

TESTIMONY OF
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BEFORE THE

U.S. HOUSE OF REPRESENTATIVES NATURAL RESOURCES COMMITTEE
SUBCOMMITTEE ON FISHERIES, WILDLIFE, OCEANS AND INSULAR AFFAIRS
APRIL 3, 2014

Hearings on

H.R. __, a bill to prevent, deter, and eliminate illegal, unreported, and unregulated fishing through port state measures (the "Port State Measure"); and H.R. 69, a bill to strengthen enforcement mechanisms to stop IUU fishing and to implement the Antigua Convention

Mr. Chairman and Members of the Subcommittee:

Thank you for the invitation to testify today on a subject of growing importance-- international enforcement of regional agreements to conserve and manage the world's fishery resources, including those found outside the 200-mile jurisdiction of coastal nations and on the high seas. Since enactment of the Magnuson-Stevens Act in 1976, world trade value in fish products has increased from \$8 billion per year to \$102 billion in 2011. Despite the fact that overall world marine fish harvests have now leveled off at around 80 million tons per year,¹ competition for those limited resources is increasing as the world population continues to grow and the health benefits of fish consumption are more generally known.

The United States has long pioneered creation of international organizations to deal collectively with the scientific management of international fisheries resources, which are now referred to as Regional Fisheries Management Organizations (RFMOs). For example, United States leadership led to the creation of the Inter-American Tropical Tuna Commission (IATTC) in 1949, one of the most successful RFMOs. The Senate is now considering ratification of four international agreements to broaden the coverage of RFMOs and strengthen enforcement of RFMO conservation measures, including the Port State Treaty. Reaffirming the importance of world-wide enforcement of RFMO conservation and management measures is consistent with our Nation's leadership in achieving science-based management, fishery sustainability and fair trade.² But we must also be wary of unintended consequences of well-meaning measures.

¹ 2012 U.N. World Fisheries Report, U.N. Food and Agriculture Organization, Rome, Italy. The vast majority of this fish is used for human consumption. Per capita consumption of fish is increasing most in developing regions and in low-income food-deficit countries, although consumption in developed countries is greater. Most of the fish consumed in developed countries (such as the United States), however, consists of imports, in particular from developing countries. Fish is one of the largest food product categories traded globally today.

² Agnew, et al., "Estimating the Worldwide Extent of Illegal Fishing," PLoS ONE, Vol. 4, Issue 2 (February 2009). Agnew estimated total losses due to IUU fishing at between \$10-24 billion annually.

I am a partner in the law firm of Davis Wright Tremaine LLP and my practice focuses on advice, counseling, and litigation for commercial harvest and processing companies based in the United States with operations in the U.S. and other countries and on the high seas. However, I appear here today on my own behalf and not on behalf of the firm or any of its clients. I have been practicing law since 1970, with extensive recent experience in fisheries enforcement matters in contested proceedings. From 1972 to 1981, I was engaged in public service, as Staff Counsel and later General Counsel of the U.S. Senate Committee on Commerce (Senator Warren Magnuson, Chairman) and then as Deputy Administrator of the National Oceanic and Atmospheric Administration (NOAA) under President Jimmy Carter.

In summary, I believe that S. 69 should be enacted after modifications as suggested below are made to insure consistency, symmetry, and fair process. I do not see the need to enact the bill to implement the Port State Treaty, which has yet to be introduced. The United States already has sufficient legal authority with its existing pattern of fishery enforcement statutes to meet, and even exceed, its obligations under that Treaty. And the Port State Measures would not only be redundant and confusing, because of its broad breadth, but would have the effect of overriding some of the provisions in S. 69. If there is a gap to be filled in our current pattern of enforcement authorities to satisfy our obligations under the Treaty, it should be identified and filled with the necessary well-framed additional authority.

Overview Comments:

While I urge support for the basic concepts set forth in H.R. 69, improvements in its text before final enactment would help avoid unintended consequences and possible conflicts in real-life implementation of the concepts contained in any new law. In addition, we must all recognize certain realities of the global problem of what is called Illegal, Unregulated and Unreported (IUU) fishing activities. The greatest problems in IUU fishing are beyond the reach of the U.S., particularly if we go it alone. It is estimated that, off Africa, illegal fishing may be 40% higher than reported catches. It has gotten so bad that the International Tribunal for Law of the Sea is considering a request for an advisory opinion on whether a flag nation should be held financially liable for IUU fishing by its vessels in exclusive economic zones off West Africa.

Moreover, we must remember that we have American fishing fleets that are subject to enforcement by other countries which may not always pursue enforcement in a manner consistent with what we consider due process.

