Gauging US and EU Seal Regimes in the Arctic Against Inuit Sovereignty

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Abstract

The US and EU each enacted seal hunting moratoriums that provide an exception for indigenous hunters. This chapter compares the respective seal regimes – the US marine mammal conservation laws and the 2015 EU trade import ban – because seal hunting is a practice that not only provides sustenance and income to Inuit and other indigenous peoples, it also defines self-hood in the Arctic. This chapter argues that whoever regulates animals is in effect regulating land and water of where animals live. And to regulate a space leads to regulating people by restricting their activities. The seal regimes are principal ways each authority negotiates its relationship with Arctic indigenous communities and expresses power in the Arctic. The chapter therefore considers seal hunting laws as part of a much broader jockeying for control and authority – sovereign power – in the Arctic. Sovereignty is employed as an analytical concept that is pluralist and relational, involves the regular negotiation of authority and jurisdiction, and constitutes a complex relationship to land. I take claims to sovereign power to be only as legitimate and as good as one’s

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1. Introduction

It is worth comparing US and EU Arctic power because both have had an ambivalent policy position on the Arctic; and both have recently started to devote significant political and financial resources towards a coherent Arctic strategy.

The US intensified its Arctic policy on 12 January 2009, when the George W. Bush administration released a presidential directive establishing a new policy for the Arctic region.1 On 10 May 2013, Barack Obama’s administration released a document entitled National Strategy for the Arctic Region supplementing the 2009 directive.2 With the directive and strategy in tow, the Obama administration has been very politically active in the Arctic as highlighted by several events: In May 2011, as part of the US chairmanship of the Arctic Council, Secretary of State Hillary Clinton attended the Arctic Council ministerial meeting, held in Nuuk, Greenland accompanied by US Interior Secretary Ken Salazar. They were the first US Cabinet members to attend an Arctic Council meeting. In February 2014, the Obama administration appointed retired Coast Guard Admiral Robert J. Papp, Jr. as the first Special Representative for the Arctic Region. And in September 2015, during Obama’s trip to Alaska was the first time a US president travelled north of the Arctic Circle. It was also the longest and most engaged visit a sitting president made to Alaska since 1923.3 All of these events were to some degree the US exercising its political muscle in international Arctic politics. This was also the Obama administration’s attempt to try to bring Arctic policy home and direct domestic attention due north. As Special Representative Papp recently stated, ‘[Americans] are detached from our Arctic. Alaskans understand it, but the rest of the country really

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doesn’t think about the United States being an Arctic nation.4

Finland was the first to push the EU towards developing an Arctic policy when in 1997, as part of its first EU presidency, it put forward the Northern Dimension policy. This was then approved by the European Council in 2000.5 The Northern Dimension policy raised more questions than answers and commentators continued to wonder what the EU’s role in the Arctic was and should be.6 The European Commission then produced two official Communications in 2008 and 2012.7 Despite these two Communications, most EU politicians and policymakers remained ambivalent to the Arctic. In response, some commentators argued that it was in the EU’s interest to devise a rigorous Arctic policy that was more coherent than the piecemeal initiatives to date.8 On 27 April 2016 the EU

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released its most articulate position to date with its Integrated Policy for the Arctic.  

While both the US and EU have published new policy documents, their relationship to the Arctic is still unclear. They have framed their Arctic political activity in terms of matters of environment, sustainable development energy and security and it remains to be seen how each authority will pursue an agenda that navigates these multiple – and at times competing – demands. Moreover, within the US and EU, the degree of political interest in the Arctic remains uneven.

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11 Philip E Steinberg, ‘Maintaining Hegemony at a Distance: Ambivalence in US Arctic Policy’ in Richard C Powell and Klaus Dodds (eds), Polar Geopolitics?: Knowledges, Resources and Legal Regimes (Edward Elgar 2014); see also Østhagen, n. 6 above.
2. Sovereignty as an analytical concept

Before commencing the legal study, I should explain how I use sovereignty as an analytical concept since the term is inherently contentious. One way to understand sovereignty is as an exclusive exercise of power over a determined territory by a single authority. But this concept does not capture the multiple ways that sovereignty is expressed and defined in practice. Sovereignty is pluralist and relational, involves the regular negotiation of authority and jurisdiction, and constitutes a complex relationship to land.

While sovereignty is about the authority to rule over people and things within a particular territorial jurisdiction, it is not necessarily established through military exercises, flag planting, or regular scientific expeditions. Instead, I take sovereignty as a historically contingent concept, which in the Arctic can be understood within the context of Inuit and other indigenous peoples’ ‘long history of struggle to gain recognition and respect.’ I do not assume that sovereignty over land and territory in the Arctic is something that is ever determinatively settled. Instead, it is a concept that people deploy in different ways when they argue over who gets to create the rules and institutions that govern territory. Thus, examining international legal and political disputes as disagreements amongst sovereigns may not completely capture political dynamics in a case; it may be more illuminating to understand what is at stake by examining how sovereign power is defined through those disputes.

In order to better understand the stakes it also helps to make a distinction between the concepts of self-determination and sovereignty, even though their meanings significantly overlap and people often use the terms interchangeably. I understand self-determination as a group’s ability to obtain their needs and express their desires within an

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existing system – to play the game in a way that serves their own interest. Sovereign power is a group’s ability to define the rules of the game and determine the space in which those rules apply.

I will show how due to a particular colonial and legal context, debates about seal hunting (and other hunting rights) – not claims in terms of land title or maritime boundaries – are one significant way that contemporary sovereignty is understood, contested, and negotiated in Alaska. By using sovereignty as a way to organize legal concepts, the fight over seal hunting laws becomes a story about the broader jockeying for control and authority in the Arctic. The EU is not making direct claims to any land or seaways in the Arctic, but as two residents of the North Slope Borough in Alaska explain, ‘Regulation of animals extends to regulating the land and water on and in which the animals live, which then leads to “regulating” people by restricting their activities.’

The meaning of seal hunting and the implications of the law become even more complicated when considering how seal hunting connects to a global economy. Sovereignty, therefore, serves as a useful concept to examine how the EU’s new seal regime changes how different bodies exercise authority and jurisdiction over Inuit seal hunting practice and commerce.

Also, I take claims to sovereign power to be only as legitimate and as good as one’s relation to Arctic indigenous communities. Or as Mary Simons, former President of Inuit Tapiriit Kanatami, famously put it in the context of Canada, ‘Sovereignty begins at home.’ The international corollary is that ‘Artic sovereignty begins with Inuit [and indigenous peoples].’ This is true for all Arctic states, but especially true for the US and EU since they have such a historically and geographically equivocal Arctic presence. Thus, the EU seal regime should be measured against contemporary Arctic legal and political developments in which indigenous peoples are granted at least autonomous legal and procedural standing as a right.

Canada


In sum – since indigenous peoples such as the Inuit have a clear claim to their presence in the Arctic, only by gauging and comparing the US and EU’s relationship to indigenous communities can one truly understand how US and EU power operates in the Arctic.  

