<sup>210</sup> Japan usually sells whale meat to the Japanese consumer market in order to help pay for the expense of conducting scientific research on whales.<sup>211</sup>

Japan’s use of the scientific whaling exception is very controversial among the members of the IWC.<sup>212</sup> In 1985, the Japanese Minis-

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nifty.com/jstwa/pdf/1999E.pdf (last visited Jan. 30, 2004).

199. Iino & Goodman, *supra* note 110, at 16.

200. *Id.*

201. *Id.* at 17.

202. Greenberg et al., *supra* note 188, at 168.

203. *Id.*

204. Iino & Goodman, *supra* note 110, at 17.

205. *Id.* at 17-18.

206. Journal Staff 2002, *supra* note 142, at 384.

207. Donoghue, *supra* note 185, at 392.

208. *Id.*

209. Journal Staff 2002, *supra* note 142, at 384.

210. Iino & Goodman, *supra* note 110, at 19.

211. *Id.*

212. See generally SIMON BROOMAN & DEBBIE LEGGE, LAW RELATING TO ANIMALS 375, 403-04, (1997) (describing the debate over Japan’s justifications for its scientific whaling

ter for Fisheries asserted, “[t]he government [of Japan] will do its utmost to find ways to maintain the nation’s whaling in the form of research or other forms.”<sup>213</sup> Through illegal trade, Japan has contributed to the decline of populations of whales while remaining members of an organization vowing to protect whales.<sup>214</sup> For example, the Taiyo Fisheries of Japan provided funding for Taiwanese whalers to illegally import whale meat by directing the meat through South Korea.<sup>215</sup> Taiyo was eventually caught by Greenpeace officers, and when the U.S. threatened Japan and Taiwan with fishing sanctions Taiyo promptly stopped the trade.<sup>216</sup> Furthermore, despite being a member of the IWC, Japan has yet to ratify the Convention on the Conservation of Migratory Species of Wild Animals.<sup>217</sup> This convention is an international treaty aimed at protecting migratory species, including whales.<sup>218</sup>

### C. National Whaling Laws

Present whaling regulations in Japan are virtually non-existent. Japan’s Ministry of the Environment enforces laws pertaining to environmental protection.<sup>219</sup> The Global Environment Bureau enforces ocean related issues.<sup>220</sup> The Nature Conservation Bureau enforces the protection of wildlife and sets up conservation plans for areas including “special marine areas.”<sup>221</sup> The Wildlife Protection and Hunting Law protects wildlife, issues hunting licenses and provides for the management of hunting areas.<sup>222</sup> Although numerous relevant government organizations and laws exist to protect wild animals, Japan has no specific laws pertaining to whales, or any other marine mammals.

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program).

213. *Id.* at 403 (second alteration in original).

214. *Id.* at 406.

215. ELLIS, *supra* note 21, at 452.

216. *Id.*

217. Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention), June 23, 1979, 19 I.L.M. 15, 1651 U.N.T.S. 28395 (entered into force Nov. 1 1983).

218. See Convention on the Conservation of Migratory Species of Wild Animals, *List of Parties as of June 1, 2004* (does not include Japan), at [http://www.cms.int/pdf/en/party\\_list/Partylist\\_eng.pdf](http://www.cms.int/pdf/en/party_list/Partylist_eng.pdf) (last visited Oct. 9, 2004).

219. See Japan [Environmental impact assessment law], Law No. 81 of 1997, art. 1; Japan [Pollution conflicts resolution law], Law No. 108 of 1970, art. 1; Japan [Water pollution control law], Law No. 138 of 1970, art. 1.

220. *Environmental Laws of Japan Overview*, 179 INT’L ENV’T’L REP. REF. FILE 101, 101 (2002).

221. *Id.* at 102, 105.

222. *Id.* at 106.

Under Article 6.2(A)(1) (Protection System of Mammals and Birds) of the Nature Conservation in Japan Policy (“Conservation Policy”), whales fall under the jurisdiction of Japan’s Ministry of Agriculture, Forestry and Fisheries.<sup>223</sup> Article 6.2(A)(3) states some marine mammals (including whales) are not protected under the Conservation Policy.<sup>224</sup> Furthermore, the Japanese Environment Agency’s “Red Data Book” of endangered species does not list any cetacean species.<sup>225</sup>

The Government of Japan’s First National Report under the Convention on Biological Diversity (December 1997)<sup>226</sup> addresses marine conservation with virtually no mention of whales. Whales are not discussed under the “Protection and Management of Wild Aquatic Life,” but are briefly addressed under the “Sustainable Use and Conservation of International Marine Resources.”<sup>227</sup> This section states, “[w]ith regard to whale resources, efforts shall be made to gain worldwide awareness of the principle of appropriate conservation and sustainable use of whale resources, based on scientific evidence derived from researches [sic].”<sup>228</sup> According to this section, the aim of “sustainable use and conservation” is to “increase” marine resources (presumptively including whales) and “rationalize their use.”<sup>229</sup> The Japanese government states, in regard to cooperating with the IWC, it takes “limited whale samples” in conducting scientific research on the “resource condition of whales and the ecosystems surrounding whales.”<sup>230</sup>

Japan’s Fisheries Law (1949) describes the numerous provisions for obtaining fishing licenses and continually refers to fishing regulations as “fishery rights” of individuals.<sup>231</sup> The Fishery Resources Conservation Law (1951) describes various measures for the conservation of aquatic animals and plants.<sup>232</sup> The “Restriction on Fishing

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223. Ministry of the Environment, *Nature Conservation in Japan* § 6, available at <http://www.env.go.jp/en/jeg/biodiv/wp.html> (last visited Sept. 15, 2004) [hereinafter Ministry, *Nature Conservation*].

224. *Id.*

225. See Japan [The law for the conservation of endangered species of wild fauna and flora], Law No. 75 of 1992, art. 1.

226. Ministry of the Environment, *The First National Report Under the Convention on Biological Diversity*, available at <http://www.env.go.jp/en/lar/fnr/index.html> (Dec. 1997) [hereinafter Ministry, *First National Report*].

227. *Id.* at chs. 6.3 & 6.5.

228. *Id.* at ch. 6.5.

229. *Id.* (emphasis added).

230. *Id.* at ch. 6.10.1.

231. See Japan [Fisheries law], Law No. 267 of 1949, revised in Law No. 156 of 1962, available at <http://faolex.fao.org/faolex/index.htm> (last visited Oct. 26, 2004).

