

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ALFA INTERNATIONAL SEAFOOD INC., *et al.*, )  
)  
*Plaintiffs,* )  
)  
v. ) Case No. 1:17-cv-00031-APM  
)  
THE HONORABLE WILBUR ROSS, *et al.*, )  
)  
*Defendants.* )

**BRIEF AMICUS CURIAE OF THE MONTEREY BAY AQUARIUM FOUNDATION IN  
SUPPORT OF DEFENDANTS**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Local Rules 7.1 and 7(o)(5), *amicus curiae* the Monterey Bay Aquarium Foundation states that it is a non-profit, 501(c)(3) tax-exempt organization, has no parent corporation, and there are no outstanding securities in the hands of the public.

/s/ W. Eric Pilsk  
W. Eric Pilsk

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**BRIEF AMICUS CURIAE OF THE MONTEREY BAY AQUARIUM FOUNDATION IN  
SUPPORT OF DEFENDANTS**

**INTEREST OF THE MONTEREY BAY AQUARIUM FOUNDATION**

The Monterey Bay Aquarium Foundation (“the Aquarium”)<sup>1</sup> is a nonprofit organization located in Monterey, California.<sup>2</sup> The Aquarium’s mission is to inspire conservation of the ocean. It is a respected and trusted authority on ocean conservation issues locally and globally. Since opening in 1984, the Aquarium has welcomed over 56 million visitors to experience its globally recognized exhibits, education, and conservation programs. These programs demonstrate the importance of our ocean and the connections to our human existence – from the

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<sup>1</sup> Pursuant to Local Rule 7(o)(5), the Aquarium makes the following disclosures:

- (A) No party’s counsel authored this brief in whole or in part;
- (B) No party or a party’s counsel contributed money that was intended to fund preparing or submitting the brief; and,
- (C) No person – other than the *amicus curiae*, its members, or its counsel – contributed money that was intended to fund preparing or submitting this brief.

The Aquarium was granted leave to file this brief by order of the Court. *See* May 9, 2017 Minute Order.

<sup>2</sup>*See generally* MONTEREY BAY AQUARIUM, <http://www.montereybayaquarium.org> (last visited May 12, 2017); *Conservation and Science Programs for Businesses and Consumers – Seafood Watch*, MONTEREY BAY AQUARIUM, <http://www.montereybayaquarium.org/conservation-and-science/our-programs/seafood-watch> (last visited May 12, 2017).

air we breathe to weather patterns and resources that drive our multi-billion-dollar ocean-based economy.

The Aquarium has developed several strategic priorities to address major threats to ocean health and to promote long-term conservation for future generations. One of the Aquarium's strategic priorities is to achieve sustainability in global production of seafood, including wild fisheries and aquaculture operations. Illegal, unreported and unregulated fishing and aquaculture ("IUU activities") are key threats to progress. The Aquarium brings its unique expertise to a range of research, policy, and market-based efforts to improve the sustainability of fisheries and aquaculture globally, including addressing IUU activities, based on sound science. Among other research efforts, the Aquarium is committed to studying and improving the health of wildlife species such as sharks and bluefin tuna, which are among the world's most vulnerable marine species to both IUU activities and the lack of effective enforcement and management controls.

The Aquarium's policy efforts to fight IUU activities included participation throughout the development and adoption of the Seafood Import Monitoring Rule at issue in this case, providing comments and input to the Task Force and commenting on the Seafood Import Monitoring Rule at several points in the rulemaking.<sup>3</sup> In addition, the Aquarium is an important stakeholder in legislative efforts to combat IUU activities, and was instrumental in the passage of

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<sup>3</sup> See, e.g., Comment Letter from Margaret Spring, Monterey Bay Aquarium, to Melissa Beaudry, Quality Officer, Nat'l Marine Fisheries Serv. (June 28, 2016) (AR 006878); Comment Letter from Margaret Spring, Monterey Bay Aquarium, to Mark Wildman, Nat'l Marine Fisheries Serv. (Apr. 12, 2016) (AR 004734); Comment Letter from Margaret Spring, Monterey Bay Aquarium, to Danielle Roux, Nat'l Marine Fisheries Serv. (Sept. 11, 2015) (AR 004436); Comment Letter from Margaret Spring, Monterey Bay Aquarium, to Melissa Beaudry, Quality Officer, NOAA Fisheries (July 31, 2015) (AR 003179); Comment Letter from Margaret Spring, Monterey Bay Aquarium, to Danielle Roux, Nat'l Marine Fisheries Serv. (June 7, 2015) (AR 002876).

the Illegal, Unreported, and Unregulated Fishing Enforcement Act of 2015,<sup>4</sup> which strengthens a variety of enforcement mechanisms and permits NOAA to disclose enforcement information to other government and fisheries management organizations.