3. Multiple understandings of the Arctic

Even though both the US and EU have new revitalized Arctic policy agendas, their geopolitical relationship to the Arctic remains a matter of debate. This stems in part by the fact the ‘Arctic’ is a multifaceted concept. The Arctic may be understood in various geographic terms: the area north of Arctic Circle (latitude 66 degrees, 32 minutes north), north of the tree line (which roughly follows the 10°C summer isotherm), or the territory surrounding the Arctic Ocean. Instead of thinking of the Arctic as having a particular boundary you get a better understanding of Arctic geopolitics if you think of it as ‘structurally more of a multifold extension of the northerly regions of the eight Arctic states’. If you think in these terms, the Arctic is then defined by how those States and their citizens deploy a complex mix of domestic and international laws to govern the North.

By any geographic definition, the US Federal Government may claim to be an Arctic power because of the fact that part of Alaska is situated in the Arctic Circle. Nonetheless, many residents in Alaska will use the phrase ‘Alaska and the United States’ designating an indefinite relationship between what is now the State of Alaska and the 48 states that comprise the contiguous continental United States (the ‘Lower 48’). The European Commission makes geographic claims to the Arctic based on the fact that three of its members, Denmark, Finland, and Sweden have territory in the Arctic Circle. But that claim is fraught with problems.


See the following for a history of the complexities of Alaska statehood, Gregory W Kimura (ed), Alaska at 50: The Past, Present, and Future of Alaska Statehood (University of Alaska Press 2010).
political uncertainties: Denmark’s claim to Arctic geography is based on the fact that Greenland and the Faroe Islands are countries within the Kingdom of Denmark. But Greenland’s autonomy and sovereignty increases every year, and the Faroese are divided over the future of their constitutional relationship with Denmark thereby complicating Denmark’s Arctic geography. Moreover, Greenland and the Faroe Islands, though part of the Kingdom of Denmark, are not members of the EU. Finland and Sweden are relative newcomers to the EU, joining in 1995 and have showed some leadership within the EU to develop an Arctic policy. Nonetheless, Sweden only recently began presenting itself as an ‘Arctic’ nation in foreign relations and developed its first significant Arctic strategy only in 2011; Finland articulated its Arctic policy only in 2010.

The Arctic may also be understood as the space comprised by the multiple institutions that focus on Arctic life, politics, and geography. The Arctic Council, since its inception in 1996, has become a principal intergovernmental forum that addresses issues faced by the Arctic governments and indigenous peoples. It is constituted by eight

Legal Regimes (Edward Elgar Pub 2014). On understanding the EU’s involvement in the Arctic as a mix between external and internal factors see Clive Archer, ‘The Arctic and the European Union’ in Robert W Murray and Anita Dey Nuttall (eds), International Relations and the Arctic: Understanding Policy and Governance (Cambria Press 2014). Lassi Heininen, ‘Finland as an Arctic and European State’ in Robert W Murray and Anita Dey Nuttall (eds), International Relations and the Arctic: Understanding Policy and Governance (Cambria Press 2014).

The Arctic Ocean is primarily governed under the auspices of the 1982 UN Convention on the Law of the Sea. A series of relevant ‘sub-regional’ entities include the Nordic Council, Nordic Council of Ministers, West Nordic Council, Barents Euro-Arctic Council, Northern Dimension, and Council of Baltic Sea States, see Alyson JK Bailes and Kristmundur Th Ólafsson, ‘Northern Europe and the Arctic Agenda: Roles of Nordic and Other Sub-Regional Organizations’ (2013) 5 Yearbook of Polar Law 45. On the EU’s role in some of these organizations see, Alyson JK Bailes and Kristmundur Th Ólafsson, ‘The EU Crossing Arctic Frontiers: the Barents Euro – Arctic Council, Northern Dimension, and EU-West Nordic Relations’ Chapter 3.


25 Sverker Sörlin, ‘The Reluctant Arctic Citizen: Sweden and the North’ in Richard C Powell and Klaus Dodds (eds), Polar Geopolitics?: Knowledges, Resources and
Member Countries and six indigenous Permanent Participants, all of which occupy territory in the Arctic by any geographic definition. The Arctic Council allows States and organizations to seek official observer status: to date this includes 12 non-Arctic States, 9 intergovernmental and inter-parliamentary organizations, and 11 non-governmental organizations. The fact that the number of official observer applicants is increasing every year is indicative of the fact that the Arctic Council has quickly become a site of global focus and politics. In fact, some Arctic Council members worry that their power will be diluted if the Arctic Council membership is opened up too widely.

The European Commission has been able to send observers to Arctic Council meetings on an ad-hoc basis, which means it is treated like other observers in practice but has to apply every time it wants to attend. Since 2008, it has set its sights on trying to receive accreditation as a more permanent Observer to the Arctic Council and put its bid forward at the Kiruna Ministerial meeting in 2013. This can be understood as the EU’s attempt to increase its prominence in Arctic geopolitics. But Arctic Council members have pointed to the


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30 France, Germany, the Netherlands, Poland, Spain, United Kingdom, People’s Republic of China, Italy, Japan, South Korea, Singapore, and India.
32 Advisory Committee on Protection of the Seas, Arctic Institute of North America, Association of World Reindeer Herders, Circumpolar Conservation Union, International Arctic Science Committee,
EU seal regime and its insensitivity to indigenous hunters as a principal reason to block EU’s membership bid. Until recently, the EU’s Observer status has been vetoed by Canada as an explicit response to the seal hunt dispute (described below).\(^{36}\) In 2014, Canada dropped its opposition to the EU’s application to the Arctic Council after striking a deal on implementing exemptions for indigenous peoples from the EU seal regime\(^ {37}\) and as part of its bilateral trade negotiation (Comprehensive and Economic Trade Agreement).\(^ {38}\) Nonetheless, some Greenland representatives in Danish Parliament called for their government to veto the EU’s bid for the Arctic Council if the EU did not do away with its seal regime banning the importation of sealskin, even with an indigenous exception.\(^ {39}\) Since the EU’s membership was left off the agenda (along with other observer applications) at the 2015 Ministerial Meeting of the Arctic Council in Iqaluit, the EU will now have to wait at least until the next Ministerial meeting in 2019 in Finland.

The EU has some pan-Arctic institutional presence through its parliamentarians who are members of the Conference of Parliamentarians of the Arctic Region. The Conference views the Arctic Circle as the primary forum for Arctic cooperation. The Standing Committee (which includes one EU parliamentarian amongst a total of 11 members) works to promote the work of the Arctic Council and participates in the meetings of the Arctic Council as an Observer.

The US, because of its possession of Alaska, was invited to be a founding member of the Arctic Council. While the US was skeptical of the need for the Arctic Council it nonetheless joined at the Council’s inception in 1996. But like the EU, it now has significantly increased the political resources it puts towards participating in the Arctic Council, especially since it assumed the chairmanship in 2015.\(^ {40}\)


\(^{40}\) Diddy RM Hitchins, ‘An Alaskan Perspective: The Relationship between the US
4. The US and Alaska

4.1 Hunting rights and sovereignty

In order to understand US Arctic presence and policy, one must understand the historical legal relationship between the US and Alaska. In Alaska, the meaning and delineation of sovereign power remains a live debate. In the past, like today, hunting rights have played a central role in territorial debates over Alaska.41 I provide brief historical context as to of how sovereignty in Alaska is the product of constant negotiation and is in practice dispersed across an array of authorities. From within this context, I then discuss the legal regime governing marine mammal hunting and provisions made for indigenous hunting rights as it relates to seals.

