

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

THE INSTITUTE OF CETACEAN  
RESEARCH, et al.,

Plaintiffs,

v.

SEA SHEPHERD CONSERVATION  
SOCIETY, et al.,

Defendants.

CASE NO. C11-2043RAJ

ORDER DENYING MOTION FOR  
PRELIMINARY INJUNCTION

**I. INTRODUCTION**

This matter comes before the court on Plaintiffs' motion for a preliminary injunction. Dkt. # 13. This order also resolves several issues that Defendants raised in their motion to dismiss, although the court will issue a separate order addressing that motion. The court heard oral argument from the parties on February 16, 2012. Having reviewed the parties' briefs and the voluminous evidentiary record, the court DENIES the motion for a preliminary injunction for the reasons stated below.

Because this order "grant[s] or refus[es] an interlocutory injunction," the court must make findings of fact and conclusions of law. Fed. R. Civ. P. 52(a)(2). The court includes its findings and conclusions in this order, which serves as a memorandum of the court's decision. Fed. R. Civ. P. 52(a)(1) (permitting findings and conclusions within "an opinion or a memorandum of decision"); *see also FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1109 (9th Cir. 1982) (noting that explicit factual findings are unnecessary).

## II. BACKGROUND

1 This case concerns a long-enduring standoff in the high seas that has attracted the  
2 attention, but not the intervention, of many nations' governments. Defendant Sea  
3 Shepherd Conservation Society ("Sea Shepherd"), headed by Defendant Paul Watson,  
4 has used a small fleet of ships under Mr. Watson's command to stymie Plaintiffs'  
5 whaling in the Southern Ocean. Plaintiffs, to whom the court will refer collectively as  
6 the "whalers",<sup>1</sup> have their own fleet that kills hundreds of whales each year in the  
7 Southern Ocean. An understanding of each fleet's presence in the Southern Ocean begins  
8 with an understanding of international whaling regulation.

### A. Whaling in the Southern Ocean

10 The International Convention for the Regulation of Whaling ("Whaling  
11 Convention") established the International Whaling Commission ("IWC"). Int'l Conv.  
12 for the Regulation of Whaling, Art. III, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.  
13 Since 1986, the IWC has maintained a moratorium on commercial whaling. Whaling  
14 Convention, Sch. ¶ 10(e). The moratorium has no binding force; any member nation is  
15 free to object to it and disregard it. Whaling Convention, Art. V. Japan, a longtime IWC  
16 member, initially objected to the moratorium, but withdrew its objection in 1987.  
17 Although it purports to eschew "commercial whaling," Japan takes advantage of IWC  
18 rules that permit any member nation to issue permits to kill whales for "scientific  
19 research." Whaling Conv., Art. VII. The IWC has no authority over the permits. For  
20 more than 20 years, Japan has issued a "research" permit that permits the slaughter of  
21 hundreds of whales in the Southern Ocean. Holders of Japan's permits have killed  
22 thousands of whales in the Southern Ocean since 1987. The whalers in this case have  
23 been the recipients of Japan's permit for many years. This season, for example, they  
24 have a permit to kill up to 935 minke whales, 50 fin whales, and 50 humpback whales.

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26 <sup>1</sup> The Plaintiffs are the Institute of Cetacean Research (a Japanese foundation), Kyodo Senpaku  
27 Kaisha Ltd. (a Japanese corporation that charters whaling vessels and sailors to the Institute), and  
Tomoyuki Ogawa and Toshiyuki Miura, masters of two of the whaling vessels.

1 Compl. (Dkt. # 1), Ex. 1. There is no evidence that this “research” has produced any  
2 work of scientific value. There is no evidence that killing whales is necessary to perform  
3 legitimate scientific research. There is no dispute that the whalers sell meat from the  
4 whales they kill for consumption in Japan. Using the shelter of Japan’s “research”  
5 permit, the whalers have sold whale meat despite the IWC’s creation of the Southern  
6 Ocean Whale Sanctuary in 1994, an additional prohibition on commercial whaling.  
7 Whaling Conv., Sch. ¶ 7(b).

8 Plaintiffs’ whaling is the focus of criticism, if not outright condemnation, from  
9 many nations’ governments. As recently as last December, the governments of the  
10 United States, Australia, New Zealand, and The Netherlands jointly stated that they  
11 “remain resolute in [their] opposition to commercial whaling, including so-called  
12 ‘scientific’ whaling, in particular in the Southern Ocean Whale Sanctuary . . . .” J.  
13 Statement on Whaling and Safety at Sea (Dec. 13, 2011) (<http://www.state.gov/r/pa/prs/ps/2011/12/178704.htm>). They stated their “disappoint[ment] about the recent departure  
14 of the Japanese whaling fleet for the Southern Ocean,” and “emphasize[d] that lethal  
15 techniques are not required in modern whale conservation and management.” *Id.* The  
16 Buenos Aires Group, consisting of IWC members Argentina, Brazil, Chile, Costa Rica,  
17 Ecuador, Mexico, Peru, and Uruguay, declared their “strongest rejection of the hunting of  
18 nearly a thousand whales . . . in the Southern Ocean Whale Sanctuary.” Buenos Aires  
19 Group J. Statement, Feb. 21, 2011 (<http://portal3.sre.gob.mx/english>) (Press Release No.  
20 51). The IWC itself has repeatedly passed resolutions criticizing Japan’s “research”  
21 program in the Southern Ocean. *See, e.g.*, IWC Res. Nos. 1989-3, 1994-10, 2001-7,  
22 2003-1&2, 2005-1, 2007-1 ([http://www.iwcoffice.org/meetings/resolutions/](http://www.iwcoffice.org/meetings/resolutions/searchRes.htm)  
23 [searchRes.htm](http://www.iwcoffice.org/meetings/resolutions/searchRes.htm)).

24  
25 Among the world’s governments, Australia has taken the most active role in  
26 protecting Southern Ocean whales. In 1999 it created the Australian Whale Sanctuary  
27

1 (“AWS”), a swath of the Southern Ocean encompassing all waters within 200 miles of  
2 Australia’s Antarctic territory. *See Humane Society Int’l v. Kyodo Senpaku Kaisha Ltd.*,  
3 2008 FCA 3, ¶¶ 5-8 (FCR 2008) (describing creation of AWS).<sup>2</sup> Because Australia’s  
4 claim to its Antarctic territory is disputed, only the United Kingdom, France, Norway,  
5 and New Zealand recognize the AWS. *Id.* ¶¶ 13. That has not deterred Australia’s  
6 courts. In January 2008, Australia’s Federal Court issued a permanent injunction in a  
7 case that the Human Society International brought against the whalers. The court  
8 concluded that the whalers had killed whales in the AWS in violation of Australian law.  
9 *Id.* ¶ 39. It enjoined the whalers from hunting and killing whales in the AWS. *Id.* ¶ 55.  
10 The whalers, who refused to participate in the Australian proceedings, do not dispute that  
11 they have hunted and killed whales in the AWS since the injunction. It is not clear  
12 whether they have violated the injunction this season. So far as the record reveals,  
13 neither Australia’s courts nor other arms of its government have attempted to enforce the  
14 injunction.

15 Australia has recently taken its opposition to Southern Ocean whaling a step  
16 further. It has sued Japan in the International Court of Justice (“ICJ”), contending that  
17 Japan’s “research” whaling permits violate the Whaling Convention’s commercial  
18 whaling moratorium and regulation on the Southern Ocean Whale Sanctuary. ICJ Press  
19 Release No. 2010/16 (June 1, 2010) (<http://www.icj-cij.org/docket/files/148/15953.pdf>).  
20 The ICJ is awaiting Japan’s response to Australia’s pleadings.

## 21 **B. Sea Shepherd’s Confrontation with the Whalers**

22 While the world’s governments condemn Antarctic whaling from afar, Sea  
23 Shepherd is in the Southern Ocean actively intervening to keep the whalers from their  
24 prey. Whaling season in the Southern Ocean lasts from November or December until  
25 February or March. Sea Shepherd has coordinated a campaign to frustrate the whalers’

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26 <sup>2</sup> A map of the AWS is available at  
27 <http://www.environment.gov.au/coasts/species/cetaceans/conservation/pubs/sanctuary-map.pdf>.

1 efforts in each of the last seven seasons, including this one, dating back to the 2005-2006  
2 season. It also mounted an initial Southern Ocean campaign in 2002.

3 Sea Shepherd characterizes its Southern Ocean campaigns as “aggressive  
4 protests”; the whalers characterize them as terrorism. Whatever label one chooses, there  
5 is ample evidence of the tactics that Sea Shepherd uses. The whalers have captured those  
6 tactics in photographs and videos; the Animal Planet network has captured them for the  
7 past three seasons for use in its “Whale Wars” television program. The court now  
8 describes Sea Shepherd’s tactics. In doing so, it makes only preliminary findings based  
9 on the evidence currently in the record. Based on that evidence, the court describes the  
10 facts as the parties would likely be able to prove them at trial.<sup>3</sup>

11 The whaling fleet consists solely of Japanese-owned, Japanese-flagged vessels,  
12 including the NISSHIN MARU (“NM”), a 425-foot-long, 63-foot-wide ship, and three  
13 smaller ships, named YUSHIN MARU number one, two, and three (“YM1,” “YM2,” and  
14 “YM3”). The NM is the only ship large enough to hold dead whales. The YM vessels  
15 search for, chase, and harpoon whales. It also appears that the whaling fleet uses at least  
16 one other large vessel (apparently named SHONAN MARU NO. 2 (“SM2”)) devoted  
17 solely to resisting Sea Shepherd’s tactics. There are more than a hundred crew members  
18 who work aboard the whaling fleet’s ships.

19 The Sea Shepherd fleet consists of the BOB BARKER and the STEVE IRWIN,  
20 two Dutch-flagged ships that are about 160 feet long, slightly smaller than the YM ships.  
21 The BRIGITTE BARDOT, an Australian-flagged 100-foot trimaran, is faster and more  
22 maneuverable than the larger boats. Sea Shepherd also uses a number of rigid inflatable

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23 <sup>3</sup> The parties have submitted an extraordinary volume of evidence, including hundreds of  
24 photographs and videos. A substantial portion of that evidence is hearsay or is questionably  
25 authenticated. Rather than address the parties’ various evidentiary objections individually, the  
26 court notes its discretion to consider otherwise inadmissible evidence in deciding whether to  
27 issue an injunction. *See Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009) (explaining  
28 that court may rely on hearsay and other inadmissible evidence). The court’s findings today  
regarding what the parties are likely to prove at trial takes into account the likelihood that they  
would be able to cure evidentiary deficiencies at trial.

1 boats (“zodiacs”) that it launches from the larger ships. Slightly fewer than a hundred  
2 crew members work aboard Sea Shepherd’s Southern Ocean fleet. Fewer than half of  
3 them are citizens of the United States. The Sea Shepherd fleet launches from Australian  
4 ports, which are the base of operations for its Southern Ocean campaign. In prior  
5 seasons, both the whaling fleet and the Sea Shepherd fleet have used different vessels (or  
6 the same vessels under different names), but the essential composition of the fleets has  
7 remained the same.