The Aquarium's market-based efforts are led by its Seafood Watch<sup>®</sup> program, a global leader in establishing seafood sustainability ratings and standards. Seafood Watch<sup>®</sup> has sustainability ratings for over 85% of the seafood products (by volume) on the North American market, the majority of which comes from imports. This program provides science-based information to consumers and businesses about seafood that is produced (wild and aquaculture) in a sustainable manner, and partners with a variety of businesses in the seafood supply chain, including major food service companies, suppliers, retailers, and restaurants from around the country. Seafood Watch<sup>®</sup> works with over 1,100 entities worldwide, and the Aquarium takes particular pride in its work with over 20 local Monterey Bay restaurant and business partners.<sup>5</sup> The Aquarium recently partnered with USAID to further leverage Seafood Watch's<sup>®</sup> existing connections with North American seafood buyers to improve traceability of seafood products entering the market from Asia.<sup>6</sup> The Aquarium uses this market-based approach to encourage consumers and businesses to purchase sustainable seafood, and to drive changes throughout the global seafood supply chain to address key problems, including IUU activities.

The Seafood Import Monitoring Rule is an important first step in addressing IUU activities in order to advance sustainable fisheries and aquaculture worldwide. The Aquarium

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<sup>4</sup> Pub. L. No. 114-81, 129 Stat. 649 (2015).

<sup>5</sup> *Our Partners*, MONTEREY BAY AQUARIUM SEAFOOD WATCH, <http://www.seafoodwatch.org/businesses-and-organizations/partners> (last visited May 12, 2017).

<sup>6</sup> Press Release, USAID, USAID Partners with Monterey Bay Aquarium to Combat Illegal Fishing and Promote Sustainable Fisheries in Southeast Asia (Sept. 12, 2016), *available at* <https://www.usaid.gov/news-information/press-releases/sep-12-2016-usaid-partners-monterey-bay-aquarium-combat-illegal-fishing> (last visited May 15, 2017).

therefore has an interest in defending the Seafood Import Monitoring Rule, and seeks to present its perspective and experience in this amicus brief.

## ARGUMENT

### I. THE AQUARIUM'S LONG STANDING PROGRAM TO DEVELOP MARKET-BASED APPROACHES TO FIGHTING IUU ACTIVITIES DEPENDS ON GOVERNMENT EFFORTS LIKE THE SEAFOOD IMPORT MONITORING RULE

Among the Aquarium's highest priorities is advocating for sustainable fisheries and aquaculture. As part of its efforts, in 1999 the Aquarium launched its Seafood Watch<sup>®</sup> program, which empowers businesses and consumers to choose seafood that is caught or farmed in ways that support a healthy ocean. Seafood Watch<sup>®</sup> conducts extensive public outreach on important seafood sustainability challenges, including IUU activities, and utilizes partnerships with an extensive network of businesses and non-government organizations to encourage sustainable purchasing decisions that will drive major changes throughout the global seafood supply chain and result in improvements in ocean health.

A key part of Seafood Watch<sup>®</sup> is the development of science-based standards that industry and consumers can rely upon to assure the distribution and sale of sustainably sourced seafood.<sup>7</sup> Seafood Watch<sup>®</sup> uses those standards in a variety of publicly available corporate and consumer tools that enable informed choices about seafood purchasing decisions.<sup>8</sup> For example,

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<sup>7</sup> See *Our Standards*, MONTEREY BAY AQUARIUM SEAFOOD WATCH, <http://www.seafoodwatch.org/seafood-recommendations/our-standards> (last visited May 12, 2017).

<sup>8</sup> See *Tools for Businesses and Organizations*, MONTEREY BAY AQUARIUM SEAFOOD WATCH, <http://www.seafoodwatch.org/businesses-and-organizations/tools> (last visited May 12, 2017); *Consumer Resources to Support Sustainable Seafood*, MONTEREY BAY AQUARIUM SEAFOOD WATCH, <http://www.seafoodwatch.org/consumers> (last visited May 12, 2017).