In Alaska, sovereignty has been the means through which indigenous peoples and settler colonists have defined their relationship between each other, and negotiated authority and jurisdiction over land. Indigenous claims to sovereignty in Alaska today arise from assertions of the inherent powers of self-governing communities that have lived with particular lands from time immemorial. Indigenous communities first engaged with sovereignty as a legal and political concept tied to notions of nationhood and the state in their encounter with European migrants. The US lays legal claim to Alaska, and by extension to the Arctic, through the colonial doctrine of discovery.42 It began when the US purchased what is now the State of Alaska from Russia in 1867 through the Treaty of Cession.43 Article 3 of the treaty deemed the tribes to be uncivilized and granted the US Federal government the power to subject almost all aboriginal peoples in the area to US federal law.44 Thus, the treaty followed the logic that Russia was the initial discovering nation, and the US became its successor to legal title of the land used and occupied by indigenous peoples. Indigenous tribes were enraged that no one sought their consent or even consulted with them. The US Federal Government’s legal claim was that indigenous tribes only retained the right to the use and occupancy of the land as if they were tenants; this conflicted with native understanding

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43 Treaty Concerning the Cession of Russian Possessions in North America (30 March 1867) 15 Stat. 539, TS No. 301.

44 The US considered Unangans to be ‘civilized’ Russian subjects, and ostensibly could choose Russian or American citizenship through the Treaty. In practice, the United States did not recognize the civil rights of Unangans until 1966, see Barbara Boyle Torrey and Agafon Krukoff, Slaves of the Harvest: The Story of the Pribilof Aleuts (Tanadgusix Corp 1978).
of their relationship to the land. As it stands today in US law, indigenous communities retain the sovereign power of self-government which cannot be extinguished; but Congress in effect passes laws that alters indigenous authority and jurisdiction. Herein lies the space where Alaska Natives negotiate with or resist against US Federal law to define their sovereign power. If we understand authority as the power over someone or something, and jurisdiction as the scope of said power, Congress and the US Federal Government significantly control the levers of indigenous sovereignty. While indigenous peoples as US citizens have some leverage with the executive and legislative branch of US government, like for any citizen, this is power is determined by how well people can organize themselves and exert collective will within the national system.

The US federal government has recognized 229 Alaska Native governments, but without specifically identified territory. The result is that questions over sovereign powers of authority and jurisdiction most often arise through conflicts over subsistence hunting. In fact, subsistence and self-government remains to be the most legally complex and politically heated issue in Alaska today. But this is not a new issue. Ever since 1867, tribes in Alaska have been fighting for hunting, gathering, and land rights. The struggle was made more acute after the Second World War when Alaska native peoples, demanding more land rights from the US federal government, came up against non-native desires to take of advantage of the postwar economic boom. When Alaska became a state in 1959, the federal government deliberately avoided the issue. Instead, it authorized the newly created state to select 103.35 million acres of ‘vacant, unappropriated, and unreserved’ land as its own from federal public land (representing about 28% of Alaska’s total land base); while at the same time it recognized but did not define native rights.

The clash between Native tribes and the new State government was then over which lands were ‘vacant, unappropriated, and unreserved’ and which were lands necessary and part of Native subsistence use.

Today, this conflict continues between Native governments and the State government over different understandings of hunting rights. Alaska’s Constitution does not recognize indigenous rights as such or grant any preference for subsistence hunting. Moreover, the State of Alaska’s Department of Fish and Game has had a bias in favor of sport subsistence use.

45 See Anderson, n. 42 above.
50 See Theriault and others, n. 48 above; Anderson, n. 42 above.
fishing and hunting by urban non-natives.\textsuperscript{51} The US government did not address Native hunting rights until the passing of the 1971 Alaska Native Claims Settlement Act (ANCSA), which forms the basis of the modern relationship between tribes in Alaska and the US Federal government.\textsuperscript{52} The act fundamentally transformed indigenous relations with the US Federal government and significantly curtailed Native sovereign power.\textsuperscript{53} First, the ANCSA extinguished Aboriginal title claims based on prior conveyances, use and occupancy, right, or foreign law.\textsuperscript{54} This, however, was not an effort to permanently abolish Native rights; instead the ANCSA then redefined indigenous powers of self-determination. In lieu of title claims, all Alaska Natives alive on 18 December 1971 received the right to obtain stock in one of the newly created thirteen regional corporations and in more than two hundred village corporations. The ANCSA conveyed approximately forty-five million acres of land to the Alaska Native Corporations through fee title, along with a cash payment of almost $1 billion.\textsuperscript{55} Thus, land in Alaska was and remains governed in part through Alaska Native corporations created by the ANCSA and in turn through Alaska state corporate law.

The ANCSA also extinguished ‘any aboriginal hunting or fishing rights that may exist.’\textsuperscript{56} Then, US Congress requested that the Secretary of Interior and State of Alaska take positive measures to protect native hunting rights. This did not happen and the question of subsistence hunting was left unaddressed (along with other key issues such as federal services and Native government). While Native tribes retained their sovereign hunting rights, the meaning and definition of those rights remained a matter to be decided by tribes in their debates with the Federal government through Congress and disagreements with the Federal government through the courts.

The 1980 Alaska National Interest Lands Conservation Act (ANILCA)\textsuperscript{57} was an attempt to further settle Alaska Native hunting and fishing rights. It did this by granting exclusive access to hunting, gathering, and fishing to all rural residents. Thus, it did not create rights to Native peoples in law and left the issue to the fact that most rural residents are Native. In 1989, the Alaska Supreme Court found this provision to be unconstitutional since it made a distinction between rural and non-rural Alaskans.\textsuperscript{58} To date, distinct Native subsistence hunting rights are not granted in positive law as a rule

\begin{itemize}
  \item See Case and Voluck, n. 47 above, 293–294.
  \item 43 USC § 1603.
  \item Case and Voluck, n. 47 above, 35, 75, 79.
  \item 43 USC § 1603(b).
  \item McDowell v State, 785 P.2d 1 (Alaska 1989).
\end{itemize}
and are only provided through exceptions to wildlife management statutes such as the 2000 Migratory Bird Treaty Act, the 1972 Marine Mammal Protection Act (MMPA), and the 1973 Endangered Species Act.\(^\text{59}\)

4.2. The economy of seal hunting rights and indigenous sovereignty

In Alaska, seal hunting is at the intersection of three aspects of village economies: subsistence, government transfer, and the market economy.\(^\text{60}\) It also has a broader existential meaning in which seal hunting is how indigenous groups in the Arctic socially and culturally define themselves. In other words, seal hunting in the Arctic is a practice that is embedded within several economies – and those economies are conjoined through indigenous understandings and expressions of sovereign power and rights of self-determination. Indigenous communities make choices through this matrix to determine what seal hunting means and how it should be valued, and often those choices are conditioned by law.

