

ECO-TERRORISM AND PIRACY ON THE HIGH SEAS:
 JAPANESE WHALING AND THE RIGHTS OF PRIVATE
 GROUPS TO ENFORCE INTERNATIONAL CONSERVATION
 LAW IN NEUTRAL WATERS

I. INTRODUCTION

“[F]rom hell’s heart I stab at thee[,]” exclaimed Captain Ahab, as he cast his final harpoon at Moby Dick and subsequently plunged to the bottom of the sea with his whaling ship.¹ Recently, it appears Paul Watson, founder of the Sea Shepherd Conservation Society (Sea Shepherd), would prefer to see the Japanese whaling fleet suffer a fate similar to Captain Ahab and his crew.² Over the past thirty years, Watson has used his privately funded navy to enforce international conservation law by chasing, harassing, scuttling and in some cases ramming illegal whaling and fishing vessels on the high seas.³

As of 2008, Watson has claimed responsibility for sinking ten “illegal” whaling ships.⁴ Watson asserts that the United Nations

1. HERMAN MELVILLE, *MOBY DICK; OR, THE WHALE* 468 (New York, Harper and Brothers 1851) (1851) (quoting portion of final dialogue from Captain Ahab).

2. See Raffi Khatchadourian, *Neptune’s Navy*, *THE NEW YORKER*, Nov. 5, 2007, 9, available at http://www.newyorker.com/reporting/2007/11/05/071105fa_fact_khatchadourian (discussing recent history between Sea Shepherd and Japanese whaling fleet); see also Jonah Fisher, *Diary: Jonah and the Whale-Chasers*, *BBC NEWS*, Jan. 28, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7171409.stm> (detailing events of January 2008 between Japanese whaling fleet and activist groups, Greenpeace and Sea Shepherd); see also *Japanese Detain Whaling Activists*, *BBC NEWS*, Jan. 15, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7189580.stm> (discussing Japanese detainment of two Sea Shepherd protestors).

3. See Khatchadourian, *supra* note 2, at 9 (explaining thirty-year history of Paul Watson and Sea Shepherd).

4. See Press Release, Sea Shepherd Conservation Society, *Victory for the Whales in Berlin* (June 16, 2003) (on file with author), available at http://www.sea-shepherd.org/news/media_030616_1.html (discussing self proclaimed ship sinking history of Sea Shepherd).

Since 1979, Sea Shepherd crew and agents have sent ten illegal whaling ships to the bottom:

1979 - The pirate whaler “Sierra” rammed and sunk in Portugal.

1980 - The outlaw whalers “Isba I” and “Isba II” sunk in Vigo, Spain.

1980 - The pirate whalers “Susan” and “Theresa” sunk in South Africa.

1981 - The illegal whaling ships “Hvalur 6” and “Hvalur 7” sunk in Iceland.

1992 - The outlaw whaler “Ybraena” sunk in Norway.

1994 - The pirate whaler “Senet” sunk in Norway.

1998 - The pirate whaler “Morild” sunk in Norway.

Id.

World Charter for Nature (Charter for Nature) provides Sea Shepherd with the authority “to act on behalf of and enforce international conservation laws” in areas outside national jurisdiction.⁵ Sea Shepherd claims that the Japanese whaling fleet, like the ten sunken ships prior, engages in illegal whaling in violation of international conservation law.⁶ Sea Shepherd has made it clear that, if given the opportunity, it intends to stop the Japanese fleet from killing any additional whales; at what cost is yet to be seen.⁷

Although whaling is generally prohibited today, Japan claims its annual whaling expedition is legal under a scientific research exception to the International Whaling Commission’s global moratorium on commercial whaling.⁸ Technically, Japan’s argument holds water; however, due to heightened exposure from environmental activist groups, Japan’s notorious annual trip to Antarctica has come under increased public scrutiny.⁹ During the 2007-08 Japanese whaling expeditions, Sea Shepherd and Greenpeace pursued the Japanese fleet, documenting and publicizing the fleet’s every move.¹⁰ This unwanted international attention for Japan climaxed when two Sea Shepherd volunteers boarded a Japanese whaling vessel and were detained for three days; the episode attracted the attention of media outlets worldwide.¹¹

5. See Sea Shepherd Conservation Society, International Laws and Charters, <http://www.seashepherd.org/about-rules.html> (last visited Oct. 19, 2008) [hereinafter International Laws & Charters] (asserting Sea Shepherd’s authority for enforcing conservation law).

6. See Khatchadourian, *supra* note 2, at 1 (discussing views of Paul Watson and Sea Shepherd on Japanese whaling activity in Southern Antarctic Ocean).

7. See Sea Shepherd Conservation Society, Operation Migaloo: Antarctic Whale Defense Campaign: 2007-08, <http://www.seashepherd.org/migaloo/index.html> (last visited Oct. 19, 2008) [hereinafter Operation Migaloo] (discussing Sea Shepherd’s campaign to halt Japanese whaling fleet in 2008).

8. See Institute of Cetacean Research, Japan’s Whale Research: What’s it all About?, <http://www.icrwhale.org/WhatsResearchAbout.htm> (last visited Oct. 19, 2008) (discussing Japanese whaling organization’s justification for conducting scientific whaling).

9. See Fisher, *supra* note 2 (detailing events of January 2008 involving Japanese whaling fleet and activist groups, Greenpeace and Sea Shepherd).

10. See *generally id.* (documenting January 2008 incidents between Japanese whaling fleet and both Greenpeace and Sea Shepherd). See also Operation Migaloo, *supra* note 7 (discussing Sea Shepherd’s opposition to Japan’s whaling fleet); see also *Scandalous Whale Hunt has Resumed*, GREENPEACE, Feb. 6, 2008, <http://www.greenpeace.org/usa/news/japan-resumes-scandalous-whale> (discussing Greenpeace opposition to Japan’s whaling fleet).

11. See Kyung Lah, *Anti-Whaling Activists Handed Over*, CNN, Jan. 17, 2008, <http://www.cnn.com/2008/WORLD/asiapcf/01/17/activists.ship/index.html> (detailing public attention on Japanese detainment of two Sea Shepherd volunteers).

Japan and other pro-whaling countries have strongly denounced the actions of Sea Shepherd, labeling its coercive techniques as “acts of piracy” and “eco-terrorism” under the United Nations Convention on the Law of the Sea (UNCLOS) and the regulations of the International Whaling Commission (IWC).¹² Sea Shepherd defends its actions under the United Nations World Charter for Nature, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and more recently, Federal Australian case law.¹³ Political compromise and a general lack of forethought, however, have resulted in an ambiguous amalgamation of international maritime law, which regulates whaling.¹⁴ This legal confusion is amplified by the fact that seven different countries claim ownership of Antarctica; consequently, with regards to whaling, governments and environmental activists alike seem to pick and choose which bodies of law to follow.¹⁵

This Comment examines the various sources of international law on whaling, which attempt to wrestle with the convoluted area

12. See Yoko Wakatsuki, *Japanese Accuse Anti-Whaling Activists of “Terrorism”*, CNN, Feb. 12, 2007, <http://www.cnn.com/2007/WORLD/asiapcf/02/12/japan.whaling/index.html?iref=newssearch> (quoting statement by Hideki Moronuki, chief of Japan’s whaling activities accusing Sea Shepherd of “act of terrorism”).

A Japanese fisheries official condemned Monday what he called an “act of terrorism” by anti-whaling activists on a Japanese vessel in Antarctic waters. “It is very dangerous action of attack,” said Hideki Moronuki, chief of Japan’s whaling activities. “We would like to appeal to all relevant countries for cooperation to stop such [an] act of terrorism by this group.”

Id.

13. See *International Laws and Charters*, *supra* note 5 (asserting Sea Shepherd’s authority for enforcing conservation law). See *Humane Soc’y Inter’l, Inc. v. Kyodo Senpaku Kaisha, Ltd.* (2008) 165 F.C.R. 510 (Austl.), available at <http://www.iilj.org/courses/documents/HumaneSocietyvs.Kyodo.pdf> (ordering injunction against Japanese whaling company for any further whaling); see also United Nations World Charter for Nature, G.A. Res. 37/7, U.N. Doc. A/RES/37/7 (Oct. 28, 1982), available at <http://www.un.org/documents/ga/res/37/a37r007.htm> (proclaiming general principles, functions and implementation of “conservation by which all human conduct affecting nature is to be guided and judged”).

14. See Khatchadourian, *supra* note 2, at 1-9 (discussing general confusion regarding relevant areas of law controlling International Whaling regulation).

15. See Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71 (listing Articles and subsequent text of Antarctic Treaty); see also Antarctic Connection, *The Antarctic Treaty*, <http://www.antarcticconnection.com/Antarctic/treaty/index.shtml> (last visited Oct. 19, 2008) (explaining sovereignty status of Antarctica). “Antarctica is the only continent with no nations. While seven nations (not including the United States) have made claims to Antarctica, no single nation controls any part of the continent. The Antarctic Treaty governs the actions of people in Antarctica.” *Id.*

of international environmental conservation law on the high seas.¹⁶ Specifically, this Comment analyzes whether, and to what extent, private groups like Sea Shepherd have legal authority to protect endangered whales in neutral waters outside the jurisdiction of any nation.¹⁷ Section II explains the history of whaling, including a synopsis of whaling in Japanese culture and a history of the Sea Shepherd Conservation Society.¹⁸ Section III outlines the relevant areas of international law that regulate whaling and environmental activism, which take place in the neutral coastal waters off of Antarctica.¹⁹ Section IV details the Japanese exploitation of the scientific research exception and provides a critical analysis of how the relevant regulations apply to individuals and private groups who enforce international conservation laws.²⁰ Finally, Section V focuses on the effect Sea Shepherd has had on the Japanese scientific whaling program and suggests that Sea Shepherd should be allowed to continue enforcing international conservation law, but through less controversial means.²¹

II. A HISTORY OF WHALING AND ITS GLOBAL OPPOSITION

The active hunting of whales has taken place for more than four hundred years.²² In the Eighteenth and Nineteenth centuries, the meat, baleen, bones, blubber and oil of a whale were all highly

16. For a further discussion of the underlying international legal principles that control the act of whaling on the open sea, see *infra* notes 68-141 and accompanying text.

17. For a critical analysis of how the relevant regulations apply to individuals or organizations that choose to enforce international conservation law, see *infra* notes 143-212 and accompanying text.

18. For a discussion of the history of whaling, whaling in Japanese culture, and the Sea Shepherd Conservation Society, see *infra* notes 22-67 and accompanying text.

19. For a further discussion of the underlying international legal principles that control whaling on the open sea and environmental activism against whaling, see *infra* notes 68-141 and accompanying text.

20. For a critical analysis of how the relevant regulations apply to individuals or organizations that choose to enforce international conservation law, see *infra* notes 142-211 and accompanying text.

21. For a further discussion of the impact Sea Shepherd has had upon the international maritime legal community, and future environmental conservation, see *infra* notes 212-253 and accompanying text.

22. See Media Brief, Inst. for Cetacean Research, Whales as Food & Japanese Culture, (May 28-31, 2007) (on file with the author), available at www.icrwhale.org/eng/59FoodCulture.pdf [hereinafter Whales as Food & Japanese Culture] (discussing whaling history in Japan). "Active hunting for large cetaceans has a history of more than 400 years." *Id.*

sought-after products in many civilizations.²³ During the Nineteenth century, commercial whaling became a lucrative industry for many of the Scandinavian countries, Russia, Japan and certain areas of the United States.²⁴ Public disgust with whaling began to develop and, consequently, since the 1970s, commercial whaling has faced a great deal of anti-whaling activism.²⁵ Recently, however, the Sea Shepherd Conservation Society has faced increased criticism for its controversial high seas tactics taken against the Japanese whaling fleet in Antarctica in 2007 and 2008.²⁶

A. Prevalence of Whaling in Japanese Culture

According to the Institute of Cetacean Research, the Japanese “have been eating whale meat and utilizing whalebones, blubber and oil for more than two thousand years.”²⁷ Japan did not begin using organized offshore whaling, however, until 1868.²⁸ In the 1930s Japan started using government funding to subsidize modern industrial whaling fleets, which grew extensively following the devastation of World War II.²⁹ While Japan recovered economically from the war, whale meat provided a cheap but plentiful way to feed the large Japanese population.³⁰ During 1947-49, two years

23. See Anthony Matera, *Whale Quotas: A Market-Based Solution to the Whaling Controversy*, 13 GEO. INT'L ENVTL. L. REV. 23, 26 (2000) (discussing United States history of commercial whaling). The United States began commercially whaling in the eighteenth century utilizing whales for oil. *Id.* See also New Bedford Whaling Museum, Overview of American Whaling, <http://www.whalingmuseum.org/library/index.html> (last visited Oct. 19, 2008) (explaining various whale products).

24. See Matera, *supra* note 23, at 26 (discussing U.S. commercial whaling history); see also Sarah Suhre, Note, *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, 307-08 (1999) (explaining eventual decline of U.S. commercial whaling industry). Because whale oil was considered the best machine lubricant and best smokeless burning oil, the U.S. industrial revolution and its high demand for oil, helped the U.S. to become a hotbed for whaling. *Id.* Later, due to the development of the U.S. petroleum industry, the U.S. whaling industry deteriorated. *Id.*

25. See Khatchadourian, *supra* note 2, at 9 (discussing thirty-year history of Paul Watson and Sea Shepherd).

26. See Fisher, *supra* note 2 (detailing events of January 2008 between Japanese whaling fleet and activist groups, Greenpeace and Sea Shepherd). See also Wakatsuki, *supra* note 12 (accusing Sea Shepherd of committing “act of terrorism”).