232. Japan [Fisheries resources conservation law], Law No. 313 of 1951, available at



Method[s]" in Article 5 states "[n]o aquatic animal or plant shall be taken or gathered by means of any explosive substance," *except* marine mammals.<sup>233</sup> Under Article 6, aquatic animals used for scientific research (i.e. whales) may be taken by "poisonous material."<sup>234</sup>

Japan's lack of whaling regulations creates an uncertain relationship with the IWC. Although the majority of the IWC members disagree with Japan's whaling practices, Japan continues to push for more lenient whaling regulations.<sup>235</sup> At the 55th annual IWC meeting in Berlin in June 2003, Japan presented two new proposals.<sup>236</sup> The first was for a long-term research program to study the feeding ecology of whales focusing on the "conservation and sustainable use of marine living resources in the western North Pacific, especially within Japan's EEZ."<sup>237</sup> This research program proposed killing "150 minke whales, 50 Bryde's whales, 50 sei whales and 10 sperm whales in the western North Pacific."<sup>238</sup>

The second proposal was for the extension of Japan's Southern Hemisphere program (JARPA), which permitted killing over 400 minke whales in the Antarctic.<sup>239</sup> In response, the IWC passed a resolution urging Japan not to continue the JARPA program.<sup>240</sup> This resolution specifically addresses concerns about the decline of minke whale populations and re-requests the Scientific Committee ("Committee") to provide hypotheses for the decline.<sup>241</sup> The Committee urged Japan to consider alternative non-lethal research methods and called on the Government of Japan to halt or revise JARPA, so only non-lethal research methods are used.<sup>242</sup>

The Committee found Japan's special permit program takings provide over 3,000 tons of commercial whale meat per year.<sup>243</sup> The Committee reiterated Article VIII of the ICRW, stating special permits

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<http://faolex.fao.org/faolex/index.htm> (last visited Oct. 26, 2004).

233. *Id.* art. 5.

234. *Id.* art. 6.

235. International Whaling Commission, *Final Press Release From the International Whaling Commission's 55th Annual Meeting in Berlin, Germany 2003*, at <http://www.iwcoffice.org/meetings/meeting2003.htm> (last visited Sept. 14, 2004) [hereinafter IWC Press Release]; Jenkins & Romanzo, *supra* note 20, at 89-90.

236. IWC Press Release, *supra* note 235.

237. *Id.*

238. *Id.*

239. *Id.*

240. International Whaling Commission, *The Resolutions Made at the IWC Annual Meeting in Berlin, Germany 2003*, at <http://www.iwcoffice.org/meetings/resolution2003.htm> (last visited Oct. 10, 2004).

241. *Id.* at Resolution 2003-3.

242. *Id.*

243. *Id.* at Resolution 2003-2.

are “not intended to be exploited in order to provide whale meat for commercial purposes.”<sup>244</sup>

### III. THE INFLUENCE OF CULTURE ON WHALING REGULATIONS

It is evident culture influences law just as law influences culture.<sup>245</sup> Ancient cultures are often regarded as obsolete. However, indigenous practices and beliefs have a profound effect on the way a society functions in the present day. Examining the underlying principles of whaling regulations in two modern societies reveals the powerful influence of indigenous whaling practices. This supports the theory indigenous cultures do in fact shape modern laws.

#### A. *The IWC’s Indigenous Whaling Exception*

The ICRW first defined “aboriginal whalers” as natives who only used canoes or self propelled watercraft to hunt whales.<sup>246</sup> Additionally, “aboriginal whalers” were defined as whalers who did not carry firearms or “contract to deliver” the products of their whaling to a third party.<sup>247</sup> The definition of “aboriginal whalers” subsequently transformed into those indigenous people who hunt whales and use the whale products locally; thus, for sustainable use only.<sup>248</sup> The IWC continues to recognize the cultural importance of subsistence whaling.<sup>249</sup>

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244. *Id.*

245. See, e.g., Anne Griffiths, *Remaking Law: Gender, Ethnography, and Legal Discourse*, 35 LAW & SOC’Y REV. 495, 495 (2001) (book review) (acknowledging Kenyan local customs are shaped by state law); Kristen A. Carpenter, *Native American Sovereignty Issues: Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73, 117 (1999) (recognizing indigenous people infuse international law with their own customs); Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557, 573 (1994) (recognizing Japan created “antimonopoly law[s] to meet indigenous societal needs”); Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1777 (1997) (noting indigenous American Indian practices have shaped federal Indian law, and will continue to do so).

246. Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 79 (citing Convention for the Regulation of Whaling, Sept. 24, 1931, L.N.T.S. CLU. No. 3586, reprinted in PATRICIA BIRNIE, 2 THE INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE WATCHING 681-82 (1985)).

247. *Id.*

248. See generally *id.* at 79-80 (discussing the criteria constituting “aboriginal” whaling).

249. See generally Bradford, *supra* note 19 (discussing the IWC’s recognition of culture in defining subsistence whaling); Jeffrey D. Lindemann, *The Dilemma of the International Whaling Commission: The Loophole Provisions of the Commission vs. The World Con-*

The various definitions of “aboriginal” in international law have led to inconsistent applications of the term.<sup>250</sup> The determination of which groups of people are “aboriginal” has proved difficult. Complex factors such as the use of traditional methods, nutrition, subsistence and culture are considered.<sup>251</sup>

“Traditional methods” are typically considered those methods originally used to hunt without the use of technology.<sup>252</sup> The ICRW does not require aboriginal whalers use traditional practices.<sup>253</sup> Likewise, the IWC views the use of technology in traditional practices as permissible.<sup>254</sup> Most members of the IWC agreed with this concept at its inception largely because traditional hunting methods were often more inhumane than modern methods.<sup>255</sup> Therefore, little emphasis is placed on the use of traditional hunting methods when determining the “aboriginal” status of indigenous whalers.<sup>256</sup>

Indigenous peoples’ need for nutritional sustenance has always been a primary concern of the IWC.<sup>257</sup> However, in order for this concern to apply, indigenous groups must prove there is little else available to eat that is nutritionally valuable besides whale meat.<sup>258</sup> Social and psychological criteria also factor into the nutritional need determination.<sup>259</sup> The “possible adverse effects of shifts to non-native foods” and the “acceptability of other food sources” are considered in nutritional needs claims.<sup>260</sup> Japan has used this definition in arguing

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*science*, 7 J. INT’L L. & PRAC. 491, 494 (1998) (noting the ICRW’s definition of “aboriginal subsistence whaling” recognizes the “cultural ties related to a continuing traditional dependence on whaling and the use of whales”); Stephen M. Hankins, Comment, *The United States’ Abuse of the Aboriginal Whaling Exception: A Contradiction in United States Policy and a Dangerous Precedent for the Whale*, 24 U.C. DAVIS L. REV. 489, 508 (1990) (arguing the IWC’s aboriginal whaling exception “reflects the [IWC’s] concern” for cultural traditions).

250. Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 92-95.

251. Lindemann, *supra* note 249, at 494.

252. Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 97.