Seafood Watch<sup>®</sup> publishes regional consumer guides to sustainable seafood,<sup>9</sup> supports a mobile device application,<sup>10</sup> and provides a complete seafood recommendation guide designed for chefs, suppliers, and businesses.<sup>11</sup> These efforts help combat IUU activities by allowing consumers and businesses to make informed choices to buy seafood that is sustainably sourced and meets the highest standards of environmental performance.

However, the work of the Aquarium, particularly as it relates to the market-based approach of Seafood Watch<sup>®</sup> to develop and update sustainable seafood ratings, is often limited by a lack of information that, if available, would allow consumers and businesses within the supply chain to effectively trace seafood back to its point of capture or harvest. Without that key traceability information, consumers and businesses have difficulty identifying the species, fishing method, and origin of the product that correspond to a Seafood Watch<sup>®</sup> rating, thus hampering their ability to utilize their purchasing power to fight IUU activities and encourage sustainability. Traceability information is necessary to give businesses and consumers the certainty they need to be assured that seafood was caught legally and sustainably.

The purpose of the Aquarium's brief is to explain why the Seafood Import Monitoring Rule is necessary to allow the Aquarium and its private sector partners in the seafood supply chain to combat IUU activities. Plaintiffs argue that existing laws and voluntary industry efforts are sufficient to fight IUU activities making the Seafood Import Monitoring Rule unnecessary.

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<sup>9</sup> *Printable Consumer Guides*, MONTEREY BAY AQUARIUM SEAFOOD WATCH, <http://www.seafoodwatch.org/seafood-recommendations/consumer-guides> (last visited May 12, 2017).

<sup>10</sup> *Seafood Watch Mobile App*, MONTEREY BAY AQUARIUM SEAFOOD WATCH, <http://www.seafoodwatch.org/seafood-recommendations/our-app> (last visited May 12, 2017).

<sup>11</sup> MONTEREY BAY AQUARIUM SEAFOOD WATCH, COMPLETE RECOMMENDATION LIST (May 1, 2017), available at <http://www.seafoodwatch.org/-/m/sfw/pdf/whats%20new/complete%20recommendation%20list.pdf>.

The Aquarium has spent over 15 years working with the seafood industry and other businesses and entities throughout the seafood supply chain, from fishermen to consumers, to implement market-based solutions to IUU activities and other sustainability challenges. While those efforts have had notable success, the successes have been limited due to the inherent limits of private sector authority and power. Critically, the Aquarium, together with many leaders in the seafood supply chain, recognize that some degree of government regulation is necessary and, if done correctly, will allow the private sector to leverage the power of the market to reward well-managed fisheries and aquaculture operations, combat IUU activities, and make meaningful progress in advancing the sustainability of fisheries and aquaculture globally. The Aquarium and industry leaders recognize that the Seafood Import Monitoring Rule provides a powerful tool to fight IUU activities that only a government can provide and that supports and complements the ongoing efforts of the private sector.

**II. IUU ACTIVITIES CREATE PARTICULAR RISKS FOR MARKET PARTICIPANTS THAT CANNOT BE MITIGATED WITHOUT GOVERNMENT ACTION LIKE THE SEAFOOD IMPORT MONITORING RULE**

**A. IUU Activities, And The Lack Of Traceability, Create Economic And Legal Risks To Participants In The Seafood Market**

Plaintiffs, the Government, Intervenors, and the other amici all acknowledge that IUU activities are a serious problem. Congress agrees, and legislation to fight IUU activities has enjoyed broad bi-partisan support as demonstrated by the bi-partisan support for the 2006 reauthorization of the Magnuson-Stevenson Fishery Conservation and Management Act, the passage of the Illegal, Unreported, and Unregulated Fishing Enforcement Act of 2015, *supra*, and the recent ratification of the Port State Measures Agreement.<sup>12</sup>

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<sup>12</sup> See *The United States has ratified the FAO Port State Measures Agreement*, U.S. MISSION TO THE UN AGENCIES IN ROME, <https://usunrome.usmission.gov/the-united-states-has-ratified-the-fao-port-state-measures-agreement/> (last visited May 15, 2017).