It would also be a mistake to carry out a national program against IUU fishing that focuses on the trivial and not on the most significant unacceptable practices. For example, in NOAA's January 2013 Report to Congress on *Improving International Fisheries Management*, the agency identified Colombia as an "IUU Fishing Nation" on the basis of shark finning cases (illegal under Colombian law) for three Colombian vessels and three cases of discarding salt bags or trash at sea, each occurring in 2011 or 2012.³ NOAA said that "Colombia had not yet resolved these cases" so it was being identified, based on NOAA's very broad characterization of IUU fishing. Suffice it to say, NOAA does not resolve its own civil penalty cases in such a short

³ The alleged violations were based on measures adopted in 2011 and 2012 by the IATTC. However, the vessels in question had not been listed (and are still not listed) by the IATTC as IUU vessels.

period of time and it would be difficult for those not involved in such cases to determine their status.⁴

One of the biggest problems with IUU fishing is simply defining what it is and what should be actionable by enforcement authorities. Some RFMOs have adopted resolutions to be more precise about vessels to be listed as IUU. *See* IATTC Resolution C-05-07, Resolution to Establish A List of Vessels Presumed to Have Carried Out IUU Fishing Activities in the Eastern Pacific Ocean. Yet these actions lack uniformity. There is no universally agreed upon definition, only broadly stated descriptions quite sweeping in scope.⁵ That vagueness creates the threat of inappropriate enforcement.

Here are a few considerations that should be kept in mind when considering this new legislation:

First, the United States currently has sufficient laws on the books to deal with IUU fishing as it relates to our own fisheries, imports into the United States, and exports from the United States. In fact, it can be said that the U.S. commercial fisheries business is the most highly regulated in the world and the U.S. laws the most strict. The Nicholson Act, 46 U.S.C. § 55114, enacted in 1950, prohibits a foreign-flag vessel from landing any fish caught on the high seas, or any product made from that fish, in a port of the United States, unless authorized by treaty. Any such fish or product is subject to forfeiture by the Department of Homeland Security and any trader in the U.S. is liable for a \$1,000 fine.

So fish from any high seas fishing activity by a foreign-flag vessel cannot now enter the United States at all, unless there is a treaty in place that allows landings.⁶ The only exceptions are ports in American Samoa, Guam, and the Virgin Islands. Thus, foreign fishing vessels may enter only a few American ports. A National Plan of Action with respect to IUU fishing, prepared by the State Department, NOAA, the Coast Guard, the Fish and Wildlife Service, and the U.S. Customs Service nearly 10 years ago concluded that, because of that fact, “it may not be necessary for the United States to establish a “national” strategy and procedures for Port State Control in this context.” National Plan, at 24.⁷

⁴ In *Etheridge v. Pritzker*, No. 2:12-CV-79-BO (E.D. North Carolina)(decided Nov. 22, 2013), a NOAA civil penalty shark finning case begun in 2007 was decided by a federal judge, who ruled that NOAA and an administrative law judge got the law completely wrong in applying the ban on shark finning and threw out the entire case after six years in the NOAA enforcement system.

⁵ Illegal fishing means harvests in violation of coastal nation law and measures adopted by RFMOs. Unreported fishing means harvest that have not been reported, or are misreported, to management authorities. Unregulated fishing means activity by stateless vessels or vessels operating under flags of convenience where the flag country ignores what is going on. “Closing the Net: Stopping Illegal Fishing on the High Seas,” Final Report of the Ministerially-led Task Force on IUU Fishing on the High Seas (2006), at 14-15.

⁶ The U.S.-Canada Albacore Treaty allowed such landings, but it is being terminated.

⁷ The Appendix listing the existing U.S. laws that could be applied to the identified problem of IUU fishing is attached for your reference.

The most important statute is the Lacey Act, 16 U.S.C. § 3371 et seq., which other countries believe should be emulated in their domestic laws to address IUU fishing.⁸ Among other things, the Lacey Act makes it illegal to import fish or fish products into the United States that were caught or produced in violation of any foreign law. Perhaps the best example of its use to prevent IUU fishing is the case of *U.S. v. Bengis*, 631 F.3d 33 (2nd Cir. 2011). Mr. Bengis, a U.S. citizen, and his colleagues operated for years an illicit harvest and export operation from South Africa taking rock lobsters in violation of that country's laws, as well as Chilean sea bass caught elsewhere, and exporting them to the United States. In 2004, Mr. Bengis pleaded guilty to a criminal conspiracy to import nearly \$90 million in IUU fish into the United States and forfeited \$13 million to the United States. The Second Circuit Court of Appeals also ordered Mr. Bengis to pay restitution to the South African Government for loss of the lobsters.⁹ The government was seeking nearly \$40 million in restitution. The Lacey Act has been used to interdict salmon unlawfully harvested in the high seas, illicit king crab from Russia, and spiny lobsters from Honduras.