253. *Id.* at 98.

254. *Id.*

255. *Id.* at 98-99.

256. See generally *id.* (discussing “indigenous peoples,” as defined by the IWC, are not limited to traditional technology); World Council of Whalers, *Student Section*, at <http://www.worldcouncilofwhalers.com/stud-sect-intro.htm> (discussing past and present whaling techniques).

257. See Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 101.

258. *Id.*; Lawrence Watters & Connie Dugger, *The Hunt for Gray Whales: The Dilemma of Native American Rights and the International Moratorium on Whaling*, 22 COLUM. J. ENVTL. L. 319, 341 (1997) (stating the aboriginal subsistence exception applies to “groups that have consistently relied upon whales to meet their nutritional . . . needs”).

259. Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 104.

260. *Id.*

the cultural importance of eating whales as a form of nutritional need.<sup>261</sup>

Subsistence requirements are also considered in determining the necessity of whales to indigenous people. "Subsistence whaling" relates to the need for whales for transportation, food, shelter, clothing, fuel, etc.<sup>262</sup> Restrictions include the hunts be non-commercial and conducted locally.<sup>263</sup> Japan consistently attempts to convince the IWC that its whaling practices are non-commercial.<sup>264</sup>

### *B. The Influence of Indigenous Cultures on National Whaling Laws*

This section analyzes the role indigenous whaling practices play in present day whaling regulations. New Zealand and Japan's indigenous cultures each have strong beliefs regarding whaling.<sup>265</sup> These beliefs influenced the manner in which each modern society interacts with whales. The Māori's spiritual perception of whales led to the extensive protection of whales in the modern era.<sup>266</sup> The indigenous coastal people of Japan utilized whales as another important seafood staple.<sup>267</sup> The continued importance of whales in the Japanese diet is reflected by the lack of whaling restrictions and the determination to continue to hunt for whales.

Culture and the importance of tradition are well recognized by the IWC.<sup>268</sup> The social and spiritual aspects of whale hunting have proved

261. *Id.* at 104, n.126; Watters & Dugger, *supra* note 258, at 337 (stating Japan argues it should be entitled to subsistence whaling quotas because whaling is significant to many of its coastal villages).

262. Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 106 (citing Ray Gambell, *The Bowhead Whale Problem and the International Whaling Commission*, in REPORT OF THE INTERNATIONAL WHALING COMMISSION, Special Issue No. 4 at 1, Office of the Commission (1982)).

263. Harris, *supra* note 3, at 397.

264. *See generally* Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 107-08 (discussing Japan's argument that the non-commercial aspect of whaling is more pervasive than the commercial).

265. *See generally* Whale Watch, *supra* note 36 (discussing the Māori connection with whales); Japan Small-Type Whaling Association, *Japanese Small-Type Coastal Whaling: Tradition and Practice*, at <http://homepage2.nifty.com/jstwa/pdf/1996E.pdf> (last visited Oct. 9, 2004) [hereinafter Japan Small-Type Whaling Association, *Japanese Small-Type Coastal Whaling*] (arguing that Japan's long-standing cultural beliefs justifies its whaling practices).

266. *See generally* Whale Watch, *Our Conservation Policy*, at <http://www.whale-watch.co.nz/our.htm> (discussing the traditional spiritual importance of whales and the conservation efforts of the Ngai Tahu Māori).

267. *See generally* Japan Small-Type Whaling Association, *Japanese Small-Type Coastal Whaling*, *supra* note 265 (discussing the early Japanese reliance on seafood, including whale meat).

268. Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 114.

important enough to justify “aboriginal whaling exceptions” for indigenous groups.<sup>269</sup> It is evident culture influences law, as apparent in the very nature of democracy.<sup>270</sup> Representatives of people pass laws reflecting the values, desires and goals of their society.<sup>271</sup> The connection between culture and environmental law has been widely recognized in several forums.<sup>272</sup> Culture survives the test of time; a reflection of native cultures is detected in many present day societies.<sup>273</sup> The practices and desires of society are represented in laws; thus, laws contain indigenous beliefs.

Legal scholars have stressed the importance of looking at indigenous practices when creating and interpreting law.<sup>274</sup> Some scholars argue laws must be created to save indigenous cultures.<sup>275</sup> However, what these scholars fail to recognize is that indigenous cultures do in fact influence modern laws, and the practices and beliefs deeply ingrained in indigenous cultures survive over time. The impact the indigenous peoples of Japan and New Zealand have had on present whaling regulations demonstrates this theory.

### 1. New Zealand

Whaling regulations in New Zealand are extensive due to the indigenous Māori whaling practices. The Māori have a close link with

269. See *id.* at 116 (providing an example of the spiritual aspects of whaling in the Makah Indian communities).

270. See Steven Lubet, *Law and Popular Culture: Slap Leather! Legal Culture, Wild Bill Hickok, and the Gunslinger Myth*, 48 UCLA L. REV. 1545, 1545 (2001).

271. *Id.*

272. See Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 113 (listing the Convention on Wetlands of International Importance, the Convention on the Conservation of Migratory Species of Wild Animals, the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, the 1975 South Pacific Conference on National Parks and Reserves, the 1982 Declaration of the World National Parks Congress, and the World Heritage Convention).

273. See, e.g., Frickey, *supra* note 245, at 1777 (noting indigenous American Indian practices have shaped federal Indian law, and will continue to do so); James Cockayne, *supra* note 3, at 795 (recognizing the presence of indigenous traditions in modern Aboriginal society).

274. New Zealand Law Commission, *Māori Custom and Values in New Zealand Law*, NZLC SP9, at 1, 3 (2001), available at <http://www.lawcom.govt.nz/documents/publications/sp9mcl.pdf>.

275. See generally Robert H. Berry III, *Indigenous Nations and International Trade*, 24 BROOK. J. INT'L L. 239, 241 (1998) (discussing the need for international law protecting the economic rights of indigenous people); James A. Casey, *Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty*, 79 CORNELL L. REV. 404, 435 (1994) (acknowledging the need for the U.S. to comply with the modern trend of protecting indigenous rights); Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 4-6 (2001) (discussing the need to protect indigenous practices under intellectual property law).

whales, though their attitude regarding whaling practices is markedly different from the Japanese. Historically, the Māori had a *non-lethal* relationship with whales, meaning they never actively killed whales.<sup>276</sup> Whales were considered spiritual beings that protected the Māori and were held with the utmost regard.<sup>277</sup>

These highly revered creatures continue to represent *taonga* (treasures) to the Māori.<sup>278</sup> Arguably, in the Māori culture, not hunting whales is just as important as hunting whales is to some other cultures.<sup>279</sup> This argument is a valid rebuttal to Japan's assertion whales are an important part of its culture. Whales are an important part of the Māori culture (and are a significant part of New Zealand's history), but are viewed in a completely different manner.