In addition to the problems identified and ably described by the parties and amici – such as overfishing, unsustainable fishing practices, economic losses and market destabilization, undermining existing laws and treaties, and labor and human rights abuses in the supply chain<sup>13</sup> – the Aquarium has come to understand that IUU activities also create particular economic and legal risks to market participants that are not widely appreciated. Those risks drive the efforts of businesses to address the problem of IUU activities in general, and have led many businesses to join the Aquarium and a wide range of other entities to support the Seafood Import Monitoring Rule.<sup>14</sup> A better understanding of those risks will help the Court understand the important role the Seafood Import Monitoring Rule plays in combatting IUU activities and it is a reasonable and appropriate way to implement the Magnuson-Stevenson Fishery Conservation and Management Act.

Increasingly, today's consumers value businesses and products that integrate environmental and human rights values into their business practices. With respect to seafood, consumers demand to know that seafood was caught and processed legally and sustainably, and consumers value businesses and products that can provide meaningful validation of those things. Businesses, both out of a need to meet consumer demand and from a sense of corporate responsibility, want to be able to assure their customers that their seafood has been harvested or

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<sup>13</sup> See Ian Urbina, *The Outlaw Ocean*, N.Y. TIMES, July 7, 2015, available at [https://www.nytimes.com/interactive/2015/07/24/world/the-outlaw-ocean.html?\\_r=1](https://www.nytimes.com/interactive/2015/07/24/world/the-outlaw-ocean.html?_r=1).

<sup>14</sup> See, e.g., Comment Letter from Maisie Ganzler, Bon Appetit Management Co., Julia Jordan, Compass Group USA, Tod MacKenzie, Aramark, Ron Hall, Service Systems Associates, Inc., and Samantha Lubow, Cal Dining, to Mark Wildman, Nat'l Marine Fisheries Serv. (Apr. 12, 2016) (AR 006768); Comment Letter from Buster Houston, Group Seafood Director, Albertsons Companies, to Mark Wildman, Nat'l Marine Fisheries Serv. (Apr. 12, 2016) (AR 006545); Comment from A.C. Gallo, President & Chief Operating Officer, Whole Foods Market, to Docket No. NOAA-NMFS-2015-0122 (Apr. 11, 2016) (AR 004667); Comment Letter from Eli Penberthy, PCC Natural Markets, to Mark Wildman, Nat'l Marine Fisheries Serv. (Mar. 30, 2016) (AR 004539).

farmed in an environmentally responsible manner and was not the product of unfair labor practices or human rights abuses. Businesses are also aware of the damage to their reputation and market position when problems in the supply chain are exposed, and very much want to find ways to mitigate that risk and prevent damaging scandals and the resulting disruption to their businesses.<sup>15</sup> IUU activities pose such a risk to participants in the seafood industry, including in particular public-facing participants such as restaurants, distributors, grocery stores, and other food retailers and wholesalers.<sup>16</sup>

From a more practical point of view, businesses do not want their prices undercut by competitors who are willing to sell fish caught illegally. As all parties appear to acknowledge, IUU activities undercut legally caught seafood prices and destabilize markets. Int.-Def.'s Mem. in Supp. of Mot. Summ. J. 3, 5, ECF No. 57; Def.'s Mem. in Supp. of Mot. Summ. J. 1, ECF No. 56-1; Pl.'s Mem. in Supp. of Mot. Summ. J. ("Pl. Br.") 1, ECF No. 48-1 (noting that IUU

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<sup>15</sup> Alison Cook, *Houston Restaurateur Caught up in Illegal Seafood Network Investigation*, HOUSTON CHRON., Apr. 5, 2017, available at <http://www.chron.com/entertainment/restaurants-bars/article/Houston-restaurateur-accused-of-operating-illegal-11052346.php> (criminal citations issued to restaurant owner who allegedly purchased illegally caught fish); News Release, Tex. Parks & Wildlife Dep't, Texas Game Wardens Uncover Massive Illegal Seafood Network in Houston (Apr. 5, 2017), available at <http://tpwd.texas.gov/newsmedia/releases/?req=20170405a>; Jenn Abelson & Beth Daley, *Many Mass. Restaurants Still Serve Mislabeled Fish*, BOSTON GLOBE, Dec. 2, 2012, available at <http://www.bostonglobe.com/business/2012/12/02/dnasidebar/SAe6PdZMRqi6mZUDOdWz7M/story.html> (stating how many restaurants had changed their practices after testing revealing they were selling mislabeled fish).

