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August 21, 2020

Inv. No. 332-575
Seafood Obtained via Illegal, Unreported, and Unregulated Fishing: U.S. Imports and Economic Impact on U.S. Commercial Fisheries

PUBLIC DOCUMENT

VIA ELECTRONIC FILING

The Honorable Lisa R. Barton
Secretary of the Commission
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

Re: ***Seafood Obtained via Illegal, Unreported, and Unregulated Fishing: U.S. Imports and Economic Impact on U.S. Commercial Fisheries (Inv. No. 332-575)*: Prehearing Brief**

Dear Secretary Barton:

On behalf of the Southern Shrimp Alliance, and pursuant to the *Federal Register* notices regarding the U.S. International Trade Commission's ("Commission") institution of the above-captioned investigation and scheduling a hearing,[1] as well as the Commission's notice of a new hearing date,[2] we hereby submit a prehearing brief concerning the extent to which seafood

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1 *Seafood Obtained via Illegal, Unreported, and Unregulated Fishing: U.S. Imports and Economic Impact on U.S. Commercial Fisheries*, 85 Fed. Reg. 5,704 (U.S. International Trade Commission, Jan. 31, 2020) (Institution of Investigation and Scheduling of Hearing).

2 *Seafood Obtained via Illegal, Unreported, and Unregulated Fishing: U.S. Imports and Economic Impact on U.S. Commercial Fisheries*, 85 Fed. Reg. 33,709 (U.S. International

products obtained from illegal, unreported, and unregulated fishing are imported into the United States and the potential economic effects on U.S. fishermen of competition with such imports. This submission is timely pursuant to the Commission's re-scheduling notice.[3]

Please do not hesitate to contact the undersigned should you require clarification of any aspect of this submission.

Respectfully submitted,

/s/ Nathaniel Maandig Rickard
Nathaniel Maandig Rickard
Counsel to the Southern Shrimp Alliance

Trade Commission, June 2, 2020) (Notice of New Dates for Public Hearing and Transmittal of the Commission's Report).

3 *See id.*

USITC Inv. No. 332-575

PUBLIC DOCUMENT

BEFORE THE UNITED STATES
INTERNATIONAL TRADE COMMISSION

Inv. No. 332-575

Seafood Obtained via Illegal, Unreported, and Unregulated Fishing: U.S. Imports and Economic Impact on U.S. Commercial Fisheries

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PREHEARING BRIEF ON BEHALF OF THE SOUTHERN SHRIMP ALLIANCE

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August 21, 2020

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PREHEARING BRIEF ON BEHALF OF THE SOUTHERN SHRIMP ALLIANCE

I. INTRODUCTION

The Committee on Ways and Means of the U.S. House of Representatives ("Committee") has requested that the U.S. International Trade Commission ("Commission" or "ITC") conduct an investigation of the potential economic effects on U.S. fishermen of competition with illegal, unreported, and unregulated ("IUU") seafood imports.[1] In its request, the Committee defined "IUU seafood" as encompassing both "products obtained in contravention of fisheries management regulations or in violation of labor laws."[2] The Committee further explained that IUU seafood products are involved in trade not only in terms of goods "sent directly to end

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1 *See* Letter from Rep. Richard E. Neal, Chairman, Ways & Means Committee and Rep. Earl Blumenauer, Chairman, Trade Subcommittee, to the U.S. International Trade Commission (Dec. 19, 2019), attached here as **Exhibit 1**.

2 *Id.*

markets," but also as "raw material inputs that are further processed into aquaculture feed or seafood products for human consumption."[3]

With this background, the Committee indicated that in order "[t]o better understand the size, scope, supply chains, pricing pressures, and potential economic effects of this problem," it wished the Commission to issue a report including the following:

- A description of the size and structure of the U.S. commercial fishing industry;
- A review of existing data and literature on the prevalence of IUU products in the U.S. import market, and an overview of international mechanisms for monitoring and enforcement to address IUU fishing;
- A description of major global producers of IUU products, including but not limited to China, and country practices related to IUU production and exports;
- An analysis of the extent to which IUU product is imported into the United States, as well as major U.S. import sources and global supply of such products; and
- A quantitative analysis of the economic impact of IUU imports on U.S. commercial fishermen and U.S. commercial fishing production, trade, and prices.[4]

The Southern Shrimp Alliance's prehearing brief is intended to assist the Commission in conducting an analysis of the factors set out above.

Because the Commission has evaluated the condition of the U.S. commercial shrimp industry in the conduct of two Section 332 factfinding investigations, a safeguard investigation, two investigations regarding the impact of unfairly-traded imports on the domestic industry, as well as in two sunset reviews of the antidumping duty orders in place to address unfairly-traded

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3 *Id.*

4 *Id.*

shrimp imports,[5] this brief focuses on other issues relevant to the agency's current inquiry that have not previously been addressed in those proceedings.

II. ILLEGALLY HARVESTED SHRIMP IS TRADED INTERNATIONALLY AND IS IMPORTED INTO THE UNITED STATES

Consistent with the definition of IUU seafood employed by the Committee, seafood harvested through IUU fishing adversely impacts the domestic shrimp industry in at least two distinct ways. First, shrimp harvested through IUU fishing that is imported into the United States competes directly for sales with domestically-harvested shrimp. Second, fish products landed by IUU fishing that are subsequently used to produce feed for shrimp aquaculture are instrumental in the production of *farmed* shrimp imported into the United States that also compete directly for sales with domestically-harvested shrimp. Moreover, indirectly, the opaque supply chains that have developed in order to facilitate the importation of IUU seafood have also been utilized to evade the trade remedies on dumped imported shrimp as well as regulatory controls that would otherwise prevent contaminated shrimp imports from entering the United States. Shrimp imported through means of fraud and evasion, whether farmed or wild-caught, also compete directly for sales in the United States market with domestically-harvested shrimp.

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[5] *See* U.S. Tariff Commission, *Shrimp*, Inv. No. 332-40, TC Publication No. 8 (Mar. 1961); *Conditions of Competition Affecting the U.S. Gulf and South Atlantic Shrimp Industry*, Inv. No. 332-201, USITC Pub. 1738 (Aug. 1985); *Shrimp*, Inv. No. 201-TA-12, USITC Pub. 773 (May 1976); *Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam*, Inv. Nos. 731-TA-1063-1068 (Final), USITC Pub. 3748 (Jan. 2005); *Frozen Warmwater Shrimp from China, Ecuador, India, Malaysia, and Vietnam*, Inv. Nos. 701-TA-491-493, 495, and 497 (Final), USITC Pub. 4429 (Oct. 2013); *Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam*, Inv. Nos. 731-TA-1063-1064 and 1066-1068 (Review), USITC Pub. 4221 (Mar. 2011) and *Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam*, Inv. Nos. 731-TA-1063, 1064 and 1066-1068 (Second Review), USITC Pub. 4688 (May 2017).

These impacts are difficult to quantify. It is impossible, through publicly available data, to trace IUU seafood used in the production of aquaculture feed to seafood products, including shrimp, that are raised on that feed and subsequently exported to the United States. Separately, although the Harmonized Tariff Schedule of the United States ("HTSUS" or "HTS") distinguishes between coldwater and warmwater shrimp,[6] there is no separate statistical reporting of wild-caught shrimp from farm-raised shrimp.[7] Nevertheless, although the quantities and values are not specifically reported, the United States imports significant quantities of wild-caught shrimp and has developed separate and distinct regulatory programs for wild-caught and farm-raised shrimp.

A. U.S. Regulatory Controls Distinguish Between Wild-Caught and Farm-Raised Shrimp

There are at least three regulatory programs administered by separate federal agencies that differentiate their treatment of shrimp imports based on whether these products are wild-

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6 Coldwater shrimp is entered into the United States under the six-digit HTSUS codes 0306.16 and 0306.35, while warmwater shrimp is entered under 0306.17 and 0306.36.

7 "Transparency of wild shrimp exports to the United States . . . is very low, compounded by the failure of trade statistics in the USA to differentiate wild from farmed shrimp products in imports." Ganapathiraju Pramod, Katrina Nakamura, Tony Pitcher, and Leslie Delagran, *Estimates of Illegal and Unreported Fish in Seafood Imports to the USA*, Marine Policy 48 (2014) at 111, attached as **Exhibit 2**. The HTSUS has statistical breakouts for certain seafood products other than shrimp based on whether they are wild-caught or farm-raised, including farmed rainbow trout (0302.11.0010) versus other trout (0302.11.0090), farmed Chinook (king) salmon (0302.13.0013) versus "not farmed" Chinook (king) salmon (0302.13.0014), farmed Coho (silver) salmon (0302.13.0053) versus "not farmed" Coho (silver) salmon (0302.13.0054), farmed Atlantic salmon (0302.14.0003) versus "not farmed" Atlantic salmon (0302.14.0004), farmed Atlantic salmon fillets (0302.41.0010 and 0302.52.0010) versus "not farmed" Atlantic salmon fillets (0302.41.0020 and 0302.52.0015), farmed live oysters (0307.11.0060) versus all other non-seed live oysters (0307.11.0080), farmed frozen oysters (0307.12.0060) versus all other frozen oysters (0307.12.0080), farmed non-live/non-frozen oysters (0307.19.0160) versus all other non-live/non-frozen oysters (0307.19.0180), and farmed live mussels (0307.31.0010) versus all other live mussels (0307.31.0090).

caught or farm-raised. The U.S. Department of State ("State Department") administers the "Section 609" program which since 1990, as described in more detail below, has barred the importation of shrimp harvested in a manner that adversely impacts sea turtle populations. For the vast majority of shrimp entered into the United States, the State Department's implementation of the program requires importers to indicate whether the product was farm-raised or wild-caught in order to establish admissibility.

More recently, the National Marine Fisheries Service ("NMFS") of the National Oceanic and Atmospheric Administration ("NOAA") has begun to implement a separate importation ban, originally enacted by Congress in 1972 as part of the Marine Mammal Protection Act ("MMPA"), on seafood products harvested in a manner that adversely impact marine mammal populations. As also described in more detail below, although the effective date of the regulatory importation ban has been delayed until 2022, NMFS has prohibited the importation of certain wild-caught shrimp harvested from the Upper Gulf of California in Mexico. Accordingly, for shrimp products imported from Mexico, importers are currently required to provide a certificate of admissibility indicating that the shrimp was not harvested in a manner that harms the vaquita porpoise, thereby identifying whether it was farm-raised or wild-caught.

Finally, as detailed below, the U.S. Food and Drug Administration ("FDA") administers certain "Import Alerts" that are limited in their application to farm-raised shrimp (or, more broadly, farm-raised seafood, including shrimp). These Import Alerts facilitate the detention without physical examination of shrimp imports if they are farm-raised and from either a listed producer or from a specified geographical area.

Each of these regulatory programs makes admissibility of shrimp imports into the United States contingent on whether the product is either farm-raised or wild-caught. The efforts made

to ensure that the import prohibitions of the State Department's Section 609 program and NMFS's MMPA program are effective in excluding certain wild-caught shrimp from the U.S. market, and, conversely, that the FDA's Import Alerts do not prevent the importation of certain wild-caught shrimp into the United States, imply that there has been and remains significant volumes of wild-caught shrimp imported into the United States. Moreover, these programs create strong incentives for importers to mischaracterize the origin of shrimp products that might be otherwise barred from entry into the United States. As discussed in more detail in Section IV.B, widespread fraud has been a defining characteristic for a significant amount of shrimp imported into the United States. Orchestrated efforts to obfuscate the true origin of shrimp in order to obtain entry into this market substantially complicates the ability to estimate the extent to which shrimp harvested through IUU fishing is present in the U.S. market.

1. State Department/Section 609

Enacted in 1990, Section 609 of Public Law 101-162 was intended to make regulation of imported shrimp entering the U.S. market consistent with the regulation of U.S. shrimp production by prohibiting the importation of shrimp harvested in a manner that adversely impacted sea turtle populations. Responsibility for administration of law is vested with the State Department. This regulatory program requires importers to distinguish between wild-caught and farm-raised shrimp at import entry for the vast majority of shrimp imported into the United States.

Section 609(b)(2) of Public Law 101-162 (Nov. 21, 1989) instructs that the ban on the importation of shrimp or products from shrimp harvested with commercial fishing technologies which may affect adversely sea turtles shall not apply if the President determines and certifies to Congress each year that one of the following two conditions is met by a particular country:

1. The government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of sea turtles that is comparable to that of the United States and the average rate of incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels; or

2. The particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of harvesting.

The President, in turn, delegated authority to the Secretary of State to make certifications pursuant to Section 609.[8]

After initially applying Section 609 only to certain nations in the wider Caribbean/western Atlantic region, the State Department determined that, beginning in May 1, 1996, this provision would be applied on a world-wide basis.[9] The agency initially determined that import prohibitions would distinguish between farm-raised and wild-caught shrimp, as well as warmwater and coldwater shrimp, such that they would not be applied to:

1. shrimp harvested in an aquaculture facility, provided that the shrimp spent at least 30 days in ponds prior to being harvested;

2. shrimp harvested by commercial shrimp trawl vessels using turtle excluder devices ("TEDs") comparable in effectiveness to those used in the United States;

3. shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that would not require TEDs if operated in the United States; and

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[8] *See* Presidential Document, *Memorandum of December 19, 1990: Delegation of Authority Regarding Certification of Countries Exporting Shrimp to the United States*, 56 Fed. Reg. 357 (Jan. 4, 1991). For the purposes of the State Department's analysis, the relevant species of sea turtles are: loggerhead (*Caretta caretta*); Kemp's ridley (*Lepidochelys kempi*); green (*Chelonia mydas*); leatherback (*Dermochelys coriacea*); and hawksbill (*Eretmochelys imbricata*). *See Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 64 Fed. Reg. 36,946 (Dep't State July 8, 1999).

[9] *See Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 61 Fed. Reg. 17,342, 17,343 (Dep't State Apr. 19, 1996).

4. species of shrimp, such as the pandalid species, harvested in areas in which sea turtles do not occur.[10]

In 1999, the State Department amended the last category from excluding certain species of shrimp to a more general provision of "[s]hrimp harvested in any other manner or under any other circumstances that the Department of State may determine, following consultation with NMFS, does not pose a threat of the incidental taking of sea turtles."[11]

In certifying a nation, the State Department may issue a certification without requiring further action if any one of the following three conditions existed:

1. the harvesting nation was without any relevant species of sea turtles occurring in waters subject to its jurisdiction;

2. the harvesting nation's shrimp fishery harvests shrimp exclusively by means that do not pose a threat to sea turtles (*e.g.* any nation that harvests shrimp exclusively by artisanal means); or

3. the harvesting nation's commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur.[12]

If none of those conditions exist, the State Department will only issue an annual certification "if the government of that nation has provided documentary evidence of the adoption of a regulatory

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10 *See id. See also Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 63 Fed. Reg. 46,094, 46,096 (Dep't State Aug. 28, 1998).

11 *Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 64 Fed. Reg. 39,946, 36,949 (Dep't State July 8, 1999).

12 *See Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 61 Fed. Reg. 17,342, 17,343 (Dep't State Apr. 19, 1996); *Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 63 Fed. Reg. 46,094, 46,096 (Dep't State Aug. 28, 1998); and *Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 64 Fed. Reg. 39,946, 36,950 (Dep't State July 8, 1999).

program governing the incidental taking of sea turtles in the course of commercial shrimp trawl harvesting that is comparable to that of the United States and if the average take rate of that incidental taking by vessels of the harvesting nation is comparable to the average take rate of incidental taking of sea turtles by United States vessels in the course of such harvesting."[13]

"A completed DS-2031 Shrimp Exporter's/Importer's Declaration ('DS-2031') must accompany all imports of shrimp and products of shrimp into the United States."[14] Shrimp and products from shrimp imported from a certified nation need be accompanied by a State Department form that is certified by the exporter only.[15] In contrast, imports of shrimp and shrimp products from uncertified nations must be accompanied by a State Department form that is certified by "both the exporter and a government official in the harvesting nation . . ."[16]

> Importers of shrimp and products from shrimp harvested in the certified nations . . . must either provide the DS–2031 form to Customs and Border Protection at the port of entry or provide the information required by the DS– 2031 through the Automated Commercial Environment. DS–2031 forms accompanying all imports of shrimp and products from shrimp harvested in uncertified nations and economies must be originals with Box 7(A)(1), 7(A)(2), or 7(A)(4) checked, consistent with the form's instructions with regard to the method of harvest of the

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13 *See Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 61 Fed. Reg. 17,342, 17,343-17,344 (Dep't State Apr. 19, 1996); and *Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 63 Fed. Reg. 46,094, 46,096 (Dep't State Aug. 28, 1998). *See also Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 64 Fed. Reg. 39,946, 36,950 (Dep't State July 8, 1999).

14 *See Annual Certification of Shrimp-Harvesting Nations*, 85 Fed. Reg. 24,074, 24,075 (Dep't State Apr. 30, 2020) (Notice of annual certification).

15 *See Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 63 Fed. Reg. 46,094, 46,095 (Dep't State Aug. 28, 1998).

16 *Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 63 Fed. Reg. 46,094, 46,095 (Dep't State Aug. 28, 1998).

shrimp and based on any relevant prior determinations by the Department, and signed by a responsible government official of the harvesting nation.[17]

Examples of completed versions of the *Shrimp Exporter's/Importer's Declaration* (DS-2031) accompanying the import of shrimp from Malaysia are included within the sales documentation attached at **Exhibit 3** and **Exhibit 4**. As shown, the shrimp imported from Malaysia was identified as being "Harvested by aquaculture." These declarations also include a certification from a government official.

An example of a completed version of the *Shrimp Exporter's/Importer's Declaration* (DS-2031) accompanying the import of shrimp from China is included at **Exhibit 5**.[18] This shipment of shrimp from China to the United States is indicated as being "Harvested in the waters of a nation currently certified pursuant to Section 609 of P.L. 101-162" and only includes a certification from the exporter. While the use of Box #7(B) was appropriate at the time of this shipment because China had received a certification from the State Department, shipments of shrimp from China may no longer use that option as the country's certification was suspended in April of this year "due to the use of methods of harvesting shrimp that may adversely affect sea turtles."[19] Accordingly, all current imports of shrimp and products of shrimp from China must be accompanied by a certification that identifies the relevant category under Box #7(A) and include a certification from a government official.

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17 *Annual Certification of Shrimp-Harvesting Nations*, 85 Fed. Reg. 24,074, 24,075 (Dep't State Apr. 30, 2020) (Notice of annual certification).

18 This document, which has been redacted with respect to the responses to boxes #2, #4, and #5, was obtained from the public record of an antidumping duty administrative review currently being conducted by the U.S. Department of Commerce. *See* Letter from deKieffer & Horgan PLLC to the U.S. Department of Commerce, Case No. A-570-893 at Exhibit SC-4 (Jan. 9, 2020) (Public Version).

19 *Annual Certification of Shrimp-Harvesting Nations*, 85 Fed. Reg. 24,074, 24,075 (Dep't State Apr. 30, 2020) (Notice of annual certification).

Currently, only shipments of shrimp and products of shrimp from Argentina, the Bahamas, Belgium, Belize, Canada, Chile, Colombia, Costa Rica, Denmark, the Dominican Republic, Ecuador, El Salvador, Fiji, Finland, Gabon, Germany, Guatemala, Guyana, Honduras, Iceland, Ireland, Jamaica, Mexico, the Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Oman, Panama, Peru, Russia, Sri Lanka, Suriname, Sweden, the United Kingdom, and Uruguay are permitted to be accompanied by DS-2031 forms that use Box #7(B) and do not include a certification from a government official.[20] In 2019, 77.1 percent of the volume of all shrimp imports into the United States came from India, Indonesia, Vietnam, Thailand, and China, each of which is not currently certified by the State Department.[21] Thus, for a substantial majority of the shrimp imported into the United States, the importer of record must identify whether the shrimp is wild-caught or farm-raised on the DS-2031 form. Wild-caught shrimp identified on that form is only admissible into the United States if it was harvested using turtle-excluder devices (Box #7(A)(2)) or "harvested in a manner or under circumstances determined by the Department of State not to a pose a threat of the incidental taking of sea turtles" (Box #7(A)(4)).[22] As discussed in more detail below, because shrimp is now one of the thirteen

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20 *See id.*

21 The shrimp import data cited in this brief was obtained through the Commission's *Dataweb* service and includes statistics for imports made under the following six-digit HTSUS codes: 0306.13; 0306.16; 0306.17; 0306.23; 0306.26; 0306.27; 0306.35; 0306.36; 1605.20; 1605.21; and 1605.29. These HTSUS codes encompass shrimp products outside of the scope of the antidumping duty orders on certain frozen warmwater shrimp, such as breaded shrimp, that comprise a substantial portion of the United States' imports of shrimp from China.

22 At present, Box #7(A)(4) may only be used for certain shrimp fisheries in Australia, French Guiana, and Malaysia. *See Annual Certification of Shrimp-Harvesting Nations*, 85 Fed. Reg. 24,074, 24,075 (Dep't State Apr. 30, 2020) (Notice of annual certification). "The Department did not determine that shrimp or products from shrimp harvested in a manner as described in 7(A)(3) in any uncertified nation or economy is eligible to enter the United States." *Id.*

species groups subject to NMFS's Seafood Import Monitoring Program ("SIMP"), all shrimp imported into the United States must be accompanied by an identification of whether the shrimp is wild-caught or farm-raised. However, in contrast to the long-standing limited traceability requirements of the State Department under Form DS-2031, the designation of shrimp as wild-caught or farm-raised under SIMP does not, on its own, determine admissibility.