US law grants Indigenous peoples in Alaska seal hunting rights as an exception to the MMPA. US Congress first enacted this on 21 October 1972.\(^\text{61}\) It prohibited US citizens on the high seas from harassing, hunting, capturing, or killing (‘taking’) protected species or anyone doing the same in US waters. It also prohibited importation of marine mammals and marine mammal products into the US.\(^\text{62}\) To some degree, US Congress passed the MMPA as a response to a public animal cruelty campaign against the hunting of harp seal pups in Canada, and general concerns about other marine mammals.\(^\text{63}\) Like the current EU seal regime, it was not specifically a response to species that were endangered. Native groups, to exercise their hunting rights, had to seek permission from the appropriate Federal Secretary.\(^\text{64}\)

In 1994, the MMPA was significantly amended marking a shift in conservation policy from hunting moratorium to wildlife management. It also provided Native peoples more opportunities to define their hunting rights and be part of that management.\(^\text{65}\) As usual in the case when rights are granted, this did not resolve anything and instead signaled the beginning of a long, costly, and complex negotiation and contest between different federal and state agencies, sovereign tribes, and non-native hunters.\(^\text{66}\) What follows is an

\(^{59}\) Theriault and others, n. 48 above.


\(^{62}\) 16 USC § 1371(a).


\(^{64}\) Other exceptions include taking for the purpose of scientific, commercial, and ecological activities.


\(^{66}\) Kate Wynne, ‘The Marine Mammal Protection Act: An Overview of Recent Changes’ Alaska’s Marine Resources (Fairbanks, September 1995) <http://nsgd.gso.uri.edu/aku/akug95003.pdf> accessed 17 October 2016. For the initial implementation process, $2.5 million were
examination of how the law configured the political, social, economic, and social attributes of hunting (and the concomitant debates) in a particular way.

The MMPA operates within a convoluted system of government management. After the 1989 Alaska Supreme Court ruling, ‘the federal government took over the management of fish and wildlife for subsistence purposes on Alaska public lands in 1990 (approximately 60% of Alaska lands), leaving the state to manage the remaining 40% of Alaska lands, including Native lands.’ The result is that hunting rights are governed by multiple legal regimes through a federal and state management system that is ‘complicated and sometimes conflicting.’

In sum, hunting rights to date are entangled in three, uneasy bundles of sovereign power: Native-US Federal relations, Native-State of Alaska relations, and the constitutional division of power between the Federal and State government. Since tribes in Alaska are within the fold of US imperial adventures, US executive power and local tribes negotiate and contest the meaning, limits, and extent of sovereign power through US administrative law and not international law. It is helpful to understand the administrative structure before turning to the actual legislation.

The amended MMPA provides a structure to implement the Alaska Native hunting right exception, authorizing (but not requiring) the US Federal government to develop a co-management system with Alaska Native organizations. In 1997, the Indigenous People's Council for Marine Mammals (a coalition of Tribal marine mammal commissions/councils and other Native organizations in Alaska), U.S. Geological Survey Biological Resource Division (which falls under the auspices of the Department of Interior), Fish and Wildlife Service (Department of Interior), and National Oceanic and Atmospheric Administration (NOAA Fisheries is under the auspices of the Department of Commerce) developed a Memorandum of Agreement to provide the foundation and direction for the use of co-management funds provided under the MMPA. The

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69 There is, however, a strong argument made in the US that international law is increasingly becoming the platform from which Alaska Natives, and all indigenous groups in the US, to assert their rights in relation to the US government, see Dorough, n. 53 above; Case and Voluck, n. 47 above, 1–20.

70 16 USC § 1388.

71 Memorandum of Agreement for Negotiation of Marine Mammal Protect Act Section 119 Agreements (August 1997) <https://alaskafisheries.noaa.gov/sites/default/files/umbrellagrr97.pdf> accessed 17 October 2016; this was updated with Memorandum of Agreement for Negotiation of Marine Mammal Protect Act Section 119 Agreements (October 2006).
result has been a number of place-specific or animal-specific cooperative agreements and concomitant agencies. The result is a complex system of shared responsibility in which each commission or committee is a place of back-and-forth discussion between the US Federal government and Native tribal councils – the theory being that these are ‘government-to-government’ negotiations and neither has principal control over decision-making. The meaning and effect of co-management is not only a matter of administrative design but also arises through implementation. For example, State troopers will sometimes not cite someone for a violation and leave the matter to the appropriate tribal council. In sum, co-management can be understood as the complex, pluralist legal regime through which questions of authority and jurisdiction over hunting are decided both through agreement, implementation, and interpretation.

The US government in many respects defines Native rights, but Alaska Natives assert those rights as a matter sovereign power because of pre-colonial contact history. The

MMPA defines Alaska Native organization to mean a group designated by or formed through US law, which represents or consists of Indians, Aleuts, or Eskimos residing in Alaska. Thus, tribes retain inherent sovereignty but derive their standing in government-to-government negotiations from the US itself; communities may, for example, obtain official designation as an Alaska Native Tribe, authorization through a co-management bodies, or legal personality through incorporation. An Alaska Native, as a US citizen, may also assert her Native rights by suing the appropriate federal or state agency in court, thus granting the final word on hunting rights to the US judiciary.

The US government expresses its sovereignty through two agencies which have different jurisdiction, each of which negotiates with Alaska Native organizations. The Secretary of Commerce (through NOAA Fisheries) has jurisdiction over mammals that are members of the order of Cetacea and members of the order Pinnipedia (other than walruses). The Secretary of the Interior (through the US Fish and Wildlife Service) has jurisdiction over all other marine mammals. Because each agency operates out of its own Federal department, they each operate within a distinct institutional history, has a different Secretary with her or his own particular agenda, and must respond to different political


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72 See for e.g. John v. United States, 247 F.3d 1032 (9th Cir. 2001).
73 16 USC § 1362(12)(A). In fact, the legislation grants NOAA the jurisdiction and grants the power to whatever Secretary of the department in which NOAA is operating.
pressures. As a result, each agency enforces the law in its own way.

The US seal regime’s laws are just as complex as its administrative structure. Through the MMPA, Congress first delimits indigenous hunting rights in Alaska in terms of ethno-cultural membership and geography. It does this by designating and defining the category of ‘Alaska Native’ and only granting hunting rights to ‘any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean’.

Then, Congress grants anyone who meets these defined identities the right to take any marine mammal if the taking meets the following criteria: (1) is for subsistence purposes; or (2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing…; and (3) in each case, is not accomplished in a wasteful manner.\(^{76}\)

Last, the US Federal government retains final authority to restrict or revoke this hunting right if the appropriate Secretary determines ‘any species or stock of marine mammal subject to taking by Indians, Aleuts, or Eskimos to be depleted.’\(^{77}\) In other words, the Secretary retains a conservation trump card against Alaska Natives.

