

June 2018

The World Beyond Seaworld: A Comparative Analysis of International Law Protecting Cetacea in Captivity

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Recommended Citation

Casey M. Weed, *The World Beyond Seaworld: A Comparative Analysis of International Law Protecting Cetacea in Captivity*, 23 *Ocean & Coastal L.J.* 281 (2018).

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THE WORLD BEYOND SEAWORLD: A COMPARATIVE ANALYSIS OF INTERNATIONAL LAW PROTECTING CETACEA IN CAPTIVITY

*Casey Weed**

ABSTRACT

Over the past few decades, the public has become more and more aware of the inhumane and incredibly harsh treatment of marine mammals being kept in captivity, specifically for entertainment purposes. Anger and outrage reached a heightened level after the CNN documentary, *Blackfish*, was released in 2013, as the film brought increased awareness to viewers across the country. However, the issue of marine mammals in captivity reaches far deeper than the SeaWorld controversy of recent years; in fact, the issue spans even beyond the United States. This article therefore analyzes the laws which allow for such captivity to take place, both nationally and internationally, while, at the same time, taking note of the impressive progress being made in both the United States and other areas around the world. As a whole, this comparative analysis will compare and contrast the best protection laws against the worst (or, in some cases, inexistent) laws, both nationally and internationally, analyze the common themes and apparent differences, and, based on such analysis, suggest an approach to this global issue.

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I. INTRODUCTION

“IT IS A CURIOUS SITUATION THAT THE SEA, FROM WHICH LIFE FIRST AROSE, SHOULD NOW BE THREATENED BY THE ACTIVITIES OF ONE FORM OF THAT LIFE. BUT THE SEA, TOUGH CHANGED IN A SINISTER WAY, WILL CONTINUE TO EXIST; THE THREAT IS RATHER TO LIFE ITSELF.”

- Rachel Carson, “The Sea Around Us”¹-

Three years ago, the powerful and poignant documentary, *Blackfish*, aired on CNN.² Described by reviewers as a “persuasive, passionate argument”³ and a “damning documentary about the treatment of the animals by marine parks,”⁴ this film was, for many viewers, a wake-up call, and an introduction to the darker reality of what our society has done to these highly intelligent animals. Public outrage soon turned to public actions, as the parks began suffering

¹ RACHEL CARSON, *The Sea Around Us*, at xiii (Oxford Univ. Press, Inc., 2003).

² Breeanna Hare, *‘Blackfish’: A chilling doc on captive killer whales*, CNN (Oct. 29, 2013), <https://www.cnn.com/2013/07/12/showbiz/movies/blackfish-documentary-exclusive-clip/index.html> [<https://perma.cc/8LLT-7L33>].

³ Kevine Harley, *Blackfish Review*, GAMES RADAR (July 16, 2013), <https://www.gamesradar.com/blackfish-review/> [<https://perma.cc/5TH5-EV4Z>].

⁴ Michael O’Sullivan, *‘Blackfish’ movie review*, WASHINGTON POST (July 25, 2013), https://www.washingtonpost.com/goingoutguide/movies/blackfish-movie-review/2013/07/24/63e20c48-f0b8-11e2-a1f9-ea873b7e0424_story.html?utm_term=.ea3dfaa5982c [<https://perma.cc/GKE6-7ZEU>].

almost instantly.⁵ With ticket sales down and stocks starting to plummet, SeaWorld was ultimately left with no choice but to end their captive breeding program altogether,⁶ and SeaWorld San Diego's final orca show was conducted on January 8, 2017.⁷ Their actions ultimately came too late, as their most notable orca and star of *Blackfish*, Tilikum,⁸ died only a few days before, after living almost an entire lifetime in a tank.

However, this problem did not end, nor did it begin, with the SeaWorld controversy. Perhaps to many viewers' surprise, "cetacea," also known as marine mammals such as whales,

⁵ Kim Peterson, "*Blackfish*" continues to stalk wounded SeaWorld, CBS: MONEY WATCH (Nov. 13, 2014), <https://www.cbsnews.com/news/seaworld-continues-to-suffer-after-blackfish/> [<https://perma.cc/ZPF5-PMM4>].

⁶ Helene Hesselager O'Barry, *SeaWorld Bows to Public Pressure*, HUFFINGTON POST (April 13, 2016), https://www.huffingtonpost.com/helene-hesselager-obarry/seaworld-bows-to-public-p_b_9679480.html [<https://perma.cc/Y4F6-JUG5>].

⁷ Carla Herreria, *SeaWorld's Controversial Orca Show Ends for Good in California This Sunday*, HUFFINGTON POST (Jan. 5, 2017), https://www.huffingtonpost.com/entry/seaworld-orca-show-california_us_586da97fe4b0c8575a773549 [<https://perma.cc/46P2-YPWY>].

⁸ Camila Domonoske, *Tilikum, SeaWorld's Famed Orca and Subject of 'Blackfish,' Dies*, NPR: THE TWO-WAY (Jan. 6, 2017), <https://www.npr.org/sections/thetwo-way/2017/01/06/508534005/tilikum-seaworlds-famed-orca-and-subject-of-blackfish-dies> [<https://perma.cc/3QYK-K67U>].

dolphins, and porpoises,⁹ have been subjected to life in captivity for years.¹⁰ Why is this a problem? Cetaceans are wild animals, many of which are close to extinction,¹¹ that do not benefit from being locked-up and raised in captivity.¹² Because of humans, “marine mammals ha[ve] been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to countless other atrocities,” potentially causing damage to the “entire marine ecosystem.”¹³ Furthermore, capturing and raising cetacea in captivity not only threatens the lives of the animals, but has been linked to the avoidable deaths of several humans as well, an occurrence unheard of when these creatures are in the wild.¹⁴

⁹ “cetacean.” Merriam-Webster Online Dictionary (2015), <https://www.merriam-webster.com/dictionary/cetacean> [<https://perma.cc/LA5G-DPLA>].

¹⁰ *A Whale of a Business: Historical Chronology*, PBS: FRONTLINE, (Oct. 13, 2016), <https://www.pbs.org/wgbh/pages/frontline/shows/whales/man/mancron.html> [<https://perma.cc/3DYX-BJW5>].

¹¹ International Union for the Conservation of Nature: Cetacean Specialty Group, *Status of the World’s Cetaceans*, <http://www.iucn-csg.org/index.php/status-of-the-worlds-cetaceans/> [<https://perma.cc/9SUT-WB42>].

¹² Hillary T. Wise, *All Is Whale That Ends Whale? The Deficiencies in National Protection for Orca Whales in Captivity*, 49 AKRON L. REV. 925, 928 (2016).

¹³ *Id.* at 929.

¹⁴ John Couwels and Brian Todd, *SeaWorld trainer killed by killer whale*, CNN (Feb. 25, 2010), <http://www.cnn.com/2010/US/02/24/killer.whale.trainer.death/index.html> [<https://perma.cc/G4ZP-59L5>].

While the film focused primarily on orcas in captivity at SeaWorld, the issue expands much more broadly than that, which only complicates the problem. Since the 1860s, cetacea have been captured and distributed to various aquaria on a global level.¹⁵ Recently, several states in the United States have recognized the problem, proposing and passing cetacean-protection laws that will prevent what happened to orcas at SeaWorld from happening to any other marine animal again.

And yet, the problem does not stop. Despite best efforts and public outcry in the United States, other countries vary vastly in terms of their treatment of cetacea. Many countries have legally banned capturing marine mammals for export or entertainment purposes altogether,¹⁶ while other countries refuse to recognize the problem. They argue that capturing cetacean and putting them on display serves a valuable educational purpose to the human race,¹⁷ thus putting human entertainment before animal and environmental rights.

It is important to understand why this global-patchwork of cetacean-protection law is a problem. Although cetacea make up a broad collection of different types of animals, many of

¹⁵ PBS: FRONTLINE, *supra* note 10.

¹⁶ David Kirby, *Here's All the Places Around the World That Ban Orca Captivity*, TAKEPART (April 10, 2014), <http://www.takepart.com/article/2014/04/10/all-states-countries-and-cities-ban-orcas-captivity/> [<https://perma.cc/LY2T-Y7UU>].

¹⁷ NAOMI A. ROSE, E.C.M. PARSONS, & RICHARD FARINATO, *THE CASE AGAINST MARINE MAMMALS IN CAPTIVITY*, 1 (Naomi A. Rose et al. eds., 4th ed. 2009).

these creatures have the capacity to swim hundreds of miles a day.¹⁸ They know no bounds; their home is the sea, and they move from country to country simply by swimming throughout the oceans each day. But, if countries vary in terms of protection laws, these animals will never truly be safe.