2. NMFS/Marine Mammal Protection Act

In 1972, Congress enacted the Marine Mammal Protection Act, Public Law No. 92-522 (Oct. 21, 1972), including the statutory provision found at 16 U.S.C. § 1371(a)(2) "that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate."[23] The same provision holds that the federal government "shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards."[24] "Primary responsibility for the implementation of the MMPA rests with NOAA Fisheries, which is within the Department of Commerce."[25]

For over thirty-five years, this provision of the law was not implemented and the Center for Biological Diversity, an environmental organization, first petitioned for its implementation in

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23 *See NRDC, Inc. v. Ross*, 331 F. Supp. 3d 1381, 1383 (Ct. Int'l Tr. 2018).

24 16 U.S.C. § 1371(a)(2).

25 *Sea Shepherd N.Z. & Sea Shepherd Conservation Soc'y v. United States*, 2020 Ct. Intl. Trade LEXIS 120 at *5-6 (*citing* 16 U.S.C. § 1362(12)(A)(i)).

2008.[26] In response to this petition, NMFS issued an advanced notice of proposed rulemaking in 2010, but took no further action until a lawsuit was filed against the agency at the U.S. Court of International Trade in 2014.[27] A settlement of that suit led to promulgation of regulations, at 50 C.F.R. Part 216, implementing the import ban portion of 16 U.S.C. § 1371(a)(2).[28] These regulations established a "one-time, five-year [exemption] period that commences January 1, 2017,"[29] such that any import ban would not be imposed until 2022.

Concerns over the immediate extinction of the vaquita, "the world's smallest porpoise . . . a critically endangered marine mammal endemic to the northern Gulf of California, in Mexican waters," as a result of deaths caused by entanglement with gillnets led environmental groups to file suit at the U.S. Court of International Trade seeking injunctive relief to ban the importation of "fish and shrimp from gillnet fisheries in the northern Gulf of California."[30] On July 26, 2018, the Court issued a preliminary injunction "requiring the Government, pending final adjudication of the merits, to ban the importation of all fish and fish products from Mexican commercial fisheries that use gillnets within the vaquita's range."[31] In response to the federal government's request regarding clarification of the injunction, on August 14, 2018, the Court issued a revised preliminary injunction requiring the Government to "immediately ban the importation from

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26 *See NRDC, Inc. v. Ross*, 331 F. Supp. 3d 1338, 1347 (Ct. Int'l Tr. 2018) (*citing Fish and Fish Product Import Provisions of the Marine Mammal Protection Act*, 81 Fed. Reg. 54,390 (NMFS Aug. 15, 2016)).

27 *See id.* (*citing Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act*, 75 Fed. Reg. 22,731 (NMFS Apr. 30, 2010) and Complaint, *Ctr. for Biological Diversity v. Pritzker*, No. 14-157-MAB (Ct. Int'l Tr. July 2, 2014)).

28 *See id.*

29 50 C.F.R. § 216.3.

30 *NRDC, Inc. v. Ross*, 331 F. Supp. 3d 1338, 1344 and 1352 (Ct. Int'l Tr. 2018).

31 *Id.* at 1372.

Mexico of all shrimp, curvina, sierra, and chano fish and their products caught with gillnets inside the vaquita's range."[32] The revised preliminary injunction further ordered that "this ban shall include all shrimp, curvina, sierra, and chano and their products sourced from the Gulf of California, Mexico, unless affirmatively identified as having been caught with a gear type other than gillnets or affirmatively identified as outside the vaquita's range."[33]

On March 9, 2020, a *Federal Register* notice was published indicating that NMFS had, under its regulatory structure, determined that the certification of admissibility for certain seafood products from Mexico had been revoked.[34] Through the notice, NMFS moved to "immediately ban the importation from Mexico of all shrimp, curvina, sierra, chano, anchovy, herrings, sardines, mackerels, croaker, and pilchard fish and fish products, imported under the HTS codes in Table 1, caught with gillnets inside the vaquita's range" pursuant to 16 U.S.C. § 1371(a)(2).[35] Table 1 of the *Federal Register* notice identified seventy-three different ten-digit HTSUS codes in chapters 3, 5, 16, and 23 to which the holding potentially applied to.[36] Of these codes, twenty-one expressly applied to shrimp product imports.[37] In order

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32 *NRDC, Inc. v. Ross*, 331 F. Supp. 3d 1381, 1390 (Ct. Int'l Tr. 2018).

33 *Id.*

34 *See Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act – Notification of Revocation of Comparability Findings and Implementation of Import Restrictions; Certification of Admissibility for Certain Fish Products from Mexico*, 85 Fed. Reg. 13,626 (NMFS Mar. 9, 2020) (Revocation of comparability findings and implementation of import restrictions for certain fish and fish products from Mexico).

35 *Id.* at 13,628.

36 *See id.* at 13,629-13,631.

37 *See id.*

for shrimp from Mexico categorized under these HTSUS codes to be allowed into the United States, a shipment has to be accompanied by a certification of admissibility:

> To allow imports of seafood outside the scope of these import restrictions, and to minimize disruptions to trade, fish and fish products of the same or similar fish or fish products imported to the United States under the HTS codes listed in Table 1 from Mexico that are not subject to these import prohibitions must be accompanied by a Certification of Admissibility.[38]

As a continuation of NMFS's earlier requirements in compliance with the U.S. Court of International Trade's preliminary injunction, the certification obligates importers of shrimp from Mexico to identify the source of these products, by farm or fishing vessel, at importation.[39]

3. FDA/Import Alerts

The FDA imposes and administers "Import Alerts" with respect to food imported into the United States. These Import Alerts are intended to prevent potentially violative food products from being distributed in the United States, to place responsibility on the importer to ensure that food products being imported into the United States are in compliance with the FDA's laws and regulations, and to permit the efficient allocation of agency resources to examine other shipments.[40] Three of the Import Alerts currently administered by the FDA are limited in their application to aquacultured seafood, including shrimp, or aquacultured shrimp. Accordingly, as with the State Department's Section 609 program, compliance with the FDA's Import Alerts requires importers to identify at the border whether the shrimp or products of shrimp that they seek to import is farm-raised or wild-caught.

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38 *Id.* at 13,628.

39 *See, e.g.*, Jason Huffman, *It's Not SIMP, But New Rules Are Stopping US Imports of Mexican Shrimp*, UndercurrentNews (Nov. 22, 2018), attached as **Exhibit 6**.

40 *See, e.g.*, U.S. Food and Drug Administration, *Import Alerts*, available at: https://www.fda.gov/industry/actions-enforcement/import-alerts#purpose (last visited Aug. 16, 2020).

In contrast to other Import Alerts of general applicability covering the presence of harmful antibiotics in both farm-raised and wild-caught seafood products imported into the United States,[41] Import Alert 16-124, *Detention Without Physical Examination of Aquaculture Seafood Products Due to Unapproved Drugs*, limits its application exclusively to farmed seafood. The FDA explains the basis of Import Alert 16-124 as follows:

> There has been extensive commercialization and an increased consumption rate of aquaculture seafood products. As this industry grows, the use of unapproved new animal drugs and misuse of approved new animal drugs in seafood raised in aquaculture also grows. The use of unapproved new animal drugs will have an impact on the safety of aquaculture products for consumers.[42]

While the majority of the companies listed on the Import Alert are for farmed seafood products other than shrimp, farmed shrimp producers and exporters from Bangladesh, Malaysia, Mexico, and Vietnam are currently included. Wild-caught shrimp exported by the producers listed would not be subject to the Import Alert.

In addition, two country-specific Import Alerts – Import Alert 16-131, *Detention Without Physical Examination of Aquacultured[] Shrimp, Dace, and Eel from China – Presence of New Animal Drugs and/or Unsafe Food Additives*,[43] and Import Alert 16-136, *Detention Without Physical Examination of Aquacultured Shrimp and Prawns from Peninsular Malaysia Due to Presence of Drug Residues from Unapproved Animal Drugs or the Presence of Unsafe Food Additives*[44] – are similarly limited in their applicability exclusively to farmed shrimp. As with

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41 *See* Import Alert 16-129, *Detention Without Physical Examination of Seafood Products Due to Nitrofurans*, attached as **Exhibit 7** and Import Alert 16-127, *Detention Without Physical Examination of Crustaceans Due to Chloramphenicol*, attached as **Exhibit 8**.

42 **Exhibit 9**.

43 **Exhibit 10.**

44 **Exhibit 11.**

Import Alert 16-121, wild-caught shrimp exported by producers from China or from peninsular Malaysia would not be subject to the controls of these Import Alerts.

Because of the limited scope of Import Alert 16-131, Chinese shrimp exporters tend to explicitly describe products of shrimp exported to the United States as "wild caught" in describing the contents of a shipment in a bill of lading. **Exhibit 12** provides an example of information from a bill of lading for a recent shipment from Qingdao Xuchang Food Co., Ltd. to JYC International Inc. describing "SPRING ROLL WITH VEGETABLE FULLY COOKED [SPRING] ROLL WITH VEGETABLE SPRING ROLL WITH SHRIMP (WILD CAUGHT) . . ." **Exhibit 13** provides an example of information from a bill of lading for a shipment in May from Ruian Huasheng Aquatic Products to Linkway Corp. describing "DRIED SHRIMP (WILD CAUGHT)." And, finally, **Exhibit 14** provides an example of information from a bill of lading for a shipment in April from Zhejiang Evernew Seafood Co. to Ocean Bistro Corp. describing "SHRIMP AND PRAWNS SALTED SHRIMP (OCEAN WILD) . . ."

B. Estimates of IUU Shrimp Imports into the United States

In their novel study of illegal and unreported ("IU") (but not unregulated) fishing on a worldwide scale to create estimates of current and historical IU catch, David J. Agnew and John R. Beddington of Imperial College London, United Kingdom; Ganapathiraju Pramod, Reg Watson, and Tony Pitcher of the Fisheries Centre, University of British Columbia, Canada; and Tom Peatman of MRAG Ltd., United Kingdom found that shrimp was one of the products most frequently harvested through IU fishing.[45] Analyzing data from 2000 through 2003, the authors concluded that "[a]s would be expected, the highest levels of illegal fishing are associated with

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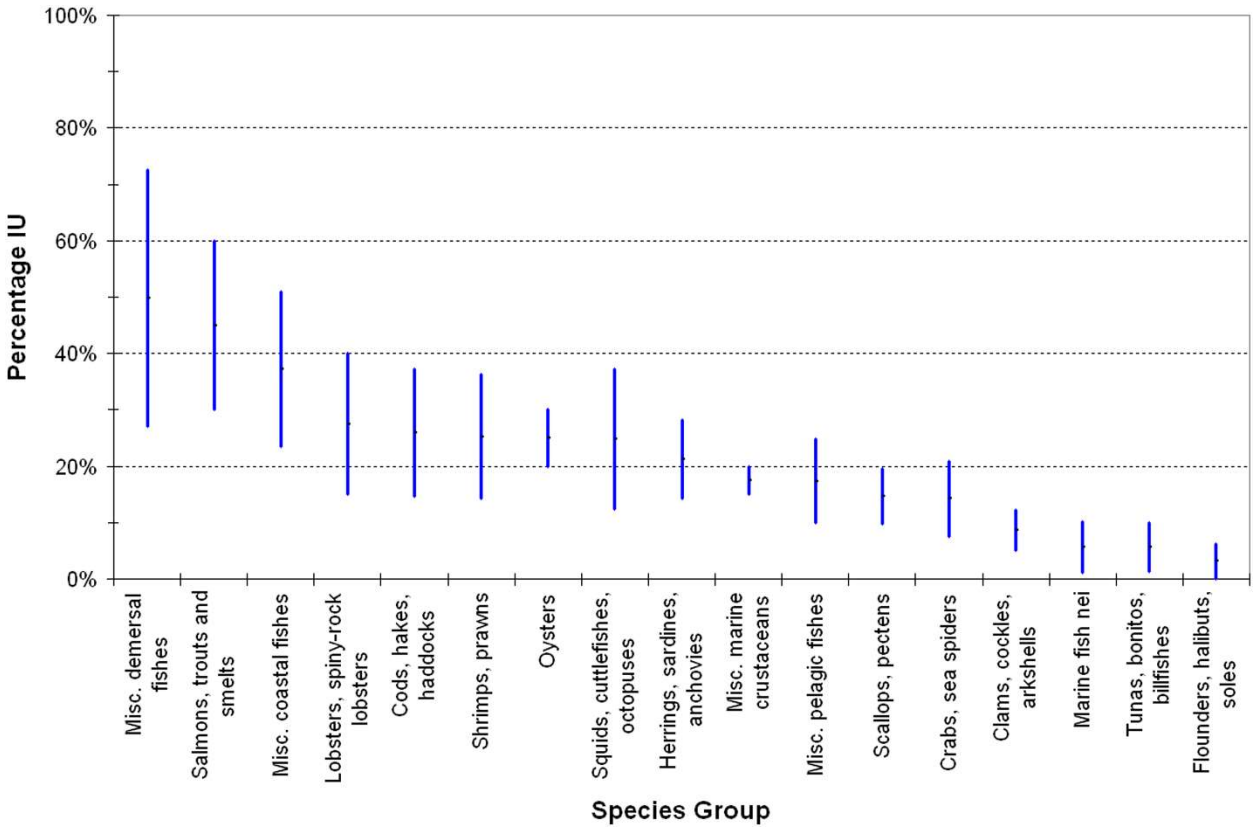
[45] *See* David J. Agnew, John Pearce, Ganapathiraju Pramod, Tom Peatman, Reg Watson, John R. Beddington, and Tony Pitcher, *Estimating the Worldwide Extent of Illegal Fishing*, PLoS One (Feb. 2009) Vol. 4, Issue 2, e4570, attached as **Exhibit 15**.

high value demersal fish, lobsters and shrimps/prawns . . ."[46] The percentage of overall wild-caught shrimp landed estimated to be from IU fishing ranged from a lower estimate in the high teens to an upper estimate of over 35 percent as shown in the study's Figure 1 reproduced below:[47]



Accordingly, significant quantities of the wild-caught shrimp harvested outside of the United States are believed to be the product of IU fishing. Although shrimp appears to be a significant contributor to the overall production of seafood through IUU fishing, there has not been detailed analysis conducted of the market for such shrimp and the extent to which it is internationally traded. Moreover, there has been minimal analysis conducted as to the extent to

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46 *Id.* at 3.

47 *Id.*

which wild-caught shrimp, whether legally harvested or harvested through IUU fishing, is imported into the United States. There is no public data source available that would quantify the total quantity and value of wild-caught or farm-raised shrimp imported into the United States. The lack of available data complicates any effort to determine the extent to which shrimp harvested through IUU fishing is imported into the United States. Nevertheless, the regulatory approach of the State Department, the FDA, and NMFS assumes that there are significant quantities of wild-caught shrimp imported into the United States – enough, at least, that wild-caught and farm-raised shrimp is subject to differing treatment at importation by the three federal agencies.

Despite the constraints on additional data, in a subsequent study published in 2014 that was conducted by Ganapathiraju Pramod and Tony Pitcher along with Katrina Nakamura of the Sustainability Incubator, and Leslie Delagran, currently of Chesapeake Conservancy, the authors sought to construct a methodology for estimating the amount of seafood harvested through IU fishing that enters the United States.[48] The results of their research indicate that not only is the volume of wild-caught shrimp imported into the United States significant, but, further, the volume of wild-caught shrimp harvested through IU fishing imported into the United States is significant. Building on the analysis of previous studies, Pramod *et al.* sought to refine the "anchor point and influence" methodology to focus on specific foreign fisheries from which products were subsequently exported to the United States.[49] Pursuant to this methodology, "anchor point" estimates of upper and lower bounds of IU fishing were determined based on a

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48 *See* Ganapathiraju Pramod, Katrina Nakamura, Tony Pitcher, and Leslie Delagran, *Estimates of Illegal and Unreported Fish in Seafood Imports to the USA*, Marine Policy 48 (2014) 102-113, attached as **Exhibit 16**.

49 *See id.* at 104.

"wide variety of sources" and "Monte Carlo simulations were used to investigate the effects of uncertainty, with 1000 simulations across the distribution of uncertainty."[50] Thereafter, qualitative and quantitative data were employed to create "influence factors" intended to reflect the overall incentives and disincentives to misreport catches.[51]

Pramod *et al.* reviewed data regarding the top three wild-caught products from the top ten seafood exporting nations to the United States in 2011, comprising, in total, "more than 0.5 million tonnes of seafood worth about US$ 3.7 billion."[52] The results of their analysis provided confirmation of previous efforts to estimate the prevalence of global IUU fishing:

> The results from this analysis of wild-caught imports . . . indicate that 20-32% by weight of wild-caught seafood imported by the United States in 2011, with a value between $1.3 billion and $2.1 billion (or 15-26% of total value of wild-caught seafood), were from illegal and unreported (IU) catches. This suggests that the amounts of illegal fish entering the market in the USA lie within the range of earlier estimates of global illegal fishing of 13-31% implying that USA sourcing practices do not preclude entry of illegal products.[53]

Shrimp was the largest single species group exported from these countries to the United States, but was ultimately excluded from the analysis for four of the ten countries, although the authors noted that there was evidence that wild-caught shrimp from these countries was fraudulently described as an aquaculture product upon exportation:

> Shrimps represented 24% of imports by volume and 31% by value in 2011. Although shrimps comprise the largest category of seafood imported to the USA both in volume and value, such products were excluded from the analysis for Thailand, China, Indonesia and Vietnam as much was of farmed origin. There is

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50 *Id.*

51 *See id.*

52 *Id.* at 105.

53 *Id.*

> some evidence that wild-caught shrimp is on occasion illegally exported mislabeled as farmed shrimp . . .[54]

The authors explained the evidence of shrimp harvesting in these countries through IU fishing as follows:

> Wild shrimp from the South East Asian region, such as Indonesia, is often purchased at sea and trans-shipped to Thailand and China for processing, and is therefore not landed and reported in source country trade statistics. Part of this catch is unreported but licensed through joint venture agreements with Thai, Taiwanese and Korean vessels. Part of the catch is also from unlicensed vessels selling supplies to trans-shipping vessels at-sea. This extra supply feeds the processing sector in Thailand, while simultaneously diverting the catch away from the Indonesian processing sector. As is seen for other products and regions, the incentive for IUU fishing is the lack of transparency on trade flows at sea where supplies are amalgamated for large, shore-based processing interests.[55]

Of the remaining six countries, Pramod *et al.* included shrimp in their analysis for two, Ecuador and Mexico. The authors estimated that between 25 to 40 percent of wild-caught shrimp from Mexico was the product of IU fishing, that 34 percent of Mexico's production of shrimp in 2011 was wild-caught, rather than farm-raised, shrimp, and that of this wild-caught production, nineteen percent was exported to the United States.[56] Based on these figures, Pramod *et al.* estimated that between 2,606 and 4,169 tons of the 10,423 tons of wild-caught shrimp exported from Mexico to the United States in 2011 was the product of IU fishing.[57] As the value of wild-caught shrimp exported to the United States from Mexico in 2011 was estimated to be $96,523,445,[58] the application of the same percentage share of IU fishing would

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54 *Id.*

55 *Id.* at 110-111.

56 *See id.* at 105.

57 *See id.* at 106.

58 *See id.* at 105.

indicate that the value of IU shrimp imported into the United States from Mexico was between $24.1 and $38.6 million.

For Ecuador, the authors estimated that 25 to 35 percent of wild-caught shrimp was the product of IU fishing and that ten percent of the shrimp exported from Ecuador to the United States was wild-caught, rather than farm-raised.[59] Based on these figures, Pramod *et al.* estimated that between 1,839 and 2,575 tons of the 7,378 tons of wild-caught shrimp exported from Ecuador to the United States in 2011 was the product of IU fishing.[60] As the value of wild-caught shrimp exported to the United States from Ecuador in 2011 was estimated to be $51,222,278,[61] the application of the same percentage share of IU fishing would indicate that the value of IU shrimp imported into the United States from Ecuador was between $12.8 and $17.9 million.

Overall, Pramod *et al.* estimated that between 109,498 and 175,017 tons of seafood harvested through IU fishing was imported into the United States in 2011.[62] Of this total, shrimp from Ecuador and Mexico accounted for roughly four percent of the total estimated volume of IU seafood imported into the United States.[63] The total commercial value of this IU shrimp may be estimated as being between $36.9 million and $56.5 million. Although this is a small fraction

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59 *See id.* at 105.

60 *See id.* at 106. The calculation appearing in the published paper appears to estimate the volume of exports of shrimp harvested through IU fishing to the United States by a base number of 7,357 tons rather than 7,378 tons.

61 *See id.* at 105.

62 *See id.* at 106.

63 Lower estimate was 2,606 tons (Mexico) plus 1,839 tons (Ecuador) equals 4,445 tons. 4,445 tons divided by 109,498 tons equals 4.1 percent. Upper estimate was 4,169 tons (Mexico) plus 2,575 tons (Ecuador) equals 6,744 tons. 6,744 tons divided by 175,017 tons equals 3.9 percent.

of the $5.2 billion total value in shrimp imported into the United States in 2011,[64] these estimates nevertheless indicate that the United States functions as a significant market for IU shrimp. Moreover, these volumes are significant in the context of domestic commercial shrimp landings, as NMFS reported that total commercial landings of shrimp in the United States were almost 312.7 million pounds (156,350 tons) valued at $518 million in 2011.[65]

If these same estimates were applied to 2019 imports, the methodology would indicate that between 2,769 and 4,430 tons of shrimp imported from Mexico into the United States were the product of IU fishing, worth between $25.9 and $41.4 million.[66] For Ecuador, the methodology would estimate that between 2,286 and 3,200 tons of shrimp imported from Ecuador into the United States were the product of IU fishing, worth between $13.8 and $19.3 million.[67] NMFS has not yet published the *Fisheries of the United States* for 2019, but, by way of comparison, U.S. landings of shrimp were 289.2 million pounds (144,600 tons) valued at $496.1 million in 2018.[68]

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64 ITC *Dataweb*.