<sup>16</sup> UNITED NATIONS ENVIRONMENTAL PROGRAMME, THE ROLE OF SUPPLY CHAINS IN ADDRESSING THE GLOBAL SEAFOOD CRISIS at 51 (2009), available at <http://www.unep.org/resourceefficiency/what-we-do/sustainable-lifestyles/food-and-food-waste/publications-food> ("UNEP Report"):

Retailers, and all organisations in the fish and fish product supply chains, are thus faced with the fact that the resources they trade do not comply with their commitment towards sustainable resources, which is core to most CSR policies. This is a major risk to retailers' image and may explain why details of their seafood sourcing policies and the state of their implementation is very difficult to obtain, as will be further discussed.

activities are “a global concern”). Businesses seek to create a level playing field to assure that competition occurs based on quality, service, and efficiency rather than price competition based on unfairly low prices due to IUU activities. Businesses also need to avoid the legal risks associated with handling and selling IUU seafood products.<sup>17</sup>

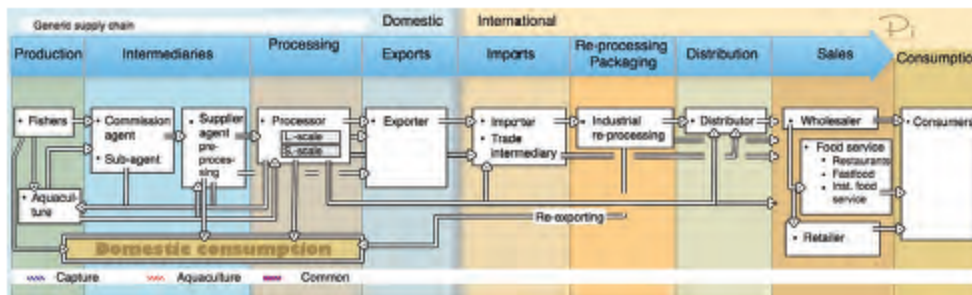
Fundamentally, the global nature of the seafood industry and the complexity of seafood supply chains (which can vary between fisheries and species) make it very difficult for the entire seafood industry to address IUU activities, and all but impossible for any one group of private businesses to do so. The complexity of the issue and its solutions is reflected in the fact that the Presidential Task Force on Combatting IUU Fishing and Seafood Fraud developed, after extensive public comment and consultation among multiple agencies, 15 recommended measures to address IUU activities covering a wide range of actions, including capacity building, international agreement and cooperation, enforcement, state and local measures, and the establishment of a seafood traceability program which the Seafood Import Monitoring Rule implements in part. The global and complex nature of the problem requires multi-faceted solutions and close cooperation between public and private entities across the world. Businesses and non-governmental organizations alone cannot solve the problem.

For example, the typical supply chain for seafood products is very complex, involving multiple players, often of different nationalities. A report by the United Nations Environment Programme depicted the generic seafood supply chain as follows<sup>18</sup>:

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<sup>17</sup> *E.g.*, 16 U.S.C. § 1857(1)(Q) (2017) (“It is unlawful for any person – to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish taken, possessed, transported, or sold in violation of any foreign law or regulation.”). *See also id.* § 3372(a)(2)(A).

<sup>18</sup> UNEP Report at 36.

**Diagram 2: Generic fish and fish product supply chain**

With so many steps and players in the process, there are multiple opportunities for seafood products associated with IUU activities to enter the supply chain. Conversely, it is extremely difficult for an end-buyer business or consumer to work back through such a complex supply chain to independently verify that the seafood product was legally harvested or produced. That task is even more daunting because the structure of, and participants in, the supply chains for different seafood products can vary considerably, even for fish of the same species.<sup>19</sup>

The difficulty of addressing IUU activities, and assuring integrity in the supply chain, is exacerbated by the global nature of the seafood industry. A recent New York Times article illustrates the complex nature of the problem. The Chinese fishing fleet, which has expanded in recent years with government subsidies, ranges across the globe. Chinese fishing boats illegally fish heavily off the west coast of Africa where there is little enforcement, and bring their catch to various processing plants where the fish are often mixed with other similar species. Some of the fish is processed into fishmeal for aquaculture and other uses, while some is processed and then exported to markets like the United States.<sup>20</sup> Existing data requirements on most imported

<sup>19</sup> E.g., *id.* at 36-42.

<sup>20</sup> Andrew Jacobs, *China's Appetite Pushes Fisheries to the Brink*, N.Y. TIMES, Apr. 30, 2017, available at <https://www.nytimes.com/2017/04/30/world/asia/chinas-appetite-pushes-fisheries-to-the-brink.html>.

seafood products are insufficient to determine if the seafood is from legal sources or the product of IUU activities.