Furthermore, if we somehow succeed in a globally-accepted restriction of the capturing of cetacea, there remains yet another problem; what do we do with the animals who were born and raised in captivity, specifically those who have been stripped of any survival skills or instincts, and will likely die if they are put back into the ocean?¹⁹ These types of issues relating to ‘capture and release’ must therefore be figured out beforehand.

Clearly, this issue is incredibly broad and complex in scope. What can we do to solve it? Where do we even begin? In order to best address the lack of any uniform cetacean-protection laws, we must first look at the existing protection laws at a global-level. Therefore, the purpose of this paper will be to analyze and compare, at an international level, existing cetacean-protection laws, the competing arguments in favor of and against them, and their development. This will help to address the most prominent gaps in protection laws, understand where we are globally, and create the ability to propose recommendations for best “next steps” moving forward.

¹⁸ Whale and Dolphin Conservation, *End Captivity*, US. WHALES.ORG, <http://us.whales.org/wdc-in-action/end-captivity-1> [<https://perma.cc/8ASR-Q2QF>].

¹⁹ See Tim Zimmermann, *Can Captive Dolphins Return to the Wild?*, NAT’L GEOGRAPHIC (June 2015) <http://ngm.nationalgeographic.com/2015/06/rewilding-orcas/zimmerman-text> [<https://perma.cc/XK6J-QDG9>].

I will begin this analysis by walking through the history of capturing cetacea for entertainment purposes in order to establish pertinent background information and a foundation for moving forward.

Next, I will introduce the current cetacean-protection laws that exist throughout the world, beginning with the both federal and state laws within the United States, before moving on to a similar explanation on an international level. I have selected the more notable countries and have separated them into two groups: those countries with admirable cetacean-protection laws and those without. For simplicity, I have only selected a few of each. I will also be sure to mention several international treaties applicable to all countries.

After this introduction to the varying foreign laws, I will conduct a comparative analysis of the differing laws and arguments for and against keeping cetacea in captivity. After comparing these laws, I will finally come to a conclusion that represents what I feel would be the best solution to the problem presented, based on my analysis of differing laws, opinions, and plausibly available resources.

II. FROM CIRCUSES TO SEA WORLD: A HISTORY OF CETACEAN CAPTURE

The history of cetacea in captivity “entails a violent and discreditable past.”²⁰ “Modern cetacean captivity” dates back to the 1860s and 1870s²¹ “with the display of bottlenose dolphins

²⁰ Corrine Henn, *How Did We Get Here? The Evolution of Whale and Dolphin Captivity in the U.S* (Feb. 11, 2015), <http://www.onegreenplanet.org/animalsandnature/evolution-of-marine-mammal-captivity-in-the-u-s/> [<https://perma.cc/SNG7-SK4W>].

²¹ PBS: FRONTLINE, *supra* note 10.

and beluga whales in aquaria in New York City, and harbor porpoises in aquaria in London.”²² Specifically, the first cetacean in captivity were believed to belong to PT Barnum,²³ the circus-promotion king,²⁴ who in 1862 had six beluga whales caught and shipped by train to his New York museum.²⁵

Sadly, “inadequate veterinary care” and limited awareness, among other factors, led to high mortality rates of such captive cetacea.²⁶ But, these inadequacies did not stop the display industry, with the opening of the first “cetacean display facility” at Marineland in Florida in 1938.²⁷ Animal health standards advanced from the 1950s through the 1970s, helping to “increase longevity, resulting in an explosion of public display facilities across North America, Europe, and Australia.”²⁸ This was primarily caused by Marineland’s newly discovered training of bottlenose dolphins.²⁹ This new form of entertainment, coupled with the release of the movie

²² Elizabeth Lewis, *Whale Wars: Reconciling Science, Public Opinion, and the Public Display Industry Under the Marine Mammal Protection Act*, 66 ADMIN. L. REV. 861, 872 (2014).

²³ PBS: FRONTLINE, *supra* note 10.

²⁴ See *P.T. Barnum Biography*, BIOGRAPHY.COM, <https://www.biography.com/people/pt-barnum-9199751> [<https://perma.cc/X3P3-5L74>] (last updated Dec. 22, 2017).

²⁵ PBS: FRONTLINE, *supra* note 10.

²⁶ Lewis, *supra* note 22 at 872.

²⁷ *Id.*

²⁸ Lewis, *supra* note 22 at 872-873.

²⁹ ANIMAL WELFARE INSTITUTE, *Confinement of Marine Life*, <https://awionline.org/content/confinement-marine-life> [<https://perma.cc/2B3J-Z4LJ>].

Flipper,³⁰ created heightened interest.

By the 1990s, public awareness shifted, largely instigated by several documentaries “exposing the horrors of dolphin capture in Japan and the alleged mistreatment of marine mammals at SeaWorld[.]”³¹

And yet, the industry continues. As I will discuss in this paper, the United States has started to recognize the human-driven dangers affecting these animals, with several individual States enacting protection legislation.³² At an international level, several treaties do exist, in addition to laws passed by individual countries.³³ As we will see, countries have differing arguments in terms of the need for such laws. Educational benefits and cultural issues make up most of the pro-captivity stances.

However, as this discussion illustrates, history, combined with scientific advancements, proves these arguments are flawed. It would therefore be ignorant to ignore such historical realities in order to preserve such a broad class of animals.

[I]gnoring the history of how marine mammal parks got to where they are today and opting to focus on the individual history of an animal instead of the natural history of the species as a whole only further perpetuates the problem and the ideology that marine

³⁰ *Id.*

³¹ Lewis, *supra* note 22 at 873.

³² *See*, Kirby, *supra* 16.

³³ *See*, Lauren Tierney, *Brief Summary of Laws Concerning Orcas in Captivity*, Animal Legal & Historical Center (2010), <https://www.animallaw.info/intro/laws-concerning-captive-orcas> [<https://perma.cc/5Y5Y-PJJ6>].

mammals should be kept captive for mere entertainment.³⁴

The Animal Welfare Institute has described the ongoing issue perfectly; “[t]hough tanks are bigger and cetaceans in captivity are less callously treated than in P.T. Barnum's day, the fact remains that captivity for these active, social, intelligent animals is still inappropriate.”³⁵ With this important historical foundational structure established, we are able to learn from history, and use it to help understand how we have failed these animals. But, history alone cannot guide us completely, and so we must also understand the benefits of comparative analysis as a contributory step toward understanding where we have yet to go.

III. CURRENT CETACEAN PROTECTION LAWS

In this section, I will begin by discussing the existing laws protecting cetacea in the United States, including both federal law, as well as notable individual state law (of which there is little). Next, I will broaden the scope by analyzing a select number of other countries and the existence, or in some cases, the inexistence, of protection laws, with a comparative analysis to follow. However, analyzing all countries outside of the United States would be nearly impossible, so I have only chosen to highlight some of the more notable foreign countries for varying reasons discussed below. I will also mention several international treaties that apply to all countries, in order to create a more well-rounded sampling of different laws currently in existence.

³⁴ Aisling Maria Cronin, *Greece Upholds Ban on Captive Dolphin Performances*, ONE GREEN PLANET (Jan. 21, 2014), <http://www.onegreenplanet.org/news/greece-upholds-ban-on-captive-dolphin-performances/> [<https://perma.cc/6W9S-7P4H>].

³⁵ ANIMAL WELFARE INSTITUTE, *supra* note 29.

A. The United States

The United States has enacted varying levels of cetacean-protection laws both at the federal level and the individual state level. However, as we will see, the United States as a whole lacks any uniform law that adequately protects cetacea, despite best efforts by Congress and individual state legislatures. We will start by looking at the few federal laws that are related to the issue at hand.

1. The Federal Level

The United States Congress has enacted two laws governing the capturing of animals for captive purposes, both of which have the potential to affect cetacea specifically. They are the the Animal Welfare Act and the Marine Mammal Protection Act.

The Animal Welfare Act (AWA)³⁶ was the first federal law regulating the use of animals in research.³⁷ The Act “applies to animal carriers, handlers, dealers, breeders, and exhibitors in addition to research laboratories,” setting “minimum standards of care that must be provided for animals – including housing, handling, sanitation, food, water, veterinary care and protection from weather extremes.”³⁸ Originally named “the Laboratory Animal Welfare Act,” the Animal Welfare Act, as it is known today, was passed in 1966³⁹ to “ensure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and

³⁶ The Animal Welfare Act, 7 U.S.C. §§ 2131 – 2156 (2013).

³⁷ ANIMAL WELFARE INSTITUTE, *Animal Welfare Act*, <https://awionline.org/content/animal-welfare-act> [<https://perma.cc/379N-ANC7>].