65 *See* NMFS, *Fisheries of the United States, 2011*, Current Fishery Statistics No. 2011 (Aug. 2012) at xiii, available at: https://www.st.nmfs.noaa.gov/Assets/commercial/fus/fus11/FUS2011.pdf

66 The United States imported 32,577 tons of shrimp from Mexico in 2019 valued at $304.2 million. ITC *Dataweb*.

67 The United States imported 91,439 tons of shrimp from Ecuador in 2019 valued at $552.5 million. ITC *Dataweb*.

68 *See* NMFS, *Fisheries of the United States, 2018*, Current Fishery Statistics No. 2018 (Feb. 2020) at xxv, available at: https://www.fisheries.noaa.gov/resource/document/fisheries-united-states-2018-report

C. Farm-Raised Shrimp Imported into the United States Is an Important Conduit for IUU Seafood

Every year, an estimated 15 million tons of wild fish are used to produce fishmeal and fish oil.[69] "Almost one-fifth of the world's annual wild-fish catch is taken out of the ocean for this purpose."[70] Although there are several industries that consume the fishmeal and fish oil produced from this wild-caught seafood, aquaculture is the dominant use, with feed for farmed seafood including salmon, sea bass, and shrimp accounting for 70 percent of fishmeal and fish oil consumption.[71] Aquaculture's consumption of fishmeal has seen a massive increase over the last thirty-five years, as aquaculture's "fishmeal consumption share [rose] from 10% in 1980 to 73% in 2016 . . ."[72]

Shrimp farming accounts for a significant amount of the fishmeal consumed in aquaculture: "While shrimp aquaculture consumed 16% (approximately 6.18 million MT) of the

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69 *See* Changing Markets Foundation and Feedback, *Caught Out: How UK Retailers Are Tackling the Use of Wild Fish in Their Aquaculture Supply Chains* (Mar. 2020) at 9 (*citing* Food and Agricultural Organization of the United Nations, *The State of World Fisheries and Aquaculture, 2018: Meeting the Sustainable Development Goals*, Licence: CC BY-NC-SA 3.0 IGO. ROME: FAO), attached as **Exhibit 17**.

70 Changing Markets Foundation, *Fishing for Catastrophe: How Global Aquaculture Supply Chains Are Leading to the Destruction of Wild Fish Stocks and Depriving People of Food in India, Vietnam, and The Gambia* (Oct. 2019) at 5 (*citing* Cashion T., Le Manach, F., Zeller, D. and Pauly, D. (2017), *Most Fish Destined for Fishmeal Are Food-Grade Fish*, Fish and Fisheries, 18(5): 1-8), attached as **Exhibit 18**.

71 *See* Changing Markets Foundation and Feedback, *Caught Out: How UK Retailers Are Tackling the Use of Wild Fish in Their Aquaculture Supply Chains* (Mar. 2020) at 9 (*citing* Bachis, E. (2017), *Fishmeal and Fish Oil: A Summary of Global Trends*, Washington 57th IFFO Annual Conference).

72 Wesley Malcorps, Bjorn Kok, Mike van't Land, Maarten Fritz, Davy van Doren, Kurt Servin, Paul van der Heijden, Roy Palmer, Neil A. Auchterlonie, Max Rietkerk, Maria J. Santos, and Simon J. Davies, *The Sustainability Conundrum of Fishmeal Substitution by Plant Ingredients in Shrimp Feeds*, Sustainability (Feb. 2019) *11*, 1212, at 2 (*citing* Shepherd, C.J.; Jackson, A.J., *Global Fishmeal and Fish-Oil Supply: Inputs, Outputs and Markets*, J. Fish Biol. 2013, *83*, 1046-1066), attached as **Exhibit 19**.

global aquafeed production (approximately 39.62 million MT) in 2012, it consumed 31% (approximately 1 million MT) of the fishmeal in aquaculture."[73] Using this figure, the non-governmental organizations Changing Markets Foundation and Feedback compared it to global shrimp aquaculture production in 2012 (4 million MT) and estimated that four pounds of farmed shrimp may be produced from every one pound of fishmeal used in shrimp feed.[74] If this estimate was applied to the most recent year (2018) for which shrimp aquaculture production data is available from the Food and Agricultural Organization of the United Nations ("FAO"), 6 million tons of global farmed shrimp production[75] would imply the consumption of 1.5 million tons of fishmeal.

Summarizing the findings of their investigation of the harvesting of seafood used in the production of fishmeal and fish oil in India, Vietnam, and The Gambia, the Changing Markets Foundation reported:

> Our research finds that aquafeed companies with unsustainable and illegal sourcing practices are supplying seafood farms exporting to the global market – and, in turn, many of the biggest seafood processors and retailers in the world. **This means that aquafeed companies, aquaculture producers, seafood processors and major retailers are complicit by association in the socioeconomic and ecological damage our investigators encountered.** While our analysis focused on European retail supply chains, we would expect the picture to be broadly similar in other high-income markets, based on the knowledge that the same aquafeed companies and seafood exporters supplying the

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73 *Id.* at 2-3 (footnotes omitted).

74 *See* Changing Markets Foundation and Feedback, *Caught Out: How UK Retailers Are Tackling the Use of Wild Fish in Their Aquaculture Supply Chains* (Mar. 2020) at Appendix A.

75 *See* **Exhibit 20**.

> European market are also exporting to other markets in the Global North, including the US and Canada.[76]

The Changing Markets Foundation observed that fishmeal and fish oil production, "driven by demand from the global aquaculture sector is visibly accelerating the decline of fish stocks in India, Vietnam and The Gambia, which marine fisheries for consumption have already pushed to the breaking point."[77] In each of these three countries, the Changing Markets Foundation concluded that "localised decline or collapse of local target fish stocks [is] fuelled by rampant illegal, unregulated and unreported (IUU) fishing . . ."[78] The organization's comprehensive report details specific examples of the supply of IUU seafood to fishmeal and fish oil producers.

Further, the Changing Markets Foundation also discussed the close ties (and proximity) between fishmeal producers and shrimp farming and exporting operations. Their investigation looked into seafood landed at Song Duc port within a province of substantial importance to Vietnam's shrimp farming, processing, and exporting industry:

> **Song Duc port, Ca Mau Province:** Ca Mau is the southernmost province of Vietnam and plays a key role in prawn farming and export. Ca Mau makes up 40% of the country's prawn-farming area; in 2016, it accounted for one-third of Vietnam's prawn export, with a value of nearly $1 billion. The province is home to Vietnam's biggest prawn exporter, Minh Phu Seafood JSC, which was ranked among the world's 50 biggest seafood companies in 2018. Song Doc port industrial zone includes three seafood-processing plants and nine fishmeal factories, and is known to be an environmental 'black spot' owing to air and water pollution from the factories.[79]

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76 Changing Markets Foundation, *Fishing for Catastrophe: How Global Aquaculture Supply Chains Are Leading to the Destruction of Wild Fish Stocks and Depriving People of Food in India, Vietnam, and The Gambia* (Oct. 2019) at 6 (emphasis in original).

77 *Id.* at 12.

78 *Id.*

79 *Id.* at 33 (footnotes omitted).

The report further claimed to have found evidence of direct supply of IUU seafood to prawn feed producers:

> The investigation uncovered supply links between problematic FMFO producers in southern Vietnam and several major companies with global reach, including Vinh Hoan Corporation, a large aquafeed producer and leading Vietnamese pangasius exporter to the EU; CP Vietnam, the feed subsidiary of global giant CP Foods, part of multinational conglomerate Charoen Pokphand; and Minh Phu, Vietnam's largest prawn exporter, which exports significant volumes to the EU and US. Grobest, a major producer of prawn feed with its own aquaculture farms and processing facilities across Asia, is supplied by all three of the problematic fishmeal companies studied in this report. . .
>
> In a face-to-face meeting with one of our researchers posing as a buyer, Mrs Chau Cam Le, the owner of Phuc Ngoc (one of the Chau family fishmeal factories), disclosed that Phuc Ngoc supplies fishmeal for aquafeed to all the CP Vietnam aquafeed plants, as well as to Proconco, Thang Long, Vinh Hoan, Tongwei, Uni-President and Cargill. These companies are among the largest aquafeed providers in Vietnam, feeding a wide range of farmed fish and prawn destined for the US, EU and many other international markets.[80]

The Changing Markets Foundation's investigators were also able to trace "IUU fishmeal from Bich Khai fishmeal plant entering the aquafeed supply chain of Grobest, a leading feed producer that supplies Vietnam's largest prawn exporter, Minh Phu – a company that exports significant amounts of seafood to the EU and US"[81] and "IUU fishmeal from Phuc Loc fishmeal plant entering the aquafeed supply chain of CP Vietnam, part of the multinational conglomerate Charoen Pokphand."[82] In total, the Changing Markets Foundation's investigators claimed to be able to trace some of the seafood harvested through IUU fishing to fishmeal producers to aquafeed producers to shrimp processor/exporters to seafood distributors and, ultimately, to European retailers, summarizing their findings in the following chart:

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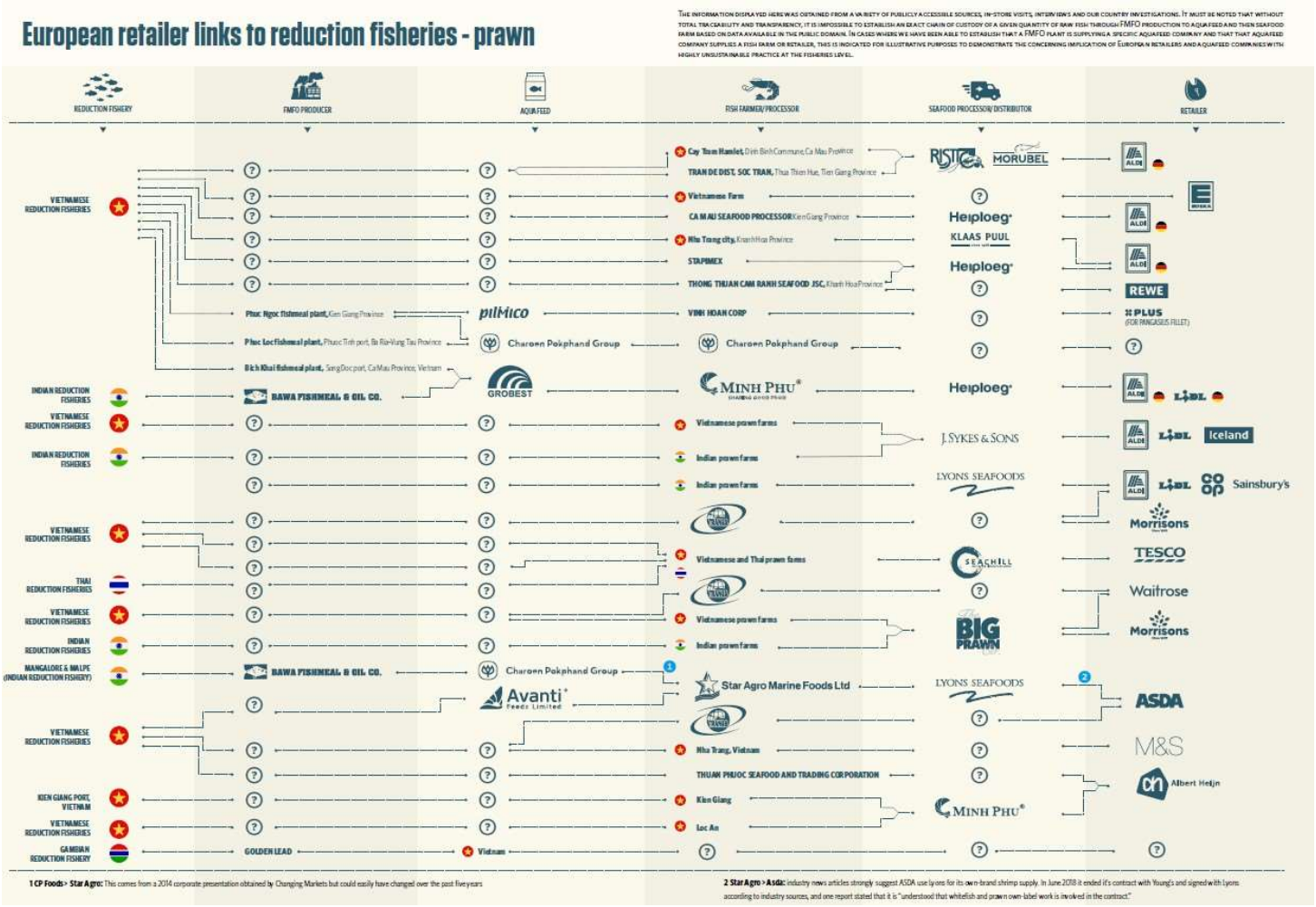
80 *Id.* at 37.

81 *Id.* at 38.

82 *Id.* at 39.



Absent sophisticated, resource-intensive investigations like the one conducted by the Changing Markets Foundation, it is not possible to trace seafood harvested through IUU fishing through the process by which it is converted into fishmeal, used to produce shrimp feed, fed to shrimp in shrimp farms, with the shrimp then harvested, processed, and exported to the United States. Nevertheless, the work of the Changing Markets Foundation conclusively demonstrates that the market for IUU seafood is driven in significant part by shrimp aquaculture production and, moreover, that IUU seafood enters the U.S. market through farmed shrimp imports. These farmed shrimp imports, in turn, have had a devastating impact on the U.S. commercial warmwater shrimp industry.

III. THE SEAFOOD IMPORT MONITORING PROGRAM HAS ALREADY HAD A SIGNIFICANT IMPACT ON SEAFOOD IMPORTS

The United States' effort to limit the introduction of seafood harvested through IUU fishing to the U.S. market was implemented by and is administered through SIMP. By denying access to the U.S. market for IUU seafood products, the federal government seeks to assure that the United States is not contributing to the maintenance and proliferation of IUU fishing activities by providing a market for such products. Further, "there may be price effects in that illegal or would-be fraudulent seafood would be diverted from the U.S. market to lower value markets."[83] Combined, these two factors, "deterrent and price effects would reduce the incentives for IUU fishing operations and seafood fraud."[84] At the same time, law-abiding participants in international seafood trade would profit: "authorized fisheries stand to benefit from import monitoring programs that aim to identify and exclude products of IUU fishing and seafood fraud, both through enhanced market share and potentially higher prices."[85]

SIMP has been in effect at the border with respect to certain seafood imports since 2018 and, at the time of the Commission's investigation here, changes in trade patterns since the program was implemented provide some insight into the prevalence of IUU seafood in the U.S. market. Although SIMP has been criticized by U.S. seafood importing interests as an onerous regulatory program that fails to address the problem of IUU fishing, a review of trade data belies this claim. Instead, the early history of SIMP establishes that the *laissez faire* treatment of imported seafood – long vigorously defended by U.S. seafood importing interests – has led the

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83 *Magnuson-Stevens Fishery Conservation and Management Act; Seafood Import Monitoring Program*, 81 Fed. Reg. 88,975, 88,992 (NMFS Dec. 9, 2016) (Final rule).

84 *Id.*

85 *Id.*

United States to become a significant market for IUU seafood. As discussed in more detail below, without more, the mere implementation of a traceability requirement appears to have had a substantial impact on U.S. imports of at least two of the thirteen species groups covered by SIMP.

A. History of SIMP

On February 5, 2016, the *Federal Register* published a notice from NMFS with a proposal for the adoption of a rule that

> would establish filing and recordkeeping procedures relating to the importation of certain fish and fish products in order to implement the [Magnuson-Stevens Fishery Conservation and Management Act's ("MSA")] prohibition on the import and trade, in interstate or foreign commerce, of fish taken, possessed, transported or sold in violation of any foreign law or regulation.[86]

The proposed rule had three components. First, the rule would require "U.S. importers of record for designated at-risk species covered by this rule and seafood products derived from such species" to obtain an International Fisheries Trade Permit ("IFTP") from NMFS.[87] Second, at the point of entry for species covered by the proposed rule, "importers of record would be required to report" information regarding the harvesting and processing of the seafood via the Automated and Commercial Environment ("ACE") "portal as part of the CBP entry/entry summary process."[88] Third, these "importers of record" "would be required to maintain and have access to, and make available for inspection, electronic or paper versions of records

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86 *Magnuson-Stevens Fishery Conservation and Management Act; Seafood Import Monitoring Program*, 81 Fed. Reg. 6,210 (NMFS Feb. 5, 2016) (Proposed rule; request for comments).

87 *Id.* at 6,217.

88 *Id.* at 6,216.

associated with an entry for at-risk species at their place of business for a period of five years after the date of entry."[89]

Beyond providing traceability for the at-risk species imported into the United States, NMFS explained that the proposed rule would "also decrease the incidence of seafood fraud by collecting information at import and requiring retention of documentation so that information reported (*e.g.*, regarding species and harvest location) can be verified."[90] To that end, NMFS explained that the agency intended to "implement a verification scheme, including levels of inspection sufficient to assure that imports of the at-risk species are not products of illegal fisheries and are not fraudulently represented."[91]

A *Federal Register* notice announcing the formal adoption of a final rule creating SIMP was published on December 9, 2016.[92] The final rule revised 50 C.F.R. § 600.725 to prohibit the importation, purchase, ownership, transportation, sale (including offer to sell), and export of any "fish taken, possessed, transported, or sold in violation of any foreign law or regulation, or any treaty or in contravention of a binding conservation measure adopted by an international agreement or organization to which the United States is a party."[93] The final rule further promulgated SIMP through the amendment and addition of the regulatory provisions at 50 C.F.R. § 300.321, § 300.323, § 300.324, and § 300.325.[94] With the exception of 50 C.F.R. §

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89 *Id.* at 6,217.

90 *Id.* at 6,211.

91 *Id.* at 6,218.

92 *Magnuson-Stevens Fishery Conservation and Management Act; Seafood Import Monitoring Program*, 81 Fed. Reg. 88,975 (NMFS Dec. 9, 2016) (Final rule).

93 *Id.* at 88,998.

94 *Id.* at 88,996-88,998.

300.324(a)(3), the final rule became effective on January 9, 2017 with a compliance date for the at-risk species listed at 50 C.F.R. § 300.324(a)(2) established as January 1, 2018.[95] Section 300.324(a)(3) applies to abalone and shrimp and, for these two species, the effective date of the rule's adoption was "stayed indefinitely."[96] A *Federal Register* notice published on April 24, 2018 lifted this stay, effective May 24, 2018, and established a compliance date of December 31, 2018 for abalone and shrimp.[97]

In a December 18, 2017 Cargo Systems Messaging Service ("CSMS") message to the trade, CBP explained that for the eleven species listed at 50 C.F.R. § 300.324(a)(2), NMFS would "initially adopt an 'informed compliance' approach . . ."[98] In February 2018, another CSMS message to the trade explained that, beginning April 7, 2018, import entries of seafood products encompassed amongst those listed at 50 C.F.R. § 300.324(a)(2) that did not include complete and accurate information required by SIMP had to be corrected before they would be accepted.[99] That deadline was extended to April 9, 2018 in a subsequent CSMS message.[100]

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95 *Id.* at 88,975.

96 *Id.* at 88,975 and 88,997.

97 *Magnuson-Stevens Fishery Conservation and Management Act; Lifting the Stay on Inclusion of Shrimp and Abalone in the Seafood Traceability Program*, 83 Fed. Reg. 17,762 (NMFS Apr. 24, 2018) (Final rule; compliance date and lift of stay).

98 CSMS #17-000783, *Informed Compliance NMFS SIMP* (Dec. 18, 2017), available at: https://csms.cbp.gov/viewmssg.asp?Recid=23181&page=3&srch_argv=seafood&srchtype=&btype=&sortby=&sby=.

99 CSMS #18-000124, *Update on Informed Compliance for NMFS SIMP* (Feb. 8, 2018), available at: https://csms.cbp.gov/viewmssg.asp?Recid=23325&page=2&srch_argv=seafood&srchtype=&btype=&sortby=&sby=.

100 CSMS #18-000232, *Update: Two-Day Extension of Informed Compliance for NMFS SIMP* (Mar. 19, 2018), available at: https://csms.cbp.gov/viewmssg.asp?Recid=23428&page=2&srch_argv=seafood&srchtype=&btype=&sortby=&sby=

For the remaining two species (abalone and shrimp), listed at 50 C.F.R. § 300.324(a)(3), a CSMS message was issued in September 2018 notifying the trade that beginning on October 9, 2018 and going through December 31, 2018, SIMP reporting would be voluntary but that after December 31, 2018, incomplete or inaccurate information submitted in response to SIMP requirements had to be corrected before an import entry would be accepted,[101] while a second CSMS message issued on October 9, 2019 explained that the "Trade can begin voluntary filing for shrimp and abalone now, to assure they are ready before the mandate in January."[102] In December 2018, a CSMS message notified the trade that, despite the lengthy voluntary trial period, NMFS would implement a period of "informed compliance" for abalone and shrimp imports starting December 31, 2018 through March 1, 2019, similar to the approach adopted for the other eleven at-risk seafood species groups.[103] This "informed compliance" period was extended until April 1, 2019 per a CSMS message issued on February 25, 2019,[104] with a

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101 CSMS #18-000531, *Information About NMFS SIM Program Updates* (Sept. 13, 2018), available at: https://csms.cbp.gov/viewmssg.asp?Recid=23737&page=2&srch_argv=seafood&srchtype=&btype=&sortby=&sby=.

102 CSMS #18-000583, *Update to NMFS SIM Program Information* (Oct. 2, 2018), available at: https://csms.cbp.gov/viewmssg.asp?Recid=23792&page=2&srch_argv=seafood&srchtype=&btype=&sortby=&sby=.