27. Whales as Food & Japanese Culture, *supra* note 22 (discussing whaling history in Japan).

28. See *id.* (discussing development of modern commercial whaling in Japan).

29. See Khatchadourian, *supra* note 2, at 1 (discussing industrial history of Japanese whaling).

30. See Norimitsu Onishi, *For Japan, Defense of Whaling Scratches a Nationalist Itch*, INT'L HERALD TRIB., Mar. 13, 2007, at 1, available at <http://www.iht.com/>

immediately following World War II, whale meat constituted 45% of the total meat consumption in Japan; consumption remained at 30% until the 1960s, but has subsequently decreased since.³¹ Industrial Japanese whaling fleets continued to harvest whales regularly for commercial purposes until 1986, the year the commercial whaling moratorium banned all whaling for commercial purposes.³²

Following the moratorium, Japan continued to practice whaling, claiming it was for scientific research, a legitimate purpose according to the International Whaling Commission (IWC).³³ Between 2005 and 2006, the Japanese killed 2,113 whales in the name of scientific research.³⁴ During the 2007-08 Japan Whale Research Program under Special Permit in the Antarctic (JARPA II), Japan planned to kill fifty Fin, fifty Humpback and 935 Minke whales.³⁵ In response to immense public pressure, however, Japan later decided not to kill any Humpback whales.³⁶ The Japanese government contends they are hunting whales off the coast of Antarctica in order to “ascertain when there will be enough to harvest for profit.”³⁷ The whale meat, considered a “by-product” of the scientific research, is subsequently sold in markets, used for school lunches and placed in pet food.³⁸ Each year, the Japanese Institute

articles/2007/03/13/news/whale.php (noting importance of whale meat for Japan following World War II).

31. See Whales as Food & Japanese Culture, *supra* note 22 (discussing considerable Japanese use of whale meat following World War Two). See also *History of the Traditional Diet: Japanese and the Whale*, WHALE AND TRADITIONS OF DIET (1987), available at http://luna.pos.to/whale/jwa_trad.html (discussing partial data on whale consumption following World War II).

32. See Khatchadourian, *supra* note 2, at 1 (discussing industrial history of Japanese whaling).

33. See International Convention for the Regulation of Whaling, Art. VIII, p. 1 (1946), available at http://www.iwcoffice.org/_documents/commission/convention.pdf (establishing scientific whaling exception provisions). See also International Whaling Commission, List of Special Permit Catches Since 1985, http://www.iwcoffice.org/_documents/table_permit.htm (last visited Oct. 19, 2008) (listing numbers of whales killed by Japan each year under scientific research permits since 1985). Japan has issued a scientific whaling permit to itself each year since the moratorium was implemented in 1986. *Id.*

34. See *List of Special Permit Catches Since 1985*, *supra* note 33 (listing numbers of whales killed by Japan under scientific research permits).

35. See Fisher, *supra* note 2 (detailing Japan's JARPA II catch quotas for 2007-08 whaling season).

36. See *id.* (discussing public pressure upon Japan with regards to killing Humpback whales). Only after immense public pressure from numerous anti-whaling countries, did Japan decide to adjust its JARPA II catch quotas, so as not to kill the fifty humpback whales it originally planned to kill. *Id.*

37. Khatchadourian, *supra* note 2, at 1 (discussing Japan's justification for scientific whaling program).

38. See Justin McCurry, *Big Sushi: The World's Most Politically Sensitive Lunch*, THE MONTHLY (Aug. 2006), available at <http://www.themonthly.com.au/tm/?q=>

for Cetacean Research raises approximately 6.5 billion Yen, or 61 million dollars, from the sale of whale meat.³⁹ The market for whale meat, however, seems to be weakening due to generational differences, health concerns and an awareness of the controversy surrounding whaling.⁴⁰

With regards to the consumption of whale meat, the Japanese government's advisory level for safe amounts of mercury found in food is 0.4 parts per million.⁴¹ Yet, one recent study found that the mercury content of whale meat ranged from ten to one-hundred parts per million, with one whale specimen found in a Japanese food market containing an alarming two thousand parts per million.⁴² Mercury consumption for long periods of time can cause birth defects, brain damage and even death.⁴³

Moreover, studies show, that while older Japanese generations continue to eat whale, younger generations rarely do so.⁴⁴ In 2002, a Japanese newspaper found "4% of respondents ate whale meat 'sometimes', and 9% ate it 'infrequently' . . . 86% said they had never eaten it, or had stopped doing so in childhood."⁴⁵ The younger Japanese generations eat less whale meat for two primary reasons: (1) knowledge of the global controversy surrounding Ja-

node/268 (discussing uses of whale meat in Japan). "Earlier this year the Whale and Dolphin Conservation Society in Britain caused a furore [sic] when it revealed that a Japanese firm was turning unwanted whale meat into pet food." *Id.* See also *Anger Over Whale Pet Food Claims*, BBC News, Feb. 16, 2006, <http://news.bbc.co.uk/2/hi/science/nature/4700418.stm> (discussing Japan's argument against UK conservation group's statement that Japan uses whale meat in pet food).

39. See McCurry, *supra* note 38 (discussing income generated by Japanese government's sale of whale meat). "The sale of all whale meat in Japan generates 6.5 billion Yen [roughly \$61 million] a year, with the profits used to fund scientific hunts in the Antarctic and North Pacific." *Id.* See also Alex Frew McMillian, *Whale Meat Prices Slashed in Japan*, CNN, July 31, 2002, available at <http://archives.cnn.com/2002/BUSINESS/asia/07/31/japan.whalemeat/index.html> (discussing decline in prices and sales of whale meat in Japan).

40. See Martin Fackler, *Mercury Taint Divides a Japanese Whaling Town*, N.Y. TIMES, Feb. 21, 2008, at A10, available at 2008 WLNR 336455 (detailing history of whaling in Japan and study conducted on mercury levels within whale meat in Japan); see McMillian, *supra* note 39 (elaborating upon reasons for declining whale meat sales).

41. See Fackler, *supra* note 40, at A10 (detailing history of whaling in Japan and study conducted on mercury levels within whale meat in Japan).

42. See *id.* (explaining study conducted on mercury content within whale and dolphin meat in Japan).

43. See *id.* (stating long term effects of mercury consumption in food).

44. See *id.* (discussing lower rate of whale meat consumption amongst younger generations). See also McCurry, *supra* note 38 (detailing study conducted by Japanese newspaper showing how infrequently young people eat whale meat).

45. McCurry, *supra* note 38 (explaining study on frequency of young people's consumption of whale meat).

pan's whaling practice; and (2) education on the dangers associated with consuming the high levels of mercury found in whale meat.⁴⁶

Each year, despite the IWC's rejection of the Japanese whale research program in Antarctica, Japan continues to issue itself scientific permits to kill endangered whales.⁴⁷ IWC member countries have been extremely critical of the Japanese research program which, to date, has killed more than 11,000 whales,⁴⁸ but failed to produce any substantial scientific data from twenty-two years of research.⁴⁹

B. Paul Watson & the Sea Shepherd Conservation Society

Paul Watson was an original cofounder of the environmental activist group Greenpeace in the early 1970s.⁵⁰ After much disagreement over the appropriate level of aggression needed to protect the environment, Watson left Greenpeace in 1977 to form the Sea Shepherd Conservation Society.⁵¹ Watson took an increasingly aggressive approach to environmental activism, which differed drastically from Greenpeace's conventional non-violent protest methods.⁵² Today, with Sea Shepherd "Paul Watson flies the Jolly Roger from his ship and boasts of ramming more boats than any living

46. See Fackler, *supra* note 40, at A10 (explaining educational efforts seeking to educate rural Japanese about rising mercury levels in dolphin and whale).

47. See International Whaling Commission, Scientific Permit Whaling, North Pacific (2) – JARPEN II, <http://www.iwcoffice.org/conservation/permits.htm> (last visited Oct. 19, 2008) [hereinafter Scientific Permit Whaling] (discussing past rejections of various Japanese scientific whale research programs).

There was considerable disagreement within the Committee over most aspects of this research programme, including objectives, methodology, likelihood of success and effect on stocks . . . [i]n 2000, the Commission adopted a Resolution by majority strongly urging Japan to reconsider issuing the permit. It adopted a similar Resolution in 2001. A further Resolution was passed in 2003 (24 in favour, 21 against and 1 abstention).

Id.

48. See List of Special Permit Catches Since 1985, *supra* note 33 (listing numbers of whales killed by Japan each year under scientific research permits).

49. See Scientific Permit Whaling, *supra* note 47 (discussing persistent rejections of Japanese scientific research program by IWC member countries).

50. See Khatchadourian, *supra* note 2, at 2 (explaining origin and Watson's founding of Greenpeace).

51. See *id.* at 6 (detailing origin of Greenpeace and Watson's departure to form Sea Shepherd). Greenpeace members would protest by placing themselves between the whales and the harpooners in order to document the whole practice for public anti-whaling awareness. *Id.*

52. See John Vidal, *A Tale of Two Ships*, THE GUARDIAN, Jan. 17, 2008, <http://www.guardian.co.uk/environment/2008/jan/17/whaling-japan> (discussing animosity and differences between environmental activism of Sea Shepherd and Greenpeace).

seafarer, part of an anti-whaling crusade that even Greenpeace calls too radical.”⁵³ Some of Sea Shepherd’s tactics include: firing smoke canisters onto decks, using nylon ropes to disable propellers, nailing shut drains that spill whale blood into the ocean and finally the antiquated “pirate-esque” ramming technique.⁵⁴

Upon acquiring Sea Shepherd’s original ship in 1978, Watson filled its front hull with concrete in order to facilitate the ramming of other ships.⁵⁵ In 1979, off the coast of Portugal, Watson rammed a ship for the first time, a notorious illegal whaling vessel named the Sierra.⁵⁶ Since sinking the Sierra, Watson and Sea Shepherd have gone on to ram or sink nine other “illegal” whaling vessels, and damage several others.⁵⁷ According to Watson, Sea Shepherd has not purposely sunk a whaling vessel since 1998; other countries however, disagree.⁵⁸

Officials in Iceland, Norway, Denmark, Japan, Canada and Costa Rica have publicly denounced Watson, comparing his actions to that of a common terrorist.⁵⁹ Norway convicted Watson in the mid-1990s for attempting to scuttle, or sink, a Norwegian whaling vessel; Watson spent eighty-days in detention.⁶⁰ Additionally, in 1986 the IWC banned Watson from its meetings after he “scuttled two . . . ships in Reykjavik’s harbor . . . an act of sabotage that many

53. Rod McGuirk, *A “Conservationist” Even Greenpeace Doesn’t Love*, ASSOCIATED PRESS, (Mar. 1, 2007), available at http://seattlepi.nwsourc.com/national/305601_pirate01.html (describing public status of Paul Watson and Sea Shepherd).

54. *See id.* (discussing tactics used by Sea Shepherd against Japanese whaling fleet).

55. *See Victory at Sea*, TIME (Jul. 30, 1979), available at <http://www.time.com/time/magazine/article/0,9171,948497,00.html?iid=chix-sphere> (discussing composition of Sea Shepherd’s first ship in 1979).

56. *See id.* (discussing events surrounding Sea Shepherd’s ramming of Sierra off coast of Portugal).

Its bow packed with 100 tons of cement, the 789-ton Shepherd bore down on the lighter Sierra and struck a glancing blow. Explained Watson: “I tried to take off the harpoon.” Then, after making a 360° turn, the avenging trawler opened up to twelve knots and hit again, this time punching a gaping hole amidships.

Id.

57. *See Victory for the Whales in Berlin*, *supra* note 4 (discussing self-proclaimed ship sinking history of Sea Shepherd).

58. *See id.* (detailing timeline for Sea Shepherds ship sinking history); *See Khatchadourian*, *supra* note 2, at 2 (discussing certain countries’ displeasure with Paul Watson and Sea Shepherd).

59. *See Khatchadourian*, *supra* note 2, at 2 (examining displeasure of countries with Paul Watson and Sea Shepherd).

60. *See id.* (convicting Watson under Norwegian law and detaining him for eighty days).

conservationists believe helped turn Icelandic public opinion against the cause of saving whales.”⁶¹

In 2007, when asked on a radio show about Sea Shepherd’s aggressive tactics, Watson stated:

[w]e intervene against illegal activities, and we are simply upholding international conservation law, and the United Nations World Charter for Nature allows for us to do that. It says that any nongovernmental organization, or individual, is empowered to uphold international conservation law. That’s why I’ve sunk ten whaling ships and destroyed tens of millions of dollars’ worth of illegal fishing gear, and I’m not in jail.⁶²

Sea Shepherd conducts most of its environmental campaigns in international waters, “where the law is vague and enforcement is weak.”⁶³ This controversial direct action has garnered a large number of supporters, “but also condemnation from governments and the label eco-terrorists.”⁶⁴

In February 2007, Sea Shepherd used its high seas tactics to harass a Japanese whaling vessel, which eventually led to a controversial collision with the ship in Antarctica.⁶⁵ Additionally, in January 2008, two Sea Shepherd volunteers managed to board a Japanese whaling vessel on the open sea, after which they were detained on a Japanese ship for three days in a highly publicized standoff; the volunteers were eventually released to Australian au-

61. *Id.* (explaining why IWC barred Paul Watson from further IWC meetings).