³⁸ *Id.*

³⁹ *Id.*

treatment.”⁴⁰

The second component of the AWA allows for the issuance of licenses to animal dealers and exhibitors in order to become a licensed exhibitor.⁴¹ In order for an exhibitor (such as a marine park) to be granted a license, they must “have demonstrated that [their] facilities comply with the standards promulgated” in the Act.⁴² These standards include “minimum requirements . . . for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species . . . for humane handling, care, or treatment of animals.”⁴³

However, these standards are only required to meet *minimal humane* standards. Therefore, “when confronted with opposition . . . arguing that it is inhumane to have cetaceans in confined tanks for public display, the owners point to the fact that their operations are governed by the AWA, which establishes ‘humane’ guidelines for their care, making cetacean captivity not only legal but humane.”⁴⁴ Thus, although the AWA was built on good intentions, it tends to leave open gaps related to adequate care and protection provisions, as it still allows for marine parks to keep animals in captivity while only applying minimal standards of care.

⁴⁰ 7 U.S.C. § 2131(1) (1976).

⁴¹ *Id.* § 2133.

⁴² *Id.*

⁴³ 7 U.S.C. § 2143(a)(2)(A) (1985).

⁴⁴ Joan E. Schaffner, *Chapter 11 Blackfish and Public Outcry: A Unique Political and Legal Opportunity for Fundamental Change to the Legal Protection of Marine Mammals in the United States*, 53 IUS GENTIUM 237, 247 (2016).

Not long after the passage of the AWA, Congress passed the Marine Mammal Protection Act (MMPA) in 1972.⁴⁵ The purpose of this act was more specifically tailored towards the protection of marine mammals, including all cetacea within United States waters.⁴⁶ The MMPA was the result of Congressional findings indicating that certain marine mammal species are in danger of becoming extinct due to human activity.⁴⁷ Furthermore, the MMPA specifically suggests that, based on such findings, “negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals.”⁴⁸ However, the Act also suggests that perhaps its motives do not solely rest with the desire to protect marine mammals and their ecosystems, but also to sustain what has become a great economic resource.

[M]arine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.⁴⁹

These purposes aside, the Act’s primary mechanism is that it makes it illegal to “take” any

⁴⁵ THE MARINE MAMMAL CENTER, *The Marine Mammal Protection Act of 1972, Amended 1994*, [<https://perma.cc/4E8K-VNJ9>].

⁴⁶ *Id.*

⁴⁷ The Marine Mammal Protection Act, 16 U.S.C. § 1361(1) (2013).

⁴⁸ *Id.* § 1361(4).

⁴⁹ 16 U.S.C.A. § 1361 (2013)

marine mammal without a permit to do so.⁵⁰ The Act defines “take” as harassing, hunting, capturing, killing or any attempt at any of these actions.⁵¹

According to the MMPA, permits are only issued for “scientific research, public display, or enhancing the survival or recovery of a marine mammal species of stock.”⁵² Applicants for such public-display permits must also “show they offer a program of education or conservation based on professionally recognized standards, have a license to exhibit under the Animal Welfare Act (AWA), and maintain facilities open to the public on a regularly scheduled basis.”⁵³ Public display permits are never issued if the animal was pregnant when taken, nursing or less than eight months old, or if the marine mammal was “taken in a manner deemed inhumane”⁵⁴

Once again, despite Congress admirably acting upon the concerns of protecting cetacea, loopholes in the Act do exist. For example, the Act itself still allows cetacea to be held in captivity, even though certain hurdles exist for those seeking public display permits. Thus, keeping cetacea in captivity is still legal, despite “advocates and scientists . . . argu[ing] that holding cetacea in captivity for public display purposes severely harms the individual animals, does not promote the protection of the species, and thus is antithetical to the goals of the MMPA.”⁵⁵

⁵⁰ THE MARINE MAMMAL CENTER, *supra* note 45.

⁵¹ 16 U.S.C. § 1362(13) (2003).

⁵² 16 U.S.C. § 1371(a)(1) (2003).

⁵³ Schaffner, *supra* note 44 at 241; *See also* 16 U.S.C. § 1374(c) (2013).

⁵⁴ 16 U.S.C. § 1372(b) (2013).

⁵⁵ Schaffner, *supra* note 44 at 243.

Additional loopholes exist that not only cause concerns with regard to keeping cetacea in captivity, but also provide issues relating to the killing of marine mammals. For example, certain provisions essentially provide that “[c]ommercial fishermen can ignore the prohibition on harassment and are allowed ‘inadvertent lethal takes’ so long as they report the number of marine mammals they kill.”⁵⁶ Also, shipping companies are not as regulated as other entities, despite that they “generate 90 percent of the noise in the ocean and strike an unknown number of animals.”⁵⁷ This Act therefore attempts admirable goals, but in essence is fostering captivity of wild animals who themselves have yet to see any true benefits.

In sum, the United States federal government has taken several steps to help protect wild animals, including cetacea, but criticisms by scientists, advocates and the general public tend to show that amendments to these laws may be inevitable in the near future in order to truly help these animals.

2. The State Level

Over the course of the past several years, some States within the United States have passed, or started the process of passing, laws specifically aimed at protections for marine mammals. Here, I have chosen to discuss only a handful, focusing attention on the more prominent laws as opposed to states still transitioning.

⁵⁶ Andrea Baird & Michael Carlowicz, *Caught in the Middle of the Marine Mammal Protection Act*, OCEANUS MAGAZINE, April 2006, <https://www.whoi.edu/oceanus/feature/caught-in-the-middle-of-the-marine-mammal-protection-act> [<https://perma.cc/W8U2-NFTU>].

⁵⁷ *Id.*

a. California

California is perhaps the most notable of the States in terms of cetacea protection, as it is also home to a SeaWorld theme parks and has access to miles and miles of coastal waters.

California introduced its Orca Protection Act in 2016, and it was passed into law in January 2017.⁵⁸ The initial law, AB 2140, made it “unlawful to take any marine mammal” with some exceptions.⁵⁹ However, amendments were recently made to more specifically address the issue of orcas in captivity. The law now reads:

(a) It is unlawful for any person to do any of the following:

(1)(A) Except as provided in subparagraph (B) and subdivision (c), hold in captivity an orca, whether wild-caught or captive-bred, for any purpose, including, but not limited to, display, performance, or entertainment purposes.

(2) Breed or impregnate any orca held in captivity in the state.

(3) Export, collect, or import the semen, other gametes, or embryos of an orca held in captivity for the purpose of artificial insemination.

(4) Export, transport, move, or sell an orca located in the state to another state or country unless otherwise authorized by federal law or if the transfer is to another facility within North America that meets standards comparable to those provided under the Animal Welfare Act (7 U.S.C. Sec. 2131 and following).⁶⁰

Essentially, this law bans the holding of orcas in captivity if they are being held for

⁵⁸ ANIMAL WELFARE INSTITUTE, *Cetacean Anti-Captivity Legislation*,

<https://awionline.org/content/cetacean-anti-captivity-legislation> [<https://perma.cc/GT6S-FVY5>].

⁵⁹ Marine mammals: protection of orcas; unlawful activities. CA Assembly Bill 2140, (2014),

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201320140AB2140

[<https://perma.cc/8UVD-ERST>].

⁶⁰ CAL. FISH & GAME CODE § 4502.5 (a) (1)-(4) (West 2016).

entertainment (and not educational) purposes and it ends the breeding programs of orcas throughout the state.⁶¹ California has thus become the first State in the United States “to ban the breeding of killer whales and using the animals in theatrical shows;” the law will go into effect in 2017.⁶²

However, despite this monumentally historical legal advancement, a closer reading of the statute clarifies that the law itself only applies to orcas, and not all cetacea.⁶³ Additionally, this is the second amendment to an already existing protection law, so it seems that a more inclusive amendment could be possible. The Animal Welfare Institute co-sponsored this bill,⁶⁴ with one of their whale experts, Naomi Rose, who stated, “she would like to see similar bills pertaining to beluga whales, dolphins, and ultimately, all captive marine mammals.”⁶⁵

b. Washington

Washington has taken inspiration from their neighboring state of California in passing their own similar cetacean-protection law. However, the primary difference between the laws is

⁶¹ ANIMAL WELFARE INSTITUTE, *supra* note 58.

⁶² Madison Park, *California bans killer whale theatrical shows, breeding*, CNN, Sept. 14, 2016 [<https://perma.cc/V2MY-QXHX>].

⁶³ *See* CAL. FISH & GAME CODE § 4502.5(d)(2) (West 2016).

⁶⁴ David Kirby, *California Lawmakers Pass Bill Banning Orca Shows, Captive Breeding*, TAKEPART, Aug. 26, 2016, <http://www.takepart.com/article/2016/08/26/california-lawmakers-pass-bill-banning-orca-shows-captive-breeding/> [<https://perma.cc/H9CU-3VEU>].