8 Sea Shepherd throws glass bottles filled with paint or butyric acid at the whaling  
9 ships. Often, its crew throws the glass projectiles by hand, but they also use large  
10 slingshots and other launching devices. Butyric acid is a foul-smelling but not  
11 particularly caustic acid. Sea Shepherd uses it to make the odor on the whaling ships’  
12 decks unbearable for the whaling crew, and also to ruin any whale meat on deck. The  
13 court relies on the declaration of Dr. Greg Phelan, a chemist who declares that butyric  
14 acid poses no serious risk to human health, especially in the way that Sea Shepherd uses  
15 it. The glass projectiles themselves, however, are an obvious hazard to anyone who they  
16 might hit. Sea Shepherd does not target the whalers themselves with the projectiles, and  
17 there is no evidence that a projectile has ever hit one of the whalers. There is evidence,  
18 however, that projectiles have flown or broken in dangerous proximity to members of the  
19 whaling crew. At least one whaler was splattered with paint when a projectile shattered  
20 near him. Although the whalers claim that members of their crew have been injured by  
21 butyric acid, their evidence does not convince the court.<sup>4</sup> The court credits Sea

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23 <sup>4</sup> The sole “evidence” of injury is the declaration of Tomoyuki Ogawa, the Captain of the NM.  
24 He claims that two crew members were injured in a February 2007 attack with butyric acid and  
25 smoke bombs, and that three men were “slightly injured” in a March 2008 attack. Captain  
26 Ogawa does not identify the men who were injured, explain what their injuries were, or  
27 otherwise substantiate his claims. The whalers’ counsel submitted a declaration (Dkt. # 45) in  
28 which he attaches photographs that he claims are evidence of an unnamed whaler injured by  
butyric acid in an unspecified “previous whale research season.” The photographs show a man  
with red cheeks that are perhaps slightly swollen. Counsel also attached an unauthenticated  
spreadsheet purporting to document acid-induced injuries in 2007, 2008, and 2010.

1 Shepherd's evidence that the whalers have steadfastly refused their requests that they  
2 document the injuries they claim. On this record, it is unlikely that the whalers will prove  
3 that Sea Shepherd has ever injured a member of their crew or that Sea Shepherd is likely  
4 to injure a crew member in the future.

5 The whalers hang nets strategically above and alongside the decks of their ships to  
6 protect them from the glass projectiles. Sea Shepherd in turn throws or launches safety  
7 flares, sometimes modified with metal hooks, hoping that they will catch on the nets and  
8 burn holes in them. There is no evidence that the flares or the fires they cause have  
9 injured or endangered anyone. Moreover, despite the insistence of the whalers that the  
10 fires pose a risk of explosion or other serious damage, their own videos and photographs  
11 reveal that they are content to watch the flares burn on the nets, rather than attempt to  
12 extinguish them. There is no evidence that the flares have caused damage to the ships,  
13 beyond the holes they burn in the nets.

14 Sea Shepherd also hurls smoke bombs at the whaling ships. It is not clear what  
15 purpose this serves, other than to annoy the whalers and perhaps slightly obstruct their  
16 vision. Although there is some danger that a hurled smoke bomb could hit and injure a  
17 whaling crew member, there is no evidence that the smoke itself is dangerous. Again,  
18 there is no evidence of any injury or damage as a result of the smoke bomb attacks.

19 Sea Shepherd points what appears to be a high-powered laser at various parts of  
20 the whaling ships. Again, it is not clear what purpose this serves, other than to distract or  
21 annoy the whaling crew. It is possible that the laser could cause damage if its beam  
22 struck directly in the eye of a crew member, but that there is no evidence that this has  
23 occurred. The sole member of the whaling crew to submit evidence on this issue admits  
24 that a physician found no injury to his eyes.

25 Sea Shepherd pilots its ships and boats across the bow of the whaling ships while  
26 towing lines in an effort to foul the rudder or propeller of the ships. The evidence

1 suggests that these efforts are rarely successful. The whalers submitted a single set of  
2 underwater photographs from early 2011 showing a line wrapped around the propeller of  
3 the YM3, along with some apparent damage to the rudder. There is no evidence as to the  
4 effect this had on the ship and its ability to navigate, and no evidence about what the  
5 whalers did to free the propeller or otherwise make repairs. Sea Shepherd asserts that  
6 these efforts do little more than slow the whaling ships. If Sea Shepherd succeeded in  
7 significantly disabling one of the whaling ships, those ships would be in danger if a storm  
8 arose or they needed to maneuver around icebergs. Again, there is no evidence that Sea  
9 Shepherd's propeller-fouling efforts have ever caused an injury to anyone.

10 Finally, Sea Shepherd either intentionally pilots its ships to collide with the  
11 whaling ships or pilots them in such a way that a collision is highly likely. The whalers  
12 admit that there have been no collisions this season. In February 2009, the whalers  
13 videotaped a collision between the side of the STEVE IRWIN (then known as the BOB  
14 BARKER) and the side of the YM3. The whalers photographed a February 2010  
15 collision between the same vessels. Although these collisions between the larger ships  
16 make for dramatic video, and appear dangerous, there is no evidence that anyone has  
17 been hurt as a result. Indeed, there is little evidence that the collisions even damage the  
18 ships. In a much-publicized January 2010 incident, a collision between the SM2 and the  
19 ADY GILL (a trimaran that previously served the role that the BRIGITTE BARDOT  
20 now serves) tore off several feet of the ADY GILL's stern. Other Sea Shepherd ships  
21 rescued the ADY GILL's crew unharmed. The ADY GILL, however, is now at the  
22 bottom of the ocean, although it is not clear whether it sank or Sea Shepherd scuttled it.  
23 Although the parties sharply dispute the events that led to this collision, the court relies  
24 on the extensive investigative report of Maritime New Zealand (a maritime fleet akin to  
25 the United States Coast Guard). Maritime New Zealand found the masters of both ships  
26 to be at fault.



1 The whalers admit to using countermeasures against Sea Shepherd. They  
2 frequently use high-powered water cannons aboard their ships to repel Sea Shepherd  
3 ships that come within range. They have used concussion grenades against Sea  
4 Shepherd. When Sea Shepherd boats towing lines approach, the whalers use grappling  
5 hooks to fend them off. They use the same hooks to fend off Sea Shepherd zodiacs that  
6 collide with or come within a few feet of their ships. They have used bamboo poles to  
7 repel the zodiacs at close range. Sea Shepherd asserts that a whaler beat one of their crew  
8 members in the face with a bamboo pole, but has presented no evidence to support that  
9 assertion. The whalers also use long-range acoustic devices (“LRADs”), which produce  
10 a sound so loud that it is disabling within a certain range. There is no evidence that the  
11 LRADs have caused injury. Finally, there is video evidence of one of the whalers hurling  
12 an object at Sea Shepherd crew members in a small boat. The video suggests that the  
13 object was a large brass bolt, although Sea Shepherd has produced no competent  
14 evidence to prove as much.<sup>5</sup> Just as there is no evidence of injury to the whaling crew,  
15 there is no evidence that the whalers’ countermeasures have injured any member of Sea  
16 Shepherd’s crew.<sup>6</sup>

17 The court has already noted the international condemnation of Plaintiffs’ slaughter  
18 of whales. Sea Shepherd’s tactics are also the target of international scorn. In the same  
19 joint statement criticizing the whalers, the governments of the United States, Australia,  
20 New Zealand, and The Netherlands “condemn dangerous or violent activities from all  
21 participants” in the Southern Ocean standoff, and express their “deep[] concern[] that  
22 confrontations in the Southern Ocean will eventually lead to injury or loss of life among  
23

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24 <sup>5</sup> Sea Shepherd has submitted numerous video excerpts from the “Whale Wars” television series,  
25 including one showing a whaler throwing a bolt at a Sea Shepherd boat. It contends that these  
26 clips reflect “unbiased journalism.” Sea Shepherd is highly unlikely to prove that assertion at  
27 trial.

28 <sup>6</sup> The court finds it highly unlikely that Mr. Watson will prove that any member of the whaling  
crew has ever shot him with a firearm. Watson Decl. (Dkt. # 60) ¶ 12.

1 protestors . . . and whaling crews.” J. Statement on Whaling and Safety at Sea, *supra*.  
2 The IWC and the International Maritime Organization have repeatedly condemned Sea  
3 Shepherd’s tactics. *See, e.g.*, IWC Res. Nos. 2006-2, 2007-2, 2011-2; Int’l Mar. Org.  
4 Res. MSC.303(87) (May 17, 2010) ([http://www.maritimenz.govt.nz/AdyGil/IMO-](http://www.maritimenz.govt.nz/AdyGil/IMO-resolution.pdf)  
5 [resolution.pdf](http://www.maritimenz.govt.nz/AdyGil/IMO-resolution.pdf)).

6 For eight seasons, Sea Shepherd and the whalers have engaged in these risky  
7 tactics in the Southern Ocean. It is impossible, on the record before the court, to know  
8 how frequently confrontations occur. The record suggests that the whalers do everything  
9 they can to elude the Sea Shepherd, and that Sea Shepherd spends a significant part of  
10 each season searching for the whaling fleet or chasing it. The whalers use their own  
11 vessels to impede that search. Also uncertain is what tactics the parties are using this  
12 season. There is video evidence of more bottle throwing, including one incident in which  
13 a Sea Shepherd crew member throws a bottle close enough to a whaler using a water  
14 cannon to cause the whaler to duck. There is no evidence from this season of collisions  
15 or the use of lasers or flares. Sea Shepherd has not, however, disavowed any of the  
16 tactics in its arsenal this season. The court finds that there is a substantial risk that Sea  
17 Shepherd will use any of the tactics described above at any given time.

18 **C. The Whalers Bring Their Dispute with Sea Shepherd to Court.**

19 What distinguishes this whaling season from the many before it is that the whalers  
20 have brought this lawsuit. In December 2011, about the same time that Plaintiffs’ fleet  
21 made its way to the Southern Ocean for another whaling season, they sued Sea Shepherd  
22 and Mr. Watson. Although there are apparently Sea Shepherd entities in other countries,  
23 Sea Shepherd in the United States is an Oregon not-for-profit corporation with  
24 headquarters in Friday Harbor, Washington. Although it is not clear where Mr. Watson  
25 lives when he is not at sea, neither Mr. Watson nor Sea Shepherd contest that this court  
26 has personal jurisdiction over them.

1 The whalers sued on December 8, 2011. Six days later, with both the whaling  
2 fleet and the Sea Shepherd fleet already at sea, they filed a motion for a preliminary  
3 injunction. The injunction they requested would require Sea Shepherd's ships and boats  
4 to stay at least 800 meters from their vessels. The injunction would also prohibit attacks  
5 on the whaling crew members or its ships, although it seems unlikely that Sea Shepherd  
6 could attack anything from 800 meters away.

7 The whalers preferred that the court decide the motion as early as January, but  
8 they cited no particular exigency. They did not explain why a dispute that has lasted the  
9 better part of a decade needed to be resolved in less than a month. Sea Shepherd  
10 requested months of additional time to attempt to obtain discovery and to file a motion to  
11 dismiss. The court granted a little over a month. The parties finished their briefing on  
12 February 6. The court spent most of two weeks poring over the dozens of declarations  
13 and hundreds of exhibits the parties filed, and attempting to unravel the complex issues of  
14 international and domestic law that this lawsuit presents. The court held oral argument  
15 on February 16. No party requested an evidentiary hearing.

16 With this factual and procedural background in mind, the court turns to the  
17 whalers' motion for a preliminary injunction.

### 18 **III. ANALYSIS**

19 The whalers seek declaratory and injunctive relief only, asserting four claims.  
20 They base their first three claims on international law protecting freedom of navigation at  
21 sea, freedom from piracy, and freedom from terrorism. Their fourth claim is for civil  
22 conspiracy under Washington law. As the court will discuss later, the whalers'  
23 preliminary injunction motion sufficiently invokes only the freedom of navigation and  
24 freedom from piracy claim.