The Māori's perception of whales is reflected in New Zealand's current policies. New Zealand has a strong conservation ethic, and the preservation of whales is a primary concern.<sup>280</sup> The government stresses whale stocks cannot be treated as fisheries resources.<sup>281</sup> This is based somewhat on the belief whales are akin to humans and far too valuable to be considered simply a good source of protein.<sup>282</sup> New Zealand fervently argues to uphold the IWC moratorium and suggests an ethical approach to the world-wide whaling debate.<sup>283</sup> In approaching the IWC, New Zealand urges whales are "unique" because they have characteristics unlike other animals.<sup>284</sup> Moreover, the brain of a whale is superior to other animals in size and complexity, suggesting whales have a high level of "consciousness."<sup>285</sup> Representatives of the New Zealand government have even suggested humans may be able to learn something from whales.<sup>286</sup>

The degree to which the traditional practices of the Māori have influenced New Zealand's present policy on whales is important. Māori custom law is referred to as *tikanga*,<sup>287</sup> which is given significant deference in several of New Zealand's statutes (for instance the Resource

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276. ELLIS, *supra* note 21, at 114-15; MORTON, *supra* note 40, at 62.

277. Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 116; Kahn, *supra* note 32, at 59.

278. Resource Management Act, 1991, § 6(e) (N.Z.); Boast, *supra* note 75, at 251.

279. Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 117.

280. Gillespie, *The Ethical Question*, *supra* note 14 at 367-68

281. *Id.* at 368.

282. *Id.*

283. *Id.* at 367-68.

284. *Id.* at 368-69.

285. *Id.* at 369-70.

286. *Id.* at 368.

287. New Zealand Law Commission, *supra* note 274, at 2 (citing Joseph Williams, *He Aha Te Tikanga Māori* (1998) (unpublished draft paper for the Law Commission)).

Management Act 1991).<sup>288</sup> Although the application of ancient customs to current law may at times seem irrelevant, the depth and significance of Māori culture is “inextricably interwoven with the history, development and purpose” of the New Zealand court system.<sup>289</sup>

Māori spiritual beliefs are pertinent in law, and New Zealand courts often consider these beliefs even when most statutes do not.<sup>290</sup> An example of an act that does consider indigenous beliefs is the Resource Management Act of 1991. Section 6(e) of this act recognizes “[t]he relationship of Māori and their culture and traditions with their ancestral lands, water, sites, *waahi tapu*, and other *taonga*” in managing natural resources.<sup>291</sup> In addition, the Treaty of Waitangi has served as an important vessel in incorporating Māori beliefs into the modern laws of New Zealand.<sup>292</sup>

Even in 1910, in *Baldick v. Jackson*,<sup>293</sup> strong deference was given to the Treaty in an issue concerning the ownership of beached whales.<sup>294</sup> The Court denied the application of English law (which gave the Crown jurisdiction over whales and whaling) and instead applied customary law.<sup>295</sup> The Māori were granted their “fisheries right” under the Treaty and allowed access to the whale remains for traditional use.<sup>296</sup>

The application of Māori beliefs regarding whales appears in the modern law of New Zealand. New Zealand is one of the few countries having legislation specifically protecting marine mammals.<sup>297</sup> Violators of New Zealand’s marine mammal act are held accountable anywhere in the world, demonstrating whales are considered highly important species.<sup>298</sup>

The judicial application and legal recognition of Māori customs has surfaced in New Zealand’s current stance on whaling.<sup>299</sup> Accord-

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288. Resource Management Act, 1991, § (2)(1) (N.Z.).

289. New Zealand Law Commission, *supra* note 274, at 1.

290. *See id.* at 52 ¶ 220.

291. Resource Management Act, 1991, § (2)(6)(e) (N.Z.).

292. Austin, *supra* note 76, at 341.

293. [1910] 30 N.Z.L.R. 343.

294. New Zealand Law Commission, *supra* note 274, at 50.

295. *Id.*

296. *Id.*

297. New Zealand, Australia and the United States have adopted whale or marine mammal protection acts addressing the welfare as well as the conservation of cetaceans and prohibit killing, harming or harassing them. *See* Kitty Block & Sue Fisher, *Legal Precedents for Whale Protection*, SJ011 A.L.I.-A.B.A. COURSE OF STUDY 361, 364 (2003).

298. Marine Mammal Protection Act, 1978, § 1(3)(c) (N.Z.).

299. *See generally* Bennion & Melvin, *supra* note 88; New Zealand Law Commission, *supra* note 274, at 1-2 (citing Joseph Williams, *He Aha Te Tikanga Māori* (1998) (unpublished draft paper for the Law Commission)) (discussing the Ngai Tahu case in which the

ing to the Māori, whales are akin to gods, highly revered and spiritual protectors.<sup>300</sup> The traditional Māori practice is to only use whales when they are presented as a gift, washed up on shore.<sup>301</sup> These traditions are reflected in the attitude New Zealand has in dealing with international whaling issues. New Zealand has been at the forefront in the movement to enforce the IWC moratorium.<sup>302</sup> Along with Australia, New Zealand has led the campaign to establish a South Pacific Whale Sanctuary.<sup>303</sup>

Although the Māori did have a brief phase of whale hunting,<sup>304</sup> this was only due to the persuasion and glamour the *Pākehā* portrayed in whaling. Employed by Europeans, most Māori worked abroad,<sup>305</sup> and therefore did not alter their *indigenous* whaling practices. The underlying value of whales did not change; the Māori did not take up whaling independently. Even today, the Māori fight for the use of whales is not for financial gain, world status, or diet. Whales are used only in spiritual ornamentation and for whale watching,<sup>306</sup> both practices respecting and honoring whales.

Around the same time the Crown recognized Māori rights in the Treaty of Waitangi, European whaling in New Zealand took a dramatic turn.<sup>307</sup> Whales were no longer considered financially valuable natural resources, but rather something the Māori had a unique connection with. Today, New Zealand perceives whales as threatened marine mammals,<sup>308</sup> not a “fisheries” resource.

## 2. Japan

Unlike New Zealand, Japan has always categorized “whale” stocks as a “fisheries” resource, existing to be exploited.<sup>309</sup> From the

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court recognized the importance of Māori customs).

300. See generally *Whale Watch*, *supra* note 36 (describing how the Māori considered it lucky “to have a whale as a guardian spirit watching over them at sea”).

301. ELLIS, *supra* note 21, at 114-15; Henke, *supra* note 42.

302. Gillespie, *The Ethical Question*, *supra* note 14, at 368.

303. John Barlow Weiner et al., *International Legal Developments in Review: 2001 Public International Law*, 36 INT'L LAW. 619, 638 (2002).