⁶⁵ *Id.*

that the Washington law, if passed, will apply to all cetacea, and not just orcas.⁶⁶ The proposed law, currently Senate Bill 5666, would make capturing cetacea illegal. More specifically, one will be found guilty of unlawfully capturing cetacea if they (1) hold “a wild-caught or captive-bred cetacean in captivity” for entertainment purposes; (2) capture or import cetacea into the state for entertainment purpose; (3) breed cetacea for captivity; or (4) import cetacean semen and/or embryos in order to artificially inseminate and breed.⁶⁷

Despite the fact that there are currently no captive cetacea in Washington,⁶⁸ as capturing orcas off the coast of Washington ended in 1976,⁶⁹ this law would help to sustain protection for all cetacea, and not only orcas. The bill is currently stuck in the Washington Senate, and will be revisited in 2017.⁷⁰ However, if passed, this law would not only be a huge success in terms of marine mammal protection, it would prove to be economically beneficially for the entire state of Washington. It will “save the headache and cost of permitting and overseeing the construction and maintenance of captive dolphin facilities . . . as well as the issue of having the federal government looking over the shoulder of the state to make sure that federal guidelines, as weak

⁶⁶ ANIMAL WELFARE INSTITUTE, *supra*, note 58.

⁶⁷ S.B. 5666, 64 Leg., Reg. Sess. (Wash. 2015) <http://lawfilesextra.leg.wa.gov/biennium/2015-16/Pdf/Bills/Senate%20Bills/5666.pdf> [<https://perma.cc/42RB-ET8B>].

⁶⁸ ANIMAL WELFARE INSTITUTE, *supra*, note 58.

⁶⁹ *Id.*

⁷⁰ *Id.*

as they are, are met.”⁷¹ Such benefits serve as crucial incentives for States to consider passing similar types of laws.

c. South Carolina

South Carolina is another state that protects cetacea from captivity. Although the California law was the first to ban breeding of cetacea in captivity, South Carolina was the first state to ban cetacea from simply being held in captivity. The initial South Carolina law was passed in 1982,⁷² but applied only to dolphins.⁷³ Killer whales, dolphins and other marine mammals have been banned from being held in captivity since 2000, but in 2011, the exact wording of the law was changed from ”marine mammals” to ”cetaceans.”⁷⁴ The current language

⁷¹ Candace Calloway Whiting, *The “Unlawful Cetacean Captivity” Bill Makes Sense for Washington, Please Call and Let Senator Pearson Know Your Opinion*, Seattle Post-Intelligencer (Feb. 23, 2016 at 11:49 am)

<https://blog.seattlepi.com/candacewhiting/2016/02/23/the-unlawful-cetacean-captivity-bill-makes-sense-for-washington-please-call-and-let-senator-pearson-know-your-opinion/>
[<https://perma.cc/82MA-WDM6>].

⁷² Kirby *supra*, note 16.

⁷³ Bo Petersen, *‘Blackfish’ stopped here by ‘first of its kind’ marine mammal law that legislators recently changed*, POST AND COURIER: TIDELINE MAGAZINE, Nov. 13, 2013, https://www.postandcourier.com/timeline_magazine/blackfish-stopped-here-by-first-of-its-kind-marine-mammal/article_3e892778-7e2a-57a8-8bbe-e6e67f604205.html [<https://perma.cc/RYC2-FLBG>].

⁷⁴ *Id.*

of the statute reads that it “is unlawful for a person, which includes a corporation, to display a wild caught or captive-bred mammal of the order Cetacean (dolphins and whales).”⁷⁵

Furthermore, anyone who has violated the law will be found guilty of a misdemeanor and “upon conviction, must be fined not more than one thousand dollars or imprisoned for not more than six months.”⁷⁶

Collectively, these three states have made great strides in legal protection of cetacea. Although several gaps among the state laws do exist, as a whole they are attempting to achieve the same goal, the protection of a severely under-protected and exploited species. Again, these states are not the only U.S. states with either protection laws or proposed legislation in the works, but they are the most promising or effective in their execution of such policy.

B. Foreign Laws

Capturing cetacea for captivity is just as much of a problem internationally as it is within the United States. For example, “[c]aptive cetacea facilities are found in 63 countries, with the highest numbers located in Japan (57), China (44), USA (34), Russia (24) and Mexico (24).”⁷⁷

Furthermore, as discussed, both federal law and state law within the United States are somewhat different, although they aim to serve similar goals. However, internationally, cetacean-protection laws are vastly different, because of differences in policy, research,

⁷⁵ S.C. CODE ANN. § 50-5-2310 (A) (2011).

⁷⁶ *Id.*, at (B).

⁷⁷ *Captive Whales and Dolphins – Global Born Free Found*,

<http://www.bornfree.org.uk/campaigns/zoo-check/captive-whales-dolphins/global/>

[<https://perma.cc/SGS3-3EYM>].

resources, or, more predominantly, culture. Although the United States has not “issued a permit for the taking of a wild orca since 1989, other nations perform hunts in order to capture orcas for display,” thereby exacerbating the problem.⁷⁸

Therefore, in this section I will once again select the prominent foreign laws, both the more restrictive and the most problematic countries, who have yet to accept the growing problem. Initially, however, I will discuss the overarching international treaties that, although apply to most countries, offer little support in terms of cetacean-protection.

1. International Treaties

There are three primary international treaties which have the capacity to affect cetacean-protection at an international level. They are: The International Whaling Convention, the Convention on International Trade in Endangered Species, and the United Nations Convention on the Law of the Sea.

The International Whaling Convention (IWC) was established in 1946 to “oversee the management of the whaling industry worldwide,” specifically “in response to the rapid decline in the population of whales from whaling.”⁷⁹ The IWC, which placed an indefinite ban on all commercial whaling,⁸⁰ sets specific catch limits for “commercial and aboriginal subsistence whaling.”⁸¹ However, a few countries, specifically including Norway and Japan, have not

⁷⁸ Tierney *supra*, note 33.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ International Whaling Commission, *Key Documents*, <https://iwc.int/convention> [<https://perma.cc/9VQC-7FM9>].

honored the IWC.⁸² Both Japan and Iceland have specifically ignored the ban “citing legal loopholes” which have the potential to cause even more problems with consistency.⁸³

The express language of the IWC states that it only applies to whales, but the Convention itself does not define “whale.”⁸⁴ Some of the countries who adhere to the IWC (of which there are currently 89)⁸⁵ have decided to implement the exact language of the Convention, and thus only apply it to whales. However, other countries interpret the language a different way, “believ[ing] that all cetaceans, including the smaller dolphins and porpoises, also fall within IWC jurisdiction.”⁸⁶ This inconsistent application of the Convention could therefore inevitably cause issues for true cetacean-protection.

The Convention on International Trade in Endangered Species (CITES) “is an international agreement between governments” which aims “to ensure that international trade in

⁸² Angela Lang, *Overview of Laws and Regulations Protecting Whales*, Animal Legal and Historical Center (2002), <https://www.animallaw.info/article/overview-laws-and-regulations-protecting-whales> [<https://perma.cc/8GBP-VWF2>].

⁸³ PBS: FRONTLINE, *supra*, note 10.

⁸⁴ International Whaling Commission, *Taxonomy of Whales*, <https://iwc.int/> [<https://perma.cc/5HJR-6429>].

⁸⁵ International Fund for Animal Welfare, *What is the International Whaling Commission (IWC)*, <https://www.ifaw.org/united-states/our-work/whales/what-international-whaling-commission-iwc> [<https://perma.cc/Z54N-YQPX>].

⁸⁶ *Id.*

specimens of wild animals and plants does not threaten their survival.”⁸⁷ CITES is more specifically designed to “to promote the conservation of endangered species while allowing trade in certain wildlife.”⁸⁸ Under CITES, there are three levels of protection, with species put into different Appendices based on their state of extinction.⁸⁹ For example, whales are all listed in Appendix I, meaning they are currently “threatened with extinction and are or may be affected by trade, therefore commercial trade is strictly prohibited.”⁹⁰ Other cetacea can be found in both Appendix I, described above, and Appendix II,⁹¹ meaning they are “species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival.”⁹²

Although CITES does prevent the commercial trade of certain cetacea, it clearly only applies to those which are endangered, meaning that not all cetacea are protected. Furthermore, countries join CITES on a voluntary basis. CITES then becomes legally binding, but does not necessarily take the place of national laws but rather “provides a framework to be respected by

⁸⁷ Convention on International Trade in Endangered Species of Wild Fauna and Flora, *What is CITES*, <https://www.cites.org/eng/disc/what.php> [<https://perma.cc/5QYH-K8JT>].

⁸⁸ International Whaling Commission, *supra* note 84.

⁸⁹ *Id.*

⁹⁰ Lang, *supra*, note 82.

⁹¹ Convention on International Trade in Endangered Species of Wild Fauna and Flora, *Cetacea*, <https://cites.org/eng/node/20547> [<https://perma.cc/7JHC-SPMF>].