62. *Id.* at 8 (quoting Paul Watson on his asserted justification for Sea Shepherd’s actions).

63. *Id.* at 7 (explaining general vagueness and weak enforcement of law on open ocean and weak enforcement).

64. Katchadourian, *supra* note 2, at 2 (naming celebrity supporters of Sea Shepherd). Some of Sea Shepherd’s celebrity supporters include Mick Jagger, Sean Penn, Uma Thurman, William Shatner, Edward Norton, Pierce Brosnan, Aidan Quinn, and Orlando Bloom. *Id.* The Dalai Lama has even given Sea Shepherd a written endorsement supporting its actions. *Id.* See also Fisher, *supra* note 2 (discussing both public support and disdain for Paul Watson and Sea Shepherd).

65. See McGuirk, *supra* note 53 (detailing February 2007 events between Sea Shepherd and Japanese whaling fleet in Antarctic Ross Sea). In February 2007, Sea Shepherd used some of its high seas tactics to disable a Japanese whaling vessel, which eventually led to a highly controversial collision in the Antarctic Ross Sea with the Japanese ship. *Id.* Both ships suffered damages, and though there is no alleged connection, one day after Sea Shepherd’s Antarctic departure, the Japanese ship caught fire bringing an end to the 2007 Japanese whaling expedition. *Id.* Japan called Watson and Sea Shepherd “eco-terrorists”, and labeled their actions as acts of piracy, in violation of the U.N. Convention on the Law of the Seas. *Id.*

thorities and subsequently returned to Sea Shepherd.⁶⁶ Japan has threatened to bring suit for Sea Shepherd's alleged acts of eco-terrorism and piracy, but the jurisdiction under which they may be charged is yet to be determined.⁶⁷

III. LEGAL BACKGROUND

A. International Efforts to Regulate Whaling

The United States strictly prohibits commercial whaling.⁶⁸ Additionally, most whale species are generally protected under the U.S. Endangered Species Act of 1973.⁶⁹ Under international law, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) prohibits the commercial trade of any whale species, yet somehow international whaling continues.⁷⁰ While the laws that regulate whaling in the U.S. are clear, the laws that regulate international whaling appear convoluted, outdated and often unenforceable.⁷¹

66. See Fisher, *supra* note 2 (detailing January 2008 events between Japanese whaling fleet and activist groups Greenpeace and Sea Shepherd). The controversial events in 2007 failed to discourage a 2008 Japanese whaling expedition, and predictably, this past winter, Sea Shepherd again closely pursued the Japanese fleet through the Antarctic waters. *Id.* On the run for the most part, the Japanese fleet kept its distance from the Sea Shepherd ship, the Steve Irwin, named after the late Australian conservationist. *Id.* On January 15, 2008, however, two Sea Shepherd volunteers managed to board one of the Japanese ships, attempting to deliver a written document and the two men ended up being detained on the boat for three days under the laws of Japan, which preside over Japanese vessels at sea. *Id.* After Japan's whaling received much unwanted public attention, the two men were released to Australian authorities and returned to Sea Shepherd. *Id.*

67. See *id.* (detailing January 2008 events between Japanese whaling fleet and activist groups, Greenpeace and Sea Shepherd). See also Wakatsuki, *supra* note 12 (accusing Sea Shepherd of committing "act of terrorism").

68. See Marine Mammal Protection Act § 101, 16 U.S.C. § 1371 (2006) (placing moratorium on taking and importing marine mammals and marine mammal products).

69. See NOAA Fisheries: Office of Protected Resources, Marine Mammal Species Under the Endangered Species Act (ESA), <http://www.nmfs.noaa.gov/pr/species/esa/mammals.htm> (last visited Oct. 19, 2008) [hereinafter Marine Mammal Species] (listing endangered species of whales).

70. See Convention on International Trade in Endangered Species of Wild Fauna and Flora, Appendices I-III (July 1, 2008), <http://www.cites.org/eng/app/E-Jul01.pdf> (listing groups of cetaceans in Appendix I, which are most protected species in international trade).

71. See UNITED NATIONS ENVIRONMENT PROGRAMME, TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW 283-91 (2001), available at http://www.unep.org/law/PDF/law_training_Manual.pdf (discussing confusion and subsequent non-binding nature of most international agreements regarding Antarctica).

Although a number of countries have taken legislative actions for the protection and conservation of Polar Regions' ecosystems, not all these laws indicate clearly whether or not they were intended to implement the international instruments at domestic levels. In addition, given the non-

1. *The IWC Commercial Whaling Moratorium of 1986*

In 1946, the International Convention for the Regulation of Whaling (ICRW) created the International Whaling Commission (IWC), the administrative body responsible for the regulation of whaling on an international level.⁷² The purpose of the IWC is to “provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.”⁷³ Currently, there are seventy-eight member nations in the IWC, including Japan, Australia and the United States.⁷⁴

Prior to the rise of environmental conservation in the 1960s, pro-whaling countries had little reason to appreciate the consequences of their whaling.⁷⁵ Eventually, however, advancing science and environmental activism identified the near-extinction of many whale species, and a subsequent global moratorium was placed on commercial whaling in 1986.⁷⁶ Today, most whale species are on the United States endangered species list, with a number of these whale species threatened by extinction.⁷⁷ Since the moratorium, however, studies have shown that some previously endangered

legally binding nature of most international arrangements regarding the Arctic, “implementing legislation” in the strict sense of the term is difficult to identify.

Id. at 90.

72. *See generally* International Convention for the Regulation of Whaling, *supra* note 33 (establishing International Whaling Commission as its regulatory body). The IWC is charged with the duty of being the sole regulatory body of the ICRW, and it is responsible for reviewing and revising necessary measures as they see fit. *Id.*

73. International Whaling Commission, IWC Information, <http://www.iwc.org/office.org/commission/iwcmain.htm> (last visited Oct. 19, 2008) (discussing main purpose of International Whaling Commission).

74. *See id.* (naming list of IWC member nations which are bound by IWC provisions).

75. *See* Japanese Institute for Cetacean Research, Jarpa II: The Second Phase of Japan’s Whale Research Program under Special Permit in the Antarctic, <http://www.icrwhale.org/FAQ.htm> (last visited Oct. 19, 2008) (discussing devastation of blue whale species caused by humans). “The initial abundance (population before man started whaling) of blue whales has been estimated at about 200,000. The latest abundance estimate by the IWC Scientific Committee members is of only 1,700 . . . (less than 1% of the initial abundance)” *Id.*

76. *See* International Convention for the Regulation of Whaling, *supra* note 33, at Art. VIII, para. 1 (establishing necessity for global moratorium on commercial whaling).

77. *See* World Conservation Union, The IUCN Red List of Threatened Species, <http://www.iucnredlist.org/search/search-basic> (search for whales found in marine group) (last visited Oct. 3, 2008) (listing all whale species on IUCN Red List database of threatened species). *See also* Marine Mammal Species, *supra* note 69 (listing species of whales on endangered species list).

whale populations have stabilized.⁷⁸ For additional protection, the Southern Ocean Sanctuary was established in 1994 over Japan's objection.⁷⁹ The sanctuary prohibits *all* commercial whaling within its borders, consisting of nearly all of the Antarctic Southern Ocean.⁸⁰

Despite the absolute ban on commercial whaling, some IWC member countries continue to engage in limited whaling due to a scientific "loophole" created in 1946.⁸¹ Article VIII of the ICRW provides a scientific research exception to the whaling moratorium.⁸² IWC member countries, under this provision, may issue special scientific permits to kill whales for research purposes.⁸³ The scientific permit provision was originally created back in 1946 to allow proper supervision of the health of whale pods in order to promote and maintain their populations.⁸⁴ Even though IWC member countries are required to submit scientific permit proposals for committee review, the member nation requesting the permit ultimately determines whether to issue itself the permit.⁸⁵

78. See IUCN, Humpback Whale on Road to Recovery, Reveals IUCN Red List, <http://cms.iucn.org/what/ecosystems/marine/index.cfm?unewsID=1413> (last visited Oct. 19, 2008) (discussing threats and conservation success specifically with Southern Right Whale and Humpback Whales of Eastern Australia).

79. See International Whaling Commission, Whale Sanctuaries: Establishment of the International Whaling Commission's sanctuaries, <http://www.iwcoffice.org/conservation/sanctuaries.htm> (last visited Oct. 19, 2008) [hereinafter Whale Sanctuaries] (establishing Southern Ocean Whale Sanctuary). See also International Fund for Animal Welfare, The Southern Ocean Sanctuary, http://www.ifaw.org/ifaw_united_states/join_campaigns/protecting_whales_around_the_world/protecting_whales_and_their_habitats/sanctuaries_for_whales_a_global_approach/the_southern_ocean_sanctuary/index.php (last visited Oct. 19, 2008) (discussing implementation of Southern Ocean Whale Sanctuary). Japan was the only IWC nation that voted against the Sanctuary, which is "designed to allow the natural restoration of an ecosystem devastated by commercial whaling." *Id.* (discussing purposes of Southern Ocean Whale Sanctuary).

80. See Whale Sanctuaries, *supra* note 79 (explaining purpose and goal of Southern Ocean Whale Sanctuary). "At the 46th (1994) Annual Meeting the IWC adopted the Southern Ocean Sanctuary as another area in which commercial whaling is prohibited." *Id.* See also Antarctic Treaty, *supra* note 15 (listing Articles and subsequent text of Antarctic Treaty).

81. See International Convention for the Regulation of Whaling, *supra* note 33, at art. VIII, ¶¶ 1-3 (explaining IWC scientific research exception to commercial whaling moratorium).

82. See *id.* ¶ 1 (explaining IWC scientific research exception).

83. See *id.* (describing purpose for issuing scientific research permit).

84. See *id.* art. IV, ¶¶ 1-2 (establishing purpose and intent of scientific research on whales within IWC).

85. See *id.* art. VIII, ¶ 1 (explaining issuance of special scientific permits for whaling). According to the IWC, for countries holding a scientific whaling permit, "this [permit] overrides any other Commission regulations including the moratorium and sanctuaries." *Id.*

Additionally, Article VIII of the ICRW “requires that the animals be utilised [*sic*] once the scientific data [has] been collected.”⁸⁶ Accordingly, “utilised” means a whale killed for scientific research must be processed for meat or some other use, commercial or otherwise.⁸⁷ Certain countries, primarily Japan, Norway and Iceland have continued to practice whaling, collectively killing more than 25,000 whales since 1986.⁸⁸ Norway never agreed to the whaling moratorium, but instead decided to continue with its commercial whaling practice.⁸⁹ Conversely, Japan and Iceland, bound by the moratorium, chose to conceal their whaling practices under the guise of scientific research.⁹⁰

86. International Convention for the Regulation of Whaling, *supra* note 33, at art. VIII, ¶ 2 (explaining what must be done with whales caught for scientific research). See also International Whaling Commission, Scientific Permit Whaling: Information on Scientific Permits, Review Procedure Guidelines and Current Permits in Effect, <http://www.iwcoffice.org/conservation/permits.htm#topofpage> (last visited Oct. 19, 2008) (explaining general overview and procedures for IWC scientific permits).

87. See International Convention for the Regulation of Whaling, *supra* note 33, at art. VIII, ¶ 2 (explaining what must be done with whales caught for scientific research).

“Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.” *Id.*

88. See Helen Briggs, Q & A: Is a Return to Whaling in Sight?, BBC NEWS, June 15, 2005, <http://news.bbc.co.uk/2/hi/science/nature/4584449.stm> (discussing effects of moratorium on whale hunting).

89. See International Whaling Commission, Catch Limits & Catches Taken: Information on Recent Catches Taken by Commercial, Aboriginal and Scientific Permit Whaling, <http://www.iwcoffice.org/conservation/catches.htm> (last visited Oct. 19, 2008) (explaining Norway’s objection to commercial whaling moratorium). “As Norway has lodged objections to the relevant items in the Schedule, it has exercised its right to set national catch limits for its coastal whaling operations for minke whales. The Commission passed a Resolution calling on Norway to halt all whaling activities under its jurisdiction.” *Id.* See also TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 71, at 229-30 (discussing ability to opt out of commercial whaling moratorium). Norway has opted out from the commercial whaling moratorium by using the “opting-out” procedure under Art. V(3) of the ICRW. See *id.* at 230 (noting that Norway has opted out). This “opting-out” allows Norway to legally engage in commercial whaling despite the moratorium. *Id.*

90. See Ruth Davis, Commentary, *Enforcing Australian law in Antarctica: the HSI litigation*, 8 MELB. J. OF INT’L L. 1, 7 (2007), available at [http://www.mjil.law.unimelb.edu.au/issues/archive/2007\(1\)/06Davis.pdf](http://www.mjil.law.unimelb.edu.au/issues/archive/2007(1)/06Davis.pdf) (discussing Japan’s agreement to sign IWC while continuing to whale under scientific research exception). Despite the IWC’s rejection of Japan’s scientific research plan for the 2007-08 whaling season, Japan issued a permit to itself. *Id.* at 10.