1 **A. Preliminary Injunction Standard**

2 The court may issue a preliminary injunction where a party establishes (1) a  
3 likelihood of success on the merits, that (2) it is likely to suffer irreparable harm in the  
4 absence of preliminary relief, that (3) the balance of hardships tips in its favor, and (4)  
5 that the public interest favors an injunction. *Winter v. Natural Resources Defense*  
6 *Council, Inc.*, 555 U.S. 7, 20 (2008). A party can also satisfy the first and third elements  
7 of the test by raising serious questions going to the merits of its case and a balance of  
8 hardships that tips sharply in its favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d  
9 1127, 1131. (9th Cir. 2011).<sup>7</sup>

10 **B. Subject Matter Jurisdiction**

11 The court's first inquiry must be into its subject matter jurisdiction. As to the  
12 whalers' claims invoking international law, the court has both federal question  
13 jurisdiction and admiralty jurisdiction. 28 U.S.C. § 1331; 28 U.S.C. § 1333(1).

14 The federal statute under which the whalers' claims arise is the commonly known  
15 as the Alien Tort Statute ("ATS"). It grants district courts "original jurisdiction of any  
16 civil action by an alien for a tort only, committed in violation of the law of nations or a  
17 treaty of the United States." 28 U.S.C. § 1350. As the court will discuss in detail later,  
18 not all violations of the law of nations give rise to an ATS cause of action. Nonetheless,  
19 the ATS grants district courts subject matter to determine, at a minimum, whether a  
20 violation of the law of nations is cognizable via the ATS. *Sosa v. Alvarez-Machain*, 542  
21 U.S. 692, 714 (2004) (holding that the ATS is "jurisdictional in the sense of addressing  
22 the power of the courts to entertain cases concerned with a certain subject"); *Sarei v. Rio*  
23 *Tinto, PLC*, No. 02-56256, 2011 U.S. App. LEXIS 21515, at \*36 (9th Cir. Oct. 25, 2011)

24 <sup>7</sup> *Winter* overruled Ninth Circuit law that permitted a party to obtain a preliminary injunction  
25 merely by proving a "possibility" of irreparable harm 555 U.S. at 22. Ninth Circuit panels  
26 initially raised questions over the scope of the *Winter* ruling. See *Shepherd v. Weldon Mediation*  
27 *Servs., Inc.*, 794 F. Supp. 2d 1173, 1176-77 (W.D. Wash. 2011) (reviewing cases). It now  
28 appears settled that *Winter* did not "change the requisite showing for any individual factor [in the  
preliminary injunction analysis] other than irreparable harm." *Small v. Avanti Health Sys., LLC*,  
661 F.3d 1180, 1187 (9th Cir. 2011).

1 (holding that an “ATS case ‘arises under’ the laws of the United States and calls for the  
2 exercise of federal question jurisdiction”).

3 Admiralty jurisdiction has always extended to torts on the high seas, as long as  
4 they arise out of traditional maritime activity. *Myhran v. Johns-Manville Corp.*, 741 F.2d  
5 1119, 1120-21 (9th Cir. 1984). Because admiralty jurisdiction extends beyond the  
6 borders of the United States, it often incorporates aspects of international law. The law  
7 of the sea “is in a peculiar sense an international law, but application of its specific rules  
8 depends upon acceptance by the United States.” *Lauritzen v. Larsen*, 345 U.S. 571, 578  
9 (1953) (quoting *Farrell v. United States*, 336 U.S. 511, 517 (1949)). Sometimes the  
10 United States recognizes international maritime law by statute, but courts exercising  
11 admiralty jurisdiction also incorporate “international law that is obligatory on all states”  
12 into federal common law. *Sarei*, 2011 U.S. App. LEXIS 21515, at \*140 (McKeown, J.,  
13 concurring in part and dissenting in part). Admiralty courts defer to “international  
14 maritime law of impressive maturity and universality,” which gains the force of law from  
15 “acceptance by common consent of civilized communities of rules designed to foster  
16 amicable and workable commercial relations.” *Lauritzen*, 345 U.S. at 581-82. Like a  
17 court considering an ATS claim, a court considering an admiralty claim has subject  
18 matter jurisdiction to decide if a claimed violation of international law is cognizable in a  
19 United States court.

20 The whalers’ Washington law claims arise between “citizens of a State and  
21 citizens or subjects of a foreign state,” and thus potentially invoke the court’s diversity  
22 jurisdiction. 28 U.S.C. § 1332(a)(2). Sea Shepherd contends that the whalers have not  
23 surmounted the \$75,000 amount-in-controversy requirement for diversity jurisdiction.  
24 The whalers’ complaint states otherwise, albeit in conclusory fashion. Compl. ¶ 7.2.  
25 Nonetheless, a complaint that a plaintiff files in federal court against a diverse defendant  
26 invokes diversity jurisdiction unless it appears to a “legal certainty” that the amount in

1 controversy is less than \$75,000. *Crum v. Circus Circus Enters.*, 231 F.3d 1129, 1131  
2 (9th Cir. 2000). Where a suit seeks “declaratory or injunctive relief, it is well established  
3 that the amount in controversy is measured by the value of the object of the litigation.”  
4 *Hunt v. Wash. St. Apple Advertising Comm’n*, 432 U.S. 333, 347 (1977). The whalers’  
5 Washington law claims target Sea Shepherd’s fundraising in Washington, which serves in  
6 part to fund its Southern Ocean campaigns. Because the whalers seek relief that would  
7 keep those funds from the Southern Ocean fleet, it is far from a legal certainty that there  
8 is less than \$75,000 in controversy here. Moreover, it is far from a legal certainty that  
9 preventing Sea Shepherd from causing further damage to the whalers’ ships and whaling  
10 operations is worth \$75,000 or less.

11 Although the court has subject matter jurisdiction over each of the whalers’  
12 claims, the court considers only two of them – their claim for a violation of their right to  
13 free navigation at sea and for piracy – as a basis for the injunction they request. The  
14 whalers expressly disavow reliance on their terrorism claim as a basis for injunctive  
15 relief. Pltfs.’ Mot. (Dkt. # 13) at 14. The role of their Washington law claim is less clear,  
16 but the court finds that it cannot support the injunction they request. The Washington law  
17 claim describes a civil conspiracy in which Sea Shepherd uses its Washington  
18 headquarters to raise funds to support its Southern Ocean campaigns. Compl. ¶ 42  
19 (“[Defendants] use their [Friday Harbor] base to raise millions of dollars to fund their  
20 campaign against research whaling. Defendants conspire with each another [sic] and aid  
21 and abet each another [sic] in planning, soliciting, recruiting, funding and direction  
22 actions to interfere with plaintiffs’ activities through wrongful and dangerous means,  
23 including assault, battery, and trespass.”). To the extent these claims target Sea  
24 Shepherd’s activities in Washington, they raise no concern, or at least no concern that the  
25 parties have identified so far. To the extent these claims target Sea Shepherd’s activities  
26 on the Southern Ocean, they raise serious questions about the application of Washington

1 law to conduct on the high seas. The court is unwilling to assume that Washington law  
2 permits it to enjoin conduct in the Southern Ocean, and the whalers have made no attempt  
3 to demonstrate that it does.<sup>8</sup> Even if the whalers are likely to succeed on the merits of  
4 their Washington claim targeting Sea Shepherd's Washington activities (and the court  
5 does not suggest that they are), the injunction they seek does not target Washington  
6 conduct. The whalers' failure to address these issues is reason enough not to consider  
7 further their Washington law claim as a basis for the injunction they request.

### 8 **C. Likelihood of Success on the Merits**

9 The whalers are likely to succeed in proving the facts that the court recounted in  
10 Part II.B. They are likely to succeed on the merits if those facts amount to a cognizable  
11 violation of international law. The court now considers whether the ATS or admiralty  
12 law incorporates international law that prohibits Sea Shepherd's conduct in the Southern  
13 Ocean. The court begins with the ATS.

#### 14 **1. Legal Standards for Evaluating ATS Claims**

15 The ATS permits aliens to sue in tort to remedy violations of some (but not nearly  
16 all) norms of international law. Although the ATS was part of the Judiciary Act of 1789,  
17 scarcely anyone attempted to invoke it until the late 20th Century. *Sosa*, 542 U.S. at 712.  
18 In its enactment, "Congress intended the ATS to furnish jurisdiction for a relatively  
19 modest set of actions alleging violations of the law of nations." *Id.* at 720. The three  
20 paradigmatic violations were offenses against ambassadors, "violations of safe conduct,"<sup>9</sup>

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21  
22 <sup>8</sup> Sea Shepherd has all but ignored the whalers' Washington law claim in the motions before the  
23 court. It merely requested that the court exercise the discretion that 28 U.S.C. § 1367(c) affords  
24 it to decline supplemental jurisdiction over the Washington law claim, a request premised on its  
25 erroneous belief that the court lacks diversity jurisdiction.

26 <sup>9</sup> To avoid confusion with the whalers' free navigation claim, the court notes that "safe conduct"  
27 violations, as they were understood in the late Eighteenth Century, are not violations of the right  
28 to safe passage on the high seas. A "safe conduct" was a right a sovereign granted to an alien to  
travel freely either in the sovereign's territory or in areas where it had a military presence.  
Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Col. L. Rev. 830, 873  
(2006); see also *Taveras v. Taveraz*, 477 F.3d 767, 773 (6th Cir. 2007).

1 and acts of piracy. *Id.* In *Sosa*, the Supreme Court held that the ATS might permit suits  
2 for violations of modern norms comparable to these paradigmatic late-18th Century  
3 norms of the law of nations. *Id.* at 725 (“[W]e think courts should require any claim  
4 based on the present-day law of nations to rest on a norm of international character  
5 accepted by the civilized world and defined with a specificity comparable to the features  
6 of the 18th-century paradigms we have recognized.”). *Sosa* did not identify any  
7 international law norm that met this standard. Many lower courts had done so, however,  
8 and the *Sosa* Court explained that its “limit on judicial recognition” of international law  
9 norms via the ATS was “generally consistent with the reasoning of many of the courts  
10 and judges who faced this issue before it reached this Court.” Among those lower courts  
11 was the Ninth Circuit, which held in *Hilao v. Marcos*, that “[a]ctionable violations of  
12 international law must be of a norm that is specific, universal, and obligatory.” 25 F.3d  
13 1467, 1475 (9th Cir. 1994) (quoted in *Sosa*, 542 U.S. at 732).

14 Because the court will repeat the “specific, universal, and obligatory” mantra  
15 often, it pauses here to consider what it means. Perhaps the least self-explanatory  
16 requirement is that a norm be “obligatory.” The ATS recognizes only those international  
17 norms that nations have a *mutual* obligation to recognize. There are many norms of  
18 conduct that every nation recognizes, but not as a matter of mutual obligation. Every  
19 nation prohibits theft, for example, but this universal condemnation “does not incorporate  
20 ‘the Eighth Commandment, ‘Thou Shalt not steal’ . . . into the law of nations.” *Filartiga*  
21 *v. Pena-Irala*, 630 F.3d 876, 888 (2d Cir. 1980) (quoting *IIT v. Vencap*, 519 F.2d 1001,  
22 1015 (2d Cir. 1975)). An international norm is “obligatory” when nations enforce it as a  
23 matter of “mutual, and not merely several, concern.” *Filartiga*, 630 F.3d at 888; *see also*  
24 *Alvarez-Machain v. United States*, 331 F.3d 604, 619-20 (9th Cir. 2003) (discussing  
25 mutuality requirement and citing *Filartiga*), *rev’d on other grounds*, *Sosa*, 542 U.S. at  
26 735 n.24. An international norm is “universal” when virtually every nation recognizes it.