⁹² Convention on International Trade in Endangered Species of Wild Fauna and Flora, *How CITES works* [<https://perma.cc/A2HQ-PHBC>]

each Party, which has to adopt its own domestic legislation to ensure that CITES is implemented at the national level.”⁹³ Thus, although CITES has the power to make serious change and protect endangered animals, including cetacea, the Convention is not always adhered to by those countries who have adopted it.

Finally, there is the United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS “lays down a comprehensive regime of law and order in the world's oceans and seas establishing rules governing all uses of the oceans and their resources” based on the idea “that all problems of ocean space are closely interrelated and need to be addressed as a whole.”⁹⁴ Like IWC and CITES, UNCLOS only places a duty on those countries who have volunteered to sign the treaty.⁹⁵ For example, under the UNCLOS, countries agree to have duties “to conserve marine mammals,” which “is thought to be stronger than the obligations imposed under the International Whaling Convention.”⁹⁶

However, the exact language of UNCLOS makes no mention of regulating marine mammals. The only mention of cetacean appears in two articles: Article 65 and Article 120.

⁹³ CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, *supra* note 87.

⁹⁴ *United Nations Convention on the Law of the Sea of 10 December 1982 Overview*, UNITED NATIONS: OCEANS & LAW OF THE SEA, http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm [<https://perma.cc/G527-YHQ9>].

⁹⁵ Lang, *supra* note 82.

⁹⁶ *Id.*

Article 65 appears in Part V, which relates to economic zones. It states:

“[n]othing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.”⁹⁷

Article 120, appearing in Part VII, “High Seas,” further specifies, “Article 65 also applies to the conservation and management of marine mammals in the high seas.”⁹⁸ Essentially, UNCLOS does not provide any controlling international law pertaining to the regulation and management of cetacean.

These three treaties all provide potential for international regulation, and still fall short. I will now move on to discussing some of the more notable foreign laws as examples of how other countries, customs and ideas have further complicated this regulatory issue.

2. Foreign Law Individually

As mentioned, consistent cetacean-protection legislation presents a large-scale problem, extending far beyond the boundaries of the United States. International treaties, as I have just discussed, do little to solve the problem, despite solid efforts. Many factors affect the differences among other countries’ laws, such as culture, understanding, and resources.

For comparison purposes and ease of understanding, I have split the following information into two sections. I will first discuss the most notable countries with admirable cetacean-protection laws, which I have named “Protectors.” Next, I will discuss those countries with little to no protection, while incorporating arguments as to why these countries do not

⁹⁷ United Nations Convention on the Law of the Sea, art. 65, Dec. 10, 1982, 1833 U.N.T.S. 397

⁹⁸ *Id.* at 120.

acknowledge cetacean-protection as a problem. I have named these countries “Captors.”

a. Foreign “Protectors”

Although countries all over the world take different approaches on lawmaking and how best to serve their countries, many areas of the world who are similarly situated or located tend to have similar policies. For example, the countries of Bolivia and Chile, neighboring South American countries, have made groundbreaking strides in cetacean-protection laws. In 2005, Chile amended pre-existing legislation, prohibiting “the capture or import of any cetacean species ‘for public exhibition or any objective associated to its utilization by man.’”⁹⁹ Several years later in 2009, Bolivia became the first country to “ban all animals in circuses and other public performance venues,”¹⁰⁰ including domestic animals, as well as marine mammals.¹⁰¹ Both countries, therefore, realized the growing problem caused by humans and the need for animal entertainment, and did something about it.

Another set of neighboring countries have established impressive and profound protection laws as well. Greece and Cyprus are both popular vacation destinations surrounded by oceans and natural beauty. Both countries also passed successful cetacean-protection laws thanks to help from several different animal advocacy groups. In Greece, both the Animal Defenders International and the Greek Animal Welfare Fund helped the government pass a law in 2012 that

⁹⁹ Kirby, *supra* note 16.

¹⁰⁰ *Id.*

¹⁰¹ Associated Press, La Paz, *Bolivia bans all circus animals*, THE GUARDIAN, (July 31, 2009),

<https://www.theguardian.com/world/2009/jul/31/bolivia-bans-circus-animals>

[<https://perma.cc/584Y-BFJC>].

banned “not only dolphin captivity but the use of all animals in circuses,” including animals used in exhibitions and for entertainment purposes.¹⁰² Two years later, in 2014, the law was upheld by the Greek government.¹⁰³

In Cyprus, a group called Animal Responsibility Cyprus similarly assisted the government, helping to lead the way toward a ban on “the importation of cetacean.”¹⁰⁴ The law, passed in 2011,¹⁰⁵ was not the only success for the group. In 1999, they also helped shut down the only dolphinarium on the island, and to this day, no marine mammal parks exist in Cyprus.¹⁰⁶ These two countries, therefore, show the impact of special interest groups and the potential positive change that they can help to instigate.

Although we have already touched on the various laws within the United States, another portion of North America also has the potential to play a vital role in cetacean-protection legislation. The Canadian province of British Columbia has banned all orca captures since 1990, following issues with SeaWorld after they “contracting with a team of orca hunters to capture 3-6 juvenile whales from Puget Sound.”¹⁰⁷ Many killer whales are found in Canadian waters, as

¹⁰² Kirby, *supra* note 16; *See also, Greece bans animal circuses*, ANIMAL EQUALITY (Apr. 2, 2012), <http://www.animalequality.net/news/355/greece-bans-animal-circuses> [<https://perma.cc/XB9Y-5FWU>].

¹⁰³ Cronin, *supra* note 34.

¹⁰⁴ Kirby, *supra* note 16.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ PBS: FRONTLINE, *supra* note 10.

they have been found “in all three of Canada's oceans,”¹⁰⁸ specifically Hudson Bay, the Gulf of St. Lawrence, and most often along the coast of British Columbia.¹⁰⁹ Thus, Canada serves as a prime location for capturing and hunting orca whales. SeaWorld captured several juvenile whales from the Puget Sound, causing British Columbia to pass a law banning all “transportation of captive whales.”¹¹⁰ The law banning all orca whale captures passed not long after.¹¹¹

Because all of Canadian waters are such vulnerable locations for orcas and dolphins, a bill named “The Ending of Captivity of Whales and Dolphins Acts” was reintroduced.¹¹² This bill aims to “put an end to the display of cetaceans in aquariums throughout Canada”¹¹³ and has

¹⁰⁸ *Animal Facts: Killer whale*, CANADIAN GEOGRAPHIC (June 12, 2006), <https://www.canadiangeographic.ca/article/animal-facts-killer-whale> [<https://perma.cc/N9ZP-Z34Y>].

¹⁰⁹ *Id.*

¹¹⁰ PBS: FRONTLINE, *supra* note 10.

¹¹¹ *Id.*

¹¹² Laura Bridgeman, *Bill to End Dolphin and Whale Captivity Reintroduced in Canada*, EARTH ISLAND JOURNAL, (Dec. 30, 2015), http://www.earthisland.org/journal/index.php/elist/eListRead/bill_to_end_dolphin_and_whale_captivity_reintroduced_in_canada/ [<https://perma.cc/9JH3-HSGY>].

¹¹³ *Id.*

the support of the director of the *Blackfish* documentary, Gabriela Cowperthwaite.¹¹⁴ Public opinion tends to show a general support of the bill as well, and as of today, only one orca whale is still being held in captivity in Canada.¹¹⁵

Finally, Switzerland also finds itself among the list of “protectors,” as they have not only outlawed the keeping of dolphins in marine parks, but the importation of them as well.¹¹⁶ Although these laws were passed in 2012 and 2013, “animal dignity protection has been a constitutional principle in Switzerland,” as the country has been a great supporter of the Animal Welfare Act since 1992.¹¹⁷

Aside from this handful of countries, many others “have standards so strict that it is nearly impossible to keep cetacea in captivity, including Brazil, Luxembourg, Nicaragua, [and]Norway.”¹¹⁸ For example, England closed its last dolphinarium in 1993,¹¹⁹ with no other parks

¹¹⁴ Wilfred Moore, *Senate Liberal to Ban Captivity of Whales and Dolphins*, LIBERAL SENATE FORUM (June 11, 2015), <http://liberalsenateforum.ca/news-release/senate-liberal-ban-captivity-whales-dolphins/> [<https://perma.cc/G6M3-YDH4>].

¹¹⁵ *Orcas Held in Canadian Marine Parks*, WDC IN ACTION. <http://us.whales.org/wdc-in-action/orcas-held-in-canadian-marine-parks> [<https://perma.cc/KV53-9VC4>].

¹¹⁶ Kirby, *supra* note 16.