103 CSMS #18-000744, *Update to NMFS SIM Program Information* (Dec. 18, 2018), available at: https://csms.cbp.gov/viewmssg.asp?Recid=23956&page=1&srch_argv=seafood&srchtype=&btype=&sortby=&sby=.

104 CSMS #19-000085, *This CSMS Updates CSMS # 18-000744, 583 and 531 (Information About NMFS SIM Program Update)* (Feb. 25, 2019), available at: https://csms.cbp.gov/viewmssg.asp?Recid=24070&page=1&srch_argv=seafood&srchtype=&btype=&sortby=&sby=.

reminder of the April 1st effective date issued through another CSMS message on March 19, 2019.[105]

Accordingly, for the following eleven seafood species groups listed at 50 C.F.R. § 300.324(a)(2), the requirements of SIMP took effect at the border on January 1, 2018, with enforcement fully starting on April 9, 2018: (1) Atlantic Cod; (2) Pacific Cod; (3) Blue Crab; (4) Red King Crab; (5) Dolphinfish (Mahi Mahi); (6) Grouper; (7) Red Snapper; (8) Sea Cucumber; (9) Sharks; (10) Swordfish; and (11) Tunas (Albacore, Bigeye, Skipjack, Yellowfin, and Bluefin). For the remaining two species groups – (12) abalone and (13) shrimp – listed at 50 C.F.R. § 300.324(a)(3), the requirements of SIMP took effect at the border on December 31, 2018, with enforcement fully starting on April 1, 2019.

B. Impact of SIMP on the U.S. Seafood Market

In comments submitted to NMFS attacking SIMP, "[s]everal commenters from the seafood industry expressed their opinion that the Program will not combat illegal fishing and seafood fraud, arguing that limited resources to combat these issues would be most effectively spent on international capacity building."[106] The agency appropriately rejected this view, explaining that "NMFS and the other agencies contributing to this effort agree that the Program will in fact serve to reduce IUU fishing."[107] Nevertheless, seafood importing interests have continued to attack SIMP as ineffective. For example, in testimony last year before the Waters,

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105 CSMS #19-000139, *Information About NMFS SIM Program Updates* (Mar. 19, 2019), available at: https://csms.cbp.gov/viewmssg.asp?Recid=24124&page=1&srch_argv=seafood&srchtype=&btype=&sortby=&sby=.

106 *Magnuson-Stevens Fishery Conservation and Management Act; Seafood Import Monitoring Program*, 81 Fed. Reg. 88,975, 88,977 (NMFS Dec. 9, 2016) (Final rule).

107 *Id.*

Oceans, and Wildlife Subcommittee of the House Natural Resources Committee, the President of the National Fisheries Institute ("NFI"), John P. Connelly, argued that SIMP imposed millions of dollars in additional costs to seafood importers with no measurable effect on IUU fishing:

> As for the effectiveness of SIMP as a tool for combatting IUU fishing, let us look at what has transpired since the program started two years ago. In a recent discussion with industry representatives, a NMFS official conceded that of several hundred thousand seafood containers subject to the program thus far, and of over 1,000 audits done of international fisheries trade permit holders, NOAA's Office of Law Enforcement ("OLE") was alerted to approximately only 50 administrative discrepancies. Of those 50 referrals, according to this official, OLE has taken not a single enforcement action itself and has made not a single referral to the Department of Justice. We have long sought to understand how sweeping up voluminous information about legitimate seafood trade will improve anti-IUU and economic integrity outcomes achieved by U.S. agencies via their prior programs, including the NMFS Biennial IUU Report. This has been done at a cost of millions of extra dollars that our members have had to pass along to the American consumer, and for what? The recent exchange confirms our concerns.[108]

However, a review of trade data demonstrates that, in fact, the implementation of SIMP had a significant impact on the U.S. seafood market. The *Federal Register* notice establishing SIMP as a final rule included a listing of ten-digit codes within the HTSUS that "are subject to the permitting and recordkeeping requirements of this rule and are designated in ACE as requiring the additional NMFS data set in order to obtain release of the inbound shipment . . ."[109] NMFS explained that these codes were subject to revision and that any changes would "be reflected in the NMFS Implementation Guides for ACE that are posted to the internet by

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108 Statement of John P. Connelly, President, National Fisheries Institute, Before the Water, Oceans, and Wildlife Subcommittee, Natural Resources Committee, U.S. House of Representatives, *Oversight of NOAA's Report on Illegal, Unreported, and Unregulated Fishing* (Nov. 14, 2019) at 4, attached as **Exhibit 21**.

109 *Magnuson-Stevens Fishery Conservation and Management Act; Seafood Import Monitoring Program*, 81 Fed. Reg. 88,975, 88,989-88,991 (NMFS Dec. 9, 2016) (Final rule).

CBP."[110] The most recent version of CBP's implementation guide, now consolidated into the "NMFS PGA Message Set Guidelines" document[111] refers back to NMFS's website for a complete listing of the HTSUS codes subject to SIMP.[112] The most recent list, updated in May 2019, is attached as **Exhibit 22**.

An initial, superficial analysis of the impact of SIMP on U.S. seafood imports may be conducted by investigating trade patterns before and after the imposition of SIMP. Where substantial declines in the volume of imports under an HTSUS code have taken place, these circumstances imply that the supply chain for that product is incapable of providing traceability information sufficient to demonstrate that the seafood was not harvested from IUU fishing.

1. Sea Cucumbers

Imports of sea cucumbers into the United States have substantially declined in volume and value with the implementation of SIMP at the beginning of 2018. Per NMFS's listing of covered HTSUS codes, sea cucumbers are imported under four different ten-digit HTSUS numbers: 0308.11.0000; 0308.12.0000; 0308.19.0100; and 1605.61.000. Two of the relevant HTSUS codes – 0308.12.0000 and 0308.19.0100 – became effective in 2017[113] and, as such, it is possible to conduct an apples-to-apples comparison of sea cucumber import patterns in the

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110 *Id.* at 88,989.

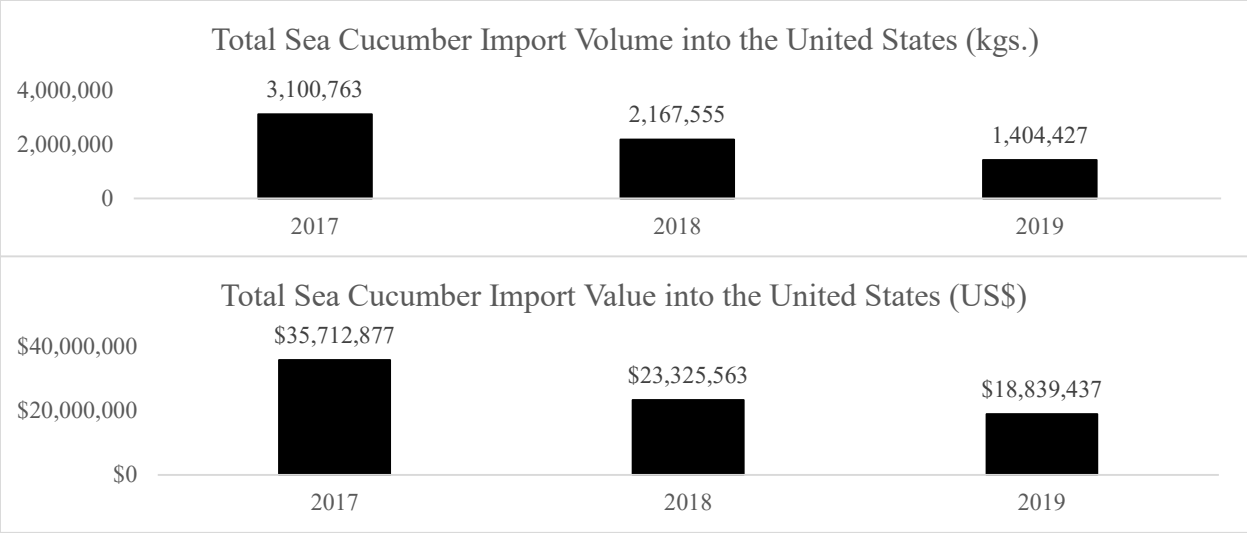
111 *See* U.S. Customs and Border Protection, *NMFS PGA Message Set Guidelines* (Feb. 2020) at 40, available at: https://www.cbp.gov/sites/default/files/assets/documents/2020-Mar/ACE%20NMFS%20PGA%20Implementation%20Guide%2018Feb2020_final_0.pdf.

112 *See* https://www.fisheries.noaa.gov/resource/form/harmonized-tariff-codes-seafood-import-monitoring-program.

113 Prior to 2017, frozen sea cucumbers, along with all other sea cucumbers that were not "Live, Fresh, or Chilled" were imported under the HTSUS code 0308.19.0000 ("Other"). The revisions to the HTSUS in 2019 split this basket category out to distinguish between "Frozen" (0308.12.0000) and "Other" (0308.19.0100).

calendar year before SIMP took effect (2017) against the two calendar years after SIMP took effect (2018 and 2019). As shown in the table below, the volume and value of sea cucumbers imported into the United States fell to roughly half of 2017 levels in 2019, the second year of SIMP enforcement.

Source: USITC *Dataweb*	2017	2018	2019
Sea Cucumber Imports (Total; kgs)	3,100,763	2,167,555	1,404,427
Sea Cucumber Imports (Total; US$)	$35,712,877	$23,325,563	$18,839,437

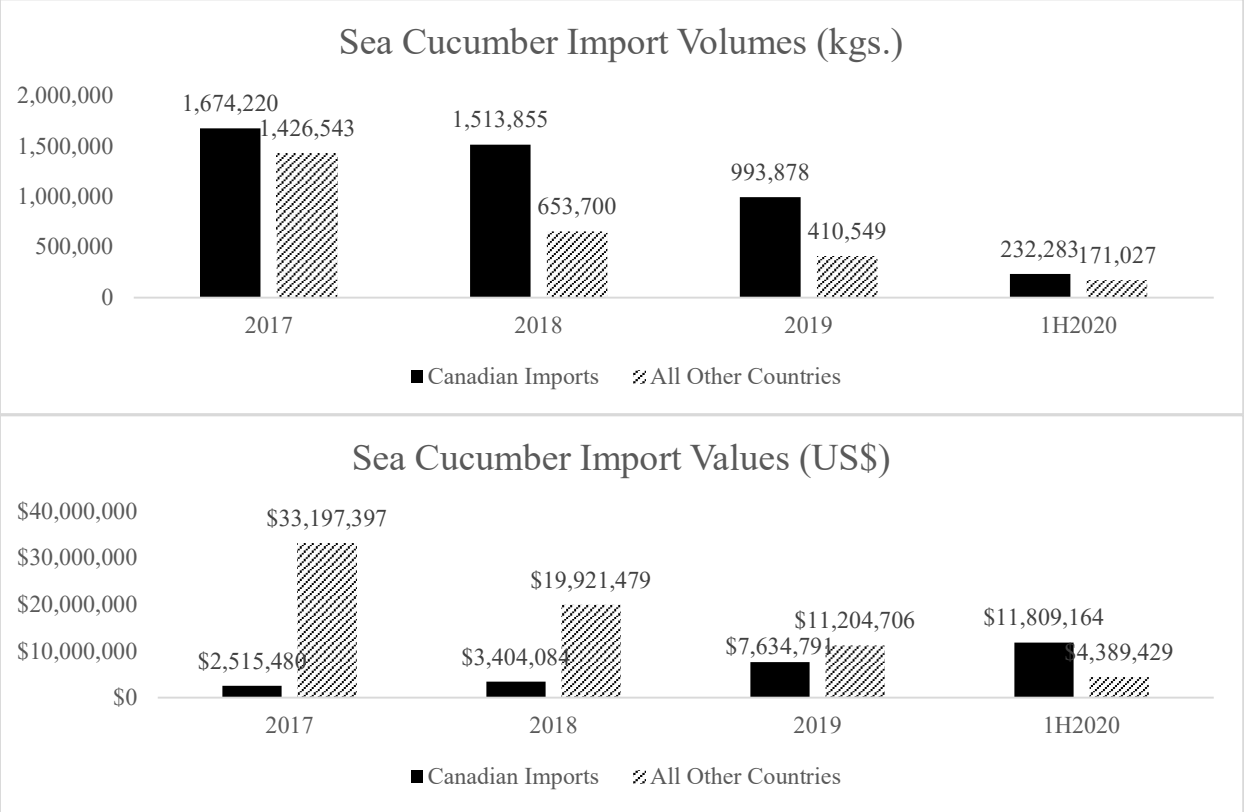


As the total volume and value of sea cucumber imports have declined significantly over the last two years, imports of sea cucumbers from Canada have taken an increasingly dominant role over that same time period. As shown in the table below, the volume of sea cucumbers imported from Canada last year was more than double the amount imported from all other countries, while Canadian sea cucumbers accounted for over forty percent of the total value of all sea cucumber imports, up from a seven percent share in 2017. As also shown in the table below, the difference in trends between the increasing value of declining volumes of Canadian sea cucumber imports and declining volumes and values of sea cucumber imports from all other sources has grown even more pronounced in the first half of 2020, where Canada accounted for

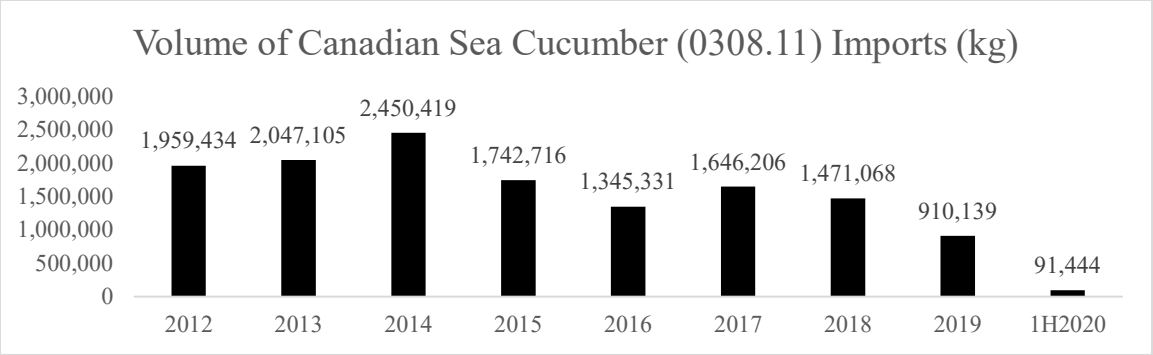
57.6 percent of the volume and 72.9 percent of the value of all sea cucumber imports into the United States.

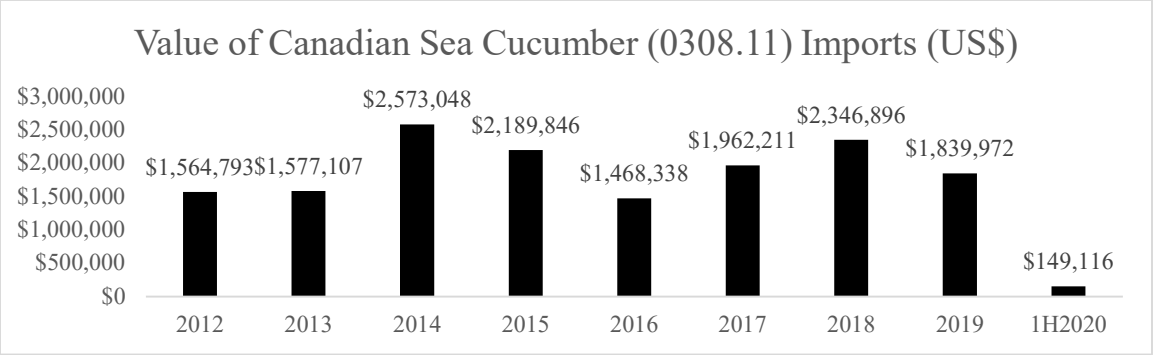
Source: USITC *Dataweb*	2017	2018	2019	Jan. to June 2020
Sea Cucumber Imports (Canada; kgs)	1,674,220	1,513,855	993,878	232,283
Sea Cucumber Imports (All others; kgs)	1,426,543	653,700	410,549	171,027
Sea Cucumber Imports (Canada; US$)	$2,515,480	$3,404,084	$7,634,791	$11,809,164
Sea Cucumber Imports (All Others; US$)	$33,197,397	$19,921,479	$11,204,706	$4,389,429

At the same time, the import volume and value of sea cucumbers from all other countries has fallen by over two-thirds between 2017 and 2019.

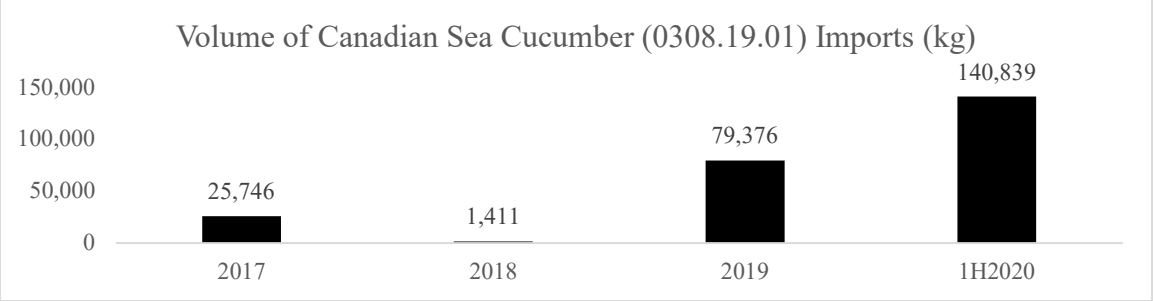


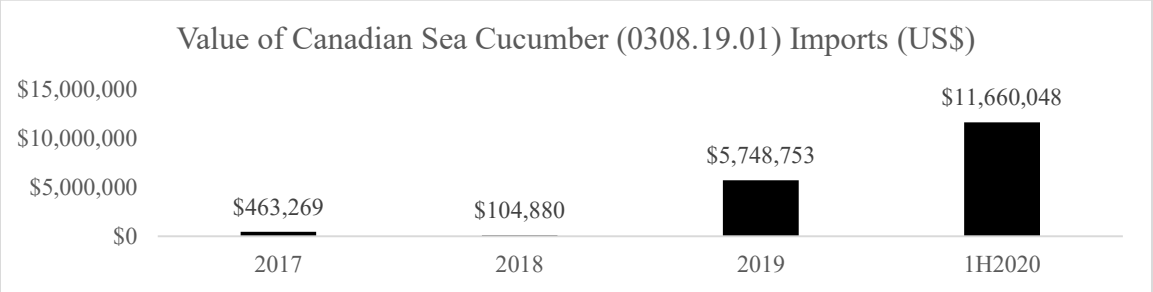
The vast majority of imports of Canadian sea cucumbers have historically been of live/fresh/chilled sea cucumbers imported under 0308.11.0000.



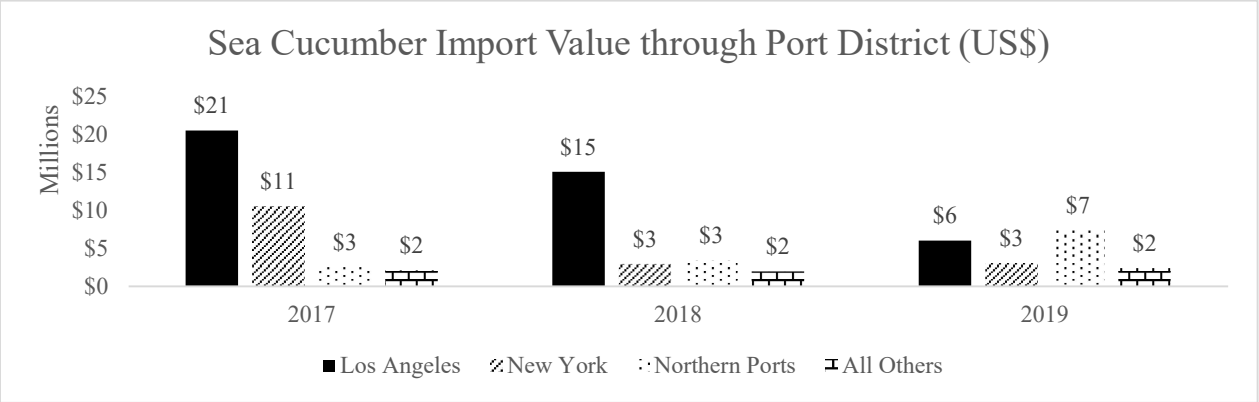


However, in 2019, the large increase in the value of imported Canadian sea cucumbers resulted from a shift to products exported from Canada under 0308.19.0100 ("other," *i.e.* not live/fresh/chilled or frozen), with this shift becoming even more pronounced in the first half of this year.





The changes in the supply of sea cucumbers into the United States has also dramatically altered where this species enters into the United States. As shown in the table below, the value of sea cucumber imports entered through the districts of Los Angeles and New York city have plummeted, while the value of imports of sea cucumbers through northern districts (Buffalo, New York; Detroit, Michigan; Great Falls, Montana; Ogdensburg, New York; Portland, Maine; and Seattle, Washington) has almost tripled since 2017.



Thus, an analysis of import data demonstrates that roughly $15 million in sea cucumbers that entered the U.S. market through the port district of Los Angeles disappeared between 2017 and 2019, while another $8 million disappeared from the port district of New York city.

While correlation is not causation, trade patterns regarding sea cucumbers appear to have shifted in the manner predicted by NMFS and other federal agencies working to address IUU seafood since the imposition of SIMP. Low-value sea cucumber imports of dubious origin have largely exited the market and, in their place, imports of high value sea cucumbers from Canada have increased substantially. The significant changes in trade patterns immediately after the implementation of SIMP imply that NOAA's traceability program may have altered supply chains to discourage shipments from exporters who would have difficulty demonstrating that their sea cucumbers were legally harvested. Alternatively, exporters and importers of sea

cucumber products may be intentionally misclassifying this merchandise under inappropriate HTSUS numbers not included in NMFS's list to evade SIMP.