Because the United States imports up to 90% of its seafood annually,<sup>21</sup> making it one of the three largest importers of seafood in the world, the United States must reach beyond its borders to combat IUU activities. That market power also gives the United States leverage to discourage IUU activities through markets, trade, and import restrictions.

**B. Current Laws, Technology, And Practices Are Insufficient To Mitigate The Economic And Legal Risks Posed By IUU Activities**

Although current laws and private-sector efforts to address IUU activities and to permit only legal seafood in the domestic market are important steps, they are not sufficient. It is widely recognized, as the Task Force and NOAA also recognized, that traceability is the key building block on which other efforts, by both public and private sectors, depend. As the United Nations Report explained:

The lack of traceability not only means that it is impossible to know precisely where the fish comes from, thus allowing abuses such as [IUU fishing, overfishing and stock depletion]. It also means that no reliable information can be attached to the product that can be rebuilt afterwards. It may be possible to identify the fish species or its safety as a food product by analysing the product on the shelves, but all information on the conditions of its production is lost. **As seen above, corporations include, more and more often, a corporate social responsibility policy in their management system that details social and environmental requirements regarding the production methods of goods. The lack of traceability defeats these policies as it makes them almost impossible to implement. Effective traceability is thus the primary tool for using market forces to direct processes towards sustainability.**<sup>22</sup>

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<sup>21</sup> See *The Global Picture*, FISHWATCH, <https://www.fishwatch.gov/sustainable-seafood/the-global-picture> (last visited May 15, 2017).

<sup>22</sup> UNEP Report at 39 (emphasis added).

There is no substitute for the information and assurance that traceability provides. Plaintiffs argue that existing non-governmental efforts and emerging technology can solve the problem. But that is not true. As the Aquarium and others have discovered, non-governmental efforts to validate the supply chain and verify that seafood products are not the result of IUU activities are unable to trace harvest event information back to the source for most seafood products due to the lack of information, inconsistent chain of custody reporting, and the complexity of the supply chain.<sup>23</sup>

Equally fundamental, there are no standards in United States law governing what information regarding supply chain traceability and legality should be collected, how it should be recorded, and how it should be stored.<sup>24</sup> For example, in many areas of the world, information on fish harvests is recorded by hand on paper. In addition to legibility and language issues, it is almost impossible to convert those handwritten documents, often created in remote areas of the world, into useable data that can be accessed and analyzed by downstream users in a timely manner.

Technology alone is not sufficient either. For example, Plaintiffs suggest that GPS or other monitoring technology can effectively police fishing and aquaculture. Pl. Br. at 2. Plaintiffs do not explain, however, how such technology can police the thousands and thousands of fishing craft, ranging from large factory trawlers to small artisanal boats scattered over the

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<sup>23</sup> Some seafood products do have independent third-party verification of supply chain from point of capture. For example, the Marine Stewardship Council (“MSC”) offers a voluntary certification process that allows seafood products to be “eco-certified”, and it includes standards to facilitate chain-of-custody verification and audits. *See MSC Chain of Custody Standard*, MARINE STEWARDSHIP COUNCIL, <https://www.msc.org/about-us/standards/chain-of-custody-standard> (last visited May 15, 2017). In today’s market and legal environment, however, that process can be met for only a limited number of products.

<sup>24</sup> The European Union has also adopted rules to bar illegally produced seafood, including data collection requirements to provide traceability. *See Illegal fishing (IUU)*, European Commission, [https://ec.europa.eu/fisheries/cfp/illegal\\_fishing\\_en](https://ec.europa.eu/fisheries/cfp/illegal_fishing_en) (last visited May 15, 2017).



Earth's 139.6 million square miles of ocean. It is simply not reasonable to expect every vessel to use a tracking device, particularly vessels engaged in IUU activities that depend on not being detected.<sup>25</sup>

Moreover, even if one could pinpoint the location of each fishing vessel, one cannot know via GPS or satellite what fish each vessel is catching, how it is catching those fish, or whether its catch is within legal limits. Moreover, even if such tracking can detect potential illegal activity, there is insufficient capacity to dispatch enforcement personnel to each potential incident. While technology can enhance our collective ability to enforce existing law, the simple fact is that existing law and existing technology are not sufficient by themselves.