1 Truly universal acceptance is unnecessary, it suffices that the civilized nations of the  
2 world have come to accept the norm. *Alvarez*, 331 F.3d at 620. Finally, an international  
3 law norm must be specific. Broad prohibitions are not meaningful where there is  
4 insufficient evidence of international agreement about the specific conduct before a court.  
5 In *Alvarez*, for example, the court rejected “general prohibitions against restricting an  
6 individual’s right to freedom and movement and security of person” as a basis for a  
7 specific norm against transborder kidnapping. *Id.* at 618-19.

8 Complicating a court’s consideration of an AWS claim is the difficulty of  
9 ascertaining norms of customary international law. *See Flores v. S. Peru Copper Corp.*,  
10 414 F.3d 233, 247-48 (2d Cir. 2003) (“[T]he relevant evidence of customary international  
11 law is widely dispersed and generally unfamiliar to lawyers and judges.”). A court may  
12 consider “the work of jurists and the usage of nations,” along with “treaties, the laws of  
13 nations[,] and court opinions.” *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383-84  
14 (9th Cir. 1998); *see also Sosa*, 542 U.S. at 733-34 (describing sources of customary  
15 international law). There is no authoritative codification of customary international law,  
16 because as the phrase suggests, it derives from the “general customs and practices of  
17 nations and therefore does not stem from any single, definitive, readily-identifiable  
18 source.”). *Flores*, 414 F.3d at 248.

19 The court now briefly surveys the decisions of the federal courts of appeals to  
20 illustrate the variety of international law norms that pass muster under the ATS. The  
21 *Marcos* court acknowledged a “right to be free from official torture” that satisfied the  
22 ATS standard. 25 F.3d at 1475; *see also Filartiga*, 630 F.3d at 885 (holding official  
23 torture claim cognizable via ATS). Other violations that courts have found remediable  
24 via the ATS include forced labor, genocide, and war crimes. *See, e.g., Doe v. Unocal*  
25 *Corp.*, 395 F.3d 932 (9th Cir. 2002) (considering forced labor in Myanmar as well as  
26 torts committed in furtherance of forced labor); *Sarei*, 2011 U.S. App. LEXIS 21515, at

1 \*51 (recognizing international norms against genocide and war crimes); *Kadic v.*  
2 *Karadzic*, 70 F.3d 232 (2d Cir. 1995) (considering genocide and other war crimes in  
3 Bosnia); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009) (recognizing  
4 international norm against non-consensual medical experiments on humans). Courts  
5 have rejected ATS claims based on intranational pollution, theft, transborder kidnapping,  
6 a blockade of food and medicine, and racial discrimination. *See IIT*, 519 F.2d at 1015  
7 (holding theft beyond scope of ATS despite all nations' prohibitions on theft); *Flores*,  
8 414 F.3d at 255-56 (declining to recognize broader "right to life" or "right to health" as  
9 well as specific norm against intranational pollution); *Sarei*, 2011 U.S. App. LEXIS  
10 21515, at \*78, 81 (rejecting ATS claims based on blockade of food and medical supplies  
11 and racial discrimination).

12       There are many disagreements among the circuit courts as to the scope of the  
13 ATS. For example, while courts generally agree on an ATS cause of action for official  
14 torture, they disagree as to whether torture by non-state actors is actionable. *E.g.*, *Shafi v.*  
15 *Palestinian Auth.*, 642 F.3d 1088, 1096 (D.C. Cir. 2011) (finding claim of torture by  
16 Palestinian Authority beyond scope of ATS). The Ninth Circuit held that an international  
17 norm against arbitrary arrest and detention satisfied the ATS standard. *Alvarez*, 331 F.3d  
18 at 621. It was that aspect of the *Alvarez* decision that the Supreme Court reversed in  
19 *Sosa*, holding that the recognition of a prohibition on arbitrary arrest would "support a  
20 cause of action for any arrest, anywhere in the world, unauthorized by the law of the  
21 jurisdiction in which it took place . . . ." *Sosa*, 542 U.S. at 736. The Court declined to  
22 decide whether the ATS recognizes any international norm against unlawful detention, it  
23 merely held that a "single illegal detention of less than a day . . . violates no norm of  
24 customary international law so well defined as to support the creation of a federal  
25 remedy." *Id.* at 738. As Justice Scalia observed in his dissent, the Ninth Circuit reached  
26 the holdings that the *Sosa* majority rejected by applying the same "verbal formula" that

1 the majority endorsed. *Id.* at 748. The circuit courts disagree not only as to whether  
2 corporations can be held liable for violations of international law, but as to how to answer  
3 the question. Compare *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir.  
4 2010) (finding no corporate liability after holding that applicable customary international  
5 law imposes only individual liability), with *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 51  
6 (D.C. Cir. 2011) (recognizing corporate liability for ATS violation as a matter of federal  
7 common law), and with *Sarei*, 2011 U.S. App. LEXIS 21515, at \*55, \*68 (recognizing  
8 corporate ATS liability for war crimes and genocide). The Supreme Court will consider  
9 *Kiobel* this year. 132 S. Ct. 472 (Oct. 17, 2011) (granting certiorari).<sup>10</sup>

10 No court has ever considered an ATS claim based on international norms against  
11 piracy or interference with marine navigation. The whalers ask this court to be the first.

## 12 **2. Do the Whalers State an ATS Claim?**

13 The whalers rely primarily on four international treaties as evidence of  
14 international norms against piracy and interference with maritime navigation: the 1982  
15 United Nations Convention on the Law of the Sea (“UNCLOS”), Dec. 10, 1982, 1833  
16 U.N.T.S. 397; the 1958 Convention on the High Seas (“High Seas Convention”), Apr. 29,  
17 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82; the 1988 Convention for the Suppression of  
18 Unlawful Acts Against the Safety of Maritime Navigation (“SUA”), Mar. 10, 1988, 1678  
19 U.N.T.S. 201; and the International Maritime Organization’s International Regulations  
20 for Preventing Collisions at Sea (commonly known as the “COLREGS”), Oct. 20, 1972,  
21 28 U.S.T. 3459, 1050 U.N.T.S. 16.<sup>11</sup> All of these agreements have attained broad

22 <sup>10</sup> Sea Shepherd requested that the court stay this case pending the Supreme Court’s decision in  
23 *Kiobel*. No stay is necessary in advance of the court’s decision today. If Sea Shepherd wishes to  
24 renew its request for a stay, it must at a minimum acknowledge that *Kiobel* will have no effect on  
the whalers’ claims against Mr. Watson.

25 <sup>11</sup> The ATS provides jurisdiction over a tort “in violation of the law of nations *or* a treaty of the  
26 United States.” 28 U.S.C. § 1350 (emphasis added). The whalers have relied on the treaties they  
27 cite solely as evidence of the law of nations, not as sources for a cause of action arising directly  
from any individual treaty. The court accordingly does not consider whether any of the treaties  
provide an individual right to sue.

1 international consensus. More than 150 nations have agreed to UNCLOS, SUA, and the  
2 COLREGS; more than 60 have agreed to the High Seas Convention.<sup>12</sup> The United  
3 States has ratified each of these agreements, with the exception of UNCLOS. The United  
4 States has accepted UNCLOS except for its provisions on deep seabed mining. *Sarei*,  
5 2011 U.S. App. LEXIS 21515, at \*132-33 n.4 (McKeown, J., concurring) (noting that the  
6 “core provisions [of UNCLOS] are generally accepted as customary international law”);  
7 *United States v. Hasan*, 747 F. Supp. 2d 599, 634 (E.D. Va. 2010).

8 Each of these treaties is evidence of the mutual and nearly universal interest of the  
9 nations of the world in regulating conduct on the open seas. This is no surprise, as  
10 maritime traffic is perhaps the prototypical arena in which nations have universal, mutual  
11 concern. Any nation that depends on maritime trade, which is to say virtually every  
12 nation, has a selfish interest in ensuring that the vessels carrying its citizens or their cargo  
13 can do so expeditiously. That selfish interest becomes a matter of mutual international  
14 concern because only where every nation commits to the enforcement of those norms can  
15 any nation ensure the protection of its individual interests.

16 That there are some universal and obligatory norms of international conduct that  
17 govern navigation on the high seas, however, is no proof of a specific norm against Sea  
18 Shepherd’s conduct. The court now considers whether the whalers have demonstrated  
19 sufficiently specific norms.<sup>13</sup>

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20 <sup>12</sup> The court has relied on the United Nations for information on the ratification of the High Seas  
21 Convention and UNCLOS and on the International Maritime Organization for information on the  
22 ratification of SUA and UNCLOS. United Nations Treaty Collection ([http://treaties.un.org/  
pages/ParticipationStatus.aspx](http://treaties.un.org/pages/ParticipationStatus.aspx)); Status of Conventions ([http://www.imo.org/About/  
Conventions/StatusOfConventions/Pages/Default.aspx](http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx)).

23 <sup>13</sup> Although a court’s determination of foreign law is a legal question, Fed. R. Civ. P. 44.1, most  
24 courts have placed the burden of demonstrating the content of foreign law on the party seeking to  
25 rely on it. *E.g.*, *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1006 (5th Cir.  
26 1990); *Bel-Ray Co. v. Chemrite Ltd.*, 181 F.3d 435, 440 (3d Cir. 1999); *but see Tobar v. United*  
27 *States*, 639 F.3d 1191, (9th Cir. 2011) (noting uncertainty as to “burden of establishing the  
28 content of foreign law”). At least one district court within the Ninth Circuit has held that a  
plaintiff invoking the ATS bears the burden to demonstrate the content of international law. *Doe*  
*v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1143 (C.D. Cal. 2010).

1                   **a.     ATS Piracy Claim**

2                   The whalers contend that Sea Shepherd’s conduct violates international norms  
3 prohibiting piracy. *Sosa* suggests that, at least in the late 18th Century, there was an  
4 international piracy norm that the ATS would have recognized. 542 U.S. at 720 (noting  
5 that “individual actions arising out of prize captures and piracy may well have also been  
6 contemplated”). The question before the court is what “piracy” means today as a matter  
7 of specific, universal, and obligatory international law. Sea Shepherd argues for a narrow  
8 view, claiming that “piracy” is no more or less than robbery at sea. The whalers argue  
9 for a broader definition that includes other acts of violence against ships on the high seas.  
10 No appellate court has considered the issue. Even among judges in the same district  
11 court, there is substantial disagreement. *United States v. Said*, 757 F. Supp. 2d 554 563-  
12 566 (E.D. Va. 2010) (finding no modern international consensus on the definition of  
13 piracy); *Hasan*, 747 F. Supp. 2d at 640 (holding that “the definition of general piracy  
14 under customary international law today is reflected in UNCLOS”).