2. Sharks

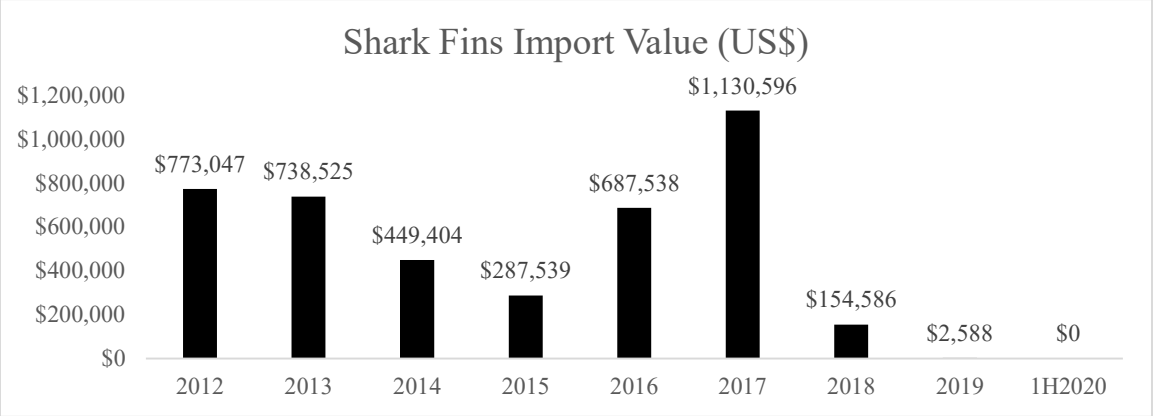
Imports of shark into the United States have also substantially declined in volume and value with the implementation of SIMP at the beginning of 2018. Per NMFS's listing of covered HTSUS codes, shark is imported under thirteen different ten-digit HTSUS numbers: 0302.81.0011; 0302.81.0091; 0302.92.0000; 0303.81.0011; 0303.81.0091; 0303.92.0000; 0304.47.0000; 0304.56.0000; 0304.88.0000; 0304.96.0000; 0305.71.0000; 1604.18.1000; and 1604.18.9000. The vast majority of these HTSUS codes did not have values reported prior to 2017. Accordingly, as with sea cucumbers, it is possible to conduct an apples-to-apples comparison of shark import patterns in the calendar year before SIMP took effect (2017) against the two calendar years after SIMP took effect (2018 and 2019).

As shown in the table below, the volume and value of shark imported into the United States fell to roughly one-quarter of 2017 levels in 2019, the second full year of SIMP enforcement.

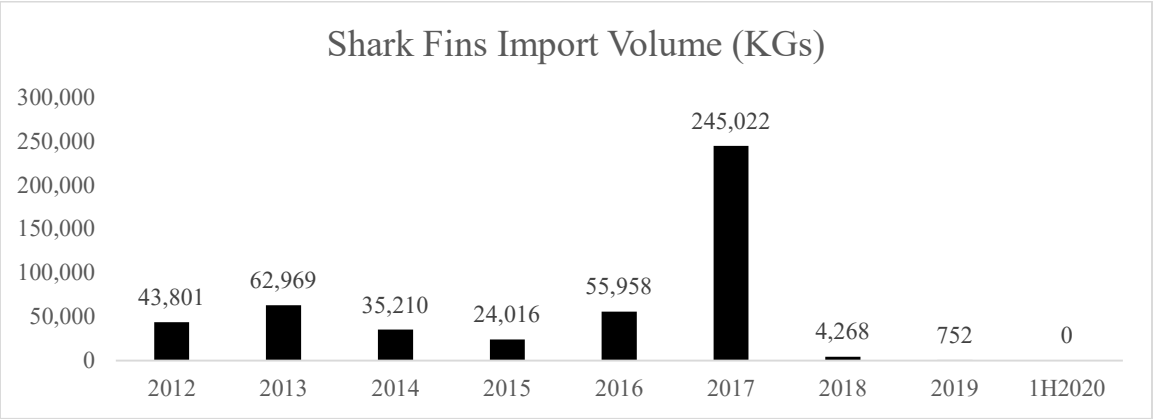
Source: USITC *Dataweb*	2017	2018	2019
Shark Imports (Total; kgs)	414,886	81,035	111,218
Shark Imports (Total; US$)	$1,952,250	$518,234	$489,065

The most significant change in the nature of shark imports after the imposition of SIMP was the complete collapse in imports of shark fins. Within NMFS's list of HTSUS codes, shark fins are imported under five different ten-digit HTSUS codes: 0302.92.0000; 0303.92.0000; 0305.71.0000; 1604.18.1000; and 1604.18.9000. In the six-year period between 2012 and 2017, the United States imported, on average, $677,775 worth of product under these five HTSUS

codes. In the thirty months since then, the United States has imported just $157,174 worth of product in total under these five HTSUS codes.



The volume of shark fin imports into the United States has similarly collapsed. In the six-year period between 2012 and 2017, the United States imported an average of 77,829 kilograms of product under these five HTSUS codes each year. But since then, the United States has imported a total of just 5,020 kilograms of merchandise under these codes over the last thirty months.



Again, correlation is not causation. However, the sharp decline in imports of shark – and the total collapse of shark fin imports – took place simultaneous to SIMP's implementation. Indeed, there appears to have been a sharp increase in the volume and value of shark fin import in the year before SIMP took effect. The significant changes in trade patterns immediately before and after the implementation of SIMP imply that, as with sea cucumbers, NMFS's

traceability program may have altered supply chains to discourage shipments from exporters who would have difficulty demonstrating that the shark they were shipping was legally harvested. Alternatively, exporters and importers of shark products may be intentionally misclassifying this merchandise under inappropriate HTSUS numbers not included in NMFS's list to evade SIMP.

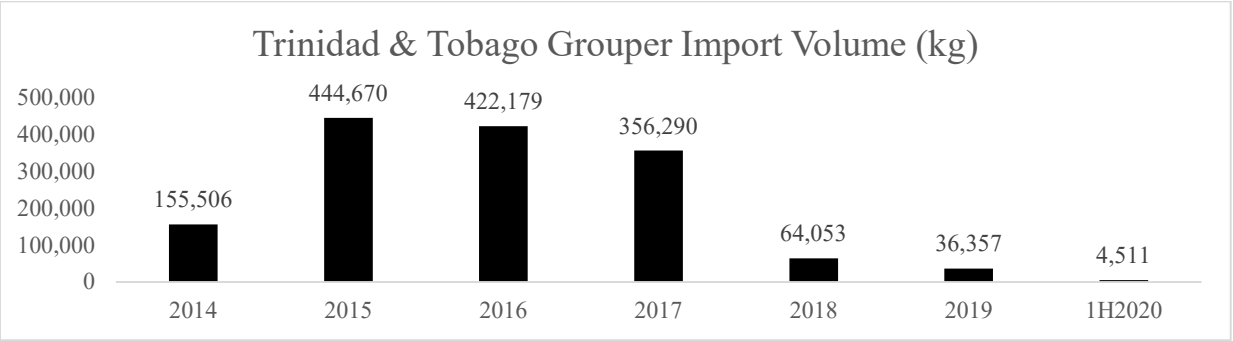
3. Dolphinfish

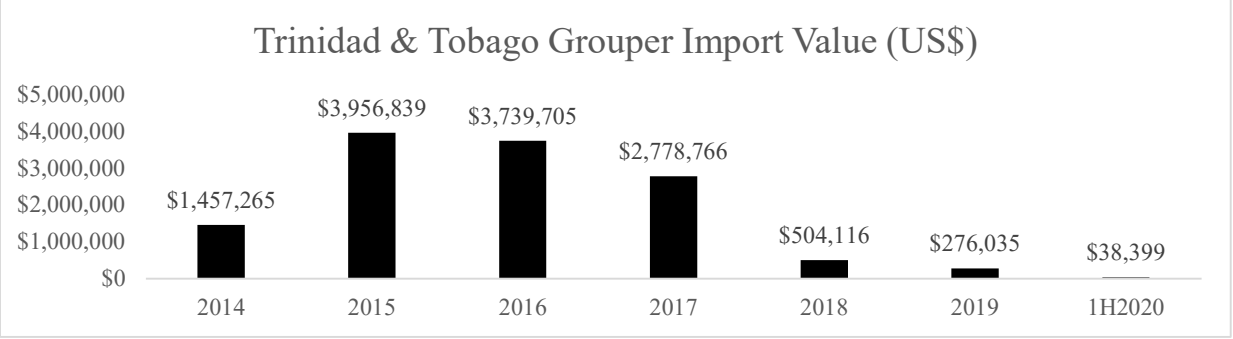
For sea cucumbers and shark products, the implementation of SIMP may be correlated with severe changes in import patterns for these species groups. For these species, the adoption of traceability requirements appears to have demonstrated that it was not possible to continue sourcing through traditional supply chains because such supply chains were channels of distribution for IUU seafood worth millions of dollars each year. At a minimum, the massive changes in import patterns has flagged for NMFS an area that merits further investigation and monitoring.

For other species groups covered by the program, the implementation of SIMP has corresponded to dramatic changes with specific sources of supply. In these circumstances, it is not as obvious that any such changes are attributable to SIMP, as sharp declines in imports from one country may be the result of changes in the availability of that fish in the exporting country or increased competition from other sources of supply. Nevertheless, sharp declines in shipments coincident with the implementation of SIMP are an important indicator that trade in IUU seafood may have been occurring and that traceability requirements could not be broadly met.

For example, due to significant increases in shipments of merchandise under HTSUS codes 0302.89.5061 and 0303.89.0070 from Mexico, Brazil, Venezuela, and India, the total volume and value of U.S. imports of grouper increased significantly after the implementation of SIMP in 2018. The increased shipments from these four countries were more than enough to

offset declines in grouper shipments from other significant suppliers, including Indonesia, Panama, and Senegal. A closer review of the trade data indicates that within the total amount of grouper imports, U.S. imports of grouper from Trinidad & Tobago collapsed in 2018, with over $2 million in seafood import value disappearing altogether from the U.S. market.





Outside of grouper, Trinidad & Tobago continues to be a significant supplier of seafood to the United States, exporting significant quantities of tuna and snapper since the implementation of SIMP. However, concerns regarding the structure of Trinidad & Tobago's commercial fishing operations and the ability of the country to trace seafood products led the European Commission to issue a warning (yellow card) to the nation in April 2016, stating:

> **Trinidad and Tobago** also has a large fleet operating internationally where authorities do not control or inspect foreign vessels, nor cooperate with relevant flag States. The poor traceability system also causes the risk of laundering of fisheries products.[114]

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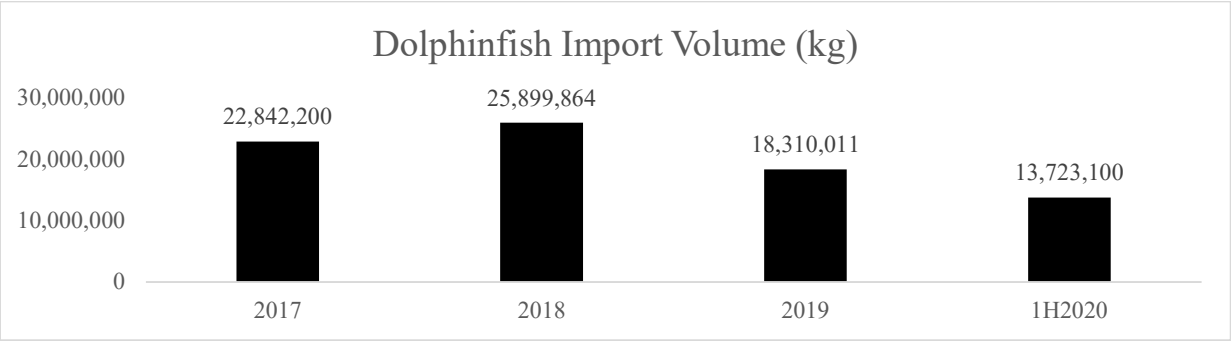
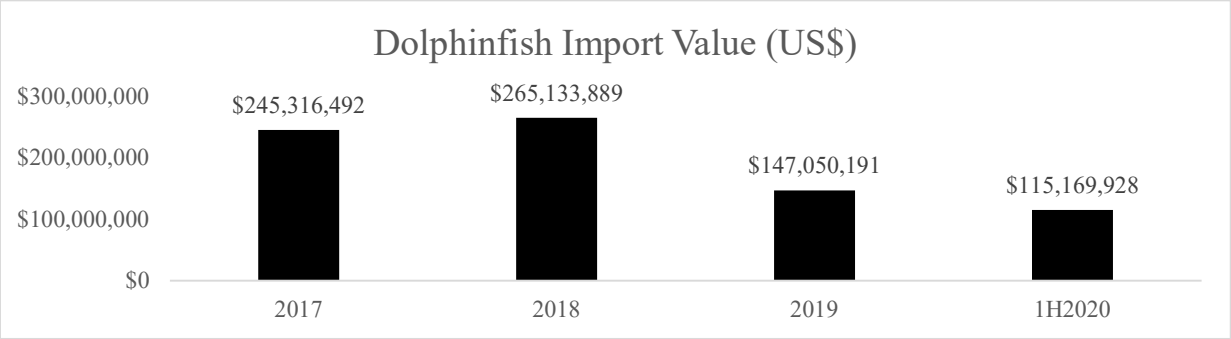
[114] European Commission Press Release, *Fighting Illegal Fishing: Warnings for Kiribati, Sierra Leone, and Trinidad & Tobago, while Sri Lanka Is Delisted* (Apr. 21, 2016),

Changes in supply patterns from individual countries since the implementation of SIMP are even more pronounced with Dolphinfish (Mahi Mahi). In the first year of SIMP (2018), both the volume and value of Dolphinfish imports (HTSUS Numbers 0302.89.5072 and 0304.89.5055) increased, before significantly declining in 2019:



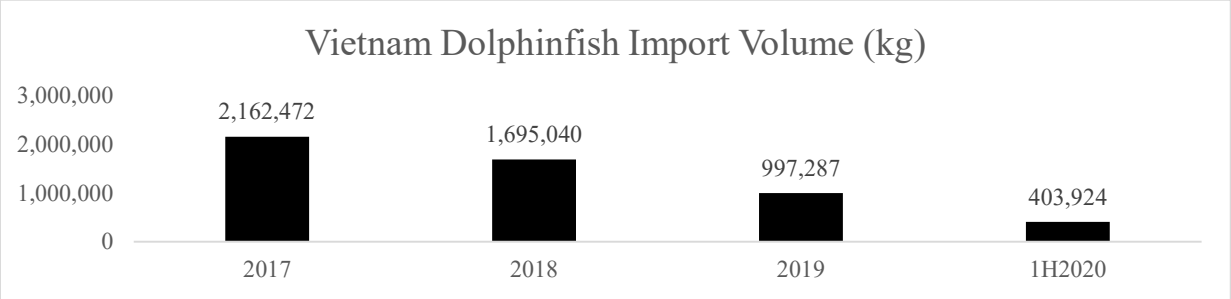


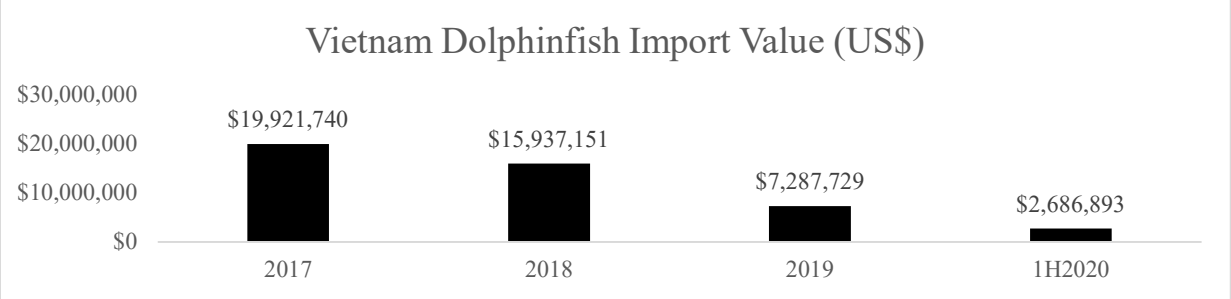
The increase in overall imports of Dolphinfish in 2018 masked substantial declines in shipments from two of the four largest suppliers to the U.S. of this seafood in 2017, Vietnam and Taiwan. Vietnam, which like Trinidad and Tobago has received a warning (yellow card) from the European Commission regarding illegal fishing,[115] saw its shipments of Dolphinfish to the

attached as **Exhibit 23**. Additional information regarding the European Union's measures to combat legal fishing may be accessed at https://ec.europa.eu/fisheries/cfp/illegal_fishing/info/.

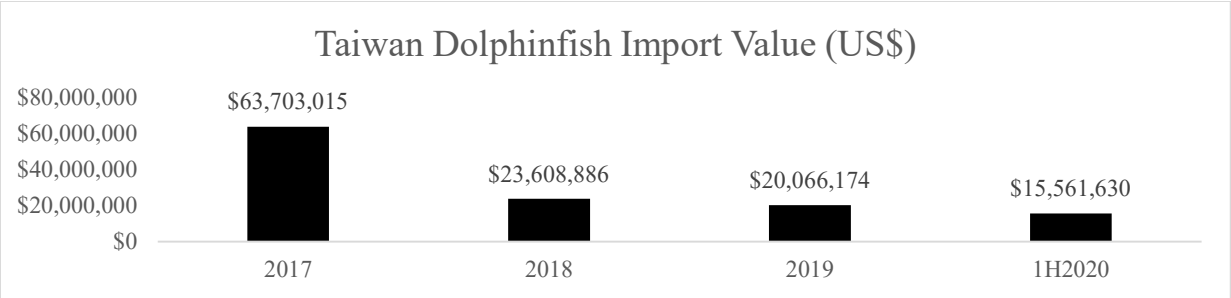
115 *See* European Commission Press Release, *Commission Warns Vietnam Over Insufficient Action to Fight Illegal Fishing* (Oct. 23, 2017), attached as **Exhibit 24** and *Commission Decision of 23 October 2017 Notifying the Socialist Republic of Vietnam of the Possibility of Being Identified as a Non-Cooperating Third Country in Fighting Illegal, Unreported and Unregulated Fishing* (2017/C 364/03), attached as **Exhibit 25**.

United States plummet after SIMP became effective in 2018. After being the fourth largest supplier of Dolphinfish to the United States in 2017, import volumes and values declined to less than half that amount in 2019.





Taiwan, a close second to Peru in its supply of Dolphinfish to the United States in 2017, also saw its shipments sharply decline following the implementation of SIMP before recovering somewhat in 2019 and the first half of 2020.



As with Trinidad & Tobago and Vietnam, Taiwan had also received a warning (yellow card) from the European Commission regarding illegal fishing.[116] Unlike those two countries, the European Commission rescinded its warning to Taiwan in June 2019 following reforms undertaken by the country.[117]

4. "Other Fish"

Changes in trade patterns of sea cucumbers and shark have been the most severe of the thirteen species groups covered by SIMP as the result of the implementation of that program. Further, as described above, major changes in the supply of species like Dolphinfish (Mahi Mahi) and grouper are discernible for individual supplying countries within the trade data. At the same time, there has also been significant changes in trade patterns with regard to other seafood products covered by SIMP that also correspond to the program's application. Associating these changes to SIMP is more difficult because of the nature of some of the HTSUS codes included within the program, as these codes are for basket categories that encompass species groups beyond those covered by the program. Imports entered under the HTSUS codes discussed above for sea cucumbers, sharks, grouper, and Dolphinfish are limited to each of those species groups, respectively. Other HTSUS codes covered by SIMP, such as the "other" category of 0304.49.0190 (fish fillets, fresh or chilled, not elsewhere specified or included ("NESOI")), do not permit a direct correlation to any particular species group, although seafood products subject to SIMP may be potentially imported under this ten-digit HTSUS code.

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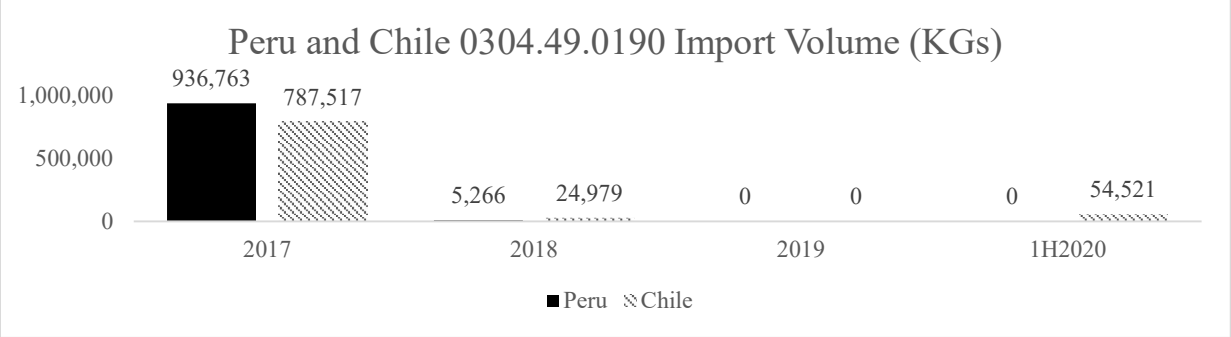
116 *See* European Commission Press Release, *Fighting Illegal Fishing: Commission Warns Taiwan and Comoros with Yellow Cards and Welcomes Reforms in Ghana and Papua New Guinea* (Oct. 1, 2015), attached as **Exhibit 26**.