304. MORTON, *supra* note 40, at 218-19; MARTIN, *supra* note 32, at 12, 97-98.

305. BELICH, *supra* note 47, at 144-45.

306. *Whale Watch*, *supra* note 36; Marine Mammal Protection Act, 1978, § 4(5)(c) (N.Z.).

307. ELLIS, *supra* note 21, at 124; Kahn, *supra* note 32, at 59.

308. Department of Conservation, *Marine Mammals in New Zealand*, at <http://www.doc.govt.nz/Conservation/001~Plants-and-Animals/003~Marine-Mammals/index.asp> (last visited Oct. 9, 2004).

309. ELLIS, *supra* note 21, at 87; Japan Whaling Association, Publication: *ISANA*, at <http://www.whaling.jp/english/isana.html> (last visited Sept. 12, 2004).



beginning of whaling in Japan, whales were thought of as fish, rather than warm-blooded mammals.<sup>310</sup> This mentality led to Japan's present day standing on whaling.

The cultural significance of whales in Japan is based on the traditional diets of coastal peoples.<sup>311</sup> Japan is an island nation whose people obtain the great majority of their protein from fish and shellfish.<sup>312</sup> Japan claims a right to eat whale meat "just like Westerners have a right to eat hamburgers."<sup>313</sup> The dietary importance of whale meat is exemplified in a statement from the Japanese Whaling Association, "[o]f course we could eat pork or beef, but I don't think we would have much zest for living, or could work hard."<sup>314</sup>

In Japan, the image of whales is associated with red meat. Booklets distributed by Japanese pro-whaling groups almost never show pictures of whales, the booklets only show pictures of whale meat preparation.<sup>315</sup> Although whales are wild animals, the Japanese Whaling Association asserts:

Domesticated animals . . . were at one time wild. . . [H]uman beings have become accustomed to eating . . . these animals. Although we feel respectful gratitude and pity towards these animals, we, as human beings, have no other choice but to take their lives and consume them. Whales, from this point of view, are really no different from domesticated animals.<sup>316</sup>

Thus, many Japanese correlate whales with cows, chickens, or goats, although whales have virtually no chance of being domesticated animals. Japan's fondness for whale meat has been a source of contention among anti-whaling nations.

Many anti-whaling nations argue Japan's attempt to prove whaling is an integral part of Japanese culture is futile. These nations argue ancient small-scale whaling has turned into an industry based on the desires of whimsical dietary preferences.<sup>317</sup> Anti-whaling supporters ask: why is whale meat so important in Japanese culture? Is it the taste or simply the association? Could the Japanese find a suitable alternative for whale meat?

310. Japan Whaling Association, *supra* note 309.

311. ELLIS, *supra* note 21, at 494.

312. *Id.*

313. Shennie Patel, *Making the Change, One Conservative at a Time: A Review of Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy* by Michael Scully, 9 ANIMAL L. 299, 315 (2003) (book review).

314. ELLIS, *supra* note 21, at 494.

315. *Id.*

316. *Id.*

317. Patel, *supra* note 313, at 315, n.93 (citing MATTHEW SCULLY, *DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY* 175-76 (2002)).

Examining the history of whaling in Japan, it is quite apparent the role the whale played in ancient Japanese society was much different from early New Zealand society. From the beginning, whales were considered a form of nutritional sustenance just like other “fish.” Whales were considered fish by many Japanese in an attempt to overcome the restrictions of Buddhism.<sup>318</sup>

The spiritual importance of whales in early Japan differed from the significance of whales to the Māori. The Japanese did not revere whales in the same manner as the Māori. The indigenous Japanese praised whales for their gift of nourishment, and the Māori praised whales for their spiritual meaning and ornamental representation. Today the Japanese continue to perform ceremonies to ensure the abundance of whales, while the Māori look to whales for protection and wisdom.<sup>319</sup>

Despite persistence, Japan has had a difficult time convincing the world that culture plays a role in their whaling practices. Japan has argued small-scale whaling fits into the “aboriginal exception,” however, many members of the IWC have questioned this argument.<sup>320</sup> For many years, the IWC accepted Japan’s argument. However, the majority of the IWC finally determined the commercial aspect disqualified Japan’s small-scale whaling from the aboriginal exception.<sup>321</sup> At the 1995 IWC meeting, Japan conceded their small-scale whaling communities did not qualify under the “aboriginal subsistence whaling” exception.<sup>322</sup>

The Japanese government has instead chosen to turn to “scientific research” to justify whaling. Japan continually asserts its sovereign right to hunt whales.<sup>323</sup> Japan formulates exceptions to an international conservation effort, while New Zealand takes extra measures to ensure the effort is successful.

Japan’s lack of legislation in the conservation of whales is not surprising considering the traditional practice of whaling in Japan. Because the Japanese have always considered whales “fish,” traditional fisheries management principles apply to whale resource management. Whales are referred to as stocks and are explicitly not pro-

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318. ELLIS, *supra* note 21, at 82.

319. As reflected in the recent film “Whale Rider,” modern Māoris still consider whales guardians and spiritual beings. WHALE RIDER (South Pacific Pictures 2002).

320. See generally Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 83 (noting how the aboriginal whaling exception was questioned by several IWC member states).

321. *Id.* at 84.

322. Bradford, *supra* note 19, at 196.

323. See generally Ackerman, *supra* note 15, at 334 (discussing Japan’s claims “that the U.S. sanctions and IWC restrictions constitute ‘cultural imperialism,’ because many Japanese have grown up eating whale meat as part of their culture”).

tected.<sup>324</sup> This is demonstrated in the whale exception to Japan's prohibition on the taking of animals by means of explosives.<sup>325</sup> Japanese "fishing rights" even prevail over the sustainable use of whales.

Seeking to rationalize the *use* of whales is a primary objective of Japanese domestic law, while seeking a balance between *conservation and sustainable use* applies at the international level.<sup>326</sup> Japan's passion for whale meat is linked to the traditional use of whale meat in many important social events.<sup>327</sup> The Japanese have grown so accustomed to having whale meat dishes at these events that they strive to keep this aspect of their culture.