2. *The Antarctic Treaty System of 1959*

Of the seven continents on Earth, Antarctica is the only continent containing no nation.⁹¹ Despite this fact, seven nations claim ownership to various sections of Antarctica.⁹² According to the Antarctic Treaty ratified in 1961, however, no single nation controls any part of Antarctica.⁹³ The Antarctic Treaty controls all activity in Antarctica, and protects the Antarctic environment and its wildlife.⁹⁴ The Antarctic Treaty also helps to avoid the legal and political confusion created when seven nations claim ownership to one piece of land.⁹⁵

The Antarctic Treaty defers to the IWC regarding whaling regulations, but if a nation is not an IWC member nation, the provisions of the Antarctic Treaty govern any whaling that takes place within Antarctic waters.⁹⁶ Unlike the easily acquired IWC scientific research permits, the Antarctic Treaty more strictly prohibits whaling within the Southern Ocean Whale Sanctuary,⁹⁷ stating, “Antarctica shall be used for peaceful purposes only.”⁹⁸

3. *Federal Australian Case Law*

Recently, in *Humane Society International, Inc. v. Kyodo Senpaku Kaisha, Ltd. (Humane Society)*,⁹⁹ Australia became the first nation to

91. See The Antarctic Connection, The Antarctic Treaty, <http://www.antarcticconnection.com/Antarctic/treaty/index.shtml> (last visited Oct. 19, 2008) (providing general information concerning Antarctica).

92. See *id.* (listing countries claiming ownership to Antarctica: Argentina, Australia, Chile, France, Great Britain, New Zealand, and Norway).

93. See *id.* (explaining actual ownership status of Antarctica). See also Antarctic Treaty, *supra* note 15 (listing articles and subsequent text of Antarctic Treaty).

94. See Antarctic Treaty, *supra* note 15 (stating that Antarctica shall be used for peaceful purposes only with freedom of scientific investigation).

95. See The Antarctic Connection, *supra* note 91 (providing general information regarding Antarctica and Antarctic Treaty System). Forty-four nations representing two-thirds of the world’s population have signed and agreed to the privileges and responsibilities of the Antarctic Treaty. *Id.* Some of the original 1959 signees that agreed to be bound by the Antarctic Treaty include: Japan, Norway, Australia, and the United States of America. *Id.*

96. See Graham J. Clarke, *Japan MUST be Expelled from the International Whaling Commission*, WHALES ON THE NET, May 26, 2005, <http://www.whales.org.au/news/aexpel050527.html> (discussing strict legal repercussions for member nations if member nations leave IWC).

97. See *id.* (listing Articles and subsequent text of the Antarctic Treaty). See also *id.* (discussing strict legal repercussions under Antarctic Treaty for non-IWC member nations).

98. See Antarctic Treaty, *supra* note 15, at art. I ¶ 1 (listing text regarding proper usage of Antarctica).

99. (2008) 165 F.C.R. 510 (Austl.), available at <http://www.iilj.org/courses/documents/HumaneSocietyvs.Kyodo.pdf>.

hold Japan's whaling in the Southern Ocean Sanctuary illegal.¹⁰⁰ A Federal Australian court held that Japan's Antarctic whaling was illegal under Australian law, and subsequently issued an injunction on the Japanese whaling within the Sanctuary, effective January 15, 2008.¹⁰¹ The court determined Japan had violated Australia's Environment Protection and Biodiversity Conservation Act of 1999 (the EPBC Act),¹⁰² which makes it illegal to "kill, injure, or interfere with a cetacean [a whale]" within the Australian Whale Sanctuary.¹⁰³

The two main issues in *Humane Society* were: (1) whether Japan had violated the EPBC Act; and (2) whether Australia had power to impose legal authority over the Japanese whaling fleet.¹⁰⁴ Although it was easy for the court to find Japan in violation of the EPBC, which prohibits killing whales within the Australian Whale Sanctuary for *any* reason, the difficult issue concerned Australia's claim of sovereignty and subsequent authority over the Australian-Antarctic Territory.¹⁰⁵ Australia argued that Antarctica's coastal waters were part of Australia's exclusive economic zone (EEZ), and thus any Japanese whaling within its borders fell under Australian authority.¹⁰⁶

According to the Australian court, Australia's EEZ "extends to the waters adjacent to the baseline of Australia's external territories, including, importantly for this matter, the Australian Antarctic Territory."¹⁰⁷ After analyzing both the United Nations Convention

100. See *Humane Society International, Inc. v. Kyodo Senpaku Kaisha, Ltd.*, <http://www.iilj.org/courses/documents/HumaneSocietyvs.Kyodo.pdf>. (discussing Federal Court of Australia's holding). The *Humane Society* case involved a federal lawsuit against the government subsidized private company responsible for the Japanese whaling fleet. *Id.*

101. See *id.* (stating order of Australian court and subsequent injunction).

102. Environment Protection and Biodiversity Conservation Act, 1999 (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/epabca1999588/.

103. *Humane Society*, <http://www.iilj.org/courses/documents/HumaneSocietyvs.Kyodo.pdf> (stating reasons why Japanese whaling fleet violated EPBC Act).

104. See *id.* (noting two main issues surrounding case).

105. See *id.* (noting primary difficulties that arose).

106. See *id.* (discussing Japan's refusal to recognize Australia's claim to Australian Antarctic Territory). Despite the fact that Australia is close in proximity to significant portions of Antarctica, only four nations recognize Australia's claim to the Australian Antarctic Territory, Japan is not one of these nations. *Id.*

107. *Id.* (quoting court's discussion on Australia's EEZ). See also United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, in force Nov. 16, 1994, 1833 U.N.T.S. 396, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (stating language on breadth of exclusive economic zone). According to Article 57 of UNCLOS, the EEZ of a

on the Law of the Sea (UNCLOS) and the EPBC Act's provisions, the court determined Australia's EEZ and subsequent Whale Sanctuary extended into the Antarctic territory.¹⁰⁸ Therefore, the court concluded, because the Japanese killed whales within the Australian Antarctic Territory, they violated the Australian EPBC Act.¹⁰⁹

Experts throughout the anti-whaling community consider *Humane Society* to be a landmark decision for environmental conservation; skeptics, however, believe this decision to be futile because of the practical inabilities of Australia to adequately enforce the injunction.¹¹⁰ Perhaps most significantly, Japan has publicly expressed its intention to ignore the Australian Court's ruling.¹¹¹

B. Legal Restrictions on Environmental Activism

In recent years, Japan has routinely accused Sea Shepherd of eco-terrorism and acts of piracy, often times threatening to bring suit in response to these acts.¹¹² The following legal provisions es-

coastal state "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." *Id.* See also *id.* pt. V, art. 56 (stating language on Rights, jurisdiction and duties of coastal State in exclusive economic zone).

108. See *Humane Society*, <http://www.iilj.org/courses/documents/HumaneSocietyvsKyodo.pdf> (quoting court's discussion on Australia's EEZ). "By virtue of the statutory definition in §225 of the EPBC Act, the waters within 200 nautical miles from the Australian Antarctic Territory land mass are within the Australian Whale Sanctuary." *Id.*

109. See *id.* (discussing Federal Australian court's holding).

110. See *id.* (concluding practical difficulties with enforcement are no reason to avoid issuing injunction upon Japanese whaling fleet). The judge considered the complexities of enforcing the injunction upon Japan, but nonetheless stated, "I cannot conclude that the practical difficulty of enforcement is a reason to withhold relief." *Id.*

See also *Hunting the Whalers*, ENCYCLOPEDIA BRITANNICA'S ADVOCACY FOR ANIMALS, Feb. 4, 2008, <http://advocacy.britannica.com/blog/advocacy/2008/02/hunting-the-whales-again/> (discussing critical reactions to ruling in *Humane Society*).

111. See Justin McCurry, *Activists Claim Rough Tactics in Battle with Japanese Whalers*, THE GUARDIAN, Jan. 16, 2008, <http://www.guardian.co.uk/environment/2008/jan/16/whaling.conservaion> (quoting Japanese refusal to follow Australian case law). A Japanese foreign ministry spokesman said, "[i]t is impossible for the Japanese government to accept the Australian court's ruling . . . Japan's whaling activities are taking place in international waters and . . . the activities must be allowed to continue in a calm and peaceful manner." *Id.*

112. See Sea Shepherd Conservation Society, *Sea Shepherd FAQ: Commentary by Captain Paul Watson*, http://www.seashepherd.org/editorials//editorial_080119_1.html (last visited Oct. 19, 2008) [hereinafter *Sea Shepherd FAQ*] (discussing Japanese claims of eco-terrorism and piracy against Sea Shepherd); see also *Australia Backs Eco-Terrorism: Whalers*, ASSOCIATED PRESS, Jan. 21, 2008, http://www.livenews.com.au/articles/2008/01/21/Australia_backs_ecoterrorism_whalers (identifying Japanese claims of eco-terrorism and piracy against Sea Shepherd).

establish the rights and boundaries involved with claims of eco-terrorism and piracy stemming from environmental activism at sea.¹¹³

1. *United Nations World Charter for Nature*

The United Nations World Charter for Nature (Charter for Nature) provides guidelines for the international protection of nature.¹¹⁴ Section 21 of the Charter states that “individuals, [and] groups [shall]. . . [s]afeguard and conserve nature in areas beyond national jurisdiction[.]”¹¹⁵ From a textual standpoint, section 21 includes the conservation of endangered species within Antarctic waters.¹¹⁶ Furthermore, section 24 states that “acting individually . . . each person shall strive to ensure that the objectives and requirements of the [Charter for Nature] are met.”¹¹⁷ The U.N. General Assembly adopted the Charter for Nature on November 9, 1982.¹¹⁸

Sea Shepherd maintains that the Charter for Nature provides authority for individuals and conservation groups to “act on behalf of and enforce international conservation laws.”¹¹⁹ Sea Shepherd cites the Charter for Nature as its principal authority to justify its law enforcement role on the high seas.¹²⁰ Conversely, opponents of Sea Shepherd downplay the authority of the Charter for Nature, claiming it merely provides guidance from the United Nations and contains no real authority.¹²¹

2. *Eco-terrorism Legislation*

As recently as 2005, the FBI considered environmental and animal rights activists to be the number one domestic terrorism

113. For a discussion of the legal provisions regarding claims of eco-terrorism and piracy, see *infra* notes 123-142 and accompanying text.

114. See generally United Nations World Charter for Nature, *supra* note 13 (providing guidelines for protection of nature).

115. *Id.* § 21(e) (discussing enforcement rights of individuals under World Charter for Nature).

116. See *id.* § 21 (noting possible textual interpretation of World Charter for Nature).

117. See *id.* § 24 (discussing further general provisions of World Charter for Nature).

118. See *id.* (noting adoption by U.N. General Assembly).

119. International Laws & Charters, *supra* note 5 (stating Sea Shepherd’s guidance for its authority to enforce conservation law).

120. See *id.* (citing authority for Sea Shepherd’s actions).

121. See Khatchadourian, *supra* note 2, at 9 (discussing opposition to Sea Shepherd’s asserted legal authority).

threat.¹²² The FBI defines eco-terrorism as “the use or threatened use of violence of a criminal nature against innocent victims or property by an environmentally-oriented, subnational group for environmental-political reasons . . .”¹²³ The spectrum of eco-terrorism ranges from non-violent sit-ins to serious crimes such as arson, burglary and death threats.¹²⁴ John Lewis, an FBI director and top official in charge of domestic terrorism issues, claims that from 1990 to 2004 “animal and environmental rights extremists have claimed credit for more than 1,200 [attacks], resulting in millions of dollars of damages and monetary loss.”¹²⁵

In response to rising concerns over the behavior of extreme environmental activists, state and federal legislatures passed legislation to impose increased penalties upon the criminal activities of extremist environmental groups.¹²⁶ The Animal Enterprise Protection Act of 1992 (AEPA)¹²⁷ and the Animal Enterprise Terrorism Act of 2006 (AETA)¹²⁸ were promulgated primarily to hold accountable the domestic criminal actions of the Animal Liberation

122. See Henry Schuster, Domestic Terror: Who’s Most Dangerous? Eco-Terrorists are now Above Ultra-Right Extremists on the FBI Charts, CNN, Aug. 24, 2005, <http://www.cnn.com/2005/US/08/24/schuster.column/> (explaining level of attention placed upon eco-terrorists by FBI). “‘The No. 1 domestic terrorism threat is the eco-terrorism, animal-rights movement,’ said John Lewis, an FBI deputy assistant director and top official in charge of domestic terrorism.” *Id.*

123. *The Threat of Eco-Terrorism: Hearing Before the H. Comm. on Resources, Subcomm. on Forests and Forest Health*, 110th Cong. (2008) (testimony of James F. Jarboe, Domestic Terrorism Section Chief, FBI), available at <http://www.fbi.gov/congress/congress02/jarboe021202.htm> (defining eco-terrorism).

124. See L. Cheryl Runyon, *Eco-terrorism-A New Kind of Sabotage*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/programs/press/2001/freedom/ecoterrorism.htm> (last visited Oct. 19, 2008) (discussing different examples of eco-terrorism).