Each one these points have been legally contentious. First, on the question of who is allowed to hunt and the category of ‘Alaska Native’: unlike the Alaskan Constitution, the MMPA singles out Alaska Natives and in doing so recognizes indigenous sovereignty to some degree. What makes the issue more antagonistic amongst people in Alaska is the fact that hunting rights are now embroiled in a constitutional debate that was triggered when the Alaska Supreme Court ruled in 1989 that ANILCA’s provision privileging rural – and mostly Native – residents was unconstitutional because it contravened the ‘equal access’ clause of the Alaska Constitution.\(^{78}\) Native and pro-Native groups argue that the Alaska Constitution should be amended to bring it into compliance with ANILCA; while non-native groups argue that ANILCA should be amended to bring it into compliance with the Alaska Constitution.\(^{79}\) Additionally, some conservationists oppose the government granting Native tribes subsistence rights because they worry that such rights will ‘open the door’ to commercial hunting.\(^{80}\) From another perspective, if an Alaska Native no longer ‘dwells on the coast of the North Pacific Ocean or the Arctic Ocean’, moving for example to an urban center like

\(^{76}\) 16 USC § 1371(b).
\(^{77}\) Ibid.
Fairbanks in the interior of the State, this suggests that she or he will likely lose their hunting rights.

Next, hunting practice criteria are also a matter of significant disagreement: hunting must be for the purpose of subsistence or making authentic handicrafts/clothing, and is not wasteful. To start with the overarching requirement of non-wastefulness, the criticism has been that ‘interpretation has been ambiguous, and enforcement arbitrary’, and such debates have eroded the relationship between indigenous hunters and government managers.\(^{81}\)

ANILCA identifies the elements to subsistence, requiring Alaska Natives to show the hunt is a matter of economic and physical reliance, cultural or social value, and custom and tradition.\(^{82}\) Not only are there legal debates over the meaning of subsistence, but there are also socio-economic questions as to whether subsistence hunting should be treated more like a commercial commodity or as a communal right for Alaska villages.\(^{83}\) The more acute problem, however, is the sovereign power question of who gets to decide what is subsistence hunting. In the division of power in Alaska, the State authority and legal regime is often rigid and backward looking, while the Federal system of co-management with tribes tends to be more accommodating and responsive to indigenous claims.\(^{84}\) Nonetheless, Federal conservationist legislation that carves out indigenous exception such as the MMPA do not grant tribes a mandatory role in the federal government’s decision-making on whether and how much to limit subsistence hunting. Moreover, the Federal government makes these decisions through executive orders, which does not provide tribes with clarity since these orders are more easily made and unmade than legislation (the corollary is that they are more negotiable). More problematic is the fact that each federal agency has their own concept of when or how they engage in co-management consultations.\(^{85}\)

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\(^{84}\) See Theriault and others, n. 48 above; Diamond, Swanson and Mengerink, n. 68 above.

The requirement that hunting be for the purpose of making ‘authentic’ handicraft or clothes, the other criteria for allowable indigenous hunting, is vexing. One Federal agency (Fish and Wildlife Service) decided to only look to the past and limit ‘authentic’ articles to those ‘commonly produced’ before the enactment of the MMPA (in this case it was products made from sea otter skin). The Federal Court of Appeal struck down their legislation and held that legislation sufficiently defined authentic native handicrafts as being ‘made at least in part of “natural materials”, and …[produced]… in traditional native ways, such as weaving, carving, and stitching.’ Thus, the court held that the agency had no discretion to impose what it deemed to be as additional requirements.86

The final way that Congress delineates its authority over hunting rights is through wildlife protection powers. While seals are not currently endangered, this may change as the climate rapidly changes raising the issue of seal protection in the future. Alaska Natives’ rights are respected, however, by the fact that the Federal Government must bare to them (and the courts) a very specific burden of proof, and must show ‘substantial evidence on the basis of the record as a whole’ that a species or stock of marine mammal is depleted.87 The US Federal government rarely exercises this authority, but when it does the political stakes are high. This is exemplified in the case when the Federal government banned all gray whale hunting on conservation grounds contra their treaty with the Makah tribe in the Northern Pacific (in the State of Washington); the Tribe forcefully responded through a long legal battle and extra-administrative measures.88

The reality of everyday life is that communities’ cultural, economic, and social practices and ensuing meanings are always responding to changing conditions.89 Subsistence hunting, like all community practices, is embedded in the past but also alive in the present. Thus, as indigenous communities change so does their sense of subsistence hunting’s meaning and purpose. What is consistent is that subsistence hunting remains central to indigenous self-understanding in Alaska.

The legal complexity of the seal regime in Alaska is the result of that fact ever since statehood in 1959 sovereignty remains – in the words of a doyen of indigenous law in the US – a matter of ‘unfinished business’ in Alaska.90 And as long as it remains a

86 Didrickson v United States Department of the Interior, 982 F.2d 1332 (9th Cir. 1992).
87 16 USC § 1371(b)(3).
90 See Anderson, n. 42 above.
matter of ‘unfinished business’ the US’s claims to sovereignty in the Arctic will be politically tenuous.

5. EU seal regime

In 2009, the EU enacted regulations whose aim was to ban the importation of seal products in its market. It made exceptions for indigenous communities, marine resource management, and personal use by travelers. The indigenous community exception only allowed seal products that result from Inuit or other indigenous communities if they met the following criteria:

(a) seal hunts conducted by Inuit or other indigenous communities which have a tradition of seal hunting in the community and in the geographical region;
(b) seal hunts the products of which are at least partly used, consumed or processed within the communities according to their traditions;
(c) seal hunts which contribute to the subsistence of the community.

This seal ban created an international maelstrom including a series of cases before the EU courts and WTO. I first provide a summary of these cases as part of the larger political context surrounding the 2009 EU seal regime since the current 2015 seal regime was drafted in response to these cases. Using the sovereignty analytic developed in the previous section on Alaska, I then examine the process that lead to the current seal regime and the text of the regime itself.

5.1. Seal ban cases

Inuit groups in Canada were frustrated that they had no practical way to take advantage of the indigenous community exception because the EU did not create any administrative structure to clarify and enforce the measure in a way that applied to them. As exemplified in Alaska, the terms of the measure were not self-explanatory and also required significant administrative structures in order to be effective. The EU did put into place a mechanism that allowed (the mostly Inuit) Greenlandic hunters to benefit from the exception. Nonetheless, Inuit groups in Canada and Greenland came together in their broader concern that even with an indigenous exception, such legislation would cause the entire seal market to collapse. In alliance with all seal hunters they called for an end to the whole seal regime.

This position was partly based on experience: international animal welfare activists had successfully led anti-seal hunt campaigns in the 1970s and 1980s that lead the US banning the importation of all seal products in 1972 and the EU banning the importation of the white pelts of the

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92 Implementation Regulation, article 3.

93 See Chapter 4.
youngest pups in 1983. This in effect reduced the price of seal pelts and significantly diminished all seal hunting. The Inuit position was also based on contemporary economic conditions: by the European Commission’s estimate, 30% of global trade in seal is within the EU market. The EU’s ban would likely cause surplus seal products to flood other markets thereby depressing the global price. Moreover, Inuit hunters and their communities’ livelihood would be affected since not all seal products they produced would satisfy the specific, exceptional conditions laid out in the EU regulation. Even if the products did meet the regulatory exception, Inuit traders would have to bear the administrative and financial burden proving the hunt and product meet EU criteria, thereby raising the cost of production. Moreover, Inuit access to the international seal product markets depends upon the marketing channels created and maintained by the much larger Atlantic seal hunt. The ban would do away with these channels, which would in effect deny Inuit hunters market access.