15                  Both *Hasan* and *Said* concerned criminal prosecutions invoking 18 U.S.C. § 1651,  
16 which makes “piracy as defined by the law of nations” a crime with a mandatory life  
17 sentence. The putative pirates in each case were akin to the eye-patched, sword-wielding  
18 marauders familiar from novels and movies depicting a bygone era of ocean travel. The  
19 defendants in *Said* approached a United States naval vessel in the Gulf of Aden and shot  
20 at it. 757 F. Supp. 2d at 557. The defendants in *Hasan*, “in search of a merchant ship to  
21 attack and plunder,” opened fire on a United States naval vessel in the Indian Ocean,  
22 mistakenly believing it was a merchant ship. 747 F. Supp. 2d at 601. The court in *Said*  
23 defined “piracy” as “sea robbery,” consistent with its interpretation of the law of nations  
24 when Congress enacted § 1651 in 1819. 757 F. Supp. 2d at 562. The court nonetheless  
25 considered the modern international definition of piracy, finding it “[u]nsettled.” *Id.* at  
26 563. In *Hasan*, by contrast, the court found that § 1651 embraced an evolving view of

1 “piracy as defined by the law of nations.” 747 F. Supp. 2d at 623. It found the modern  
2 view to be consistent with UNCLOS, which defines piracy as “any illegal acts of  
3 violence or detention . . . committed for private ends” against a ship on the high seas or  
4 persons or property aboard it. UNCLOS art. 101, 1833 U.N.T.S. 397. Both *Hasan* and  
5 *Said* provide an excellent overview of the evolving history of piracy as a matter of  
6 international law. Whether by design or coincidence, Sea Shepherd and the whalers offer  
7 little authority or argument that these two courts did not dissect.

8 The court assumes, but does not decide, that the whalers correctly contend that  
9 UNCLOS reflects specific, universal and obligatory international norms prohibiting  
10 piracy.<sup>14</sup> Reduced to their essence, UNCLOS’s anti-piracy provisions target “acts of  
11 violence . . . committed for private ends by the crew or passengers of a private ship . . .  
12 directed against a ship . . . outside the jurisdiction of any State.” UNCLOS, Art. 101.

13 The dual UNCLOS requirements that a pirate commit “violence” to serve “private  
14 ends” is fatal to the whalers’ ATS claim. The whalers cite no authority that defines  
15 “private ends.” In the ordinary case, pirates seek financial enrichment, the prototypical  
16 private end. Sea Shepherd is uninterested in financial gain; it seeks to save the lives of  
17 whales in the Southern Ocean.<sup>15</sup> One might characterize that goal as a “private end,”  
18 depending on one’s point of view. The whalers present no authority, and the court is  
19 aware of none, that suggests an international consensus on this issue. Absent an  
20 international consensus that preventing the slaughter of marine life is a “private end,” the  
21 court cannot say that there is a specific, obligatory, and universal international norm

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22 <sup>14</sup> The whalers also rely on the High Seas Convention, which defines piracy almost exactly as  
23 UNCLOS does and similarly requires the cooperation of signatory nations in repressing piracy.  
24 High Seas Convention arts. 14, 15. Given the similarity between the two conventions with  
respect to piracy, the court declines to discuss them separately.

25 <sup>15</sup> Sea Shepherd profits from its Southern Ocean campaigns both because Animal Planet pays it  
26 for the privilege of filming “Whale Wars” and because its fundraising efforts no doubt succeed  
27 in part based on the success of its anti-whaling efforts. Nonetheless, financial gain is not the  
28 purpose of its conduct, it is merely a byproduct. Sea Shepherd would cease its “piracy”  
immediately if the Plaintiffs stopped killing whales.

1 against violence in the pursuit of the protection of marine life. Even if there were such a  
2 norm, it would be incumbent upon the whalers to show that Sea Shepherd's tactics are  
3 "violence" within the meaning of customary international law. Sea Shepherd does not  
4 target people, and although its tactics sometimes target the whalers' ships, it is not  
5 apparent that the nations of the world would agree that tactics that resemble malicious  
6 mischief amount to piratical "violence."

7 **b. ATS Safe Navigation Claim**

8 The court transitions from the whalers' piracy claim to their safe navigation claim  
9 by examining SUA, a source of international law that bridges the two claims. SUA  
10 makes no explicit mention of piracy. It does, however, prohibit a series of "unlawful[]  
11 and intentional[]" acts that "endanger the safe navigation of [a] ship." SUA, Art. 3(1).  
12 SUA's prohibitions include "act[s] of violence against a person on board a ship,"  
13 "caus[ing] damage to a ship or to its cargo," and "plac[ing] . . . on a ship . . . a device or  
14 substance which is likely to . . . cause damage to that ship." SUA, Art. 3(1)(b), 3(1)(c),  
15 3(1)(d). SUA mandates that all signatories punish these offenses with "appropriate  
16 penalties which take into account the[ir] grave nature." SUA, Art. 5. The United States,  
17 which ratified SUA in 1994, has complied with SUA's mandate by enacting 18 U.S.C.  
18 § 2280, which makes each of the offenses in SUA's Article 3 a crime punishable by up to  
19 20 years in prison. At least with respect to SUA's more serious offenses, courts have  
20 recognized the treaty as codifying prohibitions on "acts of piracy" that are "universally  
21 condemned." *United States v. Shi*, 525 F.3d 709, 723 (9th Cir. 2008) (citing 18 U.S.C.  
22 § 2280(a)(1)(A) and (B), which prohibit taking control of a ship by force or threat and  
23 acts of violence against people that endanger safe navigation).

24 The court concludes that Article 3 of SUA sets forth specific, universal, and  
25 obligatory norms of international law, and is thus cognizable in an ATS suit. Sea  
26

1 Shepherd offers scant argument to the contrary. The whalers are not, however, likely to  
2 succeed in proving that Sea Shepherd has violated SUA.

3 On this record, only two of Sea Shepherd's Southern Ocean tactics potentially  
4 violate SUA. The use of ropes to foul the propellers of the whaling ships is an act that at  
5 least arguably causes damage to a ship and is likely to endanger its safe navigation.<sup>16</sup>  
6 Although the record reveals several instances in which Sea Shepherd drags lines in front  
7 of a whaling vessel in an apparent attempt to foul its propeller, there is evidence of only  
8 one successful attempt. That evidence reveals a propeller entangled in rope and a rudder  
9 with apparent damage. That evidence does not, however, reveal any impediment to the  
10 "safe navigation" of the ship. There is no evidence that the ship was disabled, even  
11 temporarily, much less that it was disabled in a way that put its crew at risk. The  
12 evidence before the court does not permit the conclusion that Sea Shepherd's propeller-  
13 fouling tactics are "likely to endanger the safe navigation of a ship." SUA, Art. 3(1)(c).  
14 The other tactic of concern is Sea Shepherd's maneuvering of its vessels near the whaling  
15 vessels. These maneuvers create a risk of collision and, in at least a few cases, have  
16 resulted in collisions. As to Sea Shepherd's smaller vessels, including its trimarans, these  
17 collisions are no danger to the safe navigation of the whaling vessels. These vessels are  
18 simply too small to endanger the navigation of the whaling ships. The larger vessels,  
19 however, at least have the potential to cause damage when they collide with the whaling  
20 ships. The evidence suggests that Sea Shepherd is aware of this risk, because there is  
21 only one documented incident where one of Sea Shepherd's large ships collides with a  
22 whaling ship. That collision, moreover, was from the side. While that collision makes

23 \_\_\_\_\_  
24 <sup>16</sup> No party points to any authority interpreting the language of SUA's Article 3. With one  
25 exception not relevant here, Article 3's prohibitions apply to acts that are "likely to endanger the  
26 safe navigation of [the targeted] ship." The whalers appear to interpret "safe navigation"  
27 broadly, suggesting that any interference with their preferred navigational path endangers the  
28 "safe navigation" of their vessels. Reading SUA as a whole, however, the court concludes that  
endangering "safe navigation" is interfering with navigation in a way that puts human safety at  
risk.



1 for dramatic video, there is no evidence of damage to the whaling ship, nor is there  
2 evidence that the collision endangered the safe navigation of the whaling ship.

3 Most of Sea Shepherd's Southern Ocean tactics are beyond the scope of SUA.  
4 Throwing smoke bombs and glass bottles filled with butyric acid or paint are acts akin to  
5 malicious mischief. As was the case with the whalers' claims based on UNCLOS, there  
6 is no evidence of an international consensus that such acts are "violence" within the  
7 meaning of SUA. Even if Sea Shepherd engages in "violence," it does not target people,  
8 and its acts are not likely to endanger the safe navigation of any whaling ship. SUA, Art.  
9 3(1)(b). The same is true of Sea Shepherd's use of lasers and flares. While these tactics  
10 cause minor damage, and create a small degree of risk to human safety, they do not  
11 violate SUA because, at least on this record, the court cannot conclude that they are likely  
12 to endanger the safe navigation of any whaling ship.

13 The whalers point to three other sources of law that they contend support a  
14 specific, universal, and obligatory international norm protecting the right to safe  
15 navigation. One is the High Seas Convention, which lists "[f]reedom of navigation" as  
16 one of several elements of "[f]reedom of the high seas." High Seas Convention, art. 2.  
17 The High Seas convention imposes several relatively specific rules that protect  
18 navigation at sea. None of them (with the exception of the anti-piracy provisions the  
19 court has already addressed) apply to Sea Shepherd's tactics targeted at the whalers. The  
20 High Seas Convention falls well short of establishing a specific, obligatory, and universal  
21 norm of maritime navigation that is applicable to the conduct at issue in this case. The  
22 same is true of the whalers' citation to UNCLOS as a source of a right to free maritime  
23 navigation. UNCLOS announces a right to "freedom of navigation" on the high seas,  
24 UNCLOS, Art. 87, but the whalers point to no more specific aspect of UNCLOS that  
25 applies to Sea Shepherd's conduct here.

1           The COLREGS, by contrast, are a detailed statement of the “rules of the road” for  
2 maritime traffic. Hundreds of nations have agreed to abide by the COLREGS, including  
3 the United States, Japan, Australia, and the Netherlands. *Crowley Mar. Servs. v.*  
4 *Maritrans*, 530 F.3d 1169, 1172 (9th Cir. 2008) (“The COLREGS provide a ‘universal  
5 system of sea traffic rules’ applicable to vessels in international waters.”) (citation  
6 omitted). The COLREGS include a series of navigation rules intended to prevent  
7 collisions. COLREGS R. 4-19. One rule mandates actions to avoid collisions.  
8 COLREGS R. 8. Admiralty courts in the United States use the COLREGS to determine  
9 fault in maritime collision cases. *Crowley*, 530 F.3d at 1173-77. The court concludes  
10 that the COLREGS state specific, obligatory, and universal norms of maritime  
11 navigation. It is likely that Sea Shepherd violates one or more of the COLREGS when it  
12 maneuvers its ships and boats near the whaling ships.

13           **c.       Sea Shepherd’s International Law Defense**

14           The court rejects Sea Shepherd’s claim that the World Charter for Nature (“Nature  
15 Charter”) authorizes its tactics in the Southern Ocean or provides any defense in this  
16 case. Among other things, the Nature Charter declares that nations, “public authorities,  
17 international organizations, individuals, groups and corporations shall . . . [s]afeguard and  
18 conserve nature in areas beyond national jurisdiction.” Nature Charter, G.A. Res. 37/7,  
19 U.N. Doc. A/RES/37/7 ¶ 21 (Oct. 28, 1982). Sea Shepherd claims that this provision  
20 authorizes it to act as a “private coast guard” in the Southern Ocean. Sea Shepherd is  
21 mistaken. To begin, the Nature Charter authorizes nothing. It is not a treaty or a binding  
22 commitment by any nation, it is a resolution of the United Nations General Assembly.  
23 General Assembly resolutions can serve as evidence of customary international law, but  
24 they bind no one. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 720 (9th  
25 Cir. 1992); *see also Flores*, 414 F.3d at 259-60 (explaining that General Assembly  
26 resolutions “do not have the power to bind member States”). Putting that aside, the claim

1 that a generic authorization to safeguard nature is an implicit authorization to use Sea  
2 Shepherd's approach finds no support in any source of law. Whatever solace Sea  
3 Shepherd takes from it, the Nature Charter provides no legal authorization for its  
4 Southern Ocean tactics and provides it no defense in this case.