125. Schuster, *supra* note 122 (noting amount of damage caused domestically by eco-terrorism); see also JEFFREY PAUL & ELLEN FRANKEL PAUL, WHY ANIMAL EXPERIMENTATION MATTERS: THE USE OF ANIMALS IN MEDICAL RESEARCH 11 (2001) (noting damage caused by eco-terrorism in United States between 1980-1999). In the United States, damage created by environmentalist sabotage between 1980 and 1999 amounted to \$42.8 million. *Id.*

126. RENADA RUTMANIS, *Animal Legal & Historical Ctr.*, The Rise of Ecoterrorism (2006), <http://www.animallaw.info/articles/ddusecoterrorism.htm> (describing increased concern for domestic eco-terrorism and subsequent legislation enacted).

In response to this growing concern over the actions of animal rights activists there has been legislation passed on both the state and federal level that impose harsher penalties on those whose actions are motivated by a desire to save animals. Many of these laws have come under attack both for their constitutionality and their far reaching effects.

Id.

127. 18 U.S.C. §§ 41-49 (2006).

128. H.R. 4239, 109th Cong. (2006), available at <http://www.govtrack.us/congress/billtext.xpd?bill=s109-3880>.

Front (ALF) and the Earth Liberation Front (ELF), two extremist environmental groups operating within the United States.¹²⁹ The ACPA made it an offense, punishable by up to one year in prison, “to physically disrupt an animal enterprise and cause the owners to lose \$10,000 or more.”¹³⁰

3. *U.N. Convention on the Law of the Sea*

Environmental activism that takes place at sea adopts a dimension that transcends the domestic laws of any country: the law of the open sea.¹³¹ The 1982 United Nations Convention on the Law of the Sea (UNCLOS) is an international agreement concerning traditional aspects of ocean governance and uses.¹³² The provisions of UNCLOS “apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State”¹³³ According to the language of UNCLOS, because Antarctica contains no state or nation, any activity within Antarctic waters is subject to the UNCLOS provisions.¹³⁴

For environmental confrontations at sea, Article 87 of UNCLOS provides that “[t]he high seas are open to all States,”¹³⁵ and further, “[t]he high seas shall be reserved for peaceful purposes.”¹³⁶ With Article 87 in mind, UNCLOS defines acts of piracy as, “any illegal acts of violence or detention . . . committed for private ends

129. See RUTMANIS, *supra* note 126 (describing legislative response to increased ALF and ELF activity).

130. See Runyon, *supra* note 124 (discussing punishment provisions of ACPA).

131. See United Nations Convention on the Law of the Sea, *supra* note 107 (stating legislation which controls activity taken at sea).

132. See *id.* (discussing international laws of sea); see also TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 71, at 222 (detailing various UNCLOS provisions). “UNCLOS is a massive treaty. It consists of 320 articles in 17 separate parts and has 9 Annexes. As a ‘Constitution for the Oceans,’ the Convention deals with a much broader range of issues than those related to marine biodiversity and sustainable fisheries” *Id.*

133. United Nations Convention on the Law of the Sea, *supra* note 107, pt. VII, §1, art. 86 (discussing language of statute).

134. See Jonathan I. Charney, *The Antarctic System and Customary International Law*, in INTERNATIONAL LAW FOR ANTARCTICA 51, 58-59 (Francesco Francioni & Tullio Scovazzi, eds., 1996), available at <http://books.google.com/books?id=9QfojGIRDawC&printsec=frontcover#PPA58,M1> (discussing applicability of UNCLOS to Antarctica).

135. United Nations Convention on the Law of the Sea, *supra* note 107, pt. VII, §1, art. 87 (quoting language of provision titled “Freedom of the high seas”). “The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law.” *Id.*

136. See *id.* pt. VII, §1, art. 88 (quoting language of provision titled “Reservation of the high seas for peaceful purposes”). “The high seas shall be reserved for peaceful purposes.” *Id.*

by the crew or the passengers of a private ship . . . on the high seas, against another ship . . . or against persons or property on board such ship . . . in a place outside the jurisdiction of any State[.]”¹³⁷

In addition to the general duty to repress piracy under UNCLOS,¹³⁸ flag-states are responsible for controlling any sea vessels that register under the flag of that flag-state or nation.¹³⁹ At sea, that registered ship is then considered a part of the flag-state itself, and legal jurisdiction under that country would apply accordingly.¹⁴⁰ For disputes arising under UNCLOS, both the International Tribunal for the Law of the Sea (TLS) and the International Court of Justice (ICJ) provide suitable venues for relief.¹⁴¹

IV. ANALYSIS

If a law applies in theory, but a nation fails to enforce it, does anyone notice when it fails?¹⁴² It has been said, laws that lack enforcement power are often worth less than the paper on which they are printed.¹⁴³ Nearly all of the international laws discussed thus far consist primarily of collections of agreements by certain nation-states, which member nations pick and choose to follow. This form of lawlessness stems from the fact that these laws are devoid of any adequate enforcement powers.¹⁴⁴ Consequently, it is difficult to ascertain which laws *actually* control whaling in the Antarctic Austra-

137. *See id.* pt. VII, §1, art. 101 (quoting language of provision titled “Definition of piracy”).

138. *See id.* pt. VII, §1, art. 100 (quoting language of provision titled “Duty to cooperate in the repression of piracy”). Likewise, UNCLOS requires that “[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.” *Id.*

139. *See* United Nations Convention on the Law of the Sea, *supra* note 107, pt. VII, §1, art. 91-94 (discussing language of provisions dealing with flag state responsibilities and titled “Status of ships”).

140. *See id.* pt. VII, §1, art. 91 (discussing nationality status for ships). If a ship does not retain a flag, or its flag is taken away for some reason, the ship is fair game on the open sea, meaning if attacked, no country will be required to come to the ship’s aid. *Id.*

141. *See id.* pt. XI, §5, art. 186-191, pt. XV (discussing procedure for dispute resolution under UNCLOS). Japan has publicly stated it considers Australia to be in the wrong under their flag state responsibilities, for assisting Sea Shepherd in any fashion. *Id.*

142. *See* TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 71, at 39-47 (detailing practical difficulties associated with enforcing environmental agreements).

143. *See id.* (discussing inefficiency of laws that lack enforcement powers).

144. *See id.* at 290 (describing non-legally binding nature of most international agreements with Antarctica).

lian territory.¹⁴⁵ One thing is clear, however: the IWC “scientific research” loophole mocks international conservation law.¹⁴⁶ Without the security of the scientific research exception, Japan’s whaling practice would be in violation of a number of conservation laws that private groups, such as Sea Shepherd, would be free to enforce.¹⁴⁷

Three questions concerning this dilemma deserve analysis: (1) whether the scientific research exception to the commercial whaling moratorium should be repealed; (2) whether Sea Shepherd and other privately funded groups, at their own risk, should be allowed to enforce international conservation laws that would otherwise not be enforced; and (3) whether Sea Shepherds high seas tactics should be considered appropriate means of enforcement, or merely acts of eco-terrorism and piracy.¹⁴⁸

A. Exploitation of the Scientific Research Exception

Japan is currently taking advantage of the scientific research exception to the IWC commercial whaling moratorium.¹⁴⁹ The Japanese whaling program has taken place every year since the moratorium began in 1986, yet Japan has produced almost no peer-reviewed studies explaining their scientific findings.¹⁵⁰ The Japa-

145. *See id.* (discussing non-legally binding nature of most international agreements with Antarctic which makes it difficult to determine which laws are controlling).

146. *See* International Convention for the Regulation of Whaling, *supra* note 33, art. VIII, ¶¶ 1-3 (explaining issuance of special scientific permits for whaling under IWC).

147. *See id.* (explaining purpose of IWC and subsequent commercial whaling moratorium); *see also* United Nations World Charter for Nature, *supra* note 13, at 239 (providing U.N. mandated conservation law); *see also* Environment Protection and Biodiversity Conservation Act, 1999 (Austl.), *available at* http://www.austlii.edu.au/au/legis/cth/consol_act/epabcal999588/ (outlining language and provisions of EPBC); *see also* Convention on International Trade in Endangered Species of Wild Fauna and Flora, *supra* note 70 (discussing text of convention); *see also* Antarctic Treaty, *supra* note 15 (listing Articles and subsequent text of Antarctic Treaty); *see also* Antarctic Conservation Act, 16 U.S.C. §§ 2401-2413 (2006) (discussing U.S. law prohibiting Antarctic whaling).

148. For a discussion of the analysis of the scientific research exception to the commercial whaling moratorium and whether Sea Shepherd’s enforcement of international conservation law is appropriate or an act of eco-terrorism, *see supra* notes 142-211 and accompanying text.

149. *See generally* International Convention for the Regulation of Whaling, *supra* note 33, art. VIII, ¶¶ 1-3 (explaining proper procedure and issuance of special scientific permits for whaling). Japan is not using the scientific research exception for the purpose it was originally intended. *Id.*

150. *See* KAREN STEUER, *World Wildlife Fund*, Science, Profit and Politics: Scientific Whaling in the 21st Century 12 (2005), <http://assets.panda.org/downloads/wfsciwhalingreportfinal.pdf> (discussing considerable amounts of criticism raised by IWC scientists over Japanese scientific whaling). *See also* P.J. Clapham, et al.,

nese government “say[s] that they are hunting whales off Antarctica in order to ascertain when there will be enough to harvest for profit.”¹⁵¹ Since killing whales for commercial purposes became illegal, however, more than 11,000 whales have been killed, processed and sold for consumption in Japan under the scientific research exception.¹⁵² Killing whales seems counterintuitive to a study meant to determine “when there will be enough to harvest for profit” in the future,¹⁵³ as it only decreases the likelihood that whale populations will increase enough to justify lifting the moratorium.¹⁵⁴

Japan further defends commercial whaling by arguing that whales eat so much marine life that humans consequently suffer from depleted fisheries.¹⁵⁵ Yet scientists have labeled this argument “simplistic and erroneous,” finding that humans, not whales, are guilty of depleting the world’s fisheries.¹⁵⁶

It is unnecessary for Japan to utilize lethal research methods to determine whale population numbers in Antarctica.¹⁵⁷ Non-lethal methods of scientific research are equally successful in determining the growth of whale stocks.¹⁵⁸ If Japan is truly eager to resume whaling for profit, it should support the growth of whale populations rather than contribute to their further demise, because with-

Whaling as science, BIOSCIENCE, Mar. 1, 2003, at 210 (criticizing Japanese JARPA II program and its poor scientific results).

151. Khatchadourian, *supra* note 2, at 2 (detailing ultimate goal of Japanese scientific research upon whales).

152. See List of Special Permit Catches Since 1985, *supra* note 33 (listing numbers of whales killed by Japan each year under scientific research permits).

153. Khatchadourian, *supra* note 2, at 2 (explaining that ultimate goal of Japanese scientific research on whales is to eventually harvest them for profit). For the IWC to potentially lift the commercial whaling moratorium, there would need to be enough whales on the planet to establish a sustainable stock of whales. *Id.*

154. See *id.* (discussing controversial reasoning behind Japanese scientific whaling). See also List of Special Permit Catches Since 1985, *supra* note 33 (listing numbers of whales killed each year by different countries under scientific research permits).

155. See Japan’s Whale Research: What’s it all about?, *supra* note 8 (explaining Japan’s alternate argument for killing whales for commercial purposes).

156. Katy Penland, IWC, *Whaling*, AM. CETACEAN SOC’Y, www.acsonline.org/issues/whaling/index.html (last visited Oct. 19, 2008) (explaining scientists’ opinion of Japan’s argument that whales should be killed because they are depriving humans of food source).

157. See McCurry, *supra* note 38 (detailing study which revealed non-lethal methods of research could be just as effective to conduct Japan’s study of whales).

158. See *id.* (discussing alternative non-lethal research methods for studying whales). “Australian experts recently completed a ten-year study of whales’ place in the ecosystem without killing a single animal, and they insist that Japan could cease using their current methods and still be able to collect all the data they need.” *Id.*

out population growth the whaling moratorium could never be lifted.¹⁵⁹

To avoid further exploitation, the IWC should either repeal the entire self-issuing scientific research exception, or prohibit all lethal methods of scientific research until whale populations are no longer endangered.¹⁶⁰ If these changes were implemented, countries such as Japan could no longer disguise their commercial whaling practices as “scientific research.”¹⁶¹

B. Privately Enforcing International Conservation Law

Should an individual or non-governmental organization be allowed to enforce international conservation law with its own time and money?¹⁶² Sea Shepherd answers this question affirmatively, and has continued to answer this question through practice, not theory, over the course of the last thirty years.¹⁶³ Sea Shepherd’s enforcement methods have been controversial and criticized, even illegal at times, yet praised and highly-respected as well.¹⁶⁴

Paul Watson and Sea Shepherd have limited legal authority to enforce international conservation law in neutral waters.¹⁶⁵ Yet, the recent Australian decision in *Humane Society* and the increased public ire of the global community over Japan’s whaling, together, lend

159. See generally International Convention for the Regulation of Whaling, *supra* note 33 (explaining purpose of IWC and subsequent commercial whaling moratorium). The ICW is charged with the duty of being the sole regulatory body of the ICRW, and it is responsible for reviewing and revising necessary measures as they see fit. *Id.*

160. See Int’l Whaling Comm’n, *Resolution on JARPA*, Res. 2007-1 (Apr. 6, 2007), available at <http://www.iwcoffice.org/meetings/resolutions/Resolution2007-1.pdf> (explaining resolution requesting Japan to cease using lethal methods to conduct scientific research in Southern Ocean).