Japan argues IWC restrictions are a form of discrimination and "cultural imperialism," because eating whale meat is such an integral part of their culture.<sup>328</sup> However, completely relaxing the IWC moratorium to please the Japanese culture would be offending those cultures that are adamant whaling is inhumane.<sup>329</sup> Interestingly, the anti-whaling states' strong opposition to Japan's whale hunting has taken a toll on the significance of whales in Japanese culture. Apparently, Japan's whale watching industry is currently more profitable than their whale meat industry.<sup>330</sup> Furthermore, the consumption of whale meat in Japan is less than one percent of what it was thirty years ago."<sup>331</sup>

One could argue the decline in Japanese whale meat consumption indicates Japanese culture is evolving away from indigenous practices. However, it is quite apparent, if the moratorium were removed Japan would continue to hunt whales for consumption and most likely, it would increase whale quotas.<sup>332</sup> The decline in whale meat consump-

324. See Ministry, *Nature Conservation*, *supra* note 223, at 2(A)(3).

325. See Japan [Fishery resources conservation law], Law No. 313 of 1951, art. 5.

326. Ministry, *First National Report*, *supra* note 226, ch. 6.5.

327. Freeman, *supra* note 23, at 44.

328. Ackerman, *supra* note 15, at 334.

329. Anthony Matera, *Whale Quotas: A Market Based Solution to the Whaling Controversy*, 13 GEO. INT'L ENVTL. L. REV. 23, 40 (2000).

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One Japanese whale-catcher turned pleasure-cruiser described the experience thus, "When we sight a pod of whales, you can see the generational difference straight away. The older people start counting them and working out how much they weigh, how much they would be worth as meat. The younger ones, especially the women are incredibly moved by the experience . . . they want to jump overboard and swim with them."

Johanna Matanich, *A Treaty Comes of Age for the Ancient Ones: Implications of the Law of the Sea for the Regulation of Whaling*, 8 INT'L LEGAL PERSP. 37, n.101 (1996) (alteration in original) (quoting BEN HILLS, JAPAN WELCOMES WHALES AS FRIENDS, NOT FOOD, THE AGE 13 (1994)).

331. *Id.* at 43.

332. For example, at the 2003 meeting of the IWC, Japan proposed to increase the catch quotas by extending and creating new scientific programs. IWC Press Release, *supra* note

tion is simply due to the international pressure Japan has received over the past few decades. Moreover, whale meat is such a “prized delicacy” and is associated with many social events; therefore, it will not be forgotten easily.<sup>333</sup> Political pressure from anti-whaling countries may continue to increase, but Japan will continue to fight for their perceived right to hunt whales.

If Japan develops any whaling regulations, it will not be because of any disassociation with indigenous whaling practices. International sanctions and legal ramifications will strain Japan’s economy and whaling regulations will become necessary.<sup>334</sup> Therefore, there is an exception to the theory indigenous practices influence modern law. Intervening forces can cause a nation’s laws to change independent of the influence of traditional practices. Political and economic pressures can cause a country to conform to international legal norms.<sup>335</sup> Whether or not international whaling regulations will someday have enough force to affect Japan’s domestic whaling legislation is difficult to determine.

### C. Resolving Conflicting Cultural Beliefs

Whales play a significant role in both modern Japanese and New Zealand cultures, albeit a very different one. In which culture does the whale play a more significant role? Should the significance of whales be based on the foundation of indigenous beliefs or the presence of modern regulations? Should the culture with the stronger indigenous connection to whales prevail in the formation of international whaling regulations? These are questions not easily answered.

Many factors determine the degree of significance of whales in each society. The one factor prevalent in the whaling debate is the indigenous right to subsistence. Japan’s underlying premise for continuing to whale, even under the guise of scientific research, is to provide whale meat for the Japanese. Whale meat is provided to satisfy the desire to consume. Although Japan’s whaling practices are now “scientific” in nature, Japan continues to argue whale meat plays a signifi-

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333. Ackerman, *supra* note 15, at 334.

334. *Id.* at 336.

335. Patricia Marshall & Barbara Koenig, Symposium, *Looking Forward in Bioethics: Accounting for Culture in a Globalized Bioethics*, 32 J.L. MED. & ETHICS 252, 258 (2004) (discussing the pressure to conform to international ethical guidelines); Reece Walters, *Criminology and Genetically Modified Food*, 44 BRIT. J. CRIMINOLOGY 151, 161 (2004) (acknowledging international trade rules put pressure on the EU).

cant role in Japanese culture.<sup>336</sup> How important is the desire for a particular food in defining a culture?

Perhaps one solution to conflicting cultural whaling interests would be to reevaluate the origins of cultural views. For example, why is diet so important in defining a culture? The importance of culinary traditions is evident throughout the world.<sup>337</sup> Moreover, the indigenous right to particular diets is well recognized in international law.<sup>338</sup> Indigenous peoples' subsistence foods are traditionally valued for their nutritional and economic importance.<sup>339</sup> However, international institutions strongly emphasize the cultural importance of traditional diets.<sup>340</sup>

There are other aspects of culture that are more consistent and conscious-driven than diet, for example, religion and ethics. The presence of a particular food in a society is based on a myriad of things, for instance, climate, geography, economics and communal health. The foundation of a culture's diet is based on the presence of certain edible items. Therefore, the presence of whale meat in Japanese culture is merely a situational circumstance.

Unlike the Japanese, whales are not important to the Māori as a food source, but as spiritual beings that must be protected. Māoris chose not to utilize whales for meat, and even today, beached whale carcasses are rarely used for traditional purposes. The Māori's cultural perception of whales originates from the spiritual connection many native Pacific Islanders have with the environment.<sup>341</sup> Indige-

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336. See generally The Government of Japan, *Quantification of Local Need for Minke Whale Meat*, *supra* note 152 (discussing the continued social importance of whaling in modern Japanese culture).

337. Heather Berit Freeman, *Trade Epidemic: The Impact of the Mad Cow Crisis on EU-U.S. Relations*, 25 B.C. INT'L & COMP. L. REV. 343, 343 (2002) (stating Europeans have an "extreme sensitivity . . . about the food they eat." Most European Union (EU) Member States lay claim to great culinary traditions. The importance of such traditions means that food is taken seriously in the European culture. Food scandals, thus, are disturbing news"). See also David Carlines, *Refugees—The Trauma of Exile: The Humanitarian Role of Red Cross and Red Crescent*, 85 AM. J. INT'L L. 569, 570 (book review) (noting the "importance of hierarchical authority and of the intake and preparation of foods, which characterize the basic psychological structure of the Vietnamese and Chinese societies").

338. For examples of laws recognizing indigenous rights to eat particular diets, see the Food and Agriculture Organization of the United Nations, at <http://www.fao.org> (last visited Oct. 9, 2004), and the International Indian Treaty Council, at <http://www.treatycouncil.org/home.htm> (last visited Oct. 9, 2004).

339. See International Indian Treaty Council, *Questionnaire on Indigenous Peoples' Traditional Foods & Cultures* ¶ 1, at <http://www.treatycouncil.org/QRE%20RESULTS.pdf> (Aug. 25, 2003).