Second, responsible U.S. fishing industry participants are moving to address IUU fishing through the marketplace, given the limits and inefficiencies of command-and-control government regulatory systems in many countries around the world. A good example is the International Seafood Sustainability Foundation (ISSF), a non-governmental organization that focuses on the sustainability of the global tuna market. ISSF, comprised of scientists, tuna company officials, and representatives of environmental groups, develops best practices and policies to address a wide range of sustainability issues, including IUU fishing. Recently, ISSF published a paper outlining the steps needed to improve compliance in tuna RFMOs, a challenging subject.¹⁰ As of the first of this year, ISSF member companies will not engage in transactions with purse seine vessels unless their flag nation is in substantial compliance with RFMO obligations. In effect, the industry is in the front line carrying out tuna RFMO conservation measures.

The National Fisheries Institute has developed an implementation guide for applying traceability standards in the U.S. seafood supply chain, beginning with the catching vessel to the table. Finally, labeling standards, such as "Dolphin-Safe" and those provided by the Marine Stewardship Council and others, also create incentives to conduct responsible fishing operations or else the product may not be allowed into the marketplace.

The private sector has a very key role to play here and steps are being taken to address a problem that impacts the entire market, given the problem of governance capacity in many countries with fishery resources that are exported to world markets.

⁸ Congress, however, has specified that the Lacey Act does not apply to fishery activities regulated under the Magnuson-Stevens Act or certain tuna conventions. 16 U.S.C. § 3377.

⁹ See Meyer, "Restitution and the Lacey Act: New Solutions, Old Remedies," 93 Cornell L.R. 849 (2008).

¹⁰ Koehler, Promoting Compliance in Tuna RFMOs: A Comprehensive Baseline Survey of Current Mechanics of Reviewing, Assessing, and Addressing Compliance with RFMO Obligations and Measures, ISSF Technical Report 2013-2.

Third, addressing and eliminating IUU fishing requires a sophisticated management and regulatory system, with strong scientific support. It also requires an enforcement system that respects due process and civil rights. Unfortunately, the capacity to create and maintain the kind of regulatory system that exists here in the U.S. is limited by the political will and wealth of a particular country and is not currently prevalent in many developing countries. Some countries do not even maintain a searchable online library of their fishing laws and regulations. A July 2005 Report on IUU Fishing and Developing Countries by the Marine Resources Assessment Group Ltd. concluded that its “analysis uncovered a striking relationship between the level of governance of a country and its vulnerability to IUU.” Consequently, there is a danger that a country with weak governance, once given the authority set forth in the Port State Treaty, will use that authority to inspect and fine vessels for its own narrow purposes, i.e. to increase income or protect home-base competitors.

Fourth, H.R. 69, if enacted, would add a new general enforcement provision to the Magnuson-Stevens Act¹¹ that, in effect, incorporates the civil penalties, permit sanctions, criminal offenses, civil forfeitures, and enforcement provisions of that law (16 U.S.C. §§ 308-311) into nine other resource management statutes, presumably as a substitute for the comparable provisions of those statutes. If this is the intent, this would have the effect, among other things of setting the maximum civil penalty that can be assessed under those nine statutes at the current maximum in the Magnuson-Stevens Act of \$140,000 per violation. As a result, the enforcement provisions and penalty amount would be similar across all statutes, a welcome development given the patch-work nature of the enforcement provisions in those statutes. This would mean that similar transgressions under each law would be treated similarly, an important improvement in fairness.

Finally, given that the Magnuson-Stevens Act would become the central mechanism to enforce alleged violations of all these statutes, now may also be a good time to amend the Magnuson-Stevens Act enforcement and penalty provisions to incorporate into law the recent program changes instituted by NOAA in its enforcement program and to improve the fairness of its civil penalty, permit sanction, and civil forfeiture programs. H.R. 69 gives the United States the opportunity to reinforce its commitment to fair and equitable law enforcement and to provide leadership to other countries for improving their enforcement programs, particularly given the new authority in the Port State Treaty to inspect foreign-flag vessels, including vessels flying the U.S. flag. The suggested changes deal with the statute of limitations, hearing procedure and application of rules of evidence, and setting forth the factors to be considered in settling a penalty amount, and are discussed below.