Similarly, there is only so much that private efforts can accomplish without government action. The Aquarium has been working with market participants in the seafood supply chain for 18 years and believes that market-based efforts to address IUU activities must be paired with complementary government regulations and programs to effectively address the problem. The seafood market is too large, complex, multi-faceted, and international in nature to police itself. Market participants cannot exclude abusers from the marketplace, and cannot prevent lower-priced IUU-caught seafood from entering the market. Market participants lack the enforcement authority to compel compliance with laws and best practices. As the diverse range of comments from industry submitted to the Task Force and NOAA reflect, the global industry is simply too large and diverse to agree on a way to police itself effectively. The Aquarium is proud to work

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<sup>25</sup> As the article cited by Plaintiffs (Pl. Br. at 2) observes, "Not all fishing vessels willingly broadcast their location, of course — particularly those intent on breaking the law — and vessels can switch off their trackers, potentially hindering the usefulness of the new technology." Bradley Dennis, *How Google Is Helping to Crack Down on Illegal Fishing – From Space*, WASH. POST, Sept. 15, 2016, available at [https://www.washingtonpost.com/news/energy-environment/wp/2016/09/15/from-space-a-new-effort-to-crack-down-on-illegal-fishing-across-the-globe/?utm\\_term=.b3715f3aeea6](https://www.washingtonpost.com/news/energy-environment/wp/2016/09/15/from-space-a-new-effort-to-crack-down-on-illegal-fishing-across-the-globe/?utm_term=.b3715f3aeea6).

with a large number of leading businesses who have stepped up to take responsibility for promoting sustainable fishing and aquaculture, but there are limits to the ability of the market to compel all of the actors within the supply chain, particularly the most unscrupulous businesses that engage in, or tolerate, IUU activities, to comply with the law without government action.

More is needed, and the Seafood Import Monitoring Rule fills a critical gap that will complement and enhance the ability of existing law, technology, and non-governmental initiatives to fight IUU activities.

### **III. TRACEABILITY HELPS OVERCOME SUPPLY CHAIN COMPLEXITY AND DISTANCE TO ENABLE EFFORTS BY GOVERNMENT, CONSUMERS, AND BUSINESSES TO FIGHT IUU ACTIVITIES**

The Seafood Import Monitoring Rule helps to overcome the complexity of the supply chain and global nature of the seafood industry by imposing traceability data requirements for certain “at risk” species as a condition to entry into the United States market. By making traceability under the Seafood Import Monitoring Rule a condition of entry into the United States market, the United States can leverage its market power to mandate traceability and, therefore, compliance with existing laws, both foreign and international, regarding fishing and aquaculture, promoting sustainable fishing and aquaculture practices worldwide. Traceability also protects United States businesses by excluding lower-priced, IUU-caught seafood from entering the market and undercutting their prices. The Magnuson-Stevens Fishery Conservation and Management Act expressly recognizes the need to use trade as a tool to improve international fishing and aquaculture standards to make international practice consistent with United States practice.<sup>26</sup>

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<sup>26</sup> See 16 U.S.C. § 1801(c)(4)-(5) (2017) (“It is further declared to be the policy of the Congress in this chapter...to permit foreign fishing consistent with the provisions of this chapter [and] to support and encourage active United States efforts to obtain internationally acceptable agreements which provide for effective conservation and management of fishery resources.”).

Of particular importance to the Aquarium is that the data required by the Seafood Import Monitoring Rule will support and enhance the efforts of the Aquarium and others to use market-based tools to encourage the sale and consumption of sustainably harvested seafood and address major conservation challenges, particularly IUU activities. As the United Nations Report explains:

Traceability is much more than the capacity to physically follow the product throughout the supply chain; it is also a mechanism that ensures the flow of socio-economic and environmental information about the different stages of production. This allows the identification of issues and facilitates responses from all stakeholders in the supply chain. It is a key element in providing transparency about commercial interactions. As such it is a fundamental part of equitable benefit sharing. Finally, it is the instrument that allows consumers to learn about the ethical conditions of production in the social and environmental sense. It is therefore the key that permits them to use their buying power to influence trade, being understood that they may do so, not necessarily by paying more for products, but by choosing producers and retailers they deem more responsible than others.<sup>27</sup>

The availability of the information required by the Seafood Import Monitoring Rule will allow the Aquarium and its partners, and other private and non-governmental organizations, to better promote market-based efforts in several ways. First, the Seafood Import Monitoring Rule will provide a reliable and transparent information trail from point of harvest or capture to entry into the United States that will enable businesses to validate that seafood is not the product of IUU activities. That information helps to eliminate many of the risks inherent in today's environment. Businesses can make representations to consumers regarding the origin of seafood with a higher degree of confidence than today and consumers will have a higher degree of confidence that the seafood they buy is not the result of IUU activities. Further, businesses will be able to manage the risk that seafood is the result of IUU activities or otherwise illegally

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<sup>27</sup> UNEP Report at 60.

imported into the United States. Businesses will also be able to gain a better understanding of the origin of seafood products and make purchasing decisions to mitigate the environmental and human rights risks associated with seafood harvested or captured through IUU activities.