340. *Id.*

341. Lori Osmundsen, *Paradise Preserved? The Contribution of the SPREP Convention to the Environmental Welfare of the South Pacific*, 19 ECOLOGY L.Q. 727, 730 (1992) (noting

nous peoples' "emotional nexus with the earth and its fruits" is acknowledged worldwide.<sup>342</sup> International forums recognize the importance of the spiritual connection indigenous people have with native lands and natural resources.<sup>343</sup>

In weighing the cultural significance of whales in each culture, perhaps the following should be asked: does one culture's desire to consume whale meat outweigh another culture's desire to preserve whales? One scholar suggests:

The right not to whale is no less important than the right to whale. A people's cultural right to "use" whales should not be limited to killing them for food and oil. Because whales are no more the property of one nation than they are of another, cultures should be allowed to "use" whales in ways other than killing them. That one people choose to take a property interest in whales by killing them should not restrict the right of another people to give whales a right to live and proliferate.<sup>344</sup>

Additionally, New Zealand's former Minister of Conservation stated in a speech to the IWC, "I have observed with interest the comments made by a number of delegations of historical traditional relationships many indigenous peoples have with whales. I would point out however, that many traditional relationships for my people [the Māori] are not simply based on the linear argument of harvesting whales."<sup>345</sup>

These arguments suggest the concentration the IWC has placed on cultural values is slightly one-sided, favoring pro-whaling countries. In contrast, Japan argues anti-whaling nations are culturally arrogant.<sup>346</sup> However, are pro-whaling countries culturally arrogant when it comes to cultures who believe in the preservation of whales? To what degree has the IWC taken this argument into account? As one author suggests, pro-whaling countries "appeal to the sentiment that the indigenous peoples must not suffer further loss of their cultural

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Pacific Islanders' conservation of natural resources is based on spiritual beliefs).

342. S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L COMP. L. 1, 24 (1991).

343. Robert A. Williams, Jr., *Frontier of Legal Thought III: Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 689 (1990).

344. Matera, *supra* note 329, at 41.

345. See Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 117 (citing Sandra Lee, *Conservation Minister's Speech on South Pacific Whale Sanctuary Proposal to the International Whaling Commission Annual Meeting in Adelaide*, available at <http://www.scoop.co.nz/stories/PA0007/S00026.htm> (June 4, 2000)).

346. Harry N. Scheiber, *Historical Memory, Cultural Claims, and Environmental Ethics: The Jurisprudence of Whaling Regulation*, in *LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES* 127, 141 (Harry N. Scheiber ed., 2000).

identities.”<sup>347</sup> Should the IWC consider the loss of identity to cultures that consider whales spiritual beings?

These concerns suggest pro-whaling cultural beliefs should be weighed against anti-whaling cultural beliefs in the formation of international whaling regulations. However, an easier way to resolve these conflicting cultural beliefs may be to dismiss them all together. It seems impossible to weigh the importance of one culture’s beliefs over another’s. This suggestion may seem culturally insensitive, but there is no easy solution when balancing conflicting indigenous values.

Perhaps a non-ethnocentric approach should be applied in creating international whaling regulations. One scholar suggests both pro-whaling countries such as Japan, and anti-whaling countries such as New Zealand support the “possession” of whales.<sup>348</sup> The pro-whaling countries support this view because it encourages the sustainable harvest of whales, and the anti-whaling countries for the sustainability aspect.<sup>349</sup>

Considering whales as possessions will not help resolve the international whaling debate. Perceiving whales as property will only lead back to the cultural values debate. Instead, ecological principles should apply in resolving the international whaling debate. Most whale species do not continuously reside in one particular area of the ocean; whales are migratory animals.<sup>350</sup> Anthropogenic effects to the open-ocean environment are detrimental to whales around the world.<sup>351</sup>

International biodiversity<sup>352</sup> is necessary in order to conserve biological wealth. The ocean’s biodiversity is important because many oceanic species play a crucial role in the survival of whales.<sup>353</sup> Environmental stressors, such as ocean pollution, ultimately affect whales.<sup>354</sup> For example, pollutants can kill vast amounts of the plank-

347. *Id.* at 146.

348. Matera, *supra* note 329, at 40.

349. *Id.*

350. ALYN C. DUXBURY & ALISON B. DUXBURY, AN INTRODUCTION TO THE WORLD’S OCEANS 411-14 (Lynne M. Meyers et al. eds., 5th ed. 1997).

351. *See generally* PETER CASTRO & MICHAEL E. HUBER, MARINE BIOLOGY 381-401 (2d ed. 1997) (discussing the adverse impacts of humans on the marine environment, including marine organisms).

352. Biological diversity or “biodiversity” is defined as “the variability among living organisms from all sources, including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are a part; . . .” Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818, 823.

353. *See generally* DUXBURY & DUXBURY, *supra* note 350, at 400-01 (discussing the Antarctic Food Web and the importance of krill in the food chain).

354. Whale populations are estimated to have already declined by sixty-nine percent. *See*

tonic organisms that several whale species depend on for food.<sup>355</sup> Accordingly, an ecosystem approach should be applied in international regulations governing the sustainability of whales.<sup>356</sup> This resolution seeks to avoid complex social issues and instead focuses on a universal concept. Therefore, the continued existence of whales, which is the desire of pro and anti-whaling cultures, depends on the status of the ocean's biodiversity.

If the objective of the IWC is truly a scientific one, then a more comprehensive scientific approach should apply. The continued monitoring of whale stocks is not necessarily an accurate indicator of the status of whales and should not be the only factor in determining the degree to which whaling is regulated. Moreover, applying the concept of biodiversity does not simply require the strict conservation of whale species. The application of scientific principles should encompass a broader spectrum, from fish to algal species, taking into account the entire ocean ecosystem. The strong interdependence of marine organisms requires these comprehensive conservation efforts.

The implementation of an ecosystem approach in the development of international whaling regulations must be based on objective data from several areas of science. Often scientific groups are employed to identify key issues and offer expert advice in the development of international policy.<sup>357</sup> Scientific working groups and institutions act as valuable unbiased resources in examining complicated environmental issues.<sup>358</sup>

For example, an "epistemic community is a transnational network of experts with recognized authority, usually scientists and policy-makers, around whom the consensus regarding the methodologies of and policy options for complex, global problems builds."<sup>359</sup> Epistemic

Kieran Suckling, *A House on Fire: Linking the Biological and Linguistic Diversity Crises*, 6 ANIMAL L. 193, 195 (2000).

355. The application of biodiversity conservation exists in several U.S. Federal Agencies including the Council on Environmental Quality, the U.S. Forest Service, and the Fish and Wildlife Service. Biodiversity is applied at international law under the Convention on Biological Diversity. Holly Doremus, *Biodiversity and the Challenge of Saving the Ordinary*, 38 IDAHO L. REV. 325, 326 (2002).