“Now therefore the commission calls upon . . . the Government of Japan to suspend indefinitely the lethal aspects of JARPA II conducted within the Southern Ocean Whale Sanctuary.” *Id.*

161. See *id.* (requesting Japan to cease using lethal methods of research on whales).

162. See TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 71, at 229 (discussing enforcement responsibilities of member nations to ICRW and IWC).

163. See generally Khatchadourian, *supra* note 2 (detailing thirty-year history of Paul Watson and Sea Shepherd).

164. See *id.* at 3 (discussing controversy and alternative praise surrounding Sea Shepherd’s choice of enforcement tactics used). “‘I think he’s a hero,’ Peter Singer, the Princeton ethicist and the author of ‘Animal Liberation,’ [said].” *Id.* at 2.

165. See United Nations World Charter for Nature, *supra* note 13 (providing legal authority for non-governmental groups to enforce conservation law).

increased weight to Sea Shepherd's authority.¹⁶⁶ Accordingly, Sea Shepherd's legal authority appears sufficient to justify reasonably interfering with the Japanese whaling fleet in the Australian Antarctic Territory.¹⁶⁷

After ramming the *Sierra* in 1979 on the basis of morality, Sea Shepherd in the early 1990s began to assert legal authority for its actions under the U.N. World Charter for Nature.¹⁶⁸ The Charter for Nature states that individuals and groups may help "[s]afeguard and conserve nature in areas beyond national jurisdiction."¹⁶⁹ Critics, however, are quick to assert that the Charter for Nature "is not a license for vigilantism."¹⁷⁰ The Charter for Nature contains no enforcement provisions, and thus, like most international law, is effectually non-binding.¹⁷¹

Additionally, the Charter for Nature states that individuals should take action "to the extent they are able," a provision that one critic believes "Watson interprets to mean physical capability but . . . is obviously meant to encompass legal authority as well."¹⁷² Sea Shepherd clearly has the physical capabilities to enforce international conservation law, because they have done so for thirty years.¹⁷³ As for Sea Shepherd's legal authority, however, most countries do not consider "ramming, disabling, or scuttling ships to

166. See *Humane Soc'y Int'l, Inc. v. Kyodo Senpaku Kaisha, Ltd.*, (2008) 165 F.C.R. 510 (Austl.), available at <http://www.iilj.org/courses/documents/HumaneSocietyvs.Kyodo.pdf> (detailing holding and subsequent order of Federal Court of Australia).

167. TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 71, at 3 (detailing relevant strength of "charter" as compared to other forms of international law).

The term "charter" is used for particularly formal and solemn instruments, such as the constituent treaty of an international organisation. The term itself has an emotive content that goes back to the Magna Carta of 1215 . . . [t]he 1982 World Charter for Nature is a resolution adopted by the General Assembly of the United Nations and is not a treaty.

Id.

168. See Khatchadourian, *supra* note 2, at 7 (asserting legal authority for Sea Shepherd's actions). Paul Watson and Sea Shepherd cite the U.N. World Charter for Nature as justification for their enforcement role taken against Japanese whaling in Antarctica. *Id.*

169. United Nations World Charter for Nature, *supra* note 13 (discussing language of Charter for Nature).

170. Khatchadourian, *supra* note 2, at 7 (interpreting Charter for Nature's authority).

171. See *id.* (explaining non-binding nature of World Charter for Nature).

172. *Id.* (quoting critic's interpretation of Charter for Nature's authority).

173. See *id.* (detailing thirty year history of Paul Watson and Sea Shepherd). See also Sea Shepherd Conservation Society, <http://www.seashepherd.org> (last visited Oct. 19, 2008) (detailing general overview of Sea Shepherd Conservation Society).

be legal activities, and, except on rare occasions, even naval ships cannot lawfully interfere with foreign vessels on the high seas.”¹⁷⁴ David Caron, Director of the Law of the Sea Institute at the University of California at Berkeley believes Watson’s interpretation is “[c]learly wrong [and] . . . [t]here is no ambiguity.”¹⁷⁵

While most countries will not support the tactics utilized by Sea Shepherd, at the same time, it appears no anti-whaling country wants to actually preclude Sea Shepherd from enforcing laws that protect endangered species.¹⁷⁶ Further, now that Sea Shepherd appears to have won some support from the Australian government in *Humane Society*, it is likely Sea Shepherd will be able to continue enforcing the whaling ban within the Southern Ocean Sanctuary.¹⁷⁷

While Watson and Sea Shepherd have managed to elude significant punishment for the ten ships they have rammed or disabled, sailing forward they should refrain from intentionally ramming future ships in the name of international conservation law.¹⁷⁸ Using other less volatile means, which are acceptable under the laws of the sea, would be more appropriate for enforcing international conservation laws under the Charter for Nature.¹⁷⁹ Nonetheless, until a country or international body enforces international conservation law on the high seas, which is unlikely due to its cost, private groups and individuals should be allowed to enforce international conservation laws through private funding and at their own risk.¹⁸⁰

C. Appropriate Enforcement v. Eco-terrorism and Piracy

Over the past thirty years, Paul Watson and Sea Shepherd have committed acts that would be considered illegal in a number of

174. Khatchadourian, *supra* note 2, at 7 (explaining beliefs of countries regarding legal enforcement actions).

175. *Id.* (quoting opinion of David Caron on Paul Watson’s interpretation of World Charter for Nature).

176. *See generally id.* (discussing general failure to punish Watson and Sea Shepherd for actions taken).

177. *See Humane Soc’y Int’l, Inc. v. Kyodo Senpaku Kaisha, Ltd.*, (2008) 165 F.C.R. 510 (Austl.), available at <http://www.iilj.org/courses/documents/HumaneSocietyvs.Kyodo.pdf> (discussing generally holding of court).

178. *See Khatchadourian, supra* note 2, at 7 (noting that countries do not consider actions taken by Sea Shepherd to be legal enforcement actions).

179. *See id.* (discussing legality under UNCLOS).

180. *See United Nations World Charter for Nature, supra* note 13 (discussing language of Charter for Nature). The Charter for Nature gives Paul Watson and Sea Shepherd enough authority to act on behalf of and enforce international conservation law. *Id.* *See also Humane Society*, <http://www.iilj.org/courses/documents/HumaneSocietyvs.Kyodo.pdf> (discussing general holding of Federal Australian court). *See also Khatchadourian, supra* note 2, at 7 (discussing legality of actions under Laws of Sea).

countries, such as ramming or scuttling ships.¹⁸¹ Still, Watson and Sea Shepherd have managed to avoid any major punishment.¹⁸²

Why do they get away with these actions? Some reasons include the difficult and costly nature of enforcing international laws, and the fact that Sea Shepherd directs its tactics at property, not people, which tends to be less controversial.¹⁸³ Recently, however, Japan has questioned Sea Shepherd's enforcement tactics.¹⁸⁴ Following the January 2008 Japanese detainment of two Sea Shepherd volunteers, Japan threatened to bring claims of eco-terrorism and piracy against Sea Shepherd.¹⁸⁵ While these claims have legal standing, they appear to be geared more towards generating public sympathy for Japan than anything else.¹⁸⁶

1. *Japanese Claims of Eco-terrorism*

In response to Japanese claims of eco-terrorism, Paul Watson has stated, "it is now routine for every ecologically destructive industry in the world to label their critics as eco-terrorists so that comment is easily dismissed."¹⁸⁷ According to existing legislation on

181. See Khatchadourian, *supra* note 2, at 2 (discussing denouncement of Paul Watson's tactics by other countries). In reference to Watson, Kristjan Loftsson, managing director of Hvalur, Iceland's largest whaling company said "[h]e is persona non grata in Iceland," meaning an unwelcome person. *Id.*

182. See *id.* at 7 (detailing lack of severe international punishment upon Paul Watson and Sea Shepherd).

183. See *id.* at 1 (explaining intent of Sea Shepherd's actions which are directed at whaling vessels and illegal poaching equipment, not people). See also TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 71, at 39-47 (detailing practical difficulties associated with enforcing environmental agreements).

184. See *Australia Backs Eco-Terrorism: Whalers*, *supra* note 112 (explaining Japanese displeasure with Australian government's assistance of Sea Shepherd). Japan refuses to acknowledge that Sea Shepherd has any authority to enforce international conservation law and subsequently denounces all Sea Shepherd actions taken against Japan. *Id.*

185. See *id.* (explaining Japanese displeasure with Australian government's assistance of Sea Shepherd). Japanese Fisheries Agency chief of whaling Hideki Moronuki said, "[t]he Australian government helped an eco-terrorist group by providing full support . . . [i]t was simply inappropriate." *Id.* Japan has routinely accused Sea Shepherd of eco-terrorism, and publicly stated they believe the Australian government is wrong to support the "terrorist group" Sea Shepherd in any fashion. *Id.*

186. See *Australia Condemns Anti-Whaling Protest*, SYDNEY MORNING HERALD (Mar. 3, 2008), available at <http://news.smh.com.au/australia-condemns-antiwhaling-protest/20080303-1whu.html> (discussing potential ploy by Japan to get public sympathy for actions taken by Sea Shepherd).

187. See News Release, Sea Shepherd Conservation Soc'y, Captain Paul Watson Responds to the Director-General of the Japanese Institute of Cetacean Research (Dec. 27, 2005) (on file with author), available at http://www.seashepherd.org/news/media_051227_1p.html (quoting Watson's response to accusations of

“eco-terrorism,” Watson, to some extent, is correct in his assessment.¹⁸⁸

Today, ostensible “eco-terrorism” legislation exists exclusively in the United States.¹⁸⁹ Some commentators actually believe anti-environmentalists created the term “eco-terrorism” as a “buzzword” to associate negativity with environmental activism in the United States.¹⁹⁰ Under international law, there is no common definition for the term “terrorism,” let alone a definition for the term “eco-terrorism;” thus, there is little international focus placed upon the term “eco-terrorism.”¹⁹¹ According to Boaz Ganor, Director of the International Policy Institute for Counter-Terrorism, many definitions of terrorism proposed in international courts of law “state[] that terrorism is the intentional use of, or threat to use violence

piracy by Hiroshi Hatanaka Director General of Institute for Cetacean Research for Japanese government).

188. See Stop Terrorism of Property Act of 2003, H.R. 3307, 108th Cong. (2003), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h108-3307> (describing failed efforts to enact eco-terrorism legislation). See also Ecoterrorism Prevention Act of 2004, H.R. 4454, 108th Cong. (2004), (describing failed eco-terrorism amendments). See also *The Birth of a Buzz Word: Eco-Terrorism*, INDEPENDENT (New York), Sept. 17, 2007, available at <http://www.independent.org/2007/09/15/the-birth-of-a-buzz-word-eco-terrorism/> (discussing possibility that eco-terrorism was term created by Ron Arnold to create negative image for environmental activists).

189. For a discussion of international terrorism and eco-terrorism, see *infra* notes 190-200 and accompanying text (discussing lack of international attention on eco-terrorism). See also Michael Penders, President, Env'tl. Sec. Int'l, Paper on Eco-Terrorism, Environmental Crime, and International Environmental Security at NATO Round Table Speech (Mar. 20, 2003), available at <http://www.nato.int/docu/speech/2003/s030320g.htm> (calling upon other countries to develop eco-terrorism laws so United States can better control threat of domestic terrorism).

190. See *The Birth of a Buzz Word: Eco-Terrorism*, *supra* note 188 (discussing possibility that eco-terrorism was term coined by Ron Arnold to create negative image for environmentalists).

191. See Report on Terrorism & Human Rights, Inter-Am. C.H.R., OEA/Ser.L/V/II.116, doc. 5, rev. 1, corr. (Oct. 22, 2002), available at <http://www.cidh.org/Terrorism/Eng/toc.htm> (explaining lack of international legal definition of terrorism).

[T]o date there has been no international consensus on a comprehensive international legal definition of terrorism . . . [t]he absence of agreement on a comprehensive definition of terrorism under international law suggests in turn that the characterization of an act or situation as one of terrorism cannot in and of itself serve as a basis for defining the international legal obligations of states.

Id.

See also EU OFFICE, AMNESTY INT'L, HUMAN RIGHTS DISSOLVING AT THE BORDERS? COUNTER-TERRORISM AND CRIMINAL LAW IN THE EU, AMNESTY INTERNATIONAL 8 (2005) available at <http://www.amnesty.org/en/library/asset/IOR61/013/2005/en/dom-IOR610132005en.pdf> (discussing global difficulty with creation of terrorism definition). “The international community has found it very hard in the past to come up with a consensus on what exactly is meant by ‘terrorism’ due to ideological clashes between states” *Id.*

against civilians or against civilian targets, in order to attain political aims.”¹⁹² Thus, while the United States’ definition for terrorism includes violence against people *or* property, the proposed international definitions often include only violence against people.¹⁹³ Significantly, Sea Shepherd does not purposely commit violence against people.¹⁹⁴

Today, Americans tend to have a heightened, almost Pavlovian, sensitivity to any use of the word “terrorist.”¹⁹⁵ It is conceivable that Japan, hoping to acquire U.S. assistance, labeled Sea Shepherd “eco-terrorists” in order to raise the ire of the American public. A surge of “eco-terrorism” legislation was proposed to Congress following the attacks of September 11, 2001, though nearly all of it was rejected.¹⁹⁶ The U.S. eco-terrorism legislation which passed is focused on reducing the problems presented by the ALF and ELF *within* the United States, such as tree spiking, setting fires to animal testing facilities and using explosives on sport utility vehicles.¹⁹⁷

In the United States, there are few enforceable eco-terrorism laws that exist, and the laws that do exist aim to control domestic crimes against legitimate animal enterprises; Japan’s whaling is

192. Boaz Ganor, *Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter?*, 3 POLICE PRAC. & RES. 287 (2002), available at <http://www.ict.org.il/ResearchPublications/tabid/64/Articlsid/432/currentpage/1/Default.aspx> (suggesting proper international definition for terrorism). “Proposing a Definition of Terrorism - The question is whether it is at all possible to arrive at an exhaustive and objective definition of terrorism” *Id.*

193. *See id.* (comparing international definition of terrorism to U.S. definition of terrorism). According to Boaz Ganor, if international laws on eco-terrorism were to be created, they likely would only incorporate violence against people. *Id.*

194. *See* Sea Shepherd Conservation Society, *Defending Whales: The History of Sea Shepherd Conservation Society and Whaling*, http://www.seashepherd.org/whales/whales_SSCS_history.html (last visited Oct. 19, 2008) (chronicling extreme history of Sea Shepherd taken against whaling vessels and not people).