117 *See* European Commission Press Release, *Illegal Fishing: EU Lifts Taiwan's Yellow Card Following Reforms* (June 27, 2019), attached as **Exhibit 27**.

Following the implementation of SIMP in 2018, the countries that had accounted for the second and third most volume and value of imports made pursuant to 0304.49.0190 saw their shipments collapse simultaneously. Imports entered under this ten-digit HTSUS code from Peru and Chile fell by 98 percent in value – amounting to over $21 million – in a single year and then dropped to nothing in 2019.



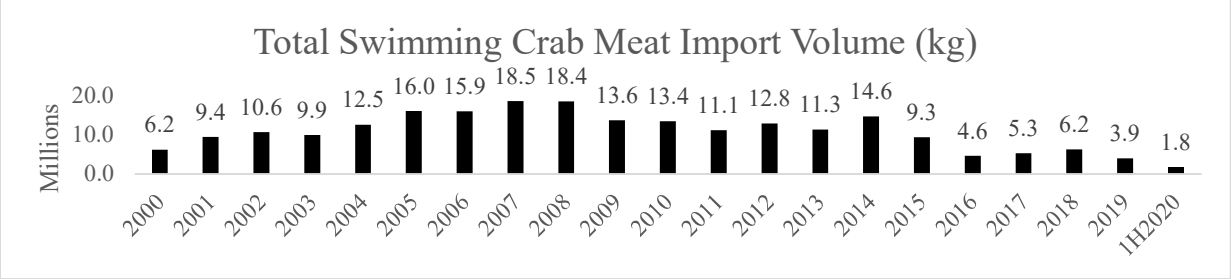
While it is possible that the species of seafood imported under this HTSUS code from Peru and Chile may not have been within any of the species groups encompassed by SIMP, the application of the traceability requirement appears to have had a substantial impact on importations made under this ten-digit code.

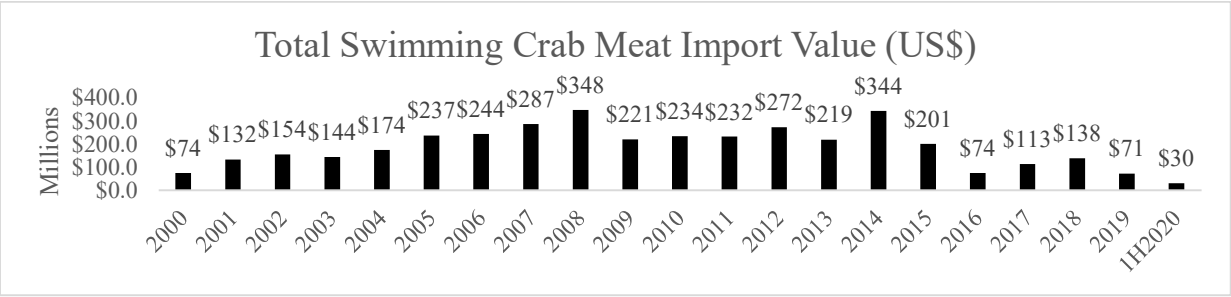
5. Blue Crab (Atlantic)/ Swimming Crab

Significant changes in the supply of seafood species groups covered by SIMP that may be correlated to the implementation of that program are not limited exclusively to declines in shipments of those species. In at least one case, the implementation of SIMP corresponds to a

sharp increase in the volume of the relevant covered species group. Blue crab is, along with Red king crab, one of two crab species groups covered by SIMP.[118] Blue crab, however, is the only swimming crab species covered by SIMP and is imported under two HTSUS numbers specific to swimming crab: 1605.10.2051 and 1605.10.4025. Although not reflected in the language of 50 C.F.R. § 300.324(a)(2), NMFS qualifies the blue crab subject to SIMP as "Blue Crab (Atlantic)."[119] The two ten-digit HTSUS codes are not so limited and, as such, encompass more species of swimming crab than just this type.

Taken at the aggregate level, import volumes and values under these two HTSUS numbers began declining in 2015, before the implementation of SIMP. As shown in the tables below, the volume and value of swimming crab imports fell to twenty-year historic lows in 2019.

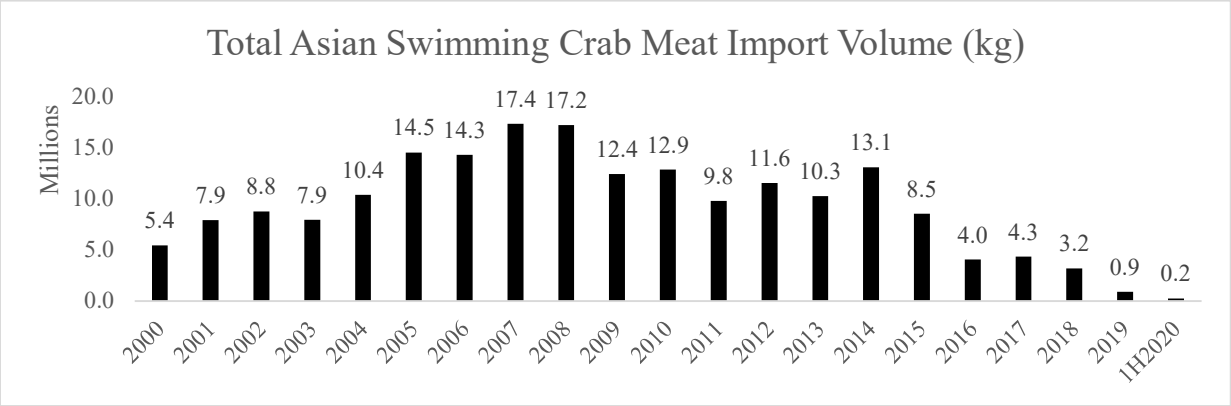




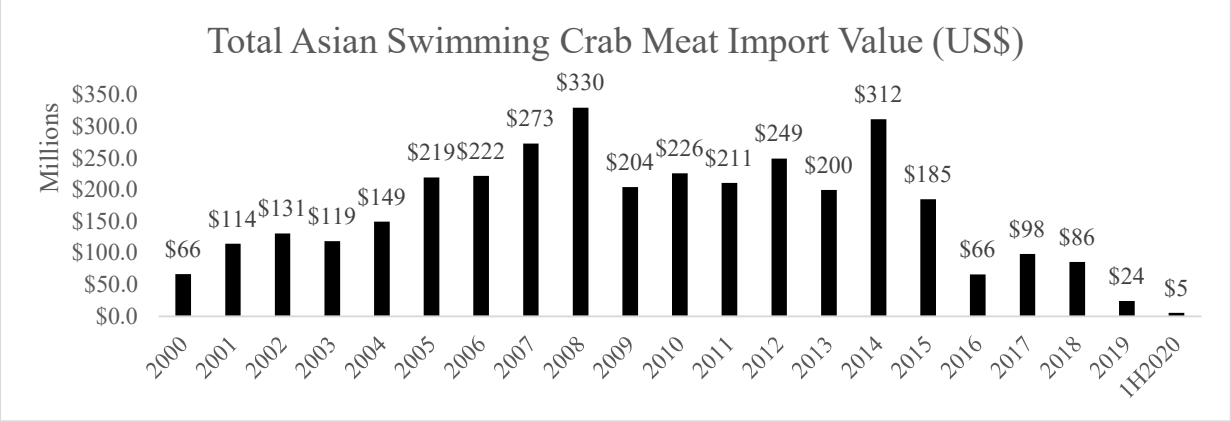
118 *See* 50 C.F.R. § 300.324(a)(2).

119 *See* NMFS, *Seafood Import Monitoring Program*, https://www.fisheries.noaa.gov/international/seafood-import-monitoring-program and National Ocean Council Committee on IUU Fishing and Seafood Fraud, *U.S. Seafood Import Monitoring Program*, https://www.iuufishing.noaa.gov/RecommendationsandActions/RECOMMENDATION1415/FinalRuleTraceability.aspx

The decline in swimming crab import volume and value is attributable to a collapse in swimming crab imports from Asia. Imports of swimming crab from Bangladesh, China, Hong Kong, India, Indonesia, Japan, Malaysia, Pakistan, the Philippines, South Korea, Sri Lanka, Taiwan, Thailand, and Vietnam plummeted from 13.1 million kilograms as recently as 2014 to less than one million kilograms last year, with imports on track to fall below half a million kilograms this year.

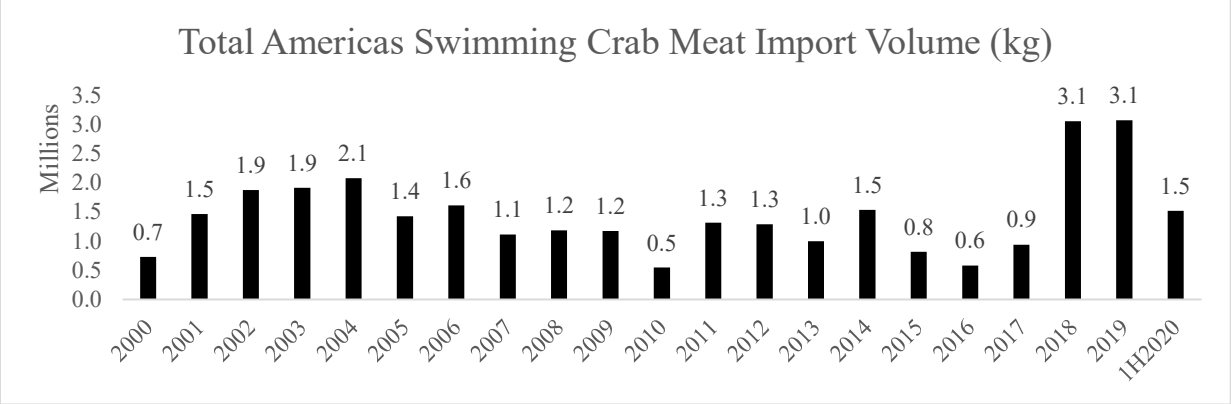


The sharp decline in import volumes had led to the disappearance of nearly $300 million in seafood imports from Asia.

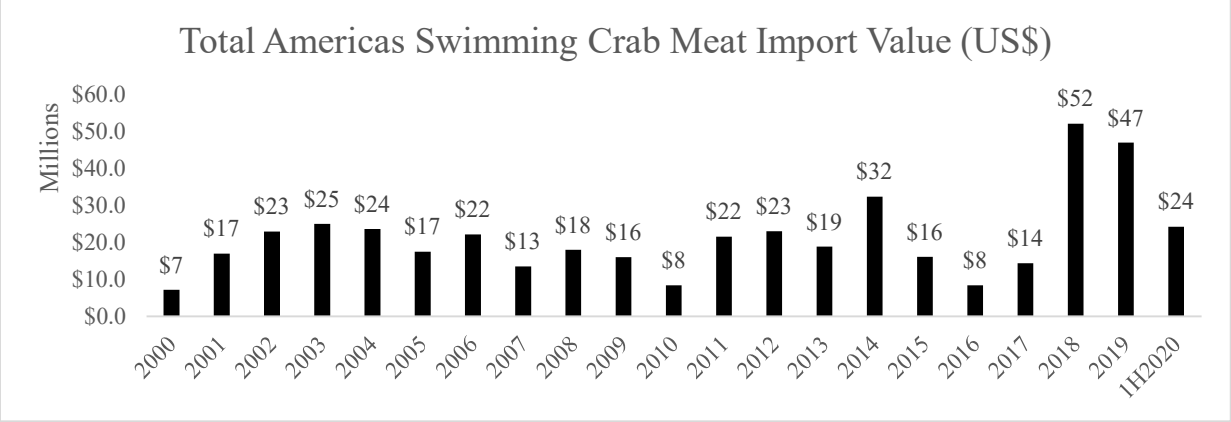


While these changes do not correspond to the implementation of SIMP, since that program has taken effect, swimming crab imports from another part of the world – the Americas – have increased significantly. Shipments of swimming crab from Argentina, Brazil, Canada,

Chile, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Peru, Suriname, and Venezuela reached record levels after SIMP took effect in 2018. Moreover, through the first six months of this year, the U.S. has already imported more swimming crab from these countries (1.5 million kilograms) than the annual average of import volumes during the eighteen-year period running from 2000 to 2017 (1.3 million kilograms).



With the increase in volume, the total value of swimming crab imports from the Americas hit record levels, although this increase has been insufficient to balance the sharp decline in the import value of swimming crab from Asia.



Nevertheless, a review of trade data shows that the implementation of SIMP corresponded to a substantial increase in the volume and value of swimming crab imports from the Americas. Although other factors are likely at play with the decline in swimming crab

imports from Asia and other factors may have also played a role in the increase of swimming crab imports from the Americas, these data indicate that a traceability program may have encouraged the shipment of certain types of swimming crab, particularly Atlantic blue crab, to the U.S. market.

IV. THE U.S. SEAFOOD MARKET IS NOT SELF-REGULATING

As noted above, U.S. seafood importing interests have argued that SIMP – and any other possible government-imposed regulation – will be ineffective in addressing trade in IUU seafood.[120] International negotiations and agreements to build capacity overseas, coupled with private industry responses to problems through privately developed and administered schemes like certification systems, are asserted to be sufficient, on their own, to preclude the United States from purchasing IUU seafood. This line of argumentation is belied by the history of seafood imports into the United States. In areas of concern to the Southern Shrimp Alliance, seafood importers have repeatedly demonstrated that in the absence of meaningful government oversight, the pursuit of the lowest price (and highest profit margins) outweighs all other concerns. The absence of meaningful federal regulation of importers – an approach that has developed and evolved simultaneously to intense federal regulation of domestic seafood producers – has resulted in the United States becoming the dumping ground for the world's worst seafood.

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120 *See e.g.*, *Magnuson-Stevens Fishery Conservation and Management Act; Seafood Import Monitoring Program*, 81 Fed. Reg. 88,975, 88,977 (NMFS Dec. 9, 2016) (Final rule) and John P. Connelly, President, National Fisheries Institute, Before the Water, Oceans, and Wildlife Subcommittee, Natural Resources Committee, U.S. House of Representatives, *Oversight of NOAA's Report on Illegal, Unreported, and Unregulated Fishing* (Nov. 14, 2019), attached as **Exhibit 21**.

A. The Continuing Problem of Harmful Antibiotics in Shrimp Imports Demonstrates that the U.S. Seafood Market Is Not Self-Regulating

One area of consistent focus for the Southern Shrimp Alliance over the last two decades has been the inexplicable continued tolerance for the presence of banned, harmful antibiotics in farmed shrimp imports sold to U.S. consumers. Although U.S. seafood importers have voiced concern regarding the continued use of veterinary drugs in shrimp aquaculture, importers have argued that educational outreach to shrimp farmers around the world, rather than increased testing at the border, will eventually lead to the elimination of the problem. For example, thirteen years ago, NFI's President, John P. Connelly, testified before Congress that, in response to findings of antibiotics in Vietnamese farmed seafood, NFI worked with the Vietnamese industry to enhance educational outreach and that the results of this initiative demonstrated that the private collective action of seafood importers, on its own, could effectively counter problems in seafood supply chains:

> As an example of how industry and government can work together, in 2005, Vietnam had--the FDA had found out that Vietnam had a number of companies using fluoroquinolone, an unauthorized antibiotic. NFI travelled to Vietnam to encourage both the companies and government to take action. Subsequently, Vietnam banned that product, conducted a significant educational system out in their farm communities. They began 100 percent testing for fluoroquinolones and had swift and sure punishment for anyone misusing that product.
>
> The results have been impressive. In 2006 and 2007, to date, there have been zero shrimp imports from Vietnam with testing positive for antibiotics. There have been zero basa or tra, a kind of Chinese--excuse me--Vietnamese catfish, testing positive for antibiotics. That is a good example of industry and government working together.[121]

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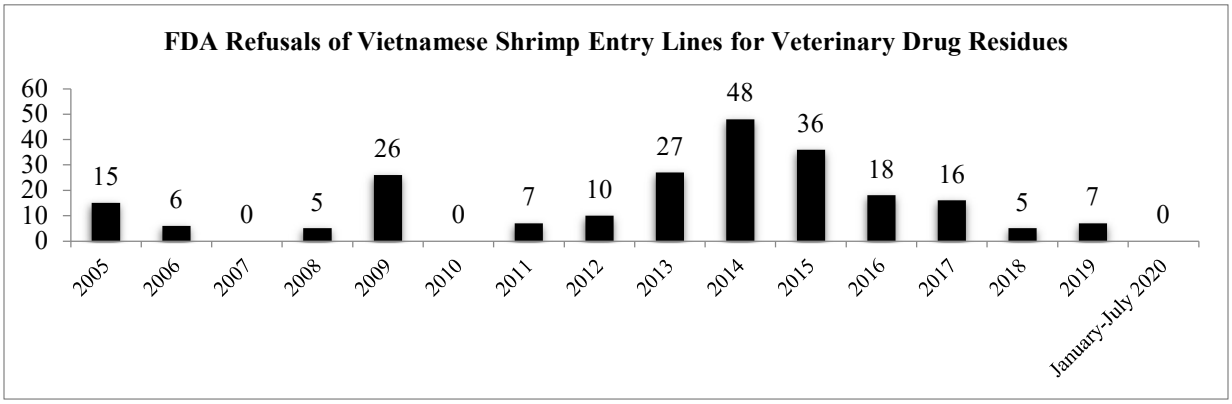
[121] Testimony of John Connelly, President, National Fisheries Institute, "Joint Hearing on Import Safety," Subcommittee on Trade, Committee on Ways and Means (Oct. 4, 2007), attached here as **Exhibit 28**.

It is true that in 2007 the FDA did not refuse any shrimp entry lines from Vietnam for reasons related to veterinary drug residues. But that year did not portend any meaningful elimination of the problem of antibiotics in Vietnamese aquaculture. As shown in the chart below, since 2008, the FDA has reported refusing 205 entry lines of shrimp exported from Vietnam for reasons related to banned antibiotics, averaging over seventeen a year between 2008 and 2019. In fact, while the NFI's activities in Vietnam came in response to the FDA's refusal of fifteen shrimp entry lines from Vietnam in 2005 after the detection of banned antibiotics, the agency has refused a greater number of Vietnamese shrimp entry lines in six of the twelve years since 2007:



Moreover, these detections reflect a testing regimen administered by the FDA wherein just 0.1 percent of seafood entry lines are sampled to test for the presence of veterinary drugs.[122] Despite this minimal testing, the FDA confirmed the presence of unsafe drug residues in an astonishing 12.2 percent of the shrimp that the agency sampled.[123]

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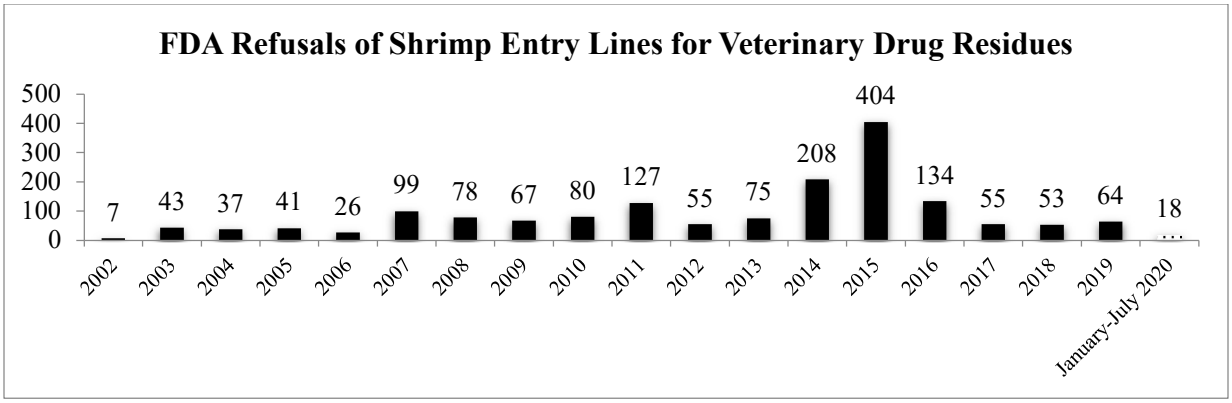
122 *See* Government Accountability Office, *Imported Seafood Safety: FDA and USDA Could Strengthen Efforts to Prevent Unsafe Drug Residues*, GAO-17-443 (Sept. 2017) at p. 20, Figure 3 (reporting that just 1,065 seafood entry lines out of a total of 1,010,148 entry lines of seafood imported in fiscal year 2015 were sampled for drugs), attached here as **Exhibit 29**.

123 *See id.* at p. 53, Appendix II (unsafe drug residues found in 67 of 550 shrimp samples taken in fiscal year 2015).