### 5 **3. Admiralty Claims**

6 The court next considers whether the whalers' prospects for success look any  
7 different through the lens of admiralty law. As the court has noted, admiralty law  
8 incorporates certain universal rules of international law. With the exception of the  
9 COLREGS, the whalers point to no admiralty court that has recognized any of the other  
10 international accords on which they rely. Indeed, the whalers' invocation of admiralty  
11 jurisdiction has so far been largely pro forma. Focusing their attention on the ATS, the  
12 whalers do not suggest that a court sitting in admiralty would apply any different analysis  
13 to the scope of their causes of action.

14 The whalers also ignore the choice-of-law issues that their admiralty law claims  
15 raise. To the extent that the whalers rely on universally-accepted international law, the  
16 choice of applicable law is unimportant. But to the extent they seek particular remedies  
17 for those international law violations, or allege violations that are not based on  
18 international law, choice of law is critical. Even where nations agree on substantive legal  
19 norms, they are free to define the subsidiary rules that define a cause of action and the  
20 remedies for it. It is possible, to give one hypothetical example, that the courts of the  
21 United States would permit an injunction to issue to prevent a maritime tort on the high  
22 seas, whereas the courts of Australia would not.

23 United States law would not apply to the whalers' causes of action based on Sea  
24 Shepherd's conduct in the Southern Ocean. A court considering a "maritime tort claim"  
25 must consider several factors that influence its choice of law. *Lauritzen*, 345 U.S. 571.  
26 The so-called "*Lauritzen* factors" are:

1 (1) [the] place of the wrongful act; (2) the flag of the vessel; (3) allegiance  
2 or domicile of the injured party; (4) allegiance of the shipowner; (5) place  
of the contract; (6) inaccessibility of the foreign forum; and (7) law of the  
forum.

3 *Pereira v. Utah Transport, Inc.*, 764 F.2d 686, 689 (9th Cir. 1985). The Supreme Court  
4 has also directed courts to consider the shipowner's base of operations. *Hellenic Lines,*  
5 *Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970). These factors guide choice-of-law  
6 determinations in Jones Act claims as well as claims invoking maritime common law.  
7 *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 382 (1959). These factors are not  
8 exhaustive, and a court should apply them flexibly in consideration of the circumstances  
9 that the case before it presents. *Pereira*, 764 F.2d at 689; *Gund v. Philbrook's Boatyard*,  
10 374 F. Supp. 2d 909, 911 (W.D. Wash. 2005) (engaging in "flexible application" of  
11 *Lauritzen* factors). Rather than dwell on the *Lauritzen* factors in this case; it suffices to  
12 note that they point away from the choice of the law of the United States. Other than  
13 financing and fundraising conduct that is not at issue in this motion, none of the wrongful  
14 acts alleged occurred in the United States. None of the vessels involved carry a United  
15 States flag. *See Lauritzen*, 345 U.S. at 584 (giving "cardinal importance" to the flag of  
16 the vessels involved in a dispute); *Pereira*, 764 F.2d at 689 (following *Lauritzen* and  
17 giving "great weight" to the law of the flag). The parties claiming injury are citizens of  
18 Japan. There is no suggestion that the courts of Japan, Australia, or the Netherlands are  
19 inaccessible to the parties.<sup>17</sup> There is some evidence (in the form of depreciation claimed  
20 on Sea Shepherd's United States tax returns) that Sea Shepherd's organization in the  
21 United States owns one or more vessels in the Southern Ocean fleet, but the fleet bases its  
22 operations from Australia. On this record, United States law would not apply to the

23  
24  
25 <sup>17</sup> At oral argument, counsel for the whalers claimed that they had not sued Sea Shepherd in  
26 Japan because they could not assert personal jurisdiction over them. The whalers made no effort  
27 to substantiate this assertion with evidence of Japanese law. Courts generally assume "universal  
28 jurisdiction" over violations of international law on the high seas. *E.g., Shi*, 525 F.3d at 723  
(discussing universal jurisdiction and noting that "federal courts have historically accepted the  
notion that a pirate may be tried by any state").

1 whalers' admiralty claims. Whether that makes a material difference in this case is an  
2 issue that no party addresses.

3 In light of these considerations, the court concludes that the whalers' causes of  
4 action based in admiralty are not likely to succeed. Even if the whalers were to address  
5 the choice-of-law issues and show that applicable law recognizes both the substantive  
6 norms they rely on and the remedies they seek, they would be no more likely to succeed  
7 on their admiralty claims than on their ATS claims.

#### 8 **4. Other Impediments to Success on the Merits**

9 Sea Shepherd incorporates the arguments from its motion to dismiss into its  
10 opposition to the whalers' injunction motion. Many of those arguments target the  
11 whalers' individual claims, and the court has touched on some of those arguments in its  
12 preceding analysis. Some of Sea Shepherd's arguments, however, are not claim-specific.  
13 One example is its challenge to subject matter jurisdiction, which the court has already  
14 rejected. Sea Shepherd also contends that the court must dismiss this action on forum  
15 non conveniens grounds, that neither the ATS nor admiralty law authorize a court to issue  
16 an injunction, that this dispute presents a non-justiciable political question, that  
17 international comity demands that the court not adjudicate this dispute, and that the First  
18 Amendment privileges its conduct in the Southern Ocean. Because Sea Shepherd's  
19 success in asserting these defenses would prevent the court from issuing an injunction,  
20 the court considers them now.

##### 21 **a. Forum Non Conveniens**

22 The application of the forum non conveniens doctrine, which permits a court to  
23 dismiss a case when the defendant demonstrates that another nation's tribunals are  
24 manifestly more convenient than the courts of the United States, is committed to the  
25 court's discretion. *Monegro v. Rosa*, 211 F.3d 509, 511 (9th Cir. 2000). The party  
26 seeking dismissal must make two showings: first that there exists an "adequate

1 alternative forum” for the dispute, and second that “the balance of private and public  
2 interest factors favors dismissal.” *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*,  
3 583 F.3d 656, 664 (9th Cir. 2009).

4 Sea Shepherd falls well short of carrying its forum non conveniens burden. Sea  
5 Shepherd is an American corporation being sued in its home forum.<sup>18</sup> That fact alone  
6 weighs strongly against its request for dismissal. *Carijano v. Occidental Petroleum*  
7 *Corp.*, 643 F.3d 1216, 1229 (9th Cir. 2011). There is nothing before the court sufficient  
8 to overcome the presumption that a defendant’s home forum is a convenient forum. The  
9 crews of the vessels involved in this dispute are made up primarily of citizens of the  
10 United States, Japan, and Australia. No forum is substantially better situated than another  
11 to compel the attendance of witnesses. The physical evidence is no more difficult to  
12 present in the United States than it is in another country. In short, Sea Shepherd has  
13 wholly failed to demonstrate that the trial of this action (including pretrial procedures)  
14 would be any more convenient in any other forum. *Carijano*, 643 F.3d at 1229  
15 (summarizing factors relating to the private interests of the litigants). Given the whalers’  
16 reliance on international law, there is no reason to conclude that any nation’s courts are  
17 more familiar with the applicable law. Sea Shepherd has made no effort to show that any  
18 other nation’s courts could resolve this action more quickly, at a lower cost, or with less  
19 burden on the court who hears the dispute. *Id.* at 1232 (summarizing public interest  
20 factors). Sea Shepherd has not met its burden on its forum non conveniens defense, and  
21 the court declines to dismiss this action on that basis.

22 **b. The ATS Permits Preliminary Injunctions.**

23 Sea Shepherd cites *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund,*  
24 *Inc.*, 527 U.S. 308 (1999) for the proposition that a court cannot grant injunctive relief in

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25  
26 <sup>18</sup> Mr. Watson, the only other Defendant, has offered no evidence about his citizenship or  
27 domicile. He does not, however, offer the court any reason to treat the United States, the country  
28 in which he founded and incorporated Sea Shepherd, as something other than his home forum.

1 an ATS case. Sea Shepherd is mistaken. In *Grupo Mexicano*, the Court considered a  
2 preliminary injunction preventing the defendant in a breach of contract case from  
3 transferring unencumbered assets that the plaintiff believed were essential to satisfy the  
4 judgment it hoped to obtain. 527 U.S. at 312-13. The Court traced the grant of the  
5 federal courts' equitable powers to the Judiciary Act of 1789, which invested federal  
6 courts with only the equitable power that the High Court of Chancery in England  
7 exercised at the time. *Id.* at 318. The Court held that a preliminary injunction freezing  
8 unencumbered assets for a later judgment was beyond those equitable powers. *Id.* at 322.  
9 It also held that federal courts have no power to "create remedies previously unknown to  
10 equity jurisprudence." *Id.* at 322.

11 If *Grupo Mexicano* prohibits the injunctive relief that the whalers request, Sea  
12 Shepherd does not explain why. It argues that *Grupo Mexicano* stands for the  
13 proposition that "preliminary injunctive relief was not accorded to courts of equity in  
14 1789." Defs.' Mot. (Dkt. # 29) at 14. This is wrong for at least two reasons. First,  
15 *Grupo Mexicano* made no ruling about the availability of preliminary injunctions in  
16 1789, it merely held that no "all-purpose prejudgment injunction" was available. 527  
17 U.S. at 331. Second, preliminary injunctions were available in England's High Chancery  
18 Court in 1789. Anthony DiSarro, *Freeze Frame: The Supreme Court's Reaffirmation of*  
19 *the Substantive Principles of Preliminary Injunctions*, 47 *Gonz. L. Rev.* 51, 62-64 (2011).

20 A court adjudicating an ATS claim may issue an injunction, subject to the  
21 traditional limits on its equitable discretion. The ATS itself says nothing about the  
22 availability of injunctive relief, and no court has squarely addressed the issue. To be  
23 sure, courts adjudicating ATS claims have issued injunctions. *Hilao*, 25 F.3d at 1480  
24 (affirming preliminary injunction freezing assets). Courts in ATS cases have also  
25 considered injunctions without suggesting that they are categorically unavailable.  
26 *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 124 (2d  
27

1 Cir. 2008) (affirming denial of injunction requiring abatement of chemical nuisance in  
2 Vietnam). Federal courts presumptively have the power to enter injunctions. *Califano v.*  
3 *Yamasaki*, 442 U.S. 682, 705 (1979) (“Absent the clearest command to the contrary from  
4 Congress, federal courts retain their equitable power to issue injunctions in suits over  
5 which they have jurisdiction.”). No one suggests that Congress has limited the power of  
6 courts to exercise their equitable powers in ATS cases.

7 Because the court can grant an injunction in support of an ATS claim, the court  
8 need need not consider whether the whalers’ admiralty claims provide an independent  
9 basis for injunctive relief.<sup>19</sup> As the court has already observed, even if the whalers have  
10 viable admiralty claims, they have not shown them to be any broader than their ATS  
11 claims.