195. *See* DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY ix-xi* (2002) (discussing American public’s sensitivity to terrorism following attacks of Sept. 11, 2001).

196. *See* Stop Terrorism of Property Act of 2003, H.R. 3307, 108th Cong. (2003), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h108-3307> (describing purpose of failed eco-terrorism legislation); *see also* Ecoterrorism Prevention Act of 2004, H.R. 4454, 108th Cong. (2004) (describing failed eco-terrorism amendments).

197. *See* Animal Enterprise Protection Act, 18 U.S.C. §43(b) (2006) (establishing punishments for animal enterprise terrorism); *see also* H.R. 4239, 109th Cong. (2006), available at <http://www.govtrack.us/congress/billtext.xpd?bill=s109-3880> (discussing main purpose of AETA legislation aimed at punishing property crimes and threats against people involved in animal enterprises).

neither domestic *nor* legitimate.¹⁹⁸ Sea Shepherd's conservation activities against Japan took place outside the U.S., and the actions were aimed at preventing the killing of endangered species.¹⁹⁹ Therefore, Sea Shepherd's actions would not fall under the aim or jurisdiction of the American-made eco-terrorism laws. Although it may be appropriate to punish Watson and Sea Shepherd for their actions, U.S. eco-terrorism laws are inappropriate here and Japan would be best suited to pursue relief under a different body of law.²⁰⁰

2. *Japanese Claims of Piracy*

Japan claims Watson and two Sea Shepherd volunteers committed acts of piracy in 2008, when Watson ordered two Sea Shepherd volunteers to board a Japanese whaling vessel without permission.²⁰¹ Japan asserts that Sea Shepherd's actions took place on the high seas and thus UNCLOS applies; conversely, according to *Humane Society*, Australia believes the activities took place in Australian waters, and thus Australian law applies.²⁰² While Japan could potentially bring claims of piracy against Watson and the volunteers, they would likely fail.²⁰³

Under UNCLOS, either the International Tribunal for the Law of the Sea (TLS) or the International Court of Justice (ICJ) are considered appropriate venues for any piracy claims.²⁰⁴ If Watson

198. For a discussion of the illegal nature of Japanese whaling under international law, see *supra* note 146 and accompanying text (discussing illegal nature of Japan's whaling practice under numerous international laws).

199. See Animal Enterprise Protection Act, 18 U.S.C. §43(b) (establishing punishments for animal enterprise terrorism); see also H.R. 4239 (discussing main purpose of AETA geared towards ALF-type and ELF-type offenses).

200. For a discussion of the scope of U.S. eco-terrorism laws, see *supra* note 196 and accompanying text (defining scope of U.S. eco-terrorism legislation and how legislation does not apply to Sea Shepherd's actions against Japan in Antarctica).

201. See Lah, *supra* note 11 (detailing public attention on Japanese detainment of two Sea Shepherd volunteers); see also *Japanese Detain Whaling Activists*, *supra* note 2 (discussing Japanese detainment of two Sea Shepherd protestors).

202. See *Humane Soc'y Int'l, Inc. v. Kyodo Senpaku Kaisha, Ltd.*, (2008) 165 F.C.R. 510 (Austl.), available at [http://www.iilj.org/courses/documents/HumaneSociety vs.Kyodo.pdf](http://www.iilj.org/courses/documents/HumaneSociety%20vs.%20Kyodo.pdf) (discussing Australia's belief that Australian exclusive economic zone extends into Antarctic waters).

203. See United Nations Convention on the Law of the Sea, *supra* note 107, pt. XV, art. 279-99 (discussing provisions regarding settlement of disputes under UNCLOS). Sea Shepherd is careful to follow the U.N. Convention on the Laws of the Sea, and it is unlikely that Japan could mount a successful case. See *id.*

204. See *id.* (identifying proper venues for settlement of disputes under UNCLOS). It is unlikely that Watson and the two men would appear in a Japanese court, and Australia is unlikely to lay charges of piracy because they seem to support Sea Shepherd in some fashion. See generally *id.* Complexities with the jurisdic-

and the two volunteers actually appear in either the TLS or the ICJ, then Watson, not the volunteers, could potentially be charged with committing acts of piracy.²⁰⁵ The piracy charges would need to be aimed at Watson because he ordered the two men to board the Japanese vessel.²⁰⁶

Watson has publicly stated that Japanese claims of piracy fail to intimidate him.²⁰⁷ Watson has reason to be confident, due to the fact that acts of piracy under UNCLOS require “illegal acts of violence or detention, or any act of depredation, committed for private ends . . .”²⁰⁸ Watson and the two men did not commit “illegal acts of violence” by boarding the Japanese vessel to deliver a written

tion for a claim of piracy taking place on the open sea can be reason enough to deter such a claim; jurisdiction, however, would not be an issue here. *See generally id.* *See also* International Court of Justice, <http://www.icj-cij.org/homepage/index.php?lang=en> (last visited Oct. 19, 2008) (providing information regarding ICJ). The International Court of Justice is located at The Hague, in the Netherlands and it is considered the “principal judicial organ of the United Nations.” *Id.* *See also* International Tribunal for the Law of the Sea, General Information – Overview Introduction http://www.itlos.org/start2_en.html (follow “General Information” hyperlink; then follow “Overview” hyperlink; then follow “Introduction” hyperlink) (last visited Oct. 19, 2008) (providing information regarding TLS). The International Tribunal for the Law of the Sea is located in Hamburg, Germany, and is an independent judicial body consisting of twenty-one independent members “elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea.” *Id.*

205. *See* United Nations Convention on the Law of the Sea, *supra* note 107, pt. VII, §1, art. 101 (defining acts of piracy under UNCLOS).

206. *See id.* (discussing piracy under UNCLOS); *see also* Captain Paul Watson Responds to the Director-General of the Japanese Institute of Cetacean Research, *supra* note 187 (detailing Watson’s response to accusations of piracy by Japanese government).

207. *See* Sea Shepherd FAQ, *supra* note 112 (quoting Watson on not being intimidated by Japanese Piracy claims). Said Paul Watson, “I’ve been accused of piracy so many times that I’ve lost count . . . I’m not worried about any charges.” *Id.*

208. United Nations Convention on the Law of the Sea, *supra* note 107, pt. VII, §1, art. 101 (quoting language of UNCLOS provision titled “Definition of piracy”).

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Id.

message, nor did Watson act for “private ends.”²⁰⁹ Therefore, a Japanese claim of piracy is likely to fail.²¹⁰ Finally, because Sea Shepherd’s vessels are registered in the Netherlands, any Japanese claims against Australia under the UNCLOS flag-state responsibility provisions would also fail.²¹¹

V. WHAT DOES THE FUTURE HOLD FOR JAPANESE WHALING?

The Australian Federal court order in *Humane Society* was clear: the Japanese whaling fleet should be restricted from killing whales within the Australian Antarctic Territorial waters.²¹² Sea Shepherd has called upon Australian Federal Police to uphold the federal court order against Japan.²¹³ Nevertheless, neither Australia nor any other anti-whaling country has taken affirmative steps to physically restrain any illegal Japanese whaling.²¹⁴

It is one thing to enact legislation, but it is another to actually implement and enforce it.²¹⁵ While many countries continue to create conservation laws prohibiting the killing of endangered species, these same countries fail to act while Japan, Norway and Iceland violate their laws.²¹⁶ By enforcing conservation laws, Sea

209. *See id.* (analyzing UNCLOS provision on piracy).
See also Would-be Johnny Depps Unlikely to Qualify as Pirates, *CANBERRA TIMES*, Jan. 17, 2008, available at 2008 WLNR 869772 (discussing Japanese piracy claims against Paul Watson and Sea Shepherd).

210. *See* United Nations Convention on the Law of the Sea, *supra* note 107, pt. VII, §1, art. 101 (defining piracy under UNCLOS). Alternatively, Sea Shepherd could bring a claim for piracy against Japan for detaining the two Sea Shepherd volunteers onboard the Japanese boat for three days, however this claim is also likely to be unsubstantiated. *Id.*

211. *See id.* pt. VII, §1, art. 91-94 (defining and describing provisions that control responsibilities of flag states).

212. *See Humane Soc’y Int’l, Inc. v. Kyodo Senpaku Kaisha, Ltd.*, (2008) 165 F.C.R. 510 (Austl.), available at http://www.iilj.org/courses/documents/HumaneSociety_vs.Kyodo.pdf (discussing generally holding of Federal Court of Australia).

213. *See* News Release, Sea Shepherd Conservation Soc’y, Sea Shepherd Requests a Warrant from the Australian Government (Feb. 18, 2008) (on file with author), available at http://www.seashepherd.org/news/media_080218_1.html (calling for Australian government to enforce Australian law handed down in *Humane Society*).

214. *See* Rosslyn Beeby, *Whalers Refuse to Accept Injunction*, *CANBERRA TIMES*, Jan. 24, 2008, available at <http://canberra.yourguide.com.au/news/local/general/whalers-refuse-to-accept-injunction/1168342.html> (discussing possible Australian and New Zealand lawsuits against Japan); *see also It’s Ocean Warfare*, *CANBERRA TIMES*, Feb. 23, 2008, available at 2008 WLNR 3513032 (discussing potential case Australia may soon bring against Japan for Japan’s whaling practices).

215. *See* TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 71, at 39-47 (detailing practical difficulties associated with enforcing environmental agreements).

216. *See* Davis, *supra* note 90, at 7 (discussing Japan’s agreement to sign IWC but continue whaling under scientific research exception).

Shepherd is simply doing the costly dirty work for these anti-whaling countries.²¹⁷ By utilizing private funding to monitor and enforce conservation laws, private groups like Sea Shepherd save anti-whaling countries considerable amounts of tax money and government resources that would be spent attempting to properly enforce international conservation laws.²¹⁸

Although Japan tries to justify their whaling under the IWC scientific research exception, this exception is merely a technical anomaly that the IWC could soon revoke.²¹⁹ From a public policy standpoint, most people would not want to see endangered animals killed under the guise of “scientific research” on mortality rates, only to see those same endangered animals end up on a dinner plate in Japan.²²⁰ The more negative attention Japanese whaling receives, the more public support Sea Shepherd and other related groups acquire.²²¹

A. Potential Policy Changes for Japanese Whaling

Without physically ramming the Japanese whaling fleet, Watson and Sea Shepherd may have sunk the Japanese fleet in a much more critical area: Japanese public opinion.²²² It is possible that whaling will soon become banned in Japan, thanks in part to Sea Shepherd’s constant harassment of the Japanese fleet, and the in-

217. See TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 71, at 39-47 (detailing practical difficulties associated with enforcing environmental agreements).

218. See *id.* (discussing complexity of law enforcement on open seas). See also Khatchadourian, *supra* note 2, at 1-9 (addressing general confusion regarding relevant areas of law controlling International Whaling regulations).

219. See International Convention for the Regulation of Whaling, *supra* note 33, art. VIII, ¶¶ 1-3 (explaining IWC scientific research exception to commercial whaling moratorium). See also Khatchadourian, *supra* note 2, at 1-9 (discussing general confusion relating to areas of law controlling International Whaling regulations).

220. See Fackler, *supra* note 40, at A10 (discussing lower rate of whale meat consumption amongst younger generations). See also McCurry, *supra* note 38 (detailing Japanese newspaper’s study showing how infrequently young people eat whale meat).

221. See *Japanese Frown on Whaling*, DAILY TELEGRAPH (Sydney, Australia), Feb. 21, 2008, available at WLNR 3396327 (detailing decrease of public support in Japan for Japanese whaling).