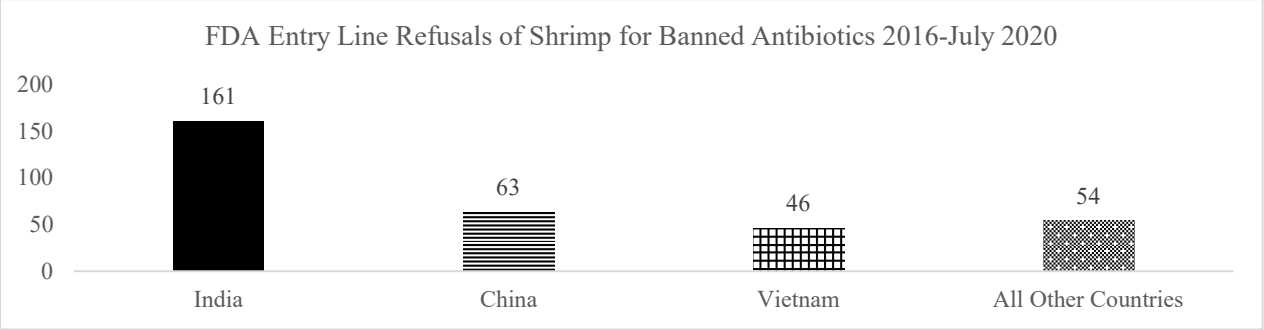
As of today, there is no indication of any significant decline in the use of banned antibiotics in shrimp aquaculture. In fact, the FDA's refusals of shrimp entry lines for reasons related to the presence of banned veterinary drug residues has remained remarkably high, reflecting a continued tolerance for contaminated farmed shrimp amongst U.S. seafood importers:



While the volume of shrimp supplied by one country infamous for tolerating indiscriminate antibiotic use in shrimp ponds has declined substantially (China) following actions taken by the FDA to limit the access of Chinese shrimp exporters to the U.S. market,[124] another nation equally infamous for the same practices is now the United States' largest supplier of shrimp imports (India). Although India does not account for the majority of the volume of shrimp imported into the United States, India accounts for roughly half of the shrimp refused at the border by the FDA because of banned antibiotics. Since 2016, 161 of the 324 entry lines of shrimp (49.6 percent) refused by the FDA for reasons related to the presence of veterinary drug residues have been from India. As shown in the chart below, India accounted for almost three

[124] In 2003, 178.8 million pounds of shrimp was imported into the United States from China. Last year, just 44.4 million pounds of shrimp was imported into the United States from China.

times as many shrimp entry line refusals for banned antibiotics than China over the last five years.



In 2019, shrimp products from India accounted for 39.6 percent of the total value and 40.4 percent of the total volume of shrimp imported into the United States. These figures reflect massive growth in Indian shrimp exports to the United States: in 2010, India's share of total shrimp import value was just 7.2 percent, while its volume share was just 5.4 percent.

India has become the most significant supplier of shrimp to the United States precisely because it has failed to control the use of antibiotics in the country's aquaculture. This is because although the FDA has taken no additional measures to address the continuing presence of banned antibiotics in Indian shrimp exports, this approach has not been followed in other major seafood importing markets. In contrast to the FDA, the European Union has adopted targeted controls of Indian aquaculture exports designed to encourage the government of India to implement food safety measures that would eliminate abuse of harmful antibiotics. While these measures have successfully prevented contaminated Indian shrimp from reaching European consumers, the incentives created to clean up the industry have been fatally undermined by unfettered access to the U.S. market over the same time period.

In July 2010, the European Union issued a Commission decision declaring emergency measures with regard to imports of aquaculture products from India, including shrimp, intended

for human consumption.[125] The European Union mandated that at least ten percent of consignments of aquaculture products from India be tested for the presence of pharmacologically active substances, with a particular focus on chloramphenicol, tetracycline, oxytetracycline and chlortetracycline and of metabolites of nitrofurans.

Using UNCOMTRADE data, the table below shows the volume of shrimp exported from India to the United States and from India to the European Union over the last decade.[126] In 2010, India exported more shrimp to the European Union (117.6 million pounds) than to the United States (112.9 million pounds). As India's shrimp aquaculture expanded, the country's shipments to both the United States and the European Union increased significantly. But the growth in shipment volume of Indian shrimp to the European Union appears to have been impeded by the European Commission's testing regimen, such that in 2015, while India had exported a total of 182 million pounds of shrimp to the European Union, the country had exported an additional 100 million pounds of shrimp to the United States.

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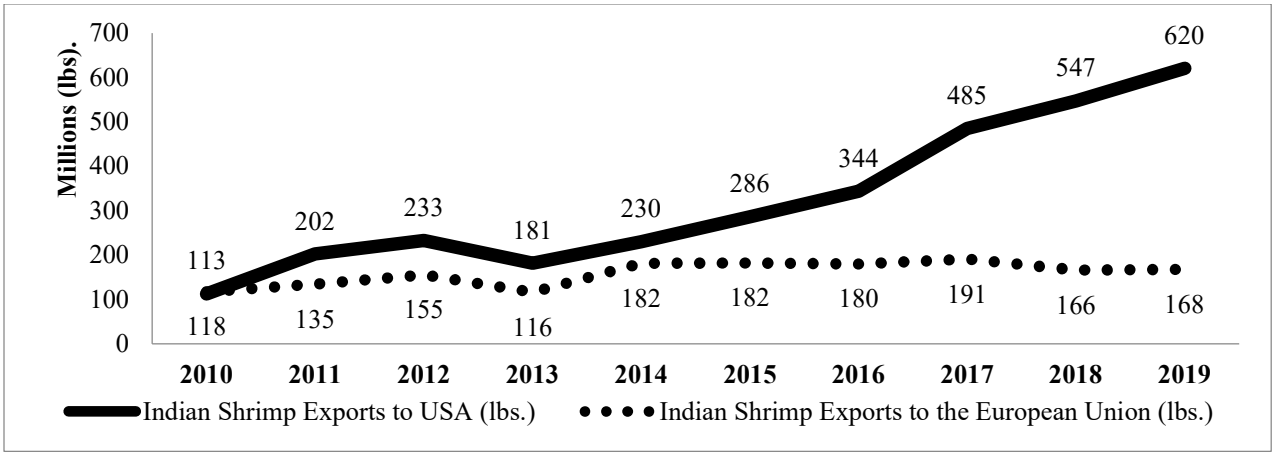
125 *See Commission Decision of 8 July 2010 on Emergency Measures Applicable to Consignments of Aquaculture Products Imported from India and Intended for Human Consumption* (2010/381/EU), attached as **Exhibit 30**.

126 These data were obtained from UNCOMTRADE for Indian exports of merchandise under Harmonized Schedule codes 0306.13; 0306.16; 0306.17; 0306.23; 0306.26; 0306.27; 0306.35; 0306.36; 0306.95; 1605.20; 1605.21; and 1605.29 to Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the United Kingdom, and the United States.



In 2016, after continued detection of antibiotics in shipments of Indian aquaculture products to Europe, the European Union determined to take additional action with respect to Indian shrimp and, as the chart above shows, shrimp shipments to the United States exploded while India's shrimp exports to the European Union declined. Specifically, in October 2016, the European Union issued another Commission decision observing that "[t]he results of analytical tests undertaken by official control laboratories demonstrate that the level of compliance of aquaculture products from India intended for human consumption as regards the presence of residues of chloramphenicol, tetracycline, oxytetracycline, chlortetracycline and metabolites of nitrofurans is unsatisfactory."[127] The European Union found that "[t]he obligation for [] mandatory testing should be strengthened to continue to deter producers in India from misusing the relevant substances and to minimise risks to human health in the European Union" and ordered that samples be taken from at least **fifty percent** of consignments of aquaculture products from India, including shrimp. In the wake of this testing requirement, India's shrimp

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127 *See Commission Implementing Decision (EU) 2016/1774 of 4 October 2016 Amending Decision 2010/381/EU on Emergency Measures Applicable to Consignments of Aquaculture Products Imported from India and Intended for Human Consumption*, attached as **Exhibit 31**.

exports to the European Union declined while India substantially ramped up shipments to the United States.

This substantial level of testing of import shipments is done in addition to the European Union's requirements for pre-shipment controls on Indian exports of aquaculture products.[128] The European Union's pre-shipment controls require that all shrimp exported out of India to the European Union must be from an establishment approved by India's Export Inspection Council (EIC), with each processor obligated to have samples taken from them every six months to test for the presence of antibiotics "including chloramphenicol, nitrofuran metabolites and tetracyclines." EIC-approved shrimp exporters are only permitted to source shrimp from shrimp farms that are registered with India's Marine Product Export Development Agency (MPEDA). MPEDA registered shrimp farms are, in turn, required to have shrimp batches sampled and tested for chloramphenicol and four nitrofuran metabolites prior to harvest. EIC-approval also requires that a processing plant limit the number of farms/batches in one exported consignment to four. This limitation on sourcing allows for more accurate sampling, facilitates follow-up investigations, and ensures traceability. Further, prior to export, staff from EIC laboratories visit the EIC-approved facility and take samples to test for chloramphenicol, tetracycline, oxytetracycline, chlortetracycline, and metabolites of nitrofurans. All shipments of shrimp to the European Union from India must be accompanied by the results of this analytical test.

The mandated sampling of fifty percent of all aquacultured products imported into the European Union from India is intended to ensure that the pre-shipment controls adopted by India

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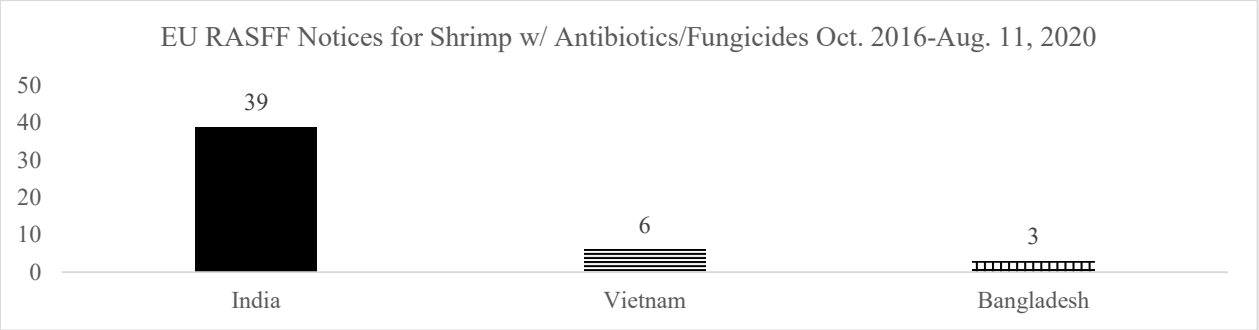
[128] *See* European Commission's Directorate-General for Health and Food Safety's "Final Report of an Audit Carried Out in India from 20 November 2017 to 30 November 2017 in Order to Evaluate the Control Systems in Place Governing the Production of Fishery Products Intended for Export to the European Union," DG(SANTE) 2017-6161, attached as **Exhibit 32**.

prevent antibiotic-contaminated shrimp from reaching European consumers. Yet, even with knowledge that its shipments of shrimp will be subject to this heightened level of scrutiny, Indian shrimp dominates the European Union's reported detections of antibiotic-contaminated shrimp. Since October 2016, there have been a total of 48 notices posted on the European Union's Rapid Alert System for Food and Feed (RASFF) regarding the detection of different forms of antibiotics or fungicides in shrimp. In total, 39 of these 48 RASFF notices were for shrimp shipped from India.



The continued use of banned antibiotics in Indian shrimp aquaculture has additionally prevented India from increasing its shipments to other major seafood importing markets, including Japan. Repeated findings of antibiotics in Indian shrimp exports has led the Japanese government to implement inspection orders mandating increased testing of Indian shrimp, most recently ranging from between 30 to 100 percent of all black tiger shrimp shipments.[129] The chart below compares India's volume of shrimp exports to Japan with its exports of shrimp to the United States over the last decade. As shown, in 2010, India's shrimp exports to the United States were roughly 30 percent higher than the volume of shrimp exported by India to Japan. In

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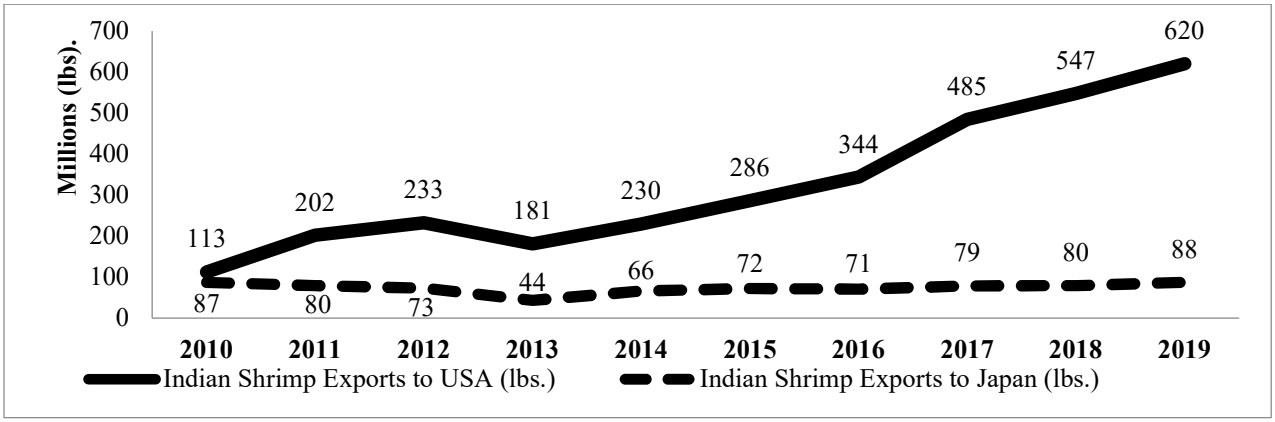
129 *See* Rachel Mutter, *Japan Lifts Antibiotic Inspection Order on Indian Black Tiger Shrimp, Opens Door for Production Resurgence*, Intrafish (Apr. 7, 2020), attached as **Exhibit 33**.

2019, India's shrimp exports to Japan remained at approximately the same level as they were in 2010, but the volume of India's shrimp exports to the United States was now 608 percent higher.



B. The Continuing Problem of Fraud in Seafood Trade Demonstrates that the U.S. Seafood Market Is Not Self-Regulating

Another area of grave concern to the Southern Shrimp Alliance over the last two decades has been the susceptibility of the U.S. seafood market to wide-scale fraud. As with the continued presence of banned, harmful antibiotics in seafood imports, the prevalence of fraud in the U.S. seafood market demonstrates that the market is not self-regulating.

The domestic shrimp industry filed petitions for antidumping duties on shrimp imports from Brazil, China, Ecuador, India, Thailand, and Vietnam on December 31, 2003.[130] Shortly after that filing, the United States saw an unprecedented volume of shrimp shipped from Cambodia. Between 2004 and 2006, the United States imported roughly $67.5 million worth of shrimp from Cambodia, after importing just *de minimis* annual amounts prior to 2004 and none after 2006.

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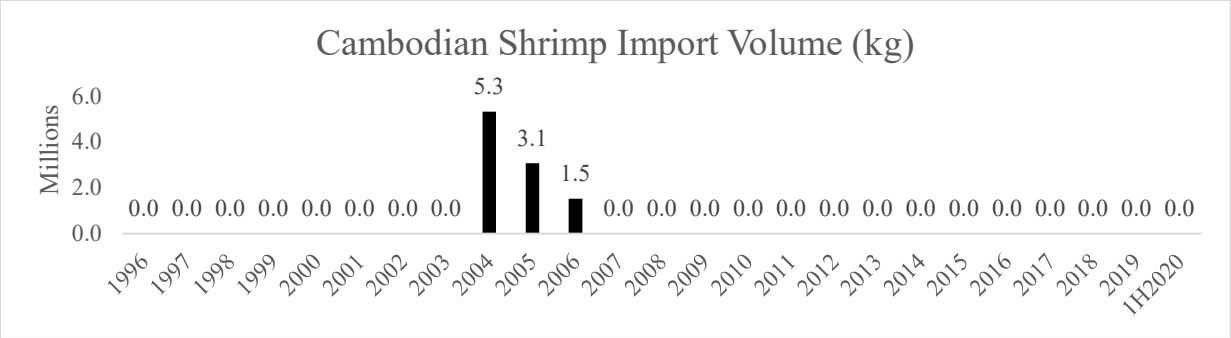
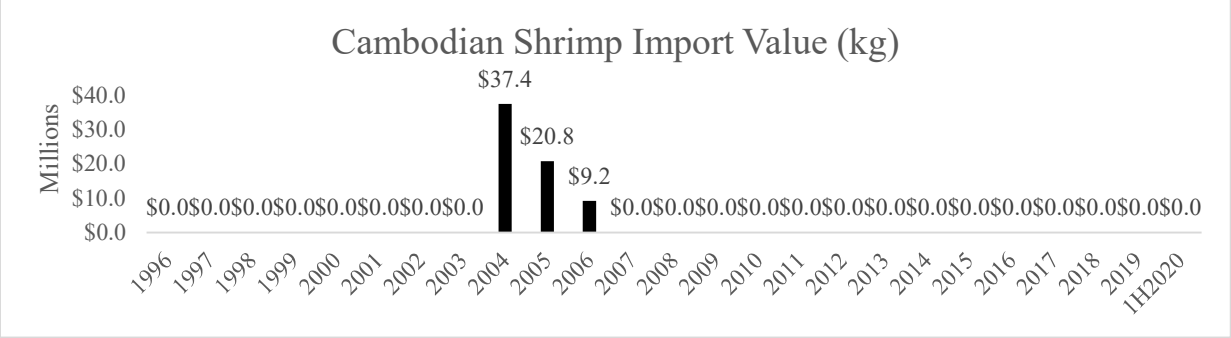
130 *See Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam*, Inv. Nos. 731-TA-1063-1068 (Final), USITC Pub. 3748 (Jan. 2005) at I-1.





Evasion of antidumping duty orders is neither a new nor novel phenomena. However, because shrimp is a food product, the need to trace food back to its source should any issues arise was assumed to limit the potential markets for fraudulently traded shrimp. Nevertheless, the sheer volume of shrimp entering the United States claimed to be a product of Cambodia implied that a well-developed distribution system sat behind these shipments.

In 2012, as part of a criminal prosecution, the U.S. Department of Justice submitted documents on a court docket that described the investigation of NOAA Law Enforcement ("OLE") agents into the transshipment of Chinese shrimp through Cambodia to the United States between 2004 and 2006. One of those documents was a memorandum to the case file from an OLE Special Agent following an interview with a former employee of Ocean Duke Corporation

("ODC"), a large, California-based seafood importer and distributor.[131] The Special Agent summarized his conversation with the former employee as follows:

> I asked [the former employee] what he could tell me about the shrimp imported by Ocean Duke Corporation. He told me [that] ODC would have to pay 108% tariff for Chinese shrimp, and that much of it came out of Cambodia. He told me that he thought it might be transshipped or trucked to Cambodia to avoid tariffs. He also told me that he had previously spoken with Roger Lin about the shrimp ODC imported from Cambodia. [The former employee] told me that [he] estimated that ODC imported approximately 3,000,000 lb [] shrimp from Cambodia, and that he and Roger Lin discussed how ODC imported more shrimp than Cambodia produced.
>
> According to [the former employee], ODC sold millions of pounds of shrimp to Meijers Company in Grand Rapids Michigan. He told me that Meijers has since switched from importing shrimp from Thailand and China (high tariffs), to Thailand (lowers tariffs) and Cambodia (no tariff).
>
> [The former employee] also told me that ODC had been importing shrimp from Cambodia for three or four years, at a time when Cambodia produced less than ½ million lbs of shrimp per year. He told me that Cambodia is only now starting to develop a shrimp industry. . .[132]

The OLE Special Agent's internal memorandum corroborated the research conducted by the Southern Shrimp Alliance in the organization's own investigation of the Cambodian shrimp supply chain. Moreover, the allegations provided additional support for the Southern Shrimp Alliance's concerns that large, sophisticated customers continued to provide a market for fraudulently traded seafood.

As OLE investigated the transshipment of Chinese shrimp through Cambodia, CBP investigated the transshipment of Chinese shrimp through Indonesia. Public records regarding these investigations, also published in 2012, similarly confirmed the involvement of large, sophisticated customers. Through a Notice of Action dated November 15, 2005, CBP informed

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131 *See* Memorandum from SA Norm Simons NOAA OLE for the Case File, *Ken MacKenzie Interview* (Mar. 25, 2007), attached as **Exhibit 34**.

132 *Id.* at 2.

King & Prince Seafood ("KP"), another large purchaser of imported shrimp, that it was investigating the company for evasion of the antidumping duty order on certain frozen warmwater shrimp from the People's Republic of China.[133] In January 2006, "KP filed what it termed a prior disclosure under 19 U.S.C. § 1592 and it produced information demonstrating that its shrimp supplier, P.T. Ocean Gemindo, had falsely identified Chinese-origin shrimp as having originated in Indonesia."[134] On June 1, 2007, CBP's Office of Regulatory Audit issued its report following the audit of the origin of KP's warmwater shrimp entries. "The audit concluded that KP falsely declared Chinese-origin shrimp on these entries that were actually subject to ADD order A-570-893. The report indicated that the Indonesian-origin shrimp was commingled with Chinese-origin shrimp."[135] KP subsequently sought the refund of the antidumping duties paid by the company under various arguments, including through the identification of multiple different Chinese shrimp exporters asserted to be the actual companies responsible for the shrimp shipments, including Fuqing Dongwei Aquatic Products Co., Ltd.,[136] Shantou Red Garden Foodstuff Co., Ltd., Shantou Jinhang Aquatic Industry Co., and Zhanjiang Regal Integrated Marine Resources Co., Ltd.[137]

As large volumes of shrimp were transshipped from China through Cambodia and Indonesia to evade the antidumping duty order on Chinese frozen warmwater shrimp, Chinese

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133 *See* U.S. Customs and Border Protection, HQ H028384 (Feb. 28, 2012), attached as **Exhibit 35** and U.S. Customs and Border Protection, HQ H194977 (Feb. 28, 2012), attached as **Exhibit 36**.

134 *Id.*

135 *Id.*

136 *See* U.S. Customs and Border Protection, HQ H194977 (Feb. 28, 2012), attached as **Exhibit 36**.

137 *See* U.S. Customs and Border Protection, HQ H028384 (Feb. 28, 2012), attached as **Exhibit 35.**

shrimp was also being transshipped through Malaysia to the United States. Unlike Cambodia, Malaysia had significant production of shrimp and, prior to the filings of the antidumping duty petitions, had exported commercial quantities of shrimp to the United States. However, once the antidumping duty petitions were filed at the end of 2003, shrimp shipments from Malaysia exploded:

Beginning in 2004, as shown in the table above, the United States began importing over $100 million worth of shrimp from Malaysia on an annual basis.