¹¹⁷ Gieri Bolliger, *Legal Protection of Animal Dignity in Switzerland: Status Quo and Future Perspectives*, 22 ANIMAL L. 311, 311 (2016).

¹¹⁸ Kirby, *supra* note 16.

¹¹⁹ Claire Jones, *Dolphins on display: How UK's "Seaworlds" sank*, BBC NEWS (March 19, 2016), <http://www.bbc.com/news/uk-england-35832175> [<https://perma.cc/V88E-NSAX>].

able to open “because imposed standards exceed[ed] the viability of establishing a dolphinarium in the country.”¹²⁰ In sum, a majority of countries have, at the very least, recognized the importance of passing laws protecting cetacean from capture and captivity. However, many still have not.

b. Foreign “Captors”

Although many countries lack cetacean-protection laws, several of those countries go beyond simply lacking legislation, as some even actively participate in worsening the problem. Some of the most prominent “captor” countries include Russia, China, and Japan.

Specifically, Russia has been named “the new frontier for catching wild orcas,” according to activists, since the passing of the Marine Mammal Protection Act (as well as other laws) made it harder to capture whales off the coasts of the United States and Canada.¹²¹ Since public opinion in the United States began to shift in 2013, and “[w]ith pressure against orca capture. . . activists say the industry migrated to Iceland, then Japan, and now Russia.”¹²² Orcas specifically have been captured off the coast of Russia in the Okhotsk Sea for the past several years, and most are then being sold to China where the demand is high.¹²³ Before 2013, the hunting and capturing of beluga whales ran rampant in Russia, again within the Okhotsk Sea. Eighty-one were caught in 2013 alone, with thirty-four dying “as a result of the capture operation,” and

¹²⁰ Kirby, *supra* note 16.

¹²¹ Azure Gilman, *Orca capture trade has moved to Russia, China, activists say*, ALJAZEERA AMERICA (Nov. 14, 2015), <http://america.aljazeera.com/articles/2015/11/14/captive-orca-trade-moves-to-russia-china.html> [<https://perma.cc/H24A-524J>].

¹²² *Id.*

¹²³ *Id.*

seven more dying while “in temporary holding tanks.”¹²⁴ In terms of orca whales, the Russian government does regulate capture to an extent, setting a quota of thirteen captures allowed per year in 2015.¹²⁵ However, this number has gone up, as orca quotas were once set at ten annually.¹²⁶ Furthermore, scientists are having a hard time figuring out what kind of an impact these hunts are having on the orca population in Russia, as they still do not know the exact population size for that area. That being said, whales are animals who live in large packs, or pods, and so with the capture of up to 13 orcas per year, “we may be seeing entire pods and communities being disrupted for decades.”¹²⁷ For this reason, scientists have advised the Russian government to enact a zero quota.¹²⁸

As stated, China has one of the largest demands for marine mammals due to the vast number of marine entertainment parks. Currently, China has thirty marine park facilities, with at least fourteen more under construction.¹²⁹ One of their parks, Chimelong Ocean Kingdom, is

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *More Orcas Captured in the Okhotsk Sea, Russia – When Will it Stop?*, WDC IN ACTION (Aug. 14, 2015), <http://uk.whales.org/blog/2015/08/more-orcas-captured-in-okhotsk-sea-russia-when-will-it-stop> [<https://perma.cc/2DHD-4TEP>].

¹²⁸ *Id.*

¹²⁹ Todd Woddy, *Captive*, TAKEPART, (June 14, 2016), <http://www.takepart.com/feature/2016/06/14/big-business-marine-mammal-captivity/> [<https://perma.cc/MM9U-5EGP>].

home to the world's largest aquarium, with "exhibits of whales, dolphins, seals, polar bears, walruses, penguins, and manatees."¹³⁰ As a whole, the country holds approximately 500 marine mammals in captivity.¹³¹

However, to worsen the problem, China receives its animals from other countries such as Russia and Japan. Instead of slowly phasing out their marine parks, they become instigators in a never-ending capture cycle. For example, "when a dolphin dies it must be replaced by one captured from the wild, keeping in business the brutal annual dolphin hunt in Taiji, Japan."¹³²

Which brings us to our next captor, Japan. Japan conducts what are called "Taiji Drives," which allegedly originate from a longstanding community hunting tradition, which "begins in September and runs through March" every year.¹³³ During the hunting season, hundreds of dolphins are driven into Taiji Cove in Japan, captured for captivity, or slaughtered.¹³⁴ According to reports, about 500 dolphins were driven into the cove in 2014.¹³⁵ Over the last several years, at least seventy of those dolphins were sold to Chinese parks for anywhere between \$150,000 and \$1,000,000 each.¹³⁶ Over the years, the Taiji tradition has been scrutinized by Western countries,

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Yoko Wakatsuki, *Japan officials defend dolphin hunting at Taiji Cove*, CNN (Jan. 22, 2014), <http://www.cnn.com/2014/01/20/world/asia/japan-dolphin-hunt/> [<https://perma.cc/6G5K-DD5P>].

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Woddy, *supra* note 129.

but the practice continues as the hunters and community members defend it as a form of tradition.¹³⁷ The mayor of Taiji stated, “[d]olphin fishing is one of traditional fishing forms of our country and is carried out appropriately in accordance with the law. Dolphin is not covered by the International Whaling Commission control and is controlled under responsibility of each country.”¹³⁸ However, in 2015, “Japanese aquariums voted to stop acquiring dolphins caught during the controversial hunt . . . because of the way dolphins are caught.”¹³⁹

Although very few, if any, cetacean-protection laws or regulations exist in these countries, some activist groups have formed as a result of this behavior. For example, the China Cetacean Alliance (CCA), “a coalition of international and Chinese animal welfare organizations,”¹⁴⁰ has not only recognized the concern for cetaceans in this area of the world, but has started taking steps to bring an end to the cycle. The CCA has stated that:

China’s participation in the live capture of free-ranging cetaceans from the waters of both Russia and Japan, and the subsequent import of these individuals, is having a negative impact on the conservation status of some targeted cetacean populations and on the international image of the country for its ability to protect wild animals.¹⁴¹

Furthermore, the CCA has recommended that “governing authorities responsible for the

¹³⁷ *Id.*

¹³⁸ Wakatsuki, *supra* note 133.

¹³⁹ *Dolphins escape from Taiji facility in Japan*, BBC NEWS ASIA (Jan. 5, 2017), <http://www.bbc.com/news/world-asia-38515187> [<https://perma.cc/7K66-RAVV>].

¹⁴⁰ *China’s captive Cetacean Industry Exposed in Unprecedented Report*, ANIMAL WELFARE INSTITUTE (Dec. 8, 2015), <https://awionline.org/content/chinas-captive-cetacean-industry-exposed-unprecedented-report> [<https://perma.cc/C4DL-LNQ3>].

¹⁴¹ *Id.*

management of captive cetaceans in China adopt several measures, including preparing plans to phase out the display of captive cetacea at ocean theme parks.”¹⁴² Despite some push towards a more compassionate stance on cetacean captivity, these three countries remain the most dangerous and threatening in terms of their lack of protection laws.

IV. COMPARATIVE ANALYSIS & NEXT STEPS

Keeping all of this expansive and complex background information in mind, we now move on to a law-based comparative analysis regarding the problem; the inconsistent existence of cetacean-protection laws throughout the globe.

First, I will begin by addressing the broad overarching problems that have woven themselves throughout several countries and individual states. Next, I will address the equally important sub-issue of capture and release as it applies to the protection laws currently in place. Finally, I will take those problems and propose what could be done to achieve the most effective regulation, based on some of the more successful laws we have seen so far.

A. Major Problems

Given all of these inconsistent protection laws currently in existence, there are three prominent problems apparent throughout them all. The laws (1) are underinclusive, meaning they do not protect all cetacea, but instead protect a select few; (2) can be somewhat ineffective, whether it is due to loopholes or because they are optional in nature; and (3) sometimes come into contact with cultural differences, which make it near impossible to successfully implement protection laws.

1. Underinclusiveness

¹⁴² *Id.*

As we have seen with several of these laws and treaties, many countries have attempted to put protection laws in place or have successfully implemented such laws. However, when we look at the specifics of these laws, some do not address the protection of *all* cetacea and instead focus only on one or a few types of cetacea.

For example, the California Orca Protection Act only prevents the capture and breeding of orcas.¹⁴³ As mentioned earlier, this orca-specific law originally applied to all marine mammals but was amended following issues with Sea World.¹⁴⁴ In contrast, other laws such as the proposed Washington statute would protect all cetacea.¹⁴⁵

The same could be said with the three international treaties. The International Whaling Convention deals only with whales and the whaling industry, while the Convention on International Trade in Endangered Species deals with all animals, so long as they are somewhere on the endangered species spectrum. Furthermore, the United Nations Convention on the Law of the Sea fails to touch on any cetacea at all.