H.R. , the Pirate Fishing Elimination Act:

This bill would implement the Port State Treaty and create a new, separate regulatory and enforcement regime to address IUU fishing of almost any kind, trivial or destructive, accidental or intentional through authorities in “Port” states to enforce fishing laws in much the same as the Lacey Act operates, with a whole new set of enforcement tools and penalty amounts. It is clear,

¹¹ Technically, the amendments are to the High Seas Driftnet Fishing Moratorium Protection Act, which has been codified as part of the Magnuson Stevens Act at 16 U.S.C. §1826a-k. Perhaps the Committee might examine a more straight-forward drafting approach, rather than using the High Seas Act, to create a single enforcement regime for all fishery conservation statutes, based on the provisions in the Magnuson-Stevens Act.

however, that the drafting of this bill was not undertaken in a manner that considers the Lacey Act and the Nicholson Act, or even the provisions in H.R. 69. For example, even though H.R. 69 can be read to limit civil penalties to no more than \$140,000 per violation, the Port State bill has a separate section on civil penalties, which are increased to \$250,000 for each violation, even for acts in violation of one of the statutes implementing RFMO measures (which may be limited to no more than \$140,000 per violation).¹² The Port State Measure is drafted to apply to any person subject to the jurisdiction of the United States (Sec. 4(a)(3)) and covers any activity considered IUU fishing under the sweeping definition if it is in violation of any law or regulation in Sec. 3(10). As a consequence, if enacted, this bill will cause confusion and duplication and will trump the enforcement provisions in all other fishery regulatory statutes.

Here are some further particular concerns:

Title: the title, though catchy in our internet world, is not accurate with respect to the international legal definition of what constitutes piracy. Given the broad sweep of the bill, some Members of Congress might be surprised to learn that the definition of pirate fishing would apply to their fishing industry constituents who misreported their catch to the National Marine Fisheries Service by even 1%, even if in error, given the strict liability nature of civil penalties under the Magnuson-Stevens Act. Such a transgression would be fishing activity in contravention of the laws of a nation in waters subject to that nation's jurisdiction, within the meaning of the IUU definition in the Port State Measure, and therefore are covered under the Pirate Fishing Elimination Act.

Calling every fishing transgression piracy is unnecessarily over the top, to say the least, and also legally inaccurate. The definition of piracy is carefully drafted in Article 101 of U.N. Convention on the Law of the Sea and that provision is considered binding international law by the United States. It does not cover ordinary fishing violations. In addition, the Law of the Sea Convention states, in Article 73.2, that coastal state penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary. So calling all fishing violations piracy simply does not comport with customary international law and is needless hyperbole.

Definition of IUU Fishing: What is most troubling is the definition of IUU fishing, to include anything and everything in the kitchen sink, not just the more severe, repetitive or criminal behavior. The bill would make a U.S. fishing vessel subject to inspection and sanction for any alleged violation of law of any kind, even exclusive U.S. rules of the most trivial nature, if it offloads in a foreign port. All that is needed is an allegation that enforcement officials in that country have "reasonable grounds" to believe a violation covered by the Port State Treaty and the broad definition of IUU fishing has occurred.¹³ I am familiar with many of the countries

¹² The existing suite of U.S. enforcement laws, and existing penalties, has worked in bringing U.S. fisheries to sustainability. See Daniel Pauly, Op. Ed., *New York Times*, March 26, 2014 (Fishing grounds off the United States are being replenished, owing to the passage in 1976 of the Magnuson-Stevens Act). It is hard to understand, therefore, why increasing the amount of civil penalties with respect to domestic U.S. fishing operations will do anything to address IUU fishing off West Africa in where our vessels do not fish.

¹³ The Port State Treaty does not contain an internal definition of IUU fishing, but instead refers to "activities set out in paragraph 3 of the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate IUU Fishing."

in the Pacific where U.S. vessels occasionally land their fish, and their legal procedures are not always conducive to easy resolution of allegations of fishing violations, even if the allegations are clearly false.

Enforcement of RFMO Conservation Measures: the United States generally has existing legal authority to enforce conservation and management measures adopted by RFMOs and agreed to by the United States. For instance, H.R. 69, at Sec. 101, references the domestic statute implementing the Western and Central Pacific Fisheries Convention (16 U.S.C. § 6901 et seq.). That statute authorizes rulemaking, enforcement, and penalty assessment for the tuna RFMO in that region with respect to U.S. vessels. Should any non-U.S. fishing vessels participating in that fishery call at American Samoa or Guam, the Lacey Act could be applied to sanction a clearly established violation of an RFMO conservation measure. Yet the Port State Measure would create an entirely new set of measures that are mostly duplicative and/or contradictory in comparison to our existing laws and the terms of H.R. 69.