Inuit were also angry that animal welfare activists, celebrities, and the regime itself characterized seal hunting as a cruel and barbaric practice. They were frustrated that animal welfare activists and EU officials did not understand the reality of the seal hunts, conditions in the Arctic, or the centrality of seal hunting in almost all aspects of Inuit life. This had economic implications for even if Inuit seal products made it to the European market, they would be tainted by demonizing moralistic language. Moreover, Inuit heard this complaint as patronizing especially since their identity was at stake. For example, at the 2014 Oscars, comedian Ellen DeGeneres raised funds by posting a selfie photo and sent about $1.5 million to the Humane Society, which strongly opposes the seal hunt. In response, Killaq Enuaraq-Strauss, a 17-year-old Inuit woman from Iqualuit and DeGeneres fan, posted a video, where she told DeGeneres in the most considered and considerate way, ‘We do not hunt seals ... for fashion. We hunt to survive.’ This triggered an online campaign and Inuit flooded Twitter with selfies posing with seal fur and affirming the importance of hunting seal for food, clothing, and traditional reasons (#sealfies).

Like the Inuit, some commentators questioned the


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exceptions legitimacy or effectiveness and predicted that the seal regime would shut down all seal trade and hunts, commercial or otherwise. Some found that the EU seal regime contravened indigenous human rights since it potentially threatened Inuit livelihood and way of life.98 Others focused on the incoherence of the legislation pointing out that it served multiple conflicting purposes namely the protection of animal welfare concerns, the need to harmonize a fragmented internal market, and an attempt to protect indigenous rights.99 The Court of Justice of the European Union (CJEU) upheld the Regulations on the basis of Article 95 of the EC Treaty and determined that the principal objective of the EU’s Sealing Regulations ‘…is not to safeguard the welfare of animals but to improve the functioning of the internal market.’100 The WTO Panel found that that hunting methods used by indigenous hunters ‘…can cause the very pain and suffering for seals that the EU public is concerned about’ and as such the indigenous community exception bore no rational connection to the EU’s alleged concern for animal welfare.101 One Member of the European Parliament (MEP) agreed that the legislation did not clearly serve animal welfare purposes and stated, [t]here is something not strictly rational about singling out seals for special treatment. They are not an endangered species—even the WWF says so. We do not get anything like the clamour about hunting seals on behalf of wasps or woodlice or wolverines or worms. Then again, democracy is not strictly rational.102 Others have pointed out that not only did the European and WTO courts have ample evidence that seals did not necessarily suffer in the hunts, but that the EU legislation was disconnected from scientific and social reality of seal hunting communities.103 The EU’s position that the legislation’s

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99 See Fitzgerald, n. 94 above; Whitsitt and Bankes, n. 96 above; Nikolas Sellheim, ‘The Goals of the EU Seal Products Trade Regulation: From Effectiveness to Consequence’ (2015) 51(3) Polar Record 274.
100 Case T-526/10 Inuit Tapiriit Kanatami and Others v Commission (General Court, 25 April 2013), paras 35, 83.
102 Quoted in Fitzgerald, n. 94 above, 129.
purpose was to protect animal welfare was not strengthened since it defended the seal regime at the WTO as a measure necessary to protect public morals, and not in terms of exceptional provisions in the GATT that allowed states to restrict trade if it was necessary to protect animal life and health.

One reason that the issue bubbled up onto international politics was because the price of seal pelts doubled from 2001 to 2004 due to a thriving seal population and new markets in Russia, Ukraine, Poland, and China. Inuit hunters and struggling communities in Newfoundland were excited about the prospect of revived market. With the new booming market, animal activists reinvigorated their international campaign against seal hunting. Moreover, animal activists were empowered by 2009 Treaty on the Functioning of the European Union which placed a legal obligation on the EU and Member States to ‘pay full regard to welfare requirements of animals’ when enacting and enforcing EU policies.

Inuit groups quickly mobilized against the 2009 EU seal regime. In April 2009, the Nunavut Premier Eva Aariak asked the Federal Government of Canada to oppose the EU’s bid to seek Observer Status at the Arctic Council. The Federal Government accommodated this request, which was a political blow to the EU trying to position itself as an Arctic power – the EU seal regime was now one of the major issues in Arctic politics. Meanwhile, both the Governments of Nunavut and Canada mounted a campaign to convince EU parliamentarians to vote against the legislation.

When that failed, Inuit Tapiriit Kanatami (representing Inuit interests in Canada) led advocacy groups from Canada and Greenland, associations of hunters from Canada and Greenland, individual Inuit hunters, and other representatives from the seal hunting industry from Canada, Greece, and Norway in a series of suits in EU courts. The General Court found the challenge inadmissible primarily on the grounds that the measure in question was a legislative and not regulatory measure. The Court of

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105 GATT, article XX (b).
109 Case T-18/10 Inuit Tapiriit Kanatami and Others v Commission (General Court, 6 September 2011) ECR 11-5599; Article 263, TFEU: ‘[a]ny natural or legal person may…institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory of direct concern to them and does not entail implementing measures.’
Justice of the European Union (CJEU) upheld this finding on appeal.\(^{110}\)

Inuit Tapiriit Kanatami then lead the group to challenge the implementing measure before the European courts. This time the courts did not address the admissibility question and instead focused on the substance of the legal claims. The General Court of the CJEU dismissed the applicants claims that: 1) the Commission did not have the appropriate legal basis to enact the regulation and; 2) that regulation breached proportionality and subsidiary rights, and fundamental rights.\(^{111}\) The applicants lost their appeal before the CJEU.\(^{112}\) Part of the applicants’ argument was that General Court erred in finding not applying Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, especially since the Declaration was mentioned in the Recital of the measure. Article 19 provides that ‘States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.’ The CJEU held that the Declaration was not binding and the reference to it in the Recital only provided reasoning for the indigenous exception and did not acknowledge a legal obligation – which in effect denied Inuit rights to self-determination within the EU.

While the EU court cases proceeded, Canada and Norway challenged the EU seal regime before the WTO.\(^{113}\) Their claims were that the regime was discriminatory and contravened ‘Most Favored Nation’ and ‘National Treatment’ obligations under the General Agreement on Tariffs and Trade (GATT) and Technical Barriers to Trade Agreement (TBT). They also claimed that regime violated the TBT because it was not ‘necessary to achieve a legitimate objective’ and constituted an ‘unnecessary obstacle to trade’. Much like the CJEU, the WTO Appellate Body (AB) held that the EU Seal regime was not a ‘technical regulation’ and therefore the TBT did not apply.

The AB did hold that EU seal regime contravened GATT Article I:1 (Most-Favored Nation) because it unjustifiably discriminated against all seal products from Canada and Norway in favor of seal products from Greenland. It followed, however, with the conclusion that the EU could provisionally justify its ban as a general exception under GATT Article XX(a) as a measure necessary to protect public morals. The AB’s

\(^{110}\) Case C-583/11 P Inuit Tapiriit Kanatami and Others v Commission (Grand Chamber, 3 October 2013).

\(^{111}\) Case T-526/10 Inuit Tapiriit Kanatami and Others v Commission (CJEU, 25 April 2013).