This issue of underinclusiveness is thus directly related to the major issue of inconsistency. The fact that countries or states have protection laws in place does not mean the problem of cetacean-protection is suddenly solved. If laws are not protecting the targeted animals in their entirety, there remain gaping holes in legal protection. As discussed, cetacea includes all marine mammals, such as all species of whales, dolphins and porpoises. These laws would therefore be far more effective if they protected all marine mammals instead of only a few. For

¹⁴³ CAL. FISH & GAME CODE §§ 4502.5(a)(1)-(4), (d)(2) (West 2016).

¹⁴⁴ Kirby, *supra* note 64.

¹⁴⁵ S.B. 5666, 64 Leg., Reg. Sess. (Wash. 2015) *available at* [<https://perma.cc/42RB-ET8B>].

example, the cetacean protection law in South Carolina has been amended several times over the years in order to make sure their law was as protective as possible, now stating that it is illegal to hold any cetacea in captivity.¹⁴⁶ It is worth mentioning however, that this law is still underinclusive in that it only protects cetacea from being held in captivity, and does not actually make it illegal to capture them for sale or for other purposes.

Although California has received much recognition for their Orca Protection Act, it only serves orcas. Hypothetically speaking, parks could still potentially keep their dolphin shows or beluga exhibits open. While these laws admirably attempt to take charge of the growing legal problem, their underinclusive nature only leads to more problems and potential inconsistencies that still put all marine mammals in danger.

2. Ineffectiveness

Secondly, there is clearly a prevailing issue of actual effectiveness among some of the regulations currently in existence, even with some of the more successful laws. Although they may sound good on paper, when put into practice, prevalent loopholes are brought to light.

Take, for example, the United States' Marine Mammal Protection Act (MMPA) of 1972. The purpose of the law had impressive intentions, to protect all marine mammals in United States waters.¹⁴⁷ The United States Congress itself recognized and responded to research and findings showing a correlation between the rising extinction rates of marine mammals and human activity.¹⁴⁸ However, as I have discussed, scientists and advocates alike are cautious

¹⁴⁶ Petersen, *supra* note 73.

¹⁴⁷ The Marine Mammal Protection Act, 16 U.S.C. §§ 1361(1)-(6) (2013).

¹⁴⁸ *Id.* at 1361(1).

about the MMPA because loopholes within the Act exist. Under the Act, marine mammals can be held in captivity for public display once certain duties required within the Act are performed. Fishermen can still harass the animals, so long as they report the number of mammals they “take.” As mentioned, larger commercial shipping companies have even fewer hurdles to jump through. At the end of the day, the Act’s purpose comes in direct conflict with what it actually legally allows in terms of capture and captivity; in other words, its actual effectiveness leaves much to be desired.

Some scientists state that the Act “not only prevented extinctions that seemed imminent, but also helped some species bounce back in strong numbers.”¹⁴⁹ While this may be true, and while saving animals from extinction is an incredible accomplishment, the fact remains that captivity is still a huge problem. In addition to captivity, the ineffectiveness of the Act has led to the inability to address other problems as well, such as “new diseases, depleted food resources . . . and underwater ship noise that can drown out whale songs and other marine mammal communications.”¹⁵⁰

Aside from loopholes, other laws have proven ineffective for other reasons as well, namely their voluntary nature. This problem is one that specifically arises within the international treaties.

All three of the treaties discussed, the IWC, CITES and UNCLOS, are not controlling on

¹⁴⁹ Megan Gannon, *Historic Marine Mammal Protection Act Worked, Scientists Say*, LIVE SCIENCE (Apr. 12, 2013), <https://www.livescience.com/28703-marine-mammal-protection-act.html> [<https://perma.cc/Y6XA-YXXL>].

¹⁵⁰ *Id.*

all nations. They are voluntary treaties, meaning that only those countries who wish to adopt these laws will be held to their standards. Although all fail to truly address the problem of capturing and keeping cetacean in captivity, even if they did include provisions that were specifically aimed at this issue, they would likely be ineffective simply because they were controlling only on those countries who voluntarily signed them. This is an important concept to keep in mind moving forward with best “next steps” or potential solutions, because without a universally controlling standard or enforcement mechanisms, any future laws will fail due to ineffectiveness.

3. Cultural Differences

Although it is becoming less of an influence, cultural differences among countries serves as a potential problem when dealing with the issue of developing a more uniform international approach to cetacean protection.

As discussed, Japan is the primary country of concern with respect to cultural opposition to the protection of marine mammals, specifically dolphins. The Taiji drives, as described above, are conducted every year as part of an alleged hunting tradition. Regardless of whether or not these drives are truly part of a cultural tradition, they do bring up the question of what happens when cultural differences do not allow for cetacean protection.

For argument’s sake, let us say that the Taiji drives do derive from a cultural tradition. Cultural traditions, just like religious practices, are sometimes granted exceptions when it comes to laws that, if enforced, would violate their practices and beliefs. Thus, cultural traditions can serve a perfectly valid exception, so long as these exceptions are not inappropriately taken advantage of.

Is there a way, however, to still create uniform protection across the globe, while also

addressing those countries whose ancestral traditions prevent them from protecting cetacea? Perhaps there is a way to distinguish between those traditions that allow for the hunting of cetacea, or any other animal (as most civilizations do hunt animals) for meat, and those who hunt cetacean specifically in order to capture and sell them to marine parks for entertainment purposes. Perhaps there should also be a distinction between those who hunt humanely as opposed to inhumanely.

Regardless of the intentions behind different types of cultural practices, their existence does serve as an issue that is worth discussing. In order to implement a wholly uniform set of policies that protect marine mammals in captivity, the laws themselves should be formal enough that they are effective, but flexible enough that they can actually be followed, practically speaking.

B. Capture and Release

Another slight caveat that policy makers should recognize is the existence of “capture and release” programs as applied to marine mammals. “Capture and release,” or rehabilitation, of marine mammals is a slightly controversial area that has resulted from the very issue discussed above. Essentially, rehabilitation has grown as a solution to the following question; even if we were to suddenly halt all cetacean from being captured for entertainment purposes, or if we were successful in implementing some type of universal policy, what do we do with all of the animals currently kept in captivity? Especially those that were bred and born in tanks?

Marine mammals kept in captivity for entertainment purposes generally cannot be released back into the wild, especially if they were born in captivity, because after spending so long in a tank, their natural hunting instincts have been diminished.

The marine park experience is the wild inverted. The physical space is tightly constricted and relatively barren, life is on a schedule, and there’s no need to hunt and forage.

Outside of training and shows, there's also little need for movement. Most notably, a captive dolphin's orientation changes profoundly: The world above the surface suddenly becomes much more important than the world below. Almost all the action—from feedings to training sessions to audiences applauding to the directions given during shows—is topside. One simple comparison makes the point. Wild dolphins spend an estimated 80 percent of their time well below the surface. Captive dolphins spend about 80 percent of their time at or near the surface.¹⁵¹

Although this excerpt primarily discusses dolphins, the same issues hold for all cetacea.

Researchers have attempted to release animals back into the wild, but have been extremely careful in doing so. In fact, “[f]ewer than three dozen long-term captive dolphins had been released over the previous [fifty] years, with mixed and often inconclusive results.”¹⁵² One of the most well-known examples of these results is the tragic death of Keiko, the orca who starred in the *Free Willy* movies.¹⁵³ Keiko lived in a poorly-maintained tank for most of his life, until starring in *Free Willy* changed his life. The movie was a hit, but in turn, audiences soon learned of his terrible living conditions. After public campaigns to “save Keiko,” the whale was then put through five years of training that would allegedly help him survive once they ultimately returned him to the wild.¹⁵⁴ However, after being released back into the waters of Norway in July

¹⁵¹ Tim Zimmermann, *Can Captive Dolphins Return to the Wild?*, NATIONAL GEOGRAPHIC (June 2015), <http://ngm.nationalgeographic.com/2015/06/rewilding-orcas/zimmerman-text>

[<https://perma.cc/C342-P6TG>]

¹⁵² *Id.*

¹⁵³ Adam Lusher, *Whale star of 'Free Willy' dies after return to wild*, THE TELEGRAPH (Dec. 14, 2003), <https://www.telegraph.co.uk/news/worldnews/northamerica/usa/1449436/Whale-star-of-Free-Willy-dies-after-return-to-wild.html> [<https://perma.cc/RR79-LQQM>].