12 While there is no categorical bar to an ATS-backed injunction, it is an open  
13 question whether the availability of an injunction or any other remedy in an ATS case  
14 depends on a choice-of-law analysis. In a diversity case, for example, a party cannot  
15 obtain an injunction in federal court if “state law clearly rejects the availability of that  
16 remedy.” *Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 647 (9th Cir. 1988). In an ATS  
17 case, the obligation to apply only universal norms of international law means that a court  
18

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19 <sup>19</sup> There was a time when courts, including the Supreme Court, questioned the power of  
20 admiralty courts to grant injunctive relief. *Schoenamsgruber v. Hamburg Am. Line*, 294 U.S.  
21 454, 457-58, (1935) (“While courts of admiralty have capacity to apply equitable principles . . .  
22 except in limitation of liability proceedings, they do not issue injunctions.”) (footnotes omitted);  
23 *Marine Cooks & Stewards v. Panama S.S. Co.*, 265 F.2d 780, 785 (9th Cir. 1959) (“It has been  
24 specifically held that admiralty can not give injunctive relief.”). More recently, particularly after  
25 the 1966 merger of federal admiralty, civil, and equity courts, circuit courts have held otherwise.  
26 *Farrell Lines v. Ceres Terminals*, 161 F.3d 115, 117 (2d Cir. 1998) (“[W]e now align ourselves  
27 with those courts that recognize the authority of an admiralty court to issue injunctions.”) (citing  
28 authority from First and Fifth Circuits); *Lewis v. S.S. Baune*, 534 F.2d 1115, 1121 (5th Cir. 1976)  
29 (“Whatever may have been the extent of the equitable power of an admiralty court to issue  
30 injunctions prior to the 1966 unification of admiralty and other civil actions, there should be little  
31 doubt today that courts of admiralty, in proper cases, may invoke the equitable tool of  
32 injunction.”). The Ninth Circuit has not considered the issue since it decided *Marine Cooks &*  
33 *Stewards* in 1959. Because the whalers’ ATS claim gives the court an independent basis to  
34 exercise its injunctive power, the court need not decide whether the injunction prohibition from  
35 *Marine Cooks & Stewards* remains good law today.



1 need not consider choice of law when determining applicable norms of conduct. But  
2 international law does not provide remedies. *Doe*, 654 F.3d at 41-42. For example, when  
3 the *Alvarez* court considered what damages were available to a plaintiff subjected to  
4 arbitrary detention in Mexico violation of international law, it had to decide whether the  
5 law of Mexico or the law of the United States applied. 331 F.3d at 632-35. As this court  
6 has already noted, a choice-of-law analysis points to the applicability of another nation's  
7 law to Sea Shepherd's conduct in the Southern Ocean. The parties scarcely address this  
8 issue, and in light of the court's decision today, the court need not resolve it. It suffices  
9 to observe that choice-of-law concerns may preclude the use of an injunctive remedy in  
10 this case.

11         ATS claims that target extraterritorial conduct present additional obstacles to the  
12 grant of injunctive relief. In a case like this one, where the injunction would apply  
13 extraterritorially, an injunction may be "impracticable." *In re Agent Orange Prod.*  
14 *Liability Litig.*, 373 F. Supp. 2d 7, 46 (E.D.N.Y. 2005) (declining to impose injunction  
15 requiring chemical cleanup in Vietnam), *aff'd by Vietnam Ass'n for Victims of Agent*  
16 *Orange v. Dow Chem. Co.*, 517 F.3d 104, 124 (2d Cir. 2008). Extraterritorial injunctions  
17 also raise concerns of infringement of sovereignty and enforceability. *In re Agent*  
18 *Orange*, 373 F. Supp. 2d at 45.

19         The court does not, however, find that extraterritoriality concerns are a sufficient  
20 reason to withhold injunctive relief in this case. Everyone concedes that were the court to  
21 grant the injunction the whalers seek, the court cannot directly enforce it. The court has  
22 no armada to dispatch to the Southern Ocean. But even when a court issues an injunction  
23 against conduct within its traditional geographical jurisdiction, it rarely if ever enforces  
24 the injunction directly. Instead, courts enforce their equitable decrees through contempt  
25 proceedings. In this case, both Mr. Watson and Sea Shepherd have consented to this  
26 court's jurisdiction over them. The whalers acknowledge that contempt proceedings

1 would be their sole remedy if Defendants were to violate an injunction this court  
2 imposed. The whalers also propose an injunction that would be simple to monitor. Even  
3 from thousands of miles away, it would not be difficult to provide the court with evidence  
4 that Sea Shepherd came within 800 meters of a whaling vessel or engaged in specific  
5 prohibited tactics. Moreover, while several nations have an interest in this dispute, the  
6 injunction would (with one important caveat) operate on the high seas. The court could  
7 thus craft the injunction so that it does not impinge on any sovereign rights. To do so,  
8 however, the court must respect Australia's claim of sovereignty in the Australian Whale  
9 Sanctuary, a claim that the court will consider when it discusses the international comity  
10 doctrine.

11 **c. The Non-Justiciable Political Question Doctrine**

12 Sea Shepherd also asks the court to dismiss this case because it presents a non-  
13 justiciable political question. The political question doctrine received its modern  
14 formulation in *Baker v. Carr*:

15 Prominent on the surface of any case held to involve a political question is  
16 found [1] a textually demonstrable constitutional commitment of the issue  
17 to a coordinate political department; or [2] a lack of judicially discoverable  
18 and manageable standards for resolving it; or [3] the impossibility of  
19 deciding without an initial policy determination of a kind clearly for  
20 nonjudicial discretion; or [4] the impossibility of a court's undertaking  
independent resolution without expressing lack of the respect due  
coordinate branches of government; or [5] an unusual need for  
unquestioning adherence to a political decision already made; or [6] the  
potentiality of embarrassment from multifarious pronouncements by  
various departments on one question.

21 *Arakaki v. Lingle*, 477 F.3d 1048, 1066-67 (9th Cir. 2007) (quoting *Baker v. Carr*, 369  
22 U.S. 186, 217 (1962)) (alterations in *Arakaki*). If a non-justiciable political question is  
23 "inextricable from the case," the court must dismiss it. *Sarei*, 2011 U.S. App. LEXIS  
24 21515, at \*40.

25 The court will not dismiss this case on political question grounds. The court's  
26 primary task in this case is to determine whether Sea Shepherd's Southern Ocean tactics

1 are unlawful. To do so, it must interpret international law, an enterprise that Congress  
2 has committed to the courts via the ATS. The Supreme Court has already held that a case  
3 touching on international whaling controversies is justiciable. *Japan Whaling Ass'n v.*  
4 *Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). In the abstract, it is possible that  
5 resolving controversial questions of international law could implicate the political  
6 question doctrine. The judicial standards that apply in an ATS case ameliorate that  
7 possibility, however, because a court can only apply international law norms that are  
8 specific, universal, and obligatory. But for the whalers' request for an injunction, this  
9 case would present purely judicial questions. What is the law? Did Sea Shepherd violate  
10 it? If so, what remedies are available? Because the court can resolve this case merely by  
11 answering plainly judicial questions, no non-justiciable political question mandates  
12 dismissal.

13 Although this *case* does not raise a political question, the injunctive *remedy* that  
14 the whalers' request raises some of the concerns underlying the political question  
15 doctrine. Direct enforcement of that injunction is manifestly beyond the power of this  
16 court. The Executive Branch has sole authority to use force or the threat of force on the  
17 high seas. The Executive Branch has declined to interfere in this dispute, even as it has  
18 condemned both the slaughter of Southern Ocean whales and Sea Shepherd's anti-  
19 whaling tactics. Whether that is evidence of an Executive Branch decision is debatable,  
20 but it is at least conceivable that the Executive Branch would look poorly on this court  
21 using its coercive powers to interfere where it has declined to do so. The court observes  
22 that neither the whalers nor Sea Shepherd has sought the input of the Executive Branch.  
23 *Compare Sarei*, 2011 U.S. App. LEXIS 21515, at \*43-44 (reviewing statements from  
24 Department of State and foreign governments regarding impact of case on foreign  
25 relations).

1 Because only the whalers' request for an injunction implicates the political  
2 question doctrine, the court declines to dismiss the case or any aspect of it. Instead, the  
3 court will consider the concerns underlying the political question doctrine as it  
4 determines whether to exercise its discretion to enter an injunction.

5 **d. International Comity**

6 Whereas the political question doctrine recognizes the balance of power among  
7 the three branches of the United States government, courts have recognized a doctrine of  
8 international comity that demands respect for the sovereignty of other nations'  
9 governments. *Sarei*, 2011 U.S. App. LEXIS 21515, at \*44-45 ("Comity refers to the  
10 spirit of cooperation in which a domestic tribunal approaches the resolution of cases  
11 touching the laws and interests of other sovereign states.") (quoting *Societe Nationale*  
12 *Industrielle Aerospatiale v. United States Dist. Ct. for the S. D. of Iowa*, 482 U.S. 522,  
13 544 n.27 (1987)). With one important exception, this case concerns conduct on  
14 international waters in which no nation's government has intervened, and thus does not  
15 raise international comity concerns.

16 The exception is Australia, whose legislature has declared whaling unlawful in the  
17 AWS, and whose courts have enjoined the whalers from hunting there. The whalers  
18 decline to recognize either Australia's law or the injunction because they dispute  
19 Australia's sovereignty in the AWS. Indeed, the whalers refused to participate in the  
20 Australian court proceedings. But whether the whalers respect Australian law,  
21 international comity demands respect for the judgments of foreign courts. *Avestas v.*  
22 *Petroutsas*, 580 F.3d 1000, 1010-11 (9th Cir. 2009). A court need not defer to a foreign  
23 judgment in every case, but it must generally do so. *Id.* at 1011 (citing *Hilton v. Guyot*,  
24 159 U.S. 113, 202 (1895)).

1 For reasons of international comity, the court will not grant relief on the whalers'  
2 claims to the extent they concern conduct in the AWS.<sup>20</sup> Regardless of the whalers' view  
3 of the Australian injunction, the Australian judiciary has imposed it and expects the  
4 whalers to adhere to it. What penalties, if any, the whalers face for violating the  
5 Australian injunction is not this court's concern. This court's concern is that the whalers  
6 ask a United States court to issue an injunction that would help them engage in the very  
7 conduct that an Australian court has enjoined. The court will not grant that request. At a  
8 bare minimum, the court will not issue an injunction (or any affirmative relief) as to the  
9 whalers' conduct in the AWS. In its later analysis, the court will consider whether the  
10 whalers' flouting of the Australian injunction is grounds to deny them injunctive relief as  
11 to the portions of the Southern Ocean outside the AWS.

12 **e. First Amendment**

13 Sea Shepherd contends that its Southern Ocean campaign is a "protest" that the  
14 First Amendment protects. They cite no authority supporting the notion that the First  
15 Amendment protects a right to launch bottles, flares, and smoke bombs at ships, a right to  
16 attempt to foul their propellers, or a right to collide with them. The court is aware of no  
17 such authority. There may be aspects of Sea Shepherd's Southern Ocean conduct that are  
18 expressive activity that the First Amendment protects. Sea Shepherd has made no  
19 attempt to explain what those aspects are. To the extent that the First Amendment  
20 provides any grounds for denying or limiting the injunctive relief that the whalers  
21 request, Sea Shepherd has failed to provide coherent argument that identifies those  
22 grounds.

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<sup>20</sup> At oral argument, counsel for the whalers stated that he did not believe that this season's  
26 whale hunt was taking place in the AWS. He declined, however, to assure the court that the  
27 whalers would not hunt in the AWS in this season or future seasons. Moreover, the whalers have  
28 not disputed that they have hunted for whales in the AWS in past seasons, despite the injunction.