\(^{112}\) Case C-398/13 P Inuit Tapiriit Kanatami and Others v Commission (CJEU, 3 September 2015).

conclusion was provisional because the AB also found that the EU seal regime favored Greenlandic Inuit hunters over Canadian Inuit hunters because the EU did not pursue ‘cooperative arrangements to facilitate the access of Canadian Inuit to the [indigenous community] exception’; the AB held that as a result the EU had not shown that their ban was not arbitrary or unjustifiable suggesting that if the EU treated all indigenous hunters equally it would be WTO compliant.114

5.2. The process leading to the new seal regime

Inuit leaders throughout the whole fight against the EU through the courts did not assert their hunting rights in explicit terms of sovereignty and instead framed the issue as a matter of human rights, WTO law, and EU law. Nonetheless, after the series of cases were decided, one can see how sovereignty – understood as the authority to decide what rules applied to seal hunting – was in practice negotiated and contested amongst national and transnational Inuit advocacy groups, the Government of Canada, the Government of Nunavut, the WTO courts, the EU courts, the EU Parliament, EU Council, and EU Commission in the process of developing the new seal regime.

Several months after the WTO AB report was released, all the relevant authorities and groups adjusted to the new legal landscape, politically regrouped, and mobilized. Canada and the EU ironed out their economic differences and negotiated a framework to ensure the indigenous exception would allow actual access for Inuit seal products into the product, while also finalizing the text of the Canada-EU bilateral trade agreement.115 In return, Canada agreed to support the EU bid for Observer Status at the Arctic Council. Thus, the EU was able to preserve its ability to enact its seal regime and in effect govern seal hunts in the Arctic while also garnering more support for its position in the Arctic Council.

Indigenous groups were cautiously favorable with the prospect of an effective indigenous exception. But since details were still not worked out it was unclear whether the Inuit would have meaningful input in the process or whether the new seal regime would actually benefit indigenous people. Duane Smith, president at the time of ICC Canada statement captures the concern of how

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114 WTO AB Seals para. 5.337.
much power the EU may retain when he stated, ‘Hopefully, [Canada and the EU] resolve this issue so that we don’t have to deal with this every time the EU has elections.’

The European Commission released its proposal for a new seal regime on 6 February 2015. Inuit hunting advocacy groups, such as Inuit Sila from Greenland took a two-pronged approach. They continued to outright oppose the seal import ban. But seeing that the process was continuing, in the alternative they also argued that the EU had to make an active effort undoing the stigma against seal products and inform consumers that sealskin is sustainable and legal, and invest in businesses that help increase the sale of seal products. The EU Parliament took up some of those points and successfully fought the Council of the European Union and the European Commission to include a provision in the regime that requires the European Commission to inform the public as such. Parliamentarians also successfully added more language that emphatically framed hunting as a matter of self-determination. The Commission’s original proposal contextualized hunting rights in the following way: ‘seal hunting is an integral part of the socio-economy, nutrition, culture and identity of the Inuit and other indigenous communities, making a major contribution to their subsistence.’ Parliamentarians managed to add the statement that ‘seal hunting was a major contribution to indigenous subsistence and development, providing food and income to support the life and sustainable livelihood of the community, preserving and continuing the traditional existence of the community.’ Also, references to hunting as ‘cruel’ were removed and references to indigenous rights were placed more centrally as an effort to reduce the assumption in many people’s mind that all seal hunting was inhumane.

After the release of the proposed new seal regime, the Governments of Greenland and Nunavut engaged in the process and released a joint statement emphasizing the role that seal hunting played in their way of life, sense of self, and human rights. They concluded by

122 The Government of Nunavut is a semi-autonomous body governing a mostly Inuit
encouraging ‘the EU to work with us in a manner that respects for our way of life and the United Nations Declaration on the Rights of Indigenous Peoples, to ensure all Indigenous peoples have equal access to, and benefits from, the implementation of the Indigenous Communities Exemption.’

This communicated that the respective Inuit governments’ tactic was to accept that the new EU seal regime was going forward and work to ensure that Inuit rights of self-determination were as protected as much as possible within this new law.

While the EU Parliament was able to find some compromise with the Council and Commission on meeting Inuit demands for enhancing references to indigenous self-determination, the regime by the very act of its existence is in effect a co-management system in which the EU shares sovereign power with the Governments of Nunavut, Greenland, and Canada. The EU seal regime forces Arctic authorities to engage in ‘government-to-government’ negotiations over seal hunting with the EU.

Under the new regime, the EU sets the rules and approves recognized bodies which implement the rules. The new criteria only focus on the hunting methods and do not scrutinize the seal products themselves. But, in order to comply with WTO law, due regard for animal welfare was now included as a determining factor. Now seal products from indigenous hunts will only be allowed into the EU market if they meet the following criteria:

(a) the hunt has traditionally been conducted by the community;
(b) the hunt is conducted for and contributes to the subsistence of the community, including in order to provide food and income to support life and sustainable livelihood, and is not conducted primarily for commercial reasons;
(c) the hunt is conducted in a manner which has due regard to animal welfare, taking into consideration the way of life of the community and the subsistence purpose of the hunt.

To date, the EU has authorized the Governments of Greenland and Nunavut to implement the

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124 Article 1, Basic Regulation 2015.
126 European Commission, ‘Decision recognising the Department of Environment,
indigenous exception. Thus, Inuit governments retain some power in how the system is managed since they assess the conditions of the hunt that generated the seal products according to the EU indigenous exception. Then (if appropriate), the respective authorized government agency issues the attesting document, which accompanies the seal product into the EU market. This document is what confirms the legality of the seal product and all subsequent invoices related to the product must contain a reference to the number of the attesting document. As we saw in Alaska, terms such as ‘subsistence’ and ‘traditional’ are complex, dynamic ideas best determined by the communities themselves.

Much like the US Secretary of the Interior or Commerce in Alaska, EU authorities, however, retain the final word. Disputes over the authenticity or correctness of the attesting document are to be determined by each EU Member States. It is unclear what this means, and one can imagine Inuit hunters having to navigate an inconsistent, fragmented dispute resolution system. Moreover, in order to respond to the WTO ruling and the AB concerns about the seal regime being arbitrary and unjustified in its ability to distinguish between commercial and subsistence hunting, the new seal regime accords the Commission heightened powers to scrutinize indigenous hunters: if the Commission has evidence that indigenous hunts are ‘commercial’, it may prohibit the placing on the market or limit the quantity that may be placed on the market of seal products resulting from the hunt concerned. Thus, the Commission is the final arbiter of interpreting what is meant by ‘subsistence’ and what is ‘commercial’, what is ‘traditional’, and what constitutes appropriate consideration for animal welfare. From Alaska, we learned that this interpretive authority is a key power in governing seal hunts.

The language empowering the Commission to conduct ‘appropriate consultations’ is not clear as to whether this is mandatory or only permitted. Nor does it explain whether the Commission has to consider the input from experts and stakeholders when making its final decision. As a result, the standard of proof is unclear. Much like how each US Federal agency interprets its duty to consult


127 Basic Regulation 2015.
128 Article 4, Basic Regulation 2015.
129 Basic Regulation 2015, recital para 5: ‘It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. It is also important that the Commission carry out appropriate consultations with the countries of origin concerned and with relevant stakeholders. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.’
Alaska Natives, Inuit seal hunters will have to see how the EU Commission will interpret its duty.