¹⁵⁴ *Id.*

of 2002, Keiko remained largely dependent on humans until his death in December of 2003.¹⁵⁵

As a result, rehabilitation centers and conservatories have emerged to help better take care of cetacea, both released from captivity, and even those currently living in the wild who may be sick or injured. While programs aimed at helping those cetacea in the wild can be slightly controversial, they have important purposes “founded on two general principles -- altruistic assistance to the sick or injured, and conservation of wild populations. In the process we gain scientific and medical knowledge, though this benefit is rarely proposed as a principal objective.”¹⁵⁶

Specifically, some activists have called for marine mammal entertainment venues such as SeaWorld to develop “sea pen sanctuaries,”¹⁵⁷ which represent “a concept similar to the land sanctuaries that are home to elephants and chimps.” In the case of marine mammals the sanctuary “would be a large space in the ocean, most likely in a bay or a cove, that is enclosed by nets.”¹⁵⁸ This would essentially allow for orcas to “retire” into a structured environment, while

¹⁵⁵ *Id.*

¹⁵⁶ David John St. Aubin, Joseph R. Geraci & Valerie J. Lounsbury, *Rescue, Rehabilitation, and Release of Marine Mammals: An Analysis of Current Views and Practices (Proceedings of a workshop held in Des Plaines, Illinois, 3-5 December 1991)*, University of Guelph, Ontario, 9, (Dec. 1991) [<https://perma.cc/82JK-BT7H>].

¹⁵⁷ Stav Ziv, *How to Retire a Captive Orca: The Sea Sanctuaries of the Future*, NEWSWEEK (Nov. 11, 2015), <http://www.newsweek.com/retire-captive-orcas-sea-sanctuaries-392943> [<https://perma.cc/5SV2-KUSE>].

¹⁵⁸ *Id.*

still being given the chance to “experience the current and swim and dive and interact with other ocean animals” just like they would in the wild.¹⁵⁹ Additionally, what makes these sanctuaries so appealing is that they can be used for all types of cetacea. Currently, developers and scientists are “explor[ing] the potential for the development of sea pen, retirement sanctuaries or refuges for captive cetaceans in North America.”¹⁶⁰

In an attempt to create more uniformity among the practices of these rehabilitation centers, the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Fish and Wildlife Service (USFWS) have created “Policies and Best Practices” as it applies to “Standards of Release” for marine mammals. These standards only apply to the United States, as they work in conjunction with conditions set forth in the Marine Mammal Protection Act (MMPA).¹⁶¹ The MMPA states that the Secretary of Commerce, “in consultation with the Secretary of the Interior, the Marine Mammal Commission, and individuals with knowledge and experience in marine science, marine mammal science, marine mammal veterinary and husbandry practices, and marine conservation, including stranding network participants, establish a program to be known as the ‘Marine Mammal Health and Stranding Response Program.’”¹⁶² Thus, NOAA and USFWS assisted these officials with the creation of such standards, which includes a specific

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ 16 U.S.C. § 1379 (2013).

¹⁶² 16 U.S.C. § 1421(a) (2013).

section on the release of cetacea.¹⁶³

Essentially, all rehabilitation centers must adhere to the same standards set forth in the document when considering whether or not to release a cetacean back into the wild. The centers must also place their cetacea into one of three “release categories” that determine their likely level of survival if they were to be put back into the wild based on a “standardized checklist.”¹⁶⁴ These categories for cetacean include “Non-Releasable,” “Conditionally Releasable,” and “Releasable.”¹⁶⁵

If a cetacean is found to be “releasable,” meaning, “there are no significant concerns related to the likelihood of survival in the wild and/or risk of introducing disease into the wild population,” they may be released once a release plan has been approved.¹⁶⁶ Before being released, the standards require “a thorough evaluation of the historical, developmental, behavioral, and medical records and status be completed by the Assessment Team (i.e., Stranding Network Participant, attending veterinarian, animal care supervisor, and biologist with

¹⁶³ Janet E. Whaley & Rose Borkowski, *Best Practices Marine Mammal Stranding and Response, Rehabilitation, and Release: Standards for release*, NAT’L OCEANIC AND ATMOSPHERIC ADMIN., NAT’L MARINE FISHERIES OFFICE OF PROTECTED RESOURCES, MARINE MAMMAL HEALTH AND STRANDING RESPONSE PROGRAM AND U.S. FISH AND WILDLIFE SERVICE, FISHERIES AND HABITAT CONSERVATION, MARINE MAMMAL PROGRAM, (Feb. 2009) [<https://perma.cc/38LL-CDCR>].

¹⁶⁴ *Id.* at 3-1 to -2.

¹⁶⁵ *Id.* at 3-2.

¹⁶⁶ *Id.*

knowledge of species behavior, ecology, and life history).” The evaluation must state that “the animal is medically and behaviorally suitable for release in accordance with the release criteria and include a written release plan and timeline.”¹⁶⁷

This detailed and extensive process ensures that animals are entirely ready to be released before going back into the wild. However, as mentioned, these standards only apply to the United States. Despite the fact that clearly not all countries have these same processes in place, these guidelines are worth mentioning because they can serve as building blocks for a potential uniform law that *does* apply on a much wider scale. Thus, these processes will be picked up again in my final discussion regarding suggested “Next Steps.”

C. Possible Solutions & Suggested “Next Steps”

Based on all of the above analysis, it is clear that the issue of protecting marine mammals from captivity is a huge problem that requires a massive undertaking of time, resources, and solid international participation. That being said, all of this discussion is incredibly important in considering a plausible solution to the problem. Therefore, I will now state a proposed solution to the issue which attempts to take all of the different opinions, problems, and caveats and address them in a way that still achieves the best possible outcome: an outright international ban on marine mammals kept in captivity for entertainment purposes.

In order to achieve an international ban, the law itself would need to be enforced by an internationally recognized body. In my opinion, this should be the United Nations. UNCLOS, despite having no mention of laws protecting cetacean, is an already-existing law that is enforceable on all participating countries. I would therefore suggest either some sort of

¹⁶⁷ *Id.* at 3-1.

amendment to UNCLOS, or perhaps a brand new international agreement with its sole purpose being the protection of cetacean in captivity. Either way, the United Nations seems to be the best governing body to attempt this legislation. Also, because all participating nations have United Nations delegates, this would allow for voices from across the world to be heard if any individual countries had problems with the law that needed to be addressed.

Next, this treaty would most importantly need to enforce protections for *all* cetacea, not just whales or dolphins. As discussed, many laws currently in existence are underinclusive because they only address a select type of cetacea as opposed to all species within that class. In reality, all cetacea are at risk, and therefore all cetacea are in need of protection. As a reminder, this would include all types of marine mammals.

The proposed law would also need to be as free of loopholes as possible. In reality, this is likely easier said than done, as most loopholes are not discovered until a law has been in effect for some time and gaps are discovered which ultimately lead to ineffectiveness. This is true of any law and, as such, should be avoided as much as possible during the drafting process despite inevitable mistakes.

As of now, most countries have some form of protection laws in place, or at least support the idea of such protection. For those problematic countries that do not have protective laws, enforcement is key. However, for those countries with cultural traditions that conflict with such laws, it is imperative that the law have some type of flexibility. Such countries should not be ostracized because of their traditions, especially if being ostracized due to valid concerns lessens their participation. Participation of all countries is incredibly important, although practically impossible. Therefore, the law should aim to be as inclusive as possible, even if that means including some type of formal exceptions, with guidelines and requirements, for countries with

potential conflicts. As discussed, these exceptional guidelines should draw the line between countries who hunt as part of tradition and those who hunt as a means to sell marine mammals to parks, aquariums, and the like.

Although not discussed at length, aquariums do serve a valid educational purpose as the conservatories and rehabilitation centers that are open to the public. A final law should therefore make a point to define what types of “public spaces” are allowed to house marine mammals, such as rehabilitation centers, and those that are not, such as marine parks that are purely entertainment-based in nature. Although education regarding the marine world is important, this law should aim to balance the costs of such education against the health and wellness of the animals they house.

For those facilities that are primarily rehabilitation-based, I would strongly recommend looking to the guidance cited above from the United States pertaining to capture and release. It is incredibly important that if a law such as this were to exist, it also include a valid “safety net” for those animals who cannot possibly return to the wild. However, it is equally important that animals who can return to the wild be given some sort of a release plan, complete with multiple checks and pre-screenings to make sure they will adapt and survive to their new environment. From an ethical standpoint, this is imperative to help keep our ocean wildlife safe and thriving.

V. CONCLUSION

Cetacea are, without a doubt, in danger because of the impact we as humans have caused on an international basis. Although there have been great strides in attempting to rectify this problem, we have yet to solve the issue entirely. With all of this background, analysis, and recommendations in mind, it is my hope that such information will at the very least serve as a wake-up call to the general public and perhaps prove that there is great urgency to find a

solution. As I have also recognized, these proposed “next steps” are likely to take far more research, time, and many international resources in order to be achievable; the issue will in no way be solved overnight. At the very least, I hope that this analysis serves as a starting point for an important problem, which continues to affect species at an international level.