Second, the Seafood Import Monitoring Rule sets new legal standards for traceability information, including the information to be collected and standards for recording data elements in an electronic format. The Rule is complementary to the European Union seafood traceability requirements with many of the same information requirements, but requires electronic data submission – a key step that will advance the program’s effectiveness and avoid loopholes that have hampered efforts to fully enforce the European Union’s rules.<sup>28</sup> If implemented appropriately, the Seafood Import Monitoring Rule will set a new international baseline for seafood traceability and encourage countries around the world to move toward electronic, interoperable data systems that can efficiently and effectively address IUU activities. Electronic data also would enable the government to utilize data analytics to help detect inconsistencies and errors in the data that may indicate IUU activities. Businesses in the supply chain can cooperate with each other, and with non-governmental organizations like the Aquarium, to use that standardized data to provide information about seafood to consumers and other end users to empower more informed seafood purchasing decisions and to encourage the consumption of seafood captured or harvested in the most environmentally responsible manner.

That standardized data-set would also allow the Aquarium and other entities to build tools to better inform consumers and market participants on the choices they make. As discussed above, the Aquarium’s current efforts to improve the sustainability of seafood and address IUU

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<sup>28</sup> See ENVTL. JUSTICE FOUND., OCEANA, THE PEW CHARITABLE TRUSTS, & WORLD WILDLIFE FUND, THE EU IUU REGULATION: BUILDING ON SUCCESS EU PROGRESS IN THE GLOBAL FIGHT AGAINST ILLEGAL FISHING (Feb. 2016), *available at* [http://eu.oceana.org/sites/default/files/oceana\\_iuu\\_report\\_01\\_02\\_16\\_web.pdf](http://eu.oceana.org/sites/default/files/oceana_iuu_report_01_02_16_web.pdf).

activities through its Seafood Watch<sup>®</sup> program are limited by the data available regarding imported seafood. The data required by the Seafood Import Monitoring Rule is expected to significantly improve the quality and specificity of data on imports, and enable much more accurate and effective consumer and business tools to address issues about sustainability, legality, human rights, and social responsibility in the capture, harvesting, and distribution of seafood. For example, more accurate information on imports will be available to seafood importers, and that information could be provided to end buyers in the seafood supply chain. In addition, the United States government will also have access to the information, and could provide aggregated information to the public, subject to appropriate confidentiality rules. This information will improve the ability of consumers and businesses to use specific Seafood Watch<sup>®</sup> ratings and other tools to inform their purchasing decisions and incentivize those products that meet the highest standards of environmental performance and social responsibility.

Similarly, additional information about specific countries or businesses that are involved in IUU activities, engaged in unsustainable fishing and aquaculture, or associated with human rights abuses can be combined with data from the Seafood Import Monitoring Program to improve the accuracy of Seafood Watch<sup>®</sup> ratings and other tools that can inform consumer and business purchasing decisions, federal enforcement actions, and diplomatic efforts at capacity building to address IUU fishing. Non-governmental entities cannot collect that data themselves, and only the combined power of a government and the market leverage of the United States can effectively compel the collection of the traceability information essential to assure that only legally captured or harvested seafood is imported into the United States.

## CONCLUSION

For all of the reasons discussed above, the Monterey Bay Aquarium Foundation respectfully urges the Court to deny Plaintiffs' Motion for Summary Judgment and allow the Seafood Import Monitoring Rule to play its critical role in enforcing the Magnuson-Stevens Fishery Conservation and Management Act's goal of prohibiting the sale or distribution of illegally caught seafood in the United States and promoting sustainable fishing and aquaculture practices worldwide.

May 15, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 15, 2017, I electronically filed the foregoing Brief Amicus Curiae of the Monterey Bay Aquarium Foundation in Support of Defendants with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

May 15, 2017

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