The Enforcement Provisions: It makes no sense to create a whole new set of enforcement provisions (with higher limits on penalties) in a new statute when the comprehensive enforcement provisions of the Magnuson-Stevens Act could be referenced, as in H.R. 69. The enforcement provisions of the Magnuson-Stevens Act can very easily form the basis for enforcing restrictions on IUU fishing as well.

H.R. 69, the Illegal, Unreported and Unregulated Fishing Enforcement Act:

In General: This bill would be a welcome addition, because it makes enforcement provisions in several marine resource management statutes, some of which implement RFMO conservation measures, closely comparable. U.S. fisheries industry is highly regulated and understands the need for inspections, subpoenas, and enforcement generally (*see* the new section 606(d) on SPECIAL RULES), so long as it is fair. The expanded authorities provided in H.R. 69 are features of law enforcement which the U.S. industry has come to understand and accept, again if applied fairly. Using the enforcement provisions of the Magnuson-Stevens Act (*see* the new section 606(d) on ADMINISTRATION AND ENFORCEMENT) as the basis for enforcement actions under all referenced statutes is a good development from earlier drafts of this bill. And all penalties to be issued should be set at the same maximum as in the Magnuson-Stevens Act. Having a single set of comprehensive enforcement provisions that apply across all relevant fishery management statutes will be an improvement from the hodge-podge nature of the existing collection of statutes.

With respect to the Antigua Convention Implementation Act, I am not aware of any opposition to the Antigua provisions in H.R. 69, as many of them are already being implemented with respect to the IATTC.

IUU Lists: It is not difficult to find lists of vessels that are considered IUU by certain RFMOs, which mostly focus on state-less vessels or really bad actors. In some countries, issuing documentation to fishing vessels is a source of income and that is all, unfortunately. These vessels then compete with more highly regulated vessels from responsible nations. One hopes

That definition is as broad as in the Port State Measure, but goes on with an even more expansive gloss on this broad intent and includes activities which are not even illicit.

that global awareness will stop this kind of activity. U.S. vessels need support from our government in light of competition from less regulated vessels from less responsible nations.

With regard to such lists and to our own country's listing of IUU countries, I would recommend that the focus not be on the trivial but on the most egregious violations. Creating a program of hounding countries over minor transgressions, or slow procedures, is not likely to create much respect. Worse, this practice could end up harming U.S. vessels given that turn-about is fair play with regard to U.S. vessels fishing in other countries' waters.

Disclosure of Enforcement Information: One provision in H.R. 69 addresses the question of sharing enforcement information obtained by the Secretary of Commerce with international organizations, including RFMOs. In this regard, I had assumed that that authority already existed but if not, so long as proper protections are in place similar to our Freedom of Information Act or the confidentiality provisions of the Magnuson-Stevens Act, such new statutory authority might be needed. But it should be also aimed at obtaining enforcement information from other countries, i.e. the Secretary of Commerce should be seeking enforcement information from other countries to determine if any enforcement of RFMO conservation measures is occurring. In addition, this raises the question of whether observer reports should be made available to U.S. fishing vessels captains and vessel owners for comment at the end of a fishing trip. Although certain RFMOs allow this practice, such as the IATTC (with U.S. consent), allow this practice, NOAA is resisting such disclosures in the western Pacific, until years later in an enforcement proceeding. Perhaps this issue can be clarified in H.R. 69.

Improvement of NOAA's Civil Penalty Procedures: Finally, it may be appropriate for the Committee, as part of H.R. 69, to include amendments to the Magnuson-Stevens Act enforcement provisions to provide greater balance to the NOAA enforcement program, which has been recently criticized by a federal judge for over-enforcement in New England. Including the agency changes in legislation, along with other changes to make the NOAA process more like the penalty process followed by the Environmental Protection Agency, would be a useful way of confirming the U.S. leadership in pursuing fishing sanctions in a fair and even-handed manner, based on the rule of law. Therefore, I refer the Committee to my letter of January 31, 2014 which discussed in greater depth than appropriate here the legislative changes I have suggested, based on my years of experience in defending civil penalty cases. More can be done to make the NOAA penalty process fair, such as by requiring the use of the Federal Rules of Evidence and reducing the statute of limitations from five to three years, among other changes.

In summary, Mr. Chairman, I support enactment of H.R. 69, with the modifications I have discussed above. I do not think a case has been made for enacting the Port State Measure, as it is duplicative of what this nation already has on the statute books and would conflict with existing law in numerous respects, in addition to being inconsistent in several respects with H.R. 69. If additional authority is needed, precise provisions could be drafted to target any gaps in the law.

Thank you for the opportunity to testify here today.