## 5. Summary of Likelihood of Success on the Merits

In summary, the court concludes that the whalers are likely to succeed on one narrow aspect of the claims underlying the injunction they request: that Sea Shepherd violates the COLREGS by piloting its ships and boats too close to its ships. The whalers have no viable cause of action based on UNCLOS or the High Seas Convention. The court concludes that the whalers have a safe navigation claim based on SUA, but they are not likely to succeed on the merits of that claim. The court rejects Sea Shepherd's forum non conveniens defense, its argument that injunctions are not available in ATS suits, its request that the court dismiss this case because it presents an inextricable non-justiciable political question, and its First Amendment defense. The court concludes, however, that international comity dictates that it not grant relief as to any confrontation between the parties in the AWS.

### D. Irreparable Harm

The whalers claim irreparable harm in the form of threatened injury to members of their crew. Courts recognize physical harm as an irreparable injury. *Harris v. Bd. of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004). In considering that harm, the court must resolve the tension between its conclusion that Sea Shepherd's tactics create some risk of injury and its conclusion that Sea Shepherd has hurt no one despite using essentially the same tactics for eight whaling seasons. On this record, injury is possible, but not likely. In *Winter*, the Supreme Court reminded courts that a mere possibility of irreparable harm does not suffice, and that a party seeking injunctive relief must prove that "irreparable injury is *likely* in the absence of an injunction." 555 U.S. at 22 (emphasis in original). The sole irreparable harm to which the whalers point, physical injury to its crew, is not likely to occur in the absence of the injunction they request.

Although the court's conclusion regarding the likelihood of irreparable harm applies to the risk of injury arising from all of Sea Shepherd's tactics, the whalers' burden

1 is more specific. They must show that injury is likely to occur as a result of the tactics  
2 that fall within the legal scope of their causes of action. In the court's view, the conduct  
3 most likely to cause injury to the whalers is Sea Shepherd's hurling of various projectiles  
4 at the whaling ships. That conduct, however, is not actionable, at least not as a violation  
5 of international law. Sea Shepherd's actionable conduct – piloting its ships and boats too  
6 near to the whaling ships – is less likely to cause an injury. Sea Shepherd's small boats  
7 presents no risk of injury to the whalers. The navigation of its large ships to collide with  
8 or come too close to the whaling ships presents a risk of injury, but there is nothing in the  
9 record from which the court could conclude that injury is likely as a result.

10 That only a few weeks remain in the current whaling season is another factor that  
11 makes irreparable harm unlikely. Although their conflict with Sea Shepherd is  
12 longstanding, the whalers chose to wait until this year's whaling season was underway  
13 before bringing this case and their injunction motion. If they expected that the parties  
14 could fully brief this extraordinarily complex case and have the court rule on their motion  
15 in time to meaningfully affect this year's whaling season, their expectation was  
16 unrealistic. Irreparable harm is not likely on this record, but it is even more unlikely in  
17 light of the duration of the remainder of the whaling season.

#### 18 **E. The Balance of Hardships**

19 The balance of hardships favors the whalers, if only because Sea Shepherd has  
20 provided virtually no evidence of a hardship to it. Absent an injunction, the whalers will  
21 continue to be the victims of Sea Shepherd's harassment. Many of the hardships of  
22 which the whalers complain are beyond the scope of the international law on which they  
23 rely. But when balancing the hardships, the court need not confine itself to those  
24 hardships that are independently actionable.

25 Sea Shepherd, by contrast, points to no hardship that it will suffer if the court  
26 imposes an injunction. The whales that Sea Shepherd seeks to protect will suffer, but that

1 is not a harm to Sea Shepherd. The court defers discussion of the harm to the whales  
2 until it discusses the public interest. Focusing on its own harm, Sea Shepherd speculates  
3 that its donors will cease their financial support if the court enjoins their tactics in the  
4 Southern Ocean. They offer no evidence that any donor has conditioned current or future  
5 support of Sea Shepherd on Sea Shepherd's use of the tactics at issue in this motion. The  
6 injunction the whalers pray for would not exclude Sea Shepherd from the Southern  
7 Ocean, or prevent Sea Shepherd from attempting to preserve marine life. It would simply  
8 require Sea Shepherd to accomplish its mission by different means. Sea Shepherd has  
9 not proven that this is a hardship. Indeed, it might well be a benefit to Sea Shepherd to  
10 find a way to protect Southern Ocean whales without engaging in the tactics over which  
11 the whalers have sued.

#### 12 **F. The Public Interest**

13 The public interest weighs against issuing an injunction in this case. The public  
14 interest no doubt favors the right of ships and their crew to travel freely on the open seas.  
15 But that interest is tempered by two countervailing interests: the preservation of marine  
16 life and the interest in avoiding judicial interference in international political  
17 controversies. In exercising its equitable discretion, a court must "pay particular regard  
18 for the public consequences in employing the extraordinary remedy of injunction."  
19 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

20 If the court were to grant the whalers their injunction, more whales would die.  
21 This is not in the public interest. Were the court to confine itself to considering the  
22 public interest of the United States, the preservation of whales is unquestionably  
23 important. Whaling is illegal in all sovereign waters of the United States, and marine  
24 mammals in general are subject to strict protections. *See* Marine Mammal Protection Act,  
25 16 U.S.C. §§ 1361-1423h. Beyond its sovereign waters, the government of the United  
26 States has resolutely opposed all but subsistence whaling, and has repeatedly decried



1 whaling in the Southern Ocean. Considering the public interest of nations beyond the  
2 United States yields no different result. Virtually every nation has condemned both  
3 whaling in general and the slaughter of whales in the Southern Ocean specifically.

4 Putting aside the public interest in the conservation of marine life, the court  
5 believes that the public interest favors the resolution of this Southern Ocean dispute by  
6 means other than the intervention of a United States court. Although the political  
7 question doctrine does not prevent the court from resolving the whalers' substantive  
8 international law claims, their request for an injunction to remedy their claims raises an  
9 international political question. So far, every government with an interest in this dispute  
10 has declined to intervene directly. Australia and New Zealand, the two nations in closest  
11 geographical proximity to the dispute, have not intervened directly. They have been  
12 content to apply political pressure (and, in Australia's case, to file suit in the ICJ). The  
13 United States, which has not only a naval force but the coercive power to target Sea  
14 Shepherd's operations within its borders, has similarly confined its intervention to the  
15 political arena. Japan, whose citizens and ships are allegedly at risk, has also chosen to  
16 employ political countermeasures rather than its coercive power. It is not in the public  
17 interest for a United States court to exercise its discretion to bring its modest coercive  
18 powers to bear when every nation has declined to do so.

19 **F. Unclean Hands**

20 Sea Shepherd raises the equitable defense of unclean hands. In its view, Plaintiffs'  
21 "illegal" whaling in the Southern Ocean is reason enough for the court to deny the  
22 injunction they seek. A party has unclean hands when it is "tainted with inequitableness  
23 or bad faith relative to the matter in which he seeks [equitable] relief." *Jarrow Formulas,*  
24 *Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 841 (9th Cir. 2002) (quoting *Precision Instr.*  
25 *Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)). Unclean hands is not  
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1 “misconduct in the abstract, unrelated to the claim to which it is asserted as a defense.”

2 *Id.*

3 Outside of the AWS, Sea Shepherd cannot prevail on an unclean hands defense  
4 predicated on its assertion that the whalers’ annual slaughter is “illegal.” Outside of the  
5 AWS, the sole body that purports to exercise authority over whaling in the Southern  
6 Ocean is the IWC. The IWC forbids commercial whaling in the Southern Ocean, an edict  
7 that the whalers at least superficially heed. The IWC allows Japan to issue “research”  
8 permits to kill whales and permits the commercial sale of the meat harvested in this  
9 “research.” The whalers conduct their hunt under the auspices of Japan’s permits. Many  
10 members of the IWC assert that this “scientific” whaling is a thin veneer for the  
11 commercial slaughter of whales. The IWC has not, however, withdrawn Japan’s  
12 authorization to issue the permits or amended its charter to prohibit the sale of “research”  
13 meat. Absent an unambiguous edict from the IWC or other international authority, this  
14 court cannot resolve Sea Shepherd’s illegal whaling charge. Australia’s suit against  
15 Japan in the ICJ raises precisely this charge, but it will likely be years before the ICJ  
16 decides that suit. International comity demands that the court leave the dispute over the  
17 legality of Southern Ocean “research” whaling to the ICJ.

18 Inside the AWS, the whalers’ activity is not only in violation of the laws of  
19 Australia, it violates an Australian court’s injunction. This court has already decided that  
20 international comity demands that it not consider the whalers’ request for an injunction to  
21 aid conduct that is in violation of the Australian court’s injunction. The remaining  
22 question is whether the whalers’ derogation of the Australian injunction provides the grist  
23 for a determination that it has unclean hands that bar it from receiving injunctive relief  
24 outside of the AWS.

25 The court concludes that Sea Shepherd is likely to prevail on its unclean hands  
26 defense, and that this defense bars the whalers from seeking equitable relief. In flouting

1 the Australian injunction, the whalers demonstrate their disrespect for a judgment of a  
2 domestic court. Now they turn to another nation's domestic courts in search of an  
3 equitable decree that they expect Sea Shepherd to heed. In the whalers' view, their  
4 violation of the Australian injunction should have no consequences, whereas Sea  
5 Shepherd's violation of the injunction they seek should place it in contempt of court.  
6 Although the court would deny this injunction motion even ignoring the whalers' unclean  
7 hands, their unclean hands are an independent reason that the court declines to use its  
8 equitable power to aid them.

#### 9 **IV. CONCLUSION**

10 For the reasons stated above, the court DENIES the whalers' motion for a  
11 preliminary injunction. Dkt. # 13.

12 Finally, the court cautions anyone reading this order that the court suggests no  
13 approval of Sea Shepherd's methods or its mission. In particular, the court acknowledges  
14 that its finding that injury to the whalers is not likely will provide little comfort to a  
15 whaler struck in the head by an errantly launched bottle, burned by a misguided flare, or  
16 injured in a collision between ships. This is to say nothing of the risk to Sea Shepherd's  
17 crew, although they at least voluntarily confront that risk. A combination of tactical  
18 choice and luck has kept the crew members involved in this dispute safe for eight  
19 whaling seasons. For the sake of all involved, the court hopes that Sea Shepherd's luck  
20 does not run out.

21 The court does not approve of Sea Shepherd's tactics, it has merely declined to  
22 award the extraordinary relief that the whalers requested in this motion. That relief is not  
23 extraordinary merely in the sense that every preliminary injunction is a form of  
24 extraordinary relief, it is extraordinary in the sense that the whalers asks the court to do  
25 what perhaps no United States court has ever done. They ask the court to use its  
26 injunctive power to enforce international law to quell not merely a dispute between

1 people from different nations, but a dispute that arises from an international political  
2 controversy. The nations of the world have condemned both the whalers and Sea  
3 Shepherd but have chosen not to intervene directly. The court suggests no criticism of  
4 that choice; it merely observes that the whalers ask this court to do what no nation will  
5 do. It asks this court to condemn Sea Shepherd's conduct not merely with words, but  
6 with its injunctive power. The court will not do so.

7 DATED this 19th day of March, 2012.

8  
9 A handwritten signature in black ink, reading "Richard A. Jones". The signature is written in a cursive style and is positioned above a horizontal line.

10  
11 The Honorable Richard A. Jones  
12 United States District Court Judge  
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