356. PLANKTON: OCEAN DRIFTERS (Jonathan Bird, Oceanic Research Group 1999) (film script), available at <http://www.oceanicresearch.org/planktonscript.htm> (1999); DUXBURY & DUXBURY, *supra* note 350, at 392.

357. For example, scientific reviews played a key role in the development of ozone depletion policies at the Vienna Convention and Montreal Protocol. See Marc A. Levy et al., *Improving the Effectiveness of International Environmental Institutions*, in INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION 399 (Peter M. Haas et al. eds., 1993).

358. See generally *id.* (discussing the important role of scientific working groups and institutions in developing international environmental policies).

359. See Rupa Gupta, *Indigenous Peoples and the International Environmental Commu-*



communities serve as an effective way to deal with difficult international environmental issues and have proved successful in ocean ecosystem management and policy.<sup>360</sup> Moreover, epistemic communities have played a role in the international whaling regime; cetologists have advised in negotiations on whaling regulations.<sup>361</sup>

The formation of an epistemic community to tackle the complex issues of the international whaling regime is a viable solution. Regulations based on scientific research should not be set in stone because the health of whale populations depends on a myriad of environmental factors that constantly fluctuate.<sup>362</sup> Whaling regulations based solely on current research that set rigid standards are difficult to change.<sup>363</sup> The current scientific understanding of ocean ecosystems will be obsolete in a decade. Therefore, whaling regulations should be based on probable changes occurring to ocean ecosystems.

Continuous scientific monitoring of several environmental factors is the most accurate means of detecting changes before they affect whale populations. In employing an epistemic community, scientific data is not influenced by political or economic agendas.<sup>364</sup> Researchers employed by the United Nations Environmental Program ("UNEP") can serve as independent, unbiased providers of current knowledge on how changes in ocean ecosystems affect whale populations.<sup>365</sup> The dissemination of scientific information should be prompt and widespread, preferably distributed through an international organization such as the UNEP.<sup>366</sup> This method seeks to avoid government censorship and promotes equal access by all governments and NGOs.<sup>367</sup>

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nity: *Accommodating Claims Through a Cooperative Legal Process*, 74 N.Y.U. L. REV. 1741, n.76 (1999).

360. See Alhaji B.M. Marong, *From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development*, 16 GEO. INT'L ENVTL. L. REV. 21, 53 (2003) (describing the success of utilizing ecological epistemic communities in the implementation of policy in controlling pollution in the Mediterranean Sea).

361. Bryan L. Walser, *Shared Technical Decisionmaking and the Disaggregation of Sovereignty: International Regulatory Policy, Expert Communities, and the Multinational Pharmaceutical Industry*, 72 TUL. L. REV. 1597, 1620 (1998).

362. CNN Interactive, *Whaling Commission Focuses on Environmental Threats* (May 20, 1998), at <http://www.cnn.com/EARTH/9805/20/whale.pollution/>.

363. See generally CASTRO & HUBER, *supra* note 351, at 10 (arguing "scientific methods should not be seen as a fixed set of rules to be rigidly followed but rather as a flexible framework that guides the study of nature").

364. Levy et al., *supra* note 357, at 410-11.

365. *Id.* at 411.

366. *Id.*

367. *Id.*

If international institutions continue to overlook what should be the primary concern in the formation of international whaling regulations (the future health of whale populations), whale populations will diminish before the cultural debate is resolved. Broad ecological concepts should apply in determining the both the present condition and fate of whales. This will lead to the accurate evaluation of whale stocks, and thus provide a solid framework for the formation of more objective international whaling regulations.

#### IV. CONCLUSION

It is evident Japan and New Zealand's whaling laws are products of cultural beliefs and practices. The Māori have always valued whales as sacred creatures deriving from their gods, and not as big game animals.<sup>368</sup> The influence of traditional Māori practices in New Zealand's present laws is exemplified by the continuous application of the Treaty of Waitangi to a common law system.<sup>369</sup> Because the whale was so important to the early Māori, whale restrictions were inevitably incorporated into the Treaty.<sup>370</sup> Moreover, case law and current domestic legislation proves whales continue to be a revered and important part of New Zealand's modern society.<sup>371</sup>

Contrary to New Zealand's protectionist attitude towards whales, Japan advocates to continue and increase whaling. Japan lacks whaling restrictions, and whale meat continues to play an important role in Japanese society.<sup>372</sup> This mind-set is a direct result of the dietary preferences of the early coastal village people of Japan, because whale meat was such an integral part of these peoples' lives.<sup>373</sup> The Japanese ceremonial and spiritual importance of whale meat was passed down through generations. Since law seeks to protect the interests of society, whaling legislation failed to take hold in Japan. With the lack of national whaling regulations and the consistent push to reduce international whaling restrictions, Japan has preserved the important whaling traditions of its indigenous coastal peoples.

The contrast of Japan and New Zealand's whaling restrictions demonstrates how native cultures affect modern laws. New Zealand's

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368. Gillespie, *Aboriginal Subsistence Whaling*, *supra* note 34, at 116; Kahn, *supra* note 32, at 59.

369. See generally Bennion & Melvin, *supra* note 88, at 1 (discussing the Ngai Tahu case in which the court recognized the Ngai Tahu's Treaty rights to natural resources).

370. Garrett, *supra* note 91, at 43.

371. Ngai Tahu Trust Board v. Director-General of Conservation [1995] 3 N.Z.L.R. 553; Marine Mammal Protection Act, 1978 (N.Z.).

372. Freeman, *supra* note 23, at 51.

373. *Id.*

conservationist perception of whales originated from the beliefs of the early Māori. Japan associates whales with fine cuisine and social events, due to the practices of the indigenous people of coastal fishing villages.<sup>374</sup> The presence of whaling regulations in these two countries is a result of the differences in the practices and beliefs of their indigenous peoples.

As demonstrated, indigenous cultures shape modern culture, which in turn influences modern law. Although certain aspects of an indigenous practice may change, the fundamental beliefs of indigenous peoples survive over time. These beliefs are upheld against the backdrop of contemporary restrictions and regulations. However, in order to comply with international regulations, some indigenous practices require modification. In addition, respecting various cultural beliefs in forming international regulations is difficult. Therefore, due to conflicting cultural views it may be necessary to look beyond culture in order to achieve the underlying objective of certain international regulations.

Anne M. Creason\*

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374. The Government of Japan, *Quantification of Local Need for Minke Whale Meat*, *supra* note 152.

\* J.D. candidate, December 2004, California Western School of Law; B.A. Marine Science, University of Hawai'i at Hilo, June 1999. Thank you to Professor William J. Aceves for providing comments and constant encouragement in drafting this Comment. I also give special thanks to my amazing husband, Christopher, for his unwavering support and understanding. Finally, I would like to thank my father for his time and insight.