222. See *id.* (discussing decreasing support for whaling within Japanese communities). See also Fackler, *supra* note 40, at A10 (explaining study showing mercury content within whale and dolphin meat in Japan may have decreased public support for Japanese whaling).

creased availability of scientific studies that reveal the alarmingly high levels of toxins contained within whale meat.²²³

The negative attention Sea Shepherd has generated for the Japanese whaling fleet has inspired Japanese citizens to become increasingly informed of their government-subsidized whaling program.²²⁴ Recent scientific studies that reveal the high toxin levels in whale meat have been widely distributed throughout Japan.²²⁵ Accordingly, a recent Japanese study found that “[m]ore than two thirds of Japanese people do not support their country’s whaling in the Southern Ocean[.]”²²⁶ Furthermore, the study found that “87 percent of the Japanese population were surprised to learn their tax money was being used to subsidize the increasingly-unpopular whaling operation.”²²⁷

Japan is figuratively walking the plank of international public opinion, and it may be too late to turn back without removing the Japanese whaling program altogether.²²⁸ Currently, the whaling industry “seems to enjoy a protected status, mainly as a tradition to be defended against foreign interference.”²²⁹ Yet, few young people eat whale meat in Japan, and soon, the older generation who traditionally continue to eat whale meat will pass away.²³⁰ With few consumers of whale meat remaining, Japan would have little reason to continue whaling.²³¹ The global community has placed immense public pressure on Japan to cease any further “scientific” whaling, and consequently, it is possible that Japan could soon bend under

223. See Fackler, *supra* note 40, at A10 (discussing study conducted on high levels of mercury content within whale and dolphin meat in Japan).

224. See *Japanese Frown on Whaling*, *supra* note 221 (detailing decrease of public support in Japan for Japanese whaling). According to a number of studies, public support to continue whaling in Japan has recently dwindled. *Id.*

225. See Fackler, *supra* note 40, at A10 (detailing study conducted on mercury content within whale and dolphin meat in Japan and subsequent education in rural Japan on subject).

226. *Japanese Frown on Whaling*, *supra* note 221 (quoting portions of study that found Japanese do not support government whaling in Southern Ocean).

227. *Id.* (quoting portions of study that found Japanese people did not know tax money was spent on whaling).

228. See *id.* (citing portions of study that found most Japanese people do not support government whaling in Southern Ocean). See also Fackler, *supra* note 40, at A10 (discussing global attention placed on health risks associated with mercury consumption in whale and dolphin meat).

229. Fackler, *supra* note 40, at A10 (explaining national protection of Japan’s whaling practice).

230. See *id.* (analyzing possibility that demand for whale meat will die off as older generations disappear).

231. See *id.* (discussing that older generations of Japanese people keep whale meat industry slightly alive, but will eventually die off).

the pressure and decide to terminate its scientific whaling program.²³²

Alternatively, if the Japanese government continues with the JARPA II program in 2008-09, deciding to stand by its ostracized whaling tradition, it is unlikely the whaling expeditions will cease any time soon.²³³ Eventually, Japan could decide to leave the IWC and start its own axis of pro-whaling countries along with Iceland and Norway.²³⁴ The commercial whaling moratorium would no longer restrict Japan, and the scientific research exception would no longer be necessary to conceal Japan's commercial whaling practice.²³⁵

Leaving the IWC, however, would most likely backfire on Japan.²³⁶ Non-IWC member nations are subject to the Antarctic Treaty system, which would likely prohibit whaling within the fragile Southern Ocean Whale Sanctuary for *any* reason, including scientific purposes.²³⁷ Therefore, leaving the IWC would remove the protections of the scientific research exception for Japan, and the Japanese whaling fleet would become exposed to increasingly restrictive legal authority.²³⁸ Furthermore, if Japan left the IWC, other IWC countries who oppose whaling could potentially place economic trade sanctions upon Japan; if this occurred, Sea Shepherd would be the least of Japan's worries.²³⁹

232. *See id.* (emphasizing global displeasure with Japanese whaling). *See also It's Ocean Warfare*, *supra* note 214 (identifying Australian and other governments' mounting pressure on Japan to cease whaling).

233. *See* Chris Hogg, *Understanding Japan's Whale Ethics*, BBC NEWS, Jan. 22, 2008, http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/7201804.stm (discussing strong Japanese association of sovereignty with ability to whale). *See also* Khatchadourian, *supra* note 2, at 2 (discussing Japanese Government's adamant defense of whaling operation).

234. *See* Hogg, *supra* note 233 (examining Japanese threat to leave IWC and start new group for pro-whaling nations). "Japan is serious about its threat to leave the International Whaling Commission unless it is reformed." *Id.*

235. *See id.* (discussing Japan's threat to leave IWC which would free Japan of IWC restrictions).

236. *See* Clarke, *supra* note 96 (discussing potential repercussions for Japan if Japan leaves IWC).

237. Agreed Measures for the Conservation of Antarctic Fauna and Flora, June 2, 1964, *available at* <http://users.erols.com/jackbobo/1964agreed.htm> (amending portions of Antarctic Treaty to further protect fauna and flora within Antarctica). Antarctic Treaty provisions would restrict Japanese whaling more than the IWC would, likely prohibiting Japanese whaling within Antarctic waters. *See generally id.*

238. *See id.* (amending portions of Antarctic Treaty to provide protection of Antarctica's flora and fauna).

239. *See* Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801(b)(1)(B) (2006) (asserting U.S. authority to impose trade sanctions upon Japan if Japan violates U.S. fishery restrictions). The Packwood-Magnuson Amend-

B. Potential Lawsuit Against Japan in the ICJ or TLS

If Japan decides to carry on with its scientific whaling program, JARPA II, in December 2008, Australia will most likely bring a lawsuit against the Japanese government in an international tribunal,²⁴⁰ where Japan could potentially be charged with violating a number of IWC whaling regulations.²⁴¹ The Australian government is currently gathering evidence for a potential suit against Japan for its illegal whaling practice in the Southern Ocean Whale Sanctuary.²⁴² In 2008, the *Oceanic Viking*, an Australian customs vessel, followed the Japanese whaling fleet and took graphic pictures and video of the Japanese killing whales in the Australian Antarctic Territory.²⁴³ Under the ruling in *Humane Society*, it is illegal for Japan to kill whales within this territory.²⁴⁴

Australia would not likely pursue Japan in an Australian court under *Humane Society*, because this would “raise the sensitive question of Australian sovereignty over Antarctica which is only recognized by four other countries with Japan not one of these [countries].”²⁴⁵ Alternatively, pursuing Japan in an international

ment to the Magnuson Fishery Conservation and Management Act provides authority for the U.S. to restrict Japanese fishing rights in the U.S. exclusive economic zone. *See id.* (giving authority to restrict Japanese fishing right).

240. *See It's Ocean Warfare*, *supra* note 214 (detailing potential case against Japan in international court).

241. *See* News Release, Sea Shepherd Conservation Soc’y, A Warrant to Intervene: Sea Shepherd Intends to Enforce the Australian Federal Court Order, (Feb. 21, 2008) (on file with author), *available at* http://www.seashepherd.org/news/media_080221_1.html [hereinafter A Warrant to Intervene] (discussing international laws Japan may have violated). “The Japanese whaling fleet is in violation of IWC regulation 19(a). The IWC regulations in the Schedule to the Convention forbid the use of factory ships to process any protected stock . . . This moratorium applies to sperm whales, killer whales, and baleen whales, except minke whales.” *Id.*

242. *See Activists Have “Bugged” Whaling Ships*, CANBERRA TIMES, Feb. 26, 2008, *available at* <http://canberratimes.com.au/news/world/general/activists-have-bugged-whaling-ships/1190739.html> (discussing Australia’s collection of evidence against Japan in Southern Ocean). *See also* Beeby, *supra* note 214 (discussing possible Australian and New Zealand lawsuits against Japan). *See also It's Ocean Warfare*, *supra* note 214 (discussing mounting pressure and potential case against Japan by Australian and other governments).

243. *See Whale Hunt Pictures Increase Pressure on Japanese Whalers*, (Australian Broadcasting Corp. television broadcast Feb. 7, 2008), *available at* <http://www.abc.net.au/lateline/content/2007/s2157296.htm> (reporting expert opinions on recent Australian monitoring of Japanese Whaling Fleet to collect evidence).

244. *See Humane Soc’y Int’l, Inc. v. Kyodo Senpaku Kaisha, Ltd.*, (2008) 165 F.C.R. 510 (Austl.), *available at* <http://www.iilj.org/courses/documents/HumaneSocietyvs.Kyodo.pdf> (discussing generally holding of Australian Federal Court).

245. *It's Ocean Warfare*, *supra* note 214 (quoting discussion of controversy surrounding Australian claims to portions of Antarctica).

court would be much more appealing for Australia.²⁴⁶ Australia could present a very compelling argument that Japanese whaling activities have violated IWC whaling restrictions, UNCLOS, the Antarctic Treaty and CITES.²⁴⁷ If given the option to pursue Japan in either the ICJ or the TLS, Australia is likely to choose the TLS, where in 1999, Australia and New Zealand had some success forcing Japan to abandon an illegal fishing program.²⁴⁸

Additionally, other anti-whaling countries may join Australia in a potential lawsuit against Japan.²⁴⁹ For example, the U.S. could pursue a Japanese violation of the U.S. Antarctic Conservation Act.²⁵⁰ Under the laws of the TLS, provisional measures could be ordered as late as November and still effectively shut down the JARPA II program for the 2008-09 whaling season.²⁵¹ Japan's whaling practice is highly controversial, lacks public support and violates numerous international conservation laws.²⁵² Consequently, Aus-

246. *See id.* (weighing potential for international case as opposed to Australian case).

247. *See id.* (explaining possibility for strong case against Japanese whaling in Australian Antarctic Whale Sanctuary). *See also* A Warrant to Intervene, *supra* note 240 (discussing various international laws Japan may have violated).

248. *See* Howard S. Schiffman, *The Southern Bluefin Tuna Case: ITLOS Hears Its First Fishery Dispute*, 2(3) J. INT'L WILDLIFE L. & POL'Y 1 (1999) available at <http://www.jiwlpl.com/contents/SBTArt.pdf> (detailing outcome of Australian victory over Japan in Southern Bluefin Tuna Case before International Court of Justice). *See also* Beeby, *supra* note 214 (discussing Australian and New Zealand success against Japan under Law of the Sea).

249. *See It's Ocean Warfare*, *supra* note 214 (discussing potential for other countries to be persuaded to join in lawsuit against Japan).

250. *See* Antarctic Conservation Act, 16 U.S.C. §§ 2401-2413 (2006) (providing U.S. law prohibiting Antarctic whaling).

[The Antarctic Conservation Act] provides civil and criminal penalties for the . . . taking of native mammals or birds; the introduction of nonindigenous plants and animals; entry into specially protected or scientific areas; the discharge or disposal of pollutants; and the importation into the US of certain items from Antarctica. Violation of the Antarctic Conservation Act carries penalties of up to \$10,000 in fines and 1 year in prison.

Id.

See also Antarctic Environmental Protection Act of 1996, Pub. L. No. 104-227, 110 Stat. 3034 (1996), (amending Antarctic Conservation Act of 1978).

251. *See It's Ocean Warfare*, *supra* note 214 (explaining potential time frame to prohibit Japanese whaling).

252. *See generally* International Convention for the Regulation of Whaling, *supra* note 33 (explaining purpose of IWC and subsequent commercial whaling moratorium); *see also* Environment Protection and Biodiversity Conservation Act, *supra* note 102 (discussing language and provisions of EPBC). *See generally* Convention on International Trade in Endangered Species of Wild Fauna and Flora, *supra* note 70 (discussing text of convention); *see also* Antarctic Treaty, *supra* note 15 (listing Articles and subsequent text of the Antarctic Treaty); *see also* Antarctic Conservation Act, 16 U.S.C. §§ 2401-2413 (2006) (discussing U.S. law prohibiting Antarctic whaling).

tralia would most likely succeed in an international lawsuit against Japan over its illegal whaling practices in the Southern Ocean.²⁵³

VI. CONCLUSION

Logistically, international conservation laws are tremendously costly and difficult to enforce on the open ocean.²⁵⁴ With this said, though controversial, I believe Sea Shepherd as a privately funded group, will continue to traverse the world protecting endangered species with little to no legal repercussions. This is due in part to Sea Shepherd's ability to present enough relevant legal authority and public support to successfully continue with its enforcement activities.²⁵⁵ Additionally, Paul Watson's recent declaration that he will no longer intentionally ram any Japanese whaling ships further anchors Sea Shepherd's legal authority within international conservation law.²⁵⁶ Ultimately, given the fact that pro-whaling countries have failed to obtain significant legal relief against Sea Shepherd in the past, it is doubtful Sea Shepherd will face punishment anytime soon for its actions taken against Japan.²⁵⁷

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253. See Beeby, *supra* note 214 (discussing past success of Australia and New Zealand against Japan under Law of the Sea); see also *It's Ocean Warfare*, *supra* note 214 (explaining possibility for strong case against Japanese whaling in Australian Antarctic Whale Sanctuary).

254. See TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 71, at 39-47 (detailing practical difficulties associated with enforcing environmental agreements).

255. See United Nations World Charter for Nature, *supra* note 13 (providing authority for non-governmental groups to enforce environmental conservation law).

256. See News Release, Sea Shepherd Conservation Soc'y, Captain Paul Watson Responds to the Australian Federal Police (Feb. 22, 2008) (on file with author), available at http://www.seashepherd.org/news/media_080222_1.html (discussing Watson's statement to not intentionally ram any Japanese whaling vessels in Antarctic waters); see also News Release, Sea Shepherd Conservation Soc'y, Sea Shepherd Will Not Ram Any Japanese Ships (Nov. 20, 2007) (on file with author), available at http://www.seashepherd.org/news/media_071120_2.html (announcing Sea Shepherd will not intentionally ram any Japanese whaling ships despite Japan's accusations against Sea Shepherd).

257. See Khatchadourian, *supra* note 2, at 9 (discussing Paul Watson's history and insubstantial punishment faced for his past actions).

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