The new seal regime forces the Governments of Canada, Nunavut, and Greenland to expend resources on implementing the new regime and responding to market conditions that they could have otherwise spent on other services for Inuit communities. For example, the Government of Canada allocated CAD 5.7 million over five years to build the Inuit seal industry and create the certification system for the EU market. The Government of Greenland spent large sums of money to counter negative public perception and promote and document the sustainability of the seal hunt.

Even with all these provisions that distribute decision-making power across different authorities, the EU still retains significant power in affecting the seal product market. The seal products market has still not recovered from 2009 mainly due to public perception in the EU that all seal products are illegal or immoral. The market is at the mercy of how quickly the EU works with the respective authorities to get the new seal regime up and running. For example, Danish and Greenlandic MEPs have been frustrated with how slow the Commission has been in launching an awareness-raising campaign. In fact, the Commission has interpreted their duty to raise public awareness to be about ‘informing the public and competent authorities in order to facilitate the implementation of the regulation and of its exceptions’ and explicitly not as a strategy to ‘restore consumer confidence’. This approach will undoubtedly limit the ability of seal product prices to rise.

While Inuit governments work hard to ensure that Inuit rights of self-determination are protected within the new system, Inuit hunter advocates are consolidating their efforts on a parallel tract and continue to challenge the legitimacy of the new seal regime itself. 

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6. Conclusion

Since indigenous peoples constitute the core of the Arctic, one can consider the US as occupying the semi-periphery. While the US government has territory in the Arctic, its history as a colonizing power has been at the forefront of its complicated relationship with sovereign indigenous communities in Alaska. This is one reason that the US’s claims as an Arctic State are not straightforward. Alaska Natives have struggled over a number of decades to assert and define their sovereign power; the US Federal Government and Alaska State Government have each responded accordingly to those claims while still asserting their own authority and addressing their own political needs. Accordingly, US sovereignty in the Arctic is the product of a colonial relationship enacted through a complex domestic legal regime based on administrative, constitutional, corporate, and Alaska Native laws.

The EU can be understood as lying on the periphery of the Arctic because it has an even more limited relationship to territory in the Arctic (through northern Finland and Sweden) and is not a member of the Arctic Council. There are of course limits to comparing the EU to the US since it does not make any colonial claims over Inuit and other Arctic indigenous peoples. Nonetheless, the EU’s new seal regime, like its US counterpart, governs Inuit seal hunts directly effecting how Inuit relate to the land. This strikes at the heart of the Arctic and has threatened international acceptance of the EU as an Artic player.

If EU politicians and civil servants examine their relationship to the Arctic in terms of sovereign power they are presented with several choices: EU officials may continue down the path of trying to balance animal welfare activist desires, market harmonization regulations, EU Arctic policies, and Inuit livelihood. Thus, they would try to signal to Arctic peoples that they are indeed responsible Arctic actors by taking the time to investigate domestic co-management systems more deeply and systemically, with an acute awareness of Inuit self-determination rights. They would have to invest significant amounts of political and financial resources in order to ensure that the new EU seal regime is implemented in a way that aligns with contemporary Arctic law and politics.¹³⁴

What the study of the US seal regime highlights, confirmed by political reality thus far, is that putting such a scheme into effect is no easy task – and that even if done with the best intentions the process will be fraught with missteps and challenged by popular protest. Even though law is a common way to express power in a way that includes multiple agendas and interests, it does not necessarily resolve ambiguities. Instead it pushes and reshapes political agendas in a particular direction. What the EU may learn from the US and Alaska is that while the new seal regime is the

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¹³⁴ Cf. Shadian, n. 12 above.
product of resolved court disputes, it is very likely only the beginning of a long, legally complex negotiation with Inuit leaders in Canada and Greenland and will remain a matter of ‘unfinished business’ for a while. The EU seal regime, if fully operationalized, will likely be even more complicated than the US seal regime in Alaska since it will be enmeshed in the web of Federal Canadian laws, Nunavut laws, Inuit indigenous laws, the increasingly autonomous legal system of Greenland, Danish law, WTO law, international human rights law, EU law, and the respective domestic laws of EU Member States.

If EU officials choose that path they must also live with a particular irony. Under the new law and with the new administrative structures, the EU will be able to claim that they are to some degree addressing Inuit self-determination rights. Take away the irony and all that is left is the EU projecting sovereign power beyond its existing territorial boundaries, and reconfiguring Inuit relationships to seals, land, and water. One key aspect of sovereign power is to determine what is the norm and what, or as in this case who, is the exception. Sovereign power is most often constituted through defining difference and then implementing law to reconcile with this purported difference. In fact, this was the classic way in which imperial power operated over the past several centuries. Colonizing powers first would legally define indigenous as different or exceptional, then enacted laws that tried to bridge, redefine, or contain that difference. Such a ‘dynamic of difference’ would justify the enactment of positive laws and the presence of the colonizing power. In Alaska, it was as recent as the early 1970s when the US Federal Government abolished Native claims to land title, only to start anew by redefining the meaning of Native sovereign hunting rights as an exception to conservation laws.

The EU seal regime also enacts this dynamic of difference since it characterizes seal hunting as immoral, bans the importation of seal products thereby killing the market, and then categorizes indigenous hunters as an exception to the ban. The regime attempts to reconcile that indigenous difference and reconstruct the market by creating conditions for Inuit and indigenous hunters ‘to place [seal products] on the market’. This in effect increases the EU’s influence in the Arctic since it is now dictating the rules of the seal market.

135 See Anderson, n. 42 above.

136 Natalia Loukacheva, The Arctic Promise: Legal and Political Autonomy of Greenland and Nunavut (University of Toronto Press 2007).


legislation defines indigenous communities as people sharing a history of conquest or colonisation.\(^{139}\) But one could also read it as a definition that brings with it the echoes of conquest and colonialism into the present since the EU is also implicitly laying claim that it has the authority to define who is or is not indigenous.

EU officials could also take another path and measure their new seal regime against Inuit sovereign power and presence. In doing so, they would have to account for the fact that their seal regime raises questions of the EU’s legitimacy in Arctic politics and international law writ large. With that they would have a series of options. EU officials may do away with distinctions between subsistence and commercial as well as indigenous and non-indigenous, and focus on only allowing seal products that result from hunts that consider the seals’ welfare into the European market. These EU measures would still have to comply with WTO law, but this would be feasible in partnership with exporting countries. This approach would focus on the method of the hunt and not the identity of the hunter. Or EU officials may trust domestic and international legal regimes regulating seal hunts and enforcing standards of humane treatment.\(^{140}\) This would mean that the EU would treat Inuit hunting rights, and really all hunting, as the rule leaving it to domestic and international laws to determine when such rights offended legal standards of ethical treatment. With that, EU officials may want to abandon their seal regime all together and focus their Arctic efforts on other issues. This would enhance Inuit communities’ ability to confront other challenges of everyday life and determine for themselves how they want to build a livelihood from seal hunting.

\(^{139}\) New Basic Regulation article 1: ‘“other indigenous communities” means communities in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.’

\(^{140}\) Nikolas Sellheim, ‘Seal Hunting in the Arctic States. An Analysis of Legislative Frameworks, Incentives and Histories’ (2015) 7 Yearbook of Polar Law 188.