The Southern Shrimp Alliance believed that the spike in Malaysian shrimp shipments resulted from schemes developed by U.S. importers to evade the payment of antidumping duties

and, later, the FDA's Import Alert on Chinese shrimp contaminated with banned antibiotics.[138] The Southern Shrimp Alliance investigated trade patterns and developed information to support specific allegations of trade fraud involving purportedly "Malaysian" origin shrimp. Federal agencies subsequently confirmed illegal evasion activities, as explained in a report from the U.S. Government Accountability Office (GAO) issued in 2009:

> In June 2007, FDA announced a countrywide import alert on five Chinese-farmed seafood products, including shrimp. This import alert required that all Chinese shrimp be detained and refused entry, unless the importer could prove the absence of unapproved drugs in the shrimp. On the basis of industry information and CBP and ICE investigations, CBP determined that Chinese shrimp was being transshipped to the United States through Malaysia. Due to this illegal transshipment, importers of Chinese shrimp were able to circumvent not only the 2005 antidumping duty but also FDA's recent import alert. In September 2007, CBP tested shipments of suspected Chinese shrimp illegally transshipped through Malaysia for the presence of unapproved drugs and found some contaminated shrimp. On the basis of CBP's information, in March 2008, FDA issued a new import alert requiring importers of shrimp from one Malaysian manufacturer to prove the absence of unapproved drugs prior to entering future shipments of shrimp into U.S. commerce.[139]

As shown in the table above, after an initial significant decline in shipments of shrimp from Malaysia in 2009, U.S. imports of Malaysian shrimp began to increase significantly again in 2010 and continued to grow in 2011. In its investigations of these trade flows, the Southern Shrimp Alliance found that new Malaysian companies would pop up suddenly and ship massive quantities of shrimp to consignees listed on bills of lading that were shell companies – paper entities apparently lacking in any physical assets.

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138 *See* U.S. Food and Drug Administration, *Import Alert 16-131* "Detention Without Physical Examination of Aquacultured[] Shrimp, Dace, and Eel from China – Presence of New Animal Drugs and/or Unsafe Food Additives" attached as **Exhibit 10**.

139 Government Accountability Office, *Seafood Fraud: FDA Program Changes and Better Collaboration Among Key Federal Agencies Could Improve Detection and Prevention*, GAO-09-258 (Feb. 2009) at p. 15, attached as **Exhibit 37**.

Because the shrimp being shipped out of Malaysia was likely to have been Chinese in origin, these shrimp would share characteristics with Chinese shrimp inasmuch as they were likely to be contaminated with the banned and harmful antibiotics used in Chinese shrimp aquaculture. With shell companies ostensibly at both ends of Malaysian shrimp exports to the United States, the development of evidence proving fraud was met with company closures and re-activation under new names, again as paper entities. But, as CBP's testing demonstrated, scrutiny of the shrimp shipped itself would likely result in the detection of antibiotics. As these harmful substances were detected, the FDA would place Malaysian shippers on Import Alerts. U.S. seafood importing interests responded to these quicker enforcement actions by switching companies even faster. Even today, roughly sixty percent of the companies (28 out of 47) listed on the FDA's Import Alert for nitrofurans in seafood (Import Alert 16-129) are Malaysian companies that made no effort to be removed once listed.[140] Effectively, the FDA's Import Alert 16-129 is a graveyard, marked with the tombstones of Malaysian transshippers.

The extraordinary nature of this supply chain for contaminated shrimp is underscored by the history of the FDA's entry line refusals of shrimp for reasons related to veterinary drug residues going back to 2002. As shown in the table below, in the twelve-year period between 2002 and 2013, the FDA reported refusing a grand total of 735 entry lines of shrimp for reasons related to veterinary drug residues. But in just two years, 2014 and 2015, the FDA refused 612 entry lines of shrimp for the same reasons.

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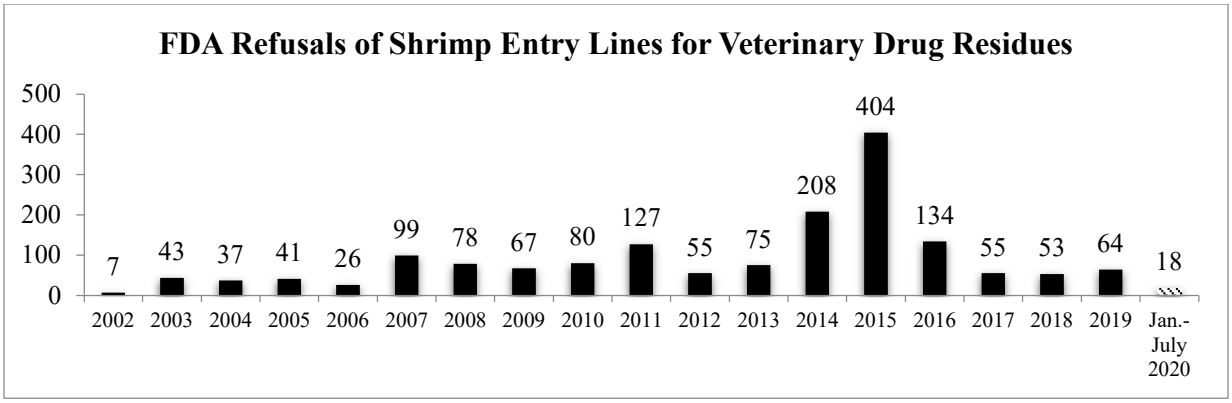
[140] *See* U.S. Food and Drug Administration, *Import Alert 16-129* "Detention Without Physical Examination of Seafood Products Due to Nitrofurans" attached as **Exhibit 7**.



The incredible spike in the FDA's refusals of shrimp entry lines for banned antibiotics in 2014 and 2015 was overwhelmingly attributable to shrimp exported from Malaysia. Of the 612 entry lines refused by the federal agency in those two years, 421 of them were of Malaysian shrimp (68.8 percent).

The FDA's findings with regard to antibiotics in Malaysian shrimp eventually resulted in the issuance of an Import Alert covering all shrimp exported from peninsular Malaysia.[141] Explaining the basis of the Import Alert, the FDA provided details regarding a sampling exercise that confirmed high levels of antibiotic contamination in shipments of shrimp from Malaysia:

> From October 1, 2014, through September 30, 2015, FDA detected a significant increase in the presence of nitrofurans and chloramphenicol residues in shrimp products imported from Peninsular Malaysia. During that period, FDA sampled and tested 138 shrimp shipments from Peninsular Malaysia. Of those collected, forty-five samples (32%) tested positive for the presence of nitrofuran residues (residues of furazolidone metabolite AOZ) and/ or chloramphenicol residues. The concentrations of nitrofuran residues detected in shrimp ranged from 1.0 ppb to 23 ppb, and the concentrations of chloramphenicol residues in shrimp ranged from 0.3 ppb to 6.8 ppb.[142]

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141 *See* U.S. Food and Drug Administration, *Import Alert 16-136* "Detention Without Physical Examination of Aquacultured Shrimp and Prawns from Peninsular Malaysia Due to Presence of Drug Residues from Unapproved Animal Drugs or the Presence of Unsafe Food Additives" attached as **Exhibit 11**.

142 *Id.*

Import data confirm that following the imposition of Import Alert 16-136, shipments of "Malaysian" shrimp to the United States collapsed and have remained at minimal levels since 2016. Moreover, although Import Alert 16-136 provides guidance as to how an individual processor may be removed from "Detention Without Physical Examination" and included on the "Green List" of exempted companies, no Malaysian entity has done so to date.[143]

Despite widespread and heavy-publicized concerns about the integrity of "Malaysian" shrimp imported into the United States, U.S. seafood importers and seafood distributors purchased massive amounts of this shrimp. After importing an annual average of just over $12 million worth of frozen shrimp from Malaysia between 2000 and 2003, Malaysia exported roughly $137 million worth of frozen shrimp to the United States, on average, between 2004 and 2015. Before enforcement actions were taken to address this illegal evasion scheme, U.S. seafood importers brought over $1.6 billion worth of Malaysian shrimp into our market, significant portions of which were contaminated with banned antibiotics.

The Southern Shrimp Alliance met repeatedly with U.S. seafood importers regarding the dubious nature of "Malaysian" shrimp shipments to the United States. In these discussions, the Southern Shrimp Alliance was repeatedly assured that such shrimp was not being purchased by large seafood distributors, restaurants, or retailers and was instead dedicated to niche, ethnic markets that operated outside of the private, sophisticated supply chain traceability measures adopted by large industry participants. These claims were inaccurate. This is because in the absence of meaningful government oversight, a substantial portion of U.S. seafood importers and their customers are indifferent as to where they source their shrimp.

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143 *Id.*

In a deposition related to a civil court case involving problems with the sale of purportedly Malaysian shrimp, a major U.S. seafood importer and distributor was asked to explain inaccuracies placed on a large purchase order for Malaysian shrimp, including an error in the listing of the country of origin of the shrimp as Chinese rather than Malaysian. In response, the seafood executive explained: "I was ordering 51/60 P&Ds. I didn't care the brand. I didn't care the country."[144] The seafood executive further explained that although the "Malaysian" shrimp purchased had been found to be short-weighted, it could not be returned, because his company's customer was a "big restaurant chain that had a commercial that was running on TV and, you know, this was all purchased for that ad that was coming out. It was zero hour and I was – I had a situation."[145]

Moreover, "Malaysian" shrimp was being purchased in large quantities despite the flimsy documents attesting to their origin that accompanied their importation. As explained in detail in Section II.A.1, in conformance with the "Section 609" program administered by the State Department, all imports of shrimp into the United States must be accompanied by a declaration that the shrimp was not harvested in a manner harmful to sea turtles. This declaration, the "Shrimp Exporter's/Importer's Declaration," is submitted to the State Department and, for farmed shrimp, requires the declarant to identify the name and address of the aquaculture facility in which the shrimp was harvested. Sales documentation, placed on the record of civil litigation, regarding the sale of "Malaysian" shrimp to the United States in 2011 showed that the claims

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144 Defendant/ Counter-Plaintiff American Seafood Imports Inc.'s Memorandum in Response to Plaintiff/Counter-Defendant National Commodities Company's Motion for Summary Judgment, *National Commodities Company v. American Seafood Imports Inc.*, Civil Action No. 4:11-cv-0716 (United States District Court, Southern District of Texas, Nov. 12, 2012) at Exhibit 3, p. 11 of Exhibit/p. 62 of Transcript, attached as **Exhibit 38**.

145 *Id.* at Exhibit 3, p. 23 of Exhibit/p. 116 of Transcript.

regarding the origin of these products were facially absurd, identifying two separate aquaculture companies – Aiman Aquatic Sdn. Bhd. and Chai Kee Aquatic – with one single address (No. 492, Lorong Satu, Kampung Cina, 32000 Sitiawan, Perak) that corresponds to a business in the Chinatown of Sitiawan, Malaysia.[146] Yet, for U.S. seafood distributors and their customers, there was likely no effort to validate the existence (or non-existence) of these shrimp farming operations, as the State Department's "Shrimp Exporter's/Importer's Declaration" was attested to by a Fisheries Officer of the "Fish Health and Quarantine Centre" and the shipments were accompanied by a "Certificate of Origin" completed by the Penang Malay Chamber of Commerce, Malaysia.

Even after enforcement actions were taken to address the transshipment of Chinese shrimp through Cambodia, Indonesia, and Malaysia, the Southern Shrimp Alliance has continued to monitor and document fraud in the importation of shrimp into the United States. Most recently, the Southern Shrimp Alliance, as part of the Ad Hoc Shrimp Trade Enforcement Committee ("AHSTEC"), submitted an allegation to CBP under the Enforce and Protect Act ("EAPA")[147] asserting that MSeafood Corporation, a U.S. importer, evaded the antidumping duty order on certain frozen warmwater shrimp from India by importing shrimp exported by its parent company, the Vietnamese-based Minh Phu Seafood Corporation and its affiliates, falsely claimed to be of Vietnamese, rather than Indian, origin.[148] In response to AHSTEC's allegation, CBP formally initiated an EAPA investigation and enacted interim measures after concluding

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146 *See* **Exhibit 4** and **Exhibit 3**.

147 *See* 19 U.S.C. § 1517.

148 *See* U.S. Customs and Border Protection, *Notice of Initiation of Investigation and Interim Measures – EAPA Case 7356* (Jan. 14, 2020) (Public Version), attached here as **Exhibit 39**.

that "reasonable suspicion exists that the frozen shrimp that MSeafood imported into the United States from Vietnam may be of Indian-origin and should have been subject to [antidumping] duties."[149] While the investigation remains open, CBP requires that all future imports of shrimp by MSeafood be made as "live entry . . . meaning that all entry documents and cash deposits must be provided before cargo is released by CBP into U.S. commerce."[150]

In almost two decades of working to counteract fraud in shrimp trade, the Southern Shrimp Alliance's experience teaches that, in the absence of government regulation and meaningful enforcement of the law, U.S. seafood importers will pursue the lowest cost sources of supply, regardless of the nature of this trade. The Southern Shrimp Alliance's investigations further establish that, more disturbingly, large seafood purchasers are agnostic as to the origins of the shrimp they purchase and, even where such purchasers have adopted policies that would appear to prevent sourcing IUU seafood, they will accept fraudulent documentation with little to no further attempts to validate the information presented.

149 *Id.* at 3.

150 *Id.*

VI. CONCLUSION

The Southern Shrimp Alliance appreciates the time and effort that the Commission and Commission staff have allocated to this important investigation. The information contained within this prehearing brief and in the voluminous attachments is intended to provide background as to how one domestic commercial fishing industry perceives the U.S. market for seafood imports, as well as to give context for the challenges faced in quantifying the issues that the agency has been asked to address. This material, taken as a whole, forms the basis for the Southern Shrimp Alliance's belief that shrimp harvested through IUU fishing accounts for a significant amount of the shrimp imported into the United States and that these imports adversely impact the U.S. market for shrimp, to the detriment of not only the U.S. commercial shrimping industry but also to the impairment of foreign seafood producers and suppliers who do not source IUU seafood.

Respectfully submitted,

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Dated: August 21, 2020

EXHIBIT LIST

Number	Title
1	Letter from Rep. Richard E. Neal, Chairman, Ways & Means Committee and Rep. Earl Blumenauer, Chairman, Trade Subcommittee, to the U.S. International Trade Commission (Dec. 19, 2019)
2	Ganapathiraju Pramod, Katrina Nakamura, Tony Pitcher, and Leslie Delagran, *Estimates of Illegal and Unreported Fish in Seafood Imports to the USA*, Marine Policy 48 (2014)
3	Commercial Sales Documentation for Sale of 1,250 Cartons of Shrimp Between Ocean Pioneer Food Sdn. Bhd. to YZ Marine Inc.
4	Commercial Sales Documentation for Sale of 1,000 Cartons of Shrimp Between Ocean Pioneer Food Sdn. Bhd. to YZ Marine Inc.
5	DS-2031 Form for Shipment from Shantou Red Garden Food Processing Co., Ltd. (Aug. 18, 2018)
6	Jason Huffman, *It's Not SIMP, But New Rules Are Stopping US Imports of Mexican Shrimp*, UndercurrentNews (Nov. 22, 2018)
7	U.S. Food and Drug Administration, Import Alert 16-129, *Detention Without Physical Examination of Seafood Products Due to Nitrofurans* (July 7, 2020)
8	U.S. Food and Drug Administration, Import Alert 16-127, *Detention Without Physical Examination of Crustaceans Due to Chloramphenicol* (Feb. 4, 2020)
9	U.S. Food and Drug Administration, Import Alert 16-124, *Detention Without Physical Examination of Aquaculture Seafood Products Due to Unapproved Drugs* (July 29, 2020)
10	U.S. Food and Drug Administration, Import Alert 16-131, *Detention Without Physical Examination of Aquacultured[] Shrimp, Dace, and Eel from China – Presence of New Animal Drugs and/or Unsafe Food Additives* (June 5, 2020)
11	U.S. Food and Drug Administration, Import Alert 16-136, *Detention Without Physical Examination of Aquacultured Shrimp and Prawns from Peninsular Malaysia Due to Presence of Drug Residues from Unapproved Animal Drugs or the Presence of Unsafe Food Additives* (Apr. 18, 2016)
12	Panjiva, Shipment Profile for Simple Bill of Lading, MEDUQ2675633 (July 21, 2020)

13	Panjiva, Shipment Profile for Simple Bill of Lading, APLUNPXH005464 (May 4, 2020)
14	Panjiva, Shipment Profile for Simple Bill of Lading, YMLUW232378957 (Apr. 23, 2020)
15	David J. Agnew, John Pearce, Ganapathiraju Pramod, Tom Peatman, Reg Watson, John R. Beddington, and Tony Pitcher, *Estimating the Worldwide Extent of Illegal Fishing*, PLoS One (Feb. 2009) Vol. 4, Issue 2, e4570
16	Ganapathiraju Pramod, Katrina Nakamura, Tony Pitcher, and Leslie Delagran, *Estimates of Illegal and Unreported Fish in Seafood Imports to the USA*, Marine Policy 48 (2014) 102-113
17	Changing Markets Foundation and Feedback, *Caught Out: How UK Retailers Are Tackling the Use of Wild Fish in Their Aquaculture Supply Chains* (Mar. 2020)
18	Changing Markets Foundation, *Fishing for Catastrophe: How Global Aquaculture Supply Chains Are Leading to the Destruction of Wild Fish Stocks and Depriving People of Food in India, Vietnam, and The Gambia* (Oct. 2019)
19	Wesley Malcorps, Bjorn Kok, Mike van't Land, Maarten Fritz, Davy van Doren, Kurt Servin, Paul van der Heijden, Roy Palmer, Neil A. Auchterlonie, Max Rietkerk, Maria J. Santos, and Simon J. Davies, *The Sustainability Conundrum of Fishmeal Substitution by Plant Ingredients in Shrimp Feeds*, Sustainability (Feb. 2019) *11*, 1212
20	Food and Agricultural Organization of the United Nations, *Statistical Query Results: Shrimp Aquaculture Production Quantity and Value 2016-2018*
21	Statement of John P. Connelly, President, National Fisheries Institute, Before the Water, Oceans, and Wildlife Subcommittee, Natural Resources Committee, U.S. House of Representatives, *Oversight of NOAA's Report on Illegal, Unreported, and Unregulated Fishing* (Nov. 14, 2019)
22	National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, *NMFS SIM Program – Harmonized Tariff Schedule (HTS) Code* (Updated May 2019)
23	European Commission Press Release, *Fighting Illegal Fishing: Warnings for Kiribati, Sierra Leone, and Trinidad & Tobago, while Sri Lanka Is Delisted* (Apr. 21, 2016)
24	European Commission Press Release, *Commission Warns Vietnam Over Insufficient Action to Fight Illegal Fishing* (Oct. 23, 2017)

25	*Commission Decision of 23 October 2017 Notifying the Socialist Republic of Vietnam of the Possibility of Being Identified as a Non-Cooperating Third Country in Fighting Illegal, Unreported and Unregulated Fishing* (2017/C 364/03)
26	European Commission Press Release, *Fighting Illegal Fishing: Commission Warns Taiwan and Comoros with Yellow Cards and Welcomes Reforms in Ghana and Papua New Guinea* (Oct. 1, 2015)
27	European Commission Press Release, *Illegal Fishing: EU Lifts Taiwan's Yellow Card Following Reforms* (June 27, 2019)
28	Testimony of John Connelly, President, National Fisheries Institute, "Joint Hearing on Import Safety," Subcommittee on Trade, Committee on Ways and Means (Oct. 4, 2007)
29	Government Accountability Office, *Imported Seafood Safety: FDA and USDA Could Strengthen Efforts to Prevent Unsafe Drug Residues*, GAO-17-443 (Sept. 2017)
30	*Commission Decision of 8 July 2010 on Emergency Measures Applicable to Consignments of Aquaculture Products Imported from India and Intended for Human Consumption* (2010/381/EU)
31	*Commission Implementing Decision (EU) 2016/1774 of 4 October 2016 Amending Decision 2010/381/EU on Emergency Measures Applicable to Consignments of Aquaculture Products Imported from India and Intended for Human Consumption*
32	European Commission's Directorate-General for Health and Food Safety's "Final Report of an Audit Carried Out in India from 20 November 2017 to 30 November 2017 in Order to Evaluate the Control Systems in Place Governing the Production of Fishery Products Intended for Export to the European Union," DG(SANTE) 2017-6161
33	Rachel Mutter, *Japan Lifts Antibiotic Inspection Order on Indian Black Tiger Shrimp, Opens Door for Production Resurgence*, Intrafish (Apr. 7, 2020)
34	Memorandum from SA Norm Simons NOAA OLE for the Case File, *Ken MacKenzie Interview* (Mar. 25, 2007)
35	U.S. Customs and Border Protection, HQ H028384 (Feb. 28, 2012)
36	U.S. Customs and Border Protection, HQ H194977 (Feb. 28, 2012)
37	Government Accountability Office, *Seafood Fraud: FDA Program Changes and Better Collaboration Among Key Federal Agencies Could Improve Detection and Prevention*, GAO-09-258 (Feb. 2009)

38	Exhibit 3 of Defendant/ Counter-Plaintiff American Seafood Imports Inc.'s Memorandum in Response to Plaintiff/Counter-Defendant National Commodities Company's Motion for Summary Judgment, *National Commodities Company v. American Seafood Imports Inc.*, Civil Action No. 4:11-cv-0716 (United States District Court, Southern District of Texas, Nov. 12, 2012)
39	U.S. Customs and Border Protection, *Notice of Initiation of Investigation and Interim Measures – EAPA Case 7356* (Jan. 14, 2020) (Public Version)